

CANADA / JUDGMENT

Fipke v. Kelowna (City)

2023 BCCA 26

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 26 Fipke v. Kelowna (City)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Fipke v. Kelowna (City),

2023 BCCA 26

Date: 20230119

Docket: CA48188

Between:

Charles Edgar Fipke

Appellant

(Petitioner)

And

The City of Kelowna and Aqua Resort Ltd.

Respondents

(Respondents)

Before:

The Honourable Madam Justice Fenlon

The Honourable Justice Griffin

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated

March 15, 2022 (Fipke v. Kelowna (City), 2022 BCSC 417,

Vancouver Docket S216774).

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Place and Date of Hearing:

Vancouver, British Columbia

November 3, 2022

Place and Date of Judgment:

Vancouver, British Columbia

January 19, 2023

Written Reasons by:

The Honourable Justice Griffin

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Abrioux

Summary

The appellant, Dr. Fipke, opposed a large multi-unit development property by the respondent neighbour, Aqua, and sought judicial review of development permits granted by the City. Dr. Fipke says that the City ignored legal constraints that prevented it from granting the development permits. The issues turned on how to treat a part of Aqua's originally surveyed property that had

become submerged by Okanagan Lake. Aqua provided, to the City, licensed land surveyor's opinions to the effect that Aqua still owned the land as it had become submerged due to avulsion. Aqua then, at the suggestion of the City, gave the submerged portion to the provincial Crown by filing a new subdivision plan marking the submerged portion as "return to Crown". The City relied on s. 1.8.1 of bylaw 8000 to treat the size of the property as the same as prior to the return to the Crown of the submerged portion. Held: Appeal dismissed. The chambers judge identified and applied the correct standard of review, reasonableness. The City did not act outside the legal constraints of its bylaw 8000, s. 1.8.1, when it considered in all the circumstances that the act of Aqua returning the portion to the Crown constituted a taking, by way of dedication to the Crown for public benefit, and it was not an abandonment by Aqua. The City also did not act outside legal constraints when it considered that at the time of Aqua's dealing with it, the submerged land still belonged to Aqua because it had become submerged due to avulsion, even if there had been subsequent changes to the shoreline. The City's decision to grant the permits was reasonable.

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Reasons for Judgment of the Honourable Justice Griffin:

- [1] The appellant, Dr. Fipke, owns property on Okanagan Lake in Kelowna, BC, adjacent to property owned by Aqua Resort Ltd. ("Aqua"). He sought judicial review of a June 22, 2021 decision by the respondent City of Kelowna (the "City") to grant Aqua a development permit and development variance permit (the "Decision"). The permits allowed for a large multi-unit development on Aqua's property.
- [2] The density for the development that was allowed by the Decision was the result of the City treating, as part of Aqua's lot size, a section of the originally surveyed land that had become submerged under the lake. Dr. Fipke says the City presupposed a lot size for the property that was inconsistent with the legal constraints on it.
- [3] The chambers judge dismissed his petition for judicial review on March 15, 2022, with reasons indexed at 2022 BCSC 417. Dr. Fipke appeals from that order.

Background

- [4] There is little dispute on the factual background and even the legal concepts at play in respect of property next to a moving shoreline, as summarized by the chambers judge.
- [5] In 1939, the initial subdivision plan for the property (the "Property") was registered in the Land Title Office (Plan 2714). It was based on a survey of the natural boundary between the Property and the lake in 1938.
- [6] Sometime between 1939 and 2008, when Aqua as owner sought to develop the Property, there was substantial change to the shoreline of the lake, with the shoreline moving inland and water from the lake submerging part of the Property.
- [7] Central to Dr. Fipke's position is his disagreement with Aqua and the City as to what caused the change in the shoreline.

- [8] Historic doctrines of accretion and avulsion dictate whether the submerged part of the Property still belonged to Aqua (the case if the submerged portion was due to avulsion), or belonged to the Crown (the case if the submerged portion was due to erosion).
- [9] From around 2008, Aqua worked with the City to make plans and apply for development permits to start construction on the Property.
- [10] The zoning for the Property in City Bylaw 8000 only permitted a maximum floor area ratio ("FAR") of 1.5; the ratio by which the floor area cannot exceed the area of the lot. Aqua's development proposal fell just within this limit at a ratio of 1.47, but only if the submerged land was included as part of the total area upon which the FAR could be calculated.
- [11] If the submerged land was not included, the development would exceed the FAR, legally precluding a permit for the development as planned. This is because ss. 490(3) and 498(2)(a) of the Local Government Act, R.S.B.C. 2015, c. 1, provide that a development permit and a development variance permit must not vary the density of the land from that permitted in the bylaw.
- [12] In 2008, Aqua consulted with Linden Fritsch, a land surveyor, regarding the submerged portion of the Property. Mr. Fritsch's report recognized the distinction between erosion and accretion, which he described as "slow and imperceptible", versus "rapid avulsion". After a historical review of events that caused changes in the shoreline, Mr. Fritsch concluded in his report that "the evidence we have proves overwhelmingly that avulsion took place on these properties".
- [13] Mr. Fritsch was of the view that the event that caused avulsion was a significant flood on the lake in 1948, where maximum lake level was above full pool for 149 days, and the "saturated soils and the effects of the wind for that period of time created ideal conditions for avulsion".
- [14] The level of the lake was controlled by a structure on the river channel feeding the lake and "full pool" meant a lake level exceeding the recommended operating range. When the lake was above full pool for a considerable time, the soils on the foreshore became saturated and more vulnerable to change.
- [15] Mr. Fritsch concluded that the titled boundary to the Property remained the same as in the 1939 plan. As of 2008, his report reflected an intention on the part of Aqua to dedicate a strip of the foreshore to the City, but this did not happen.
- [16] In 2016, Aqua applied for a development permit and provided Mr. Fritsch's report to the City.
- [17] In 2017, the City staff requested the underlying information relied on by Mr. Fritsch. Aqua provided information including:
- a) Aerial photographs showing the progression of the water boundary between 1938 and 2006.
 - b) An engineering report from Don Dobson, a professional engineer, who provided an assessment of the lake levels and changes to the shoreline from 1938 to 1951.

