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ON SECOND THOUGHT:
REPEAL, RESCISSION, AND RECONSIDERATION IN LOCAL GOVERNMENT LEGISLATIVE PROCEDURE

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I. INTRODUCTION

As the level of government that is closest to the people, municipalities and regional districts are often the first governments to respond to novel or emerging problems and issues that are of concern to their electorates. Frequently, initial responses to such problems need to be re-thought and in some cases reversed, as the novel issue becomes more thoroughly understood. Even with longstanding issues and problems, the accessibility of the decision-making process to the electorate and the relative ease with which resolutions and bylaws can be adopted makes it more likely that decisions at the local level will be made hastily. Small quorums can result in decisions that don't reflect the will of the municipal council or regional board majority as it would be expressed when all members are present, leading to initiatives to have decisions from previous meetings reconsidered. Local government elections are generally held more frequently than elections at other levels of government, resulting in more frequent opportunities for decision-makers to seek to reverse the decisions of their predecessors in order to carry out electoral mandates. These features of local government decision-making make changing legislative direction a relatively common occurrence at the local level. There are several procedures that can be used to change direction. The purpose of this paper is to place each of these procedures in its context, explore some of the issues that can arise in relation to each, to provide suggestions as to which procedure ought to be used in particular circumstances, and to give special attention to the peculiar phenomenon of reconsideration, which doesn't exist at the senior levels of government.

II. PRELIMINARY CONSIDERATIONS ON CHANGING DIRECTION

Several of the issues that arise when considering how a legislative body may change direction stem from certain basic procedural rules and from the rules governing when a resolution or bylaw takes effect. The most basic rule is that, once a legislative body like a municipal council or regional board has decided a matter, the topic is in most respects closed. *Bourinot's Rules of Order* sets this out as follows:

> "When a vote has been taken and the motion declared either carried or lost, that decision becomes formally the decision of the body in question and is so recorded. A question once decided cannot be brought up again at the same meeting, but if it should become necessary to rescind a motion that has been passed, notice of intention can be given at one meeting and a motion for rescinding be introduced and dealt with at a subsequent meeting. Ordinarily a motion that has once been negatived cannot be reintroduced; however, another motion of similar intent but different in some particulars may be entertained at the discretion of the chairman [emphasis added].

The democratic right to introduce a proposition in the form of a motion, and of full debate and a free vote thereon, carries with it the obligation of the majority to respect its own decisions to the same extent as the obligation of a minority to accept and respect decisions of the majority. In other words, a decision reached by due process must be recognized and observed as such by all concerned; if it involves action, of whatever nature, that action must be taken." [1]

Note the distinction made in this passage between a motion that has been carried and one that has been lost. A motion that has been carried can be rescinded at a subsequent meeting. According to Bourinot, a motion that has been lost stands on a different footing; it cannot be reintroduced, because the assembly must "respect its own decisions". As will be seen, however, in local government in BC a motion that has been lost can in fact be reintroduced, through the process of reconsideration.

A second issue arises from the fact that resolutions and bylaws generally take effect from the date of their adoption, or some date in the future; they are not considered to have retroactive effect, and the authority of municipalities and regional districts to legislate retroactively is very limited. Thus, for example, if a municipal council imposes a swimming pool user fee of $5 per visit on September 1 to take effect immediately, and on second thought on October 1 considers that a user fee of $6 per visit ought to have been imposed, rescinding or reconsidering the September 1 resolution is not an appropriate procedure because some $5 user fees will already have been paid. The council cannot set a $6 user fee retroactive to September 1 (even if there were some practical means to collect the additional $1 from September users). The most that the council can do is set a $6 user fee effective October 1, which requires a further resolution identical to that passed on September 1 except for the amount. The wording of the October 1 resolution does not need to refer to the resolution of September 1, or for that matter to any similar resolution from previous years; it may simply speak to the future.

