

Local Government Decision-Making: A Reminder on the Duty of Procedural Fairness

The duty of procedural fairness concerns the processes that must be followed before, during, and after a decision is made. For local governments, this means ensuring that decisions are made within the scope of its authorizing legislation, acknowledging the role that the public participatory process serves in the ultimate decision that is to be made, and complying with conditions established in common law standards of procedural fairness. Courts may look at requirements such as: clear communication; timeliness; proper record-keeping; proper notice; clear reasons for the decision; and providing an opportunity for the applicant to be heard and present their case.

The content of the duty that is required in the context of local government decision-making has recently been addressed by the B.C. Supreme Court in *3L Developments Inc. v. Comox Valley Regional District*, 2019 BCSC 1342.

Background

3L Developments Inc. (“3L”) sought to develop a large tract of land that it owns within the Comox Valley (the “Riverwood Land”) into a subdivision consisting of a variety of residential units and commercial space. The Riverwood Land is adjacent to the Brown and Puntledge Rivers and is a popular recreational area that includes Stotan Falls, a local attraction. The development of the land requires an amendment to the Comox Valley Regional Growth Strategy Bylaw (“RGS”). The CVRD adopted the RGS to guide it in long-term planning for sustainable growth in the region by addressing issues such as population growth and the establishment of residential settlements. The Local Government Act (the “Act”) prescribes the manner in which an RGS may be amended so as to permit the accommodation of development not conforming to the strategy. While it is possible to amend an RGS, the proposal must proceed through a prolonged and intensive process unless the amendment falls under the minor amendment process pre-

scribed in section 437 of the Act, or as developed and set out in the RGS. To avoid this prolonged process, 3L sought to amend the RGS as a minor amendment, pursuant to section 437 of the Act.

As such, on May 2013, 3L submitted an application to the CVRD to make a minor amendment to the RGS. The CVRD Board refused the application, and 3L applied for judicial review. The B.C. Supreme Court set aside the refusal on the grounds that CVRD failed to follow the process prescribed in the RGS. This result was upheld on appeal.

Following the appeal, the parties engaged in discussions about process and other matters. In May 2018, 3L submitted its updated application. A Technical Advisory Committee (“TAC”) and Steering Committee both determined that the application was not a minor amendment, and recommended that the amendment be treated as a standard amendment. Despite this, on July 17, 2018, the majority of the CVRD’s Committee of the Whole (“COW”) voted in favour of recommending that 3L’s development proposal proceed as a minor amendment. However, the CVRD Board did not follow the COW recommendation. On July 24, 2018, the CVRD Board voted in favour of the 3L development proposal proceeding as a standard amendment. In accordance with the standard amendment process, CVRD staff developed a consultation plan and informed local stakeholders, received further information from 3L, held a public open house at which 3L presented on the project, and scheduled the CVRD Board vote on first reading of the proposed standard amendment for October 2, 2018.

On September 28, 2018, the CVRD Steering Committee issued a report to the CVRD Board recommending against the standard amendment sought by 3L. 3L re-

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quested more time to respond to the Steering Committee's report in advance of the CVRD Board's first reading vote. After unsuccessfully trying to remove the first reading vote from the October 2 agenda, 3L attended the October 2 meeting and asked for an adjournment or deferral of consideration of the first reading of the standard amendment. The CVRD Board refused the request and voted against the standard amendment.

3L then commenced another judicial review proceeding, seeking to quash the CVRD Board's decision on the basis that it was unreasonable, made in bad faith and in breach of the rules of procedural fairness and natural justice by (i) failing to provide 3L with sufficient notice of the Steering Committee Report in advance of the October 2 meeting; (ii) failing to properly consider 3L's request for an extension to its amendment application at the October 2 meeting; and (iii) failing to properly consider 3L's request to withdraw its application at the October 2 meeting. The CVRD argued that it followed the procedure mandated by the Court of Appeal and the applicable legislation, and conducted all of its dealings with 3L in good faith.

