

CANADA / JUDGMENT

Armstrong v. North Saanich (District)

2025 BCCA 277

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 277 Armstrong v. North Saanich (District)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Armstrong v. North Saanich (District),

2025 BCCA 277

Date: 20250806

Dockets: CA50248; CA50249

Docket: CA50248

Between:

Robert Douglas Armstrong

and Margaret Jean Latham

Appellants

(Petitioners)

And

District of North Saanich, James Grier

and Mary Jean Alger

Respondents

(Respondents)

- and -

Docket: CA50249

Between:

Robert Douglas Armstrong

and Margaret Jean Latham

Appellants

(Petitioners)

And

James Grier and Mary Jean Alger

Respondents

(Respondents)

Before:

The Honourable Mr. Justice Abrioux

The Honourable Justice Fleming

The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of British Columbia, dated
October 7, 2024 (Armstrong v. District of North Saanich, 2024 BCSC 1844,
Vancouver Dockets S233677 and S234489).

Counsel for the Appellants:

C.E. Hunter, K.C.

N.J. Baker

Counsel for the Respondent, District of North Saanich:

S. Dubinsky

The Respondents, appearing in person:

J. Grier

M.J. Alger

Place and Date of Hearing:

Vancouver, British Columbia

June 5, 2025

Place and Date of Judgment:

Vancouver, British Columbia

August 6, 2025

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Justice Fleming

The Honourable Justice Gomery

Summary:

The respondents own a residential property that benefits from an easement over the appellants' property, which permits travel between the waterfront and the respondents' property. The respondents built stairs upon the easement without the appellants' consent and without the necessary permits from the District of North Saanich. The District granted the permits retroactively, and the appellants brought an application for judicial review of the District's decision. The respondents also brought a petition for a declaration that the construction of the stairs is a right necessarily ancillary to the easement. The chambers judge concluded that the District's decision was reasonable and procedurally fair, and that the easement entitled the respondents to construct the stairs. The appellants challenge both decisions on appeal and have also brought an application to adduce additional evidence.

Held: Both appeals, as well as the application to adduce additional evidence, are dismissed. The District's decision, including its statutory interpretation, was reasonable, and the District did not violate the norms of procedural fairness in its decision-making process. The chambers judge did not err in concluding that the respondents' right of easement entitled them to construct the stairs in order to make reasonable use of the easement in accord with its purpose.

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Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] These appeals arise out of a dispute about stairs built on an easement that facilitates access to the Saanich Inlet waterfront. The respondents James Grier and Mary Jean Alger own the dominant tenement. The easement is a burden on the title of their neighbours, the appellants Robert and Margaret Armstrong (also referred to as Margaret Latham), who own the servient tenement. The respondents built the stairs without the appellants' permission. They initially did so without the necessary municipal development and building permits, though the permits were subsequently issued by the District of North Saanich (the "District").
- [2] The respondents brought a petition seeking a declaration that the easement entitled them to build the staircase as a necessary ancillary right. The appellants brought a petition for judicial review of the District's decision to process and issue permits for the stairs and applied for an order that the stairs be removed. The petitions were heard together. In reasons for judgment indexed as *Armstrong v. District of North Saanich*, 2024 BCSC 1844, the

chambers judge granted the respondents' petition and ordered that the construction and existence of the stairs was a right necessarily ancillary to the use and enjoyment of the easement, and was therefore lawful. He dismissed the appellants' petition for judicial review and the related application for an order mandating the removal of the stairs.

- [3] The appellants have appealed the orders arising from both the easement and the judicial review petitions. They also apply to adduce additional evidence on appeal.
- [4] For the reasons that follow, I would dismiss both appeals as well as the application to adduce additional evidence.

Background

- [5] The appellants and the respondents are neighbours. The appellants purchased their property ("Lot B", the servient tenement) in 2018. At the time of the purchase, there was an easement registered on title over a 25-metre-long strip of land along Lot B's western property line, which easement connected the respondents' property ("Lot A", the dominant tenement) to the beach below Lot A and Lot B. Lot A is not otherwise accessible from the beach.
- [6] The respondents built the stairs without obtaining the appropriate permits from the District. Following communications with both the appellants and the respondents, the District granted the relevant permits, subject to conditions and pending a decision from the courts as to the parties' respective property rights.
- [7] The express terms of the easement grant the owners of Lot A the right to travel over the relevant portion of Lot B to and from the beach, which is Crown land. In an affidavit, the respondent Dr. Grier deposed that the purpose of the easement was to ensure that after their previous neighbour and friend, the late Ms. Hull, no longer owned Lot B, the respondents would continue to have access to the beach. Dr. Grier stated that the easement runs over a "steep slope down to the sea, and in its unimproved state, the land cannot be safely used by anyone on foot". The appellant, Mr. Armstrong, deposed that about two-thirds of the easement is not steep, and that "there used to be small logs embedded in the soil to facilitate travel". When Ms. Hull owned the property, and including after the granting of the easement, the respondents were allowed to use the existing stairs on her property (which are not within the easement area) to access the waterfront. When the appellants purchased the property, that arrangement did not continue: at paras. 18-26.

The Easement Petition

- [8] The judge summarized the legal framework that applies to the interpretation of easements, which are generally interpreted as contractual instruments. He noted that while evidence of the circumstances surrounding the creation of an easement may be considered, it ought not to "overwhelm" the written terms of the easement (where grant has been made in writing): at para. 32, citing *Tessaro v. Langlois*, 2019 BCCA 95 at para. 19; *Robb v. Walker*, 2015 BCCA

117 at para. 31 and *Fallowfield v. Bourgault* (2003), 235 D.L.R. (4th) 263 (Ont. C.A.) at para. 10. He observed that easements give rise to "two sets of rights that co-exist over the easement property" and that property owners may assert their remaining rights over the easement property to the extent that they "do not derogate from or interfere with the rights granted under the easement": at paras. 31-34.