- c) The 1946 Report of the Joint Board of Engineers, Okanagan Flood Control, that provided evidence as to the state of the lake and shoreline prior to the 1948 flood.
- d) An eyewitness account from Bud Truswell about the floods occurring during the 1940s.
- e) An opinion by a second land surveyor, Gary Borne, dated July 20, 2017. He referred to avulsion as "the loss of land by rapid and perceptible events, such as a flood". He concluded that the change in water line on the property was caused by avulsion, namely the flood of 1948. He said this was supported by aerial photos from 1938 to 1951. He concluded that the Property boundary was as shown in the 1939 subdivision plan.

[18] Following the review of the evidence, the City staff agreed that the submerged land was owned by Aqua.

[19] On January 23, 2018, the mayor requested an explanation from City staff about the submerged portion of the Property. Mr. Barton, a City employee, explained the applicability of avulsion to the mayor and the council members. The City authorized the initial permit.

[20] In 2019, the City staff and Aqua discussed what to do about the submerged land. The City told Aqua that, if it surrendered the submerged land to the Crown with the approval of the Deputy Surveyor General, this would fit within s. 1.8.1 of bylaw 8000 and be considered a taking for public use. This would allow the Property to be still considered the size it was before the taking for purposes of the development and zoning regulations, and would not adversely affect the intended FAR.

[21] Section 1.8.1 of bylaw 8000 provides:

Where a lot is reduced in size as a result of a taking for public use by the City, Provincial or Federal Government, ... by dedication, expropriation, or purchase, the lot shall be considered to exist as it did prior to the taking for the purpose of further development upon the lot under its existing zoning regulations ...

[22] As a result, Aqua reached out to the Surveyor General and asked to surrender the land to the Crown. The Surveyor General approved Aqua's surrender of the submerged land. Following advice on how to accomplish this, on November 8, 2019, Aqua registered a revised subdivision plan with the Land Title Office which showed the submerged lands as "return to Crown".

[23] The following sketch illustrates the difference between the original natural boundary (waterline) of the Property in the 1939 plan (marked by the dark line parallel to the words "Okanagan Lake" and referencing Plan 2714), and the new water boundary as of a 2008 plan (marked by the thin line roughly diagonal to the dark line and referred to as the "Present Day Waterline"). One side of the recent submerged portion starts at the same location as the original natural boundary (seen at the top left edge of the sketch) with the submerged portion gradually widening to roughly 6.9 meters, then 21.3 meters, and so on, until the submerged portion is roughly 56 meters inland from the old natural boundary. Dr. Fipke

says that the evidence shows that the wider portion of the submerged land had grown another 3 meters by 2018.

- [24] On December 6, 2019, the City granted the permit to Aqua based on the Property size that included the submerged land before it was surrendered to the Crown. If it had not included the submerged portion, the development would have exceeded the legal density limits.
- [25] The permit lapsed after two years and Aqua submitted a renewal application. It used the same lot area calculation as the previous application.
- [26] On June 22, 2021, the City issued another development permit to Aqua, including a development variance permit. The City says that, while it technically treated the renewal as a new application, it was grounded in the materials and expertise of the previous decision.
- [27] This is the Decision challenged by Dr. Fipke on judicial review.
- [28] The chambers judge reviewed the factual record before the City, as well as the legal principles regarding accretion and avulsion. He considered s. 1.8.1 of bylaw 8000. He determined that the City's Decision was reasonable, and dismissed the petition.

Legal Principles Regarding Moving Shorelines and Property Ownership

- [29] The title to a property bordering a body of water will often extend to a natural boundary. In BC, this is defined as "the visible high-water mark of any lake, river, stream or other body of water where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself": Land Act, R.S.B.C. 1996, c. 245, s. 1.
- [30] A registered subdivision plan endorsed by the Surveyor General, certifying that the water boundary shown on the plan is the natural boundary, will be proof of marketable title: Land Title Act, R.S.B.C. 1996, c. 250, s. 96(1).
- [31] The doctrine of accretion applies to ownership of land that has increased (accretion) or decreased (erosion) due to the action of a body of water bordering a property. The doctrine is rooted in the ancient Roman law of alluvion. The following description of the doctrine was accepted in *Ontario (Attorney General) v. Shanks*, [1981] O.J. No. 79 (C.A.) [Shanks]:
- [12] The doctrine of accretion is summarized by G.V. LaForest, *Water Law in Canada* (1973) at pp. 225-226 as follows:

The owner of land bounded by any body of water, whether it be the sea or a tidal river or lake, or an inland river or lake, is entitled to any extension of land on the side of the water arising by accretion. There are two types of accretion. One is created by the gradual and imperceptible deposit of alluvium on the banks of a riparian owner's land. The other results from the gradual and imperceptible recession of the waters to a lower level. In either case, the additional dry land belongs to the adjoining owner. Correspondingly the gradual erosion of the land or the

encroachment of the water upon it will vest the ownership of the land thus covered with water in the owner of the bed.

