

NO: R057 COUNCIL DATE: March 22, 2010

REGULAR COUNCIL

TO: Mayor & Council

DATE: March 15, 2010

FROM: General Manager, Engineering

**FILE: 0450-20 (LMTAC)
0440-01 (First Nations)**

SUBJECT: Adoption of a Surrey Policy on Consultation Fees

RECOMMENDATION

The Engineering Department recommends that Council adopt as City policy, the draft policy numbered R-25 and titled, “*Requests for Compensation for Consultation on Land Use and Management Plans*”, which is attached as Appendix IV to this report.

BACKGROUND

At its Regular meeting on March 9, 2009 Council considered Corporate Report No. R025, titled *Proposed Stewardship Policy from the Tsleil-Waututh Nation* (attached as Appendix I). The report advised that the Tsleil-Waututh Nation (TWN), who are situated in North Vancouver, had unilaterally imposed a *Stewardship Policy* that requires affected individuals and local governments to consult with, and pay related fees to, the TWN on all land development and planning matters that occur within their self-defined “*Consultation Area*” (which encompasses a boundary of 413,000 hectares and affects all local government jurisdictions within the Lower Mainland including Surrey).

At the time, Lower Mainland Treaty Advisory Committee (LMTAC) on behalf of its members voiced its concern to the Province of British Columbia that, if implemented, the TWN’s *Stewardship Policy* has legal and practical implications for local government. Two significant and key concerns that LMTAC presented to the Province were that:

1. The *Stewardship Policy* places the duty to consult on government; however, case law has placed the duty to consult with the Crown. Local and regional governments are not representatives of the Crown; and
2. As a matter of principle, governments at all levels do not charge each other a fee for consultation.

Over the course of 2009, LMTAC engaged the Province in a series of discussions on the *Stewardship Policy* issue in an effort to obtain guidance and direction from both the *Ministry of Aboriginal Relations & Reconciliation* and the *Ministry of Community and Rural Development*.

In the interim, the TWN has been sending invoices to a number of municipalities within the region including Metro Vancouver on development related matters. The City of Surrey has not received any such invoice to date. According to the LMTAC office, most Lower Mainland

municipalities have chosen to simply ignore the invoices, while at least one jurisdiction (Village of Belcarra) had reluctantly paid the fee in 2009 in an effort to move forward on their Potable Water Infrastructure project. Since then, however, the Village of Belcarra Council has adopted a policy to refuse payments to First Nations, third parties and the general public for consultation fees on land use and management plans.

DISCUSSION

Crown Duty to Consult with First Nations

In response to LMTAC's concerns regarding the TWN's Stewardship Policy, the Province of British Columbia recently stated that "*there is no legal authority for a First Nation to charge a fee to an individual who may be applying to government for a permit covering an activity on either Crown land or privately held land.*"

To this end, the Province confirmed that, as per the Courts, it is the Province of British Columbia which has a legal duty to consult and, where appropriate, accommodate First Nations whenever the Province proposes a decision or activity that has the potential to affect aboriginal rights, including aboriginal title and treaty rights. This duty arises from Court decisions and is consistent with the Province's commitment to establishing a *New Relationship* with First Nations.

The Courts have also determined that the Province may delegate procedural aspects of First Nations consultation to third parties; however, this does not constitute a transfer of provincial consultation obligations to local governments. Furthermore, the Courts determined that First Nations must also engage in consultation in good faith and that First Nations do not have a veto or approval function over provincial decisions.

Guide to First Nations Engagement on Local Government Statutory Approvals

In addition to the above, in June 2009, the Ministry of Community and Rural Development (MCRD) Local Government Department released an *Interim Guide to Engagement with First Nations on Local Government Statutory Approvals* (attached as Appendix II).

The *Guide* was developed following requests from local government for assistance in referring relevant matters to First Nations for their input. The intention of the Ministry in preparing the *Guide* was to facilitate the timely processing of requests from local governments and to ensure that First Nations are consulted in a meaningful way to enable the processing of the request for statutory approvals.

The "interim" nature of the guide is due to the ever-evolving nature of First Nations-related legal and policy matters that will require ongoing amendments to the guide. As reflected on its front cover, the document "*is intended to be a guide only and should not be considered as legal advice. Some of the content of the 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.*"

The document was forwarded to all British Columbia municipalities in June 2009, including the City of Surrey. Since then, no relevant First Nations-related statutory approval situation has presented itself where reference to the Guide by City staff has been required.

