

CANADA / JUDGMENT

Blanke v. West Vancouver (District)

2025 BCCA 90

COURT

British Columbia Court of Appeal

DECIDED

21 March 2025

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2025 BCCA 90 Blanke v. West Vancouver (District)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Blanke v. West Vancouver (District),

2025 BCCA 90

Date: 20250321

Docket: CA49931

Between:

Philipp Blanke

Appellant

(Petitioner)

And

The Corporation of the District of West Vancouver,

David Wolfin and Deborah Wolfin

Respondents

(Respondents)

Before:

The Honourable Madam Justice Fisher

The Honourable Justice Winteringham

The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated May 21, 2024 (Blanke v. West Vancouver (District), 2024 BCSC 858, Vancouver Docket S237970).

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Corporation of the District of West

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and Deborah Wolfin:

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J. Epp

Place and Date of Hearing:

Vancouver, British Columbia

January 29, 2025

Place and Date of Judgment:

Vancouver, British Columbia

March 21, 2025

Written Reasons by:

The Honourable Madam Justice Fisher

Concurred in by:

The Honourable Justice Winteringham

The Honourable Justice Riley

Summary:

The appellant challenges an order dismissing his petition for judicial review of certain decisions made by the respondent District of West Vancouver's Director of Planning and Development Services. In 2018, the Director issued a development permit to the respondents David and

Deborah Wolfin to build a house on their property, which is adjacent to property owned by the appellant. The appellant says the Director exceeded his authority in issuing and then subsequently renewing and approving changes to this permit. Alternatively, he says the District breached its duty of procedural fairness to him by failing to provide notice and an opportunity to consult prior to the decision to renew the permit.

Held: Appeal dismissed. The Director's 2023 renewal decision was reasonable, as was his decision to approve minor changes to the building plan. There is no basis to find that the District breached a duty of procedural fairness in this context.

Reasons for Judgment of the Honourable Madam Justice Fisher:

- [1] The dispute underlying this appeal is between the appellant, Philipp Blanke, and the respondent, District of West Vancouver (the District), in respect of the issuance of development and building permits to the respondents, David and Deborah Wolfin. The appellant and the Wolfins own adjacent waterfront properties in West Vancouver and the appellant was unhappy with the impact of the Wolfins' building plans on the use and enjoyment of his property.
- [2] The appellant brought a petition for judicial review, seeking to quash a decision made by the District's Director of Planning and Development (the Director) to renew a development permit for the Wolfins' property. He also sought an interim injunction to prohibit the Director from issuing a building permit to the Wolfins. That petition was dismissed, and this is an appeal from that dismissal.
- [3] Before I set out the factual background, it is important to briefly outline the legislative provisions that govern the Director's delegated authority to issue, renew and make changes to development permits.

The legislative context

- [4] Under s. 488 of the Local Government Act, R.S.B.C. 2015, c. 1 [LGA], a local government's official community plan (OCP) may designate development permit areas (DP areas) for various specified purposes. The OCP must describe the special conditions or objectives that justify the designation and specify guidelines as to how these matters are to be addressed. DP Area NE 6 (Sites with difficult terrain) is one of the designated DP areas in the District, created to avoid hazardous conditions, protect the natural environment and minimize site disturbances during construction.
- [5] A development permit authorizes a subdivision, an alteration of land or the building of structures within a designated DP area. In issuing a development permit, the local government may impose site-specific restrictions and conditions for the proposed work. The conditions permitted under the LGA must be specific to the category of DP area. Under s. 490, a development permit may authorize variances from existing zoning bylaws that accord with the applicable guidelines in the OCP. In this case, the guidelines in the District's OCP

sought to alleviate steep site conditions in DP Area NE 6 and authorized variances for things such as avoiding construction on more extreme slopes, restricting driveway access, minimizing the creation of artificial grades, varying setbacks and preserving existing landscapes.

- [6] In Part 19 of the Development Procedures Bylaw No. 4940 [Procedures Bylaw], the Council delegated to the Director the authority to consider, issue or refuse certain types of permits in specified DP areas. These include development permits in DP Area NE 6: s. 19.1. The conditions for issuing a development permit in DP Area NE 6 are set out in s. 19.10[1]:

19.10 Development Permits in respect of Development Permit NE 6 (Sites with Difficult Terrain) Development Permit Area may be issued by the Director if the proposed development:

19.10.1 involves the creation of 3 or fewer lots;

19.10.2 complies with Guidelines NE6; and

either

19.10.3 conforms to the Zoning Bylaw; or

19.10.4 requires a variance(s) to the Zoning Bylaw that, in the opinion of the Director, achieves superior siting that protects the natural environment, neighbouring development, and addresses steep topography.

