

Guide to First Nations Engagement on Local Government Statutory Approvals (Interim)

Ministry of Community, Sport and Cultural Development
Local Government Division

Revised: December 2014



Note: The revised *Guide to First Nations Engagement on Local Government Statutory Approvals* (Interim) is a compilation of best information available to the Province of British Columbia at this time. It is intended to be a guide only and should not be considered as legal advice. If legal advice is required, legal counsel should be sought. Some of the content of this document may be impacted by future events and decisions including future court decisions, federal or provincial government initiatives, and policy changes regarding First Nations and treaty negotiations. Therefore, the material continues to be considered “interim”.

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Introduction

This document replaces the 2009 *Guide to Engagement with First Nations on Local Government Statutory Approvals (Interim)* to reflect current information. The revised version includes additional information on best practices and frequently asked questions.

Purpose

The purpose of the updated Guide to First Nations Engagement on Local Government Statutory Approvals (Guide) remains the same – to facilitate the timely processing of requests from local governments to the Province of British Columbia (Province) for statutory approval of:

- [Boundary changes](#) and [restructures](#), under Part 2 of the *Local Government Act*;
- Bylaw adoption or amendment of an official community plan for the [Islands Trust Act, s. 27\(2\)\(b\)](#);
- Adoption or amendment of zoning bylaw for bylaws adopted after March 1990 or not covered by an official community plan approval by the minister after March 1990, [Islands Trust Act, s. 56](#); and,
- Official community plan bylaw for the [Resort Municipality of Whistler Act, s. 11](#) and other mountain resort municipalities if required by Letters Patent.

Context

Aboriginal rights (including aboriginal title) and treaty rights, are recognized and affirmed under the Canadian *Constitution Act, 1982*, sec. 35. The duty to consult is a constitutional obligation arising from this recognition.

The Province has a legal duty to consult and, where required, accommodate First Nations whenever it proposes a decision or activity that could adversely affect treaty rights or asserted or established aboriginal rights and title (“Aboriginal Interests”).

In the case of asserted aboriginal rights and title, the scope of consultation is based on an assessment of the strength of claim and the seriousness of potential impacts. In the case of proven aboriginal rights or treaty rights, the scope of consultation is based on the seriousness of the potential impact on the right.

The Province’s obligation to consult exists on a spectrum, and varies with the circumstances of each situation. Where the claim is peripheral, or the potential impact on the aboriginal claim is minimal, the duty may simply require notice of the proposed activity. Where the claim is strong or the potential impact is severe, the Province is to undertake constitutional consultation relating to the proposed activity in order to mitigate, avoid or otherwise address an adverse effect on the aboriginal claim as is

appropriate in the circumstances. Possible accommodation measures may include adjustments to a proposal and/or participation of First Nations in processes or initiatives.

Consultation must be meaningful, with the intention of reasonably addressing aboriginal claims and should be carried out through a timely, reasonable, transparent and proactive process. At a minimum, consultation involves corresponding and talking together for mutual understanding.

The courts have directed that First Nations must also engage in consultation in good faith. First Nations do not have a veto or approval function over Crown decisions.

The provincial duty to consult may arise in relation to certain local government proposals and activities that require provincial statutory approval, including the activities listed above.

For more information on the provincial duty to consult see the [*Updated Procedures for Meeting Legal Obligations When Consulting First Nations*](#). This document describes the Province's approach to consulting and accommodating First Nations.

Engagement versus Consultation

Local government engagement with First Nations and the Province's constitutional duty to consult are different.

Local governments do not have a constitutional obligation to consult on the potential impacts to Aboriginal Interests arising from local government decisions. In some cases, local governments have a statutory obligation to consider whether consultation with First Nations is required. The *Local Government Act* requires local governments to consider consultation with First Nations when developing, amending and reviewing an Official Community Plan ([s. 879](#)), and to include consultation with First Nations as part of developing, amending and reviewing a Regional Growth Strategy ([s. 855](#)).

Engagement between local governments and First Nations on activities that could impact Aboriginal Interests provides a valuable forum for exploring opportunities for cooperation and collaboration, helping to identify issues and minimizing future disagreements. The dialogue between local governments and First Nations is better described as engagement, which is part of a neighbour-to-neighbour relationship.