- [9] The judge then considered the legal framework that applies to the determination of whether an easement gives rise to a reasonably necessary ancillary right not expressly set out in the words of the easement: at paras. 34-37. The analysis, as summarized by the judge, proceeds in two stages: first, the wording and purpose of the grant must be interpreted as of the time it was made; second, the court must determine whether there are any ancillary rights, not included in the express wording of the granted easement, that are reasonably necessary for the use and enjoyment of the easement in accord with its purpose.
- [10] The judge was satisfied that the easement's "clear purpose was to provide a land corridor from Lot A to the beach and the waterfront below Lot B": at para. 38. The judge noted that "no other purpose makes sense", given that the waterfront is "the only place to get to" from Lot A over Lot B. He also noted that the "surrounding circumstances are equally clear as to the purpose of the easement", given that it was granted by the appellants' predecessor in title, who was "good friends" with the respondents and who had long permitted them to pass over her property to access the waterfront: at paras. 39-41.
- [11] The next question to be determined was whether the staircase was necessary for the use and enjoyment of the easement. The judge was satisfied that this was the case. In particular, he noted that portions of the land are very steep, including being "near-vertical" at some points. The judge concluded that "it would be a safety risk to pass over the easement area in its [unimproved] state". In reaching this determination, at paras. 47-54, the judge compared the facts of the case at bar, and the available evidence, to cases including: *Englehart v. Holt*, 2014 BCSC 1969, *Kasch v. Goyan* (1993), 103 D.L.R. (4th) 51, 1993 CanLII 2291 (B.C.C.A) ("*Kasch BCCA*"), and *Kasch v. Goyan*, 1997 CanLII 3898, [1997] B.C.J. No. 496 (S.C.).
- [12] The judge also found that recognizing a right to build stairs as a necessary ancillary right under the easement did not constitute a substantial interference with the appellants' own property rights in respect of the subject land: at paras. 56-59.

The Judicial Review petition

- [13] Turning to the judicial review petition, the judge began by summarizing the "additional facts" that were, in his view, "necessary to put the issues in context": at para. 62. He summarized certain communications between the parties and the District regarding the stairs and the terms of the necessary permits, which need not be repeated here: see paras. 63-91. He concluded that although the development permit (issued on February 23, 2023, the "permit") was issued almost two years after the stairs were constructed, this occurred "in accordance with a series of professional reports" confirming that:

- [92] (1) the stairs had not caused severe negative impacts to the Marine Upland Foreshore area, (2) they had not negatively affected any species or ecosystems at risk, (3) no detrimental effects to the slope stability had been caused by the construction, (4) the staircase had minimal, if any, effect on rainwater run-off, and (5) the stairs complied with the building code.
- [14] The permit was subject to certain conditions:
- [93] The permit itself stated that it was approved "on the basis of your ownership interest in the registered Easement CA5243442," and there were a number of conditions attached, including:
- (a) The District took no position on the extent of the rights granted under the easement and the permit was subject to determination of that issue;
 - (b) The permit only covered improvements within the easement area; and
 - (c) The permit only approved the stairs until "the fee simple owners have consented to or been ordered to permit the improvements in their current location."
- [15] The permit identified the need for a separate building permit which was issued on March 29, 2023. The occupancy permit for the stairs was issued on April 25, 2023 (the development, building, and occupancy permits being collectively referred to as "permits" if the context requires).
- [16] Before the judge, the appellants argued that the District's decision to grant the permit was unreasonable because the relevant legislation refers to "owners", which term does not include those who hold a registered interest such as an easement. I will consider this argument in greater detail below. While the judge noted that there was some force to this submission, he ultimately concluded that the appellants' interpretation was not "the only reasonable [interpretation] of the District's authority in light of the legal and factual constraints they were under, and the common law nature of an easement": at para. 115. He observed that in accepting the permit application, the District interpreted and applied its own by-law, the Development Applications Procedures Bylaw, No. 1519 (the "Applications Procedure Bylaw" or the "Bylaw").
- [17] He also noted that, while s. 4.1(a)(i) of the Bylaw provides that permit applications "shall be executed in writing by the Owner(s) of the Site", the Bylaw defines "owner" as "in respect of real property, the registered owner of such property, as verified by the District through either a Land Title Office search or BC Assessment Roll search ": at para. 111. He referred to the fact that Section 1 of the Land Title Act, R.S.B.C. 1996, c. 250, defines "owner" as "a person registered in the records as owner of land or of a charge on land, whether entitled to it in the person's own right or in a representative capacity or otherwise, and includes a registered owner": at para. 112.

[18] In the judge's view, the unique factual circumstances of the case supported this interpretation, which the District expressly relied upon in explaining its decision to the parties. In particular, the judge noted that:

[114] The stairs had been built, and there was an obvious need to assess whether they met environmental and regulatory standards. The District had no ability to resolve the private dispute between the parties. The sole question was whether they could accept an application and commence the permit process.

[Emphasis added.]

[19] The judge held that, in the circumstances, the District "took a rational approach to a problem that presented itself": at para. 116, citing *Este v. West Vancouver (District)*, 2022 BCCA 445. Considering the factual circumstances and the reasonableness of the District's interpretation of the Bylaw under which it was operating, the judge found that the decision to accept the permit application was reasonable as per the framework set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[20] In the alternative, the appellants argued that the District was required to obtain their consent before agreeing to assess the respondents' permit application. The judge did not accept this submission, noting that "no statutory provisions, regulations or bylaws expressly require the signature of every owner before an application for a permit may be processed": at para. 124. In reaching this conclusion, he distinguished this Court's decision in *Este*: at paras. 124-127.

[21] Finally, the appellants argued that the District's decision was procedurally unfair and made in bad faith. The judge was not persuaded by these arguments. While he noted that the permit application was not an adjudicative proceeding and did not amount to a "final determination" of the appellants' rights, he found, in any event, that the District provided the appellants with "multiple opportunities to communicate their position before the permit was ever issued": at para. 133. He decided that the appellants had failed to establish either a violation of the norms of procedural fairness or bad faith conduct on the part of the District: at paras. 128-140.

Issues on Appeal

[22] The issues on appeal from the judge's determination of the judicial review petition are as follows:

- a) Whether the District's decision to issue the permits, including but not limited to its interpretation of the governing statutes and Bylaw, was unreasonable; and
- b) Whether the District's decision was procedurally unfair.

[23] The issues on the appeal relating to the easement petition largely concern the extent to which the terms of the Local Government Act, R.S.B.C. 2015, c. 1 (the "LGA"), the Community Charter, S.B.C. 2003, c. 26, and the Applications Procedure Bylaw constrain the construction to be given to the easement.