- [7] Part 10 of the Procedures Bylaw requires notice to be given to owners and occupants of parcels of land within 50 metres of a subject parcel for an application concerning a "Minor Development Permit (with or without variances)"[2] and to allow two weeks for residents to provide comments: ss. 10.2-10.3.

- [8] Council also delegated to the Director the authority to approve minor changes to a development permit "where the proposed changes do not materially affect the intent of the plans attached to the Development Permit": s. 19.18.

- [9] Finally, development permits may be renewed under certain conditions. Under s. 14.1 of the Procedures Bylaw, the Director is authorized to consider one application for renewal of a development permit provided:

14.1.1 no change in the approved permit is proposed; and

14.1.2 the term of the permit has not lapsed or, if lapsed, shall have lapsed by no more than six months.

Any further renewal shall require a new application for the permit.

Factual background

- [10] The properties now owned respectively by the appellant and the Wolfins were originally subdivided in 2001. The lots are on a steep slope facing Howe Sound. The District, through its Council, issued a development permit (DP) to subdivide a large steep lot and create the two properties on a street called Citrus Wynd (the 2001 DP). One lot was designated as 8520 (which became the Wolfins' property) and the other 8540 (which became the appellant's property). Both properties are located in DP Area NE 6 (Sites with Difficult Terrain).
- [11] The 2001 DP did not authorize the construction of houses on the two properties, but, in anticipation of construction, it varied the applicable zoning bylaw to address the particular hazards and difficulties posed by the steep terrain of the lot. The 2001 DP provided a 24-month period in which to create the subdivision. The lot was subdivided within that period, and the 2001 DP remains active. It is registered on title for each property at the land registry office.
- [12] In 2012, Council approved applications for further development permits for the construction of two very similar homes on each of 8520 and 8540, both designed by the same architect (the 2012 DP). The 2012 DP authorized zoning variances that included increases in the maximum height, number of storeys and highest building face envelope for each lot. These variances accommodated the dramatic slope down to the ocean. A home was constructed on 8540 within the 24-month period but not on 8520, so the 2012 DP for that property lapsed.
- [13] The Wolfins purchased 8520 in 2017 and in 2018 applied for another development permit to build a house similar to the one that Council had authorized in 2012. They sought the same variances to maximum building height, number of storeys and highest building face envelope that had been approved in the 2012 DP.
- [14] In 2018, the Director exercised his delegated authority under s. 19.1 of the Procedures Bylaw to issue a development permit to the Wolfins that granted the variances they had sought (the 2018 DP). Prior to doing so, the Director notified the owners and occupiers of all properties situated within 50 metres of 8520, including the then-owner of 8540, in accordance with s. 10.3 of the Bylaw. No concerns arose from this notification.
- [15] In October 2019, the appellant purchased 8540. He was aware of the 2018 DP at the time and had reviewed it before he made his decision to purchase the property. He took possession in December 2019.
- [16] In November 2019, the Wolfins' architect (the same architect who designed the house built on 8540) submitted a building permit application to construct the house authorized by the 2018 DP. Unfortunately for the Wolfins, the public health measures put in place due to the COVID-19 pandemic caused significant delays and they were not able to begin construction within the 24-month window authorized in the 2018 DP. When that window closed in October 2020, the appellant assumed that the 2018 DP had expired, and construction could not proceed.

- [17] In about March 2021, the appellant noticed tradespeople coming and going from 8520. He made a number of requests to the District to confirm the status of the 2018 DP and the building permit for 8520, which were not promptly answered. Between May and August 2021, the appellant met with the Wolfins and spoke further with Mr. Wolfin and the architect. He was concerned about the building height of the house on 8520 and its placement close to the shared property line. He asked the Wolfins to consider making some changes to their design that would maintain his access to light and preserve his privacy. The Wolfins were not prepared to do this, on the advice of their architect that it would cause more delay.
- [18] Meanwhile, the Wolfins' architect continued to work with the District to address changes in the Building Code and the bylaws. In March 2022, the appellant had a further discussion with Mr. Wolfin and the architect but again was advised that the plans could not be changed. Mr. Wolfin was only prepared to plant conifers along the shared property line for privacy.
- [19] In January 2023, the architect requested a 32-month extension of the 2018 DP to account for the delays caused by the pandemic. On January 17, 2023, the Director granted a 24-month extension. He also issued a 12-month renewal of the 2018 DP under s. 14.1 of the Procedures Bylaw (the 2023 Renewal). Together, these decisions extended the deadline for commencing construction of the home on 8520 to January 16, 2024, but did not accept any changes to the building plans which had been discussed to that point.
- [20] The Wolfins' architect continued to negotiate their building permit with the District. On August 29, 2023, the Director determined that the proposed building plans complied with the 2018 DP and granted the permit, exercising his delegated authority to approve "minor changes" to a DP under s. 19.18 of the Procedures Bylaw (the 2023 Minor Changes).
- [21] There are no notice requirements in the Procedures Bylaw in relation to decisions like the 2023 Renewal or the 2023 Minor Changes (I will refer to these decisions together as the 2023 Decisions).
- [22] The Wolfins began construction of their home in accordance with the approved building plans in January 2024. By then, they had incurred over \$900,000 in costs for their consulting fees, permits and site work.