Adoption of a Surrey Policy Regarding Non-Payment of Fees for Consultation

Given the Province of British Columbia's noted position on First Nations consultation, which indicates that First Nations should not be charging fees for consultation, the Chair of LMTAC Board issued a memorandum, dated November 26, 2009, to LMTAC Member Councils, Boards and municipal administrators with a recommendation that they consider adopting a policy statement regarding nonpayment of fees for consultation with First Nations as part of the process of obtaining provincial statutory approvals. A copy of the LMTAC memorandum is attached as Appendix III. The policy recommended in this report is consistent with the policy recommended in that memorandum.

To ensure consistency throughout the region on the consultation issue, and given the Province of British Columbia's position, the LMTAC recommendation is considered supportable. Accordingly, it is recommended that the *City of Surrey Policy Manual* be amended to include a new policy statement under the *General Items of Policy* section with wording as contained in Appendix IV to this report.

CONCLUSION

In 2009, the Tsleil-Waututh Nation adopted a *Stewardship Policy* requiring affected individuals and local governments (including Surrey) to consult with, and pay related fees to, the TWN on any and all land development and planning matters that occur within their self-defined Consultation Area.

The Province of British Columbia has recently stated that "*there is no legal authority for a First Nation to charge a fee to an individual who may be applying to government for a permit covering an activity on either Crown land or privately held land.*" As a result, LMTAC has recently recommended that municipalities adopt a formal policy statement regarding nonpayment of fees for consultation with First Nations as part of the process of obtaining provincial statutory approvals. Accordingly, it is recommended that Council adopt as City policy the policy statement attached as Appendix IV to this report, which is consistent with the policy recommended by the LMTAC Board.

Vincent Lalonde, P.Eng.
General Manager, Engineering

RAC/brb

- Appendix I: Corporate Report R025 (presented at the March 9, 2009 Regular Council):
Proposed Stewardship Policy from the Tsleil-Waututh Nation
- Appendix II: Ministry of Community and Rural Development's June 2009 *Interim Guide to Engagement with First Nations on Local Government Statutory Approvals*
- Appendix III: LMTAC November 26, 2009 memorandum: *Adoption of a Council/Board Policy on Consultation Fees*
- Appendix IV: Proposed City of Surrey Policy Manual Amendment: inclusion of Policy Statement R-25: *Requests for Compensation for Consultation on Land Use and Management Plans*

**Guide To
First Nations Engagement
On
Local Government Statutory Approvals

(INTERIM)**

**Ministry of Community and Rural Development
Local Government Department
June 2009**

Note: The *Interim Guide to Engagement with First Nations on Local Government Statutory Approvals* is a compilation of best information available to the Ministry of Community and Rural Development 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.

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Introduction

The Province of British Columbia (Province) has an obligation to consult with First Nations whenever the Province proposes a decision or activity that has the potential to affect aboriginal rights including aboriginal title and treaty rights. This duty arises from court decisions and is consistent with the Province's commitment to a New Relationship with First Nations and the negotiation and resolution of modern-day treaties.

The *Interim Guide to Engagement with First Nations on Local Government Statutory Approvals* (Guide) provides guidance to local governments on engaging with First Nations as part of the process of obtaining provincial approval for local government activities that are outlined below. The intention of the Ministry of Community and Rural Development (Ministry) in preparing the Guide is to facilitate the timely processing of requests from local governments and to ensure that First Nations are consulted in a meaningful way to enable the processing of the request for statutory approvals.

The Guide was developed following requests from local governments for assistance in referring relevant matters to First Nations for their input. It is based on a review of practices of First Nations engagement by industry, provincial ministries and local governments. Many local governments have successfully established engagement processes with First Nations through the negotiation of Memorandum of Understandings, Protocols, etc. For local governments that have established formal engagement processes, the Guide may provide some additional information to enhance existing approaches.

Context

New Relationship

In 2005, the Province entered into a New Relationship with First Nations. Representatives from the Province and the Union of British Columbia Indian Chiefs, the First Nations Summit and the Assembly of First Nations (the Leadership Council) agreed to develop an overall approach to consultation. Once this work is complete, this Interim Guide will be reviewed, updated as required, and finalized.

