

CANADA / JUDGMENT

Compagna v. Nanaimo (City)

2018 BCCA 396

COURT

British Columbia Court of Appeal

DECIDED

25 October 2018

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2018 BCCA 396 Compagna v. Nanaimo (City)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Compagna v. Nanaimo (City),

2018 BCCA 396

Date: 20181025

Docket: CA43746

Between:

Thomas Neil Compagna and

Tammy Rae Compagna

Appellants

(Petitioners)

And

City of Nanaimo and Darcy Fox

Respondents

(Respondents)

Before:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Savage

The Honourable Madam Justice Fisher

On appeal from: An order of the supreme Court of British Columbia,
dated June 9, 2016 (Compagna v. Nanaimo (City), 2016 BCSC 1045,
Vancouver Registry S151853).

Counsel for the Appellants:

J.B. Melville

Counsel for the Respondents:

S. Manhas

Place and Date of Hearing:

Vancouver, British Columbia

September 27, 2018

Place and Date of Judgment:

Vancouver, British Columbia

October 25, 2018

Written Reasons by:

The Honourable Mr. Justice Savage

Concurred in by:

The Honourable Mr. Justice Goepel

The Honourable Madam Justice Fisher

Summary:

The appellants seek to set aside an order of the chambers judge dismissing their petition for judicial review of the respondents' refusal to issue a building permit. The respondents refused to issue a building permit on the basis that they required an updated geotechnical report certifying the safety of the property. The chambers judge dismissed the petition for judicial review, finding that the respondents had not acted contrary to the applicable legislation nor exercised their discretion unreasonably. The appellants submit the chambers judge erred in incorrectly determining the scope of a building inspector's discretion under the Community Charter and in failing to consider relevant evidence.

Held: appeal dismissed. The Community Charter conferred authority on a building inspector to request an up-to-date geotechnical report, and the respondents' decision to request an updated report from the appellants was reasonable. The evidence claimed to be relevant by the appellants was determined by the respondents not to meet the requirements of the Community Charter, and this conclusion was reasonable. The chambers judge did not err in finding the respondents exercised their discretion to refuse a building permit application reasonably.

Reasons for Judgment of the Honourable Mr. Justice Savage:

I. Introduction

- [1] This appeal concerns an application for a building permit made by Thomas Neil Compagna and Tammy Rae Compagna (the "Compagnas") to construct a single-family dwelling on their property (the "Subject Property") located in an area known as the North Slope of the City of Nanaimo (the "City").
- [2] The Compagnas' building permit application was denied by an employee of the respondent City, and their application for reconsideration by City council was also denied. The Compagnas issued a petition seeking a declaration that they are entitled to a building permit and an order compelling issuance of a building permit. The petition was dismissed by Mr. Justice Schultes in reasons indexed as *Compagna v. Nanaimo (City)*, 2016 BCSC 1045 ("RFJ").
- [3] On appeal to this Court, the Compagnas say the judge below erred in failing to consider some of the evidence submitted in support of their building permit application, and in incorrectly determining the scope of the building inspector's discretion under s. 56 of the Community Charter, S.B.C. 2003, c. 26.
- [4] For the reasons that follow I would dismiss the appeal.

II. Background

- [5] The Subject Property, a waterfront lot with a steep ocean-facing slope, is located in the North Slope area of the City (RFJ at para. 3). It is subject to the North Slope Development Policy, a policy which, in designated high-hazard areas, prohibits construction within 80 metres of the crest of the slope unless an engineering report submitted in support of a building application is reviewed and found acceptable by a geotechnical engineer retained by the City. The Subject Property falls under the "high hazard" designation (RFJ at para. 4).
- [6] In 2002, a large plot of land containing what is now the Subject Property (the "Parent Property") was proposed for subdivision (RFJ at para. 5). At that time, s. 699 of the Local Government Act, R.S.B.C. 1996, c. 323 [LGA], governed the issuance of building permits on land at risk of certain geological hazards. Under this provision, if a building inspector thought land on which construction was proposed was subject to or was likely to be subject to a geological hazard, then the building inspector could require the landowner to supply a report from a geotechnical engineer certifying the land was safe for its intended use. If the

engineer added conditions for construction to his or her report, the landowner had to covenant with the municipality to comply with those conditions in order to obtain a building permit.