The judicial review

- [23] Before the chambers judge, the appellant sought to quash the 2023 Decisions. The appellant took the position that these were in fact one decision, made on January 17, 2023, which purported to both renew the 2018 DP and approve the minor changes. He argued that this decision was unreasonable because the 2018 DP was issued without delegated authority and was invalid, or alternatively because the Director was not authorized to renew a development permit with changes. He also sought a declaration that the District breached its duty of procedural fairness by renewing the 2018 DP without first notifying and hearing from affected neighbours.

- [24] Although only the 2023 Decisions were the subject of the petition, the legality of the 2018 DP featured heavily in the arguments of all parties, and in the reasons of the chambers judge.
- [25] Acknowledging that the petition sought relief only in relation to the 2023 Decisions, the District argued that the legal basis for this challenge relied on the appellant's assertion that the 2018 DP was invalid as being beyond the scope of the Director's delegated authority. The District took the position that the appellant did not have private interest standing to challenge the issuance of the 2018 DP because he was not the owner of 8540 at the time and had no right to notice under the relevant bylaw. The chambers judge agreed that the correct approach was to consider whether the relevant statutory regime gave any additional express or implied right to persons in the position of the appellant to address the decision, citing *Gonzales Hill Preservation Society v. Victoria (City) Board of Variance*, 2021 BCSC 2091 [Gonzales Hill]. Because the appellant was not entitled to notice of the Director's consideration of the 2018 DP under the Procedures Bylaw at the time, the chambers judge concluded the Director had fulfilled the notice requirement by notifying the then-owner of 8540 and giving two weeks to provide input. The judge was "not convinced" the appellant had standing but he did not make a definitive ruling on this issue.
- [26] Both the District and the Wolfins argued there had been unreasonable delay on the part of the appellant in challenging the 2018 DP that caused significant prejudice to the Wolfins. The chambers judge agreed. He purported to exercise his discretion to deny the appellant "prerogative relief for the 2018 DP" and to dismiss the petition "to set aside or quash the 2018 DP": at para. 80. However, as noted above, the petition did not seek to quash the 2018 DP, at least not directly; it sought relief only with respect to the 2023 Decisions.
- [27] The chambers judge also considered the reasonableness of the Director's decision to issue the 2018 DP as well as the 2023 Decisions. He rejected the appellant's arguments that these decisions were not within the Director's authority at the time they were made, and found that all three were reasonable. He also found no breach of procedural fairness on the basis that the relevant legislation and bylaws did not provide the appellant with any right to notice or an opportunity to provide input with respect to the impugned decisions.

On appeal

- [28] The arguments made on appeal track the issues the chambers judge considered. The appellant says the chambers judge erred:
- a) in finding he lacked standing to challenge the 2018 DP;
 - b) in exercising his discretion to deny relief with respect to the 2018 DP on the basis of delay and prejudice;
 - c) in concluding that all the decisions were reasonable; and
 - d) in not finding a breach of procedural fairness.

- [29] The respondents join issue on each point. The District submits that the judge was correct to find the appellant lacked standing to challenge the 2018 DP. Both respondents say the judge did not err in his exercise of discretion to deny relief on the basis of delay and prejudice. They also say all the Director's decisions were reasonable and there was no breach of procedural fairness.
- [30] It is evident that the chambers judge's approach was the result of the focus put on the 2018 DP by all parties in argument before him. Underlying the response of the District was a submission that the appellant was attempting to collaterally attack the 2018 DP, a decision he could not challenge directly. The chambers judge did not address this argument (at least not explicitly), nor did he make a definitive ruling on standing. On the question of delay, the judge did not assess delay and prejudice in the context of the 2023 Decisions.
- [31] In these circumstances, I will address only briefly the issues of standing and delay, and will focus primarily on the question of whether the 2023 Decisions were reasonable.

