

CANADA / JUDGMENT

Gibbons v. Comox Valley (Regional District)

2024 BCSC 2141

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2024 BCSC 2141 Gibbons v. Comox Valley (Regional District)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gibbons v. Comox Valley (Regional District),

2024 BCSC 2141

Date: 20241125

Docket: S10725

Registry: Courtenay

Between:

Bruce Gibbons

Petitioner

And:

Comox Valley Regional District, Christopher Scott MacKenzie

Respondents

On judicial review from: Resolutions of the Board

of the Comox Valley Regional District made March 21, 2023

Before: The Honourable Justice K. Wolfe

Reasons for Judgment

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Counsel for the Respondent, Comox

Valley Regional District:

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Respondent, Christopher Scott MacKenzie:

Appearing in Person

Place and Date of Hearing:

Courtenay, B.C.

June 6-7, 2024

Place and Date of Judgment:

Courtenay, B.C.

November 25, 2024

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Overview

- [1] The petitioner, Bruce Gibbons, seeks judicial review of two specific resolutions passed by the board of directors of the respondent, Comox Valley Regional District (the "Regional District"), on March 21, 2023. The two impugned resolutions relate to amendments proposed by the second respondent, Christopher MacKenzie, to Conditional Water Licence No. 500169 (the "CWL"). Mr. MacKenzie and his partner hold the CWL for their property located at 2400/2410 Sackville Road, Merville, British Columbia (the "Sackville Road Property"). They wish to change the water use purpose under the CWL from "industrial (fresh water bottling)" to "waterworks", with sub-purposes of "water sales" and "water delivery", which would involve "on-site treatment, storage, transport and sale of bulk water". For ease, I will only refer to Mr. MacKenzie in this decision, without meaning any disrespect.
- [2] It is common ground that the Regional District is not the decision-maker that ultimately approves or denies Mr. MacKenzie's proposed amendments to the CWL. Rather, what is now the provincial Ministry of Forests (the "Ministry") will decide whether to approve the proposed amendments. The Ministry referred Mr. MacKenzie's amendment application to the Regional District for comments, including whether the existing zoning for the Sackville Road Property permits the proposed amended water use purposes. The Board of the Regional District (the "Board") passed the impugned resolutions to confirm how it would respond to the Ministry's referral - namely, by advising the Ministry that it considers Mr. MacKenzie's proposed amended water use purposes to be permitted as a "home occupation use", subject to existing bylaw requirements.
- [3] The Ministry's referral process is not based in statute, nor (as will be discussed further below) is the Ministry bound by any comments it may receive from the Board or anyone else following such a referral. As of the date of the hearing for this petition, the Ministry had not yet made its ultimate decision on Mr. MacKenzie's proposed amendments.
- [4] The parties disagree about what the impugned resolutions mean - legally and practically. Mr. Gibbons' position is that, taken together, the impugned resolutions are a legal conclusion that "on-site treatment, storage, transport and sale of bulk water" is permitted as a "home occupation use" for all properties, like the Sackville Road Property, that are zoned as Rural-Eight ("RU-8") under the Rural Comox Valley Zoning Bylaw, No. 520, 2019 (the "Zoning Bylaw").
- [5] Mr. Gibbons argues this is an error because, under a proper interpretation of the Zoning Bylaw, the activities described in Mr. MacKenzie's amendment application are "industrial uses", not "home occupation uses". He says that makes the Board's passage of the resolutions unreasonable. He seeks orders setting the resolutions aside, as well as a stand-alone declaration that bulk storage of water is not a "home occupation use" under the Zoning Bylaw. Practically, as Mr. Gibbons draws his water from the same aquifer as the Sackville Road Property, he is concerned about what he perceives to be the broader implications of the Board's resolutions and interpretation of the Zoning Bylaw.

- [6] The Regional District argues the impugned resolutions do not have the broad effect Mr. Gibbons attributes to them. The Regional District says the resolutions document the Board's response to the Ministry referral process regarding Mr. MacKenzie's amendment application. At best, they provide the Board's advisory opinion to the Ministry about whether the Zoning Bylaw could permit the proposed amended water use purposes at the Sackville Road Property. The Regional District says the resolutions are both different in character and separate from the decision it still needs to make in respect of a "home occupation application" that Mr. MacKenzie submitted to the Regional District in February 2023.
- [7] Given this, the Regional District advances two preliminary objections to the petition for judicial review: first, that the matters sought to be challenged in the petition are not amenable to judicial review, and second, if they are, that Mr. Gibbons lacks standing to seek at least the declaratory relief, if not all of the relief. On the merits of the judicial review, the Regional District says its interpretation of the Zoning Bylaw was not only reasonable, but was, in fact, correct. While recognizing the potential inconsistency in its position, the Regional District urges the Court to decide the merits even if the Court accepts one or more of its preliminary objections. The Regional District submits the Court's guidance would be beneficial because the issues were argued fully on this application and there will likely be subsequent decisions regarding permitted uses under the current zoning of the Sackville Road Property.
- [8] Mr. MacKenzie largely adopts the submissions of the Regional District in opposing the application for judicial review, but also provided certain factual clarifications and additional background information at the hearing.
- [9] For the reasons that follow, I have determined the impugned resolutions are in the nature of advisory opinions and are therefore not amenable to judicial review. I have also determined that stand-alone declaratory relief is not available as it is not sought in relation to any statutory power. As that is sufficient to dispose of this matter, and the second preliminary objection was contingent on there being a matter capable of judicial review, I have not addressed the question of Mr. Gibbons' standing to seek declaratory relief.
- [10] I have, however, considered whether, despite my conclusion that these matters are not subject to judicial review, I should nonetheless express a view on the reasonableness of the Board's interpretation of the Zoning Bylaw. As set out below, I decline to do so. The petition for judicial review is therefore dismissed on the basis of the first preliminary objection.

Issues

- [11] There are three issues before the Court:
1. Does the petition challenge matters that are subject to judicial review?
 2. Does Mr. Gibbons have standing to seek declaratory relief?

3. Is the Board's interpretation of the Zoning Bylaw reasonable?

[12] The first issue requires consideration of the nature of the impugned resolutions as well as when declaratory relief is available and appropriate on a judicial review. Given my conclusions regarding the first issue, the threshold question on the third issue is whether the Court should nonetheless entertain the merits, or should decline to do so. I have determined this is not an appropriate case to engage with the merits. I will deal with costs at the conclusion of these reasons.

