

Valkyrie Law Group LLP

Local Government Elected Officials: Legal Overview of Community Charter & Local Government Act (Law 101)


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Powers

- The Dartmouth Port Authority thinks cruise ship passengers would flock to a local bowling alley. The PA leases space to Bowl-A-Way to build an alley. Bowl-A-Way offers free rental bowling shoes. Can the local municipality stop this development?



Powers

- *Constitution Act, 1867*
- S. 91 federal powers
 - The Public Debt and Property
 - The Regulation of Trade and Commerce
 - Postal Service
 - Militia, Military and Naval Service and Defence
 - Navigation and Shipping
 - The Criminal Law



Powers



- S. 92 provincial powers
 - Municipal Institutions in the Province
 - Shop, Saloon, Tavern, Auctioneer, and other Licences
 - The Incorporation of Companies with Provincial Objects
 - Property and Civil Rights in the Province
 - Generally all Matters of a merely local or private Nature in the Province

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Delegated Powers



- Municipalities
 - natural person
 - regulatory powers (s. 8 CC)
- Regional Districts
 - corporate powers (s. 176 LGA)
- Other legislation
 - *Environmental Management Act, Freedom of Information & Protection of Privacy Act, Land Title Act, Vancouver Charter*, private legislation

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Authority Limitations

- Drug-upped vagrants are becoming a problem in the Town of Plenty, and residents want something done. Can Council enact any laws to run these losers out of town?



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Authority Limitations

- Constitutional limits
 - federal jurisdiction: shipping, airports, criminal law
- Charter of Rights and Freedoms
 - all local governmental actions must comply with Charter provisions
- Provincial legislation
 - bylaws subordinate to provincial legislation
 - Human Rights Code

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Authority Limitations

- Health-nut council members on Orange Town council want to require everyone in town to take at least one multi-vitamin a day, believing this will reduce the spread of seasonal influenza. Are they going too far?



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Concurrent Jurisdiction

- Municipal authority subject to concurrent jurisdiction with Province on health, environment, animals, buildings, soil removal
- Approval of relevant ministry required for concurrent jurisdiction bylaws
- Exception: where regulation adopted, e.g. pesticides

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Jurisdiction

- Municipal and RD bylaws – no effect if inconsistent with Provincial laws
- “inconsistent” - compliance with bylaw does not contravene other enactment



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Property Disposition

- Sale of municipal property (s. 26 CC)
 - notice required before disposition
 - no general requirement to make property available to the public for acquisition



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Property Disposition

- Regional districts, s. 186 LGA
- Must make available to the public, except disposition to
 - not for profit corporation, public authority, land exchange, partnering agreement, owner of adjoining land

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Prohibition on Assistance

- No assistance to businesses, unless under partnering agreement
- Assistance includes:
 - disposing of land for less than FMV
 - lending money
 - guaranteeing repayment of borrowing
 - granting an exemption from a tax or fee
- Notice required of authorized assistance



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Elector Approval

- Alternative approval process (s. 86)
 - former counter petition
 - 10% of elector responses is threshold
 - required for certain bylaws, e.g. capital liabilities in agreements exceeding 5 years, certain borrowing bylaws
- Elector consent (referendum) - occasionally required, always optional



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What is a Meeting?

Goofville Town council wants to hold a council meeting in Las Vegas (there are a few gamblers on Council, and hey, what happens in Vegas stays in Vegas!). Are they out to lunch?



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Council/Board Meetings

- Regular meetings – must advertise
- Special meetings – rules for calling
- Closed meetings – resolution required at public meeting
- What is a meeting?



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Closed Meetings

- Council meeting may be closed to the public to discuss
 - labour relations or employee negotiations
 - law enforcement matters
 - the acquisition or disposition of property
 - receiving legal advice
 - potential litigation



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Attendance at Meetings

- Councillor Jones missed two board meetings while vacationing in Mexico. Having drank way too many margaritas, she fell ill and missed 2 more meetings. At the 5th meeting, the Chair prohibited her from voting and said “you are outta here!”
- Can the Chair do this?