As a result of engagement, many local governments and First Nations have entered into [service agreements, protocol agreements and memorandums of understanding](#).

This engagement can also help to inform the Province's decision making process on requests by local governments for statutory approval.

When Seeking Statutory Approval

When a local government submits a request for statutory approval to the Ministry of Community, Sport and Cultural Development (Ministry), the Ministry must consider whether any Aboriginal Interests may be adversely affected and determine whether the Crown's duty to consult is triggered. Local government engagement with First Nations, specifically in relation to a provincial statutory approval, does not replace the Province's obligation to consult. However, engagement can assist with the timely processing of such requests in that:

- the local government which initiates the request for statutory approval is in the best position to answer questions from First Nations about the proposal;
- a local government can consider how to address a First Nation concern by modifying the proposal; and
- information and insights recorded by the local government will help the Province determine whether further engagement or provincial consultation is required.

As part of the suggested engagement process described below, local governments are encouraged to engage with First Nations early in the process of developing a proposal, to keep detailed records of all engagement efforts, and provide that record to the Ministry when making a request for statutory approval. Ministry staff are available to discuss specific proposals.

Engagement Steps

The following steps outline a suggested process that local governments are encouraged to follow when engaging with First Nations on proposals requiring provincial statutory approval.

Step 1 – Identification

In preparing for First Nations engagement, local governments should identify First Nations that may have a potential interest in the proposal.

Initial research done by a local government can become an on-going resource for engaging First Nations on future statutory approvals and other matters of mutual interest.

Local government engagement efforts are enhanced by thinking broadly and including those First Nations who have identified a subject area as part of their traditional territory, not just First Nations with Indian Reserves or Treaty Lands in the vicinity. More than one First Nation may claim an area as part of their territory.

The following questions will help with identification.

- How far is the proposed area from existing Indian Reserves or Treaty Lands?
- Are there archaeological sites in the area?
- Has a First Nation previously identified an interest or concern in the area of the proposal?
- Which First Nations have hunting, fishing, trapping, gathering sites or other traditional use sites within the local government jurisdiction? (Note: traditional use sites may include village or settlement areas, sacred sites or food gathering areas.)

Local governments may use the public Consultative Areas Database, a public map service located on GeoBC, to identify which First Nations may have claims or have aboriginal or treaty rights in the area affected by the proposal. See *Resources* on page 13.

Step 2 – Notification and Engagement

For engagement to be successful, relevant First Nations should be provided with all available information regarding a proposal as early in the process as possible to provide sufficient time for review.

Initially, a local government can provide notice of a proposal by sending an introductory notification package to the appropriate First Nations. The package should:

- describe the specific activity being considered by the local government;
- describe the purpose of the change and whether Crown land is involved;
- include a map of the proposed subject area;
- provide details on the approval process (e.g. proposed timing for submitting the proposal to the Province);

- ask the First Nation(s) to identify what practices, customs or traditions are engaged in that area, whether any Aboriginal Interests may be adversely affected by the proposed change, and to provide all readily available information on those aboriginal claims;
- offer to provide additional information and/or to hold a face-to-face meeting (if possible) to discuss the proposed change; and
- provide a reasonable time-frame (a minimum 30 days is suggested) for the First Nation(s) to respond.

See *Sample Documentation* on page 10.

It is suggested that the local government contact First Nations to ensure the introductory notification package was received and confirm the timeline for a reply. First Nations receive a large volume of referrals and contact can highlight the local government's interest in a response and assist with relationship building. Local governments are encouraged to keep detailed records of all correspondence, telephone calls or other communications with First Nations.

See *Sample Engagement Log* on page 12.

While the duty to consult and accommodate, where appropriate, rests with the Crown, local governments can consider ways to address the concerns or mitigate the impacts to Aboriginal interests raised during engagement.

Where First Nations respond to a local government request with information about a potentially adverse effect on an aboriginal right or interest, the local government can consider modifying the proposal. Possible measures to mitigate, avoid or reduce these impacts may include adjustments to a proposal and/or participation of First Nations in processes or initiatives. For example, a local government could modify a proposed boundary extension to exclude Crown land or a wilderness area where First Nations practice aboriginal rights (hunting, fishing and plant gathering) or encourage increased information sharing on matters such as land use plans.