Factual Background

[13] Before addressing the individual issues, it is useful to set out the factual background that is common to all issues and about which there is no real dispute. Since this is a judicial review, to the extent Mr. Gibbons and Mr. MacKenzie each provided the Court with extra-record evidence of events occurring after the Board responded to the Ministry's referral, I have not considered that evidence.

[14] Mr. MacKenzie and his partner own the Sackville Road Property, which is located within Aquifer 408, in the geographic boundaries of the Regional District. Aquifer 408 underlies a relatively large area on eastern Vancouver Island from approximately Williams Beach in the north to Comox in the south, and provides water to the lands owned by Mr. Gibbons, Mr. MacKenzie and many others. A factsheet produced by the Province of British Columbia indicates Aquifer 408 was, at least as of summer 2022, considered to be moderately vulnerable to contamination.

[15] As noted, the Sackville Road Property is zoned RU-8 under the Zoning Bylaw. While the Sackville Road Property was previously subject to a predecessor zoning bylaw, it is common ground that there was no change to its zoning when the Zoning Bylaw was enacted in October 2019.

[16] The Regional District has jurisdiction to regulate use and development on the surface of land within its geographic area primarily under the Local Government Act, R.S.B.C. 2015, c. 1 [LGA] and certain limited sections of the Community Charter, S.B.C. 2003, c. 26. Among other things, those statutes permit the Board to make bylaws in respect of certain matters. In contrast, jurisdiction over ground water extraction and water licensing rests solely with the provincial government under the Water Sustainability Act, S.B.C. 2014, c. 15.

[17] While the Regional District has no authority to grant or amend water licences and cannot regulate such matters, the Regional District is alive to the importance of ground water issues and has taken steps to address water issues within the scope of its jurisdiction. For example, one of the objectives of the Regional District's Regional Growth Strategy (Bylaw No. 120) is to "protect the quality of water sources." Supporting policy documents reflect a commitment to manage development on the basis of the precautionary principle within watersheds. The Regional District's Rural Official Community Plan (Bylaw No. 337) similarly includes policy objectives to ensure development proposals are assessed with a view to their potential

impacts on the quality and quantity of ground water. The petition, however, does not concern a development proposal that has been assessed and decided by the Regional District.

The issuance of the CWL

- [18] Mr. MacKenzie previously applied to the provincial government under the Water Sustainability Act for a water licence in respect of the Sackville Road Property. In that application, Mr. MacKenzie proposed an industrial purpose for the water use - specifically, "industrial (fresh water bottling)". Mr. MacKenzie proposed to extract and bottle ground water from his well on the Sackville Road Property in order to sell it as bottled water.
- [19] At that time, the Ministry of Forests, Lands and Natural Resource Operations ("FLNRO") was responsible for water licensing. FLNRO referred Mr. MacKenzie's application to the Regional District for comments. When asked, the parties were not able to identify any statutory basis for this referral process under the Water Sustainability Act, the LGA, the Community Charter or any other enactment. Rather, it appears to be an administrative process designed to seek input from those who may have legislated responsibilities or other interests that could be impacted by provincial government decisions regarding water licensing, such as regional or municipal governments and First Nations. Regional District staff responded to the referral by advising FLNRO that "water bottling" was not a permitted use on the Sackville Road Property, given its zoning. Under the predecessor zoning bylaw, "water and beverage bottling" was only permitted on properties zoned as "Industrial Light", not on properties zoned as RU-8.
- [20] Despite that input from the Regional District, under cover of a letter dated November 21, 2017, an assistant water manager at FLNRO issued the CWL, authorizing Mr. MacKenzie to extract 3650 cubic metres of water per year from his well, at a rate not to exceed 10 cubic metres of water per day. The cover letter advised Mr. MacKenzie that he would have to apply to the Regional District to rezone the Sackville Road Property to enable "water and beverage bottling" as a principal use on the property.
- [21] Mr. Gibbons attempted to challenge FLNRO's issuance of the CWL by filing an appeal to the Environmental Appeal Board. As part of the appeal process, the assistant water manager argued Mr. Gibbons lacked standing because he did not fall within a category of persons statutorily entitled to bring an appeal under s. 105(1) of the Water Sustainability Act. Applying an objective test to the evidence before it, the Environmental Appeal Board determined there were no reasonable grounds to conclude Mr. Gibbons' land will be, or was reasonably likely to be, physically affected by the CWL. The Environmental Appeal Board further held Mr. Gibbons had not proven standing as a common law "riparian owner". As a result, the Environmental Appeal Board concluded Mr. Gibbons did not have standing to appeal the issuance of the CWL and dismissed the appeal: *Gibbons v. Assistant Water Manager*, Environmental Appeal Board, May 23, 2018, 2018-WAT-001(a), at paras. 42, 52, 58, 68-69, 71, 73.

[22] In 2018, Mr. MacKenzie applied to the Regional District to amend the zoning for the Sackville Road Property to add "water bottling" as a permitted use. The Board gave the zoning amendment bylaw first reading and held a public hearing, but ultimately did not pass the amending bylaw. When the Zoning Bylaw was enacted in October 2019, it contained a new prohibition against any "water and beverage bottling facility" in the Regional District. As a result, as of the time of the hearing, Mr. MacKenzie had not yet been able to extract water pursuant to the CWL.

The application to amend the CWL and the Ministry referral

[23] In November 2021, Mr. MacKenzie submitted a water licence amendment application to the provincial government seeking to change the water use purpose on the CWL from "industrial (fresh water bottling)" to "waterworks (water sales and delivery)". Mr. MacKenzie's amendment application does not seek to increase the volume of water he was previously approved to extract. Instead, under the proposed amendment, Mr. MacKenzie seeks to extract the same volume of water, treat it and then hold it in storage tanks to ultimately permit bulk home delivery of water sales to local customers, "fast loading" of local water tanker trucks, and re-filling of customers' own water vessels. The amendment application references a need for new works to be constructed - specifically, a flow measuring device, a pump, two 10,000 litre storage tanks and a treatment facility or system.

[24] In April 2022, the Regional District received a further referral from FLNRO seeking comments on Mr. MacKenzie's amendment application, including input about whether the proposed amended "waterworks" purpose was permitted under the RU-8 zoning. Regional District staff considered the issues and prepared an initial report, dated January 6, 2023 (the "January 6th Report"), for the Chair and Directors of the Electoral Areas Services Committee (the "EAS Committee"). Subsequent to the referral but before the January 6th Report was presented to the EAS Committee, the Ministry became responsible for water licensing in place of FLRNO.