The Application to Adduce Additional Evidence

[24] I will first deal with the appellants' application to adduce additional evidence in the easement appeal.

[25] In *Barendregt v. Grebliunas*, 2022 SCC 22, the Supreme Court of Canada held that the test from *Palmer v. The Queen*, [1980] 1 S.C.R. 759 applies when a party seeks to adduce additional evidence on appeal. The Palmer test has four requirements:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484, 1964 CanLII 43.
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[26] The additional evidence in question is set out in an affidavit of Mr. Armstrong. In the affidavit, Mr. Armstrong deposes that the 2025 Assessment Notice for Lot B indicates that Lot B's assessed value has decreased due to the construction of the stairs.

[27] Mr. Armstrong further deposes that, after receiving the initial 2025 Assessment:

Margaret and I contacted our local BC Assessment Office to discuss our concerns with the 2025 Assessment Notice. Specifically, we believed that Our Property had been devalued by the construction of the stairs and that the assessed land value should be reduced.

[Emphasis added.]

[28] Several days later, an employee at the Assessment Office advised the appellants that the assessment for 2026 would be reduced by \$60,000. Mr. Armstrong deposes that he asked the employee to "clarify the basis for the reduction in land value" and the employee replied, in an email appended as an exhibit, that the basis was the "nuisance (to privacy) caused by the stairs". Mr. Armstrong also deposes that on 25 April 2025, he and Ms. Armstrong reached an agreement with BC Assessment whereby the assessed land value of their property would be reduced "by \$202,286.06 to account for the Easement and an error relating to the bank height" of the property. He says that during their discussions with the Assessment Office, they were "advised that a reduction of \$101,143.03 was attributable to the construction of the Stairs".

- [29] I would not grant the appellants' application to admit this evidence as additional evidence on appeal.
- [30] I begin by noting that, assuming that everything Mr. Armstrong has deposed to is indeed true, what the evidence "establishes" is, principally, that the appellants took a significant number of steps to ensure that the value of their property would be reduced. While the reason apparently given for this reduction was the stairs--although this evidence is presumptively inadmissible hearsay--it remains the case that the appellants appear to have been the driving force behind the reduction, which they now seek to rely upon.
- [31] As for the documents the appellants seek to have admitted on the appeal, these include the appellants' own submissions to the Assessment Appeal Board, setting out why they are of the view the value of their property should be reduced. These materials, which simply constitute more advocacy by the appellants, are of no assistance to the Court.
- [32] With these observations in mind, I turn to the specific elements of the Palmer test. I would accept that this evidence, all of which dates to 2025 (that is, after the hearing of the petitions and the release of the reasons for judgment) could not have been available, by exercise of due diligence, at the hearing of the petitions. However, in my view, the "evidence" sought to be admitted on this application is of little to no relevance to the underlying petitions or to this appeal. I am not persuaded that a decrease in property value for tax-assessment purposes could demonstrate an interference with the residual property rights of the owners of a servient tenement. The value of property, without more, has nothing to do with an owner's capacity and entitlement to exercise the basic incidents of ownership. Finally, and as to the third and fourth criteria (credibility and importance, or probative value), insofar as most of this evidence is either inadmissible hearsay, irrelevant, or both, I would conclude that it could not have affected the result and would have no real bearing on the determination of this appeal: *R. v. Lopez*, 2015 BCCA 294 at para. 57.
- [33] Accordingly, I would dismiss the application.

The Judicial Review Appeal

Introduction

- [34] In the reasons, the judge decided that the easement petition should be given priority, in that any jurisdiction the court might have to order the stairs removed would depend on the resolution of that petition and that the judicial review proceeding would not resolve the property dispute between the parties: at paras 14-15. However, given that the appellants were unsuccessful in relation to both petitions and that I would dismiss both appeals, I will consider the judicial review appeal first. This is because a focus of the appellants' submissions in this Court, in relation to both appeals, related to the proper, and possible, constructions to be given to the governing legislation and the Applications Procedure Bylaw. While there is an obvious overlap in that analysis in both appeals, I am of the view that the arguments are best addressed first in the context of the judicial review appeal.

Standard of review

[35] On an appeal from a judicial review decision, the reviewing court "steps into the shoes" of the chambers judge and focuses on the administrative decision at issue. This amounts to a correctness standard of review with respect to the chambers judge's decision. However, as this Court recently affirmed in *Blanke v. West Vancouver (District)*, 2025 BCCA 90:

[42] There are occasions, however, where the reviewing judge is required to make original findings of fact in respect of matters that are not evident on the record. Such findings are entitled to deference and may not be set aside absent a palpable and overriding error: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476 at para. 77, (per Groberman J.A.); *Onni Wyndansea Holdings Ltd. v. Ucluelet (District)*, 2023 BCCA 342 at para. 58.

[Emphasis added.]

[36] The standard of review that applies to the District's decision to issue the permit is reasonableness. As the Supreme Court of Canada set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 82, reasonableness review demands that all administrative decisions be demonstrably--that is, intelligibly and transparently--justified in light of the particular constellations, and constraints, of law and fact that bear upon them in a given case: *Vavilov* at paras. 99-135. Where written reasons are provided, reasonableness review is primarily concerned with those reasons against the backdrop of "the institutional context in which the decision was made [and] the history of the proceedings": *Vavilov* at para. 91.

[37] Where, as in the case at bar, an administrative decision engages a question of statutory interpretation (and where none of the categories of decisions requiring correctness review, as set out in *Vavilov*, are engaged), the reviewing court must ask whether the interpretation is reasonable, not whether it is the interpretation the court would have arrived at if given the opportunity to interpret the provision at first instance: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 68. In assessing the reasonableness of a decision maker's statutory interpretation, reviewing courts must be sensitive to the fact that a decision maker "may draw on its institutional expertise and experience and rely on considerations that a court would not have thought to employ, but which 'enrich and elevate the interpretive exercise'": *Mason* at para. 70, citing *Canada Post Corp v. Canadian Union of Postal Workers*, 2019 SCC 67 at para. 43. That being said, a decision maker's statutory interpretation must be justified against and consistent with, inter alia, the modern principle of statutory interpretation: *Vavilov* at para. 120; *Mason* at para. 69; and see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1999] 1 S.C.R. 27 at para. 21.