[32] The doctrine of accretion results in the property line moving with the gradual shifting of the boundary of the water. When accretion occurs, the increased land will belong to the owner of the property and, when erosion occurs, the owner of the newly submerged land will be the owner of the bed of the body of water: *Clarke v. Canada (Attorney-General)*, [1930] S.C.R. 137, 1929 CanLII 38 (S.C.C.) [Clarke].

[33] The issue in *Clarke* was whether the boundary of the appellant's land had increased to include a raised bench in the river that had been built up over time by the deposit of silt; or whether the bench still formed part of the river bed and did not belong to the appellant.

[34] The Court in *Clarke* described accretion as being a slow, gradual, and practically imperceptible process at 144:

The term "accretion" denotes the increase which land bordering on a river or on the sea undergoes through the silting up of soil, sand or other substance, or the permanent retiral of the waters. This increase must be formed by a process so slow and gradual as to be, in a practical sense, imperceptible, by which is meant that the addition cannot be observed in its actual progress from moment to moment or from hour to hour, although, after a certain period, it can be observed that there has been a fresh addition to the shore line. The increase must also result from the action of the water in the ordinary course of the operations of nature and not from some unusual or unnatural action by which a considerable quantity of soil is suddenly swept from the land of one man and deposited on, or annexed to, the land of another.

[35] Avulsion is a more unusual event which affects the land-water boundary, such as an exceptional storm, high waves, or flood. When compared to accretion or erosion, it is described as a visible or sudden change, in contrast to imperceptible change. Where land is added to or diminished due to avulsion, ownership of the new or submerged land does not change, and the legal boundary is "frozen" or fixed in place.

[36] In *Clarke*, the Court was considering the addition of silt to land, and so the language used to characterize events may be distinguishable from a case where there is submerging of land by water. Nevertheless, *Lamont J.* drew the distinction of gradual and imperceptible versus sudden and visible when distinguishing accretion from avulsion at 147-148:

The test, in my opinion, is not the number of years it took the bench to form, nor yet whether an addition to the shore line may be apparent after each flood, but whether, taking into consideration all the incidents contributing to the addition, it properly comes within what was known to the Roman law as "alluvion", which implies a gradual increment imperceptibly deposited, as distinguished from "avulsion", which implies a sudden and visible removal of a quantity of soil from one man's land to that of another, which may be followed and identified, or the sudden alteration of the river's channel.

[Emphasis added.]

- [37] In *Clarke* some evidence supported the claim that some of the bench was formed by sudden action of the waters, such as an unusual flood, but other evidence indicated that the formation of the bench was gradual. There was also dispute as to whether the fact that the bench was formed over fifteen years amounted to a perceptible or imperceptible change. Lamont J. held that there was no evidence that the formation of the bench was assisted by an "avulsion" in contrast to it forming gradually and imperceptibly. Ultimately, the Court concluded that the bench was true accretion and, as such, belonged to the appellant.
- [38] In BC, the Crown owns the beds of bodies of water below the natural boundary, as set out in s. 55 of the Land Act. Thus, if erosion moved the boundary inland between Aqua's property and the lake, the Property would be smaller than as shown on the original subdivision plan and Aqua would no longer own the submerged section. Rather, that section would be already owned by the Crown. As such, Aqua would not have owned the portion of submerged land that it marked "return to Crown", s. 1.8.1 of the bylaw 8000 would not have applied, and the permit would have been erroneously granted because the density of the development would exceed the legal limits of the permissible FAR.

Grounds of Appeal

Ground 1: There Was Abandonment, Not a Taking

- [39] As a first ground of appeal, Dr. Fipke argues that it was unreasonable for the City to interpret the relevant bylaw in such a way as to conclude that a "taking" occurred when Aqua wrote "return to Crown" on the area of the submerged land on the revised subdivision plan for the Property, filed with the Land Title Office in November 2019. Dr. Fipke argues that what really happened was that Aqua abandoned the submerged lands. On this analysis, even if the submerged lands were caused by avulsion (which he does not concede), the submerged lands should not have been considered as part of the Property for purposes of calculating the size of the development pursuant to s. 1.8.1 of bylaw 8000.
- [40] Dr. Fipke argues that abandonment should have been found on either of two versions of the facts: first, in 2008, which was many years after the 1948 flood, when Aqua did nothing to reclaim the submerged portion of the Property; and second, when Aqua wrote "return to Crown" on the revised subdivision plan filed in 2019.

Ground 2: Avulsion Followed by Erosion

- [41] As a second ground of appeal, Dr. Fipke argues that even if an avulsion occurred in 1948 due to an unusual flood, the City failed to consider that the area of the submerged land significantly increased through erosion after 1948. He says that, at a minimum, some portion of the submerged Property was lost due to erosion and, thus, could not be considered to remain the Property of Aqua. It was therefore unreasonable for the City to treat the entire portion of the submerged land as Aqua's.

Ground 3: No Avulsion

- [42] As a third ground of appeal, Dr. Fipke says that the City was not reasonable in concluding that the flooding event in 1948 was an avulsion. He says the event as described by the experts cannot amount to an avulsion as it was not sudden and abrupt.