[25] In the January 6th Report, Regional District staff provided an analysis and interpretation of "home occupation use" under the Zoning Bylaw in the specific context of Mr. MacKenzie's amendment application. Based on their conclusions, Regional District staff made two recommendations:

1. that the Board consider the proposed amended water use from the Sackville Road Property to be a "home occupation use" under the Zoning Bylaw; and
2. that "support be provided for the referral comments to inform the Province that" the proposed water uses are "permitted as a Home Occupation Use, subject to the zoning regulations, including section 305 relating to "Home Occupations"": January 6th Report at page 1.

[26] The EAS Committee considered the January 6th Report at a meeting on January 9, 2023. At that meeting, the EAS Committee heard from Mr. Gibbons, Mr. MacKenzie and staff involved in the January 6th Report, and discussed the concept of "home occupation use" under the Zoning Bylaw. The EAS Committee ultimately passed a resolution deferring any decision on the Ministry's referral to a future meeting to allow:

1. a legal opinion to be obtained on the interpretation of "home occupation" within the Zoning Bylaw;
2. the Ministry to be invited to make a presentation on its role and responsibility relating to water licensing for ground water extraction; and
3. Regional District staff to confirm any response from the K'omoks First Nation to Mr. MacKenzie's amendment application.

The Board received the EAS Committee's January 9, 2023 minutes at the Board's January 24, 2023 meeting.

[27] On February 13, 2023, Mr. MacKenzie applied to the Regional District for approval of a proposed "home occupation use" for the "Purification, Storage, Sales and Distribution of Groundwater" at the Sackville Road Property (the "Home Occupation Application"). In the Home Occupation Application, Mr. MacKenzie indicated that the proposed "home occupation use" would not conflict with the Zoning Bylaw, would comply with the requirements of section 305 of the Zoning Bylaw (which list conditions for home occupation uses) and would "suit the rural character and feel of [the] neighbourhood". When the Board passed the two impugned resolutions on March 21, 2023, the Regional District had not yet decided whether to grant or refuse the Home Occupation Application. The Court was advised the decision remained outstanding when the petition was heard in June 2024.

[28] To respond to the EAS Committee's request for additional information relating to the Ministry's referral, on March 2, 2023, Regional District staff provided the EAS Committee a further report (the "March 2nd Report"). In the March 2nd Report, Regional District staff confirmed their interpretation that the Zoning Bylaw permits the proposed amended water use purposes on the Sackville Road Property. That view was based on staff's analysis that a broad interpretation of "home occupation use" was consistent with the intent of the Zoning Bylaw and its principles. Staff also confirmed the Ministry had been invited to attend but the appropriate persons were not available until later in the spring. Finally, staff advised the Ministry consulted the K'omoks First Nation and had received a confidential response that could not be shared with the Regional District.

[29] Having addressed the three bases for the previous deferral, in the March 2nd Report, Regional District staff made the following two recommendations:

THAT the Comox Valley Regional District Board considers the on-site treatment, storage, transport, and sale of bulk water, not including water bottling, from 2400/2410 Sackville Road (PID002-904-713) as a Home Occupation use in Bylaw No. 520, being the "Rural Comox Valley Zoning Bylaw, No. 520, 2019";

AND FURTHER THAT the Comox Valley Regional District provide the referral comments on Provincial Referral (CVRD File: 20004026 C 22), attached to this report as (Appendix A), that onsite treatment, storage, transport, and sale of bulk water, not including water bottling, is permitted as a Home Occupation use, subject to Bylaw No. 520, being the "Rural Comox Valley Zoning Bylaw, No. 520, 2019".

[30] The EAS Committee considered the March 2nd Report at a meeting on March 6, 2023. The EAS Committee heard from Mr. MacKenzie and staff, and then further discussed "home occupation use" under the Zoning Bylaw. The EAS Committee ultimately passed resolutions adopting the above two recommendations in the March 2nd Report.

[31] At its March 21, 2023 meeting, the Board received the EAS Committee's minutes from March 6, 2023, and considered the EAS Committee's resolutions in determining how to respond to the Ministry's referral. In this regard, the Board received presentations from Mr. MacKenzie, Mr. Gibbons and another individual, and discussed "home occupation use" under the Zoning Bylaw. The Board ultimately passed resolutions adopting the same two recommendations set out in paragraph 29 above, with one director voting against them (the "March 21st Resolutions"). In addition, under the agenda item for "New Business", the Board also unanimously passed the following two related resolutions:

THAT a new business item regarding revisions to Bylaw No. 520 being "Rural Comox Valley Zoning Bylaw, No. 520, 2019" be considered.

THAT staff prepare a report for the Electoral Areas Services Committee regarding possible revisions to Bylaw No. 520 being "Rural Comox Valley Zoning Bylaw, No. 520, 2019" in regards to water sales as a home occupation use

(the "Related Resolutions").

[32] In light of the orders sought by Mr. Gibbons and the Regional District's first preliminary objection, it bears mention that the language of the March 21st Resolutions differs from the language of the staff recommendations in the January 6th Report. The January 6th Report recommendations proposed that the Board "support" the referral comments interpreting the Zoning Bylaw as permitting the proposed amended water use purposes as a "home occupation use". The March 21st Resolutions do not reference any kind of "support". The March 21st Resolutions speak only to what the Board "considers" to fall within a home occupation use under the Zoning Bylaw, and then direct the Regional District to provide the Ministry with the Board's comments in response to the referral.

- [33] It is common ground the Board did not issue separate "reasons" for either the March 21st Resolutions or the Related Resolutions. This is not unusual in a municipal decision-making context, and none of the parties suggests otherwise.
- [34] On March 24, 2023, Regional District staff wrote to Mr. MacKenzie advising of the March 21st Resolutions and providing an update on the status of the Home Occupation Application. The letter indicates staff will be reviewing the Home Occupation Application and requesting additional information to confirm that each of the requirements of section 305 of the Zoning Bylaw can be met. The letter also identifies other steps required by Mr. MacKenzie's proposal, such as applying to the Regional District for a building permit for the new works and contacting the Ministry of Transportation and Infrastructure to determine if a highway use permit will be necessary. The letter also indicates staff are seeking confirmation of whether additional approvals from the relevant health authority will be required. In short, the March 24, 2023 letter confirms that additional steps will be required, even if the Home Occupation Application is granted.
- [35] On April 21, 2023, the Regional District responded to the Ministry's referral by advising of the March 21st Resolutions and providing a summary of the Regional District's analysis under the Zoning Bylaw. In particular, the response states that "home occupation use" is permitted as an accessory use on the Sackville Road Property and quotes the broad definition of "home occupation" under Part 200 of the Zoning Bylaw. That definition reads:

"Home occupation" means any trade, occupation, profession or craft carried on for remuneration or financial gain and which is accessory to the principal residential use of a lot in compliance with Section 305 of this bylaw.

