

CANADA / JUDGMENT

0940460 BC Ltd. v. Burnaby (City)

2020 BCCA 142

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 142 0940460 BC Ltd. v. Burnaby (City)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

0940460 BC Ltd. v. Burnaby (City),

2020 BCCA 142

Date: 20200520

Docket: CA45608

Between:

0940460 BC Ltd. and Crescent Beach Properties Ltd.

Appellants

(Petitioners)

And

The City of Burnaby and Peter Kushnir

in his Capacity as Deputy Chief Building Inspector

Respondents

(Respondents)

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated August 31, 2018 (0940460 BC Ltd. v. Burnaby (City), 2018 BCSC 1495, Vancouver Docket S-179361).

Counsel for the Appellants:

N. Baker

O.R. Pulleyblank

Counsel for the Respondents:

D.C. Russell

C.L. Paterson

Place and Date of Hearing:

Vancouver, British Columbia

September 16, 2019

Place and Date of Judgment:

Vancouver, British Columbia

May 20, 2020

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Willcock

Summary:

The appellants 0940460 BC Ltd. and Crescent Beach Properties Ltd. brought a petition for judicial review of a refusal by the respondent City of Burnaby to issue a preliminary plan approval aimed at regularizing building aspects said to be non-compliant with a zoning bylaw. By the time of the judicial review, the appellants sought preliminary plan approval of a patio cover, which Burnaby had refused to issue due to the patio cover and a pizza oven resulting in excess lot coverage beyond that permitted, and an impermissible parking arrangement with a nearby property. The petition was dismissed by a chambers judge. On appeal, the appellants contend: (1) Burnaby was unreasonable in relying upon issues of the pizza oven's bylaw compliance when rejecting the preliminary plan approval application; (2) Burnaby's treatment of the donor parking was unreasonable; (3) Burnaby was unreasonable in deciding that the patio cover increases the lot coverage; and (4) Burnaby fettered the discretion of the Chief Building Inspector by requiring

approval by the Director of Planning of the preliminary plan, as a step to obtaining a building permit. Held: Appeal dismissed. Burnaby's reliance on the pizza oven and donor parking was reasonable, as was Burnaby's conclusion that the patio cover increases the lot coverage. Finally, Burnaby did not fetter the discretion of the Chief Building Inspector.

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] The appellants 0940460 BC Ltd. and Crescent Beach Properties Ltd. appeal from the dismissal of their petition for judicial review of decisions taken by the City of Burnaby in respect of a commercial property zoned C4 that they have owned since 2009. By the petition, the appellants sought a variety of remedies intended to regularize their operation of a restaurant in a building on this property that includes a pizza oven and covered patio on the ground floor, and storage/office space on the second storey. Prior to the petition, the appellants had submitted several applications to the City of Burnaby for preliminary plan approval aimed at regularizing building aspects that Burnaby said were non-compliant with Burnaby Zoning Bylaw, 1965 (Bylaw No. 4742). All applications were refused except for their last application which the City of Burnaby had not answered before the appellants filed the petition. The judge treated the last application as also refused for reasons advanced by Burnaby as to why it would not be granted, and dismissed the petition for judicial review in respect of it. It is that application that this appeal addresses.
- [2] When the petition was filed, one point of disagreement between the appellants and Burnaby was the appellants' use of the second storey as storage and office space. After the petition was filed, Burnaby agreed that the appellants' intended use of the second storey was allowed by plans filed long ago. This left before the judge as issues between the parties, the same three areas of concern this appeal addresses: (1) issues concerning a pizza oven; (2) issues concerning a patio area defined by a wood and metal structure covered by a glass roof; and (3) issues concerning parking.
- [3] The property, when purchased by the appellants, housed a restaurant on the ground floor with a pizza oven. After a fire in 2011, the appellants resolved to open a new restaurant and re-located the pizza oven, causing it to extend 88 square feet outside the pre-existing building. The extension impinged upon the on-site parking allocated under the existing plan under which the restaurant operated. The appellants did not obtain a preliminary plan approval or a building permit before this relocation.
- [4] The appellants tendered affidavits of Mr. Aufiero, their principal, to the effect that when Fraser Health and staff from the City of Burnaby inspected the premises before the restaurant's re-opening, Fraser Health observed that the pizza oven was in a new location and told the appellants they required a building permit for it. Mr. Aufiero deposed that shortly after receiving this advice, the senior building inspector attended the restaurant, inspected the property, and told him to apply for a building permit for an "as-built" pizza oven by submitting the application directly to him. He deposed that the building permit was "fast-tracked" and issued shortly thereafter, in June 2013. No preliminary plan approval in

respect of the pizza oven was recommended or obtained.

- [5] As a result of the installation of the pizza oven, the footprint of the building, with oven, is 1.5% over 50% of the area of the lot. Burnaby says this overage makes the building non-compliant with its C4 zoning, which limits lot coverage to 50%. Burnaby further contends that the addition of the pizza oven materially affects the external appearance of the building, and so is not excepted from a mandatory preliminary plan approval under the Zoning Bylaw. Before the judge, Burnaby also took the position that the pizza oven increased the density of occupancy of the property. It has tied the issue of zoning compliance of the pizza oven to its rejection of the appellants' application for a preliminary plan approval for the patio area.
- [6] With respect to the wood and metal structure with a glass roof around and covering the patio area, Burnaby contends that, absent the necessary permits, the assemblage contravenes the Zoning Bylaw and exacerbates the amount by which structures on the property exceed the allowable 50% limit. It says, further, that the assemblage increases the density of occupancy and materially affects the external appearance of the building, removing it from the exception for a mandatory preliminary plan approval under the Zoning Bylaw.
- [7] With respect to the adequacy of parking, it is accepted that the property has insufficient off-street parking for its proposed use as a 51 seat restaurant, or its earlier allowed use as a 48 seat restaurant. To compensate for the deficiency, the appellants rely upon an agreement with the owner of a nearby property allowing the use of parking spaces on the nearby property ("donor parking"). The building on the nearby property, however, has been vacant since 2005. Burnaby says that by virtue of the vacancy, the present sole use of that property is as a parking lot. That use, says Burnaby, is contrary to the nearby property's C2 zoning and therefore is not allowed, and is therefore not available to the appellants to meet their parking requirements for the subject property.