- [7] In 2003, as part of the subdivision approval process, the then-owners of the Parent Property entered into a restrictive covenant with the City (the "Restrictive Covenant"), agreeing not to build on the Parent Property except in accordance with the terms of the Restrictive Covenant. The Restrictive Covenant was registered on title to the Parent Property (RFJ at paras. 5-6).
- [8] The Restrictive Covenant included a report and supplement (the "Geotechnical Report") from Gerry Lewkowich, a geotechnical engineer, and an independent review of the Geotechnical Report (the "Geotechnical Review") by an engineer retained by the City (RFJ at para. 7). The Restrictive Covenant provided that the Parent Property could only be used in the manner set out in the appended Geotechnical Report, and that nothing contained in the Restrictive Covenant prejudiced or affected the rights of the City in the exercise of its functions (RFJ at paras. 12, 14-15).
- [9] The Geotechnical Report discussed the geological vulnerabilities of the Parent Property and concluded the property was suitable for residential building lot development provided the recommendations in the Geotechnical Report were followed (RFJ at para. 10).
- [10] The recommendations included the following: (1) a minimum setback from the ocean-facing slope for any residential structures; (2) a review by a geotechnical engineer of any development plans for residential structures before issuance of a building permit; and (3) an ongoing program to monitor the position of the ocean boundary and the extent of erosion of the slope over time (RFJ at paras. 10-12). The conclusion that the Parent Property was safe for residential development was based on a probability of up to 10% in 50 years of a severe geotechnical hazard, the then-applicable standard under the BC Building Code (RFJ at paras. 8-9).
- [11] In 2003, the Parent Property was subdivided, creating the Subject Property. Ms. Compagna became the registered owner of the Subject Property in 2004 and Mr. Compagna became a co-owner in 2013 (RFJ at para. 18). The Restrictive Covenant remained registered against title to the Subject Property.
- [12] In 2010, the BC Building Code was amended to create a more stringent standard for assessing whether land with the potential for slope instability is safe for construction. The new standard requires engineers to consider a probability of up to 2% in 50 years of a severe geotechnical hazard, rather than the former standard of 10% in 50 years.
- [13] From 2010 to 2013, the Compagnas submitted additional geotechnical reports in support of an application for a building permit for the Subject Property. The reports were found unsatisfactory upon review by third-party engineers retained by the City. Those reports were not relied on in these proceedings.

- [14] In April 2014, the Compagnas retained Westmark Construction Ltd. ("Westmark") to submit a building permit application for a single-family dwelling on the Subject Property (the "Building Permit Application") to the City on their behalf (RFJ at para. 20). The materials submitted in support of the Building Permit Application included a BC Building Code Schedule B form certifying that the design of the geotechnical components of the building plans comply with the BC Building Code and other enactments respecting safety (the "Schedule B Form"). Westmark submitted the Building Permit Application in June 2014.
- [15] On July 3, 2014, the City advised the Compagnas, through Westmark, that the Building Permit Application could not be processed until an updated geotechnical report was submitted and favourably reviewed by a third-party engineer as per the North Slope Development Policy. The City advised the Compagnas that a Schedule B form was not sufficient for this purpose.
- [16] In reply, the Compagnas, through Westmark, informed the City that they would not be submitting a new geotechnical report and asked the City to adjudicate the Building Permit Application as it was.
- [17] The respondent Darcy Fox ("Mr. Fox"), a supervisor of building inspections, replied to Westmark via a letter dated July 10, 2014. He informed the Compagnas that the Community Charter provided building inspectors with authority to request a geotechnical report certifying that land on which construction is proposed can be safely used for the use intended if that land is subject to, or likely to be subject to, a land slip. He noted that the North Slope Development Policy required third-party approval of geotechnical reports and that previous geotechnical reports submitted by the Compagnas were found unacceptable after third-party review. Mr. Fox stated the Building Permit Application would be cancelled if an updated report was not submitted (RFJ at para. 23).
- [18] In response to Mr. Fox's request for a geotechnical report, the Compagnas, through Westmark, provided the City with a copy of the Restrictive Covenant and the attached Geotechnical Report and Geotechnical Review (RFJ at para. 24).
- [19] Mr. Fox advised the Compagnas that the report was not current (RFJ at para. 24). Mr. Fox explained his two principal concerns with the Geotechnical Report in an affidavit: (1) the report was prepared for the purpose of a subdivision application, not a building permit application; and (2) the BC Building Code has adopted more stringent standards for assessing risk than the standard used in the Geotechnical Report (RFJ at paras. 25-27).
- [20] On July 31, 2014, the Compagnas wrote to the City requesting a reconsideration of the Building Permit Application by City council pursuant to s. 56(6) of the Community Charter. They took the position that the materials they had provided met the requirements of s. 56. In September 2014, the City council passed a resolution denying the Compagnas' request for reconsideration (RFJ at paras. 29-30).