The response also notes that section 305 of the Zoning Bylaw establishes conditions for home occupation use where, as here, the subject property has a principal residential use.

The petition

- [36] Mr. Gibbons filed the petition on September 15, 2023. The petition seeks three primary orders. I will set out the language of the orders sought in full:
1. An order quashing or setting aside the decision of the Board of the Comox Valley Regional District made on March 21, 2023 to support Provincial Referral (CVRD File: 20004026 C 22) regarding an amendment to conditional water licence No. 500169 at 2400/2410 Sackville Road. [Emphasis added.]
 2. An order quashing or setting aside the Comox Valley Regional District Resolution made on March 21, 2023 stating that the on-site treatment, storage, transport, and sale of bulk water from 2400/2410 Sackville Road (PID 002-904-713) is an appropriate Home Occupation use as defined in the Rural Comox Valley Zoning Bylaw, No. 520, 2019. [Emphasis added.]

3. A declaration that the bulk storage of water contemplated in the application to amend conditional water licence No. 500169 is not a Home Occupation use as defined in section 305 of the Rural Comox Valley Zoning Bylaw, No. 520, 2019. [Emphasis added.]
- [37] The first two orders sought are expressly directed at the March 21st Resolutions. The third order sought is a stand-alone request for a declaration to interpret "home occupation" under the Zoning Bylaw as excluding the bulk storage of water proposed in Mr. MacKenzie's amendment application. On its face, it is not connected to any particular action or decision. While the petition does not challenge the Related Resolutions, they are relevant to my conclusion that I should not decide whether the Regional District's interpretation of the Zoning Bylaw was reasonable.
- [38] In addition, Mr. Gibbons seeks costs. The Regional District counters that if it successfully defends against the petition, it should be entitled to its costs.

Analysis

- [39] Before turning to the enumerated issues, I will briefly deal with two initial matters: the standard of review and the basis on which this petition is brought.
- [40] First, the parties agree the applicable standard of review on the merits of this application is reasonableness. The merits concern the Board's interpretation of the Zoning Bylaw. That issue does not fall within any of the exceptions to reasonableness review set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, or subsequent Supreme Court of Canada jurisprudence. I accept the parties' assessment. *Vavilov* and *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, among other cases, confirm that matters of statutory interpretation are questions of law that presumptively attract reasonableness review (*Vavilov* at para. 115; *Mason* at paras. 7-9, 68-71). As a result, and particularly given my conclusion that I should decline to engage with the merits of the petition, it is unnecessary to address the applicable standard of review any further.
- [41] Second, as evidenced by the Regional District's response to petition, it was not clear if the petition was brought solely under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA], or if Mr. Gibbons also sought to advance a statutory challenge to the March 21st Resolutions under ss. 622-624 of the LGA. The question is relevant because there are time limits for bringing a petition under the LGA. During submissions, Mr. Gibbons clarified the petition is only brought under the JRPA. That eliminates the need to address any question of time limits.

Issue 1: Does the petition challenge matters subject to judicial review?

The parties' positions

- [42] By way of preliminary objection, the Regional District argues the petition does not challenge matters that are subject to judicial review or for which the relief sought is properly available. In this regard, the Regional District characterizes the March 21st Resolutions as advisory opinions that do not decide or affect rights or interests in a manner that attracts judicial review. The Regional District also says the Board's interpretation of the Zoning Bylaw, in the context of the referral process, is not an exercise of authority in respect of which judicial review, and specifically declaratory relief, may properly be sought.
- [43] In support of this position, the Regional District notes it is the Ministry, rather than the Regional District, that has jurisdiction over water licensing and will therefore decide whether to grant Mr. MacKenzie's application to amend the CWL. While the Ministry requested comments from the Regional District through its referral process, the Regional District says it is clear from what happened in 2017, when FLNRO initially issued the CWL, that the Regional District's response to the referral does not bind or dictate the ultimate decision the Ministry will make.
- [44] Further, contrary to the language of the first order sought in the petition, the Regional District says the Board did not make a "decision to support" the Ministry's referral regarding Mr. MacKenzie's amendment application. Nor, contrary to the language of the second order sought, did the Board pass a resolution "stating that the on-site treatment, storage, transport, and sale of bulk water from [the Sackville Road Property] is an appropriate Home Occupation use" under the Zoning Bylaw. [Emphasis added.]
- [45] Instead, the Regional District characterizes the first of the March 21st Resolutions as simply providing the Board's opinion about what it considers to fall within the ambit of a "home occupation use" under the Zoning Bylaw, without any indication of approval or support. Similarly, the Regional District says the second of the March 21st Resolutions merely directed staff to provide the Ministry with the Board's opinion that "onsite treatment, storage, transport, and sale of bulk water, not including water bottling, is permitted as a Home Occupation use, subject to [the Zoning Bylaw]". The Regional District says that in providing its opinion about the interpretation "home occupation use" under the Zoning Bylaw, the Board did not make a decision or take action that is subject to judicial review.
- [46] Mr. Gibbons says there can be no question the Board is a public actor, and in passing the March 21st Resolutions, and interpreting the Zoning Bylaw, it was exercising an authority that has a sufficiently public character to attract judicial review. In this regard, Mr. Gibbons argues first that the Board's passage of the March 21st Resolutions constitutes an exercise of a statutory power, as that term is defined under the JRPA. Specifically, with reference to the definition of "statutory power" in s. 1 of the JRPA, Mr. Gibbons argues that in passing the March 21st Resolutions, the Board was exercising a power or right conferred by an enactment either to make "an order" or to make "an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability".

[47] Mr. Gibbons says further that, under s. 122 of the Community Charter (which applies to the Board by virtue of s. 226(2)(a) of the LGA), the Board can only validly act and exercise its authority by resolution or bylaw. He says this confirms the passage of the March 21st Resolutions is an exercise of a power conferred by an enactment that attracts judicial review. In addition, Mr. Gibbons says the Board passed the March 21st Resolutions in the context of public meetings at which it debated and permitted delegates to speak to the question of whether the proposed amended water use purposes properly fall within the concept of a "home occupation use" under the Zoning Bylaw. He says that process has a sufficiently public decision-making character, particularly as the Board communicated its opinions on the interpretation of the Zoning Bylaw as a matter of public record, through the mechanism of the March 21st Resolutions. He further says it is appropriate to seek a declaration regarding the applicability of the Zoning Bylaw to the activities Mr. MacKenzie proposes to carry out on the Sackville Road Property.

