
CANADA / JUDGMENT

English v. Richmond (City)

2020 BCSC 1642

COURT

Supreme Court of British Columbia

DECIDED

3 November 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1642 English v. Richmond (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

English v. Richmond (City),

2020 BCSC 1642

Date: 20201103

Docket: S1913978

Registry: Vancouver

Re: In the Matter of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Between:

Linda English

Petitioner

And

City of Richmond and James Cooper in His Capacity

As Director of Building Approvals

Respondents

Before: The Honourable Mr. Justice Mayer

On judicial review from: A decision of the Building Inspector for the
City of Richmond, dated September 30, 2019.

Reasons for Judgment

Counsel for the Petitioner:

N. Baker

K. Ho

Counsel for the Respondents:

A. Bradley

N. Falzon

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 17-18, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 3, 2020

Table of Contents

Introduction.. 3

The Legislative Framework.. 5

The Agricultural Land Commission Act and Regulations. 5

The Local Government Act 6

The City's Zoning Bylaws. 7

Issues to be Resolved.. 8

Summary of the Position of Ms. English. 8

Summary of the Position of the City. 10

Summary of Issues to be Resolved in this Judicial Review.. 11

Preliminary Evidentiary Issue: The City's Objections to the Petitioner's Evidence. 11

The Standard of Review.. 13

Application of the Reasonableness Standard of Review.. 18

Threshold Issue - Were Reasons Issued by the City?. 19

Medical vs. Non-medical Cannabis Production. 20

The Decision in 0826239 B.C. Ltd. 21

Statutory Interpretation - Section 8 of the ALR Regulation..	22
What Does Section 8 of the 2019 ALR Regulation Say?.	23
What is the Context of Section 8 of the 2019 ALR Regulation?.	25
What is the Legislative Purpose of Section 8 of the 2019 ALR Regulation?.	26
Conclusion on Statutory Interpretation Issue.	27
Bad Faith..	28
Remedy.	29
Have the Necessary Conditions Precedent for Issuance of a Building Permit Been Satisfied?.	32
Are There Other Adequate Remedies That Should be Considered?.	35
Conclusion..	37

Introduction

- [1] The petitioner, Linda English, brings this application under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, to review the City of Richmond's decision to deny the petitioner's application for a building permit for a greenhouse.
- [2] Ms. English is the registered owner of property located at 13751 Garden City Road, Richmond, BC (the "Property"). The Property is located in the Agricultural Land Reserve (the "ALR") and is zoned Agriculture ("AG1") under the City's Zoning Bylaw No. 8500 (the "Zoning Bylaw").
- [3] The Agricultural Land Commission (the "ALC") has been served with a copy of this petition and is not taking a position on this application.
- [4] On May 6, 2019, Ms. English submitted a building permit application to the respondent, the City of Richmond (the "City"), to construct a soil-based greenhouse on the Property with the intention of cultivating cannabis (the "2019 Application").
- [5] At the time Ms. English submitted the 2019 Application, cannabis had been legalized and all forms of cannabis cultivation were allowed in the ALR.
- [6] On September 23, 2019, Serena Trachta, the City's manager of plan review, emailed Ms. English's son, Stave Adler, who was acting as Ms. English's representative for the purposes of the 2019 Application. Ms. Trachta requested that Mr. Adler confirm whether the greenhouse would be used for the cultivation of medical, non-medical, or both medical and non-medical cannabis.

- [7] On September 25, 2019, Mr. Adler replied, confirming that the intended use of the greenhouse would be for the cultivation of agricultural crops, including the cultivation of cannabis that could result in medical or non-medical uses. Mr. Adler explained that there is no such thing as "cultivation of medicinal cannabis".
- [8] On September 30, 2019, the respondent, James Cooper, in his capacity as director of building approval for the City (the "Building Inspector"), refused Ms. English's application for a building permit. The relevant portion of the Building Inspector's refusal letter reads as follows:

Re: Building Permit Application 19 860829 for 13751 Garden City Road

This letter is to inform you that, pursuant to the City's Building Regulation Bylaw No. 7230, the Building Inspector has refused to issue a building permit for the proposed work contemplated in application number 19 860829 on the grounds that the provisions of Richmond Zoning Bylaw No. 8500, in effect at the time the application was submitted, did not permit the cultivation of non-medical cannabis inside structures constructed after July 13, 2018. The application will, therefore, be cancelled.

- [9] In these reasons, I will refer to the Building Inspector's September 30, 2019, refusal letter as the "Decision".
- [10] In this petition Ms. English seeks the following relief:
- (1) A declaration that the City unlawfully or unreasonably cancelled building permit application No.19 860829, submitted by the petitioner on May 6, 2019;
 - (2) An order quashing the decision of the Building Inspector made on September 30, 2019, cancelling building permit application No.19 860829;
 - (3) An order of mandamus compelling the City to issue Building Permit No.19 860829;
 - (4) Costs; and
 - (5) Such further and other relief as this Honourable Court deems just.

The Legislative Framework

The Agricultural Land Commission Act and Regulations

- [11] The 2019 Application was submitted shortly after cannabis was legalized by the Federal Government. Legalization of cannabis resulted in changes to the provincial legislation dealing with the use of agricultural lands ("ALR lands") in British Columbia, the Agricultural Land Commission Act, S.B.C. 2002, c. 36 [ALCA], and the applicable regulation.

[12] Prior to July 13, 2018, only the cultivation of medical cannabis under the federal Marihuana for Medical Purposes Regulations, SOR/2013-119, was permitted on ALR lands. On July 13, 2018, the applicable ALR regulation (the "2018 ALR Regulation") was amended to include s. 2(2.5). Section 2(2.5) designated the lawful production of all forms of cannabis as a farm use and read as follows:

Part 2 - Permitted Uses

Activities designated as farm use

(2.5) The lawful production of cannabis is designated as farm use for the purposes of the Act if produced outdoors in a field or inside a structure

- (a) that has a base consisting entirely of soil, or
- (b) that was, before the date on which this section came into force,
 - (i) constructed for purpose of growing crops inside it, including but not limited to the lawful production of cannabis, or
 - (ii) under construction for the purpose referred to subparagraph (i)

[13] Through a February 22, 2019 amendment, the Agricultural Land Reserve Use Regulation, B.C. Reg. 30/2019 (the "2019 ALR Regulation"), the 2018 ALR Regulation was amended. The 2019 ALR Regulation includes the following relevant provisions with respect to use of ALR lands for cannabis production:

Part 2 -- Farm Uses

Farm uses that may not be prohibited

4 The farm uses referred to in this Part may not be prohibited

- (a) by a local government enactment except a bylaw under section 552 [farming area bylaws] of the Local Government Act, or

Cannabis

8 (1) The use of agricultural land for producing cannabis lawfully may not be prohibited as described in section 4 if the cannabis is produced

- (a) outdoors in a field, or
 - (b) inside a structure that, subject to subsection (2), has a base consisting entirely of soil.
- (2) The use of agricultural land for producing cannabis lawfully may not be prohibited as described in section 4 if the cannabis is produced inside a structure that meets both of the following conditions:
- (a) the structure was, before July 13, 2018,

- (i) constructed for the purpose of growing crops inside it, including but not limited to producing cannabis lawfully, or
 - (ii) under construction for the purpose referred to in subparagraph (i), if that construction
 - (A) was being conducted in accordance with all applicable authorizations and enactments, and
 - (B) continues without interruption from the date it began until the date the structure is completed, other than work stoppages considered reasonable in the building industry;
- [14] Section 46 of ALCA provides that local government zoning bylaws must be consistent with ALCA, its regulations, or orders of the ALC, and that a bylaw that is inconsistent, to the extent of the inconsistency, is of no force and effect.