III. MAKING A FRESH DECISION

In many cases including the example just given, a change of direction in local governance can be accomplished by simply making a fresh decision. To take another example, suppose that the municipal council decides in the fall to close the municipal swimming pool for one day each week to save money, by means of a simple resolution passed at a council meeting, resolving that the facility be closed to the public on Mondays, effective October 1. Staff then discover that the local school district has scheduled Monday physical education classes for the facility for the next term, and decide to recommend that the facility be closed on Fridays instead of Mondays beginning in the spring school term. There is no need for the council to repeal, rescind or reconsider its previous decision regarding Monday closures. It may simply pass a further resolution that the facility be closed to the public on Fridays instead of Mondays, effective January 1. Normally, a council resolution is interpreted as indicating the will of the council as of the date it is passed, and as repealing by implication any previous resolutions having

[1] *Bourinot's Rules of Order*, Third Revised Edition 1977, at p. 47.

inconsistent effect. In this case, the fall resolution has been effective to establish the schedule for the facility during the fall months, and the council is concerned not with the operation of the resolution during the latter part of the year, but with its effect in the new year. This concern can be met with the simplest measure: passing a fresh resolution expressing the new will of the council.

IV. RESCINDING A PREVIOUS RESOLUTION

The passage from *Bourinot's Rules of Order* quoted at the beginning of this paper refers to the rescinding of a motion that has been passed as an exception to the rule that "a question once decided cannot be brought up again". Robert's Rules stipulates that motions to rescind may be made at any time after the original motion was passed, but is not in order in relation to something that has been done as a result of the original motion that cannot be undone, or when someone has moved to reconsider the original motion and that motion has not yet been voted on. Some procedure bylaws require notice of a motion to rescind. No time limits are applicable, but a motion to rescind a motion that has already been acted upon would be out of order. A real-life example of rescission is the motion of the City of Toronto Council of February 7, 2012 to rescind its August 25, 2010 resolution requiring then Councillor Ford to reimburse the City in the amount of $3150 in relation to football club donations that he had solicited in his capacity as a member of Council (a motion on which Ford voted as Mayor, leading to proceedings to disqualify him for conflict of interest). Council's 2010 motion had, notoriously, not yet been acted upon – Ford had not made the reimbursement payment – so the motion to rescind was in order. (It passed, and Ford was exonerated in the disqualification proceedings on the grounds that the Council had no authority to pass the 2010 reimbursement resolution in the first place.)

The topic of rescission sometimes comes up when a council or board has rejected a bylaw at third reading or adoption, and staff or elected officials turn their minds to the status of the bylaw that has had two or three readings but has not been adopted. Is it necessary or appropriate to rescind the resolutions that gave readings to the bylaw? (Some elected officials seem to think that a bylaw has not truly been defeated until all readings have been rescinded.) Note that external authorities like the Minister of Community Development do not rescind their approval of bylaws given after third reading and before adoption, if the bylaw is not adopted. The fact that the approval has been given makes it possible for the bylaw to be brought forward for adoption a second time, subject to any applicable procedural rules on repetitive motions, but the external approval authorities don't seem to consider this a problem. Rescinding the early readings of a bylaw may provide the illusion that the bylaw has had a wooden stake driven through its heart, but the fact is that first and second readings can be moved again, subject to any local procedural limitations on repetitive motions, restoring the bylaw's status quo, and the resolution to rescind first and second reading can perhaps itself be rescinded. (Alberta's *Municipal Government Act* provides that the previous readings of a proposed bylaw are rescinded if the bylaw is defeated on second or third reading, or does not receive third reading within 2 years of first reading. We have no such legislation in BC.)

The proceedings of the Legislative Assembly are littered with Bills that did not proceed past first, second or third reading, and the Legislature takes no "housekeeping" steps to get rid of them; they simply form part of the archival history of the Legislature. We suggest that local governments approach defeated legislation in the same fashion, by simply abandoning the bylaws at the point at which their progress through the local legislative process was halted. (We have seen some proposed bylaws in which the legislative services staff have used word processing software to insert on each page of the document a large watermark indicating "Abandoned on [date]" – which if the document is then locked against further editing would reasonably ensure that subsequent readers of the document in electronic form will know that it didn't make it through the entire legislative process.) A formal motion to abandon or to "proceed no further" is not necessary. The minutes of the local government speak for themselves, recording that the bylaw achieved certain readings but that its progress was halted at a certain point in the adoption process. A motion to proceed no further would be subject to being rescinded itself if the council or board changes its mind again.