Treaty Negotiations

In a Memorandum of Understanding between the Province and the Union of British Columbia Municipalities (UBCM), local governments are recognized as part of the provincial negotiating team in the BC Treaty Process. This involvement includes discussions with First Nations regarding what local government - First Nations relations will look like after a Final Agreement comes into effect. This local government - First Nations engagement has highlighted the value of consultation in identifying interests and opportunities to work together, both before and after treaties are concluded.

Legal Recognition of Aboriginal Rights

Aboriginal rights including aboriginal title and treaty rights are recognized and protected under the *Constitution Act, 1982*. The Province has a legal duty to consult with First Nations and, where appropriate, accommodate Aboriginal Claims. The courts have also determined that the Province may delegate procedural aspects of First Nations consultation to third parties.

The trigger for the duty to consult is very low because consultation is required where potential rights may be impacted by a Crown decision. Where a claim is settled through the terms of an agreement, consultation obligations will likely still exist due to the potential impacts of a decision on those existing aboriginal rights.

The Crown's obligation to consult on decisions that may impact Aboriginal Claims exists on a spectrum. The duty to consult varies with the circumstances of each situation. With respect to potential impacts to existing treaty rights, the focus will be on the potential impacts to those established treaty rights.

Where the claim is peripheral, or the potential adverse effect 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 will participate in consultation relating to the proposed activity, in order to mitigate, avoid or otherwise address an adverse effect on an Aboriginal Claim as 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 Provincial decisions.

Statutory Approvals Requiring Consultation

The Ministry recognizes that some of its responsibilities related to local government structure changes and planning approvals require First Nations consultation.

Local government engagement with First Nations on proposed statutory approvals may be important to the overall decision-making process on the following matters: provincial approvals of municipal boundary changes and restructures under Part 2 of the *Local Government Act* and requests for ministerial approval of Regional District bylaws under *Local Government Act* Sections 882, 913, *Islands Trust Act* s. 27(2)(b) and s. 56, and *Resort Municipality of Whistler Act*, s. 11.

To discuss specific proposals, local governments should contact their Ministry staff contact in Structure and Planning Branches, or the Local Government - First Nations Relations Branch.

The Role of the Ministry

Direction from the courts relating to the provincial government's consultation obligations is evolving. The Ministry will review First Nations concerns presented during engagement with local governments to determine if any impacts to Aboriginal Claims have been identified that require more comprehensive consultation by the Ministry. Should this be the case, the Ministry will work with the local government and the First Nations to address these concerns.

Local governments are encouraged to contact their Ministry staff contact for assistance early in the statutory approval process.

Ministry staff contacts information: <http://www.cd.gov.bc.ca/lqd/contacts/department.htm>

The Role of Local Governments

The statutory approvals covered by this Guide are generally initiated by local governments, which develop the proposals, and obtain public, stakeholder and other input as required before submitting to the Ministry for processing. This Guide recommends that local governments also provide the Ministry with the input of area First Nations. This means that First Nations should be provided with an information package notifying them of the local government proposal and providing a time-period to respond. This does not transfer Provincial consultation obligations to local governments. Local government assistance in engaging First Nations early in the process will assist in the timely processing of statutory approval requests.

Appendix B outlines a suggested process that local governments may follow when engaging First Nations. Local governments that already have engagement protocols established with their neighbouring First Nations are encouraged to provide documentation to the Ministry demonstrating their engagement efforts with First Nations.

For local governments interested in building closer relationships with neighbouring First Nations, the *Community to Community Forum Program* supports the development of local government - First Nations relationships. The establishment of relationships can lead to productive engagements on statutory approvals. The *Community to Community Forum Program* is managed by the UBCM and the First Nations Summit. Their websites have more information on applying for a grant from this program (see Appendix E).

It is suggested that local governments engage with First Nations early on in the process and keep detailed records of all engagement efforts (see Appendix F). The results of these efforts should be included in the information submitted to the Ministry for consideration of a request for a statutory approval.

Appendix A – Definitions

“Aboriginal interests” may include concerns, wants or aspirations for a wide range of issues related to environment, social/education, economics, etc. Recognizing these interests is an important aspect of negotiations and may help the parties reach a resolution.