Standing

- [32] The District's objection to the appellant's standing raises an important issue in relation to petitions for judicial review. As the chambers judge noted, the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 does not specify who has standing to commence a judicial review.
- [33] The test for private interest standing at common law for persons who were not parties before the administrative decision maker is whether the person is directly affected by the administrative decision: Sara Blake, *Administrative Law in Canada*, 7th ed. (Markham: Butterworths Canada Ltd., 2022) at 217. This has also been expressed as a person "aggrieved", "affected" or "exceptionally prejudiced" by the decision: Brown and Evans, *Judicial Review of Administration Action in Canada* (Toronto: Carswell, 2014) at 4:2430.
- [34] Standing may also be found within a statutory regime. An approach endorsed by this Court is to consider whether the statute gives any express or implied right to persons in the position of the applicant to complain of the alleged unlawful act or omission: Sandhu v. British Columbia (Provincial Court), 2013 BCCA 88 at para. 35; Saanich Inlet Preservation Society v. Cowichan Valley (Regional District), (1983) 44 B.C.L.R. 121 (C.A.) at 127-128 [Saanich Inlet]. However, decisions about standing under one statute may be of little assistance to decisions under another statute: Saanich Inlet at 126.
- [35] These principles were reviewed in Gonzales Hill, a case the chambers judge considered to be similar to this case. It is evident the judge's conclusion that the appellant was not within the class of persons entitled to notice of the Wolfins' application for the 2018 DP played heavily on his lack of conviction that the appellant had standing to challenge the 2018 DP. However, the question of standing was more complex than that as it required an assessment in the context of the actual relief sought, and how the appellant's assertions about the lawfulness of the 2018 DP related to that relief.

- [36] The District raises legitimate concerns about whether the appellant was truly aggrieved by the Director's decision to renew the 2018 DP. It is an open question whether the appellant's challenge to the 2023 Decisions, relying primarily on the unlawfulness of the 2018 DP, constitutes a collateral attack on a decision he would not otherwise have standing to attack. It is also an open question whether the appellant's concerns about his neighbour's development ground an interest sufficient to establish him as a person aggrieved by the Director's 2023 Decisions.
- [37] All that said, in the absence of a definitive ruling by the chambers judge and more complete submissions on the broader context I have described, I consider it neither necessary nor appropriate to address this issue further. For the purpose of addressing the reasonableness of the 2023 Renewal, I have accepted that the validity of the 2018 DP is relevant to that analysis given that it continues to be the operative development permit as a result of its renewal.

Delay

- [38] The judge's decision to deny relief on the basis of delay is a discretionary decision that is entitled to deference. An appellate court is not entitled to interfere unless the judge erred in principle, gave no or insufficient weight to relevant considerations or made a palpable and overriding factual error: *British Columbia (Superintendent of Motor Vehicles) v. Chahal*, 2022 BCCA 416 at para. 9.
- [39] The appellant raises several arguments challenging the chambers judge's exercise of his discretion to deny relief on this basis, the most important relating to the context of the continuing application and decision-making process after the 2018 DP lapsed in October 2020. I agree that the judge focused on the 2018 DP and appeared to give no weight to the potential relevance of subsequent events leading to the 2023 Renewal, and he clearly erred in denying relief for the 2018 DP since no such relief was actually sought.
- [40] However, as my analysis on reasonableness will demonstrate, the appellant's primary position before the chambers judge and before this Court was an attack on the lawfulness of the 2018 DP. It is not surprising, then, that the judge did not consider the subsequent events to be sufficiently relevant to mention. In light of this, as well as the evidence in the record of significant prejudice to the Wolfins, I would not be inclined to interfere with the judge's finding of unreasonable delay on the part of the appellant. In any event, it is not necessary to do so given my conclusions on reasonableness.

Reasonableness

- [41] On appeal of an order made in a judicial review, this Court's task is to determine whether the chambers judge identified the correct standard of review and applied that standard correctly: see *Vancouver (City) v. Pender Lodge Holdings Ltd.*, 2024 BCCA 37 at para. 76 and the cases cited therein. There is no dispute that the standard of review applicable to the

Director's decisions is reasonableness. The question then, is whether the reviewing judge correctly applied the reasonableness standard of review. To assess this, our task is essentially to step into the shoes of the judge and focus on the administrative decisions. Our review of the judge's decision, which informs this task, is therefore governed by a correctness standard.

- [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.
- [43] Reasonableness is a robust standard under which an administrative decision is to be assessed on the basis of the decision as a whole to determine if it is based on an internally coherent and rationale chain of reasoning and is justified in relation to the relevant factual and legal constraints: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov] at paras. 85, 90. The governing legislative scheme will likely be the most important aspect of the relevant legal context in circumstances, as here, where the decision makers receive their powers by statute and regulation: *Vavilov* at para. 108; *Cowichan Valley (Regional District) v. Wilson*, 2023 BCCA 25 at para. 15. Where no reasons for the administrative decision were required or provided, the analysis will necessarily focus on the outcome to determine if the decision was reasonable in light of the relevant constraints: *Vavilov* at para. 138.
- [44] In support of his assertion that the 2023 Decisions were unreasonable, the appellant raises the following arguments:
1. The 2023 Renewal was unreasonable because the underlying 2018 DP, which was being renewed, was unlawful;
 2. In the alternative, the 2023 Renewal was unreasonable because the Director exceeded his delegated authority to renew a permit only if no changes were proposed to the associated building plans; and
 3. In the further alternative, if the 2023 Renewal did not approve any changes, the 2023 Minor Changes decision was unreasonable because it required variances.
- [45] I will address each argument in turn.
1. Was the 2018 DP unlawful?