III. Decision Below

- [21] In March 2015, the Compagnas brought a petition for judicial review. The petition sought a declaration that they are entitled to a building permit and an order compelling Mr. Fox to issue a permit to them.
- [22] The Compagnas made three principal arguments at the petition hearing. First, they argued the Geotechnical Report fulfilled the requirement under s. 699 of the LGA, the predecessor provision to s. 56 of the Community Charter, and that the City did not have authority to request an additional report. They further argued the City could not impose a third-party review policy because it went beyond the requirements set out in the statute. Second, the Compagnas argued the Restrictive Covenant was a contract between the previous owners and the City to allow for construction in accordance with the Geotechnical Report (RFJ at para. 33). Lastly, they argued that section 4.9 of the City of Nanaimo, Bylaw No. 5693, Building Bylaw (2003) (the "Building Bylaw") did not permit refusal of the Building Permit Application (RFJ at para. 36).
- [23] Mr. Fox and the City took the position that s. 56 of the Community Charter conferred broad discretion on a building inspector to require additional reports, and that the passage of time, amendments to the BC Building Code and different purpose for which the Geotechnical Report was created (subdivision rather than proposed construction) were compelling reasons to require an additional report in this case (RFJ at paras. 38-41).
- [24] In an order made on June 9, 2016, the chambers judge dismissed the Compagnas' petition. The judge did not agree the Compagnas had fulfilled the requirements for a building permit.
- [25] The chambers judge found the Restrictive Covenant with the City was registered pursuant to s. 86(1)(d) of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], not s. 699 of the LGA. Section 86(1)(d) of the LTA concerns subdivision approval of land at risk of certain geological hazards. It allows an officer reviewing an application for the subdivision of land at risk of flooding, erosion, land slip, or avalanche to request a report by an engineer or geoscientist certifying the land may be safely used for its intended use.
- [26] Since the Restrictive Covenant was not entered into pursuant to s. 699 of the LGA, the judge found this foreclosed the Compagnas' argument that the City's authority to request a report under s. 56 of the Community Charter was spent.
- [27] In any event, the judge found that s. 56 authorized Mr. Fox to request an updated report. He held that the amendment to the BC Building Code was a compelling reason for requiring an additional report, but that even without this amendment Mr. Fox would have been entitled to require a new report to address the issues raised in the Geotechnical Report.
- [28] The judge did not find any problem with the North Slope Development Policy requirement of a third-party review. He held that municipalities are empowered to create policies to inform the exercise of delegated discretion as long as such policies do not exceed the authority delegated or prevent discretion from being exercised on the merits of a case (RFJ

at para. 50). He held that the third-party review requirement actually advanced the purpose of s. 56 - ensuring safe construction in vulnerable areas - by providing building inspectors with the information necessary to exercise their discretion in an informed way (RFJ at para. 51).

- [29] The judge also did not agree that the Restrictive Covenant contained a promise from the City to the owners about future construction on the Parent Property. He found the Restrictive Covenant concerned subdivision and "had nothing to do with building permits" (RFJ at para. 49).
- [30] Lastly, the judge found that the Building Bylaw permitted Mr. Fox to refuse the Building Permit Application due to the lack of a current geotechnical report (RFJ at paras. 52-54). Section 4.9.1 of the bylaw permitted refusal of a building permit application if the information submitted was "inadequate to determine compliance with [an] enactment". The absence of a suitable geotechnical report in this case created a situation where compliance with s. 56 of the Community Charter could not be determined and so Mr. Fox's refusal was reasonable.
- [31] In conclusion, the chambers judge stated:
- [54] In short, I have not been persuaded that in rejecting this permit application because of the absence of an updated geotechnical report, Mr. Fox or City council acted contrary to the terms of the applicable legislation or exercised their discretion unreasonably. As a result, it is unnecessary to consider what specific remedies would have been appropriate if I had made either finding.