A. The Legislative Framework

- [8] Burnaby is a municipal corporation under the Community Charter, S.B.C. 2003, c. 26, and is subject to the Local Government Act, R.S.B.C. 2015, c. 1.
- [9] Section 479 of the Local Government Act allows Burnaby to regulate within a zone: the use of land, buildings, and other structures; the density of the use of land, buildings, and other structures; the siting, size, and dimensions of buildings and structures; and the uses permitted on land in a zone.

- [10] Section 8(3) of the Community Charter provides that council may, by bylaw, regulate, prohibit, and impose requirements in relation to buildings and other structures. Section 15 provides that a council may provide for a system of licences, permits, or approvals, including refusing the same and prohibiting any activity until a licence, permit or approval is obtained.
- [11] Each statute affirms as a purpose of the legislation, provision of flexibility to respond to the needs and circumstances of the community (s. 1 of the Local Government Act, and s. 3 of the Community Charter).
- [12] Burnaby has enacted, through bylaws, a scheme in which persons seeking to "undertake a development" require a "preliminary plan approval" from the Director of Planning before they can be issued a building permit, unless excepted by s. 7.3(1) of the Zoning Bylaw. The exceptions in s. 7.3(1) include "maintenance of any building structure or use" and improvements or alterations that do not "materially affect the external appearance, increase the density of occupancy [or] change the use of such building". Burnaby interprets the Zoning Bylaw as meaning an application for a building permit need not be advanced to the Chief Building Inspector until it has cleared the preliminary plan approval requirement.
- [13] It is convenient to set out the relevant provisions in both the Zoning Bylaw and Burnaby's Building Bylaw, 2016 (Bylaw No. 13658) that may bear on the issue. The Zoning Bylaw provides:

SECTION 3 DEFINITIONS

In this Bylaw unless the context otherwise requires:

"DEVELOPMENT" means a change in the use of any land, building or structure for any purpose, and shall include the carrying out of any building, engineering, construction of other operation in, on, over or under land, or the construction, addition or alteration of any building or structure.

"LOT COVERAGE" means the combined area covered by all buildings and structures on the lot, expressed as a percentage of the lot area, measured as the area of the projection of the outline of the buildings and structures onto a horizontal plane but excluding

(d) canopies and sun shades;

"STREET CANOPY" means a structure that is attached to a building by a cantilever, is not part of the building, and consists of a lightweight rigid frame covered by a stretched fabric membrane.

"STRUCTURE" means anything constructed or erected, the use of which requires location on the ground or attachment to something having location on the ground, but shall not include fences and walls that are less than the maximum fence height permitted in any district.

SECTION 4 BASIC PROVISIONS

4.1 Application

Within the City of Burnaby no land, buildings and structures, shall hereafter be used or occupied, and no building or structure or part thereof shall be erected, moved, altered or enlarged, unless in conformity with this Bylaw, and the contrary shall be unlawful.

SECTION 7 ADMINISTRATION AND ENFORCEMENT

7.1 Administration:

This Bylaw shall be administered by the Chief Building Inspector and the Chief Licence Inspector or any other official of the City who may be appointed by the Council.

7.2 Permits and Licences:

The Chief Building Inspector shall not issue any permit, nor shall the Chief Licence Inspector issue any licence for a building, structure or use which violates any of the provisions of this Bylaw.

7.3 Preliminary Plan Approval and Development Permits:

- (1) Any person wishing to undertake a development shall apply for and receive preliminary plan approval from the Director of Planning before the issuance of a permit or a business licence, except in the case of the following:
 - (b) The maintenance of any building, structure or use.
 - (d) The improvement or alteration of any building within the property lines of the lot, provided that such improvement or alteration shall not materially affect the external appearance, increase the density of occupancy nor change the use of such building.
- (2) Every application for development shall be accompanied by the following:
 - (d) A preliminary plan showing the dimensions of the lot or lots; location, plans, profiles, elevations and height of all buildings and structures including signs, setbacks, parking areas, access, open spaces and landscaping, screen fences, surrounding land uses and such further or additional land use information as the Director of Planning may require.
- (3) When such application for development conforms to the provisions of this Bylaw and does not contravene any proposed land use or road plan, preliminary plan approval shall be given by the Director of Planning.

[14] In respect to C4 zoning (applicable to the subject property), the Zoning Bylaw provides:

304.2 Conditions of Use:

- (1) Every business, repair or servicing uses shall be conducted within a completely enclosed building except for
- (e) outdoor seating at cafes, restaurants or other facilities where food or drink is served.

304.5 Lot Coverage:

The maximum coverage shall be 50 percent of the lot area.

[15] Schedule VIII of the Zoning Bylaw outlines the use of off-street parking in Burnaby, and states:

800.5 Use of Parking Facilities:

- (2) Except in the case of dwellings located in residential districts off-street parking spaces may be provided and used collectively by two or more buildings or uses, provided that the total number of parking spaces when used together is not less than the sum of the requirements for the various individual uses, and that such parking facilities shall be located not more than 122 m (400.26 ft.) from any building or use to be served.