Decision

The B.C. Supreme Court, in its August 12, 2019 decision, dismissed the application for judicial review. In reviewing the law, the court pointed out that the purpose of the duty of procedural fairness is to "ensure that administrative decisions are being made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker." Factors that were considered included:

1. the nature of the decision being made and the process followed in making it;
2. the nature of the statutory scheme and requirements of the statute;
3. the importance of the decision on those affected;
4. the procedural expectations of those affected (viewed objectively);
5. that deference should be afforded to the decision-maker's choice of procedure, particularly where the

statute grants discretion or where the decision-maker has an expertise in choosing the appropriate process.

The court was not satisfied that 3L was deprived of procedural fairness or natural justice in the particular context of its dealings with the CVRD Board and staff, or that the conduct of the CVRD gave rise to a reasonable apprehension of bias against 3L. With respect to the notice of the September 28 Steering Committee's report, the court held that the Steering Committee's function was legislative, not adjudicative or judicial, and it operated in accordance with the procedures prescribed by the RGS, with its primary role to provide its views to the CVRD Board, which was the ultimate decision-making body, comprised of elected officials. As such, the court held that 3L had no right to be consulted throughout the local government's process of examining its application. Further, although the development of the Riverwood Land was subjectively important to 3L, the judge held that the interests of 3L were focused on achieving progress, and not defending against a decision that would take away its livelihood or any previously vested rights, given 3L's statements to the CVRD during the application process that it had the opportunity to pursue other economically viable options for the land. The court found that the CVRD provided 3L with sufficient opportunities to present its position, both in writing and through delegates, at various stages, from the application to the vote on October 2. The RGS amendment application was found to have engaged a broad spectrum of community interests, and not just those of 3L. Consequently, the court held that neither the statute nor the duty of procedural fairness required that 3L be given an opportunity to respond to the Steering Committee report.

The court then went on to address whether the CVRD breached the rules of procedural fairness by failing to properly consider 3L's request for an extension to its amendment application and, later, its request to withdraw its application at the October 2 meeting. 3L argued that the Board's decision to reject 3L's requests to defer or withdraw its application was quasi-judicial and therefore demanded a more fair and transparent process. The judge referred to section 225(1) of the Act, which states that a regional board must establish the general procedures to be followed by the board and board committees, including the manner by which resolutions may be passed and bylaws adopted. The

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procedural bylaws enacted by the CVRD did not contemplate a situation in which an applicant might seek to withdraw or adjourn their application while the Board is debating the motion to refuse it. In the absence of a statutory requirement, the court was satisfied that the CVRD Board was able to determine its own procedure.

In Camera Meetings and Section 89 of the Community Charter

The court also discussed the requirement under section 89 of the Community Charter that a meeting of the council or board must be held in public unless it falls under one of the exceptions contained in section 90. 3L argued that when CVRD's Chair and Vice-Chair took a break to confer with staff about procedure in relation to 3L's request to withdraw its application, they held an in camera meeting of the Board, contrary to section 89 of the Community Charter. The court agreed with CVRD's position that the definition of "board" in the schedule of the Act means the "board of directors for the regional district". The judge determined that the sidebar between the Chair, the Vice-Chair and staff was not a meeting of the Board of Directors, and therefore the recess taken to get procedural advice from CVRD staff was not, by definition, a meeting of the Board. The court held that "it was a step taken by the two Board officials within their mandate of being in charge of procedure." Consequently, no procedural breach was found.

Takeaways

This case highlights how important it is for a local government to comply with procedural requirements. Local Governments are required to comply with all procedural requirements required by statute and to follow their own prescribed processes. When acting in a quasi-judicial capacity, local governments owe a duty of procedural fairness. If there is a failure to fulfill a duty of procedural fairness, a decision or bylaw may be quashed. The scope of the duty of procedural fairness that is owed by local governments is fact specific; the degree of fairness that will be required to fulfill the duty is dependent on the context. Generally speaking, the more serious the consequences or the greater the importance the decision will have on the affected party in relation to the general public, the greater the degree of fairness that is owed by the

decision-maker. Greater procedural protections will be required where a decision is determinative of an issue, and there is no appeal procedure. The closer the process resembles judicial decision-making, the more likely the procedural protections that are required will be similar to a court procedure (e.g. requiring the opportunity to cross-examine witnesses). The courts will take into account and respect the choices of procedure made by a decision-maker, but will also look at the legitimate expectations of the party challenging the decision and the statutory requirements related to the decision-making power and processes.

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