IV. On Appeal

[32] The issues on appeal are:

- (1) Did the chambers judge err in incorrectly determining the scope of the building inspector's discretion under s. 56 of the Community Charter?
 - (2) Did the chambers judge err in failing to consider some of the evidence submitted to the City in support of the Building Permit Application?
- [33] The role of this Court on an appeal from a judicial review decision is to determine whether the chambers judge identified the correct standard of review and applied that standard correctly. The appellate court should focus on the administrative decision under review and effectively step into the shoes of the chambers judge: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para. 43; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47; *Fraser Mills Properties Ltd. v. Coquitlam (City)*, 2018 BCCA 328 at para. 12 [Fraser Mills].

- [34] The parties' submissions on appeal, and in the court below, focused on the decision of Mr. Fox to refuse the Building Permit Application, rather than City council's refusal to reconsider Mr. Fox's decision. Although City council's refusal to reconsider is the final decision, and properly the decision being reviewed, the parties argued this case as though the decision of City council was made on the same grounds as the decision of Mr. Fox. The record before us is not clear on what was before City council.
- [35] In light of the two issues framed by the appellant I am satisfied that, in this case, nothing turns on the difference. That is, the scope of the building inspector's discretion under s. 56 of the Community Charter, the first issue raised on appeal, does not turn on the difference between a review of the decision of the inspector, or the review of the decision of city council to refuse reconsideration. Likewise, the question of whether certain evidence was considered by either the building inspector or city council, is ultimately of no moment, since that evidence was not material for the reasons I will explain.
- [36] For these reasons I am content to deal with the matter on the basis it was argued before us, and in the court below, recognizing that in other circumstances the refusal to grant a building permit by the building inspector, and council's refusal to reconsider the decision of the building inspector, will give rise to different analyses and possibly different outcomes.

V. Discussion and Analysis

A. Legislation

- [37] The statutory provisions relevant to this appeal are s. 86(1)(d) of the LTA, s. 699 of the LGA, and s. 56 of the Community Charter. Before assessing the issues, I reproduce the relevant legislation for ease of reference.
- [38] Section 86(1)(d) of the LTA governs subdivision of land at risk of certain geological hazards. It provides:
- 86 (1) Without limiting section 85 (3), in considering an application for subdivision approval, the approving officer may
- (d) if the approving officer considers that the land is, or could reasonably be expected to be, subject to flooding, erosion, land slip or avalanche, the approving officer may require, as a condition of consent to an application for subdivision approval, that the subdivider do either or both of the following:
 - (i) provide the approving officer with a report certified by a professional engineer or geoscientist experienced in geotechnical engineering that the land may be used safely for the use intended;
 - (ii) enter into one or more covenants under section 219 in respect of any of the parcels that are being created by the subdivision.

[39] When subdivision of the Parent Property occurred, building permit applications for land at risk of geological hazards was governed by s. 699 of the LGA. The section provided:

699 (1) For the purposes of this section, "construction" means

- (a) the new construction of a building or structure, or
- (b) the structural alteration of or addition to an existing building or structure,

but does not include the repair of an existing building or structure.

- (2) If a building inspector considers that construction would be on land that is subject to or is likely to be subject to flooding, mud flows, debris flows, debris torrents, erosion, land slip, rockfalls, subsidence or avalanche, the building inspector may require the owner of land to provide the building inspector with a report certified by a professional engineer with experience in geotechnical engineering that the land may be used safely for the use intended.
- (3) As an exception, subsection (2) does not apply if there are no bylaws under section 694 (1) (a) in effect.
- (4) If a professional engineer with experience in geotechnical engineering determines that land may not be used safely for the use intended, a building inspector must refuse to issue a building permit.
- (5) A building inspector may issue a building permit in accordance with subsection (6) if a professional engineer with experience in geotechnical engineering determines and certifies that the land may be used safely for the use intended, subject to conditions contained in the engineer's report with respect to
 - (a) the siting, structural design and maintenance of buildings, structures or works,
 - (b) the maintenance or planting of vegetation,
 - (c) the placement and maintenance of land fill, or
 - (d) other conditions respecting the safe use of the land, buildings, structures or works.
- (6) A building permit under subsection (5) must be issued on the condition that
 - (a) the owner of the land covenants with the municipality or regional district to use the land only in the manner determined and certified by the engineer as enabling the safe use of the land for the use intended,
 - (b) the covenant contains conditions respecting reimbursement by the covenantor for any expenses that may be incurred by the covenantee as a result of a breach of a covenant under paragraph (a), and
 - (c) the covenant be registered under section 219 of the Land Title Act.