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Attendance at Meetings

- Automatic disqualification if absent from meetings for 60 consecutive days or four consecutive regularly scheduled meetings, whichever is longer
- Exceptions: illness, injury, absence with leave of council/board

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Member Duties

- Council has passed a resolution banning the Mayor (a prolific commentator on local events) from using the City's website to post her letters to the editor.
- Can council do this?



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Member Duties

- Duties of council members (s. 115)
 - consider well-being and interests of municipality and its community
 - contribute to the development and evaluation of policies and programs
 - participate in council meetings, committee meetings and meetings of other bodies where appointed
 - carry out other duties assigned by council
 - carry out other duties assigned by legislation

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Mayor/Chair Duties

- Duties of mayor (s. 116)
 - provide leadership to the council, including recommending bylaws, resolutions
 - communicate information to council
 - preside at council meetings
 - provide general direction to municipal officers re implementation of policies and programs of municipality
 - establish standing committees
 - suspend municipal officers and employees
 - reflect the will of council and carry out other duties assigned by council
 - carry out other duties assigned by legislation



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Fiduciary Duties

- The Regional District's CFO, who loves going to the track, tells the Board that he has "a tip on a great horse". Having had a good year selling surplus property, the Board authorizes the CFO to place a \$20K bet using the Regional District's "rainy day" reserve fund.



- Problems?

Kathleen




Fiduciary Duties



- Personal liability for expenditures contrary to law
- Exception where member relied on information from an officer or employee who was guilty of dishonesty, gross negligence or malicious or wilful misconduct

Kathleen

Confidentiality





- The Town of Pleasantville was in the process of negotiating for the acquisition of a large piece of industrial property. While golfing with his neighbour, the Mayor, Bob Loblaw, let it slip that the Town could probably “go as high as \$800K”.
- Any issues?



Confidentiality

- Confidentiality
 - Members must
 - keep in confidence any record held in confidence
 - keep information received in closed meeting confidential
 - If confidentiality breached and loss results, local government may recover from member

Voting at meetings

Councillor Jones likes to ride the fence, and hates committing himself at meetings. He ducks whenever a vote is called. Is he avoiding the issues?

Voting at Meetings

- Duty to vote if present
- If no indication, deemed “yes”
- If votes equal for and against, motion is defeated

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Voting at Meetings

- Majority vote for most matters
- 2/3 vote of all Council/Board members for certain matters:
 - delegation of authority
 - termination of an officer
 - indemnification
 - emergency powers bylaw

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Voting at Meetings

- Unanimous vote (rare):
 - re-introducing bylaw or resolution rejected within 6 months after reconsideration
 - waiving notice of a special meeting
 - conferring the honour of “freedom of the municipality”

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Reconsideration

A couple of council members are absent at a critical meeting. When they return, they object to the prior decision by Council to paint all the roads pink. Are they out of luck to overturn this cool decision?



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Reconsideration



- Reconsideration (s. 131)
 - mayor may require council to reconsider any matter whether previously adopted or rejected
 - at the same council meeting or within 30 days
 - except where
 - matter has had approval or assent of the electors
 - previous reconsideration
 - no limitation where action taken by municipality

Katharine

Reconsideration

- Statutory power of mayor does not eliminate inherent power of council to reconsider
- Subject to procedure bylaw rules

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Bylaw Procedures

- While speaking at the grand opening of the new Masonic Lodge, Mayor Green committed council to granting the Masons a 10 year permissive tax exemption. Can he do this?



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Bylaw Procedures

- Councils/boards make decisions by resolution or bylaw
- Local Government Act
 - bylaws where required
 - all other decisions may be by resolution

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Bylaw Procedures

- Bylaws are
 - deliberative and formal procedure: 3 hearings and adoption
 - may include a public hearing requirement (e.g. zoning bylaws)
 - may require external consent

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Officers and Employees

- Statutory Officers: corporate, financial
- Chief Administrative Officer – by bylaw
- Other officers may be designated by bylaw

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Officers and Employees

The new Board thinks the receptionist spends too much time painting her nails instead of working. Can they fire the receptionist?