[16] The Building Bylaw sets out in detail the responsibilities of the Chief Building Inspector. It provides:

3. DEFINITIONS

- (2) In this Bylaw, unless the context otherwise requires:

"Building Inspector" means the Chief Building Inspector of the City and such other person or persons as he or she may designate from time to time as his or her assistants;

"construct" or "construction" means to build, erect, install, repair, alter, add, enlarge, move, locate, relocate, reconstruct, demolish, remove, excavate or shore, with respect to a building or structure;

"structure" means a construction or portion thereof any kind, whether fixed to, supported by, sunk into or located in land,

4. PERMIT CONDITIONS

- (1) A permit is required to undertake any work regulated under this Bylaw.
- (2) Neither the issuance of a permit under this Bylaw nor the review of plans, drawings or supporting documents, nor any inspections made by or on behalf of the City shall in any way relieve the owner or the owner's agent from full and sole responsibility to perform the work in strict accordance with this Bylaw, the Building Code, and any applicable codes, standards, bylaws and enactments.
- (5) No person shall rely upon any permit as establishing compliance with this Bylaw or assume or conclude that this Bylaw has been administered or enforced according to its terms.
- (7) The review of plans and supporting documents and issuance of a permit do not prevent the Building Inspector from thereafter requiring the correction of errors in those plans and supporting documents, or from prohibiting building construction or occupancy being carried on when in violation of this or any other bylaw or enactment.

15. REFUSAL TO ISSUE PERMIT

- (1) The Building Inspector may refuse to issue a permit where:
- (b) the applicant or owner has been notified of a violation of this or any other bylaw of the City with regard to the construction, occupancy or use of any building, structure or part thereof, and such violation has not been remedied;

16. ISSUANCE OF PERMIT

- (2) The Building Inspector shall issue the permit for which application is made when:
- (f) the proposed work set out in the application conforms with the Building Code, this Bylaw and all other applicable bylaws and enactments;

20. REVOCATION OF A PERMIT

- (1) The Building Inspector may revoke a permit where:
- (b) there is a violation of any provision of the Building Code, this Bylaw or any other bylaw of the City;

B. The Reasons for Judgment

- [17] In reviewing the application the judge first held, on the issues now before us, that he must assess Burnaby's decision on a standard of reasonableness. In this he was hampered by the fluidity of Burnaby's positions on the shortcomings of the application and he addressed those points of disagreement that he discerned, from the written materials and oral submissions, constituted the reasons for the decision.
- [18] In respect of the pizza oven, the judge addressed the appellants' contention that they had obtained a building permit for it, after the fact. He said he was unsure why the 2013 permit was issued and referred to the prohibition in s. 7.2 of the Zoning Bylaw restricting the Chief Building Inspector from issuing a permit "for a building, structure or use which violates any of the provisions of [the Zoning Bylaw]". The judge posited that the appellants likely had obtained the building permit by "mistake" or a "misunderstanding", saying it "plainly violated the Zoning Bylaw concerning maximum lot coverage". The judge noted that the 2013 building permit application did not disclose that the work had already been completed, and that the building permit itself contemplated an "interior alteration", not an addition outside the building. The judge did not address Mr. Aufiero's affidavit evidence that the senior building inspector, now deceased, had attended the property after the pizza oven was built, inspected the site, told him to apply for a permit for this "as-built" oven, and fast-tracked the ensuing application.
- [19] The judge rejected the appellants' argument that Burnaby's failure to request or require a preliminary plan approval for the pizza oven in 2013 estopped it from requiring a preliminary plan approval later, and he referred to s. 4.1 of the Zoning Bylaw, saying it clearly puts the onus on the appellants to apply for and obtain a preliminary plan approval.

- [20] Addressing the patio cover, the judge noted that the construction at issue is made of wood, glass, and metal, encloses a large patio, has a fixed roof, and is anchored to the ground. He found that the apparatus is not a "canopy" (which would remove it from a lot coverage calculation) and that the materials installed created a "building" or "structure" as those terms are defined in s. 3 of the Zoning Bylaw. He found the area had to be counted in the lot coverage, which then was increased beyond the maximum coverage allowed. He found Burnaby's decision to include the patio cover in lot coverage calculations to be reasonable.
- [21] Combining the issues of the pizza oven and the patio cover, the judge addressed the appellants' contention that they do not require a preliminary plan approval because both items were either excepted as "maintenance of [a] building, structure or use" under s. 7.3(1)(b) of the Zoning Bylaw, or improvement or alteration that do "not materially affect the external appearance, increase the density of occupancy nor change the use of such building" under s. 7.3(1)(d). He rejected these submissions.
- [22] In addressing the parking issue, the judge held that in the event the appellants were permitted to use the donor lot as parking when there was no business operating on the donor site, the primary use of the donor site would be solely as a "parking lot". The judge agreed with Burnaby that since this use would be impermissible in the C2 zone regulating the donor site, such a donor parking arrangement would not satisfy the parking requirements for the subject property.

C. The Standard of Review

- [23] As with all judicial review cases, our consideration of the grounds of appeal must start from recognition of our proper role as described by the jurisprudence. In *Fraser Mills Properties Ltd. v. Coquitlam (City)*, 2018 BCCA 328, Madam Justice Fisher, for the court, gave this succinct explanation:
- [12] In an appeal from a decision in a judicial review, the role of this Court is to determine whether the chambers judge identified the correct standard of review and applied it correctly, effectively stepping into his shoes and focusing on the administrative decision under review [citations omitted]. However, in circumstances, albeit rare, where a chambers judge on judicial review is called upon to make original findings of fact, deference is owed to those findings [citation omitted].
- [24] The question, therefore, is what standard of review is applicable to decisions of Burnaby's officials regarding: compliance of the pizza oven with the Zoning Bylaw; the need for preliminary planning approval in respect of the patio cover and all matters concerning the patio; and the decision on the availability of donor parking to solve the restaurant's parking deficiency resulting from the proposed seating capacity.
- [25] At the hearing of the appeal, the parties advocated somewhat different approaches to the standard of review based on the jurisprudence at the time. After the hearing of the appeal, the Supreme Court of Canada released *Canada (Minister of Citizenship and Immigration) v.*

Vavilov, 2019 SCC 65, re-stating the applicable standard of review of administrative decisions, and in 1120732 B.C. Ltd. v. Whistler (Resort Municipality), 2020 BCCA 101, this court considered certain of the reformative aspects of Vavilov. Counsel have made written supplementary submissions to us on the effect of these cases on the applicable standard of review. They agree that the applicable standard is reasonableness, but do not agree on the outcome of that standard's application.