The Local Government Act

- [15] Under s. 479(c) of the Local Government Act, R.S.B.C. 2015, c. 1, local governments are authorized to adopt zoning bylaws regulating various matters concerning land use including: (i) the use of land, buildings, or structures; (ii) density; and (iii) siting, size, and dimensions of buildings and structures.
- [16] Under s. 552(b) of the Local Government Act, local governments are authorized to make bylaws in relation to farming areas (which includes, under s. (2)(b), bylaws concerning the types of buildings, structures, facilities, machinery and equipment that may be used, and, under s. 2(d), bylaws prohibiting specified farm operations) if authorized by the agriculture minister to do so (s. 552(4)) or where they are authorized to do so by regulation (s. 552(5)). The City has not been authorized by the agriculture minister or by regulation to make bylaws covering the subjects set out in s. 552(b).

The City's Zoning Bylaws

- [17] There is no dispute that the Zoning Bylaw--as amended in June 2018, and therefore as it was at the time that the 2019 Application was made--is the applicable bylaw to be considered in this judicial review. The Zoning Bylaw includes the following definitions at s. 3.4:

Agriculture means the use of the land for growing crops but does not include a medical cannabis production facility or non-medical cannabis production facility

Farm business

farm business does not include:

- (d) a medical cannabis production facility;
- (e) a non-medical cannabis production facility;

Medical Cannabis Production Facility

means a facility for the cultivation or processing of medical cannabis in a fully enclosed building or structure in accordance with the appropriate federal and provincial legislation and regulations

Non-medical Cannabis Production Facility

means a facility for the cultivation and processing of non-medical cannabis in a building or structure, as well as outdoor cultivation, in accordance with the appropriate federal and provincial legislation and regulations

[18] Section 14.1 of the Zoning Bylaw deals with zoning for farming and compatible uses on lands, including those zoned AG1. Subsection 14.1.2 includes a farm business as a permitted use.

[19] Accordingly, under the Zoning Bylaw (and without considering the bylaw making prohibitions regarding cannabis production set at ss. 4 and 8 of the 2019 ALR Regulation), at the time that the 2019 Application was submitted, medical and non-medical cannabis production facilities were not permitted on the Property.

[20] The City has adopted Building Bylaw No. 7230 (the "Building Bylaw"). Section 3 of the Building Bylaw provides:

3.1 Refusal to Issue Permits

3.1.1 The building inspector, the gas inspector, and the plumbing inspector may refuse to issue a building permit, gas permit, or plumbing permit respectively:

- (a) where in such inspector's opinion, the proposed work will contravene the requirements of the building code, the gas code, or the plumbing code respectively, or the provisions of this or any other applicable bylaws of the City, or any applicable Provincial statutes; and
- (b) where the owner is in violation of this or any other applicable bylaws of the City, or any applicable Provincial statutes, with regard to the construction of another building or structure, gas work or plumbing.

[21] Pursuant to s. 5.7.1 of the Building Bylaw, a building inspector must issue the building permit if they are satisfied that the proposed construction will comply with the building code, all provisions of the Building Bylaw, and other applicable city bylaws.

Issues to be Resolved

Summary of the Position of Ms. English

[22] Ms. English's position is that the standard of review applicable to the Decision is reasonableness, but to the extent that the Decision turns on the proper interpretation of s. 8 of the 2019 ALR Regulation such interpretation is subject to a correctness review. As I understand Ms. English's argument, she contends that the Building Inspector misinterpreted

s. 8 as not prohibiting a City bylaw which did not authorize the cultivation of non-medical cannabis inside any structure constructed after July 13, 2018. As a result, Ms. English contends that the Building Inspector's interpretation of s. 8 is not entitled to deference.

[23] Alternatively, Ms. English contends that even if a standard of reasonableness applies to a review of all aspects of the Decision, the Decision was unreasonable for, in summary, the following reasons:

- (1) The Building Inspector mischaracterized Ms. English's intended use of the Property as being the production of "non-medical cannabis";
 - (2) To the extent that the Zoning Bylaw prohibited the cultivation of "non-medical cannabis" when the 2019 Application was made, such a prohibition was of no force or effect with respect to the Property;
 - (3) When the Building Inspector issued the Decision, the Zoning Bylaw had been amended to permit cannabis production, both medical and non-medical, in the ALR;
 - (4) When the 2019 Application was submitted the cultivation of non-medical cannabis, in fact all forms of cannabis, was permitted on ALR lands; and
 - (5) The Building Inspector's interpretation of s. 8 of the 2019 ALR Regulation, being that the City was able to prohibit the production of cannabis in soil-based structures constructed after July 13, 2018, was incorrect, and therefore a decision relying on such an interpretation is unreasonable.
- [24] In addition, Ms. English contends that the Decision was made in bad faith, in a "municipal law sense", as an attempt to oppose cannabis cultivation within the City.
- [25] Finally, Ms. English contends that in the circumstances of this case an order of mandamus, requiring the City to issue her a building permit, is the appropriate remedy.

Summary of the Position of the City

- [26] The City says that the Building Inspector's Decision was based on his interpretation of the Zoning Bylaw, Building Bylaw, and s. 8 of the 2019 ALR Regulation.
- [27] The City contends that the standard of review in respect of the Decision is reasonableness, and that the Building Inspector had a reasonable basis for refusing to issue a building permit, being a reasonable interpretation of his statutory authority to do so. In this respect, the City contends that Ms. English's stated intended use of the Property for the cultivation of cannabis does not fit within s. 8 of the 2019 ALR Regulation and therefore is not authorized by the Zoning Bylaw.

- [28] The City also contends that the Decision, as it was set out in the Building Inspector's refusal letter, did not include reasons and that reasons were not requested by Ms. English. On this basis, the City contends that this Court must either remit the decision back to the Building Inspector for reasons or focus its review on the outcome, and not the reasoning process.
- [29] The City submits that if the Decision is found by this Court to have been unreasonable, that an order of mandamus is not appropriate. The City submits that the appropriate remedy is to order that the Building Inspector reconsider the matter, with directions to consider and determine whether the proposed use is for production of cannabis inside a structure that has a base consisting entirely of soil.
- [30] Finally, the City objects to the admissibility of portions of the affidavit evidence filed by Ms. English. This objection is made primarily on the basis the impugned evidence contains information that was not part of the record which formed the basis for the Decision, or that this evidence constitutes inadmissible hearsay.