The legal framework

- [48] It is well established that "[j]udicial review is the means by which the courts supervise those who exercise statutory powers, to ensure they do not overstep their legal authority": *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28. Broadly speaking, the "purpose of judicial review is to ensure the legality of state decision making": *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 [Highwood Congregation] at paras. 13, 17.
- [49] In British Columbia, the JRPA codifies the process which governs judicial review and specifies the remedies available on an application for judicial review based on the source of the power being exercised: *Western Stevedoring Co. Ltd. v. W.C.B.*, 2005 BCSC 1650 at paras. 21-22. However, the JRPA does not prescribe when an administrative act is subject to judicial review. The question of whether an impugned action is amenable to judicial review is determined based on principles established at common law.
- [50] In *Highwood Congregation*, the Supreme Court of Canada confirmed that judicial review is "limited to public decision makers"; it does not extend to private actors (*Highwood Congregation* at paras. 2, 13). As judicial review primarily concerns "the relationship between the administrative state and the courts", it is only available where there is "an exercise of state authority that is of sufficiently public character" (*Highwood Congregation* at paras. 13-14). In other words, the public body must be exercising "a power central to the administrative mandate given to it by Parliament": *Highwood Congregation* at para. 14, citing *Air Canada v. Toronto Port Authority*, 2011 FCA 347 at para. 52.

- [51] Where judicial review is available, there are two categories of possible remedies: those that were historically public law remedies and which comprise the core of the superior courts' inherent supervisory jurisdiction (certiorari, mandamus and prohibition) and those that owe their origins to private law, but which have since become public law remedies (declarations and injunctions): *Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia*, 2022 BCCA 247 [Nova-BioRubber] at para. 50.
- [52] With respect to the first category, the Supreme Court of Canada has confirmed that the public law remedy of certiorari "is only available where the decision-making power at issue has a sufficiently public character"; that is to say, where the decision "involves questions about the rule of law and the limits of an administrative decision maker's exercise of power": *Highwood Congregation* at paras. 15 and 20 respectively; see also *Nova-BioRubber* at paras. 53-54. Historically, certiorari was a remedy with broad scope; it was available as a general remedy for the supervision of public bodies with power to "decide any matter affecting the rights, interests, property, privileges, or liberty of any person": *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602 at 628, 1978 CanLII 184 [Matsqui], as cited in *Nova-BioRubber* at para. 52.

[53] Section 2(2) of the JRPA reflects the distinction between the two remedial categories:

Application for judicial review

2

- (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
- (a) relief in the nature of mandamus, prohibition or certiorari;
 - (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.
- [54] Under s. 2(2)(a) of the JRPA, relief in the nature of the former prerogative writs of certiorari, mandamus and prohibition is available when there is an exercise of state authority of a sufficiently public character. For those remedies, it is not necessary that the public authority be operating pursuant to statutory powers. By contrast, declaratory or injunctive relief is only available if a state actor exercises, refuses, proposes or purports to exercise a statutory power, as that term is defined in the JRPA: *Strauss v. North Fraser Pretrial Centre (Deputy Warden of Operations)*, 2019 BCCA 207 at paras. 19-24; *Nova-BioRubber* at paras. 49-51.
- [55] A further nuance emerges from both the jurisprudence and the language of the JRPA that bears directly on this preliminary objection. To be subject to judicial review, an administrative act must have some kind of impact or legal consequence on a person. It is not enough that an administrative body has undertaken a particular action, even if it is technically an exercise of a power arising under a statute. To engage the inherent supervisory jurisdiction of the superior courts, the impugned action must go beyond being

recommendatory or advisory in nature.

[56] This is clear from the Supreme Court of Canada's confirmation in *Matsqui* that certiorari is available when a public body makes a decision that affects a person's rights, interests, property, privileges, or liberty. It is also clear from the definitions of "statutory power" and "statutory power of decision" in s. 1 of the JRPA:

"statutory power" means a power or right conferred by an enactment

- (a) to make a regulation, rule, bylaw or order,
- (b) to exercise a statutory power of decision,
- (c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,
- (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
- (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability;

"statutory power of decision" means a power or right conferred by an enactment to make a decision deciding or prescribing

- (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
- (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it

Both definitions encompass exercises of authority that have or can be expected to have legal consequences on persons, such as imposing requirements (including through regulations, bylaws and orders), permitting actions that would otherwise interfere with legal rights, and deciding or prescribing rights and entitlements.

[57] In *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2016 BCCA 500, leave to appeal to SCC ref'd, 37449 (15 June 2017) [Fort Nelson], the British Columbia Court of Appeal addressed whether a letter from the Environmental Assessment Office ("EAO") expressing its opinion on a matter of statutory interpretation was amenable to judicial review. The applicable statute at the time, the Environmental Assessment Act, S.B.C. 2002, c. 43 [EAA] (since repealed), established objective criteria to apply in deciding whether a resource project must undergo a full environmental assessment. However, the EAA expressly left it to project proponents to evaluate projects against those criteria and decide if a particular project was "reviewable".

[58] In the Fort Nelson case, a project proponent engaged in correspondence with the EAO about whether a frac sand mine was a reviewable project, based on the proponent's interpretation of production capacity thresholds. The EAO responded by letter expressing its agreement

with the proponent's interpretation, but also confirming that it was for the proponent to decide if the project was reviewable. The Fort Nelson First Nation had a different interpretation and engaged with the EAO on the issue. In response, the EAO shared its interpretation and the reasoning for it with the Fort Nelson First Nation, but reiterated again that it was for the proponent to determine if the project was reviewable. Fort Nelson First Nation sought judicial review, seeking, among other relief, to quash the "decision" in the EAO's letter to the proponent. The chambers judge quashed the "decision" on the basis that the EAO's interpretation was unreasonable.