- (7) On application of an owner, a council or board may, by resolution, direct its building inspector to issue a building permit but subject to the condition that a covenant referred to in subsection (6) be entered into and registered.

[40] In 2004, s. 699 of the LGA was replaced by s. 56 of the Community Charter, a substantively equivalent provision. Section 56 of the Community Charter currently governs building permit applications for land at risk of geological hazards. It provides:

56 (1) For the purposes of this section:

"construction" means

- (a) the new construction of a building or other structure, or
- (b) the structural alteration of or addition to an existing building or other structure,

but does not include the repair of an existing building or other structure;

"qualified professional" means

- (a) a professional engineer, or
- (b) a professional geoscientist

with experience or training in geotechnical study and geohazard assessments.

(2) If

- (a) a bylaw regulating the construction of buildings or other structures is in effect, and
- (b) a building inspector considers that construction would be on land that is subject to or is likely to be subject to flooding, mud flows, debris flows, debris torrents, erosion, land slip, rockfalls, subsidence or avalanche,

the building inspector may require the owner of land to provide the building inspector with a report certified by a qualified professional that the land may be used safely for the use intended.

- (3) If a qualified professional determines that the land may not be used safely for the use intended, a building inspector must not issue a building permit.
- (4) A building inspector may issue a building permit in accordance with subsection (5) if a qualified professional certifies that the land may be used safely for the use intended if the land is used in accordance with the conditions specified in the professional's report.
- (5) A building permit under subsection (4) may only be issued on the following conditions:
 - (a) the owner of the land covenants with the municipality to use the land only in the manner certified by the qualified professional as enabling the safe use of the land for the use intended;

- (b) the covenant contains conditions respecting reimbursement by the owner for any expenses that may be incurred by the municipality as a result of a breach of a covenant under paragraph (a);
- (c) the covenant is registered under section 219 of the Land Title Act.
- (6) If a building inspector is authorized to issue a building permit under subsection (4) but refuses to do so, the council may, on application of the owner, direct the building inspector to issue the building permit subject to the requirements of subsection (5).

B. Standard of Review

- [41] A decision of an administrative body is reviewable on one of two standards: reasonableness or correctness. The Compagnas submit the applicable standard of review in this case is correctness since the City's decision involved interpretation of a statute. The City and Mr. Fox submit that their decision is reviewable on the reasonableness standard.
- [42] The standard of review for decisions of a municipality was recently canvassed by this Court in *Fraser Mills*. Relying on *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39, and *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para. 22, Madam Justice Fisher held that the starting point in determining the appropriate standard of review is the presumption that an administrative body interpreting its home statute or a statute closely related to its functions will be granted deference and reviewed on a reasonableness standard: at para. 22. This standard of review framework applies to all types of administrative bodies, including municipalities, and not merely adjudicative tribunals: *Fraser Mills* at para. 22.
- [43] In *Fraser Mills*, Fisher J.A. reviewed two Supreme Court of Canada decisions that had applied a deferential standard to the review of a decision of a municipality: *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13 [*Rascal Trucking*], and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 [*Catalyst Paper*]. *Rascal Trucking* confirmed that *intra vires* municipal bylaws and resolutions warrant a deferential standard of review. In *Catalyst Paper*, the Court applied the reasonableness standard to the review of a municipal taxation bylaw.
- [44] In this case, the judge below did not explicitly discuss the applicable standard of review. Read as a whole, his reasons suggest he applied a correctness standard of review to the interpretation of the statutory provisions and a reasonableness standard to the review of an exercise of discretion. This is illustrated by para. 54 where he stated:
- [54] In short, I have not been persuaded that in rejecting this permit application because of the absence of an updated geotechnical report, Mr. Fox or City council acted contrary to the terms of the applicable legislation or exercised their discretion unreasonably.

- [45] The judge was clearly correct in applying a reasonableness standard to his review of the City's and Mr. Fox's exercise of discretion. I would conclude the standard for reviewing whether a building inspector can request an updated geotechnical report and refuse to issue a building permit in the absence of an updated report is also reasonableness.
- [46] These issues also involve statutory interpretation of the Community Charter. The authorities are clear that an administrative body's interpretation of its home statute is presumed not to be a question of jurisdiction reviewable on a correctness standard but a question of statutory interpretation entitled to deference: *Fraser Mills* at para. 22. The Compagnas have provided no authority for their position that Mr. Fox and the City's decision should be reviewed on a correctness standard. In any event, applying a deferential standard of review makes no difference in this case as, in my view, the City's statutory interpretation was also correct.