- [26] The appellants observe, correctly, that Vavilov emphasizes that a reasonableness review is not a "rubber-stamping" process, but rather a "robust" form of review to safeguard the legality, rationality, and fairness of the administrative decision-making process: Vavilov at paras. 12-13. They note that Vavilov emphasizes the significance of the reasons provided, which must, when the stakes threaten an individual's livelihood, reflect those stakes: Vavilov at paras. 133-35.
- [27] The respondents agree that the standard of review is reasonableness, and say that on the Vavilov approach to that standard, Burnaby's decision was reasonable. They say, correctly, that a reasonableness review focuses on the actual decision and justification offered for it, not on the court's view of the decision it would have reached. Burnaby says we are to consider whether the decision is transparent, intelligible and justified.
- [28] Both parties are correct in their Vavilov submissions. It is clear that the standard we must apply is reasonableness, to be approached with the level of scrutiny discussed in Vavilov. How reasonableness applies in respect of municipal decisions received attention in Whistler (Resort Municipality) in the context of interpretation of bylaws and statutory provisions in municipal legislation. Mr. Justice Tysoe, for the court, explained that in certain circumstances there may only be one interpretation that is reasonable, but even then it is the reasonableness standard, not correctness standard, that must be applied. He said:
- [40] At para. 83 of Vavilov, the Court commented that the role of the reviewing court is to review and, as a general rule, the reviewing court should refrain from deciding the issue itself. Later in its reasons, the Court specifically addressed the topics of statutory interpretation and municipal bylaws.
- [42] At para. 137 of Vavilov, the Court referred to bylaws passed by a municipality as an example of a situation where the administrative body will typically not give reasons for its decision. The Court did not say that this is a basis for the reviewing court itself to interpret the enabling legislation but, instead, the Court made the point that the reviewing court must look at the record as a whole to understand the municipality's decision.

- [44] There may be only one reasonable interpretation of the relevant statutory provisions in the present case and, if so, the application of the reasonableness standard of review will produce the same result as the correctness standard. However, that does not mean that we should apply the correctness standard. If the appellants' argument were taken to its natural conclusion, there would be only one reasonable interpretation of all statutory provisions. That is not the law.
- [29] Justice Tysoe concluded that both the narrowness (or breadth) of legislative language, and precedents may bear on the court's view of the reasonableness of the impugned municipal decision, but those features must be considered as part of the reasonableness analysis and not as a separate interpretive exercise measuring "correctness".
- [30] In this case, the judge applied the reasonableness standard to the decision to refuse to grant the preliminary plan approval. He was correct in doing so. The vital issue for us is whether the administrative decision under review was reasonable: *Fraser Mills Properties*, para. 12. In addition, we must address the appellants' contention that Burnaby has fettered the discretion of the Chief Building Inspector.

D. The Issues

[31] By this appeal the appellants seek:

1. a declaration that Burnaby's refusal to issue a preliminary plan approval for the latest application was unlawful, unreasonable, or both;
2. a declaration that the patio cover is not contrary to the Zoning Bylaw and is exempted from lot coverage calculations;
3. an order of mandamus compelling Burnaby to issue a preliminary plan approval for the latest application;
4. an order of mandamus compelling the Chief Building Inspector to process an application for a building permit for the patio cover and other proposed constructions or additions; and
5. a declaration that the donor parking arrangement is permissible pursuant to s. 800.5 of the Zoning Bylaw.

[32] As was the judge, we are hampered by the lack of consistency in Burnaby's responses on the building's compliance with the Zoning Bylaw. We have taken the reasons that Burnaby declined to grant the application for a preliminary plan approval, important under *Vavilov* to considering the reasonableness of the decision, from the judge's reasons for judgment as augmented by the respondent's factum. On that basis, I would frame the issues as:

1. was Burnaby reasonable in relying upon issues of the pizza oven's bylaw compliance when rejecting the latest preliminary plan approval application?;
2. was Burnaby's treatment of the donor parking reasonable?;

3. was Burnaby reasonable in deciding that the patio cover increases the lot coverage?; and
 4. has Burnaby fettered the discretion of the Chief Building Inspector by requiring approval by the Director of Planning of the preliminary plan, as a step to obtaining a building permit?
- [33] In addition to these issues, Burnaby's supplemental submissions added to its reasons for rejecting the application, questions associated to: an increase to 51 in the number of seats proposed - said to be a change in use; a reduction in on-site parking from the previously approved plan - also said to be a change in use; and the amount of loading space proposed - said to be inadequate. The issue of the number of seats was not addressed by the judge, and was not the focus of the submissions before us. In my view, the issue has not been joined in this appeal sufficiently to support a Vavilov-style analysis, and appears to me, in any event, not to be an immutable part of the proposal. I do not address it. The issue of on-site parking is tied to the issue of donor parking, which Burnaby agrees would solve its parking concerns in respect to the property if only the donor parking proposed were allowed. I address that below. The issue of the loading space was not addressed in either the judge's reasons or the respondent's factum and is not amenable to discussion in these reasons.
1. Reliance on issues of the pizza oven's bylaw compliance when rejecting the latest preliminary plan approval application
- [34] The appellants complain that the issues with the pizza oven were not always included in Burnaby's list of reasons for rejecting preliminary plan approval of the patio cover. They refer, in particular, to a request they made to remove the patio cover which was denied by Burnaby on the basis the patio cover removal could not be separated from the problems with the second storey, then considered by Burnaby to be non-compliant with the Zoning Bylaw. They say in effect, that Burnaby has responded to its applications inconsistently, demonstrating a continuing search for defects to replace previously identified shortcomings which have been cured.
- [35] With respect to the pizza oven, the appellants contend that Burnaby's decision to decline to issue a preliminary plan approval for the patio assemblage was unreasonable because Burnaby:
- i) failed to give effect to the import of the building permit issued for it in 2013;
 - ii) maintained that the exemptions from the preliminary plan approval procedure in s. 7.3(1) of the Zoning Bylaw did not apply; and
 - iii) gave weight to issues concerning construction of the pizza oven when refusing a preliminary plan approval for the patio cover.
- i) The import of the building permit issued in 2013

