

CANADA / JUDGMENT

Central Saanich (District) v. McHattie

2023 BCCA 461

COURT

British Columbia Court of Appeal

DECIDED

8 December 2023

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2023 BCCA 461 Central Saanich (District) v. McHattie

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Central Saanich (District) v. McHattie,

2023 BCCA 461

Date: 20231208

Dockets: CA48908; CA48909

Docket: CA48908

Between:

The Corporation of the District of Central Saanich

Appellant

(Respondent)

And

Margaret Ann McHattie and Jean Christison, as the Executors of

the Estate of Olive Jean McHattie, Deceased

Respondents

(Petitioners)

- and -

Docket: CA48909

Between:

The Corporation of the District of Central Saanich

Appellant

(Plaintiff)

And

Margaret Ann McHattie and Jean Christison, as the Executors of
the Estate of Olive Jean McHattie, Deceased

Respondents

(Defendants)

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Stromberg-Stein

The Honourable Justice Skolrood

On appeal from: Orders of the Supreme Court of British Columbia, dated
February 6, 2023 (McHattie v. Central Saanich (District), 2023 BCSC 175,
Victoria Dockets S-211190 and S-213810) and April 25, 2023
(McHattie v. Central Saanich (District), 2023 BCSC 663,
Victoria Dockets S-211190 and S-213810).

Counsel for the Appellant:

A.D. Bradley

N.S.A. Falzon

Counsel for the Respondents:

L.J. Alexander

L.R. LeBlanc

Place and Date of Hearing:

Vancouver, British Columbia

November 28, 2023

Place and Date of Judgment:

Vancouver, British Columbia

December 8, 2023

Written Reasons by:

The Honourable Madam Justice Stromberg-Stein

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Justice Skolrood

Summary:

The appellant appeals the chambers judge's orders which quashed the District's decision to force the respondent landowners to cease cutting down trees on their property; declared that the Central Saanich Tree Protection Bylaw was inapplicable to a portion of the respondents' property; and dismissed the District's action seeking to enforce the Tree Protection Bylaw. Held: Appeal dismissed. The chambers judge identified the correct standard of review and applied the standard correctly. The District's decision was unreasonable in all the circumstances considering the text, context and purpose of the Tree Protection Bylaw. The respondents' property was zoned for agricultural use and the tree cutting was for the purpose of developing the land for farming. As the judge said in the result, you cannot farm in a forest.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

Introduction

- [1] The McHattie family has owned property at 1720 Keating Cross Road in the District of Central Saanich since 1937. It is zoned agricultural and over half of it is in the Agricultural Land Reserve ("ALR"). It has always been used for farming, and over the years the property has been incrementally cleared of trees to expand the farming operations. In 2020 the McHattie family began to clear trees on the non-ALR portion of the property to prepare the land for the expansion of grain and forage crops, including barley, due to increased demands. This generated a Cease and Desist Letter from the Corporation of District of Central Saanich to McHatties advising them that without a tree-cutting permit they were in violation of a tree protection bylaw.
- [2] The appeal arises from two separate proceedings. The first is a petition proceeding under the Judicial Review Procedure Act, S.B.C. 2003, c. 26 [JRPA], commenced by the respondent landowners. The second is an action commenced by the appellant, the Corporation of District of Central Saanich (the "District"). Both proceedings relate to the application of a tree protection bylaw on the respondents' property.

- [3] The District challenges the chambers judge's orders, which (1) quashed the District's decision to force the landowners to cease cutting down trees on their property; (2) declared that the Central Saanich Tree Protection Bylaw, No. 2020, 2019 ("Tree Protection Bylaw") was inapplicable to a portion of the respondents' property; and (3) dismissed the District's action seeking to enforce the Tree Protection Bylaw.

Statutory Framework

- [4] Section 8(3)(c) of the Community Charter, S.B.C. 2003, c. 26 [Community Charter], grants municipalities incorporated under the Local Government Act, R.S.B.C. 2015, c. 1 [LGA], the power, by bylaw, to regulate, prohibit and impose requirements in relation to trees.

- [5] On October 7, 2019, pursuant to its powers under s. 8(3)(c) of the Community Charter, the District enacted the Tree Protection Bylaw. Section 4 of the Tree Protection Bylaw prohibits the cutting down of "Protected Trees" without a tree-cutting permit, subject to certain exceptions. "Protected Trees" are defined in s. 2 of the Tree Protection Bylaw as trees of a particular size and/or type.

- [6] Section 50 of the Community Charter provides:

50 (1) A bylaw under section 8 (3) (c) [spheres of authority -- trees] that is in relation to the protection of trees does not apply to the following:

- (a) land and the trees on it if forestry practices on the land are governed by a tree farm licence, permit or other authority or tenure under the Forest Act;
- (b) land and trees on it if section 21 of the Private Managed Forest Land Act applies to the land;
- (c) tree cutting or removal that is undertaken by a utility, on land owned or held by the utility, and done for the purpose of safety, maintenance or operation of the utility's infrastructure.