C. Scope of Discretion

- [47] The Compagnas submit the Geotechnical Report satisfied the requirement of s. 56(2) of the Community Charter. They argue a building inspector does not have authority under s. 56 to request additional reports or to refuse a building permit application if the statutory requirement has been met. Therefore, having satisfied the requirement for a geotechnical report, the Compagnas were entitled to have the Building Permit Application approved.
- [48] The City and Mr. Fox submit the Geotechnical Report does not meet the requirement of s. 56 of the Community Charter. They submit the Geotechnical Report certifies the Parent Property is suitable for residential building lot development generally (although subject to various engineering recommendations), but does not certify the Subject Property can be used for the single-family dwelling proposed by the Compagnas. They also argue that even if the Geotechnical Report satisfied the requirement under s. 56, the City is not under a duty to approve the Building Permit Application but has discretion to require further information.
- [49] The parties' arguments raise the following sub-issues:
- (1) Did the Geotechnical Report fulfill the requirement of s. 56 of the Community Charter?
 - (2) Did Mr. Fox have authority to request an updated geotechnical report and to refuse the Building Permit Application in the absence of an updated report?
 - (3) Was Mr. Fox's exercise of discretion pursuant to s. 56 of the Community Charter reasonable?
- i. Did the Geotechnical Report fulfill the requirement of s. 56 of the Community Charter?
- [50] When the Geotechnical Report was drafted, the then-owners of the Parent Property were applying for subdivision of the Parent Property and were not seeking a building permit. The chambers judge found that the Restrictive Covenant and the appended Geotechnical Report were directed at the issue of subdivision, not residential development. He concluded the Restrictive Covenant was entered into pursuant to s. 86(1)(d) of the LTA, not s. 699 of the LGA (RFJ at para. 47). Accordingly, the judge held this foreclosed the Compagnas' argument that

s. 56 did not authorize the request of a second report because the statute had already been complied with (RFJ at para. 47).

- [51] The Compagnas do not dispute the chambers judge's finding that the Geotechnical Report was generated in the context of a subdivision application. They submit, however, that the Geotechnical Report nonetheless meets the requirements of s. 56 of the Community Charter since the report certifies that "the land may be safely used for the use intended", as is required by the language of s. 56.
- [52] I do not agree that the Geotechnical Report meets the requirement of s. 56. Although both s. 86(1)(d) of the LTA and s. 56(2) of the Community Charter concern geotechnical reports which certify that "land may be used safely for the use intended", the phrase "use intended" has different meanings under these provisions.
- [53] Section 86(1)(d) of the LTA authorizes the request of a geotechnical report in the context of a subdivision application, so the phrase "use intended" must refer to the intended use of the land after subdivision. In contrast, s. 56(2) of the Community Charter authorizes a municipality to request a geotechnical report in the context of a building permit application, so the phrase "use intended" must refer to a specific proposed development rather than development generally.
- [54] The Geotechnical Report itself supports this interpretation. The supplement to the Geotechnical Report clearly defines the phrase "intended use" to mean multi-family residential subdivision. The Geotechnical Report certifies the Parent Property is safe and suitable for the intended use of residential building lot development if the recommendations in the report are followed. One of the recommendations was that a geotechnical engineer familiar with the North Slope area of the City review any development plans for residential structures prior to issuance of a permit. This recommendation is inconsistent with the Compagnas' position that the Geotechnical Report certifies the safety of their specific proposed development.
- [55] The Geotechnical Report also acknowledged the temporal limits of its conclusions. For example, the report made clear its conclusions were "based on our current knowledge of the site", and it recommended implementation of an ongoing monitoring program to evaluate erosion and changes to the position of the ocean boundary over time. Recognition that the safety of the Parent Property could change over time supports the finding that the Geotechnical Report does not certify the safety of specific construction proposed 12 years after the Geotechnical Report was drafted.
- [56] Since the Geotechnical Report does not certify the Subject Property is safe for the specific construction proposed by the Compagnas, it does not certify "that the land may be used safely for the use intended", as required by s. 56.

ii. Did Mr. Fox have authority to request an updated geotechnical report and to refuse the Building Permit Application in the absence of an updated report?