Respondents' Positions on Grounds of Appeal

- [43] The "no taking" argument was not advanced in the appellant's factum, and Aqua objected to it being raised at the hearing of the appeal. However, Dr. Fipke retained new counsel after the factum was filed (due to the death of previous counsel). Dr. Fipke's new counsel gave the respondents' notice that he would be advancing the "no taking" argument as had been advanced before the chambers judge, and received no response that the respondents would object to him doing so. Further, Aqua was given the opportunity to address the argument orally on appeal and declined to seek an opportunity to file additional written submissions, instead relying on the submission it made before the chambers judge which is in the record. In the circumstances, I consider it in the interests of justice to permit Dr. Fipke to advance this first ground of appeal.
- [44] On the first ground of appeal, Aqua submits that Dr. Fipke reads bylaw 1.8.1. too narrowly, and the City was reasonable in finding that a "taking" occurred within the meaning of the bylaw. Aqua submits that when the facts of the discussions between Aqua and the City officials are considered, as well as the broader context of the bylaw, Aqua's notation of "return to Crown" on the subdivision plan fits within the meaning of a "dedication" and "taking" as contemplated by the bylaw.
- [45] On the second ground of appeal, Aqua submits that post-avulsion erosion of the natural boundary is irrelevant since, due to the avulsion, the submerged land remained Aqua's property.
- [46] On the third ground of appeal, Aqua submits that the Decision was reasonable, because the facts and law supported the conclusion that the submerged portion of the Property was due to avulsion.

- [47] Aqua further submits, in the alternative, granting relief on judicial review is discretionary pursuant to ss. 8 and 9 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241. It says that discretion should be exercised in favour of upholding the City's Decision, even if it is found to be unreasonable. Aqua is critical of Dr. Fipke for not bringing his petition at an earlier juncture and takes the position that it would be highly prejudicial to Aqua to reverse the Decision given the amount of money Aqua has invested in the development.
- [48] The City's position is similar to Aqua's and, in summary, is that the City's Decision was reasonable.

Standard of Review

- [49] This Court's task on appeal is to assess whether the chambers judge identified the correct standard of review and applied it correctly. In so doing, the Court's focus is on the administrative decision. This Court, in effect, steps into the shoes of the reviewing judge and applies the appropriate standard of review to the administrative decision. Although the reasoning of the court below may be instructive, the decision is not entitled to deference on appeal, except where the reviewing judge was required to make findings of fact: *Yu v. Richmond (City)*, 2021 BCCA 226 [Yu] at paras. 44-45; *Highlands District Community Association v. British Columbia (Attorney General)*, 2021 BCCA 232 [Highlands District Community Association] at para. 24; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 46-47.
- [50] In accordance with *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov], the standard of review of the City's Decision is reasonableness; see also *English v. Richmond (City)*, 2021 BCCA 442 [English] at paras. 57-59. The chambers judge correctly identified this standard of review.
- [51] In *Vavilov*, the Court identified two types of fundamental flaws that may make an administrative decision unreasonable. The first is where the reasoning is irrational; the second is where the decision is untenable considering the relevant factual and legal constraints bearing on it: at paras. 100-101.
- [52] The City's Decision was not accompanied by reasons, nor were reasons required as a matter of procedural fairness: *Vavilov*, at para. 131; *English* at para. 57; *Yu* at para. 37.
- [53] The rationale for an administrative decision made without reasons may be discerned from the record, but if the basis for the decision remains unclear, the court's review will end up focusing more on the outcome than the reasoning process: *Vavilov* at paras. 123, 137-138; *Highlands District Community Association* at para. 30; *Yu* at para. 50.

- [54] Here, the focus of Dr. Fipke's appeal is on the second type of fundamental flaw in the administrative decision identified in Vavilov. Dr. Fipke says that the Decision was unreasonable because the City did not accept and work within the legal constraints on it. He says that the City could not reasonably approve the development permits if the FAR exceeded the legal density limits.
- [55] Dr. Fipke's position is that the chambers judge failed to correctly apply the standard of review, in failing to recognize that the City exceeded the legal constraints on its Decision and, therefore, the City's Decision was unreasonable. Dr. Fipke says that the size of Aqua's property, for the purposes of calculating density, did not include the submerged portion of the Property.
- [56] There are two overall prongs to Dr. Fipke's criticism of the City's Decision. He first argues that the City's interpretation of a "taking" within the meaning of s. 1.8.1 of bylaw 8000 was incorrect because, as a matter of statutory interpretation, it was not a taking. Second, he argues that the City was incorrect, as a matter of common law, in accepting that the doctrine of avulsion applied to the changing shoreline of the Property.
- [57] Dealing with the first prong, the standard of review remains reasonableness even where the Decision involves statutory interpretation. As held in English:
- [4] Vavilov emphasizes that in conducting a reasonableness review of a decision that relies on statutory interpretation, the "reviewing court does not undertake a de novo analysis of the question" or "ask itself what the correct decision would have been" (at para. 116, citing *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 50, and paras. 75, 83, 124, 289, 306, [2003] 1 S.C.R. 247).
- [58] Nevertheless, the court may interfere in an administrative decision for unreasonableness where the statute leaves room for a single reasonable interpretation and the interpretation adopted by the decision maker falls outside that single interpretation, or falls outside of the provision's text, context or purpose, or is otherwise unjustifiable on principles of statutory interpretation: English at paras. 69, 114-115.
- [59] As for the second prong of Dr. Fipke's argument, the question of whether submerged property was retained by an owner because it was caused by avulsion or was lost to the Crown due to erosion is a question of fact, or mixed fact and law because the findings of fact are informed by the common law principles of accretion. Even if ordinary appellate principles applied, the determination of such an issue would be entitled to deference.

Analysis

Ground 1: Was There Abandonment, Not a Taking?

[60] The conduct of Aqua in writing "return to Crown" on the submerged portion of the Property in a newly filed subdivision plan was accepted by the City as a "taking" of the submerged portion of the Property within the meaning of s. 1.8.1 of bylaw 8000, for purposes of considering the lot size of the Property when the City made the Decision to issue the development permits.

[61] Dr. Fipke argues that this interpretation was untenable and the City's Decision was, therefore, unreasonable.