In some cases, the local government or First Nations may propose a practical solution that addresses concerns related to the proposal. Changes or modifications of the proposal made by the local government based on First Nations input should be communicated to the First Nation. The solution should also be documented and included in the statutory approval submission to the Ministry.

If no solution is agreed to and the local government believes that its engagement process is complete to the best of its ability, the local government should notify the First Nations of its view that engagement is complete, and that it intends to proceed with its request for provincial approval. If the outstanding issues are outside the jurisdiction of the local government, it can advise the First Nations that these issues are being forwarded to the Province.

If there is no response from the First Nation, the local government can send a final notice to advise the First Nation that no response was received, and that the local government intends to forward its request for statutory approval to the Ministry by a specific date.

Step 3 – Assessment of Engagement

When submitting requests for statutory approvals to the Province, local governments should include a report and supporting documents that provide details on their engagement efforts. This will help the Province determine whether engagement is sufficient to process the request or whether further engagement and/or provincial consultation with First Nations is required.

Documentation provided to the Province should include:

- A copy of the notification package as described in Step 2;
- An engagement record, communications log and supporting documentation of responses from First Nations;
- A record of any follow-up correspondence, telephone calls and meetings between the local government and First Nations;
- Descriptions of any Aboriginal Interests and any potential impacts identified by the First Nation; and
- A record of the efforts made by the local government to address any concerns identified by First Nations.

Suggested Best Practices for Engagement

Provide information in meaningful and understandable formats.

Recognize the significance of cultural activities and traditional practices of the First Nation.

Demonstrate a respect for First Nation knowledge and uses of land and resources.

Understand the importance of youth and elders in First Nation communities.

Act with honour, openness, transparency and respect.

Create a presence in the community.

Understand the nature of First Nation economies.

Engage before planning is completed and leave room for modifications.

Be prepared to listen and allow time for meaningful discussion.

Convey willingness to describe the project and consider any concerns.

Source: Province of British Columbia

Frequently Asked Questions

- 1. What is the difference between local government engagement with First Nations and the Province’s constitutional duty to consult?**

 - Provincial constitutional consultation is a legal obligation which may be triggered where a proposed provincial decision, such as a statutory approval, could adversely affect treaty and aboriginal rights (including title) claimed or proven.
 - Local government engagement is part of a neighbour-to-neighbour relationship where issues and matters of mutual interest are discussed.

- 2. Why should a local government engage with First Nations given the provincial duty to consult?**

 - Local government engagement does not replace the Province’s obligation to consult with First Nations, but engagement by local government on a proposed statutory approval assists the timely processing of requests where information about the local government’s engagement is shared with the Ministry.
 - The local government is in the best position to answer questions on the proposal.
 - A local government can consider how to address a First Nation’s concerns by modifying the proposal.
 - The information and insights recorded through engagement at the local level can play a role in any consultation process undertaken by the Province.
 - Local government engagement with First Nations is also valuable in building relationships, exploring opportunities for mutual cooperation and collaboration, helping manage disputes, and minimizing future disagreements.

- 3. What if the First Nation claims outstanding aboriginal rights and title, objects to a proposal, or doesn’t respond to engagement efforts?**

 - Engagement is important but may not always be easy for either a local government or First Nation. Local governments are encouraged to indicate their willingness to engage with First Nations and provide opportunities to discuss any concerns.
 - The local government should advise the Province of the results of engagement. This can be done in advance of submitting the request for provincial statutory approval. Ministry staff are available to discuss and support specific local government engagements. Support can include working with the parties to address concerns where appropriate.

- 4. Is engagement or consultation required if the proposal involves private land?**

 - The Province’s duty to consult is triggered where a Crown decision can adversely affect Aboriginal interests. This includes Crown land decisions and decisions that affect private land. Circumstances will determine if, and how much, consultation and/or engagement may be required.