- [46] The appellant's first argument, properly construed, is that the 2023 Renewal decision was unreasonable because it purported to renew a permit that was unlawfully issued in the first place. As noted above, and without deciding if this argument constitutes an impermissible collateral attack on the 2018 DP, I accept for the purposes of this appeal that the validity of the 2018 DP is relevant to this analysis.
- [47] I will say at the outset that the appellant raised numerous arguments in this Court and in the court below. I have considered them all but have confined my analysis to his most central arguments, which are based on the nature of the decision that was to be made in response to the Wolfins' application in 2018. Even if accepted, none of the arguments I have not addressed would be sufficient in themselves to render the District's decision unreasonable.

The judicial review

- [48] Before the chambers judge, the appellant submitted that the Director erred in issuing the 2018 DP because the Wolfins' application was to amend the 2012 DP with variances that were not minor changes. On this basis, he contended that ss. 19.1 and 19.18 of the Procedures Bylaw were inapplicable and the Director had no authority to amend a development permit that Council had approved or to approve variances beyond minor changes.
- [49] The chambers judge concluded that the 2018 DP was a new development permit as this was the procedure applicable where a previous development permit, here the 2012 DP, had lapsed. He accepted the evidence of a senior community planner at the District who explained that a new development permit issued for a property with multiple permits will refer to an "amendment" in order to prevent confusion about potential inconsistent terms.
- [50] The appellant also submitted that the variances incorporated into the 2018 DP in respect of the building height, building face, number of storeys and front yard setback went beyond the Director's delegated authority to approve variances that achieve "superior siting that protects the natural environment, neighbouring development and address steep topography" under s. 19.10.4 of the Procedures Bylaw.
- [51] The District submitted that the appellant's interpretation of s. 19.10.4 was too narrow and the decision to issue the 2018 DP must be considered in light of the legislative scheme and relevant factual circumstances, which included (a) the wording in the authorizing bylaw informed by the guidelines in the OCP, (b) the extreme steepness of the property that imposed significant restrictions on the location and nature of the construction, (c) the guidelines which had been interpreted by Council in 2012 as allowing similar variances to enable a house to be built in a similar location on the lot, and (d) the 2001 DP that reduced the front yard set back and left the location of the home to be determined through the building plans.

[52] The chambers judge agreed with the District. He held that the words "superior siting" in the bylaw were to be given a broad meaning and found that the location of the structure on the extreme slope would impact all the factors that were the subject of the variances contained in the 2018 DP.

On appeal

[53] Before this Court, the appellant takes a different approach. He submits that what the Wolfins required and applied for was not a development permit but rather a development variance permit. He contends a development permit was not required because the lands were not being subdivided and therefore ss. 19.1 and 19.10 of the Procedures Bylaw were inapplicable. Instead, the 2001 DP required amendment to approve variances that constituted significant changes to what had been approved by Council in 2001. This, the appellant says, the Director had no authority to do, since he had no delegated authority to issue development variance permits for NE 6 lands (or at all) and could only approve "minor changes" to development permits issued by Council.

[54] The appellant contends this is the only reasonable interpretation of the Director's authority under the Procedures Bylaw and therefore the Director's interpretation, which authorized him to issue a new development permit with variances, as he did, was unreasonable.

[55] The District says the appellant's argument incorrectly assumes there is a separate process for "substantial amendments" to development permits. Although the LGA assumes development permits can be amended, it is silent on the procedure for doing so. The District submits that under the Procedures Bylaw, the only process available for an owner wishing to substantially amend a previously issued development permit is to apply for another permit:

The delegation of authority to issue NE 6 development permits includes delegation of the authority to amend existing NE 6 development permits by issuing a new permit. The Procedures Bylaw does not reserve or limit the scope of the Director's authority simply because Council has exercised it once already.

[56] The District points out that the 2018 DP is clearly, on its face, a development permit and not a development variance permit, and says the Director had explicit delegated authority to issue it under ss. 19.1 and 19.10 of the Procedures Bylaw.

[57] The District also submits that the appellant's argument misinterprets the Director's delegated authority to approve "minor changes" to development permits issued by Council as a limit on the Director's authority to issue development permits in DP Area NE 6. It says s. 19.18 of the Procedures Bylaw creates a separate category for technical alterations to building plans that are commonly required to address issues under the Building Code and the authority to approve minor changes simply means that, where no variances are required, the Director can authorize minor changes to pre-existing development permits through a relatively informal process.