- [59] Both during the hearing of the appeal and by way of a request for additional submissions, the Court of Appeal asked counsel to address whether the EAO's letter was a "decision" subject to judicial review because "it was not apparent that the letter decided anything, as opposed to merely expressing an opinion" (Fort Nelson at para. 9). The EAO took the position that the letter was not subject to judicial review as it was "merely an expression of a non-binding opinion without legal effect" (Fort Nelson at para. 10). The proponent and the Fort Nelson First Nation argued the letter was a decision subject to judicial review. In particular, the proponent argued the letter was a determination of how to interpret the statutory provision and would have consequences further along in the regulatory approval process (Fort Nelson at paras. 11-12).
- [60] Writing for the Court of Appeal, Justice Harris held that while judicial review may occur in circumstances beyond the exercise of a "statutory power of decision" under s. 1 of the JRPA, those generally also "involve reviewing a decision that has been made by a governmental body" (Fort Nelson at para. 13; emphasis added). After reviewing the legislative scheme in some detail, Harris J.A. concluded that although there might be points at which a statutory delegate could make a decision, the judicial review had been brought at a stage when the "regulatory scheme [did] not contemplate the EAO exercising a statutory power to decide the status of a project" (Fort Nelson at paras. 29-31; see also paras. 15, 21). The Court then considered if anything in the correspondence between the EAO, the proponent and the Fort Nelson First Nation rose to the level of being subject to judicial review.
- [61] The Court of Appeal noted that generally, "preliminary advice or non-binding recommendations issued by a statutory body do not determine the legal rights, powers, privileges, immunities, duties, or liabilities of a person" and therefore are not subject to judicial review (Fort Nelson at para. 42). While accepting that the EAO has an implicit statutory authority to offer guidance on the interpretation of the statutory scheme, Harris J.A. held that general power did not "authorize the EAO to assume a power of decision which is not conferred on it by the EAA" (Fort Nelson at para. 43). The Court concluded that nothing in the correspondence amounted to a "decision" by a statutory delegate about the project; rather, the letter was a "non-binding opinion" on a matter that was clearly for another entity - in that case, the proponent - to decide. As the letter did not have any legal consequences, the Court held it could not constitute the exercise of a statutory power or a statutory power of decision (Fort Nelson at para. 45; see also paras. 53-56).

- [62] Further, relying on Matsqui, the Court in Fort Nelson expressly found that "relief in the nature of certiorari is not available in the absence of a decision" that affects rights, interests, property, privileges or liberty: Fort Nelson at para. 58. The Court held the issues raised in the judicial review were premature and the relief sought was unavailable, but in the circumstances of that particular case, it was nonetheless appropriate to consider the merits: Fort Nelson at paras. 60-63.
- [63] The conclusion from Fort Nelson that certiorari is not available in the absence of a decision that affects rights or interests was recently followed by Justice Kirchner in *The Society for Canadians Studying Medicine Abroad v. The College of Physicians and Surgeons of British Columbia*, 2024 BCSC 406. In that case, the Court granted applications by two of the respondents to strike the claims against them. The Court concluded, in part, that as neither of those respondents had been granted any authority to make decisions affecting the rights, interests, property, privileges, or liberty of any person, neither had made a decision for which certiorari could be granted (see paras. 48, 51, 70).

Discussion

- [64] There is no dispute that the Board and the Regional District are public bodies; this distinguishes the present case from the situation addressed in *Nova-BioRubber*.
- [65] There is likewise no dispute that the Ministry is the public body that has jurisdiction over water licensing in British Columbia under the Water Sustainability Act, and neither the Board nor the Regional District have a decision-making function in respect of water licenses. There is further no dispute that while the Ministry has established a referral process to seek comments and input from others before making decisions on water licensing, there is no statutory basis for that process, and the Ministry is not bound by the feedback it receives.
- [66] There are also no express statutory provisions in the LGA or the Community Charter that require or permit the Board or the Regional District to respond to the Ministry's referral process by way of resolution. However, as noted, there is a statutory provision in the Community Charter that limits the Board's ability to act to one of two mechanisms: passing either a bylaw or a resolution. However, in my view, it does not follow that every resolution passed by the Board is necessarily a "decision" subject to judicial review.
- [67] There is no question that the Regional District has some decision-making authority in respect of the activities Mr. MacKenzie wishes to undertake on the Sackville Road Property if his application to amend the CWL is granted. For example, s. 305(13) of the Zoning Bylaw provides that:
13. Any person intending to operate a home occupation shall obtain written approval from the Regional District and the Health Authority, prior to commencing the home occupation on any lot.

- [68] This requirement is why Mr. MacKenzie submitted the Home Occupation Application in February 2023. That is the process under which the Regional District will decide whether to allow Mr. MacKenzie to operate his proposed bulk water sales as a home occupation. However, as noted above, as of the date of the hearing of this petition, the Regional District had not yet made its decision about whether to grant or refuse the Home Occupation Application.
- [69] Indeed, the Regional District's March 24, 2023 letter to Mr. MacKenzie is clear that there are further decisions to be made before Mr. MacKenzie can operate his proposed home occupation. For example, the letter identifies that there may be additional requirements to ensure the proposed home occupation meets each of the conditions in s. 305 of the Zoning Bylaw. The necessary implication is that if each of the requirements under s. 305 of the Zoning Bylaw cannot be met, the Home Occupation Application may not be approved, meaning Mr. MacKenzie could not proceed with his proposal. The further decisions are also not limited to the Regional District's decision on the Home Occupation Application itself. The March 24, 2023 letter expressly notes that Mr. MacKenzie will need to apply for a building permit to construct the new works that his bulk water sales operation will require. In addition, consistent with s. 305(13) of the Zoning Bylaw, the March 24, 2023 letter identifies that Mr. MacKenzie may need to obtain additional approvals from the relevant health authority (in this case, Vancouver Island Health Authority).
- [70] Each of those steps will result in a decision by either the Regional District or another government entity that will affect Mr. MacKenzie's rights and interests with respect to his proposed bulk water sales operation. Whether the Home Occupation Application is granted or refused will determine Mr. MacKenzie's rights to proceed as he wishes. Similarly, assuming one is still required, a decision about whether to grant a building permit may determine if Mr. MacKenzie can build the works necessary to support his bulk water sales operation. Each of those steps involves a decision that will have an impact on rights or interests and thus may properly be subject to an application for judicial review, and the relief of certiorari in particular. The petition, however, does not challenge any of those steps (which had not yet occurred when the petition was heard). Instead, the petition challenges the Board's March 21st Resolutions and seeks a stand-alone declaration regarding interpretation of the Zoning Bylaw.
- [71] Dealing first with the March 21st Resolutions, in my view, they are qualitatively different from the actions or decisions the Board or Regional District may make in respect of Mr. MacKenzie's Home Occupation Application or a possible forthcoming application for a building permit. Contrary to Mr. Gibbons' submissions, the March 21st Resolutions do not "approve activities". That was not the Board's role in the Ministry's referral process. Rather, the March 21st Resolutions provide the Ministry with the Board's opinion about the "home occupation use" provisions of the Zoning Bylaw in the context of Mr. MacKenzie's amendment application. Like the EAO's letter in Fort Nelson, the March 21st Resolutions are a non-binding opinion on how the Board interprets those elements of its Zoning Bylaw. The

Board's views in this regard have no legal consequences, either for the Ministry's referral process or for further along in the regulatory process.