“Aboriginal rights” are practices, customs or traditions integral to the distinctive culture of the First Nation claiming the right. A practice undertaken for survival purposes can be considered integral to a First Nation’s culture. Some examples of aboriginal rights are hunting, fishing, and gathering plants for traditional medicines and spiritual ceremonies. Aboriginal rights may be connected to a particular piece of land.

“Aboriginal title” is 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.

“Claimed territory” or “Traditional Territory” is the area over which a First Nation asserts rights including title under Section. 35 of the *Constitution Act 1982*.

“First Nation” is an aboriginal community or band. Some First Nations are organized according to the systems established under the *Indian Act* (i.e. with an elected Chief and Band Council representing the interests of the community). Some First Nations are organized by traditional systems such as the house system where one hereditary chief represents a number of families.

“Municipal boundary extension” refers generally to changing the boundary of a municipality by amending the Letters Patent, which requires Cabinet approval pursuant to the *Local Government Act* Section 20.

“Municipal incorporation” refers generally to when a community is incorporated as a municipality, which requires Cabinet approval pursuant to the *Local Government Act* Section 7.

“Official Community Plan” is a statement of objectives and policies to guide decisions on planning and land use management that requires approval from the Minister pursuant to the *Local Government Act* Section 882.

“Reserve” is a tract of land set apart by the Federal government for the use and benefit of a First Nations band.

“Restructure of local government” refers to a change in boundaries or governance of a local government, which requires Cabinet approval pursuant to the *Local Government Act* Section 7 and Section 20. “

“Treaty Lands” are those lands owned by a First Nation under a modern treaty, and are also referenced as treaty settlement land.

“Treaty rights” are those rights held by a First Nation in accordance with the terms of a historic or modern treaty agreement with the Crown.

“Zoning or Subdivision Servicing Bylaws” refers to a regional district bylaw that requires approval from the Minister pursuant to the *Local Government Act* Section 913.

Appendix B – Local Government Engagement Steps

Step 1 - Identify Potentially Affected First Nations

In preparing for First Nations engagement on statutory approvals, local governments should identify First Nations in their area that may have a potential interest in the activities requiring provincial approval.

It is recommended that local government engagement efforts be broad enough to include not only those First Nations whose Indian Reserves or Treaty Lands are close by, but First Nations who have identified a subject area as part of their traditional territory.

To determine which First Nations to engage, local governments should determine the location of nearby Indian Reserves and the traditional territory claimed by area First Nations. Local governments should be aware that more than one First Nation may claim an area as part of their territory. In this case referrals should go to all First Nations.

The resources in Appendix E will assist local governments in determining the appropriate First Nations to engage. The following questions may also help with the research.

- Which First Nations have hunting, fishing trapping or gathering sites or other traditional use sites (e.g., village or settlement sites, sacred sites, food gathering areas) within the local government jurisdiction?
- Are there archaeological sites in the area?
- How far is the proposed area from existing Indian reserves or First Nations communities?

Local governments should ensure that the relevant First Nations are notified about a proposal and provided with the opportunity to engage by describing any concerns.

It is anticipated that the initial research, once complete, will be an ongoing resource and will not have to be repeated for each activity requiring statutory approval.

Step 2 - Notify First Nations of Proposed Activity

For engagement to be successful, First Nations should be provided with all available information regarding a proposal as early in the process as is possible. The following suggestions are provided to local governments for consideration.

Initially, a local government should provide notice of a proposed change, by sending an introductory information package to the appropriate First Nation(s). The notification 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 and timing for completion of the process;

- Ask the First Nation to identify whether in its view Aboriginal Claims may be affected by the proposed change;
- Ask the First Nation to identify what impacts there may be and to provide all readily available information on those Aboriginal Claims; and
- Offer to provide additional information and/or to hold a face-to-face meeting (if possible) to discuss the proposed change; and
- Provide 30 days for the First Nation to respond.

It is suggested the local government telephone the First Nation to ensure the introductory information package has been received and point out the timelines for a reply. First Nations receive a large volume of referrals and a courtesy call assists in highlighting the local government's interest in receiving a response and assists in relationship building. Local governments are encouraged to keep detailed records of all correspondence, telephone calls or other communications with First Nations.