Positions of the parties

- [38] The appellants challenge the reasonableness of the District's interpretation of the Applications Procedure Bylaw, arguing that an interpretation of the word "owner" that includes the holders of an easement is inconsistent with the nature of the legislature's grant of authority to the District, as set out in the LGA and the Community Charter. Those legislative instruments, the appellants point out, define "owner" in terms of an owner of land in fee simple. They say that because the District adopted a broader interpretation of the word "owner" in interpreting and applying the Bylaw, it acted outside the scope of the powers the legislature intended to grant it and therefore acted unreasonably with respect to the legal constraints relevant to its decision. They argue that the words of the governing enactments are "precise, narrow, and unequivocal" and therefore "tightly [constrain]" the District's authority to determine who qualifies as an owner for permitting purposes.
- [39] Ultimately, the appellants submit that there is only one reasonable interpretation of the District's grant of authority--which interpretation excludes the holders of an easement from applying for a development permit, regardless of what is provided for in the Bylaw. They also maintained, in oral submissions, that it was an error for the judge to consider the factual circumstances of the District's decision in assessing the reasonableness of its statutory interpretation.
- [40] Furthermore, in the appellants' submission, the District's decision to issue the permit was internally incoherent in a number of ways, including that the District purported to have no jurisdiction to determine the property rights of the parties while also "purport[ing] to determine the question of registered ownership of the land". The appellants also submit that in granting the respondents' permit application, the District contradicted the terms of an earlier development permit it had issued with respect to Lot B.
- [41] In the alternative, the appellants argue that the District violated the duty of procedural fairness it owed to them in the course of its decision making process.
- [42] In response, the District submits that it acted within its statutory authority in issuing the permits pursuant to a procedurally fair process that resulted in a decision that was justified in relation to the relevant facts and law. It emphasizes that while it could not resolve the legal dispute between the parties, there was an obvious and pressing need to assess the stairs for their compliance with the relevant bylaws and community plans.

The statutory framework

- [43] As a creature of statute, the District may only exercise such authority as has been delegated to it by the provincial legislature: *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at para. 82. It was not disputed on appeal that the District's authority is delegated to it through the LGA and the Community Charter.

[44] Section 1 of the LGA describes the purposes of the legislation, and s. 2 provides a note on interpretation:

Purposes of this Act

1 The purposes of this Act are

- (a) to provide a legal framework and foundation for the establishment and continuation of local governments to represent the interests and respond to the needs of their communities,
- (b) to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, and
- (c) to provide local governments with the flexibility to respond to the different needs and changing circumstances of their communities.

Definitions and other interpretation rules

2 The Schedule to this Act establishes definitions for terms used in this Act and rules of interpretation that apply in relation to this Act.

[45] The Schedule to the LGA does not define "owner", but rather provides that unless "a term is otherwise defined in this Act or a contrary intention appears in the Act, the definitions in the Community Charter apply to this Act". The Schedule to the Community Charter provides a definition of "owner, with respect to real property", which includes the registered owner of an estate in fee simple and a tenant for life under a registered life estate but which does not, on its face, capture easements.

[46] The purposes of the Community Charter, set out in s. 3, are very similar to those described in s. 1 of the LGA, with a salient distinction being that the purposes of the Community Charter refer to the concept of providing municipalities with the "discretion to address existing and future community needs" [emphasis added]. Section 4 of the Community Charter provides that the powers conferred upon municipalities, either under the Community Charter or the LGA, must be given a broad and purposive interpretation:

Broad interpretation

4 (1) The powers conferred on municipalities and their councils under this Act or the Local Government Act must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.

(2) If

- (a) an enactment confers a specific power on a municipality or council in relation to a matter, and
- (b) the specific power can be read as coming within a general power conferred under this Act or the Local Government Act,

the general power must not be interpreted as being limited by that specific power, but that aspect of the general power that encompasses the specific power may only be exercised subject to any conditions and restrictions established in relation to the specific power.

[47] Section 8 of the Community Charter sets out the "fundamental powers" of municipalities, which include the authority to "by bylaw, regulate, prohibit and impose requirements" relating to, inter alia, environmental protection and buildings and other structures: ss. 8(3) (j) and (l), respectively. Section 8(10) provides that the powers provided to municipalities under s. 8 are "subject to any specific conditions and restrictions established under this or another Act" and must be "exercised in accordance with this Act unless otherwise provided".

[48] Section 460 of the LGA, in the context of a series of provisions relating to community planning and zoning, provides that:

460 (1) A local government that has adopted an official community plan bylaw or a zoning bylaw must, by bylaw, define procedures under which an owner of land may apply for

(a) an amendment to the plan or bylaw, or

(b) the issue of a permit under this Part.

(2) A local government must consider every application for

(a) an amendment referred to in subsection (1) (a), or

(b) the issue of a permit referred to in subsection (1) (b) that requires a resolution of the council or board.

[49] The Bylaw provides that applications for a development permit shall be brought by the "owner(s)" of the "site" that is subject to the application, or by an authorized person: s. 4.1(i). "Site" is defined as "an area of land consisting of a Lot or two or more abutting Lots", but the Bylaw does not define "Lot". Section 1 of the Bylaw defines "owner" as "in respect of real property, the registered owner of such property, as verified by the District through either a Land Title Office search or BC Assessment Roll search ". Section 1 of the Land Title Act provides that, for the purposes of that Act, "owner" means "a person registered in the records as owner of land or of a charge on land" [emphasis added].

Whether the District's statutory interpretation was unreasonable

[50] The District purported to rely upon its own permitting Bylaw and the definition of "owner" contained in the Land Title Act in deciding to accept the respondents' retroactive permit application. The appellants submit that the District's decision in this respect was unreasonable in that it exceeded the bounds of its authority as delegated in the Community Charter and the LGA and, inextricably, cannot be reconciled with the definition of "owner" provided by those statutes.

- [51] I would not accede to this submission. In my view, the District did not act unreasonably in interpreting the Bylaw or the grant of authority conferred upon it through the LGA and the Community Charter.