[62] Dr. Fipke argues that the conduct of Aqua was an abandonment of the submerged portion to the Crown, not a "taking".

[63] Again, s. 1.8.1 reads:

Where a lot is reduced in size as a result of a taking for public use by the City, Provincial or Federal Government, ... by dedication, expropriation, or purchase, the lot shall be considered to exist as it did prior to the taking for the purpose of further development upon the lot under its existing zoning regulations ...

[64] I will address Dr. Fipke's two factual arguments in respect of abandonment before addressing his argument regarding the interpretation of s. 1.8.1.

[65] Dr. Fipke first submits that, even if avulsion occurred in 1948, in 2008 Aqua ceased any efforts to move forward in reclaiming the submerged land. Its inaction in reclaiming the land should be considered abandonment.

[66] Dr. Fipke's argument picks up on a brief reference in Shanks to the concept of abandonment of property that has become submerged due to avulsion.

[67] In Shanks the court relied on the text by Gerald LaForest (later a Justice of the Supreme Court of Canada) as follows:

[26] In applying the doctrine of accretion to this evidence, of particular importance is how the doctrine operates in practice. This is described by LaForest at p. 227 as follows:

To give rise to an accretion, the change must take place gradually and imperceptibly. And the same is true of an erosion. Imperceptible here means imperceptible in its progress, not imperceptible at the end of a period. A piece of accreted or eroded land may be quite extensive and so perceptible in that sense, but it may be impossible from hour to hour or day to day to perceive its development, and so it is imperceptible in that sense. The key word is "gradual". Thus accretion must be distinguished from a sudden change in the course of a stream or the level of the sea or other water resulting in the creation of new areas of dry land or in the encroachment by water on what was formerly terra firma. In such a case, the boundary does not change, but remains as it was before. This applies where the boundary is the median line of a river as well as where the boundary is at the edge of water. Land so swallowed up, even by the sea, continues to belong to the owner, however long it may remain covered, so long as it can be ascertained by reasonable marks or the quantity can be known, though perhaps after a great length of time it

may be considered as abandoned. Accordingly the owner may take steps to reclaim the land, or if it later naturally becomes dry land it belongs to him.

[Emphasis added.]

- [68] The above quote in Shanks summarizes the law that if there is an event causing a sudden change in the land-water boundary (in contrast to an imperceptible change), that is, an avulsion, the submerged land remains that of the original property owner so long as it can be ascertained. What happens to the submerged land may become evident over time: it might be reclaimed; it might be abandoned; it might naturally become dry land again.
- [69] Shanks did not address what conduct might amount to abandonment. However, the court cited a case from 1900 that held that an owner was entitled to reclaim the land 20 years after it had been washed away, because no legal rights had accrued to others: *County of York v. Rolls*, (1900), 27 O.A.R. 72. Shanks held that, where there is avulsion, the property owner has the right to repair the damage done by the forces of nature even if no steps are taken for many years, so long as no legal rights have accrued to others in the meantime: at paras. 33-34.
- [70] In the present case, there were ways that the Property's owner could directly take steps to abandon the submerged land. One form of abandonment might occur if the owner, whether Aqua or its predecessor, sought to correct the plan of the property pursuant to s. 106 of the Land Title Act and to file a revised plan showing a change in the natural boundary. However, that did not happen.
- [71] The City was not asked to consider the issue of abandonment. However, had it been asked to consider this issue Dr. Fipke can point to no conduct by Aqua in 2008 amounting to abandonment, other than the passage of time that followed before it took additional development steps in 2016. However, the mere passage of time does not necessarily prove that an owner has abandoned the right to reclaim land submerged due to avulsion. In 2008, the registered subdivision plan for the Property showed the natural boundary as it had been in 1938 before the shoreline moved inland and there was no evidence that legal rights had accrued to others. Inconsistent with the notion of abandonment, Aqua had obtained a surveyor's opinion that confirmed that the Property's boundaries remained the same, and it maintained this position in its negotiations with the City.
- [72] I therefore cannot see merit in Dr. Fipke's first argument on abandonment.
- [73] Dr. Fipke further argues that, because Aqua did not ultimately want the submerged land, it made the business decision to abandon the submerged portion when in 2019 it filed a subdivision plan with the submerged portion marked "return to Crown". As such, Dr. Fipke says this cannot be considered a "taking" under the bylaw.

- [74] Dr. Fipke's argument requires an understanding of the facts that existed when "return to Crown" was noted on the new subdivision plan. These facts were reviewed by the chambers judge at paras. 19-20 and 47-51.
- [75] In summary, the 1939 subdivision plan showed the full boundary of the Property including the lands later submerged. This plan was the subject of the negotiations with the City and Aqua. Aqua obtained expert opinions which supported the view that it retained ownership of the submerged land because it had become submerged due to avulsion, and shared these opinions with the City when discussing its development plans with the City.
- [76] Aqua says that it considered reclaiming the submerged portion of the Property but did not pursue the idea due to the environmental impact. Instead, based on its position that it owned the submerged land, Aqua entered into discussions with the City over possible dedications of the foreshore and lakefront of the Property for certain public amenities, namely a public boardwalk, pedestrian access and a public pier, all to be owned by the City. In 2009 Aqua and the City signed a letter of understanding regarding the development of the Property that conceived of Aqua granting rights to the City for these amenities. The letter of understanding included the concept of a strata moorage facility. While the project did not proceed then, when it was revived, the negotiations revived as well. These negotiations were all part of the process of negotiating a rezoning so Aqua could develop the rest of its Property.
- [77] Initially Aqua envisioned protecting its ownership of the submerged land to allow boat access to its development, but changed its views after discussions with the City. The City wanted to see the foreshore and water access protected as a public benefit, but did not want to take responsibility for it. What eventually emerged in the negotiations was an understanding that Aqua would make dedications to the City of a portion of the dry land for a boardwalk and access to the boardwalk, and, at the City's suggestion, Aqua would return the submerged land to the Crown.
- [78] Aqua only took steps to return the submerged land to the Crown after it received advice from City staff that returning the submerged land to the Crown would be viewed favourably by the City and treated as a taking so it would not change the density available for its proposed development.
- [79] Dr. Fipke says that the notation "return to Crown" on the new subdivision plan was not a "dedication" but an abandonment. He points to the difference between Aqua's written dedication of portions of dry land to the City, and its "return" to the Province of the submerged land.
- [80] Respectfully, Dr. Fipke's position ignores the fact that both actions were taken because of the suggestions of City's staff that if Aqua gave these portions of the Property for benefit of the public this would be viewed favourably by the City. The City was not going to be the recipient of the submerged lands and so it makes sense that it would not enter into a specific dedication agreement in that respect. Nevertheless, having the submerged land returned to