- (2) Subject to subsection (3), if a bylaw under section 8 (3) (c) would have the effect on a parcel of land of

- (a) preventing all uses permitted under the applicable zoning bylaw, or
- (b) preventing the development to the density permitted under the applicable zoning bylaw,

the bylaw does not apply to the parcel to the extent necessary to allow a permitted use or the permitted density. [Emphasis added.]

- (3) A bylaw referred to in subsection (2) applies without limit to a parcel if the council, by resolution, commits the municipality to

- (a) pay compensation to the owner of the parcel for any reduction in the market value caused by the prohibition, or
- (b) provide, by development permit, development variance permit or otherwise, alternative means for the parcel to be used for a permitted use or developed to the permitted density.

- (4) For the purposes of subsection (3),
 - (a) the compensation must be as determined and paid as soon as reasonably possible in an amount set by agreement between the owner and the municipality or, if no agreement is reached, by the Supreme Court, and
 - (b) the council may issue a development permit or development variance permit on its own initiative without an application from the owner.

Factual Background

- [7] The District is a municipal corporation under the Community Charter and is subject to the LGA. The respondents, Margaret Anne McHattie and Jean Christison, as Executors of the Estate of Olive Jean McHattie, Deceased, are the owners of property located in the District of Central Saanich (the "Property").
- [8] Approximately half of the Property is in the ALR established by the Agricultural Land Commission Act, S.B.C. 2002, c. 36. The Property is zoned Agriculture: A-1 under the District's Land Use Bylaw No. 1309, 1999 (the "Land Use Bylaw"). Among other uses, the Agriculture: A-1 zoning permits the respondents to use the Property for agriculture, which is defined as "the use of land for the husbandry of plants and livestock" under s. 1 of the District of Central Saanich, Bylaw No. 1309 (11 July 2017).
- [9] It is undisputed that in or around November 2020, the respondents cut down 108 trees on a portion of the Property not within the ALR, which met the definition of "Protected Tree" under the Tree Protection Bylaw. The respondents did not have a tree-cutting permit.
- [10] On November 26, 2020, the District's bylaw enforcement officer sent a letter to the respondents which demanded that they cease all work on the non-ALR portion of the Property (the "Cease and Desist Letter"). The Cease and Desist Letter stated:

The municipality received a complaint alleging that you removed trees from the above-noted property in contravention of the Tree Protection Bylaw. The allegation was confirmed during a recent site inspection.

Section 2 of the Tree Protection Bylaw defines "Protected Tree" as:

[various species and types of trees listed]

Section 4(1) of the Tree Protection Bylaw states that:

No person shall cut down any protected tree and shall not cause or permit the cutting down of a protected tree without a permit or contrary to a permit issued pursuant to this Bylaw.

Section 4(2) of the Tree Protection Bylaw further states that:

Section 4(1) does not apply to the cutting down of a protected tree if it is located on land within the ALR.

All unauthorized tree removal is subject to a \$1,000.00 fine per tree and/or tree replacement as per the bylaw. The municipality will have an arborist attend the property in order to determine the number and size of protected trees that have been removed.

As discussed, please cease all work on the non-ALR section of the property until further notice []

- [11] On January 3, 2021, the respondents wrote to the District and advised they had complied with the Cease and Desist Letter. They said they did not agree with the District's decision and "respectfully request[ed] that the Cease and Desist order on this parcel be lifted immediately" so that they could proceed with clearing additional land for farming.
- [12] On January 7 and February 4, 2021, legal counsel for the District sent letters to the respondents confirming the District's position that the respondents had contravened the Tree Protection Bylaw and requesting that they cease all work on the non-ALR portion of the Property.
- [13] In reliance on s. 50(2) of the Community Charter, on April 13, 2021, and subsequently amended on February 25, 2022, the respondents filed a petition (the "Petition"), seeking orders in the nature of certiorari challenging the decision set out in the Cease and Desist Letter, and a declaration that the District's Tree Protection Bylaw is inapplicable in respect of the respondent's farming activities.
- [14] In December 2021, the District brought an action against the respondents seeking to enforce the District's application of the Tree Protection Bylaw and seeking, inter alia, a declaration that the respondents had contravened the Tree Protection Bylaw and a mandatory injunction requiring the respondents to plant replacement trees on the Property (the "Enforcement Action").
- [15] In March 2022, the District wrote to the respondents directing them to replace 103 of the 108 protected trees said to have been cut down in contravention of the Tree Protection Bylaw with 791 trees and to post security in the amount of \$422,193.75 pursuant to the Tree Protection Bylaw.
- [16] The parties agreed that the Petition and Enforcement Action should be heard together.