Summary of Issues to be Resolved in this Judicial Review

- [31] In summary, the broad issues to be decided on this judicial review include the following:
- (1) What is the standard of review applicable in respect of the Decision--correctness or reasonableness?
 - (2) Depending on which standard of review is to be applied, was the Decision incorrect or unreasonable?
 - (3) If the Decision is found to be either incorrect or unreasonable, is Ms. English entitled to an order in the nature of mandamus, compelling the issuance of the building permit?
- [32] For the reasons set out below, I find that the appropriate standard of review in respect of the Decision is reasonableness, that the Building Inspector's Decision was unreasonable and that an order of mandamus is warranted.

Preliminary Evidentiary Issue: The City's Objections to the Petitioner's Evidence

- [33] The City makes a number of objections to the petitioner's evidence.
- [34] First, the City objects to the admissibility of evidence concerning an earlier 2018 rezoning application made by Ms. English on the basis that such evidence has no relevance to this case. I agree, and have not considered such evidence.
- [35] The City also objects to the admissibility of an October 2018 letter from Ms. English's greenhouse designer, which attaches a September 2018 email from a representative of the ALC concerning acceptable requirements for a soil-based greenhouse. I find that this evidence is relevant to the question of whether an order of mandamus is appropriate in this case.

- [36] The City also objects to the admissibility of an interpretive bulletin issued by the ALR in May 2019 with respect to the 2019 ALR Regulation. I find that this evidence provides relevant context and assists in evaluating the reasonableness of the Building Inspector's interpretation of s. 8.
- [37] The City also objects to the admissibility of evidence concerning an abandoned 2018 application by Ms. English to rezone the Property for cannabis production under the, now repealed, Marihuana for Medical Purposes Regulation on the basis that this evidence is not relevant. I agree, and have not considered this evidence.
- [38] The City also objects to the admissibility of certain news releases on the basis that they do not go to the interpretive issue at play. I agree, and have not considered this evidence, with one exception. I have considered the news releases issued by the Ministry of Agriculture in June 2019, which provides context with respect to nature of changes made in the 2019 ALR Regulation and therefore assists in determining the reasonableness of the Building Inspector's interpretation of s. 8.
- [39] The City also objects to the admissibility of an exchange of correspondence between the Union of BC Municipalities and the Deputy Minister of Agriculture in May 2019 on the basis that it does not go to the interpretative issue at play. I disagree. In my view this correspondence provides context with respect to the reasonableness of the Building Inspector's interpretation of s. 8.
- [40] The City also objects to the admissibility of exhibits relating to the amendment of the Zoning Bylaw after the 2019 Application was submitted on the basis of relevancy. I agree, and have not considered this evidence.
- [41] The City also objects to the admissibility of exhibits attaching transcriptions of secretly recorded conversations between Mr. Adler and Ms. Trachta when the 2019 Application was submitted on the basis that they do not disclose any of the reasoning process undertaken by the Building Inspector and are therefore irrelevant. I agree, and have not considered this evidence.
- [42] The City also objects to the admissibility of pleadings from an unrelated Supreme Court Action, on the basis of relevance. With the exception of the reasons for judgment in that action, I agree, and have not considered this evidence.
- [43] Lastly, the City objects to the admissibility of evidence concerning an approval for a cannabis production facility in the Okanagan in 2018 on the basis of relevance, as that application was made under a different regulation with a different bylaw scheme. I agree, and have not considered this evidence.

The Standard of Review

[44] On December 20, 2019, the Supreme Court of Canada released a "trilogy" of judgments including *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov], setting out a revised framework to determine: (a) the applicable standard of review for courts reviewing the decisions of administrative tribunals; and (b) the process to follow when applying the relevant standard of review to the particular facts of a case.

[45] Vavilov made two major changes to the law of judicial review:

- (1) It crystalized the presumption that every administrative decision is to be reviewed on a standard of reasonableness (except in limited circumstances); and
- (2) It provided direction to how a reviewing court is to conduct a reasonableness review.

Vavilov, at paras. 10, 73-143

[46] Ms. English and the City agree that the decision to issue or refuse a building permit is subject to a reasonableness standard of review. They disagree whether, to the extent that the decision turns on the proper interpretation of s. 8 of the 2019 ALR Regulation, the interpretation is subject to a correctness review.

[47] In Vavilov, the Supreme Court found that courts are to depart from the presumption of reasonableness only in two situations:

- (1) Where the standard of review is legislated. For example, through the legislature's choice to employ an appeal clause or through legislation such as the Administrative Tribunals Act, S.B.C. 2004, c. 45; or
- (2) Where the rule of law requires correctness review.

Vavilov, at para. 33.

[48] Within the "rule of law" category, which applies in this case, the Supreme Court set out several subcategories, which include:

- (1) Constitutional questions;
- (2) General questions of law of central importance to the legal system as a whole; and
- (3) Questions regarding the jurisdictional boundaries between two or more administrative bodies.

Vavilov, at para. 53.

[49] There is no dispute that the jurisdictional boundaries exception to the presumption of a reasonableness standard of review is at issue in this case. The Supreme Court's discussion of the jurisdictional boundaries exception in Vavilov is brief:

- [63] Finally, the rule of law requires that the correctness standard be applied in order to resolve questions regarding the jurisdictional boundaries between two or more administrative bodies: *Dunsmuir*, para. 61. One such question arose in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, in which the issue was the jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that were otherwise subject to a comprehensive legislative regime. Similarly, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185, the Court considered a jurisdictional dispute between a labour arbitrator and the Quebec Human Rights Tribunal.
- [64] Administrative decisions are rarely contested on this basis. Where they are, however, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another. The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions: see *British Columbia Telephone Co.*, at para. 80, per McLachlin J. (as she then was), concurring. Members of the public must know where to turn in order to resolve a dispute. As with general questions of law of central importance to the legal system as a whole, the application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision making.
- [Emphasis added.]
- [50] As was set out by the British Columbia Court of Appeal in *The Owners, Strata Plan NW 2575 v. Booth*, 2020 BCCA 153 at paras. 18-19, the test for the standard of review set out in *Vavilov* applies retroactively.
- [51] Ms. English contends that the interpretation of s. 8 of the 2019 ALR Regulation is subject to a review on the standard of correctness, on the basis that this interpretation involves questions regarding jurisdictional boundaries between two administrative bodies. Namely, whether the City exercised its powers in relation to zoning and building permits in a manner that is compatible with the jurisdiction of the ALCA and the 2019 ALR Regulation.
- [52] The City contends that the appropriate standard of review is reasonableness on the basis that this case does not fall into the jurisdictional boundaries exception. The City submits that the common thread in the cases where this jurisdictional boundaries exception has been applied is that there are two statutory bodies on which the impugned legislation appears to confer the same statutory power of decision. In such a case, an affected person does not know which decision maker to turn to. Therefore, the reviewing court is called upon to make a decision on whether or not there is concurrent, overlapping, or exclusive jurisdiction. It must be correct in this inquiry: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39 at paras. 7-9.