- [36] The appellants contend that the fact the Chief Building Inspector issued a building permit for the pizza oven in 2013 after it was installed, without requiring a preliminary plan approval, bars Burnaby from requiring one now and removes the pizza oven as a source of complaint by Burnaby. Before the judge, they contended that Burnaby was estopped from relying upon the lack of a preliminary plan approval in light of the events of 2013.
- [37] The judge rejected this submission, saying:
- [49] The petitioners argue that because the City did not request or require a [preliminary plan approval] for the pizza oven addition in 2013, they are "estopped" from doing so now. I do not agree. As s. 4.1 of the Zoning Bylaw makes clear, the obligation to apply for and obtain a [preliminary plan approval] before the construction of such an improvement rests squarely with the applicant. The petitioners have repeatedly failed to discharge this obligation, including as it relates to the pizza oven addition, and I am not persuaded that there is any lawful basis for making an exception or prohibiting the City from enforcing compliance.
- [38] On appeal the appellants say this conclusion was wrong, and they point to the evidence of Mr. Aufiero that the senior building inspector visited the property with the pizza oven installed, told them how to cure the problem, and issued a permit for the pizza oven after the fact.
- [39] The judge did not address the evidence of Mr. Aufiero when stating that the permit was likely issued by mistake or on a misunderstanding, although the affidavit was the only direct evidence explaining how the building permit came to be issued and whether, contrary to the judge's surmise, the senior building inspector of the day knew the pizza oven was already constructed and its location. Were the surmising of the judge material to his conclusion that the building permit issued in 2013 did not prevent Burnaby from now insisting that the pizza oven comply with the Zoning Bylaw before granting a preliminary plan approval, I would direct this factual matter back to the Supreme Court of British Columbia for resolution. However, I do not consider this factual matter material to the effect of the building permit issued in 2013.
- [40] Although in this age of comprehensive property development regulation, a member of the public might expect that a building permit issued long ago in respect of a building feature would resolve that feature's legitimacy, and that in the least the law would not allow the municipality to go back on a permit issued by the very authority assigned responsibility for administering the Zoning Bylaw, the general law of municipal government and the language of this bylaw provide otherwise for this case.
- [41] In *City of Toronto v. Solway* (1919), 49 D.L.R. 473 (Ont. C.A.), Chief Justice Meredith stated, at 476, concerning a building permit, that "a permit by a corporation official to do something that was prohibited by the by-law is of no force or validity". Mr. Justice Locke applied *Solway* in *Neilson v. Langley (District)* (1980), 116 D.L.R. (3d) 462 (B.C.S.C.), in a statement approved in this court on appeal in *Neilson v. Langley (District)* (1982), 134 D.L.R. (3d) 550 (B.C.C.A.).

- [42] Reinforcing this approach is the general notion that a municipality may proceed under its bylaws without the application of estoppel: *Langley (Township) v. Wood*, 1999 BCCA 260.
- [43] These general approaches are given voice in the language of Burnaby's bylaws. The result is that although an individual member of the community might expect to rely on a permit, a permit does not always protect the property owner from a later municipal complaint. As the judge noted in this case, assuming a preliminary plan approval was required for the pizza oven, s. 4(1) of the Building Bylaw puts the obligation to obtain a preliminary plan approval on the property owner. Further, s. 4(2) of the Building Bylaw negates the concept of estoppel arising from inspection and issuance of a permit where work is contrary to a bylaw: see also s. 4(5) of the Building Bylaw. Further, s. 4.1 of the Zoning Bylaw prohibits the use of land and buildings "unless in conformity with this Bylaw".
- [44] In the result, it was reasonable for Burnaby to consider that the permit issued for the pizza oven in 2013 did not legitimize the pizza oven in the event it was non-compliant with the Zoning Bylaw, or was constructed without a preliminary plan approval, if required.
- ii) Exceptions from the preliminary plan approval procedure in s. 7.3(1) of the Zoning Bylaw
- [45] Section 7.3(1) of the Zoning Bylaw provides that a preliminary plan approval is not required for "maintenance of any building, structure or use" or "improvement or alteration of any building provided that such improvement or alteration shall not materially affect the external appearance [or] increase the density of occupancy".
- [46] The judge did not address, separately, the pizza oven's fit within those exceptions, although it appears submissions were made to him on the application of the exceptions to the pizza oven. In one paragraph he declined to determine whether the extra footprint caused by the pizza oven increased the "density". However, the same proposition was advanced in respect of the patio cover, and there the judge said:
- [53] However the City maintains that the other construction, including the pizza oven addition and the patio structure, constitute alterations to the Building that materially affect its external appearance, and increase its density of occupancy.
- [54] In my view, there is no doubt at all that the pizza oven addition and the patio structure have, at the very least, materially affected the external appearance of the building. I am also inclined to think that, if permitted, the patio structure would necessarily increase the density of occupation. In my view, the City's decision that the petitioners are not exempt from the [preliminary plan approval] procedure based on the exceptions set out in s. 7.3(1) is reasonable. It falls squarely within a range of acceptable outcomes under the bylaw and is to be accorded deference. I decline to make any declaration otherwise.

[Emphasis added.]