The Chambers Judgment

- [17] In reasons indexed at 2023 BCSC 175 [RFJ], the chambers judge dismissed the Enforcement Action and granted the remedies the respondents sought in the Petition.

- [18] The chambers judge rejected the District's argument that the Cease and Desist Letter was not reviewable under the JRPA. She found that in the Cease and Desist Letter, "the District communicated it had made and 'confirmed' a decision that the [respondents] had removed trees from Lot A 'contrary to the District's Tree Protection Bylaw', and that such unauthorized removal was subject to a requirement of tree replacement in accordance with the Tree Protection Bylaw.": RFJ at para. 18.
- [19] The judge held the Cease and Desist Letter was a decision of a public character, and based on statutory powers, and was thus reviewable under the JRPA: RFJ at para. 15. She also held that the District had, "through its bylaw enforcement officer, exercised a statutory power with respect to potential activities on the Property that allow for the granting of declaratory relief, if such a remedy is appropriate in the circumstances.": RFJ at para. 20. These determinations have not been challenged on appeal.
- [20] The judge summarized the standard of review, which the parties agreed was reasonableness, in accordance with *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov]:
- [22] A reasonable decision is one that is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": Vavilov at para. 85. Reasonableness requires that a decision be justified in relation to the facts and law that are relevant to the decision, which serve as parameters within which the decision maker is able to exercise its delegated power: Vavilov at para. 105. Factual and legal considerations that will generally be relevant include the governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts of which the decision maker may take notice, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies: Vavilov at para. 106. A reasonable decision warrants deference from the reviewing court: Vavilov at para. 85.
- [21] The judge summarized the legislative framework authorizing the District to regulate, prohibit, and impose requirements in relation to trees, and the limitations on the applicability of tree bylaws:
- [24] The District has the power to regulate, prohibit, and impose requirements in relation to trees by way of bylaw: *Community Charter*, s. 8(3)(c). In the context of this case, it is acknowledged that the District's Tree Protection Bylaw is a valid exercise of that power. However, if such a bylaw would have the effect on a parcel of land of preventing the "development to the density permitted" under the applicable zoning bylaw, the bylaw does not apply to the parcel to the extent necessary to allow a permitted use or the permitted density: *Community Charter*, s. 50(2)(b). [Emphasis added.]

- [22] With regard to the reasonableness of the District's decision, the judge noted that "development" and "density" are not defined in the Community Charter, which meant that the meaning of the two terms had to be "determined by reference to the common law": RFJ at para. 26, citing *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42 at para. 24.
- [23] The judge referred to *Service Corporation International (Canada) Inc. v. Burnaby (City)*, 1999 CanLII 7012, 9 M.P.L.R. (3d) 242 (B.C.S.C.), rev'd in part on other grounds 2001 BCCA 708 [Service Corporation], in which Justice Bauman (then a justice of the British Columbia Supreme Court) considered the application of a similar limiting provision in s. 708(1) of the *Municipal Act*, R.S.B.C. 1996, c. 323. The judge summarized the relevant portion of Justice Bauman's analysis of s. 714(1)(b) of the *Municipal Act* as follows:
- [30] In his analysis of s. 714(1)(b) of the *Municipal Act*, Bauman J. referred to the land owners' ability to "fully develop [the property] to their respective property lines in order to allow for the maximum number of marketable internment spaces" and found that the fact that there were many trees within the cemeteries meant the bylaw would "obviously seriously impact the petitioners' ability to develop its cemeteries": SCIC at paras. 54, 66. Justice Bauman went on to conclude that the effect of s. 714(1)(b) was that "the owner is entitled to enjoy development of his or her permitted density without reference at all to the Tree Bylaw": SCIC at para. 145. An appeal of Bauman J.'s decision with respect to the "tree cutting issue" was dismissed by the Court of Appeal: *Service Corporation International (Canada) Inc. v. City of Burnaby*, 2001 BCCA 708 at paras. 30-38 .
- [24] Relying on *Service Corporation*, the judge held that "[w]here the permitted use is agriculture, and involves the husbandry of plants as is the case in the land at issue in this proceeding, 'density' includes yield, and 'development' includes an increase of that yield.": RFJ at para. 33. She rejected the District's argument that the meaning of "development" should be limited to construction activity: RFJ at para. 33.
- [25] In concluding that the District's interpretation of the Tree Protection Bylaw was unreasonable, the judge stated:
- [34] Since the effect of prohibiting the removal of trees, and the tree replacement requirement, would be to prevent development to the density permitted under the zoning bylaw, no application for tree removal could be denied. In such circumstances, as was the case in SCIC BCCA, "all the provisions of the bylaw relating to permits have no application to the protected trees" on the non-ALR portion of Lot A and the Tree Protection Bylaw does not apply to them: para. 36. The permit requirements are an impediment to the allowance of the permitted density. The entirety of the Tree Protection Bylaw is inapplicable. The District's decision to the contrary was unreasonable.