- [72] As noted above, there may well be future decision points that could attract judicial review, but the current petition was brought before any such decisions had been made. While I accept that the Board, like the EAO in Fort Nelson, has an implicit authority to offer guidance on the interpretation of its bylaws, that does not authorize the Board, through the vehicle of the March 21st Resolutions, to exercise a decision-making power which has not been conferred on it by the LGA, the Community Charter or any other enactment. As the March 21st Resolutions do not constitute the Board exercising a power to decide, and do not otherwise have any legal effect or consequences, I conclude the March 21st Resolutions are non-binding advisory opinions that are not subject to judicial review.
- [73] In reaching this conclusion, I have considered the cases Mr. Gibbons relied on where the Court rejected arguments that certain municipal and regional district actions were not subject to judicial review. I have specifically considered: *O.K. Industries Ltd. v. District of Highlands*, 2021 BCSC 81 [*O.K. Industries*], rev'd in part on other grounds 2022 BCCA 12; *McHattie v. Central Saanich (District)*, 2023 BCSC 175 [*McHattie*], upheld on other grounds 2023 BCCA 461; and *Pendergast v. Sidney (Town)*, 2020 BCSC 1049 [*Pendergast*]. In each of those cases, the public body did more than convey a non-binding opinion.
- [74] In *O.K. Industries* (at para. 103) and *McHattie* (at para. 18), the public bodies issued stop- or cease-work orders that the Courts found to be decisions affecting the rights and interests of those subject to them. In *Pendergast*, the applicable legislative scheme established a referral process for certain licences that, in turn, imposed decision-making and consultation obligations on the town. Although the town was not responsible for issuing the licence, the statute prohibited the provincial decision-maker from issuing the licence without the town's positive recommendation. The Court in *Pendergast* concluded the town did not properly fulfill its statutory obligations before it recommended against the issuance of a licence. In my view, each of those cases are distinguishable from the present situation, where the Board did not make any decisions affecting rights or interests.
- [75] Given my conclusions above, it is not strictly necessary for me to address Mr. Gibbons' specific arguments about how the passage of the March 21st Resolutions could be characterised as an exercise of a "statutory power" within the meaning of s. 1 of the JRPA. However, I do wish to make a few comments. As noted, I accept that, in a general sense, s. 122 of the Community Charter and s. 226(2)(a) of the LGA establish a statutory requirement that the Board can only act by way of bylaw or resolution. There are also express provisions in the LGA (and elsewhere) that specify when the Board must act by resolution (for example, under s. 433 of the LGA, the Board must initiate the preparation of a regional growth strategy by resolution). Given the general statutory constraints on the mechanisms by which a Board can act, it could be argued that any time the Board passes a resolution, it is exercising some form of statutory authority. However, in my view, that does not necessarily bring the exercise of that statutory authority within the specific definitions of "statutory

power" and "statutory power of decision" in the JRPA.

- [76] For his part, Mr. Gibbons made a bare assertion that the March 21st Resolutions constitute a statutory power to "make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability," under subsection (e) of the JRPA's definition of "statutory power". The chapeau to the definition specifies that a statutory power is a "power or right conferred by an enactment". Mr. Gibbons did not direct me to any provision in an enactment that confers on the Board a power or right to make an investigation or inquiry into a person's legal right or duty, in this or any other related context. Absent being directed to such a provision, and given my conclusion that the March 21st Resolutions have no legal effects, it is difficult to see how his argument could succeed.
- [77] I have similar concerns about Mr. Gibbons' assertion that the March 21st Resolutions represent the exercise of a statutory power to make an "order". The JRPA and the Interpretation Act, R.S.B.C. 1996, c. 238, do not define "order" or "resolution", nor is there a definition of either term in the LGA or Community Charter. Instead, Mr. Gibbons sought support for his position from the LGA's statutory process for challenging "municipal instruments". Section 622 of the LGA defines "municipal instruments", for purposes of Division 1 of Part 16 of the LGA, as: "(a) a municipal bylaw, or (b) an order or resolution of the council". Mr. Gibbons says that because resolutions are municipal instruments that can be challenged under the LGA's statutory process, that establishes that resolutions are properly subject to court challenge. I see two difficulties with Mr. Gibbons' position.
- [78] First, the LGA expressly distinguishes among "bylaws", "orders" and "resolutions", suggesting there is a difference between an order and a resolution. Turning to the JRPA, subsection (a) of the definition of "statutory power" lists "a regulation, rule, bylaw or order". The term "resolution" is not included. General principles of statutory interpretation hold that the choice to include certain terms while omitting others should be given meaning.
- [79] Second, Mr. Gibbons clarified during the hearing that this petition is not brought in reliance on the LGA's statutory challenge process. The legislature's choice to permit resolutions to be challenged under the LGA's statutory process does not automatically make all resolutions amenable to judicial review. The two processes are distinct. Whether a particular act is subject to judicial review is to be determined based on the framework articulated above; it is not dictated by what can be challenged under the LGA.
- [80] I turn finally to whether the third order sought in the petition is properly a matter in respect of which judicial review, and specifically declaratory relief on judicial review, may be sought. For ease of reference, the order sought in para. 3 of Part 1 of the petition is as follows:

A declaration that the bulk storage of water contemplated in the application to amend conditional water licence No. 500169 is not a Home Occupation use as defined in section 305 of the Rural Comox Valley Zoning Bylaw, No. 520, 2019.