- [57] The Compagnas submit Mr. Fox did not have authority to request an updated geotechnical report. They submit Mr. Fox's authority to request a geotechnical report pursuant to s. 56(2) was spent because they had already fulfilled the requirements of the statute. They take the position the City was therefore obligated to issue a building permit based on the information submitted. The City and Mr. Fox submit s. 56 confers broad and unfettered discretion on a building inspector to request additional reports and to refuse a building permit application in the absence of a satisfactory report.
- [58] I have already concluded that the Geotechnical Report does not fulfill the requirement of s. 56 of the Community Charter. This conclusion forecloses the Compagnas' argument that the City could not request a further report and was obligated to approve the Building Permit Application. However, even if the Geotechnical Report satisfied the requirement under s. 56, in my view, the provision confers authority on a building inspector to request an updated report and to refuse a building permit application if he or she is not satisfied with the provided reports. Both the language and the purpose of the provision support this interpretation.
- [59] Local government legislation must be given a broad and purposive interpretation. The principles for interpreting local government legislation are found in sections 1, 3, and 4 of the Community Charter. Section 1 enumerates the principles of municipal governance, such as the recognition that municipalities require adequate powers and discretion to address the needs of their communities. Section 4 provides that the powers conferred on municipalities must be construed in a broad and purposive manner and in a manner consistent with municipal purposes and the purposes of the LGA and Community Charter. The purposes of the Community Charter are set out in s. 3:
- 3 The purposes of this Act are to provide municipalities and their councils with
- (a) a legal framework for the powers, duties and functions that are necessary to fulfill their purposes,
 - (b) the authority and discretion to address existing and future community needs, and
 - (c) the flexibility to determine the public interest of their communities and to respond to the different needs and changing circumstances of their communities.
- [60] In *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, the Supreme Court of Canada recognized that the unique nature of a municipal government necessitated a broad and purposive approach to the interpretation of local government legislation. The Court stated (at para. 6):

6 The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 (S.C.C.), at pp. 244-245. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo*, *supra*, at para. 18.

- [61] There is nothing in the language of s. 56 to suggest a building inspector's power is limited to the request of a single report. The use of the word "may" in s. 56(2) makes clear the decision to request a report is discretionary. This discretionary power must be construed in a broad manner which recognizes the expertise of a building inspector in matters of construction safety and the need for a municipality to fulfil its statutory functions. In my view, there is nothing in the legislation, nor in the context of the issues it is intended to address, that would support a limitation on Mr. Fox's power to request a new report in the manner that occurred in this case.
- [62] At the time the City requested an updated report, the two preconditions of s. 56(2) were met: there was a construction bylaw in effect and a building inspector considered the Subject Property was subject to, or likely to be subject to, a geological hazard. There is nothing in the statute to suggest that because a building inspector requested a report in the past he was precluded from requesting one in the future. Simply put, if a building inspector thinks land has geological vulnerabilities at the time a building permit is applied for, he may request a geotechnical report.
- [63] The purpose of s. 56 is also furthered by allowing a building inspector to request an updated report. I agree with the judge below that the purpose of s. 56 is to ensure safe construction in geologically vulnerable areas (RFJ at para. 51). The safety of construction on geologically vulnerable land could not be ensured if a building inspector was limited to relying on a single report no matter when that report was made, or what qualifications it contained. In this case, the report was over a decade old and it opined on conditions at a time when less stringent building standards applied.
- [64] The Compagnas take the position that the purpose of s. 56 is not to promote public safety, but to shield a municipality from liability. While I do not agree with their position, even this purpose suggests a building inspector has power to request an updated report. There are obvious risks associated with reliance on an outdated report. Such a risk is present in this case where the Geotechnical Report was prepared over a decade before the Building Permit Application, and the report itself recommends an engineer review any development plans before the issuance of a permit.
- [65] The City is also authorized to refuse a building permit under s. 56. Section 56(4) provides:

- (4) A building inspector may issue a building permit in accordance with subsection (5) if a qualified professional certifies that the land may be used safely for the use intended if the land is used in accordance with the conditions specified in the professional's report.

The use of the word "may" in s. 56(4) makes clear the decision to issue a building permit is discretionary. A building inspector is not obligated to issue a permit upon receipt of a single favourable report. The language of s. 56(6) ("[i]f a building inspector is authorized to issue a building permit under subsection (4) but refuses to do so") further confirms that a building inspector has power to refuse a building permit. In my view, giving a building inspector discretion to refuse a building permit application furthers the purpose of ensuring public safety.

iii. Was Mr. Fox's exercise of discretion pursuant to s. 56 of the Community Charter reasonable?