[26] The chambers judge rejected the District's argument that declaratory relief was not available to the respondents: RFJ at paras. 35-37. She dismissed the Enforcement Action, finding that it was "premised on the same unreasonable interpretation of the Tree Protection Bylaw": RFJ at para. 39.

On Appeal

[27] The District submits the chamber judge erred by:

- a) misapplying the approach to the standard of review of reasonableness;
- b) misapplying the principles of statutory interpretation; and
- c) failing to defer to the District's reasonable interpretation of the Community Charter and its bylaws including its conclusion that:
 - i. the planting of crops is not "development" of a parcel under s. 50(2)(b) of the Community Charter; and
 - ii. the amount of density of a parcel that may be covered by crops is not a measure of the "density" of the "development" of the parcel under s. 50(2)(b) of the Community Charter, even if the planting of crops is "development" of the parcel for the purpose of that section.

Discussion

Standard of Review

[28] An appeal of a decision made on judicial review requires the appellate court to determine whether the chambers judge identified the correct standard of review and applied it correctly: *Fraser Mills Properties Ltd. v. Coquitlam (City)*, 2018 BCCA 328, at para. 12; *0940460 BC Ltd. v. Burnaby (City)*, 2020 BCCA 142, at para. 23.

[29] The selection and application of the standard of review are questions of law for which no deference is owed: *Lemieux v. British Columbia (Superintendent of Motor Vehicles)*, 2019 BCCA 230 at para. 88, leave to appeal ref'd, 2020 CanLII 25170 (S.C.C.). As this Court stated in *1193652 B.C. Ltd. v. New Westminster (City)*, 2021 BCCA 176 [New Westminster]:

[41] When an appellate court assesses a decision of a chambers judge on judicial review, it is not strictly necessary to identify an error made by the judge. Although the reasoning of the court below may be instructive, the decision is not entitled to deference on appeal. Rather, an appellate court steps into the shoes of the reviewing judge and applies the appropriate standard of review to the original decision under review: *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 at para. 48; *Sereda v. Ni*, 2014 BCCA 248 at para. 35.

[30] Accordingly, while the chambers judge's reasons and errors alleged by the District may shape this Court's analysis, the principal task is to "step into the shoes" of the chambers judge and determine whether the District's decision was reasonable.

Legal Principles

- [31] In Vavilov, the Court began its discussion of reasonableness review with the acknowledgement that not all statutory decision makers will be required to provide formal reasons for their decisions. Whether or not reasons are provided will impact how a court conducts reasonableness review: Vavilov at para. 76. The question of whether reasons are required must be answered with reference to contextual factors identified in Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.
- [32] Where reasons are required, the focus of reasonableness review is to review the decision, which includes both the decision maker's reasoning process and the outcome: Vavilov at para. 83. The reasons are "the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first.": Vavilov at para. 84.
- [33] Where reasons are not required, the "reviewing court must look to the record as a whole to understand the decision": Vavilov at para. 137. Where "neither the record nor the larger context sheds light on the basis for the decision the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable": Vavilov at para. 138. Without formal reasons, the focus will inevitably be on the outcome of the decision, rather than the reasoning process.
- [34] In all contexts, reasonableness remains a single, robust standard which seeks to determine whether the decision under review is "based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker": Yu v. Richmond (City), 2021 BCCA 226 [Yu] at para. 51, citing Vavilov at paras. 85, 99, 105.
- [35] In Vavilov, the Court described two types of fundamental flaws which may render a decision unreasonable: (1) a failure of rationality internal to the reasoning process; and (2) a decision that is in some respect untenable in light of the relevant factual and legal constraints: Vavilov at para. 101. By necessity, where the decision maker is not required to provide reasons or the reasoning underlying a key aspect of their decision is unclear, the reviewing court's focus will be on the latter type of flaw: Yu at para. 51.
- [36] The Court provided the following overlapping and non-exhaustive list of factual and legal considerations which may constrain a decision maker (Yu at para. 52, citing Vavilov at para. 106):
- (1) the governing statutory scheme;
 - (2) other relevant statutory or common law;
 - (3) the principles of statutory interpretation;
 - (4) the evidence before the decision maker and facts of which the decision maker may take judicial notice;