Rescission is sometimes convenient for procedural reasons. A common circumstance is the rescission of the resolution giving third reading of a bylaw that requires a statutory public hearing prior to third reading, where the council or board wishes to hold another public hearing either because it wishes to alter the bylaw or because it would be procedurally unfair to adopt the bylaw without holding a further hearing. Rescission reverses the clock to the point that additional procedural steps can be taken in proper sequence.

V. REPEALING A BYLAW

According to s. 137 of the *Community Charter*, the power to adopt a bylaw includes the power to amend or repeal such a bylaw, and the power to amend or repeal must be exercised by bylaw and is "subject to the same approval and other requirements, if any" as the power to adopt a new bylaw. The amendment or repeal of a bylaw is an obvious way for a municipal council or regional board to change direction.

The usefulness of reconsideration as an alternative to repeal arises in relation to the "same approval and other requirements" aspect of s. 137. In the context of a zoning bylaw, OCP or any bylaw requiring an external approval such as that of the Ministry of Community Development, this proviso means that before repealing a bylaw the local government must repeat all procedural steps that applied to its adoption. As we will see when reconsideration cases are reviewed, reconsideration is treated as a continuation of the original legislative process, and can therefore be done without repeating procedural steps.

(As an aside, it is never appropriate to repeal a bylaw that amended a bylaw. When an amendment bylaw is adopted, it merges with the bylaw it amends and is said to be "spent". Reversing the effect of an amendment bylaw is accomplished by further amending the base bylaw to back out the amendment. For example, if Zoning Bylaw No. 1000 is amended by Zoning Amendment Bylaw No. 1099 to add "growing and packaging of medical marihuana" to a list of permitted uses in the General Industrial Zone, and the council or board changes its mind

about that amendment a year later, it must do so by adopting a further amendment to Zoning Bylaw No. 1000 to delete that use from the list of permitted industrial uses. It does not repeal Zoning Amendment Bylaw No. 1099. This is why it is never necessary, when repealing a bylaw, to repeal "Bylaw No. XXX and all its amendments". It is sufficient to simply repeal Bylaw No. XXX.)

VI. RECONSIDERATION

As Bourinot observes in the passage quoted at the beginning of this paper, "[o]rdinarily a motion that has once been negatived cannot be reintroduced". Reconsideration of a resolution is a special means of changing direction that is unlike repeal or rescission, in that it is a continuation of the legislative procedure by which the resolution to be reconsidered was initially put before the legislative body and voted on, rather than a fresh legislative initiative. No local government legislative process in British Columbia can be considered to have ended with finality until all possibility of reconsideration of the matter in question has been exhausted. Reconsideration initiated by a mayor or regional board chair, in the exercise of statutory powers to do so, becomes impossible simply with the passage of a relatively brief period of time. Reconsideration initiated under the local government's procedure bylaw is another matter.

A. "Reconsidered and finally adopted"

As a preliminary point, reconsideration of a bylaw initiated by a mayor or regional board chair, or by members of council or the regional board pursuant to its procedure bylaw, is different from the notional "reconsideration" that at one time occurred concurrently with adoption of a bylaw in this province. Throughout most of the history of local government in BC, the adoption of a bylaw had to be accompanied by a "reconsideration" of the bylaw, perhaps indicating a belief on the part of the Governor of the Crown Colony who initially provided for the establishment of local government, and later the provincial Legislature, that municipal councils might be inclined to legislate impulsively. (At the federal level, "sober second thought" notionally occurs in the Senate chamber which must pass legislation referred from the House of Commons before it receives Royal Assent.) An early example of the requirement for reconsideration may be found in the *Victoria Incorporation Act, 1862*, which provided that "[e]very Ordinance passed by the Council shall be reconsidered not less than three days after the original passage, and if confirmed, shall come into effect and be binding on all persons after seven days from the publication of the same".