The District's grant of authority

- [52] An implicit--and fundamental--premise of the appellants' argument is that the District has only been granted authority to issue building permits to owners as defined in the Community Charter, and that, accordingly, the District had no authority to issue permits to anyone outside that class of persons (more precisely, it had no authority to enact a bylaw purporting to permit it to do so).
- [53] Yet, there is nothing in the Community Charter nor in the LGA to support, let alone mandate, such a restrictive interpretation. Section 460 of the LGA provides that if a local government, such as the District, adopts a community plan or zoning bylaw, then it must provide owners (as defined in the Community Charter) with the opportunity to apply for permits. The fact that owners must be afforded that opportunity does not imply that only owners may be afforded that opportunity; to put the point differently, there is nothing in s. 460 of the LGA, nor in any related provisions, to suggest that the legislature intended to confine municipalities' ability to issue development permits solely to the case of owners within the meaning of the Community Charter. Indeed, the purposes of the LGA and the Community Charter--which refer to concepts of flexibility, responsiveness to changing circumstances, and discretion--are contrary, in my view, to such a restrictive interpretation.
- [54] I would note, further, that s. 8 of the Community Charter sets out certain "fundamental", and general, powers of municipalities to "by bylaw, regulate, prohibit and impose requirements" in relation to environmental protection and the building of structures. It is incontrovertible that the District's permitting bylaw falls under this head of authority, in addition to falling under the more specific provisions relating to development permits set out in the LGA.
- [55] Because the District's permitting processes and decisions fall under a general enactment (in s. 8 of the Community Charter) and a more specific one (in the LGA), the interpretive proviso in s. 4 of the Community Charter, excerpted above, applies. This means that even if the LGA, on its face, appeared to limit municipalities' capacity to issue building permits to those who do not fall within the Community Charter's definition of "owner", such a construction would be avoided by operation of ss. 4 and 8 of the Community Charter, as the specific power could not be read as limiting the general one. Far from being the only reasonable interpretation of the District's grant of authority, the appellants' preferred interpretation would see a specific power limit a general one, which is contrary to the applicable interpretative framework.

- [56] The interpretation adopted by the District was, in my view, clearly available to it in light of the modern principle of statutory interpretation. Respectfully, I disagree with the chambers judge's conclusion that the appellants' preferred interpretation was "stronger" from a statutory interpretation perspective. In my view, it is the appellants' proposed interpretation, not the District's, that appears to risk offending the text and perspectives of the LGA and the Community Charter.
- [57] Parenthetically, I would observe that there will be some circumstances in which an easement entitles the owners of the dominant tenement to conduct some works upon the servient tenement (insofar as this is consistent with the purpose and scope of the particular easement and with the nature of an easement generally). Thus, for the legislature to effectively prohibit municipalities from issuing development permits to easement 'owners' would be for the legislature to abrogate a common law entitlement (as doing so would render the right to conduct works upon the servient tenement illusory, in that it would require the permission of the servient tenement's owners). This may only be accomplished by express enactment or necessary implication: *Westjet v. Gauthier*, 2025 BCCA 134 at para. 45, citing *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 85. No such express intention is discernable in the case at bar.
- [58] The District's building Bylaw refers to "Owner(s)". In the appellants' submission, even if the LGA and the Community Charter do not prohibit easement holders from applying for building permits, this indicates that the consent of all owners must be obtained before a permit may properly issue.
- [59] On this point, they rely on this Court's decision in *Este*. The relevant bylaw in *Este* provided that owners needed to apply for building permits, and the District of West Vancouver decided not to consider the application because the application had not been made by all registered owners. This Court held that the bylaw in question could "bear the interpretation given to it by the District", noting that this interpretation was consistent with the bylaw's imposition of a liability upon any owner "to be responsible for damage to municipal work that results from the work covered by the permit": at para. 17. No such liability arises out of the Bylaw at issue in this case. The bylaw in *Este* also defined "owner" with express reference to the Community Charter's definition, which further distinguishes it from this case.
- [60] Finally, I would note that receipt of a permit does not settle disputes about common law property rights. Accordingly, it does not immunize the holder of the permit from liability in trespass and does not preclude an owner who objects to some work being performed on the subject property from seeking and obtaining injunctive relief. Ultimately, I am satisfied that this Court's decision in *Este* has no substantive bearing on the reasonableness of the District's decision in this case.

The Bylaw

[61] In oral submissions, counsel for the appellants advanced a further argument. This was to the effect that the District's decision to accept the respondents' permit application was unreasonable because it cannot be reconciled with a proper interpretation of the Bylaw. I understand this to be an argument in the alternative, that is, even if the District was statutorily empowered to make a bylaw extending the ability to apply for development permits to the holders of easements, it did not do so in this instance.

[62] The appellants make two arguments to this effect. First, they say that the Bylaw's reference to the "site" in respect of which a permit application is sought indicates that the Bylaw contemplates applications by the owner(s) of a whole plot of land (that 'whole', as I understand it, being described by the area of fee simple title), rather than the owners of a servitude in respect of a discrete portion of it (in this case, an easement).

[63] I do not agree that this follows from the text of the Bylaw, which reads, in part:

4. APPLICATION PROCEDURE

4.1 General Requirements for All Applications

- (i) An Application made pursuant to this bylaw shall be made to the Director and shall be executed in writing by the Owner(s) of the Site that is subject to the Application, or by a person authorized by the Owner(s).

[Emphasis in original.]

[64] As noted above, "Site" is defined as "an area of land consisting of a Lot or two or more abutting Lots". In the absence of any definition of the word "Lot" in the Bylaw itself, there is no textual basis to conclude that "Lot" refers to the entirety of an area of land owned in fee simple. I am thus unpersuaded by the submission that there was no reasonable interpretation of the Bylaw itself that allowed the District to accept a permit application in respect of the easement, which corresponded to a definite and ascertainable portion of a larger parcel of land.

[65] The appellants' second argument to the effect that the District's interpretation of the Bylaw was unreasonable begins with the observation that the Bylaw refers to the definition of "owner" in the LTA, and that definition refers to a "charge", itself defined as "an estate or interest in land less than fee simple". In the appellants' submission, the breadth of this definition establishes the unreasonableness of the District's interpretation, as it would allow a very expansive class of persons to apply for a development permit.