- (5) the submissions of the parties;
 - (6) the past practices and decisions of the administrative body; and
 - (7) the potential impact of the decision on the individual to whom it applies.
- [37] Where an administrative decision engages issues of statutory interpretation, reasonableness review does not give the decision maker "free reign in interpreting their enabling statutes" or "license to enlarge their powers beyond what the legislature intended": Vavilov at para. 68. The reviewing court's role is to determine whether the decision maker applied the modern principle of statutory interpretation: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 [Mason] at para. 69; Vavilov at para. 120; Yu at para. 53. The modern principle requires the words of a statute to be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 at para. 26.
- [38] Assessing a decision maker's application of the modern principle of statutory interpretation does not mean that a reviewing court may conduct a de novo analysis or seek to determine the "correct" answer: Mason at para. 68. The starting point must always be the reasons provided by the decision maker. If reasons have not been provided, "the reviewing court should attempt to discern the interpretation adopted from the record and determine whether it is reasonable": Yu at para. 53, citing Vavilov at para. 123; see also 1120732 B.C. Ltd. v. Whistler (Resort Municipality), 2020 BCCA 101 [Whistler] at para. 84.
- [39] In some circumstances, there may be only one reasonable interpretation of the statutory provision at issue: Vavilov at paras. 68, 124; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 38. However, as the Court emphasized in Mason, "the possibility of a single reasonable interpretation is not a starting point of reasonableness review, as this would be contrary to a 'reasons first' approach. Rather, it is a conclusion that a reviewing court may draw as a result of a proper reasonableness review, as part of the court's consideration of the appropriate remedy": Mason at para. 71.

The Decision Under Review

- [40] The chambers judge held that the Cease and Desist Letter contained a decision that the respondents had contravened the Tree Protection Bylaw. This aspect of the chambers judge's decision is not challenged on appeal. Accordingly, it is the decision set out in the Cease and Desist Letter sent to the respondents on November 26, 2020, that is the decision subject to a reasonableness review.
- [41] In the Cease and Desist Letter, the District's bylaw enforcement officer refers to the Tree Protection Bylaw, undisclosed complaints, and a subsequent site visit. The underlying legal rationale for the decision--that is, how the District concluded that the Tree Protection Bylaw applied to the respondents--is not provided.

- [42] In my view, implicit in the Cease and Desist Letter is the District's determination that either: (1) the planting of crops is not "development" of a parcel under s. 50(2)(b) of the Community Charter; or (2) the amount of density of a parcel that may be covered by crops is not a measure of the "density" of "the development" of a parcel under s. 50(2)(b) of the Community Charter. These are not interpretations of what s. 50(2)(b) means, but rather what it does not mean. This distinction may appear to be somewhat semantic, but, as I will explain, the lack of an explicit interpretation impacts the process of determining whether the District's decision was reasonable.
- [43] Counsel for the District has submitted that this Court should consider the District's submissions as part of the rationale for the District's decision itself. However, Vavilov directs a reviewing court to use all available resources to deduce the reasoning process that underlies the decision itself: Vavilov at paras. 137-138. This includes the actual reasons provided, the record of the decision and the outcome. In my view, it does not extend to the submissions of counsel for the decision maker, which cannot be said to underlie the decision itself. In this case, the District's submissions are legal arguments, which will be relevant in determining whether the District's decision was reasonable, but they are not accorded deference by this Court as if they constitute the rationale for the decision itself.

Were the Reasons Provided Sufficient?

- [44] The respondents submit that the District was required to provide reasons and that it failed to do so, which renders the decision unreasonable.
- [45] The District disputes that the sufficiency of reasons is relevant in this appeal. They say: (1) "a lack of, or inadequacy of reasons" was not raised as a ground of review before the chambers judge and should not be considered by this Court; (2) the District was not required to provide reasons, but adequate reasons were provided; and (3) that the District has a continuing ability to provide the rationale for its position.
- [46] In my view, the District was required to provide reasons for its decision that the respondents had contravened the Tree Protection Bylaw and its order that the respondents cease work on the non-ALR portion of the Property. The decision, however preliminary, was in the nature of enforcing a prohibition and there was a significant potential adverse impact to the respondents: see *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission)*, 2021 BCCA 67 at paras. 63-67.
- [47] However, I disagree that the sufficiency of the reasons renders the District's decision unreasonable in these circumstances. In my view, the reasons provided in the Cease and Desist Letter were sufficient in the context of the decision being made. The rationale for the decision was that the bylaw applied and the respondents had contravened it. Implicit in the decision is the District's determination that the Tree Protection Bylaw was applicable.

- [48] In the context of a decision to issue a notice alleging a bylaw violation, the decision maker is not required to provide formal reasons detailing their interpretation of the bylaw and authorizing legislation. An interpretation of the authorizing legislation is a constituent element of the decision which is secondary, in most circumstances, to the factual basis underlying the bylaw violation. To impose a requirement that the District provide its interpretation of the relevant authorizing legislation at the time it alleges a bylaw violation would "have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice": Vavilov at para. 128.
- [49] The respondents were provided the information necessary to understand the decision that was made, without an explicit interpretation of the bylaw or the applicability of the bylaw under the Community Charter. It was open to the respondents to challenge the reasonableness of the decision on the basis that the bylaw was inapplicable, which they have done.