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Officers and Employees

- Termination of officer
 - for cause – immediate termination without notice
 - in any other case, on reasonable notice
- Termination of officer without cause requires 2/3 vote of all members



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Officers and Employees

- Suspension (s. 151)
 - mayor must suspend a municipal officer or employee if mayor considers necessary
- Suspension must be reported at next meeting and decision made by council

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Interference

- Councillor Smart, an avid cyclist, regularly asks the town's planner to expedite development permits and approvals for residents who bike to work. These are the benefits of "being green"! Can she do this?



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Interference

- Members are prohibited from interfering, hindering or obstructing an officer or employee in the performance of his/her duties
- CAO duties: operational management, policy implementation, advising
- Mayor/Chair duties: general direction to officers regarding implementation of policies

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Delegation

- Council/board may delegate powers, duties and functions to member, committee, officer, employee, other body
- May not delegate:
 - making of a bylaw
 - power/duty exercisable only by bylaw

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Delegation

- May not delegate (cont'd)
 - power/duty to give approval, consent
 - power/duty to hear appeals or reconsider an action or decision
 - power/duty to terminate officer
 - power to impose a remedial action requirement

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Liabilities Under Agreements

The City Manager has committed Redfern City to a 10-year contract to purchase pencils from Lead Industries, since he thinks their erasers are great. Can he do this?

Can Council overturn his decision?



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Financial Matters

- Liabilities under agreements (s. 175)
 - from 5 year rule – elector approval required
 - regulatory exception
 - partnering agreement concept: includes nature of the activity, work or facility, maximum term, maximum liability and any other information required by regulation

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Financial Matters

- Regulatory exception
 - for operational liability
 - for capital liability where cost of servicing aggregate liabilities less than 25% of annual calculation revenue

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Financial Matters

- Permissive exemptions (s. 224)
 - broader exemptions for charitable, philanthropic and not for profit corporations – if council considers land used for related purpose
 - land or improvements owned by a municipality, regional district or other local authority and used for the purpose of the local authority
 - majority vote for permissive exemptions, not 2/3 vote
 - may exempt for up to 10 years, without electoral assent

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Financial Matters

- Notice required in advance of adoption that
 - identifies property
 - describes proposed exemption
 - states number of years of exemption
 - estimates foregone tax for each of first 3 years

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Economic Revitalization

- Times are tough and the local mill has threatened to close. Jobs in the community are scarce and the City is panicking. Is there anything the City can do?



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Financial Matters

- Permissive exemption available for "revitalization"
 - must be in a designated area (financial plan or OCP)
 - new improvement or alteration of existing improvement
 - applies only to municipal property taxes
 - exception to s. 25 CC – general assistance prohibition
 - 10 year maximum

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Public Hearings

- Notice requirements
- Information must be made available to the public
- No new information to Council members after public hearing
- Clarification from staff permitted


Public Hearings

Mrs. Smith is a known crank and council watcher who likes to attend public hearings in the neighbouring city, although she doesn't live there. Can she insist on complaining at the hearings?



Public Hearings

- Presiding member determines procedure
- Everyone who believes they are affected has the right to be heard
- May limit time for each speaker



Public Hearings

- Report of public hearing
 - must state views expressed
 - required before a member who did not attend may vote
 - ensure accuracy – or attach minutes of public hearing



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Conflict of Interest

- Pecuniary Interests
- Bias
- Penalties
- Implications for Elected Officials

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Types of Conflicts

- Pecuniary
 - direct or indirect financial interest
- Bias
 - personal interest
 - “closed mind” or pre-judgment

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Pecuniary Interests



- Direct interest
 - elected official owns land which is the subject of a rezoning application
 - elected official is a principal in a company bidding for a municipal project
- Indirect interest
 - member of a society receiving a grant from the municipality
 - member of a business or other club doing business with a municipality