[58] The District objects to the appellant's argument that the Director was not authorized to issue the 2018 DP because it did not seek subdivision, as this is a new argument on appeal. However, it answers this argument quite simply: The 2018 DP constituted an amendment to the 2001 DP which subdivided the original lot into two, specified the safest and least impactful locations for the houses to be constructed on each lot and limited their size and footprint, consistent with the guidelines in the OCP. Because the 2018 DP modifies the siting established by the 2001 DP, it, too, involves that subdivision in the manner contemplated by the OCP.

[59] The District also suggests that the reference to three or fewer lots in s. 19.10.1 is not intended to mean that a development permit can only be issued where subdivision is required. Rather, a proper interpretation is that Council has reserved to itself authority to approve development permits for larger developments involving the creation of more than three lots through subdivision. In other words, insofar as the 2018 DP created zero lots through subdivision, this fell within the limit of "3 or fewer" in s. 19.10.1.

[60] I find no merit in the appellant's submissions for the following reasons.

[61] First, the 2018 DP was clearly a new development permit that amended the 2001 DP. It states so on its face:

Amendment No. 18-038

To Development Permit No. 01-011

REGISTERED OWNERS: David and Debra [sic] Wolfin

This Development Permit applies to:

CIVIC ADDRESS: 8520 Citrus Wynd

[62] This description is consistent with the 2012 DP that was issued to the previous owners of 8520. In fact, the only reference to a development variance permit is contained in the 2012 DP that was issued to the previous owners of 8540. In all other respects, both 2012 DPs granted similar variances to each property with respect to front yard setbacks, maximum building heights, number of storeys and highest building face envelope.

[63] The appellant relied on the application submitted by the Wolfins' architect in 2018 that ticked the box for "development variance permit". However, the application also sought an "Amendment to Development Permit". The chambers judge observed that the architect at times used language that indicated he may not have appreciated the difference between the various types of permits, but he did not consider this unusual given that the architect was primarily interested in obtaining the necessary permit and less concerned about the specific procedure. While the judge was there referring to events in 2023, the same observation can be said to apply to the architect's documentation in 2018.

[64] Moreover, the District's senior community planner confirmed that the 2018 application was for a development permit. She explained:

Pure variances (to setbacks, height, etc.) could also be dealt with by way of a DVP [development variance permit]. However, in cases where a development permit is already in place which establishes a building envelope for a proposed structure, the District Planning Department's practice is to require additional variances for that structure to be dealt with by way of a development permit (sometimes referred to as a "development permit amendment") in recognition of the fact that this envelope has been established with reference to the specific Development Permit Area Guidelines in the OCP, and it is more appropriate to require that any additional variances must also meet the objectives of the Guidelines than to utilize the less restrictive DVP process.

[65] I see no basis on the record to conclude that the 2018 DP was anything other than a development permit.

[66] I also agree with the District's submission that the authority delegated to the Director under ss. 19.1 and 19.10 of the Procedures Bylaw includes authority to amend existing NE 6 development permits by issuing a new permit, whether or not the permit being amended had been approved by Council. These provisions do not limit the scope of the Director's authority.

[67] Second, the District's interpretation of s. 19.10.4 of the Procedures Bylaw is entirely reasonable and the chambers judge made no error in his application of the reasonableness standard of review on this point. This provision gives the Director discretion to approve a variance that achieves "superior siting that protects the natural environment, neighbouring development and addresses steep topography". The director's broad interpretation reflects "an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain[ed]" the exercise of his delegated power: Vavilov at paras. 85, 110.

[68] Finally, the appellant's argument that s. 19.10 of the Procedures Bylaw does not apply to the circumstances because 8520 was not being subdivided is a new argument on appeal. It is well settled that this Court does not generally consider new arguments and will do so only where the interests of justice require it. The onus is on the party raising a new issue to demonstrate that the record in the court below is as complete as it would have been had the issue been raised there: see *R. v. Gill*, 2018 BCCA 144 at paras. 9-12.

[69] I am satisfied that this issue can be properly addressed, as the record is sufficiently complete. Indeed, the District was able to provide a response that I find compelling, as it takes into account the purpose and intent of the statutory scheme, including the NE 6 guidelines. As the 2018 DP expressly amends the 2001 DP, the subdivision was already part of the approvals put in place for 8520. Any other interpretation would result in a cumbersome process whereby Council would be required to approve amendments to a development permit for a small development in DP Area NE 6. That is clearly not the intent of the scheme.

[70] Accordingly, there is no basis on which to conclude that the 2018 DP was unlawful or otherwise unreasonable.