[66] In my view, the appellants are correct that the District's interpretation would, on its face, allow permit applications from a broad class of interest holders.

- [67] That does not mean, however, that the District would be bound, on its interpretation, to accept any and all such applications. The fact remains that neither the LGA, Community Charter, nor the Bylaw itself contemplate the situation faced by the District in this case. On the two interpretations that were before the District, either a relatively broad class of persons would be allowed to apply for permits, or the rights of easement holders would be rendered illusory. Since statutory enactments ought not to be given a construction that abrogates common law entitlements unless expressly provided for or required by necessary implication of the statutory text, the broad construction is to be preferred. As between the narrow and broad interpretations, I see nothing unreasonable in the District's decision to adopt the latter.
- [68] Finally, it is important to emphasize that as an administrative decision maker, the District's decision to issue the permit had to be justified against not only the modern principle of statutory interpretation and the terms of its grant of authority, but also against the factual context and any unique "operational implications" of the matter in issue: *Mason* at para. 70.
- [69] As the chambers judge rightly noted, the District faced an unusual and rather difficult situation: the stairs had already been built, and while the District had no jurisdiction to order their removal, there was an obvious need to assess their safety and environmental effects, and to bring them into compliance with the District's permitting regime until such time as the courts were able to rule upon the underlying dispute between the parties. Indeed the appellants were urging the District to consider whether the staircase conformed to Code requirements and was safe, and consideration of the permit application was the obvious vehicle to address those considerations.
- [70] The appellants' preferred construction of the District's grant of authority would leave the District with no practical ability to respond to the circumstances of this and similar cases. The appellants have submitted, and stressed in oral argument, that the factual context of the District's decision is irrelevant to the reasonableness of its statutory interpretation. I disagree. As cases such as *Vavilov* and *Mason* establish, factual circumstances are among the constraints against which any administrative decision, including a decision that consists in or proceeds from a statutory interpretation, must be justified.
- [71] For these reasons, I would conclude that the District's decision with respect to its authority to issue permits to owners within the meaning of the Land Title Act, in accordance with the Applications Procedure Bylaw, was reasonable under the circumstances.

Whether the District's decision was internally contradictory, and therefore unreasonable

- [72] The appellants further submit that the District's decision was unreasonable in the sense that it contains several inconsistencies or contradictions.

- [73] In the appellants' view, the District's decision was internally incoherent in that it purported not to have any jurisdiction to determine the parties' dispute about their respective property rights, but nevertheless approved the permit "on the basis of [the respondents'] ownership interest in the registered Easement". Having reviewed the communications between the District and the parties, I would not conclude that by stating that it lacked jurisdiction to determine the parties' respective rights, the District should be taken to have implied that it could not proceed, in a limited manner, upon an assumption as to the nature of those rights. As I have observed, the District faced an unusual situation. Furthermore, the respondents were listed as "owners" of the easement as per the Land Title Office and the Land Title Act, which definition the District had adopted in its Bylaw. In my view, the District's decision was responsive to these facts as well as the fact that there was a live dispute between the parties as to the scope of the easement--and this is reflected in the conditions that the District imposed in the development permit.
- [74] The appellants also say that the District's decision was internally contradictory because, while the District initially advised the respondents that it could not grant their permit application as they did not own the subject land in fee simple, as per the definition given in the Community Charter, it later granted the permit application. I would not treat preliminary communications by an administrative decision maker as effectively tying the District's hands with respect to its final decision. It is certainly true that the entire course of communications between an administrative decision maker and the parties may be relevant to assessing the reasonableness and procedural fairness of its ultimate decision. However, in my view, it would be contrary to Vavilov's "culture of justification", not to mention the principles of procedural fairness, to effectively prevent administrative decision makers from changing their minds in the course of the decision making process.
- [75] Another alleged contradiction the appellants identify concerns the terms of a prior development permit granted to them by the District. This permit provided, pursuant to s. 491 of the LGA, that any development on Lot B needed to be completed in "substantial compliance" with an expert geotechnical report that they had previously obtained. That report provided that no structures should be placed on the slopes of the land "without suitable engineering analyses and recommendations regarding slope stability". They say that according to the terms of this permit, it "became binding on the [respondents], as persons with an interest in the land".
- [76] I disagree in that the terms of the permit itself do not ground this argument. As per ss. 501 and 503 of the LGA, once a municipality registers a permit with the Land Title Office, it is "binding upon all persons who acquire an interest in the land". As such, the terms of that permit are binding only between the appellants and the District, and upon anyone who may subsequently acquire a proprietary interest in Lot B. The respondents already had an interest in the land when the appellants applied for and were granted their development permit. Accordingly, the terms of the appellants' development permit do not bind the respondents, and so there can have been no contradiction arising out of the District's

decision to issue the respondents a permit upon different terms.

- [77] The appellants also argue that the District's decision is contrary to established legal precedent.
- [78] They correctly observe that in *Vavilov*, the Supreme Court of Canada noted that common law precedent may constitute a legal constraint against which administrative decisions must be justified: at para. 112. Notably, however, administrative decision makers are not expected to approach their roles as if they are courts and as I read the discussion of common law precedent in *Vavilov*, the Court's focus was upon deviations from binding precedent.
- [79] Having reviewed the authorities referred to by the appellants, I am not persuaded that any of them were dispositive of the District's decision or were even so relevant as to require the District to explain its decision not to follow them. Several of the cases cited (*Newson v. Esquimalt (Township)*, [1989] B.C.J. No. 525 (S.C.); *Morishita v. Richmond (Township)*, [1990] B.C.J. No. 634 (C.A.); *Karpick v. Colwood*, [1988] B.C.J. No. 122 (S.C.); *Vancouver (The City of) v. Grant* (1993), 17 M.P.L.R. (2d) 204 (S.C.); and *Este*) either do not concern the question of whether permits may be issued to the holders of an easement or dealt with materially distinct statutory schemes and bylaws.