- [47] The issue of "density" in relation to the pizza oven relates, say the appellants, to their ability to apply for a variance in respect of the pizza oven. While it is not entirely clear from the reasons that the judge made a finding that the pizza oven increased the density, considering the positions advanced before the judge and his reasons as a whole, it seems to me that his reasoning on the patio cover applies to the pizza oven as well; that is, he considered that the pizza oven increased the density of occupancy. The appellants have approached his reasons in this way and observe that Burnaby, in the past, has advanced the proposition that the pizza oven increased density.
- [48] Density and lot coverage are different in relation to municipal zoning. By s. 455 of the Local Governance Act:
- "density", in relation to land, a parcel of land or an area, means
- (a) the density of use of the land, parcel or area, or
 - (b) the density of use of any buildings and other structures located on the land or parcel, or in the area;
- [49] Section 479 provides that a municipality may regulate within a zone "the density of the use of land, buildings and other structures" and "the siting, size and dimensions of" buildings and other structures.
- [50] In *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271, Chief Justice Bauman considered a heritage alteration permit that allowed the construction of a taller building covering more of the lot than had been allowed previously. Referring to s. 479 (then s. 903 of the Local Governance Act, R.S.B.C.1996 , c. 323), Chief Justice Bauman noted that "density of the use of land, buildings and other structures" was distinct from "siting, size and dimensions of buildings and other structures" and reasoned that density is, accordingly, not the same as lot coverage. Saying the statutory definition of "density" was unhelpful, he defined it as "the quantity of people or things in a given area or space". That definition is consistent with the larger term employed in the Zoning Bylaw, "density of occupancy". Chief Justice Bauman found that although the permitted lot coverage in the proposal before him was increased by inflation of the authorized size and dimensions, the number of residential units was not increased and so the permit did not increase density.
- [51] Where legal precedent establishes a definition of a term logically distinguished from the alternative concept, as has been provided by Chief Justice Bauman in *Society of Fort Langley Residents* explaining the difference between "density" and "lot coverage", absent a cogent basis for a different view, it is open, on the basis of Vavilov, to find that the alternative concept is not reasonable. I conclude that a determination by Burnaby that the pizza oven increased density is not reasonable. By all accounts, the pre-fire restaurant had a pizza oven in a different location. What has happened is a re-siting of it, with an effect upon lot coverage but not, inherently, an increase in the number of people or things, that is, not an

effect upon density or density of occupancy. Accordingly, it is not reasonable for Burnaby to say that the exception for a preliminary plan approval does not apply for the pizza oven because it increases "density of occupancy".

[52] The second aspect of a possible exception for the pizza oven from a preliminary plan approval requirement is whether it "materially affect[s] the external appearance" of the building. The judge, combining the pizza oven and the patio cover, held that it was reasonable for Burnaby to conclude they represented a material change to the external appearance of the building. That conclusion on their combined effect seems to me entirely correct. Whether Burnaby or the judge would have reached the same conclusion with respect only to the pizza oven I cannot say, and it seems to me that question cannot be answered by us without engaging in fact finding, which is not our role. In any case, as it sits now, the pizza oven has the effect of pushing lot coverage beyond the 50% allowed by s. 304.5 of the Zoning Bylaw. The non-compliance with s. 304.5 will be continuing unless there is a variance; no preliminary plan approval, or exception from that process, can cure the overage to lot coverage caused by the pizza oven. So long as there is no variance, and I understand one has not been applied for, whether there has been a material change in external appearance resulting from the pizza oven is of no matter.

iii) Weight given to the pizza oven in considering the preliminary plan approval application for the patio cover

[53] The judge touched on this issue in dealing with a submission by the appellants that s. 7.3 of the Zoning Bylaw is ultra vires Burnaby's powers to regulate (a position not advanced on this appeal). The judge said:

[36] Finally, s. 9(4) of the Building Bylaw, which is not challenged by the petitioners, allows the City to refuse to issue a building permit if the proposed construction would contravene the requirements of the City's Building Code, the Building Bylaw, or "any other bylaw of the City". Similarly, s. 7.2 of the Zoning Bylaw stipulates that the Chief Building Inspector "shall not issue any permit for a building, structure or use which violates any of the provisions of [the Zoning Bylaw]".

[37] All in all, I am well satisfied that the Local Government Act and Community Charter provide the City with the authority to implement a [preliminary plan approval] system to govern its process for issuing building and other permits and to establish the necessary pre-requisites to their acquisition.

[54] The appellants say that Burnaby has misunderstood the nature and purpose of the preliminary plan approval process in the Zoning Bylaw and is wrongly using it to determine whether the existing building and any other development on the property is compliant with all aspects of the Zoning Bylaw. They deem this a "bad building" approach whereby Burnaby considers that no permit may issue where both a preliminary plan approval is required and there is a bylaw problem with the property, even if the proposed "development" is unrelated to the zoning irregularity. As an example, they point to the position once taken by Burnaby

that it would not allow the patio cover issue to be resolved by removing it unless the appellants would cure what Burnaby said were issues of bylaw non-compliance in respect of the second storey, a position on the second storey it has now abandoned. The appellants urge on us an interpretation of the Zoning Bylaw whereby one looks only at the proposed development for compliance with the Zoning Bylaw, leaving unrelated irregularities to other enforcement proceedings. They say this approach is consistent with the language of s. 7.3 of the Zoning Bylaw, the definition of "development" in the Zoning Bylaw, and a case which considered the preliminary plan approval process, *Dragonwood Enterprises Ltd. v. Burnaby (City)*, 2009 BCSC 1236. In *Dragonwood*, Mr. Justice Willcock addressed Burnaby's insistence that an application for a business permit by a tenant of property must first obtain a preliminary plan approval. The appellants say *Dragonwood* establishes that whether a preliminary plan approval is required turns on whether there is a "development" as defined in the Zoning Bylaw proposed, and that the preliminary plan approval process does not allow freezing of a building because of ongoing zoning irregularities.

[55] Burnaby says that it is entitled to consider the entire building's conformity to the Zoning Bylaw. It notes that the subject of the proposal is the building as it was at the time of the last preliminary plan approval, here, 2006. It says changes made to the building after that time, necessarily, are included in the present application - the comparison of the last approved work on the entire building to the building presented in the current application. To ignore the non-compliant changes that are not part of the patio apparatus is, says Burnaby, to deny it the benefit of reviewing important aspects of the building that the appellants intend to retain, without ever receiving a preliminary plan approval. Last, it says under the Zoning Bylaw, the Director of Planning is permitted to ensure that the proposed use of the building conforms to the Zoning Bylaw, and s. 4.1 of the Zoning Bylaw provides that no building shall be used unless it is in compliance with the Zoning Bylaw. Burnaby says it cannot approve the use of the building when the building exceeds the maximum lot coverage because of the pizza oven and the patio cover, separately and together.