Was the Decision Unreasonable?

- [50] The District submits the chambers judge improperly conducted her own analysis of the Community Charter and, in doing so, ignored the District's interpretation. Counsel for the District has provided an interpretation of s. 50(2)(b), which the District says is reasonable because it is consistent with the broad and purposive approach to the interpretation of municipal enabling legislation, the text, context and purpose of the Community Charter, and the decisions of this Court in *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271 [Society of Fort Langley], and *0940460 B.C. Ltd. v. Burnaby (City)*, 2020 BCCA 142 [0940460]. I will return to the substance of the District's statutory interpretation arguments.
- [51] The respondents raise several arguments in response. First, they say that the decision in *Service Corporation* constitutes a common law legal constraint which is relevant to determining whether the decision was unreasonable. In the respondents' submission, the chambers judge correctly considered and applied the principles from *Service Corporation*.
- [52] Second, the respondents submit that it was necessary for the chambers judge to conduct some analysis of the interpretation of s. 50(2)(b) of the Community Charter and it was not an error for her to do so, both in determining the Petition and the Enforcement Action.
- [53] Finally, the respondents submit that the chambers judge's orders can be upheld on the basis that the District's interpretation of the Community Charter would effectively eliminate the zoned permitted use of farming, which is contrary to the scheme of regulation found in the Community Charter and Local Government Act.

Analysis

- [54] The District's decision depends, in part, on its interpretation of s. 50(2)(b) of the Community Charter and its conclusion that the Community Charter did not render the Tree Protection Bylaw inapplicable to the non-ALR portion of the Property. As I have already explained, the decision does not elaborate how the District approached the task of interpreting s. 50(2)(b), but the District's conclusion regarding s. 50(2)(b) is clear.
- [55] In my view, a reasonableness analysis requires consideration of whether s. 50(2)(b) could be interpreted as supporting the District's decision. This is consistent with the approach taken by this Court in *Whistler and English v. Richmond (City)*, 2021 BCCA 442. Accordingly, I will proceed by reviewing the interpretation that counsel for the District has proposed, and assessing it in light of the modern approach to statutory interpretation.
- [56] The District's interpretation of "development" involves three observations about the immediate text, context and purpose in which the term is used in s. 50(2)(b). First, the District observes that it is most usual for the term "development" to be used in the land planning context to connote the activity of constructing buildings and structures. The District refers to the usage of the term "developed" in s. 507 of the Local Government Act, which requires the owner of lands being "developed" to provide specified works and services. The District submits, for s. 507 purposes, nobody would contend land is being "developed" when a farmer plants crops on it.
- [57] The District's second observation is that "development" connotes a narrower category of activity than "use", which is referred to in s. 50(2)(a) of the Community Charter. In the District's submission, interpreting "development" as enhancing or increasing a permitted activity destroys the distinction between "development" of land under s. 50(2)(b) and "use" of land under s. 50(2)(a).
- [58] Third, the District observes that "development" is used in s. 50(2)(b) in reference to a parcel of land, rather than the development of an enterprise or business, suggesting s. 50(2)(b) is concerned with additions of buildings and structures to the parcel.
- [59] Next the District considers dictionary definitions. The Cambridge Online Dictionary definition cited by the District defines "develop" as "to (cause something to) grow into a more advanced, larger or stronger form". The District concludes that, in the land use planning context, "develop" connotes making the area of an object parcel fuller through the addition of "permanent physical things within that parcel area". In the District's submission, it is "unlikely the Legislature intended the planting of crops to be considered 'development' of a parcel for s. 50(2)(b) purposes" because "[t]hat is not the 'understanding that spontaneously comes to mind' when one simply reads s. 50."
- [60] By way of a hypothetical, the District argues that an interpretation of "development to the density permitted", which includes enhancing or increasing a permitted use, would render s. 50(2)(a) superfluous. The District provides the hypothetical of a zoning bylaw which

restricts the use of land to a grass playing field. Under this example, the District submits that s. 50(2)(a) would render a tree protection bylaw inapplicable as "preventing all uses permitted under the applicable zoning bylaw". If planting grass to create a playing field were considered "development", the District says that s. 50(2)(a) would have no application because s. 50(2)(b) would permit the use of the land as a grass playing field "to the density permitted".

[61] The District submits that Service Corporation is not contrary to its proposed interpretation of "development" because Service Corporation concerned whether a tree protection bylaw prevented "the construction of significant internment buildings and structures" and, further, was decided on the basis of a concession that the tree protection bylaw at issue in that case would have the effect of preventing the development of the petitioner's cemetery operations as permitted under the applicable zoning bylaw.