2. Did the 2023 renewal approve changes to the building plans?

[71] The appellant's alternative position is that the Director exceeded his authority to renew the 2018 DP because the renewal included proposed changes to the permit that the Director had no authority to approve. Under s. 14.1 of the Procedures Bylaw, the Director may renew a development permit under his delegated power provided "no change in the approved permit is proposed". The appellant contends the plans attached to the 2023 Renewal proposed significant changes to the plans attached to the 2018 DP.

[72] The appellant disputes the District's contention, and the chambers judge's finding, that the 2023 Renewal and the 2023 Minor Changes were two different decisions. He says this is an after-the-fact characterization unsupported by the evidence of correspondence between the District, the Wolfins, and the architect. He points to the lack of evidence that the Wolfins paid the fee for minor changes in 2023, inconsistent language in the correspondence about what the architect was seeking, and the District's failure to notify the appellant that the 2018 DP had been renewed until August 2023, after the minor changes had been accepted.

[73] The chambers judge considered this evidence but found it was contrary to evidence from the District, which included:

- ongoing correspondence between the architect and the District from January to August 2023 setting out changes and negotiations over the building plans;
- correspondence between the District staff, Director and architect indicating that the 2018 DP renewal did not accept any changes to the building plans that were being discussed prior to January 17, 2023;
- evidence of the senior community planner that the Director advised her of his decision to renew the 2018 DP on January 17, 2023 without any changes to the building plans as described above; and
- the Director's letter of August 29, 2023 setting out the decisions he made and the basis for them.

[74] The judge noted that the architect had been working with the District for many years trying to formulate building plans that complied with changes to the Building Code. In this context, he did not find the architect's inconsistent language regarding the type of permits required or the lack of formal application or payment of fees for the final approval of the plans to be significant. He also found it unsurprising that the Director did not provide a formal letter setting out his decisions until he was satisfied that the building plans complied with the 2018 DP and rejected the appellant's contention that the August 29, 2023 letter did not accurately set out the decision-making process: at paras. 49-53.

- [75] Based on this, the judge made a clear finding that "the 2018 DP was renewed on January 17, 2023; at which time no material changes to the building plans had been accepted, no 'minor changes' to the development permit had been made and no building permit had been issued": at para. 89. This is a finding of fact that is supported by the record. It is a finding entitled to deference, and the appellant has not established any palpable and overriding error that would justify appellate intervention.
3. Did the 2023 Minor Changes require variances?
- [76] The appellant's further alternative position is that even if the 2023 Renewal and 2023 Minor Changes were separate decisions, the Director could not approve the renewal under s. 14.1 of the Procedures Bylaw because the plans attached to the renewal application contravened the zoning bylaw, the 2001 DP and the 2018 DP, and did not constitute "minor changes". Although the appellant frames this argument as a challenge to the 2023 Renewal, it is more properly directed to the 2023 Minor Changes decision.
- [77] In any event, the appellant relies on two aspects of the plans.
- [78] The first is that the proposed height of the building was miscalculated under the zoning regulations by characterizing the roof as a "pitched" rather than "butterfly" roof. This, says the appellant, increased the total height of the proposed house over the height relaxations included in the 2018 DP by 0.89 metres. The second aspect is that exterior stairs are sited within the required side yard setback and would require a zoning variance.
- [79] The issue of height calculation is another matter raised for the first time on appeal. The District objected to leave being granted to the appellant to advance this argument, as it involves factual issues that the record may not fully address. Counsel for the appellant acknowledged this as a new argument but indicated the appellant did not rely on it as a "stand-alone" ground of appeal. It is unclear what effect this concession has on the appellant's position but, in any event, it is my view that it is not in the interests of justice to consider this argument. We do not have the benefit of the District's application of the requisite height calculations in the first place, nor do we have any analysis by the chambers judge to consider. I see this as an attempt by the appellant to introduce more technical objections to a process that involves a complex mix of considerations under the District's zoning and development bylaws, the application of which rely on factual matters not evident in the record.
- [80] The issue of the exterior stairs was considered by the chambers judge, who found that the stairs did not infringe the required 1.2 metre setback: at para. 95. The appellant says this was a palpable and overriding error, as it was based on inapplicable provisions of the zoning bylaw.

- [81] Whether or not the chambers judge correctly calculated the setback, the District submits that the exterior stairs are not subject to setbacks because they are built on the finished grade and are not a "structure" within the meaning of s. 110 of the Zoning Bylaw, No. 4662, 2010.
- [82] These very technical issues are precisely why reviewing courts assess the administrative decisions of local governments in accordance with the reasonableness standard. In this case, the Director concluded that the Wolfins' building plans complied with the 2018 DP and did not demonstrate any additional inconsistencies requiring further variances or approvals. Given the context in which this decision was made, it is clearly one that is justifiable in light of the relevant constraints.