- 5. Does a local government have to pay if the First Nations demands payment for the referral?**

 - There is no legal requirement for local governments to provide financial support to First Nations when engaging on local government matters including requests for provincial statutory approvals.
 - Local governments can also inform First Nations that local jurisdictions routinely provide complimentary referrals to each other as part of a positive working relationship.

- 6. Does a local government, acting as a proponent, have to consult with First Nations?**

 - The courts have determined that the Province may delegate procedural aspects of provincial consultation with First Nations to third parties.
 - For example, if a local government is a proponent for the construction of a water or sewer plant and requires a statutory approval from the Province, the local government may be required to consult with First Nations as part of the process. For more information see the [Guide to Involving Proponents When Consulting First Nations](#).

- 7. What is the nature of the consultations required in the *Local Government Act*?**

 - The *Local Government Act* requires regional districts to consult with First Nations when developing, amending and reviewing a regional growth strategy and requires consideration of whether First Nations should be consulted when developing, amending and reviewing an Official Community Plan.
 - These consultations are required under the *Local Government Act*, and are not the same as the constitutional obligations of the Province and Canada.

Sample Documentation

Sample Notification – Proposed Boundary Extension

This letter is to advise you that the Municipality of Y is proposing to include property in xxx area [*alternative wording*: has received a request to include property in xxx area] within the Municipality of Y boundaries to (*provide reason or include proponent submission*). A map is attached for your review.

The change will mean that the Municipality of Y will assume responsibility for regulation and providing local services instead of the Regional District of Z, the local government that currently provides services to the area. The Municipality's rationale for considering this request is to (*provide reason*).

Please provide us with information about any practices, customs or traditions in the vicinity of the property and how the proposed amendment may potentially impact those practices, customs or traditions.

In addition to seeking your input, this matter is also being forwarded to a number of other agencies, including (*list relevant agencies*) for review.

A reply is respectfully requested by (*at least 30 days from the date of the letter*). Should you wish to discuss this matter, please contact me at Phone, Fax, and Email. Once your reply has been received and any issues within municipal jurisdiction have been considered, the Municipality of Y will decide whether or not to submit the proposal to the Minister of Community, Sport and Cultural Development for consideration. If we do not hear from you by, we will proceed with submitting the proposal.

Thank you for your attention to this matter.

Sincerely,

Disclaimer: *This draft text is provided as a guide only and does not represent legal advice.*

Sample Notification – Proposed Bylaw Approval

- Bylaw adoption or amendment of an official community plan for the [Islands Trust Act, s. 27\(2\)\(b\)](#);
- Adoption or amendment of zoning bylaw for bylaws adopted after March 1990 or not covered by an official community plan approval by the minister after March 1990, [Islands Trust Act, s. 56](#); and,
- Official community plan bylaw for the [Resort Municipality of Whistler Act, s. 11](#).

This letter is to advise you that Islands Trust is considering amending its Official Community Plan (OCP) Bylaw #X to (*describe purpose*). A referral form, additional information (*if appropriate*) and a map are attached for your review.

Please provide us with information about any practices, customs or traditions in the area affected by the bylaw and how the proposal may potentially impact those practices, customs or traditions.

In addition to seeking your input, this matter is also being forwarded to a number of other agencies, including (*list relevant agencies*) for review.

A reply is respectfully requested by (*at least 30 days from the date of the letter*). Should you wish to discuss this matter, please contact me at Phone, Fax, Email. Once your reply has been received and any issues have been appropriately reviewed, the Islands Trust will determine whether to submit the proposal to the Minister of Community, Sport and Cultural Development for consideration, according to the requirements of the *Local Government Act* under Section XX. The proposed changes to the OCP would (*describe change*). If we do not hear from you, we will proceed with submitting the proposal.

Thank you for your attention to this matter.

Sincerely,

Disclaimer: *This draft text is provided as a guide only and does not represent legal advice.*

Resources

Aboriginal Affairs and Northern Development Canada for information on all Indian Reserve and other First Nations lands in BC: <http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/index.aspx?lang=eng>

BC Stats for regional district maps to help identify Indian Reserve locations:
<http://www.bcstats.gov.bc.ca/statisticsbysubject/geography/referencemaps/rds.aspx>

BC Treaty Commission to determine First Nations in the treaty process and Statement of Intent maps:
www.bctreaty.net

CivicInfo BC for information on agreements between local governments and First Nations:
http://www.civicinfo.bc.ca/13_show.asp?titleid=4

Consultative Areas Database (public), GeoBC to assist in identifying potential First Nations consultative areas: <http://www.geobc.gov.bc.ca/> see “First Nations Consultative Areas Database (CAD)” under “Applications”.