The last vestige of this kind of requirement, repealed out of the *Municipal Act* around 1990, stipulated that a bylaw had to be reconsidered and adopted not less than one day after third reading. In consequence of this historical statutory language, the bylaw boilerplate of many municipalities in BC still indicates that the bylaw was "reconsidered and finally adopted" on such-and-such a date. However no formal reconsideration of the bylaw actually occurred, with the result that the municipality would likely consider that the bylaw is still eligible for formal reconsideration despite any procedure bylaw stipulation (and the rule in *Robert's Rules of*

Order) that a bylaw may be reconsidered only once. This kind of bylaw boilerplate was the source of considerable confusion and inconvenience in *Virdis v. North Vancouver (City)*,[2] in which there was an issue as to whether a failed motion on an OCP amendment, recorded in the council minutes under the pro forma heading "Reconsideration and Adoption", precluded the council from dealing again with the same OCP amendment application within the re-application period stipulated in the land use procedures bylaw (during which a 2/3 majority of council would be required to enable it to consider the application again). The City claimed that the "reconsideration" motion recorded in the minutes was a separate and discrete legislative procedure from a motion to adopt the bylaw, which had allegedly not yet been made or voted on, but the Court disagreed, holding that "reconsideration and adoption" was a single legislative step given that the debate on the motion had clearly encompassed the question of adoption – a conclusion that seems fully supported by the legislative history around mandatory reconsideration. Generally we suggest that, now that the mandatory requirement to "reconsider" bylaws has been repealed, this boilerplate be removed from local government bylaw templates, and that the template simply indicate that the bylaw was "Adopted" on a certain date.

B. Inherent right to reconsider

A useful starting point for any discussion on reconsideration is the observation of the Court of Errors and Appeals of New Jersey in *Jersey City v. State*,[3] later cited with approval in the Canadian context in *Re Dewar and East Williams (Township)*[4] that "the right of reconsidering lost measures inheres in every body possessing legislative powers".[5] *Bourinot's Rules of Order* deals with reconsideration in the following terms, again emphasising that this is a procedure for dealing with motions that have failed:

> "[P]rocedures are sometimes provided for not only rescinding a motion decided in the affirmative, but also reconsidering a negative decision. A reconsideration rule usually provides that a person must give notice in writing that he will move at the next meeting that a question be reconsidered. The provision is a useful one, in that conclusions occasionally may be reached hastily or on the basis of inadequate information and a later review may well be in the public interest. It is nevertheless important that reconsideration not be allowed except upon due notice and formal motion, and it is customary to insist on a two-thirds majority vote on a motion to reconsider." [6]

[2] [2009] B.C.J. No. 1636 (S.C.), appeal dismissed [2010] B.C.J. No. 808 (C.A.)
[3] (1863), 30 N.J.L. 521 at 529.
[4] [1905] O.J. No. 90 (Ontario High Court of Justice).
[5] An early reference to this observation is found in the BC Supreme Court's decision in *Bay Village Shopping Centre Ltd. v. Victoria (City)*, [1971] B.C.J. No. 140.
[6] Third Revised Edition, 1977, at pp. 47-48.

Robert's Rules of Order has the following:

> "Reconsider – a motion of American origin – enables a majority in an assembly, within a limited time and without notice, to bring back for further consideration a motion which has already been voted on. The purpose of reconsidering a vote is to permit correction of hasty, ill-advised, or erroneous action, or to take into account added information or a changed situation that has developed since the taking of the vote." [7]

Robert notes that the motion to reconsider can be made only by a member who voted with the prevailing side – a rule that protects against the mischievous use of the motion by a defeated minority, that the motion must be made within the same "session" as the first motion, and that the motion cannot itself be reconsidered. A time limit is usually not applied in the local government context except in the case of the mayor's statutory powers to initiate reconsideration, where a 30-day rule applies.

C. Initiation of reconsideration by the Mayor

The *Community Charter* in s. 131 enables a mayor to require the council to reconsider a matter that was the subject of a vote, and vote again on the matter. This may be done at the same council meeting as the original vote, or within the following 30 days. The council must deal with the matter "as soon as convenient", which does not necessarily mean at the meeting at which the mayor initiated the process if the council chooses to table the matter to a subsequent meeting. If a bylaw or resolution is rejected on reconsideration, s. 131 says that it is of no effect and is deemed to be repealed. Previous legislation required the mayor to initiate the process by stating his objections to the bylaw or resolution in question, and barred the use of this procedure if an officer or agent of the municipality had already acted upon the bylaw or resolution. These provisions did not find their way into the *Community Charter*. This mayoral power does not exist in most of the other provinces.