[56] Reading together the definition of "development" and s. 7.3 of the Zoning Bylaw yields:

7.3

- (1) Any person wishing to undertake a [change in the use of any land, building or structure [including] construction, addition, or alteration of any building or structure] shall apply for and receive preliminary plan approval from the Director of Planning except

[Emphasis added.]

[57] The question is what "change" is the subject of the application. Section 7.3(2) requires an applicant for a preliminary plan approval to file "[a] preliminary plan showing the dimensions of the lot ; location, plans, profiles, elevations and height of all buildings and structures and such further or additional land use information as the Director of Planning may require". This suggests that a comparison is intended between what is presented for approval and what has been approved in the past, both in their entirety. In this case, the

comparison shows differences between the previous preliminary plan that was approved and the one in issue showing the pizza oven addition and the patio apparatus. While the written words of the application were confined to the patio apparatus, I cannot say Burnaby was unreasonable in considering the entire preliminary plan as compared to the previously approved plan, when determining the differences that are properly the subject of the Director of Planning's review. I do not agree, therefore, that Burnaby was unreasonable in considering the entire structure's compliance with the Zoning Bylaw (assuming what was approved in 2006 was bylaw compliant) when considering the application for preliminary plan approval.

- [58] I recognize in reaching these conclusions that there are other ways of interpreting the words in the Zoning Bylaw, but that is not the question. The question here is whether Burnaby was unreasonable in considering the issue of the pizza oven when considering the application for preliminary plan approval. In my view, Burnaby's understanding of the Zoning Bylaw on this issue is reasonable, and I see no basis upon which a court may interfere with it.
- [59] On the conclusions that (1) it was reasonable for Burnaby to include issues with the pizza oven in deciding whether to grant a preliminary plan approval for the patio cover; (2) the pizza oven results in the building surpassing the authorized lot coverage; and (3) the building permit for the pizza oven does not determine its compliance with the Zoning Bylaw, Burnaby was reasonable in its decision to refuse a preliminary plan approval for the patio cover for the reason the pizza oven makes the building non-compliant with the Zoning Bylaw.

2. Issues Concerning the Parking

- [60] The appellants submit that Burnaby's approach to parking issues in the latest preliminary plan approval application was not reasonable, and say that the parking issues in any case should not bear on the decision concerning the patio cover. The issue here is whether Burnaby's conclusion that parking on the nearby property could not serve as donor parking to cure a parking deficiency, is reasonable.
- [61] The appellants contend that Burnaby's decision to deny the donor parking arrangement is unsupported by the Zoning Bylaw and is unreasonable. On this the judge said:
- [64] It seems to be common ground that that there is insufficient on-site parking at 6011 Hastings to satisfy the requirements of s. 800.4(19) of the Zoning Bylaw. The petitioners maintain, however, that this problem may be solved by access to donor parking at 5961 Hastings, and that the City's decision to prohibit this was unlawful. They concede that there is no business operating at 5961 Hastings, but in their submission this does not mean that the property's principal use is as a parking facility, or that the Zoning Bylaw prevents a donor or excess parking agreement between the owners as a permissible accessory use to both properties.

- [67] In any event, I was told that 5961 Hastings has been put to no permissible Zone C2 use since 2005. I agree with the City that, if the petitioners had their way, then in practical terms this property's primary use - indeed its only use - would be as an overflow parking lot for the petitioners. In my view the City's decision that this is impermissible under the Zoning Bylaw is assuredly correct. I can find no fault, either, with the City's explanation that parking as a permissible accessory use, and the availability of donor parking in the first place, may only be properly evaluated on the establishment and continued operation of a permitted use on the donor site.
- [62] The appellants refer to s. 800.5 of the Zoning Bylaw which sets as a condition for donor parking that the "total number of parking spaces when used together is not less than the sum of the requirements for the various individual uses". They say that the position Burnaby takes on donor parking - that there must be an operating business on the "donor" property - raises the possibility that satisfactory parking requirements will become unsatisfactory when a business fails or closes its doors, leaving the donee of the parking in an uncertain position. They say the Zoning Bylaw should not have this variable effect.
- [63] I do not consider that Burnaby is unreasonable, in the circumstances presented, in saying the donor arrangement effectively makes the nearby property a parking lot.
- [64] In *Kamloops (City) v. Northland Properties Ltd.*, 2000 BCCA 344, Madam Justice Newbury addressed the question of intended use of property and the fluid effect of changing intentions:
- [13] I am not persuaded that the meaning of "intended to be used" cannot be determined on an objective basis in the present context. I would have thought that one could infer the intention for which a unit is to be used by considering its size, shape, amenities, furnishings and other physical characteristics which make it suitable for one use as opposed to another. As well, I doubt that the test as to intention is to be applied on a "once and for all" basis as, for example, at the time of construction of a building. Obviously, the zoning by-law must be construed as always speaking and buildings within a particular zone must comply with the applicable zoning by-law from time to time. The phrase "intended to be used" would seem to have been included in the definition to catch units that are not actually being used, but that are available to be used, at any given time.
- [Emphasis added.]
- [65] Considering that the Zoning Bylaw is always speaking, it seems that what was business property can lose its immediate business use characterization by reason of dereliction or more than transitional vacancy. Likewise, property once apparently derelict can be brought back to business use. Here the appellants are relying on shared parking where there is no shared use with the donor property because for some time it had no business, that is, no "use" other than for parking. In my view, Burnaby's conclusion on the use of the nearby property for donor parking was reasonable.

3. Burnaby's conclusion that the patio cover increases the lot coverage

[66] The appellants contend that Burnaby's insistence that the patio apparatus is not exempt from lot coverage calculations is not reasonable. They say the patio cover is a "canopy" as referred to in the definition of "lot coverage" in s. 3 of the Zoning Bylaw, and is therefore to be excluded from lot coverage calculations.