Whether the District's decision was procedurally unfair

- [80] The appellants submit that the District's decision to issue the permit was unfair in that:
- a) It refused to provide them with correspondence and reports relating to the respondents' application;
 - b) Having advised the appellants that their authorization would be required in order for a permit to issue, later accepted the respondents' submissions and accepted the permit, after a private meeting with the respondents; and
 - c) After advising that it could not resolve the parties' legal dispute as to ownership, the District issued the permit at the respondents' urging.
- [81] The appellants' challenge to the procedural fairness of the District's decision must be assessed in light of the judge's factual findings about the participatory opportunities afforded by the District:
- [133] In any event, I find that the District did provide the Armstrong petitioners multiple opportunities to communicate their position to the District before the permit was ever issued. They advised the Armstrong petitioners that the permit application would be processed and on what basis on more than one occasion. They received correspondence from the Armstrong petitioners outlining their position. They invited receipt of any legal opinion that the Armstrong petitioners might provide. They received and considered a detailed letter from the Armstrong petitioner's legal counsel that fully outlined their position, and they responded to that letter. All of this took place well before the permit was issued.

[Emphasis added.]

- [82] While the judge's conclusion that the District did not violate its duty of procedural fairness is reviewable on a standard of correctness (see *Brar v. British Columbia (Securities Commission)*, 2023 BCCA 432), these factual findings are subject to a deferential standard of review and may only be interfered with if a palpable and overriding error is established: *Blanke v. West Vancouver (District)*, 2025 BCCA 90 at para. 42. The appellants do not allege any reviewable errors in respect of these findings.
- [83] The content of the duty of procedural fairness varies with the circumstances of each particular case: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 21. As set out in *Baker*, administrative decisions must be made according to a "fair and open procedure, appropriate to the decision with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered": *Baker* at paras. 22, 28-30.
- [84] Having regard to the factors set out in *Baker* (at paras. 23-28), I see no basis upon which to conclude that the appellants, by virtue of the fact that the respondents privately met with and communicated their position to District officials, were denied "the opportunity to present their case fully and fairly [and] have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision": at para. 28. The District heard from and engaged with both parties, on several occasions, and then made its decision. As the Supreme Court of Canada observed in *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5 at para. 46: "what is required is fairness, not perfection".
- [85] In conclusion, I would dismiss the judicial review appeal.

The Easement Appeal

Standard of review

- [86] The chambers judge's construction of the easement is a question of mixed fact and law, and is subject to the same approach on review as questions of contractual interpretation: see *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2017 BCCA 374 at paras. 27-29, referring to *Sattva Capital Corp v. Creston Moly Corp.*, 2014 SCC 53; see also *1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2025 ONCA 56 at para. 41. As such, the judge's interpretation is owed deference on appeal, absent an extricable error of law or a palpable and overriding error.

Positions of the parties

[87] The appellants submit that the judge made several material errors in interpreting the terms of the easement and in concluding that the construction of the stairs did not substantially interfere with their residual (or underlying) property rights, which I will discuss in turn. The respondents submit that the judge made no reviewable error in his decision. They say that the appellants essentially seek to overturn factual findings on appeal, which findings they say are entitled to deference.

Whether the judge's interpretation of the easement is inconsistent with the *nemo dat* principle

[88] The appellants argue that since the grantor of the easement lacked the entitlement to build stairs without municipal approval, she could not convey any such entitlement to the respondents; as such, in their submission the easement cannot be construed as admitting of an ancillary right to construct stairs upon the subject land. In particular, they rely upon the maxim *nemo dat quod non habet* ("no one may give what they do not have", i.e., the holder of a right cannot confer an entitlement in excess of what they themselves 'possess') to say that the grantor of the easement cannot have conferred upon the grantees the right to build stairs in contravention of local bylaws, as those bylaws "delineate what can and cannot be done within an easement".

[89] In oral submissions, counsel for the appellants was unable to refer us to any authority in which a bylaw or other similar instrument was used to constrain the interpretation of the terms of a granted easement. They do rely, however, upon *Zive's Estate v. Lynch* (1989), 94 N.S.R. (2d) 401 (C.A.) at para. 23 for the proposition that "[l]ocal bylaws delineate what can and cannot be done within an easement". In my view, this does not assist their position.

[90] In *Zive's Estate*, the Nova Scotia Court of Appeal considered what was described as reservation of a right of way over a strip of land, which, since its creation, had seen very "limited commercial use": at para. 8. New owners acquired the dominant tenement, and proceeded to use the right of way for extensive and intensive commercial purposes. The Court described the issue as "whether a right-of-way over residentially zoned property can be used for commercial purposes relating to the dominant tenement": at para. 12. It determined that, as a matter of the law relating to zoning bylaws and their purposes, "only the uses prescribed in the municipal bylaws may be made over a right-of-way or an easement": at para. 18. The Court did not interpret the easement; it merely confirmed that the use of an easement, whatever its terms, should conform to applicable municipal laws and that a property owner cannot grant a right of easement in such terms as to immunize the grantee from the application of municipal law: at para. 23.

[91] I would also not accept this *nemo dat* argument for the following reasons.

[92] It is true that, as a matter of municipal law, the stairs could not be built without the relevant permits. But the appellants' submission, respectfully, is contrary to the legal nature of an easement as a matter of property law. An easement is a relationship that exists between the owners of adjacent plots of land, in their capacity as owners rather than in their personal capacity. Municipal bylaws may have an incidental effect on what may be done on the subject land, but these restrictions do not form part of the legal relationship between the dominant and servient tenements per se.

[93] As the respondents emphasize in their factum, in this case the holder of the servient tenement could not prevent the building of the stairs, but the municipality could have done so. The grantor of the easement could not confer upon the grantee a right to build stairs (or any other structure) in contravention of municipal bylaws, such that the grantee would be immunized from municipal law requirements; that is, clearly, not a right any property owner has or may convey. But an owner in fee simple is entitled, in my view, at common law, to build structures upon their land (subject to any internal constraints that the law of property may provide--for instance, through the law of nuisance). And to the extent that they have this entitlement, they may convey it.

[94] Finally, as I have observed with respect to the appellants' submissions on the issues relating to statutory interpretation, an abrogation of a common law entitlement by legislative intervention may only be accomplished expressly or by necessary implication and there is none in the legislation at issue in this case.