Procedurally, the appropriate step for a mayor to take to initiate a reconsideration at a subsequent meeting of council would be to cause the matter to be placed on the agenda of the meeting during the usual agenda-setting process. Alternatively, the mayor could bring the matter forward as new business as the meeting agenda is being adopted. The statutory right of the mayor to require the council to reconsider a matter cannot be subject to any requirement that the council as a whole first approve such an agenda item; rather, s. 131 puts a matter back before the council for decision as if a motion to reconsider had been moved, seconded, debated and voted on in the affirmative by the council.

[7] Tenth Edition, 2000, at p. 304.

D. Initiation by other members of Council under the Procedure Bylaw

Most council and regional board procedure bylaws make express provision for motions to reconsider, in addition to incorporating Robert or Bourinot and thereby indirectly establishing a reconsideration procedure following the rules laid down by those authors. Procedure bylaws stipulate some or all of the following conditions:

- Notice of motion is required;
- the motion must be made by a member who voted on the prevailing side on the original motion;
- the motion must be seconded;
- the motion cannot be made if a specified period of time has elapsed since the original motion was voted on;
- the motion cannot be made if the local government has acted on the original motion;
- the motion cannot be made if a third party has acted on the original motion;
- the motion cannot be made if the matter has already been reconsidered; and
- the motion requires a simple majority vote.

E. Reconsideration procedure

The effect of an adopted motion to reconsider, or an announcement by a mayor that he or she is requiring the council to reconsider a matter under s. 131, is that the matter being reconsidered is back on the table as if the vote that disposed of the matter had not been taken, and is open for debate. Usually, the mayor or the council member who moved to reconsider opens the debate by stating their reasons for doing so. These may be very simple; for example, a member of council who voted in the negative had misunderstood the motion and actually intended to vote in the affirmative, or members of council who were not present for the vote are now present, and are sufficient in number to change the outcome of the vote. Or they may be more complex, involving new or additional information relevant to the decision that has come to light and that the member of council believes ought to have been taken into consideration. At the close of debate, a vote is taken on the motion just as it was taken on the original motion. The decision stands as the decision of the council or board, notwithstanding its decision on the original motion, which remains in the minutes of the previous meeting but is superseded by the decision reached after reconsideration of the matter. The rule in s. 131 and in Robert that a matter cannot be reconsidered more than once, gives finality to this decision.

F. Reconsideration and statutory procedural requirements

Reconsideration of bylaws enacted or rejected after statutory notifications or a statutory public hearing raises particular issues, on which reasonably consistent direction has been provided in a series of judicial decisions. In the following cases, the court held that a fresh public hearing was required if the council wished to reconsider a bylaw that had been the subject of a public hearing:

> *"Witt v. Surrey*[8]: The mayor initiated reconsideration at the council's inaugural meeting of zoning and OCP amendments adopted just prior to a civic election, under previous legislation that required the mayor to state his reasons for doing so. The bylaws were rejected by the new council, and the owners who had applied for the bylaw amendments sought judicial review, on the grounds that the mayor had not in fact stated his reasons, and that the council had not held a fresh public hearing and had therefore violated the rule now found in s. 131(3)(b) of the *Community Charter* that the council's authority on reconsideration initiated by the mayor is subject to the same conditions that applied to the original consideration. They succeeded on both grounds, the Court holding that the public had a right to be heard with respect to whatever reasons the mayor had given for bringing the matters back before Council.
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> *Bay Village Shopping Centre v. Victoria*[9]: The council adopted a zoning amendment bylaw after a resolution to adopt the bylaw had been defeated, the council received further representations by the applicant, and the municipality held another public hearing without giving proper notice. The bylaw was quashed for failure to comply with the statutory hearing notification procedure."

In the following cases, the court held that it was not necessary to provide fresh notification and another public hearing opportunity before reconsidering a bylaw that was the subject of a public hearing:

> "*Royal Oak College v. Burnaby*[10]: The Council initiated reconsideration of a defeated zoning amendment bylaw pursuant to its procedure bylaw, and adopted the zoning amendment. Distinguishing *Witt*, the Court held that there was no need for another hearing where there was no statutory requirement that anyone give reasons for initiating reconsideration. The Court indicated that notice and a further hearing would only be required where the council proposed to adopt something substantially different from what was addressed at the public hearing.

[8] [1989] B.C.J. No. 886 (S.C.)
[9] [1973] 1 W.W.R. 634 (B.C.C.A.)
[10] [1993] B.C.J. No. 469 (S.C.)