[67] On this question the judge said:

[59] The petitioners say that the patio "canopy" is exempt from lot coverage calculations pursuant to s. 3 of the Zoning Bylaw. Section 3 defines "lot coverage" as "the combined area covered by all buildings and structures on the lot, expressed as a percentage of the lot area, measured as the area of the projection of the outline of the buildings and structures onto a horizontal plane but excluding canopies and sun shades". The Zoning Bylaw does not define "canopy". It does, however, define "street canopy" as a "structure that is attached to a building by a cantilever, is not part of the building and consists of a lightweight rigid frame covered by a stretched fabric membrane" (s. 3).

[60] The alleged "canopy" in this case is a wood, glass and metal structure that covers and encloses a rather large patio on the Hastings Street side of the building. It has a fixed roof and is anchored to the ground. In my view it amounts, in practical terms, to a significant addition to the building itself. What the petitioners maintain is a "canopy" is in fact a "building" or "structure" as those terms are defined in the Zoning Bylaw. A "building" is defined therein as a "structure, located on the ground, which is designed, erected or intended for the support, enclosure, or protection of persons or property" (s. 3). A "structure", meanwhile, is "anything constructed or erected, the use of which requires location on the ground or attachment to something having location on the ground".

[61] Based on these definitions, I find that the City's decision to include the patio structure in lot coverage calculations is reasonable, supportable and justified.

[68] Before us, counsel for the appellants made valiant submissions urging on us the view that the patio cover is a canopy. They observe, correctly, that there is no dispute as to whether a patio is permitted and say the patio, uncovered, does not expand the building's allowable maximum size, occupancy, or density of use. The appellants distinguish the word "canopy" from the definition of "street canopy" which requires attachment to a building by a cantilever, and say the word "canopy" is a broader term. They contend a construction may be both a structure and a canopy and take us to dictionary definitions of "canopy", most of which incorporate the concept of a "roof" and the concept of "projection". The appellants say the patio cover provides a "roof" and extends from the building to cover the patio.

[69] Burnaby does not disagree that a canopy is a roof-like projection, but says this apparatus does not meet that description because the word "projection" contemplates something that does not require structural supports applied to the ground.

- [70] Here, again, the question is not whether a different understanding of a bylaw provision than is advanced by Burnaby is possible; it is whether Burnaby's understanding of its own bylaw is reasonable. In my view, Burnaby's understanding of the word "canopy" is within the reasonable range of meanings, and Burnaby was not unreasonable in including the patio, covered, in the calculation of lot coverage.
4. Has Burnaby fettered the discretion of the Chief Building Inspector by requiring approval by the Director of Planning to the preliminary plan, as a step to obtaining a building permit?
- [71] The appellants contend that s. 7.3 of the Zoning Bylaw introduces an unlawful impediment to the Chief Building Inspector's receipt and evaluation of permit applications. They say that under s. 15(1)(b) of the Building Bylaw, the Chief Building Inspector has discretion whether to refuse a building permit for non-compliance with the Zoning Bylaw, but this discretion has been negated by Burnaby's erroneous misunderstanding of the preliminary plan approval process. In other words, it says the Director of Planning has "usurped" the powers of the Chief Building Inspector under the Building Bylaw and Part 3, Division 8 of the Community Charter, which provides that "the permit may be withheld until the building complies with bylaws" (emphasis added).
- [72] The judge said, concerning the submission on fettering discretion:
- [40] What s. 7.3 of the Zoning Bylaw purports to do, according to the petitioners, is introduce an unlawful impediment to the Building Inspector's receipt and evaluation of permit applications. I note, however, that the alleged offence of "fettering discretion" is a specific one. It occurs when, rather than exercising its discretion to decide the individual matter before it, an administrative body binds itself to policy or to the views of others: *H.E.U., Local 180 v. Peace Arch District Hospital* (1989), 35 B.C.L.R. (2d) 64 (C.A.).
- [41] Here, there is no question of the City's Building Inspector failing to exercise a vested discretion or, instead of exercising such a discretion, adhering to the views of others. In fact, because of the "gatekeeping" function of the [preliminary plan approval] procedure, the Building Inspector has not yet received a building permit application to review, and so far has had no discretion to exercise. In my view, in any event, the [preliminary plan approval] system comprises no bar to building permit applications, but strives merely to ensure in a preliminary, almost informal way that they comply with City bylaws.
- [43] The task of the Building Inspector, in turn, is to ensure that, once an application complies with the Zoning Bylaw, it also complies with the Building Bylaw and Building Code. This two-step process does not fetter the Building Inspector's discretion within his or her own remit. It simply means that an applicant must obtain preliminary approval from the City's planning department before submitting a building permit application. The Building Inspector continues to have free rein, within his or her lawful authority, to evaluate the application and approve or reject it. I have concluded that there is nothing wrong or illegal about any of this.

- [73] A review of a judge's decision on the fettering of discretion requires application of a legal standard to a set of facts and is a question of mixed fact and law: *Minhas v. British Columbia (Superintendent of Motor Vehicles)*, 2017 BCCA 304. The question attracts a deferential standard of review, unless there is an extricable question of law.
- [74] Burnaby says the Chief Building Inspector has full rein to perform his function once the preliminary plan approval is received, and so there is no fettering of discretion. Further, Burnaby observes that the appellants have not filed an application for a building permit.
- [75] In my view, Burnaby is correct - the judge did not err in his conclusions on fettering discretion. The first question on a "fettering discretion" issue is whether the Chief Building Inspector has failed to exercise the discretion assigned to him by the legislation and bylaws, when making a decision. Here the Chief Building Inspector has made no decision in respect of which there could be a failure to exercise discretion, whether by reason of policy or the diktat of others.

E. Conclusion

[76] I would dismiss the appeal.

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Madam Justice MacKenzie"

I agree:

"The Honourable Mr. Justice Willcock"

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