- [53] The City argues that it is clear that the Building Inspector had the exclusive statutory power to make the decision under review, being whether or not to grant a building permit, and therefore the jurisdictional boundaries exception does not apply and the standard of review is reasonableness.
- [54] Ms. English relies on *0826239 B.C. Ltd. v. Richmond (City)*, 2018 BCSC 1438 [0826239 B.C. Ltd.], in support of the position that the appropriate standard of review is correctness. She concedes that this case was pre-Vavilov.
- [55] In *0826239 B.C. Ltd.*, the petitioner was refused building permits for the construction of cannabis production facilities. At issue was whether Richmond could restrict the production of cannabis on ALR land. The court found that the appropriate standard of review was the correctness standard:
- [107] The Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9 confirmed that where the jurisprudence has already settled the applicable standard of review, the court does not have to engage in the standard of review analysis anew: para. 62. This was again confirmed in *Edmonton City*, and the Court's other recent decisions on administrative law.
- [108] While in another case it may be appropriate to revisit the standard of review, the interpretation of municipal bylaws in this province is generally reviewed on a correctness standard (*Qterra*; *Turney*) and I will proceed on that basis.
- [109] There is an additional reason that correctness is the appropriate standard in this case. The issues raised in relation to the Richmond's decisions deal with Richmond's interpretation of the ALC Act and the ALR Regulation, which are not Richmond's home statute. The court must engage with the interpretation of the scope of "farm use" in the ALC Act and ALR Regulation, before assessing whether it conflicts with the Zoning Bylaw, and whether part of the Zoning Bylaw is therefore of no force or effect. Whether there is a legal duty to ground the mandamus relief sought is also based on the same interpretation of the ALR Regulation and whether the Zoning Bylaw has force or effect. The challenged decisions do not attract the presumptive level of deference discussed in *Edmonton*.
- [56] The decision in *0826239 B.C. Ltd.* was pre-Vavilov and therefore the reasons in that decision with respect to the standard of review are no longer applicable.
- [57] In *Vavilov*, the Supreme Court dispensed with the contextual analysis applied in earlier jurisprudence, affirming that the presumption of reasonableness is always the starting point for determining the standard of review:
- [25] In our view, it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute, the presumption also applies more broadly to other aspects of its decision.

- [58] Recent decisions in this jurisdiction have considered the application of jurisdictional boundary exception to the presumption that decisions be reviewed to a reasonableness standard.
- [59] In 1120732 B.C. Ltd. v. Whistler (Resort Municipality), 2020 BCCA 101 at para. 35, the court found that the result of Vavilov is that the "jurisdictional power of an administrative body is now to be reviewed on the reasonableness standard unless there is a competing administrative body that may have jurisdiction".
- [60] In G.S.R. Capital Group Inc. v. The City of White Rock, 2020 BCSC 489 [G.S.R. Capital Group], the court considered which standard of review should apply to White Rock's decision to deny the petitioner a building permit. At issue was White Rock's interpretation of the Local Government Act, which White Rock had interpreted as granting it the authority to withhold a building permit despite having previously granted a development permit. The court found that the appropriate standard of review was reasonableness:
- [70] I would also decline to recognize a new category of decisions subject to correctness review. I agree with the City's submission that all of the case law cited by G.S.R. was decided pre-Vavilov and, therefore, cannot be relied upon. Those cases were premised on the notion of true questions of jurisdiction warranting correctness review and on the lack of expertise of local governments relative to courts in interpreting its enabling legislation. Vavilov substantially changed the law with respect to how expertise is considered and with respect to true questions of jurisdiction.
- [71] Vavilov was very clear and deliberate about the decision to remove true questions of jurisdiction as a distinct category of correctness review. The fact that the reasons did not expressly discuss the line of jurisprudence applying correctness review to municipalities interpreting their enabling legislation is not surprising given the fact that this decision undertook a fundamental overhaul of the law on substantive review of administrative decisions; it would be impossible to discuss every previous line of case law that came before it. In my view, the Court in Vavilov was very clear that reasonableness review applies to questions on whether administrative decision makers have acted within the scope of their lawful authority, and that the basis for recognizing any new category of correctness review would be exceptional: paras. 67, 70. I do not think that such an exceptional circumstance can be said to arise here.
- [Emphasis added.]
- [61] I conclude that the Building Inspector's interpretation of the ALCA and s. 8 of the 2019 ALR Regulation does not fall into the jurisdictional boundaries exception. In this case, the Building Inspector had the sole authority to make the decision whether or not to issue a building permit. There is no competing authority in the hands of the ALC and therefore no issue of overlapping jurisdiction of administrative bodies arises. The presumption of a reasonableness standard of review in respect of all aspects of the Decision of the Building Inspector has not been rebutted.

Application of the Reasonableness Standard of Review

- [62] The burden is on the party challenging a decision, in this case Ms. English, to show that it is unreasonable. The reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that the decision can not be said to have been made with the required degree of "justification, intelligibility and transparency". Any shortcomings or flaws relied upon by the party challenging a decision must be sufficiently central or significant to render the decision unreasonable: Vavilov, at para. 100.
- [63] Two "fundamental flaws" that may undermine the reasonableness of a decision include: a failure of rationality internal to the reasoning process; and, an untenable decision in light of the relevant factual and legal constraints that bear on it: Vavilov, at para. 101.
- [64] A failure of rationality internal to the reasoning process may be made out, rendering a decision unreasonable, where for example, the reasons, read holistically: fail to reveal a rational chain of analysis; reveal that the decision was based on an irrational chain of analysis; lead to a conclusion that cannot follow from the analysis undertaken; fail to disclose the decision maker's reasoning on a critical point; or exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations, or an absurd premise. This Court must be satisfied, ultimately, that the decision of the Building Inspector "adds up": Vavilov, paras. 103-104.
- [65] Determining whether a decision is untenable in light of the relevant factual and legal constraints that bear on it may involve the following contextual considerations: the governing statutory scheme; other statutory or common law; principles of statutory interpretation; evidence before the decision maker; past practices and past decisions; and the impact of the decision on the affected individual: Vavilov, paras. 106-135.

Threshold Issue - Were Reasons Issued by the City?

- [66] The question of whether or not "reasons" for the Decision were issued is relevant to determining what kind of reasonableness analysis should be applied. If written reasons are given, a reasonableness review examines these reasons first. If written reasons are not provided, a reviewing court looks to the record as a whole, with a focus on the outcome: Vavilov, at paras. 137-138.
- [67] The City submits that reasons were not issued, nor were they requested when the Building Inspector refused to grant the Building Permit in September 2019. For this reason, the City contends that this Court may either:
- (1) Remit the decision back to the Building Inspector for reasons; or
 - (2) Focus its review on the outcome, rather than the path taken by the Building Inspector.
- [68] Ms. English submits that s. 54 of the Community Charter, S.B.C. 2003, c. 26, confers a right to her, not an obligation, to request written reasons from the Building Inspector where a permit application has been refused. She submits that she is not challenging the Decision on

the grounds of inadequate reasons. On this basis, she contends that there was no obligation for her to request additional reasons, which, in her submission, would simply have provided the City with an opportunity to "bootstrap" the Decision by providing additional justifications for it.