the Crown worked together with the dedication of the dry land to allow the City to achieve its goal of keeping the waterfront for public use and preventing Aqua from developing the submerged land, either by reclaiming and filling the lands or by creating a marina. In the full factual context, it was not unreasonable to treat the "return to the Crown" as a dedication.

- [81] That leads to the statutory interpretation question, namely whether s. 1.8.1 of the bylaw applied in the circumstances.
- [82] Dr. Fipke argues that the word "taking" in s. 1.8.1 requires some coercive action by a government that compels the property owner to part with the property. He submits that the purpose of s. 1.8.1 is to give a property owner relief from the harshness of any negative repercussions on the owner's development rights if a government were to unilaterally take part of the owner's property for a public use.
- [83] In my view, Dr. Fipke's position as to the interpretation of "taking" in s. 1.8.1 of the bylaw ignores the factual context of the City's direct dealings with Aqua, reviewed above. Dr. Fipke's position is also inconsistent with the broader statutory context.
- [84] The City's official community plan gives flexibility to property owners and City staff to encourage the gifting of land or protection of portions of land in return for the property owner retaining rights to develop the remaining property at the same density as before the gifting or protective measures.
- [85] For example, in addition to s. 1.8.1, the City has discretion to include a riparian management area setback as part of the lot area for calculating density, pursuant to s. 6.14.3 of bylaw 8000. Sections of the official community plan also promote this notion in respect of environmentally sensitive areas: policies 5.15.7-5.15.9, (as referred to by the chambers judge at para. 55):

5.15.7 Protection Measures. Protect and preserve environmentally sensitive areas using one of more of the following measures, depending on which measures are appropriate given the situation:

Return to Crown Land or covenant for conservation purposes with the City, the Province and/or a nongovernmental organization (e.g. Central Okanagan Land Trust) eligible to hold Conservation Covenants;

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5.15.8 Site Density Calculations. Allow the owner(s) of land affected by dedications for environmental protection to use the original site area in computing density and floor area ratios and minimum area for development or subdivision purposes.

5.15.9 Voluntary Protection. When an owner of land offers voluntary protection of an ESA [environmentally sensitive area], consider allowing: increased density on the balance of the subject property by including the dedicated area in the density calculation, transferring density to another property, trading land, purchasing land, offering grant-in-aid, or granting tax exemptions.

- [86] Dr. Fipke's reading of the word "taking" in s. 1.8.1 of the bylaw as precluding a voluntary giving of property ignores the fact that the language envisions property being taken by "dedication, expropriation, or purchase". Only an expropriation would be compulsory, whereas a dedication and purchase could be voluntary. Someone can "take" something that is offered to them, even if offered as a gift.
- [87] Dr. Fipke also says the notation "return to Crown" on the deposited subdivision plan was a transfer in fee simple to the Crown by operation of s. 108 of the Land Title Act. On this point, it may well be that this was the mechanism by which the submerged lands became owned by the Crown. However, this does not shed light on the question of whether it was reasonable for the City to conclude that the transfer was a "taking" by "dedication" within the meaning of s. 1.8.1 of the bylaw.
- [88] In short, this is not a case where it can be said that there is a single reasonable interpretation of the bylaw that is only consistent with Dr. Fipke's position. It equally cannot be said that the City's interpretation is outside the bylaw's language, context, or purpose or is otherwise unjustifiable on principles of statutory interpretation.
- [89] As noted in Yu at paras. 67-68, the reviewing court cannot conduct its own interpretation of s. 1.8.1 of the bylaw and measure the City's interpretation against it.
- [90] The chambers judge properly applied the standard of review when he concluded as follows:
- [57] The City wanted the submerged land returned to the Province for its protection. It agreed with Aqua on a means to accomplish that. Acting reasonably, it was open to the City to understand that it had agreed to a taking for public use by the Province by dedication, as contemplated by s. 1.8.1 of bylaw 8000.
- [91] It was reasonable for the City, on the facts of its dealings with Aqua and on the language of the bylaw interpreted in its statutory context, to decide that Aqua's action in noting "return to Crown" on the subdivision plan in reference to the submerged land, after it was encouraged to do so by the City staff, was a dedication to the provincial Crown of the submerged land for public benefit, and a "taking" within the meaning of s. 1.8.1.
- [92] Therefore, I do not accede to Dr. Fipke's first ground of appeal.

Grounds 2 and 3: Was There No Avulsion, or Avulsion Followed by Erosion?