Where a First Nation responds and identifies a concern that indicates an impact on an Aboriginal Claim, the local government should determine if it can mitigate the First Nation concerns. Key questions a local government should try to answer with the First Nation include:

- What are the traditional First Nations activities in the area where the proposed structure or planning change will occur? (e.g. hunting, fishing, trapping or food gathering areas)
- Are there any archaeological sites of particular importance, such as village, settlement or sacred sites in the area?
- How will the First Nation activities or sites be impacted by the local government proposal?
- Does the First Nation have a suggestion on how the impacts identified can be avoided or otherwise addressed?

In some cases, the local government or the First Nation may propose in writing or in a meeting a practical solution that addresses concerns related to the proposed structure or planning change. If both parties agree that the proposed solution is sufficient, the solution should be documented and provided to the Ministry as part of the submission requesting approval.

If no solution is achieved, but the local government believes that its engagement process is complete to the best of its ability, the local government should notify the First Nation of its view that engagement is complete, including documenting any modification or other accommodation measures proposed, and that it intends to proceed with its request for provincial approval. Alternatively the local government can advise the First Nation that it is requesting additional assistance from the Ministry to complete consultation.

If the First Nation does not engage with the local government, it should send a final notice to advise the First Nation that it has received no response to its referrals and that the local government intends to proceed with its request for provincial approval of the proposed planning or structure change by a specific date.

Step 3 - Assessment of Engagement Efforts

When submitting requests for statutory approval of planning or structure changes, local governments should provide the Ministry with a report and supporting documents that provide details on local government First Nations engagement efforts. This will help the Ministry to determine whether the engagement has been sufficient or whether further dialogue with the First Nation is required.

To help expedite this process it is recommended that local governments provide answers to the following questions.

- How far is the proposed/subject area from existing Indian Reserves or First Nations communities?
- Did the First Nation identify any traditional activities in the area and in adjacent areas?
- Does the proposed planning or structure change potentially interfere with First Nations activities on or use of the land?

In addition, local governments should provide the Ministry with the following documentation:

- A copy of the referral package including correspondence notifying and describing to the First Nation the details of the proposal, requesting their views on the potential impacts of the proposal to Aboriginal Claims, and advising that the proposal will be submitted to the Minister of Community and Rural Development for consideration;
- Supporting documentation of the First Nation's response;
- A record of any follow up correspondence, telephone calls and meetings between the local government and the First Nation; and
- A record of the efforts made by the local government to address any concerns identified by the First Nation.

Appendix C – Sample Notification Letter Proposed Boundary Extension

This letter is to advise you that the Municipality of Y 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 your views on any potential aboriginal rights and interests that may be impacted by the proposed amendment.

In addition to seeking your input, this matter is also being forwarded to a number of other agencies, including *(list relevant agencies)* for review. Agencies regularly provide complementary referrals to each other as part of a positive working relationship.

A reply is respectfully requested by *(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 have been considered, the Municipality of Y will decide whether or not to submit the proposal to the Minister of Community and Rural Development for consideration. If we do not hear from you we will proceed with the approval process.

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.

Appendix D – Sample Notification Letter Proposed Bylaw Approval

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

OR

This letter is to advise you that the Regional District of Y is considering amending its Land Use Zoning Bylaw (LUB) Bylaw #X to *(describe purpose)*. A regional district referral form, additional information *(if appropriate)* and a map are attached for your review.

Please identify any potential aboriginal rights and interests that may be impacted by the proposed amendment. We would like to hear your views on how those rights and interests may be impacted by the proposal.

In addition to seeking your input, this matter is also being forwarded to a number of other agencies, including *(list relevant agencies)* for review. Agencies regularly provide complementary referrals to each other as part of a positive working relationship.

A reply is respectfully requested by *(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 Regional District Board will determine whether to submit the proposal to the Minister of Community and Rural Development for consideration, according to the requirements of the *Local Government Act* under Section XX. The proposed changes to the LUB/OCP would *(describe change)*. If we do not hear from you we will proceed with the approval process.

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.