- [69] Further, Ms. English submits that there was no need for her to request written reasons, as the Decision provided a specific reason for the refusal, being that: the "provisions of the Richmond Zoning Bylaw No. 8500, in effect at the time that the application was submitted, did not permit the cultivation of non-medical cannabis inside structures constructed after July 13, 2018".
- [70] In my view, the Building Inspector's September 30, 2019, refusal letter sets out reasons for the Decision - although terse. As a result, the Building Inspector's reasons are the starting point for review: Vavilov, at para. 81.

Medical vs. Non-medical Cannabis Production

- [71] Ms. English contends that the stated reason for refusing the 2019 Application (being that the production of "non-medical cannabis" in structures constructed after July 13, 2018, was not authorized by the Zoning Bylaw) is based on an improper and inapplicable distinction between the cultivation of medical and non-medical cannabis.
- [72] In this respect, Ms. English points to the exchange of correspondence between Ms. Trachta and Mr. Adler on September 23 and 25, 2019, regarding the intended uses of a greenhouse on the Property. In that exchange Mr. Adler advised that the greenhouse would be used for the "cultivation of agricultural crops, including the cultivation of cannabis, that could result in medicinal or non-medicinal end uses".
- [73] I agree with the submission of Ms. English that the Building Inspector applied an improper or inapplicable distinction between medical and non-medical cannabis. However, under the Zoning Bylaw in force when the 2019 Application was made growing either of these types of cannabis was not a permitted use on lands zoned AG1. Accordingly, the distinction between medical and non-medical cannabis is irrelevant and therefore this specific flaw in reasoning is not on its own sufficiently central or significant to render the Decision unreasonable.
- [74] The validity of the prohibition in the Zoning Bylaw against both medical and non-medical cannabis production on lands zoned AG1 raises the issue of the reasonableness of the Building Inspector's statutory interpretation of s. 8 of the ALR Regulation.

The Decision in 0826239 B.C. Ltd.

- [75] Ms. English contends that as a result of the August 2018 decision of Justice Masuhara in 0826239 B.C. Ltd., the cultivation of medical cannabis was a designated farm use that could not be prohibited by a local government and that the City's zoning bylaw (in force at that time) was of no force and effect to the extent that it prohibited cultivation.

- [76] The August 2018 decision in 0826239 B.C. Ltd. is not, in my view, applicable to the case at bar. Justice Masuhara found that the City's zoning bylaw--which, at that time, prohibited a medical marihuana production facility under the Marihuana for Medical Purposes Regulations--was of no force and effect to the extent that it was in direct conflict with the ALR regulation in force. The ALR regulation in force at that time expressly forbade local governments from prohibiting cannabis production carried out in accordance with the Marihuana for Medical Purposes Regulations.
- [77] I agree with the submission of the City that this decision is simply a confirmation of the rule set in s. 46(4) of ALCA - that local government bylaws are of no force and effect to the extent of any conflict with ALCA or regulations thereunder. It does not stand for a broad proposition that local governments are unable to regulate cannabis production at large, or that all cannabis production is lawful.
- [78] As was stated in the closing submission of the City, the Building Inspector's interpretation of the 2019 ALC Regulation and the Zoning Bylaw is central to the question of whether the Decision to refuse to issue a building permit was reasonable. I will turn to this question now.

Statutory Interpretation - Section 8 of the ALR Regulation

- [79] What is at issue is whether s. 8 of the 2019 ALR Regulation prohibited the enactment of a municipal bylaw which prohibited the production of cannabis inside a structure that was not either constructed or under construction prior to July 13, 2018 (the date which the 2019 ALR Regulation came into force).
- [80] Although the Decision does not specifically reference s. 8 of the 2019 ALR Regulation, the Building Inspector's stated reason for refusing the building permit was that the Zoning Bylaw "did not permit the cultivation of non-medical cannabis inside structures constructed after July 13, 2018" (emphasis added). In my view, this is sufficient to allow me to infer that the Building Inspector was aware of the limitations of the City's bylaw making power set out in s. 8 of the 2019 ALR Regulation. In addition, as I have already stated, the City concedes that the reasonableness of the Decision turns on an evaluation of the reasonableness of the Building Inspector's interpretation of this section.
- [81] As set out in Vavilov, matters of statutory interpretation are not treated uniquely in a reasonableness review. A reviewing court must examine the decision as a whole, including the reasons provided by the decision maker and the outcome that was reached: Vavilov, at paras. 115-116.
- [82] Interpretation of a statutory provision is properly carried out by applying the "modern principle" of statutory interpretation. That is, the words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the relevant legislation, its object, and the intention of parliament or the legislature: Vavilov, at para. 117.

- [83] It is the task of an administrative decision maker to interpret a statutory provision in a manner that is consistent with the text, context, and purpose of the relevant legislation: Vavilov, at para. 121. In this case, these requirements apply to the Building Inspector's interpretation of s. 8 of the 2019 ALR Regulation.
- [84] It is worthwhile to quote the following paragraph of the decision in Vavilov:
- [124] Finally, even though the task of a court conducting a reasonableness review is not to perform a de novo analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: Dunsmuir, at paras. 72-76. One case in which this conclusion was reached was Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd., 2019 FCA 52., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.
- [85] I adopt the following comments of Justice Sewell at para. 52 of his recent decision in Guevara v. Louie, 2020 BCSC 380: "if it is clear that the administrative decision maker--had they given proper consideration to a key element of a statutory provision's text, context or purpose-- would have rendered a different decision, this failure would be 'indefensible,' and thus in my view, patently unreasonable".

What Does Section 8 of the 2019 ALR Regulation Say?

- [86] It is the City's position that ss. 8(1) and (2) of the 2019 ALR Regulation create only two categories of cannabis production that may not be prohibited by municipal bylaws: first, cannabis production outdoors in fields; and second, cannabis production in all structures that were either constructed or under construction before July 13, 2018.
- [87] The City contends that while s. 8(1)(b) does prohibit municipal bylaws barring cannabis production in soil-based facilities, this prohibition is made "subject to" the requirements of s. 8(2). Section 8(2) provides that only the production of cannabis in structures constructed, or under construction, before July 13, 2018, can not be prohibited. That is, the City contends that the use of the words "subject to" in s. 8(1)(b) makes the prohibition against municipal bylaws concerning soil-based cannabis production subordinate to s. 8(2).

