

THE REQUIREMENT FOR REASONABLENESS IN REZONING DECISIONS: LESSONS FOR LOCAL GOVERNMENTS AND BUILDERS IN *FERGUS CREEK HOMES LTD. V. CITY OF SURREY*

INTRODUCTION

Land developers and builders will be familiar with the decision-making powers over land use that are conferred to British Columbia local governments under the *Local Government Act* as well as the required approvals that are needed from these public bodies where a proposed land development project requires an amendment to the official community plan or a rezoning of the lands prior to proceeding with the project. Where a party that is directly affected by the decision of a public body believes that the decision was unreasonable then this decision may be challenged in court through a judicial review. To assess the reasonableness of a decision the factors outlined in *Canada (Minister of Citizenship & Immigration) v. Vavilov* 2019 SCC 65 will be considered by the court to determine whether the public body's decision is justified. Where the decision is found to be unreasonable then the court may remit the decision back to the public body for reconsideration.

The recent decision of [Fergus Creek Homes Ltd. v. Surrey 2024 BCSC 207](#) provides a recent example of how a judicial review can be used by land developers to challenge local government decisions over land use. It should, however, be cautioned that the approval or

rejection of a rezoning or other land use decision by a local government body is not in itself unreasonable and it must be demonstrated that there are other factors that make the decision unreasonable, such as a failure to have the necessary record before the decision maker, as was the case in *Fergus Creek*.

BACKGROUND

The petitioner, Fergus Creek Homes Ltd. (the "**Developer**"), was a property developer and owner of a 25.7-acre development site located within the boundaries of the City of Surrey (the "**City**"). In 2020, the Developer had submitted a development proposal to the City in which it proposed to develop the lands into a townhouse complex consisting of 482 homes. The property in question was located in an area of the City that was designed by the official community plan of the City (the "**OCP**") as a "Mixed Employment" area and the property was zoned as "One-Acre Residential Zone". To proceed with the project, the Developer required the City to amend the OCP to remove the Mixed Employment designation and rezone the lands to "Multiple Residential 30 Zone."

In July of 2022, the City gave first and second reading to two bylaws to:

- 1) amend the OCP to change the land use designation on the development lands from Mixed Employment to Multiple Residential; and
- 2) amend the City's Zoning Bylaw to rezone the development lands from a One-Acre Residential Zone to Multiple Residential 30 Zone.

(collectively, the "**Bylaws**")

In August of 2022, the City had a public hearing for the Bylaws, following which City Council gave third reading to the Bylaws, supported the issuance of a development variance permit and resolved to consider the issuance of a building permit upon final adoption of the Bylaws. Following the third reading of the Bylaws, the Developer received a preliminary layout review letter from the City's approving officer advising them of the conditions it needed to satisfy to have its development proposal considered for final approval by the City.

In October of 2022, a municipal general election changed the composition of the City Council. Following the municipal election, a motion was brought by the mayor in a meeting of City Council to rescind the third reading of the Bylaws (the "**Motion**"). Local governments have frequently rescinded a third reading of a bylaw so they can conduct another public hearing pursuant to Section 464 of the *Local Government Act*; however, in this case the Motion intended to have the Bylaws filed and the development application closed, effectively bringing this development proposal to an end. The City Council passed the Motion, and the Developer brought a judicial review application on the grounds that the decision was unreasonable and raised that it had been deprived of procedural fairness by not being invited to speak at the meeting of City Council at which the Motion was considered.

ISSUES

The court considered (1) whether the failure of City Council to comply with section 43(1) of the City's Procedure Bylaw No. 1530 (the "**Procedure Bylaw**") at the City Council meeting was reviewable by the courts; (2) was the decision of the City Council to rescind the third reading of the Bylaws unreasonable; and (3) did the other grounds of review advanced by the Developer (that they were deprived of procedural fairness) require review and what was the appropriate remedy.

ANALYSIS

Issue One: Was City Council's failure to comply with section 43(1) of the Procedure Bylaw reviewable?