Appendix E – Resources

BC Stats for regional district maps to help identify Indian Reserve locations:
www.bcstats.gov.bc.ca/data/pop/maps/rdmap.asp

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

Community to Community Forum Guide for assistance with establishing more formal working relationships with First Nations:
http://www.cd.gov.bc.ca/lgd/gov_structure/library/C2CGuide_FINAL.pdf

First Nations Summit for information on First Nations that are engaged in the BC Treaty process: www.fns.bc.ca/

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

Indian and Northern Affairs Canada for information on all Indian Reserve and other First Nations lands in BC: http://sdiprod2.inac.gc.ca/FNProfiles/FNProfiles_home.htm

Ministry of Aboriginal Relations and Reconciliation for information on the New Relationship and treaty negotiations: www.gov.bc.ca/arr/

Ministry of Community and Rural Development for information on consultation and building relationships: http://www.cd.gov.bc.ca/lgd/gov_structure/firstnations/index.htm

Ministry of Tourism, Culture and the Arts for information on archaeological sites:
http://www.tca.gov.bc.ca/archaeology/local_governments/index.htm

Union of BC Indian Chiefs for information on First Nations that are not in the BC Treaty process: www.ubcic.bc.ca/

Union of BC Municipalities (UBCM) First Nations Relations Committee for information on formal agreements between local governments and First Nations:
www.civicnet.bc.ca/siteengine/activepage.asp?PageID=6

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

Appendix F – Record of First Nations Engagement

Consultation Topic:		
First Nation:		
File:		
Contact Name and Position/Title:		
Phone:	Fax:	
Email:		
Date	Comment/Action	Initial

MEMORANDUM

TO: LMTAC Member Councils and Boards; Administrators
CC: LMTAC Board Members

FROM: Mayor Ralph Drew, LMTAC Chair

DATE: November 26, 2009

SUBJECT: Adoption of a Council/Board Policy on Consultation Fees

Recommendation from the LMTAC Board, November 25th, 2009:

It was MOVED and SECONDED

THAT a memorandum be sent from the LMTAC Chair to LMTAC Member Councils and Boards requesting that they consider adopting a policy statement, similar to the wording suggested within the Discussion section of this report, regarding nonpayment of fees for consultation with First Nations as part of the process of obtaining provincial statutory approvals.

CARRIED UNANIMOUSLY

PURPOSE

To provide LMTAC member Councils and Boards with a recommended policy statement regarding the nonpayment of fees for consultation with First Nations to assist in implementing the Ministry of Community and Rural Development *Guide to First Nations Engagement on Local Government Statutory Approvals* (June 2009) and in responding to potential First Nation requests to receive payment for consultation.

CONTEXT

The Crown Duty to Consult First Nations

The Province of British Columbia has a legal duty to consult and, where appropriate, accommodate First Nations whenever the Province proposes a decision or activity that has the potential to affect aboriginal rights, including aboriginal title and treaty rights. This duty arises from court decisions and is consistent with the Province's commitment to establishing a *New Relationship* with First Nations.

The courts have also determined that the Province may delegate procedural aspects of First Nations consultation to third parties; however, this does not constitute a transfer of provincial consultation obligations to local governments. Furthermore, the courts determined that First Nations must also engage in consultation in good faith and that First Nations do not have a veto or approval function over provincial decisions. The Province recently stated that "there is no

legal authority for a First Nation to charge a fee to an individual who may be applying to government for a permit covering an activity on either Crown land or privately held land.”

Guide to First Nations Engagement on Local Government Statutory Approvals

In June 2009, the Ministry of Community and Rural Development (MCRD) Local Government Department released an interim *Guide to Engagement with First Nations on Local Government Statutory Approvals* to provide guidance to local governments on engaging with First Nations as part of the process of obtaining provincial approval for the following matters:

- provincial approvals of municipal boundary changes and restructures under Part 2 of the *Local Government Act*;
- requests for ministerial approval of Regional District bylaws under *Local Government Act* section 882 (Official Community Plans, Adoption Procedures) and section 913 (Zoning and Other Development Regulation - Approval of Regional District Bylaws);
- *Island Trust* s. 27 (2) (b) s. 56, and
- *Resort Municipality of Whistler Act*, s. 11.

The *Guide* was developed following requests from local government for assistance in referring relevant matters to First Nations for their input. The intention of the Ministry in preparing the *Guide* is to facilitate the timely processing of requests from local governments and to ensure that First Nations are consulted in a meaningful way to enable the processing of the request for statutory approvals.