- [88] Ms. English contends that s. 8 creates three categories of cannabis production that may not be prohibited by municipal bylaws, including that which occurs in open fields, in structures that have a soil-base, and in all other structures that were either constructed or under construction prior to July 13, 2018.
- [89] Ms. English contends that the City's interpretation makes no sense, as it would make the prohibition in s. 8(1)(b) against enacting municipal bylaws prohibiting cannabis production inside soil-based structures redundant. In my view, Ms. English's submission has merit.
- [90] As Ms. English submits, it is presumed that the legislature avoids superfluous or meaningless words, does not pointlessly repeat itself, or speak in vain: R. Sullivan, Sullivan and Drieger on the Construction of Statutes, 5th ed. (Markham, Ont.: LexisNexis Canada, 2008) at 210.
- [91] Ms. English contends that if the legislature had intended to allow municipalities to prohibit the development of soil-based cannabis facilities not constructed or under construction by July 13, 2018, they could simply have left s. 8(1)(b) out of the 2019 ALR Regulation.
- [92] Ms. English contends, in essence, that contrary to the interpretation urged by the City, the words "subject to" in s. 8(1)(b) are additive, not restrictive. That is, these words signal an additional limitation on a municipal government's right to enact, under s. 8(2), bylaws that prohibit the production of cannabis in any type of structure constructed or under construction on July 13, 2018.
- [93] The City submits that had the legislature wished to retain an unqualified protection for soil-based structures in the 2019 ALR Regulation, as was clear in a comparable provision in s. 2 of the 2018 ALR Regulation, it could have employed several drafting methods including simply taking the words "subject to" out of s. 8(1)(b), begun subsection 8(2) with the words notwithstanding subsection 8(1)(b), or simply have made subsection 8(2) subsection 8(1)(c) instead.
- [94] With all due respect to the legislative drafters of the 2019 ALR Regulation, the limitations on a municipal government's right to prohibit cannabis production on ALR lands in s. 8 could have been made clearer.
- [95] Although in my view Ms. English's interpretation of this section is reasonable, I am unable to find, with reference to the words of the regulation alone, that the Building Inspector's interpretation, as was suggested by counsel for the City, is obviously wrong. As a result, it is necessary to consider the context and expressions of the legislative purpose of s. 8.

What is the Context of Section 8 of the 2019 ALR Regulation?

- [96] A press release issued by the ALC on June 18, 2019, provides helpful context for the 2019 ALR Regulation. Under the heading "Cannabis production in the ALR" it states that "[local] and First Nations governments can prohibit production in the ALR within their communities, unless it is grown in ways that preserve the productive capacity of agricultural

land" and that "[a] regulatory change provided authority to local and Indigenous governments to prohibit cement-based, industrial-style, cannabis-production bunkers on ALR Land in their communities ".

- [97] The rationale set out in the ALC's June 18, 2019, press release was repeated in a letter dated July 11, 2019, sent by the Deputy Minister of Agriculture, Wes Shoemaker, to the president of the Union of BC Municipalities (the "UBCM"), Arjun Singh.
- [98] In my view, the June 19, 2019, ALC press release and the Deputy Minister's July 11, 2019, letter to the UBCM both signal that what was of concern were new cannabis production facilities constructed in a way that would impact the productive capacity of ALR lands--for example, a new facility constructed a concrete slab--and not existing structures or newly constructed soil-based cannabis production facilities.

What is the Legislative Purpose of Section 8 of the 2019 ALR Regulation?

- [99] Administrative policies and interpretations, while not determinative, are entitled to weight and may be an important factor where there is doubt about the meaning of legislation: *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at p.37; *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494 at para. 17; *Minster Enterprises Ltd. v. City of Richmond*, 2020 BCSC 455 at paras. 75-78.
- [100] In an information bulletin, revised May 8, 2019, the ALC explained changes to the ALCA through the 2019 ALR Regulation. This bulletin states that "this regulatory change clarifies that all forms of cannabis production are a 'farm use'" and that "the ALR Use Regulation specifically allows local governments to prohibit cannabis production in certain forms" and then refers to its Schedule A. Schedule A to the bulletin sets out the text of s. 8 of the 2019 ALR Regulation, but, unfortunately, does not provide interpretive guidance.
- [101] The June 18, 2019, ALC press release and the Deputy Minister's July 11, 2019, letter to the UBCM provides some interpretive assistance. They state that cannabis production in the ALR cannot be prohibited if production takes place as follows: 1) in an open field; 2) in a structure that has a soil-base; and 3) in a structure that was either fully constructed or under construction, with required permits in place, prior to July 13, 2018; or, in an existing licensed operation.
- [102] In determining the purpose of s. 8 of the 2019 ALR Regulation, I find the correspondence from the ALC to Barry Konkin, the City's policy, planning and development manager, particularly useful. In this letter, dated August 28, 2019, the ALC provided comments on the City's draft revisions to the Zoning Bylaw to "help ensure that the Proposed Amendments [were] consistent with the purposes of the Agricultural Land Commission Act and the "Use Regulation". Under the heading "ALC Staff Response" the ALC gave the following explanation of the limitations on a municipal government's ability to prohibit cannabis production facilities:

ALC Staff Response:

Due to the February 22, 2019 amendments to the ALC Use Regulation 3062019, local governments now have the authority to prohibit all cannabis production facilities except:

- cannabis grown outdoors;
- or inside a structure that has a base consisting entirely of soil,
- or a pre-existing structure that was constructed for the purpose of growing crops inside of it).

[103] In summary, the ALC's letter set out three separate classes of cannabis production that a municipal government does not have the authority to prohibit. Those include cannabis grown outdoors in a field, cannabis grown in structures with a soil-base, and cannabis grown in pre-existing structures or under construction on the required date. The ALC's letter suggests an interpretation that is consistent with Ms. English's submissions.

[104] In my view, this evidence suggests that the legislative purpose of ss. 8(1) and (2) was to create a carve-out for these three separate classes of cannabis production facilities, preventing municipalities from prohibiting production in such facilities.

Conclusion on Statutory Interpretation Issue

[105] I conclude that the interplay of text, context, and purpose of s. 8 leaves room for a single reasonable interpretation of this statutory provision, or an aspect of this statutory provision. I conclude that this is a case in which the legislature made a clear choice in enacting ss. 4 and 8(1)(b) of the 2019 ALR Regulation. In particular, at the time that the 2019 Application was submitted, ss. 4 and 8(1)(b) prevented municipal governments from prohibiting, by bylaw, the production of cannabis inside a structure with a base consisting entirely of soil, regardless of when the structure is constructed.

[106] The relevant Zoning Bylaw provisions, which provide that the cultivation of non-medical and medical cannabis are not permitted uses on lands zoned AG1, are inconsistent with the limitations on the City's bylaw making power set out in s. 8 of the 2019 ALR Regulation. For that reason, pursuant to s. 46 of ALCA, the Zoning Bylaw is of no force and effect to the extent of this inconsistency.

[107] It follows, that the interpretation of s. 8(1)(b) of the 2019 ALR Regulation adopted by the Building Inspector, which I find was central to the Decision, was unreasonable, and therefore that the Building Inspector committed reviewable error.

Bad Faith

[108] Although my findings above are dispositive on the issue of whether the Decision was reasonable, I will briefly address the additional grounds for review advanced by Ms. English. That is, the contention that the Decision was made in bad faith.