Section 43(1)(a) of the Procedure Bylaw sets out the procedure for how the City Council must bring back adopted motions for reconsideration. It should be noted that the Procedure Bylaw and this provision only apply to the City and the procedures required of its City Council. Other local governments will have adopted their own procedures bylaw, which may have similar or different provisions to the Procedure Bylaw.

The court concluded that City Council had the authority to depart from the provisions of the Procedure Bylaw in a particular instance; however, it could only do so subject to the standard of reasonableness and any decision to depart from the Procedure Bylaw was reviewable by the courts on a judicial review application.¹

Issue Two: Was City Council's decision to rescind the third reading of the bylaws unreasonable?

The reasonableness standard requires a "*sensitive and respectful, but robust evaluation of the reasons provided for the decisions.*" The framework for a judicial review of a municipal decisions was summarized in the

British Columbia Supreme Court case of *Pinnacle Care Group Ltd. v. White Rock (City)* 2022 BCSC 2272:

- 1) where the reasons for the municipal decision can be discerned: the reviewing court determines if the reasons can be inferred from the record before the decision maker or larger context. If it can, the court conducts the reasonableness review on the basis of those reasons, or
- 2) where the reasons for municipal decision cannot be discerned from the record or larger context: the court determines whether the provision could reasonably be interpreted in the decision makers way or whether there are any reasonable interpretations that would have authorized" the municipal act.

At the time the motion was considered, Surrey's Council was not presented with a report describing the steps taken by staff either following third reading or otherwise. The court concluded that Surrey Council's failure to consider the actions taken by City staff was not in compliance with the Procedure Bylaw. The court recognized that the City Council had the authority to depart from the provisions of the Procedure Bylaw in certain circumstances but found that it was unreasonable to do so in this case given that the Developer had taken steps to further the proposed development.

The court's finding in *Fergus Creek* does not suggest that a municipal council or regional board must always adopt a bylaw after giving third reading if an applicant has taken further steps in reliance of third reading. Rather, the case indicates that more procedural requirements may apply before a local government can reject such an advanced application. The court has previously confirmed that a council that has given a bylaw third reading does not necessarily preclude the council from later declining to adopt it. Additionally,

where a staff report is put before a board or council containing recommendations on a course of action, this does not permit elected officials to blindly follow those recommendations and it is expected that boards and councils will consider the subject matter at hand with an open mind before coming to a decision.²

Issue Three: Should the other grounds of review advanced by the Developer be decided and what is the appropriate remedy?

The court held that the decision of City Council not to follow Section 43(1)(a) of the Procedure Bylaw was a threshold finding that justified the Motion being remitted back to City Council for reconsideration.

It was therefore unnecessary to consider the other grounds for review advanced by the Developer. The court ordered the Motion to be remitted back to City Council for reconsideration.

TAKEAWAYS FOR BUILDERS AND DEVELOPERS

Where a local government reopens a decision made on a development project for reconsideration and reverses it there may be merit to challenging that decision. However, it should be cautioned that the decision to approve or rescind a bylaw is a discretionary power conferred to local governments. The fact that a development proposal is reopened or not approved is not alone indicative of unreasonableness on the part of a local government body and a further consideration of the record before the decision maker and other factual circumstances must be considered. Regarding whether a builder or developer is deprived of procedural fairness if denied an opportunity to speak before a local government body on a reconsideration motion, there is case law that indicates that the new information that a board or council may receive after second and third reading of a proposed bylaw is limited unless a fresh public hearing is held at which persons affected by the

new information are given a reasonable opportunity to be heard.

Whether a decision is “reasonable” or “unreasonable” is a complex question of administrative law that will need to be assessed by a lawyer to consider whether there is merit to bring a judicial review of a local government decision. Builders and developers should keep in mind that where an unfavorable decision is made by a public body that impacts development projects that this avenue for judicial intervention does exist through which such decisions may be challenged through the courts.

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Footnotes:

1. *Fergus Creek Homes Ltd. v. City of Surrey* at Para 33.
2. *Vanderhaeghe v. Sunshine Coast (Regional District)* 2022 BCSC 2100 at para 180.



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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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