

BC COURT OF APPEAL AFFIRMS NORTH COWICHAN'S DENIAL OF DEVELOPMENT PERMIT

North Cowichan (Municipality) v. 1909988 Ontario Limited, 2021 BCCA 414

A recent case from the B.C. Court of Appeal has reversed the previous B.C. Supreme Court decision in *1909988 Ontario Limited v. North Cowichan (Municipality)*, 2020 BCSC 1666. We previously provided a summary of the trial decision, which can be [found here](#).

To recap, Council for the District of North Cowichan (the 'District') had delegated by bylaw decision-making authority regarding development permit applications to its Director of Planning and Building and provided for a reconsideration process by Council. The petitioner's application for a development permit had been denied on the basis that the proposed use (to expand a motorsport circuit) was not permitted under the District's Zoning Bylaw, and this decision was upheld on reconsideration by Council. This denial occurred despite the fact that the use in question had been previously permitted under the same Zoning Bylaw in relation to the same applicant. The petitioner's application for judicial review of the denial was successful at trial. The trial judge found that, having decided the use was previously permitted, it was unreasonable for the District to subsequently deny such a use under the same Zoning Bylaw, without providing an explanation. While the trial judge recognized that administrative decision-makers are not bound by their previous decisions, the Court explained that, where a decision maker departs from an established historical practice, it must justify the reason for this departure. Therefore, because Council made a decision that was inconsistent with a prior decision of

the District, it was required to provide an explanation for doing so.

The District successfully appealed the decision to the Court of Appeal. The Court of Appeal confirmed that there was no obligation for Council to provide reasons for rejecting the development permit application. In addition, the Court of Appeal confirmed that Council is not bound by previous decisions or representations of staff. If a staff member misrepresents whether a use is permitted, the applicant's remedy would be a claim for damages on the grounds of misrepresentation, and such a misrepresentation would not bind the local government to an improper interpretation of its bylaws.

In its judgment, the Court of Appeal set out the considerations to be applied when an administrative decision, such as Council's reconsideration of the rejection of the petitioner's development permit, is under review by the courts, including that:

- the basis of the administrative decision (determined by review of reasons if provided, or on review of the record) must accord with principles of justification, transparency, and intelligibility; and
- administrative decisions may be unreasonable if there is a failure of rationality internal to the reasoning process, or if it is untenable in light of relevant factual or legal constraints.

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In this case, the B.C. Court of Appeal held that the decision made by Council was not, in fact, a departure from established internal authority. Prior to the subject decision by Council, two different staff members had dealt with two development permits and reached opposite conclusions on whether the proposed use complied with the District's Zoning Bylaw. The Court of Appeal emphasized that it is important to consider the context in which deviation from past practice occurs. In the circumstances of this case, only one inconsistent decision had been made which, according to the Court of Appeal, was not a situation where a practice had been consistently applied to development permit applications over time. Therefore, it was held that Council's decision-making on the reconsideration of the second staff member's decision to deny the development permit application was not constrained by the first staff member's previous inconsistent decision.

Consequently, since no reasons had been provided by Council (and reasons were not required), and the rationale for the departure from the first staff decision could not be ascertained from the record, the Court of Appeal considered whether Council's interpretation of its Zoning Bylaw (i.e. that the proposed use was not permitted under the District's Zoning Bylaw) was unreasonable.

The Court of Appeal summarized the factors to be considered when interpreting enactments such as local government bylaws, which we suggest should be applied by administrative decision makers, such as the District Council in this case, as well as by Courts on judicial review. Such factors include a consideration of the meaning of the words of the provision in light of the context, the scheme and the object of the bylaw, as well as the intent of the legislator (i.e. in the context of a local government bylaw, the Council or Board who adopted the bylaw). Local government bylaws are to be interpreted in a broad and purposive way, in accordance with municipal purposes.

In this case, the Court of Appeal took into consideration

the general restrictive provision in the District's Zoning Bylaw that no lands in any zone shall be used for any use except one which is provided in the bylaw as expressly permitted for that zone. The Court of Appeal stated that this showed an intention to promote certainty, and that if a proposed use does not readily fit within the express permitted uses, then the intention is for those uses to not be permitted. In addition, the District's Zoning Bylaw listed more specific permitted land uses within each classification. As a result, the Court of Appeal concluded that it was open for Council's interpretation of its bylaw to be narrowed and coloured by these expressly permitted land uses. Further, the Court of Appeal observed that there was overlap between the two classifications in issue, industrial use and service industry use, and suggested that this is indicative of an intention for a distinction between the two classifications.

Taking into account all of these factors, the Court of Appeal held that because the permit application described the proposed use as primarily recreational, which was not an expressly permitted use under the District's Zoning Bylaw, it was open for Council to conclude that the proposed use was not permitted under either the industrial or service permitted uses.

Overall, this case is a good reminder of the factors to be considered by administrative decision-makers. It is important to note that the Court of Appeal did not disagree with the trial judge that, if administrative decisions are made that deviate from internal policy or longstanding practices, the decision makers will be required to justify the deviation. However, the Court of Appeal clarified that one prior inconsistent decision alone may not establish such an internal policy or longstanding practice. In addition, the justification does not need to be established through the issuance of reasons, if the provision of reasons is not otherwise required, as it may be determined from the record.



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