[62] In addressing the meaning of the term "density", the District turns to ss. 455 and 479(1)(c) of the Local Government Act, which provide:

455 In this Part:

[]

"density", in relation to land, a parcel of land or an area, means

- (a) the density of use of the land, parcel or area or
- (b) the density of use of any buildings and other structures located on the land or parcel, or in the area.

...

479 (1) A local government may, by bylaw, do one or more of the following:

[]

- (c) regulate the following within a zone:
 - (i) the use of land, buildings and other structures;
 - (ii) the density of the use of land, buildings and other structures;
 - (iii) the siting, size and dimensions of
 - (A) buildings and other structures, and
 - (B) uses that are permitted on the land;
 - (iv) the location of uses on the land and within buildings and other structures;

[63] In the District's submission, the power to regulate "density" in a zoning context involves controlling the number of buildings or structures of a specified kind that are permitted in an area, which must be distinguished from the separate power to enact measures such as lot

line setbacks and coverage rules which control the siting, size or location of uses on land. If "density" is given its broadest possible meaning, the District says that a zoning bylaw that regulates the size and siting of buildings or other uses under s. 479(1)(c)(iii) would also be a density control under s. 479(1)(c)(ii), which is subject to different variance powers under s. 498.

- [64] The District relies on *Society of Fort Langley* and 0940460, where this Court held that bylaws regulating the amount of a lot which may be used for a particular purpose are not "density" controls. In *Society of Fort Langley*, this Court interpreted "density" in s. 872 of the Local Government Act, R.S.B.C. 1996, c. 323, (now s. 455) as "the quantity of people or things in a given area or space": at para. 30. In 0940460, this Court applied *Society of Fort Langley* and held that the re-siting of a pizza oven affected lot coverage but not "density or density of occupancy". In the District's submission, it cannot be unreasonable to give the term "density" the same meaning as the Court found in *Society of Fort Langley* and 0940460.
- [65] The District concludes that its proposed interpretation better reflects the purpose of s. 50 of the Community Charter, which in the District's submission "was clearly designed to allow local governments to adopt meaningful tree removal prohibitions without always having to pay compensation to owners who are affected by those prohibitions".
- [66] In my respectful view, the District's proposed interpretation is based in a flawed approach to statutory interpretation, which works backwards from the District's preferred meaning, determined without reference to the context and the statutory scheme.
- [67] The District's principal error is that it reads in a limit on the meaning of "development" that is not apparent in the text of the statute. Rather than addressing the purpose of the provision and how it would operate, the District interprets the meaning of "development" relying on the broader land use context. However, as the respondents submit, even the broader land use context does not invariably lead to the District's interpretation of development. For example, in s. 8(1) of the Classification of Land as a Farm Regulation, B.C. Reg. 411/95, under the Assessment Act, R.S.B.C. 1996, c. 20, the term "development" is used in the context of "land being developed for a qualifying agricultural use".
- [68] The District's approach is flawed because, as the chambers judge noted, the meaning of the words "development" and "density" must be informed by the uses permitted under applicable zoning designations, which are the immediate context in which "development" and "density" are used in s. 50(2)(b). In this case, the land is zoned for agricultural use and the permitted uses included farming.
- [69] Contrary to the District's submission that s. 50 is "designed to allow local governments to adopt meaningful tree removal prohibitions without having to pay compensation", s. 50 creates an obligation to pay compensation where a municipality seeks to enact and enforce a tree protection bylaw which has the effect of "preventing all uses permitted" or "preventing the development to the density permitted" under the applicable zoning bylaw. If the legislature intended to grant municipalities the power to prohibit tree removal without

paying compensation in all circumstances, s. 50 would not exist in its present form.