- [93] It is convenient to consider grounds 2 and 3 together, as both turn on the City's acceptance of the surveyors' opinions regarding the Property boundaries remaining as indicated on the 1939 subdivision plan, notwithstanding changes to the shoreline of the Property. The City relied on three licensed land surveyors, whose reports and opinions were given to City staff, namely: Mr. Fritsch, Mr. Borne, and Mr. Fox.
- [94] As the second ground of appeal, Dr. Fipke submits that the Decision was unreasonable because it treated the whole of the submerged part of the Property as resulting from avulsion when, instead, the best case for Aqua is that a portion of the submerged land could have been caused by the 1948 flood with the remaining portion caused by subsequent erosion.
- [95] Dr. Fipke submits that the subsequently eroded portion would have become owned by the Crown by operation of the common law, and this means that Aqua did not own the entire portion of the submerged land before the "return to the Crown" dedication and taking, and so the density of its development was miscalculated and the City was legally constrained not to grant the permits.
- [96] As the third ground of appeal, Dr. Fipke submits that the Decision was unreasonable because none of the submerged land should have been treated as caused by avulsion. Since there was evidence that the 1948 flooding lasted for five months, Dr. Fipke urges us to conclude that the quantity of shoreline movement during that flood was not sufficiently "sudden" and "perceptible" to qualify as an avulsion.
- [97] The question of what causes movement in a shoreline, whether erosion or avulsion, is a question of fact and is not determined by any hard and fast rule. As held by Lamont J. in Clarke at 141:

The matters to be considered in determining whether a given piece of land forms part of the bed of a river or has been wrested therefrom were stated by Romer, J. in *Hindson v. Ashby* [[1896] 1 Chy. 78. at p. 84.] as follows: --

I think that the question whether any particular piece of land is or is not to be held part of the bed of a river at any particular spot, at any particular time, is one of fact, often of considerable difficulty, to be determined, not by any hard and fast rule, but by regarding all the material circumstances of the case, including the fluctuations to which the river has been and is subject, the nature of the land, and its growth and its user.

- [98] The chambers judge treated the three surveyors' opinions provided to the City as akin to opinions on questions of mixed fact and law: the surveyors reviewed the history of events causing change to the shoreline and then applied common law concepts regarding avulsion and erosion to arrive at their opinions that the submerged land was caused by avulsion so it remained part of the Property.

- [99] It seems undisputed that surveyors have professional expertise in distinguishing between erosion and avulsion, consistent with common law principles.
- [100] After reviewing the evidence that Aqua provided to the City, the chambers judge noted:
- [35] In short, several surveyors concluded that the movement of the shoreline was the result of avulsion, not erosion, and that the property line had not changed from that indicated in the 1938 survey. They came to this opinion following historical research. There is nothing in the record to indicate that any surveyor formed a contrary opinion.
- [36] Dr. Fipke submits that loss of land resulting from the 1948 flood cannot be considered as equivalent to what was described by Lamont J. in *Clarke* as "some unusual or unnatural action by which a considerable quantity of soil is suddenly swept from the land of one man". It is important not to read Lamont J.'s reasons for judgment as though they were the words of a statute. The surveyors' conclusion that avulsion could result from a sustained episode of flooding is consistent with the decisions in *Boyle Concessions* and *Shanks*.
- [37] Dr. Fipke submits that the surveyors mistakenly ignored the evidence of a loss of land prior to and subsequent to the flood of 1948. This is an argument based on historical records and evidence considered by the surveyors. The surveyors had expertise in the interpretation of such materials and it was reasonable for the City to rely upon them and not undertake its own forensic investigation.
- [101] The chambers judge concluded:
- [45] In summary, it was reasonable for the City to put its faith in professional surveyors who had investigated the matter and articulated reasoned conclusions. The legal positions entailed by their conclusions were either correct or fairly arguable. The alternative was that the property line according to the plan on file in the land title office was incorrect, and there was no one who was saying that was so. Acting reasonably, the City was not required to challenge the legal and factual analysis presented to it. It could view the submerged land as owned by Aqua.
- [102] The chambers judge considered the issue of erosion after avulsion. He noted that there was some evidence that there was a loss of the shoreline after 1951. He noted that the parties were unable to put authorities before him which addressed the legal effect of erosion following avulsion: at paras. 39-40. We have a similar dearth of authority directly addressing post-avulsion erosion.
- [103] Counsel for Dr. Fipke cross-examined one of the surveyors, Mr. Fox, as part of the judicial review proceeding. Mr. Fox conceded that there was a significant loss of shoreline between 1951 and 2008 that could be attributed to erosion. He also agreed that there was a further change of approximately 3 metres on one side of the submerged land and 6 metres on the other side since 2008, which could be a result of erosion and partly a result of margins of accuracy as between surveyors (that margin being 0.5 metres). Despite this, Mr. Fox did not change his opinion that Aqua continued to own the submerged portion of land because of

the initial event of avulsion in 1948.