Whether the judge failed to consider objective evidence of the circumstances surrounding the easement's creation

[95] I am not persuaded by the appellants' submissions that the judge:

- a) Failed to consider some of the available objective evidence relating to the circumstances surrounding the easement's creation; or
- b) Erred in relying on the respondents' purportedly "non-objective and inadmissible" evidence relating to the grantor's intentions in granting the easement.

[96] One piece of "objective evidence" the appellants say that the judge ought to have considered is the "existence of the District's bylaws". Bylaws are not evidence and, as discussed above, are not determinative of how the easement ought to have been interpreted. Another element of the "objective evidence" identified by the appellants is that the subject land is located in two designated Development Permit Areas. For the reasons I have given in relation to the Bylaw, I am not persuaded that the fact that the subject land has been designated in this manner bears in any material way upon the proper interpretation of the easement, which is a relationship between the owners of the dominant and servient tenements, to which the District is not party.

- [97] The final piece of evidence upon which the appellants say the judge ought to have relied on is "the fact that [the grantor's] power of attorney granted the Easement". No authority is cited to suggest that the interpretation of an easement ought to differ when that easement was granted through a person's power of attorney. As best as I can understand this submission, the appellants argue that because the attorney was required to act in the grantor's best interests, they could not have granted an easement that would allow a violation of municipal bylaws. For the reasons I have outlined I would not accept this submission.
- [98] In their factum the appellants argue that the respondents' evidence relating to the grantor's intentions was subjective and inadmissible. No legal basis is set out to support this assertion and there is nothing in the record to indicate that the appellants objected to the respondents' evidence. In any event, I would note that even if this evidence--in which the respondent Dr. Grier deposed that "the purpose of the easement was so that after Ms. Hull [the grantor] no longer owned lot B, Ms. Alger and Dr. Grier would continue to be able to access the beach, albeit in a different location than their previous access" (at para. 20)--was inadmissible, there remains the simple fact that the easement connects Lot A to the waterfront. The judge's conclusion that "no other purpose" than access to and from the beach "makes sense" (at para. 39) is entitled to deference on appeal absent a palpable and overriding error or an error in principle. The appellants do not suggest an alternative purpose for the easement, and, in my view, have failed to identify any reviewable error in the judge's conclusion on this point.

Whether the judge erred in finding that the building of the stairs was a necessary ancillary right to the easement

- [99] I see no reviewable error in the judge's conclusion that the grant of the easement included a necessary ancillary right to construct stairs to facilitate access to and from the beach on foot. Indeed, notwithstanding the deferential standard of review, I agree entirely with the judge's finding on this point.
- [100] While no easement may grant "exclusive and unrestricted use" of the subject land (*Reilly v. Booth* (1890), 44 Ch. Div. 12 at 26), as this would simply amount to a transfer of underlying title, the owners of a dominant tenement are "entitled to every reasonable use" of an easement "for its granted purpose": *1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2025 ONCA 56 at para. 25. Accordingly, the grant of an easement is *prima facie* also the implied grant of any ancillary rights that are "necessary for the comfortable use and enjoyment" of the easement in accord with its purpose: *Montcrieff v. Jamieson*, [2007] U.K.H.L. 42 at para. 29, citing *Jones v. Pritchard*, [1908] 1 Ch. 630; see also *Kasch BCCA* at para. 9.

- [101] Having found no reviewable error in the judge's conclusion that the purpose of the easement is to facilitate access to and from the waterfront on foot, what remains to be considered is whether a right to build stairs upon the subject land is reasonably necessary for the "comfortable use and enjoyment" of the easement in accord with its purpose: Montcrieff at para. 29.
- [102] The judge found that the slope is quite steep in some places. Like the judge, I would not consider it reasonable to expect the owners of the dominant tenement to risk their safety in using the easement to access the waterfront, which use is clearly contemplated by the grant.

Whether the grant was a positive covenant, not an easement

- [103] To the extent that this submission is based on the premise that the grantor could not convey an easement entitling the owners of the dominant tenement to act contrary to municipal law, I have addressed this issue above and need not do so again.
- [104] The grant was an easement, not a contract. It meets the four criteria for an easement (see *Re Ellenborough Park*, [1956] Ch. 131, [1955] 3 All E.R. 667 (C.A.)) and was registered on title. It runs with the land and binds the appellants as successors in title to the grantor.
- [105] I would not accede to this ground of appeal.

Whether the stairs constitute a substantial interference with the appellants' proprietary rights

- [106] The principle that the scope and use of an easement by the owner of the dominant tenement ought not interfere unreasonably (or, "substantially") with the servient owner's use and enjoyment of their land is correlative to the principle that the owner of the dominant tenement may make any reasonable use of the easement for its granted purpose: Montcrieff at para. 45. They are, in other words, two sides of the same coin.
- [107] The appellants submit that the judge erred in failing to find that the stairs constitute a substantial, or unreasonable, interference with their property rights. In particular, their argument on appeal is that insofar as the stairs may not comply with the development permit they themselves obtained in 2019, the stairs may cause damage to their property. They say that this constitutes an unreasonable interference with their rights as owners.
- [108] The possibility that some damage may result (or may have resulted) from the stairs is not, without more, sufficient to establish an unreasonable interference with the appellants' rights in respect of the subject land, since the use of many common easements carries a theoretical risk of damage. To the extent that there may be such damage, the respondents would potentially be liable to the appellants: see *Jones; Kasch v. Goyan*, 87 D.L.R. (4th) 123, 1992 CanLII 8523 (B.C.S.C.), *aff'd* by this Court in *Kasch BCCA*.

[109] I would emphasize, however, that nothing in the record suggests that such damage has occurred. Indeed, the record contains evidence from one of the professionals referred to by the judge to the effect that: (a) at this point, removing the stairs might cause more damage; and (b) the stairs, being quite deeply rooted in the underlying slope, have actually contributed to its stability.

[110] Accordingly, in my view, the appellants have failed to identify a reviewable error in the judge's conclusion that the stairs do not constitute an unreasonable interference with the appellants proprietary rights in respect of the subject land.

[111] I would dismiss the easement appeal.

Conclusion

[112] I would dismiss both the judicial review and easement appeals as well as the application to adduce additional evidence.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Fleming"

I AGREE:

"The Honourable Justice Gomery"

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