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Exemptions



- No conflict of interest where
 - pecuniary interest in common with electors of the municipality generally (community of interest)
 - remuneration of elected officials
 - interest so "remote or insignificant" that it "cannot reasonably be regarded as likely to influence the member"

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Conflict Exceptions

- Conflict exceptions (s. 104)
 - ability for exceptions for pecuniary interest to be established by regulation
 - if council member has a right to be heard but is excluded by conflict, may appoint representative to exercise that right



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Campaign Contributions

- Campaign contribution does not, by itself, create a conflict of interest
 - context of contribution
 - conduct of recipient



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Bias



- Non-pecuniary personal interest
 - types of personal interest include applications/ contracts dealing with
 - family members
 - business associates or friends
 - charitable organizations of which elected official is a director, etc.
 - other affiliations, e.g. religious, fraternal

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Pre-judgment Bias

- Where elected official has
 - made his/her decision in advance
 - is not capable of being persuaded
- “closed mind” indicates pre-judgment
 - can have honest opinions strongly held
 - an “open” mind is not an empty mind
 - amenable to persuasion



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Penalties



- Pecuniary conflict
 - disqualification unless
 - contravention inadvertent
 - error of judgment made in good faith
- Bias
 - does not result in disqualification

Penalties

- Local government or 10 or more electors may commence an application for Supreme Court order for disqualification
- if electors bring successful action, local government must pay electors' costs



Where Conflict Exists

- Where elected official considers that he or she is in a conflict of interest
 - conflict must be declared
 - general nature of conflict must be described
 - must not take part in discussion nor vote, must immediately leave the meeting and must not attempt to influence the vote

Where Conflict Exists

- Post-declaration
 - following declaration of conflict of interest, council member may return to the meeting if he or she, following legal advice, determines not in conflict



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Effect on Bylaws/Decisions

- Quasi judicial decision may be void if conflict found
 - decision maker not impartial
- Administrative decision
 - bylaw or resolution may still be valid if quorum would have existed, and sufficient votes cast, to carry vote without member

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Example



Councillor Grafton sells his property to the Prestons for \$200K and takes a mortgage back in the amount of \$50K. The Prestons then apply to Council to rezone their property. They want to build a leather goods boutique.

Councillor Grafton, who often wears leather, votes in favour of the rezoning.

- Was the Councillor in a conflict of interest?

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Example

- The owner of “Back in the Saddle” applied to the City for a permit to paint a 40 foot mural of a horse on the side of his building. Councillor Green, who worked as a trail guide at “Back in the Saddle” every summer, voted in favour of the application.

- Should Councillor Green be voting?
- What if the mural contained advertising?



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Example

Councillor Merchant is newly elected. Her best friend of 20 years, Angela Mueller, is the local real estate agent. The two women vacation together every year.

This year, Angela insists on paying for their trip to Club Med. Angela has had a great year selling Rwandan rangeland to disaffected Europeans.

Just back from their trip, Angela appears before Council seeking to rezone one of her properties.

- Should Councillor Merchant be voting?



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Example


- The Village of Smallville recently amended its OCP to change the designation of its one of its most highbrow neighbourhoods from single family to multi-family residential. Councillor Harry Braggs, a long-time resident of the neighborhood, voted against the amendment.

- Should he have been voting?



Kitharis


Example




The Jingle Bells Music School leases its building from the City. Councillor Phyllis Steen has no musical talent, but her son John has been taking glockenspiel lessons at the school for years (he is a slow learner).

The Music School asks the City Council for a rent deduction.


- Should Councillor Steen vote?
- Does it matter if John is on a music scholarship?






Example

- Councillor Smith loved the expansive views from the balcony of her high-rise apartment. When an application to rezone the property directly in front of her building came before council, she declared a conflict and removed herself from the discussion. This did not, however, prevent her from venting to the local media about her opposition to increased densification in the community.



- Any issues?



Questions