- [70] The result of the District's narrow interpretation of "development" is that lands zoned for uses which do not involve construction of buildings and structures are effectively omitted from the scheme set out in s. 50. A landowner whose land is zoned for the construction of buildings would be free to remove trees in order to construct the number and type of buildings permitted, but an owner whose land is zoned for agricultural use may be altogether precluded from using it for that purpose. This result is plainly unsupported by the text and purpose of the provision.
- [71] It is an accepted principle of statutory interpretation that the legislature does not intend to produce absurd consequences: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 27. The District's proposed interpretation, by limiting the meaning of the term "development" to the construction of buildings and structures, results in the absurd consequence that a farmer whose land is zoned for agricultural use may be precluded from farming on the wooded areas of their property, but at the same time would be free to remove trees which prevent the construction of buildings that are used for ancillary farming purposes. This, in my view, cannot be the outcome intended by the legislature.
- [72] Relying on its interpretation of "development", the District then says its interpretation of "density permitted" is supported by *Society of Fort Langley and 0940460*. However, both decisions interpreted "density" in the context of bylaws which modify the use of buildings and structures. A necessary distinction was drawn, in that context, between the powers to regulate lot coverage and density because to find otherwise would collapse two explicit regulatory powers granted to municipalities into one.
- [73] In my view, *Society of Fort Langley and 0940460* stand for the proposition that density controls can be distinguished from other regulations concerning lot coverage, setbacks, and the sitting, size, and dimensions of buildings and uses, but neither decision provides the meaning of "development to the density permitted under the applicable zoning bylaw" in s. 50(2)(b) where the meaning of "development" is not limited to the construction of buildings. In this regard, the District's approach is flawed because it interpreted the two terms independently and relied on its unduly limited interpretation of "development" to justify its interpretation of "density".
- [74] The flaw in the District's interpretation is further evident in the District's own hypothetical. Under the same hypothetical, s. 50(2)(b) is rendered inoperative because the permitted use of land does not involve buildings or structures. Moreover, if the permitted uses included the planting of grass for a playing field and the construction of a building, the District's proposed interpretation could result in the landowner being permitted to remove trees in order to construct the building but prohibited from removing trees to create the playing field. This is another absurd result of the District's interpretation, which ignores that zoning bylaws permit a variety of uses, not all of which involve buildings and structures.

- [75] For these reasons, I am of the view that the interpretation proposed by the District is unreasonable. Accordingly, it is not necessary to consider the other legal and factual constraints which may have applied to the District's decision in these circumstances; nor is it necessary to determine whether there is another reasonable interpretation of s. 50(2)(b) that could justify the District's decision.
- [76] I would, however, make the following comments concerning the interpretation reached by the chambers judge and what a reasonable interpretation may be in these circumstances.
- [77] The District says that the interpretation reached by the chambers judge "left no circumstance where a tree bylaw may materially impede the use of land without a municipality having to pay compensation". This is an overstatement, as is the District's submission that under the chambers judge's interpretation, "[a]n owner of residential property who wishes to plant grass or a garden could ignore a municipality's tree protection bylaw since removing the trees would be necessary to allow the residential use to be "enhanced" or "increased".
- [78] The District's submission is flawed because it equates other activities, such as planting grass or a garden, with the permitted use under a zoning bylaw. In the residential context, planting grass or a garden are not the permitted uses, nor do they "increase" or "enhance" the permitted use itself, which is constructing a residence. In the residential zoning context, I do not take the District's position as disputing that a tree bylaw would be inapplicable to the extent that it prevents a residence from being constructed.
- [79] I do not think it is necessary to say whether there is only one reasonable interpretation of s. 50(2)(b) as a whole in these circumstances. However, I do think that "development" can only reasonably be interpreted as occurring on all parcels, whether or not the permitted use includes constructing buildings and structures. In other words, for every parcel, regardless of whether constructing buildings and structures is a permitted use, "development to the density permitted" occurs and is insulated from the application of a tree protection bylaw. This is the only interpretation which gives effect to the purpose of s. 50, which is an explicit limit on municipal powers, and which does not discriminate between constructive vs. non-constructive uses of land.
- [80] In my view, the development of a parcel can connote the act of modifying the land in order to make it suitable for a permitted use or uses such as, in this case, farming. This interpretation does not conflate "use" and "development" because development of the parcel is as a necessary precursor to, and distinct from, a permitted use. Development is an active process when tree bylaw issues will typically arise.
- [81] Accordingly, I see no fault in the chambers judge's interpretation of the provision. The chambers judge found that "[d]evelopment to the density permitted includes enhancing or increasing the permitted activity, which in the context of agriculture includes increasing the potential yield of the crop permitted under the applicable zoning bylaw."

Conclusion

- [82] Stepping into the shoes of the chambers judge, I would agree she identified the correct standard of review and applied the standard correctly. She was not presented with a rationale underlying the District's decision itself, and accordingly was not obligated to give primary consideration to District counsel's submissions concerning the interpretation of s. 50. She rejected the District's interpretation for reasons I find to be sound, and concluded that s. 50 can only be interpreted as applying to the Property in these circumstances. I only disagree with the chambers judge that it was necessary to opine on whether there is only one reasonable interpretation for s. 50.
- [83] I agree with the chambers judge's approach and her application of the reasonableness standard to the administrative decision under review. I also agree with her conclusion that the decision under review was unreasonable. As the judge said in the result, you cannot farm in a forest.
- [84] The District did not, in the alternative, seek an order remitting this matter back to the District for reconsideration in the event that this Court found the District's decision to be unreasonable. The District did not point to any alternative basis upon which the decision could be upheld. That being the case, I see no purpose in remitting the matter back to the District.
- [85] Further, I do not find that the judge committed an error in principle by granting the remedies sought by the respondents.
- [86] I would dismiss the appeal.

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Justice Skolrood"

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Prepared on 29 October 2026 · Esheria