- [104] Dr. Fipke submits that the City did not even consider this issue. However, it is difficult to accept this as a failure on the City's part when Mr. Fox's cross-examination was not before it, and no expert or other reliable source suggested to the City that post-avulsion erosion was relevant to determining the size of the Property. The City points out that the reviewing court's mandate does not extend to looking beyond the record in search of alleged flaws.
- [105] The leading cases illustrate that whether the doctrine of accretion or avulsion applies requires a review of the history of the property in question and some understanding of the typical forces of the body of water at issue. Local knowledge is given significant weight and is entitled to considerable deference on appeal: see, for example, *Yukon Gold Co. v. Boyle Concession Ltd.*, (1916), 27 D.L.R. 672 (B.C.C.A) [Boyle Concession BCCA]; *aff'd*, (1917), 50 D.L.R. 742, 1917 CanLII 702 (S.C.C.) [Boyle Concession SCC] at 743; *Clarke* at 71-73.
- [106] After historical research, the three licensed land surveyors provided their opinions on the present boundary of the Property. They concluded that the movement in the shoreline was caused by avulsion, not erosion, so the original property line had not changed. The City was also provided a first-hand account from a person who witnessed the floods. There was no contrary opinion. It cannot be said that the City was unreasonable to rely on this evidence.
- [107] Furthermore, the case law dealing with distinctions between avulsion, accretion, and erosion does not typically finely parse a series of weather events and shoreline changes.
- [108] The analysis in *Shanks*, *Boyle Concessions*, and *Clarke* supports the notion that there may be differing types of weather events affecting the land-water boundary over time. A series of weather events does not necessarily require the court to consider each event separately, describing each one as either accretion or erosion or avulsion. Rather, depending on the facts, the court may characterize the overall change in the land-water boundary as being caused by accretion, erosion, or avulsion.
- [109] In *Shanks*, the Court found that the trial judge erred in concluding that a series of events made the change to the shoreline gradual and imperceptible. The Court found that the change to the shoreline was dramatic after record high water levels and abnormally high wind storms in a period from the fall of 1972 to the spring of 1973. The property was susceptible to damage due to previous flooding but that did not make the changes by the series of weather events in 1972-1973 gradual and imperceptible. The Court held that the owners of the property had not lost their rights to ownership of land that had been covered by water.

- [110] In Boyle Concession BCCA, the changing nature of the shoreline on a river did not diminish the mining rights secured by a grant where there were three successive years during which the changes in the spring season caused the water boundary to move inland by a total of approximately 100 feet: at 674. This Court accepted that the culmination of these multiple changes did not amount to "gradual" or "imperceptible" change but rather, was "sudden", so the original claim holder continued to have rights to the property.
- [111] Here, the trial judge's analysis relating to the issue of post-avulsion erosion, was as follows:
- [144] I need not decide this interesting and apparently as yet undetermined point of law. It is enough to find that the legal position articulated by Mr. Fox is at least fairly arguable. It is clear from the authorities that the common law distinction between avulsion and erosion is grounded in practical considerations, including the ascertainability of the property line and, perhaps, the length of time that has passed since the land was submerged; Shanks at para. 26. The approach taken by the surveyors is consistent with authority and workable in practice.
- [112] Dr. Fipke submits that a conclusion that the surveyor's opinion, was "at least fairly arguable", as described by the chambers judge at paras. 44-45 of the reasons, is not the proper test on judicial review. Dr. Fipke says that the Decision had to be reasonable and subject to the factual and legal constraints on it. He says the City was constrained by the fact that there was a loss of shoreline after the avulsion in 1948, and that the loss of shoreline was due to erosion; therefore, as a matter of law, the property owner cannot be said to maintain all ownership rights to it.
- [113] I agree that the phrase "fairly arguable" is not a useful measure in the context of the ultimate question on judicial review regarding whether an administrative decision maker's decision is reasonable. The "fairly arguable" measure is sometimes used when determining whether leave should be granted to commence a judicial review proceeding in the Federal Court: see *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224 at paras. 33-36. Applying this language in the wrong context risks leading judges astray as to the correct test: see *Musqueam First Nation v. Canada (Public Works and Government Services)*, 2008 FCA 214 at para. 73.
- [114] Nevertheless, I am satisfied that the chambers judge was not led astray and did not apply the wrong test. The chambers judge understood the standard of review was reasonableness and did not apply a lesser standard when he commented that the opinion by Mr. Fox was "at least fairly arguable". It is apparent from the chambers judge's reasons as a whole that he was using this language to clarify his understanding that his role on judicial review was not to determine whether the opinion of Mr. Fox was correct but, rather, to determine whether the Decision was reasonable. In this sense, his statement of "at least fairly arguable" meant that the evidence met the threshold where the City could reasonably rely on the opinion to make a decision.

- [115] While the common law authorities draw a distinction between changes that are ascertainable (avulsion) and those that are imperceptible (erosion), the facts of each case dictate how the shoreline movement will be characterized. Therefore, there cannot be a single answer to the question of whether a shoreline's gradual movement inland after avulsion should be treated as erosion and will result in diminishing the size of a property. This also means that there cannot be a single reasonable conclusion as to the impact of the changing shoreline on Aqua's property boundaries after 1948.
- [116] It also needs to be appreciated that the City was not tasked with determining competing claims to the submerged land, or with preferring one version of evidence over another. Rather, it was presented with unanimous surveyors' opinions as to the boundaries of the Property, as a background to its Decision to issue the development permits.
- [117] The reviewing court's task is not to determine the factual and legal issues that were before the City for itself, and to use that as a yardstick to measure what the administrative decision maker did: Vavilov at para. 83; 1120732 B.C. Ltd. v. Whistler (Resort Municipality), 2020 BCCA 101 at paras. 38-42.
- [118] I am satisfied that the chambers judge correctly applied the reasonableness standard to his task of reviewing the City's Decision. Based on the evidence of the surveyors' opinions and their review of the historic changes to the shoreline of the Property, it was reasonable for the City to conclude that the Property shown on the 1939 registered subdivision plan, including the subsequently submerged portion, continued to belong to Aqua prior to its return to the Crown in 2019. It was also reasonable for the City to conclude the return constituted a dedication to the Crown for the public benefit and a taking under s. 1.8.1 of the bylaw.

Disposition

[119] I would therefore dismiss the appeal.

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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