Community to Community Forum Program Guide enabling local governments and First Nations to establish and improve relationships: www.ubcm.ca/assets/Funding~Programs/LGPS/C2C/c2c-guide-final.pdf

Guide to Aboriginal Organizations and Services for contact information for First Nations in BC:
www.gov.bc.ca/arr/services/guide.html

Ministry of Aboriginal Relations and Reconciliation for information on First Nations and treaty negotiations: www.gov.bc.ca/arr/

Ministry of Community, Sport and Cultural Development for information on boundary extensions:
http://www.cscd.gov.bc.ca/lgd/gov_structure/structure_branch_index.htm

Ministry of Forests, Lands and Natural Resource Operations for information on archaeological sites:
http://www.for.gov.bc.ca/archaeology/local_governments/index.htm

Union of BC Municipalities (UBCM) for information on the Community to Community Forum program for relationship building: [UBCM | Community to Community Forum](http://ubcm.ca/Community-to-Community-Forum)

UBCM Resources on Relationship Building and Dispute Resolution:
<http://ubcm.ihostez.com/contentengine/launch.asp?ID=933>

Definitions

Aboriginal Interests	A term used to refer to asserted or determined aboriginal rights (including title) and treaty rights.
Aboriginal rights	Practices, customs or traditions integral to the distinctive pre-contact culture of the First Nation claiming the right. A practice undertaken for survival purposes can be considered integral to a First Nation's culture, e.g. hunting, fishing, and gathering plants for traditional medicines and spiritual ceremonies. Aboriginal rights may be site specific, that is connected to a particular piece of land.
Aboriginal title	A subcategory of aboriginal rights. It is a unique interest in land that encompasses a right to exclusive use and occupation of the land for a variety of purposes. Those uses must not be inconsistent with the First Nation's attachment to the land.
First Nation	An aboriginal community or band. Some First Nations are organized according to the systems established under the <i>Indian Act</i> , i.e. an elected Chief and Band Council representing the interests of the community. Some First Nations are organized by traditional systems such as a house system where a hereditary chief represents a number of families.
Municipal boundary extension	Changing the boundary of a municipality by amending the Letters Patent; requires Cabinet approval pursuant to the <i>Local Government Act</i> , s. 20.
Municipal incorporation	Incorporating a community as a municipality; requires Cabinet approval pursuant to the <i>Local Government Act</i> , s. 7.
Proponent	A third party (can be a local government) proposing an activity requiring provincial government authorization for a proposed use or development of land, natural resource or related development (e.g. <i>Forest and Range Practices Act</i> , <i>Environmental Assessment Act</i>).
Official Community Plan	Statement of objectives and policies to guide decisions on planning and land use management that requires approval from the Minister pursuant to the <i>Local Government Act</i> , s. 882.
Reserve	Tract of land set apart by the federal government for the use and benefit of a First Nations band.

<i>Restructure of local government</i>	Change in boundaries or governance of a local government, which requires Cabinet approval pursuant to the <i>Local Government Act</i> , ss. 7, 20, 777.1 and 780.
<i>Traditional territory</i>	Area over which a First Nation asserts rights including title under s. 35, <i>Constitutional Act, 1982</i> ; sometimes referred to as claimed territory.
<i>Treaty</i>	A solemn agreement between the Crown and a First Nation that defines the rights of Aboriginal peoples with respect to lands and resources over a specific area, and may also define the self-government authority of a First Nation. In BC, treaties may be historic agreements dating from the mid or late 1800s, or modern agreements ratified by Canada, BC and the First Nation(s).
<i>Treaty lands</i>	Lands owned by a First Nation under a modern treaty; also referenced as treaty settlement land.
<i>Treaty rights</i>	Rights held by a First Nation in accordance with the terms of a historic or modern treaty agreement with the Crown.