- [66] The remaining sub-issue is whether Mr. Fox's decisions to request an updated geotechnical report and to refuse the Building Permit Application in the absence of an updated report were reasonable. In my view they were.
- [67] The Court considered a similar issue in *Dick v. Coquitlam (City)*, 2013 BCSC 1698. Mr. Justice Truscott held that, in denying a building permit application, it was reasonable for a city to rely on independent engineering reports that differed from engineering reports supplied by the applicant (at paras. 283-288). This decision was upheld on appeal to this Court: 2014 BCCA 471.
- [68] In this case, Mr. Fox identified two concerns with the Geotechnical Report: (1) it was prepared for the purposes of subdivision, not residential development; and (2) the BC Building Code had since been amended to create more stringent safety assessment standards. As noted by the judge below, the amendment to the BC Building Code provided a compelling reason for seeking a current report (RFJ at para. 48). The judge went on to conclude that even without this amendment, Mr. Fox would have been entitled to seek a second report simply to address the issues expressed in the Geotechnical Report (RFJ at para. 48).
- [69] I agree with this assessment. The Geotechnical Report recommended ongoing monitoring and an engineer review any future development plans, and it was reasonable to request a report to address these issues.
- [70] In the absence of an updated report addressing the geological vulnerabilities of the Subject Property, the City did not have the necessary information with which to make its decision. The City informed the Compagnas it required an updated report and a third-party review of that report pursuant to the North Slope Development Policy. The chambers judge found the North Slope Development Policy furthered the public safety purpose of s. 56 by ensuring building inspectors have the necessary information to exercise their discretion (RFJ at para. 51). The chambers judge found that neither Mr. Fox nor City council acted unreasonably in rejecting the Building Permit Application due to the absence of an updated geotechnical report (RFJ at para. 54). I find no error in the judge's conclusion.

D. Failure to Consider Evidence

- [71] The Compagnas submitted the Schedule B Form in support of the Building Permit Application. It provides assurance that the geotechnical components of the proposed construction complied with current BC Building Code standards and other safety enactments. The Compagnas submit the Schedule B Form meets the report requirement under s. 56 of the Community Charter and the judge erred by failing to take the Schedule B Form into consideration.
- [72] The City and Mr. Fox take the position that the Schedule B Form does not meet the requirement under s. 56 of the Community Charter. They argue the letter only certifies that the geotechnical components of the Compagnas' proposed building plans are safe, whereas s. 56 requires a geotechnical engineer to certify the Subject Property is safe for its intended use. They also argue that the Compagnas never relied on the Letter as satisfying the requirement for a geotechnical report in their communications with the City.
- [73] The correspondence between the parties indicates the Compagnas did not rely on the Schedule B Form as satisfying the report requirement under s. 56. In an email dated July 21, 2014, a representative from Westmark provided the City with a copy of the Restrictive Covenant and appended Geotechnical Report for consideration. In the request for reconsideration by City council, the Compagnas' lawyer stated "my clients believe that the covenanted geotechnical reports fully satisfies the City's requirements".
- [74] Regardless of whether the Compagnas relied on the Schedule B Form, the City made clear it did not satisfy s. 56. In an email dated July 3, 2014, Ralph Topliffe, a supervisor of building inspections for the City, informed the Compagnas that "[t]he submission of a Schedule B is not sufficient for the development of this property" and requested a new geotechnical report.
- [75] The City's decision of whether the Schedule B Form fulfilled the requirements of s. 56 is entitled to deference because the City was interpreting its home statute. However, as with the Geotechnical Report, applying a deferential standard of review has no effect on this issue because the City's decision was also correct.
- [76] The Schedule B Form addressed the geotechnical components of the proposed construction. It certified that the geotechnical components of the building plans complied with the BC Building Code and other enactments. It did not give any assurances about the safety of the land on which the construction was to occur. A report requested pursuant to s. 56 must certify that the land may be safely used. A letter providing assurance of construction elements does not meet the requirement under s. 56. This was the conclusion of the City and, in my view, it was not only reasonable but correct.

VI. Conclusion

- [77] I would dismiss the appeal.

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Madam Justice Fisher"

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Prepared on 29 October 2026 · Esheria