DISCUSSION

In the coming year, most Lower Mainland local governments will be required to amend their respective Official Community Plans (OCP) for one of two reasons: to update their respective Regional Context Statements or to include target reductions for greenhouse gas (GHG) emissions in accordance with Bill 27 *Local Government (Green Communities) Statutes Amendment Act*, 2008).

Section 882 of the *Local Government Act* regarding OCPs requires Ministerial approval; therefore, related regional district planning and land use management decisions are subject to consultation with First Nations.

In January 2009, the Tsleil-Waututh (Burrard) Nation released a *Stewardship Policy* to outline its expectations with respect to the receipt of referrals for consultation. Embedded within the *Stewardship Policy* is a fee payment schedule; however, the courts have not determined that the Crown duty to consult requires payment. The Province has also stated that "There is no legal authority for a First Nation to charge a fee to an individual who may be applying to government for a permit covering an activity on either Crown land or privately held land.”

This issue has resulted in some confusion on the part of municipal and regional staff, particularly when they have received invoices from the Tsleil-Waututh Nation.

Following, it is recommended that the LMTAC Board issue a memorandum to LMTAC member Councils and Boards with a recommendation that they consider adopting a policy regarding nonpayment of fees for consultation. Proposed wording for a policy statement is as follows:

The [Insert name of respective local government] does not compensate any party – including, but not limited to, local and other orders of government, First Nations, interested third parties and the general public – for consultation on its land use and management plans.

In responding to First Nation letters of request, the following draft wording may provide assistance:

[Insert name of respective local government] invites participation in its consultation and outreach programs. The [insert name of respective local government] does not compensate any party – including, but not limited to, local and other orders of government, First Nations, interested third parties and the general public

[Insert name of respective local government] does not underwrite the costs of First Nation consultation as this falls within the jurisdiction of other levels of government. If limited resources and other priorities lead you to a decision not to participate, then of course we will understand and accept that decision.

Where necessary and feasible [insert name of respective local government] will provide staff to explain the matters on which it is seeking feedback, and arrange meetings and forums to provide that feedback. If you require that assistance in order to respond to our invitation, kindly advise us and we will consider if and how we can meet your requests.

LMTAC representatives are encouraged to communicate the need for a policy to their respective Councils and Boards and to advise their various departments (i.e. finance, engineering and planning) of this issue. For tracking purposes, please inform the LMTAC office as to whether a policy statement is adopted by your jurisdiction and if you receive requests from First Nations for payment of consultation fees.

CONCLUSION

The *Ministry of Community and Rural Development* (MCRD) released a *Guide* to assist local governments in engaging with First Nations as part of the process for obtaining provincial statutory approvals. In anticipation that all Lower Mainland local governments will be required to amend their OCPs in the near future, and in recognition that some First Nations have developed their own consultation policies, it is recommended that LMTAC member Councils and Boards consider adopting a policy regarding nonpayment of fees for consultation. This policy recommendation is consistent with the Province's statement that "there is no legal authority for a First Nation to charge a fee to an individual who may be applying to government for a permit covering an activity on either Crown land or privately held land."

Attachment:

- *Guide to First Nations Engagement on Local Government Statutory Approvals* (Interim, June 2009) 11 pages.



CITY POLICY

No. R-25

REFERENCE:

REGULAR COUNCIL MINUTES

APPROVED BY:

CITY COUNCIL

DATE:

March 22, 2010

HISTORY:

TITLE: Requests for Compensation for Consultation on Land Use and Management Plans

The City of Surrey does not compensate any party – including, but not limited to, local and other orders of government, First Nations, interested third parties and the general public – for consultation on its land use and management plans.

Any requests for compensation that the City receives related to consultation on land use and management plans shall receive the following general response:

The City of Surrey invites participation in its consultation and outreach programs. The City of Surrey does not compensate any party for such consultation – including, but not limited to, local and other orders of government, First Nations, interested third parties and the general public.

If limited resources and other priorities lead you to a decision not to participate in a consultation process, then the City of Surrey will accept that decision.

Where necessary and appropriate the City of Surrey will undertake processes to explain the matters on which it is seeking input and feedback, and arrange meetings and forums to allow such input and feedback.