Conclusion on reasonableness

- [83] The appellant's arguments throughout this dispute have focused on narrow and highly technical legal issues arising out of the zoning and procedures bylaws. This approach fails to appreciate the importance of assessing reasonableness in the context of the applicable legislative framework and the specific circumstances surrounding the District's decision-making process. This approach also fails to appreciate the prejudice to the Wolfins, who have simply been doing their best to navigate through the rather complex web of regulations and approvals they require in order to build a home on their property. The record shows that the District has taken a reasonable approach throughout in reviewing the Wolfins' various applications and the Director has exercised his discretionary authority appropriately and reasonably.
- [84] I would not accede to this ground of appeal.

Procedural fairness

- [85] The final alternative argument advanced by the appellant concerns the Director's duty of procedural fairness in renewing the 2018 DP. He submits the District breached its duty of fairness in renewing the 2018 DP and accepting the building plans without providing him with any notice or opportunity for consultation. He says he had a legitimate expectation that he would receive notice because the Director was aware of his concerns about the Wolfins' development plans.
- [86] The court does not owe deference to an administrative decision maker in determining whether the process applied conformed with the requirement of procedural fairness. The standard of review is simply whether, in all the circumstances, the decision maker acted fairly: *Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia*, 2022 BCCA 247 at para. 71. Some decisions describe this as a standard of correctness, in the sense that the process employed by the administrative decision maker either complies with the duty of fairness or it does not. This standard has also been referred to as, simply, "fairness", which I suggest is a more accurate description for matters of

procedure rather than substance: *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission)*, 2021 BCCA 67 [R.N.L. Investments] at para. 57.

- [87] The chambers judge found that the District did not breach its duty of procedural fairness because it "followed the appropriate legislative steps in reviewing and approving the 2018 DP" and was not required to give the appellant notice or an opportunity to provide input.
- [88] The appellant's brief argument on this ground is the same argument he made before the chambers judge.
- [89] The District submits that the appellant's argument incorrectly assumes that the Director, in exercising his authority to renew a development permit, is required to reconsider the merits of the permit. It says the chambers judge correctly considered the Director's compliance with the notice provisions in the Procedures Bylaw prior to issuing the 2018 DP and the fact that the Bylaw does not require any public notice for development permit renewals.
- [90] The Wolfins point out that the content of the duty of fairness in the context of property development usually arises in the context of the duty owed to the applicant, for whom decisions on development permits have high stakes: see, for example, *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160 at para. 84. They also point out that the District's discretion in issuing a development permit must be exercised in accordance with the guidelines in the OCP, and say the views of neighbours such as the appellant are not binding on this decision.
- [91] It is undisputed that the duty of procedural fairness is variable, flexible and context-specific; its specific requirements depend on the context of the applicable statute and rights affected: *R.N.L. Investments* at para. 59, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 22 and *Vavilov* at para. 77. Five key factors identified in *Baker* are (i) the nature of the decision and the process followed in making it; (ii) the statutory scheme and the role of the decision within the scheme; (iii) the importance of the decision to the individual affected; (iv) the legitimate expectations of the person challenging the decision; and (v) the procedural choices made by the tribunal: *R.N.L. Investments* at para. 60.
- [92] The legitimate expectations of the person affected must result from an official practice or clear, unambiguous and unqualified assurance that certain procedures will be followed as part of the decision-making process: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at para. 95, citing *Donald J.M. Brown & John M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf)* at §7:1710.
- [93] In the context here, the appellant's interests in the 2023 Renewal are clearly subordinate to the interests of the Wolfins, to the extent that he had no statutory right to be heard by the District. Despite this, he did manage to communicate his concerns to the District and to the Wolfins, as frustrating as that process may have been for him. Importantly, the chambers judge found that the appellant's concerns, while legitimate, were not consistent with the

guidelines governing the development. It follows that the District would not have been able to take his concerns into account.

[94] As for the appellant's legitimate expectations, there is nothing on the record before us that could amount to a clear, unambiguous and unqualified assurance from the Director or other staff that he would be notified and consulted prior to the issuance of the 2023 Renewal. Quite the contrary, as the chambers judge found, the District was slow and inconsistent in responding to the appellant's requests for information about the renewal of the 2018 DP.

[95] I therefore find no basis on which to conclude that the District breached a duty of procedural fairness to the appellant.

Disposition

[96] For all the foregoing reasons, I would dismiss the appeal.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Justice Winteringham"

I AGREE:

"The Honourable Justice Riley"

[1] Throughout these reasons, I refer to the current section numbers of the Procedures Bylaw. The numbering of some of these sections changed more than once during the relevant period but the language of the applicable provisions remained unchanged.

[2] Defined in s. 4.1 of the Procedures Bylaw to include a development permit for "Sites with Difficult Terrain NE 6 where as part of the development three or fewer lots are or will be created".

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