- [109] In this respect, Ms. English contends that the Decision was made in bad faith in a "municipal law sense", in that the City acted unreasonably and arbitrarily and without the requisite degree of fairness, openness, and impartiality in considering the 2019 Application - including by considering extraneous matters.
- [110] In summary, Ms. English contends that the City:
- (1) Desired to curtail cannabis production to the full extent possible;
 - (2) Improperly refused previous applications by Ms. English;
 - (3) After the 2019 Application was submitted, continued to deal with Ms. English in a non-transparent manner; and
 - (4) While the 2019 Application was pending, took steps to prepare and adopt amendments to the Zoning Bylaw aimed at restricting and regulating cannabis activities in the ALR, without informing her.
- [111] The words "bad faith" have been used to describe a wide range of conduct in the exercise of legislatively delegated authority. This includes, for example, challenges to the legal authority of an administrative decision maker on "jurisdictional" grounds; and challenges to the authority of an administrative decision maker for exercising its powers for an ulterior purpose, which also causes them to "lose jurisdiction": *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee*, [1995] B.C.J. No. 1763 at paras. 153-154 (C.A.); *G.S.R. Capital Group* at para. 164.
- [112] The burden of proving that a municipal body is acting in bad faith is on the petitioner. Municipal decisions, including the enactment of bylaws, are presumed to have been made in good faith: *MacMillan Bloedel*, at paras. 134, 156.
- [113] In my view, it is only the second kind of challenge that applies in this case. That is, whether the City exercised its decision making power for an ulterior purpose. There can be no bad faith in circumstances where the Building Inspector is reasonably exercising his powers under the enabling legislation, in what he genuinely believed to be in the public interest: *G.S.R. Capital Group*, at para. 172.
- [114] The evidence suggests that between May and September 2019 City staff took in the 2019 Application (the first of its kind after the adoption of the 2019 ALR Regulation), processed the application normally, and then the Building Inspector came to an interpretation of the Zoning Bylaw and the 2019 ALR Regulation, which eventually resulted in the Decision. In my view, there is insufficient evidence, and therefore Ms. English has not proven, that the City had an ulterior or improper purpose in refusing the 2019 Application.

Remedy

- [115] Ms. English seeks an order of mandamus compelling the Building Inspector to issue Building Permit No.19 860829.

[116] The criteria for an order of mandamus is set out by the Federal Court in *Apotex Inc. v. Canada (Attorney General)* (1993), [1994] 1 F.C. 742 at 19-21 [Apotex]. Summarized, the criteria for an order of mandamus are:

- (1) There must be a public legal duty to act.
- (2) The duty must be owed to the applicant.
- (3) There is a clear right to the performance of that duty, in particular:
 - (a) The applicant has satisfied all conditions precedent giving rise to the duty;
 - (b) There was:
 - (i) A prior demand for performance of the duty;
 - (ii) A reasonable time to comply with the demand unless refused outright; and
 - (iii) A subsequent refusal which can be either expressed or implied e.g. unreasonable delay.
- (4) Where the duty sought to be enforced is discretionary, the following rules apply:
 - (a) In exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
 - (b) Mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
 - (c) In the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
 - (d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and
- (a) Mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.
- (5) No other adequate remedy is available to the applicant.
- (6) The order sought will be of some practical value or effect.
- (7) The court in the exercise of discretion finds no equitable bar to the relief sought.
- (8) On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

[117] In this case, there is no dispute that the criteria set out at subparagraphs (1), (2), and (3)(b) of para. 116 above are satisfied. In this respect, I find that the City had a public duty to issue building permits which was owed to Ms. English and that she made a prior demand for issuance of the building permit a reasonable time after submitting the 2019 Application which was denied. The relevant aspects of criterion (4) have also been met; importantly, the City's discretion has been "spent". In addition, I find that the criterion set out at

subparagraph (6) is met, in that the issuance of a building permit will have some practical effect - being that Ms. English would be able to construct a soil-based structure for cannabis production. Finally, I find that there is no evidence of improper actions on the part of Ms. English establishing an equitable bar to the relief sought, therefore the criterion in subparagraph (7) is met.

- [118] What is at issue with respect to the remedy of mandamus is whether Ms. English has satisfied all conditions precedent giving rise to a duty on the part of the City to issue a building permit, whether any other adequate remedies, apart from mandamus, are available and whether the balance of convenience favours an order in the nature of mandamus.

Have the Necessary Conditions Precedent for Issuance of a Building Permit Been Satisfied?

- [119] Ms. English contends that the conditions precedent for issuance of a building permit have been satisfied.

- [120] She contends that the 2019 Application is compliant with the requirements in the building code and other bylaws. She says that the City has not raised any issues to date regarding compliance, despite being invited to do so on multiple occasions.

- [121] Ms. English refers to exchanges of correspondence between Mr. Adler and Ms. Trachta:

- (1) In July 2019, Ms. Trachta responded to a status inquiry from Mr. Adler, advising that "nothing [was] needed at [that] time".
- (2) In an email from Mr. Adler to Ms. Trachta, sent August 9, 2019, he stated: "[in] our discussion on August 1 you clarified that the physical building aspect of the review is complete ". There is no evidence that Ms. Trachta refuted Mr. Adler's understanding.
- (3) In a later exchange in mid-August 2019, Mr. Adler queried whether anything else was outstanding for the approval of the building permit and Ms. Trachta simply responded: "[just] working on all the steps that are needed. I'll get back to you as soon as possible".
- (4) In the penultimate, pre-decision correspondence from Ms. Trachta, sent September 23, 2019, she requested that Ms. English confirm whether the proposed structure was to be used for cultivation of medical cannabis, non-medical cannabis, or both.

- [122] Ms. English contends that none of the affidavits that the City filed in response to this application raise any outstanding technical considerations. Having reviewed the City's affidavits, I agree. The record before me establishes that the City's only reason for refusing the 2019 Application was its interpretation of s. 8 of the 2019 ALR Regulation, being that only soil-based structures constructed prior to July 13, 2018, could not be prohibited.