> *Lecompte v. Chilliwack*[11]: The Council reconsidered a zoning amendment bylaw that had been defeated on a tie vote, pursuant to its procedure bylaw, and passed the bylaw. No further public hearing was held. The Court upheld the bylaw, noting that the bylaw that was passed was the same as the one that had been considered at a public hearing and the public had therefore not been deprived of the opportunity to be heard.
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> *Wingold Construction Ltd. v. Surrey*[12]: Council defeated a zoning amendment bylaw following a public hearing, then reconsidered the matter under its procedure bylaw and adopted the bylaw without further hearing. The Court held that there was no need for a further hearing where reconsideration occurred in a timely fashion and no substantive change had been made in the bylaw."

(There is an additional case, *Brentwood Lakes Golf Course Ltd. v. Central Saanich*,[13] in which, as in *Witt v. Surrey* decided two years previously, the Council adopted OCP and zoning amendments just prior to an election and the mayor brought them back for reconsideration after the election. Another public hearing was held, the bylaws were repealed, and the repeal bylaws were attacked on the grounds that the notices for the second hearing were defective. That attack failed, with the Court making no observations on whether the second hearing was actually required – likely because, instead of simply reconsidering the adopted OCP and zoning amendment bylaws and defeating them on reconsideration, the District had created new bylaws repealing the amendment bylaws and the statutory hearing and notice requirements clearly applied to the new bylaws. Such a procedure was misconceived, for two reasons – true reconsideration results not in the repeal of adopted bylaws but in a new vote on adoption of those bylaws and possibly a new result, and the repeal of amendment bylaws is not a correct procedure because the amendment bylaws merged with the OCP and the zoning bylaw as soon as they were adopted.)

It seems that the central procedural issue that was addressed in these cases can be addressed by a sharp focus on the statutory rule that an OCP or zoning bylaw cannot be adopted without a public hearing having been held, and the common law rules concerning the receipt of relevant information after a public hearing and before consideration of adoption of the bylaw. Once a public hearing has been properly held, it seems that the bylaw in question can legally be adopted whether or not the resolution adopting the bylaw has been preceded by the defeat of an identical resolution and a subsequent resolution or mayor's intervention initiating reconsideration of the matter. The only circumstance in which a further hearing is required upon reconsideration, one which can arise whether or not a reconsideration step occurs, is where the council has received new, relevant information that could have a bearing on the final outcome and concerning which members of the public have not already had an opportunity to

[11] [1988] B.C.J. No. 298 (S.C.)
[12] [1979] B.C.J. No. 1011 (S.C.)
[13] [1991] B.C.J. No. 2302 (S.C.)

be heard. It seems that the same principle should apply where another kind of procedural step like the approval of a minister or the electors is required; once the approval has been given, the bylaw can be adopted whether or not the adoption resolution has been preceded by the defeat of an adoption resolution and then a motion to reconsider.

VII. IT AIN'T OVER UNTIL IT'S OVER

These zoning cases are a powerful reminder that the local government legislative process is not really over until all possibility of reconsideration has passed – 30 days in the case of reconsideration initiated by the mayor or chair of the regional board, and an indeterminate period of time in the case of reconsideration initiated under a procedure bylaw that doesn't impose a time limit. This fact makes the occasional disputes that arise about whether a council or board retains jurisdiction to not adopt a bylaw after a third reading resolution has passed seem particularly ill-conceived; surely it does, if it retains jurisdiction to not adopt the bylaw after all, even after it has adopted it. It also makes it quite surprising that parties dealing with local governments, and their legal counsel, don't pay more attention to post-adoption scenarios such as the reconsideration and rejection of a zoning amendment after it has been adopted. A purchaser would, it seems, be prudent to draft their contract so that a condition precedent involving the adoption of a bylaw or the passing of a resolution could remain in place at least until the 30-day statutory reconsideration period in s. 131 of the *Community Charter* has elapsed. They would also be prudent to inform themselves as to whether the applicable procedure bylaw allows the introduction of a motion to reconsider even where a third party may have acted upon the resolution or bylaw in question, for example by closing a real estate transaction that was "subject to rezoning". The ability of BC local governments to initiate reconsideration after a bylaw or resolution has been adopted, suggests that it's impossible for outside parties to eliminate all of the risks of sober second thought at the local government level.

NOTES