- [123] Despite the absence of any concerns in the record or in the City's affidavits with respect to whether Ms. English's proposed greenhouse is "soil-based", in argument, counsel for the City urged this Court to remit this application back to the Building Inspector to determine whether this is the case. Counsel for the City contends that this determination is required in order to confirm whether the proposed greenhouse falls within the class of soil-based structures set out in s. 8(1)(b) of the 2019 ALR Regulation.
- [124] In particular, counsel for the City submits that there are multiple reasonable interpretations of the phrase "base consisting entirely of soil" used in s. 8(1)(b). The City submits that depending on which interpretation is applied, s. 8(1)(b) may or may not apply to the greenhouse Ms. English proposes to construct, which is designed to use screw piles as part of its foundation.
- [125] The City submits that potential interpretations with respect to what constitutes a greenhouse with a "base consisting entirely of soil" include:
- (1) Base refers only to "structural" elements of a greenhouse, which can only be made of soil;
 - (2) Base refers only to the lower-most usable portion of a greenhouse (that is the floor), which can only be made of soil. This interpretation would allow the use of structural components, such as screw piles; and
 - (3) Base refers to both the lower-most usable portion of a greenhouse (that is the floor) as well as any structural elements, all of which must be made of soil.
- [126] The City submits that it is not the role of this Court on judicial review to choose one of these interpretations.
- [127] In addition, the City submits that because the City chose to deny the 2019 Application based on its interpretation of s. 8(1)(b) of the 2019 ALR Regulation that it did not fully consider whether the proposed greenhouse was soil-based - and therefore its discretion in relation to the permit application is not spent.
- [128] First, with respect to what constitutes a soil-based greenhouse, there is evidence before me that suggests an answer to this question and therefore no interpretation with respect to what "soil-based" means is required by this Court. In an email dated September 28, 2018, Martin Collins, the director of policy and planning with the ALC, wrote to Harnois Greenhouses, the firm retained by Ms. English to design her proposed greenhouse. In this email Mr. Collins stated:

This is to confirm that metal screw pile or helical piers are acceptable in-ground supports for cannabis production greenhouse in the ALR in British Columbia.

Grading of greenhouse site to level the site is acceptable provided topsoil for the greenhouse site is removed, and only native soils on the site are graded, then the topsoil replaced. Grading for leveling which buries the native topsoil is not permitted. The importation of fill from off the property is not permitted for the soil based cannabis facility.

[129] Second, with respect to the City's argument that it has not had the opportunity to fully consider whether the proposed greenhouse is soil-based, there is no affidavit evidence from the City in support of this position.

[130] On May 6, 2016, the City was provided with the technical specifications for the proposed greenhouse prepared by Harnois Greenhouses. These specifications set out that: the type of crop to be grown is "on the ground" (cannabis); the interior floor finish is to be native soil; and that the foundation type is steel plates on screw piles. In my view, this establishes that the City had the necessary information to evaluate the nature of the proposed greenhouse at the time that the 2019 Application was submitted.

[131] In addition, based on the exchanges of correspondence between Ms. Trachta and Mr. Adler, the technical questions raised by the City concerning the proposed greenhouse design concerned the nature of the proposed odour control filtration system to be used and with respect to drainage from the site. I was not taken to any evidence of any concerns being raised by the City with respect to whether the proposed greenhouse was "soil-based".

[132] For its position, the City relies on *Turney v. Langley (Township)*, 2016 BCSC 1099. In that case, the court found that proof of one unlawful reason for refusal of a building permit was not enough to warrant an order in the nature of mandamus. I find that *Turney* is distinguishable.

[133] In *Turney*, a basis of Langley's decision was that it had not determined whether the proposed addition to a barn complied with the provision of the National Farm Building Code of Canada, 1995, NRCC 38732. The court found that Langley must be permitted to assess whether the proposed addition met those provisions. In the case before me, the Building Inspector did not rely upon any uncertainty with respect to whether the proposed greenhouse was soil-based as a reason for the Decision.

[134] In conclusion on this point, I am not satisfied on the evidence before me that there are remaining technical issues that the City has yet to consider, or has not had sufficient opportunity to consider, which constitute a condition precedent for the issuance of a building permit.

Are There Other Adequate Remedies That Should be Considered?

[135] The only other remedy suggested by the City, if I find that the Decision was unreasonable, is to remit the matter back to the Building Inspector for reconsideration. For the reasons that follow, I do not consider that this would be appropriate in the circumstances.

- [136] There is authority that supports an order of mandamus requiring a municipality to issue a building permit that has been wrongfully withheld: 0826239 at para. 139; *McKeown v. City of Port Moody*, 2000 BCSC 73 at para. 23; 579340 B.C. Ltd. v. Sunshine Coast Regional District and Wills, 2005 BCSC 1203, at para. 51.
- [137] In the decision of *Paldi Khalsa Diwan Society v. Cowichan Valley (Regional District)*, 2014 BCCA 335, at issue on appeal was whether a crematorium was a "permitted use" of the appellant's property and, if so, whether the crematorium could be operated as a commercial enterprise. The main issue was the interpretation of a zoning bylaw (see paras. 26, 29-45). The court found that the crematorium was a "permitted use" of the property and that it could be operated commercially. To determine the appropriate remedy, the court considered the principles applicable to a claim for mandamus as summarized in *Apotex* (para. 56). In a brief analysis, the Court found that the *Apotex* criteria had been met, and that an order of mandamus was warranted as "no other adequate remedy [was] available to the appellants and the order [would] be of practical value and effect" (at para. 57).
- [138] Furthermore, in 0742848 B.C. Ltd. v. Squamish (District), 2011 BCSC 747, Justice Verhoeven granted the petitioner's application for a development permit after finding that there was "no deficiency" in the petitioner's application. In refusing to remit the matter back to the municipality, Verhoeven J. found that the municipality had ample opportunity to review the permit application. He stated at para. 117:

In such circumstances, sending the matter back for reconsideration could invite rejection on some other spurious ground. The Council has had two opportunities to decide whether the development permit application should be granted or refused based upon the guidelines. It has failed to do so. On these grounds as well, no purpose would be served by remitting the matter back to the Squamish Council for a third consideration.

[Emphasis added.]

- [139] As was found by Verhoeven J. in 0742848 B.C. Ltd., I consider that the City has had ample opportunity to review the 2019 Application. I see little value in referring this matter back to the City for reconsideration on the limited issue of whether the proposed greenhouse is a structure based entirely in soil, as this will invite rejection on a potentially spurious, technical ground.
- [140] In addition, the evidence establishes to my satisfaction that the City has had an opportunity to consider this issue and did not express any concerns. Referring the matter back to the Building Inspector would simply provide the City with another, unwarranted, "kick at the can".
- [141] In addition, I have considered other factors related to fairness, including additional delay for Ms. English and the fact that the City has had a genuine opportunity to weigh in on the issues in question: see *Vavilov* at para. 142. In my view, these factors militate in favour of a mandamus order.

[142] As set out at para. 142 of Vavilov, declining to remit a matter to the decision maker may be appropriate where it becomes evident that a particular outcome is inevitable and therefore remitting the case would serve no useful purpose.

[143] In the circumstances of this case, I find that remitting the 2019 Application back to the City for further consideration would serve no useful purpose and therefore find, on a balance of convenience, that an order in the nature of mandamus is warranted.

Conclusion

[144] In conclusion, I grant the following relief sought in this petition:

- (1) A declaration that the City unreasonably cancelled building permit application No.19 860829 submitted by the petitioner on May 6, 2019;
- (2) An order quashing the decision of the Building Inspector made on September 30, 2019, cancelling building permit application No.19 860829; and
- (3) An order of mandamus compelling the City to issue Building Permit No.19 860829.

[145] Costs are awarded to the petitioner.

"Mayer J. "

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/16/2020BCSC1642.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/english-v-richmond-city-2020>

Prepared on 24 October 2026 · Esheria