- [81] The Regional District says the Board's interpretation of the Zoning Bylaw, presumably as provided in the context of the referral process, is not an exercise of authority that can be challenged on judicial review, or in relation to which declaratory relief may be granted. The Regional District also opposes the request for declaratory relief on the basis that it would improperly usurp the role of the Board and the Regional District in interpreting its bylaws.
- [82] I agree with the Regional District that the interpretation of "home occupation" in the Zoning Bylaw in relation to Mr. MacKenzie's amendment application is not a matter for which judicial review can be sought, nor is a declaration a suitable remedy in these circumstances.
- [83] Mr. Gibbons effectively seeks a stand-alone interpretive declaration in relation to one of the water uses "contemplated in" Mr. MacKenzie's amendment application. On its face, the prayer for declaratory relief is not connected to any alleged exercise of a statutory power. There is no reference to the March 21st Resolutions or any other impugned action that the declaration is to remedy. Instead, Mr. Gibbons appears to seek what is effectively an independent interpretation from the Court to the effect that one of the activities proposed in Mr. MacKenzie's amendment application does not fall within the Zoning Bylaw's definition of "home occupation".
- [84] As set out above, under s. 2(2)(b) of the JRPA, declaratory relief on judicial review is only available "in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power": Strauss at paras. 18-24. A declaration cannot be granted on judicial review in the absence of the petitioner establishing the exercise of a statutory power. As the request for a declaration is not directed at any alleged exercise of a statutory power, declaratory relief under s. 2(2)(b) of the JRPA is not available.
- [85] Even if the request for a declaration was intended to follow on from and be connected to the interpretation set out in the March 21st Resolutions, that does not assist Mr. Gibbons. As discussed above, a statutory power implies a "decision" with legal effects. While the passage of the March 21st Resolutions may be characterized as the Board exercising a general power under the Community Charter to act by way of resolution, I have already determined that the March 21st Resolutions have no legal effects. Accordingly, as there has been no "decision", Mr. Gibbons has not established any basis under s. 2(2)(b) of the JRPA that would permit this Court to grant declaratory relief.
- [86] Lastly, in my view, the declaration sought is not a suitable remedy, as it would not have been appropriate to grant in any event. It is trite law that the Court's role on judicial review is supervisory in nature. Consistent with the need to respect the legislature's choice to delegate certain decision-making functions to administrative decision-makers, the Court will generally not grant a remedy that requires it to make the ultimate decision for the decision-maker. Instead, the usual remedy on judicial review is to quash the decision and remit the matter for reconsideration, with the benefit of the Court's reasons: Vavilov at paras. 139-141. While Vavilov does identify exceptions, including where the Court is satisfied there is only one possible reasonable interpretation, or where the Court considers it necessary to prevent

an endless cycle of judicial review applications (see Vavilov at para. 142), none of those exceptions apply here.

- [87] The interpretation and application of municipal bylaws, either to a particular fact situation or more generally, is a core function of municipal decision-making. As noted, as of the hearing of the petition, the Regional District had not yet made its decision on Mr. MacKenzie's Home Occupation Application. The declaration sought by Mr. Gibbons amounts, in my opinion, to a request that the Court assume primary responsibility for interpreting the Regional District's Zoning Bylaw, in a manner that would pre-empt and potentially preclude the Regional District's exercise of its interpretive and decision-making function. This is not consistent with the role of the Court on judicial review.
- [88] I have concluded both that the March 21st Resolutions are not "decisions" that are subject to judicial review, and that the request for stand-alone declaratory relief in respect of interpretation of the Zoning Bylaw is not a matter in relation to which judicial review may be sought. Those conclusions are sufficient to dispose of the petition in its entirety.

Issue 2: Does Mr. Gibbons have standing to seek declaratory relief?

- [89] In the event the Court dismissed the first preliminary objection, the Regional District sought to advance a second preliminary objection based on standing. In its written submissions, the Regional District framed Mr. Gibbons' request for declaratory relief as an attempt to require the Regional District to interpret and enforce its bylaws as Mr. Gibbons says they should be interpreted. The Regional District says that as the LGA does not expressly or implicitly grant standing to citizens to complain about bylaw enforcement, absent an allegation of bad faith, a citizen cannot seek to compel the enforcement of a municipal bylaw: *Rimmer v. North Cowichan (Municipality)*, 2018 BCSC 1750 (see, for example, paras. 10 and 24). In oral submissions, the Regional District challenged Mr. Gibbons' standing more broadly. Mr. Gibbons countered that he has both private and public interest standing, and in any event, unlike in the cases relied on by the Regional District, he is not seeking injunctive relief. Mr. MacKenzie referred the Court to the Environmental Appeal Board's conclusions that Mr. Gibbons lacked standing in the proceedings before it.
- [90] Given my conclusion that the petition does not raise matters that are properly subject to judicial review, it is not necessary for me to address the questions of standing and I decline to do so.

Issue 3: Is the Board's interpretation of the Zoning Bylaw unreasonable?

- [91] While my conclusions on the first preliminary issue are sufficient to dispose of the petition, at the hearing, the Regional District urged the Court to entertain the merits of the judicial review regardless. The Regional District submitted it would be helpful for the parties to have the Court's views on whether the Board's interpretation was reasonable.

- [92] While I understand the basis for the Regional District's request, and have some sympathy for it in light of counsel's submissions on the merits, in my opinion, there is a strong rationale not to examine the merits of the judicial review in this case. Consideration of the Board's interpretation of "home occupation use" under the Zoning Bylaw would be premature at this point. I reach this conclusion for three reasons.
- [93] First, as of the date of the hearing of the petition, the Ministry had not yet made a decision on Mr. MacKenzie's application to amend the CWL. The Ministry may decide to grant the requested amendments or may refuse to do so. If the Ministry does not grant the amendment as requested, Mr. MacKenzie will remain unable to extract water pursuant to the CWL. As Mr. MacKenzie's proposed home occupation use is dependent on being granted the amendment to the CWL, if the amendment is not granted, he will be unable to conduct bulk water sales from the Sackville Road Property. As a result, Mr. Gibbons' concerns about the potential implications for Aquifer 408 that underlie the petition will not materialize, at least in respect of Mr. MacKenzie's application, which is the context in which the Board provided its interpretation. While there may be future applications to the Ministry for different water licences or amendments in respect of Aquifer 408 that could prompt further interpretations of the Zoning Bylaw by the Board, any such applications, and any resulting interpretations, should be addressed at the relevant time. It is entirely possible that environmental, legislative or other facts may change in future.
- [94] Second, as of the date the petition was heard, the Regional District had not yet made a decision on Mr. MacKenzie's Home Occupation Application. In particular, and as the March 24, 2023 letter made clear, the Regional District was still in the process of determining whether the specific proposal Mr. MacKenzie advanced would meet all the requirements of s. 305 of the Zoning Bylaw. This qualification is captured in the second of the March 21st Resolutions, which states that "onsite treatment, storage, transport, and sale of bulk water, not including water bottling is permitted as a Home Occupation use, subject to [the Zoning Bylaw]." In other words, the Board's opinion about what Mr. MacKenzie may be permitted to do under the Zoning Bylaw is conditional and presumably subject to change if Mr. MacKenzie cannot meet all the conditions for home occupation use. As a result, even if the Ministry permits the proposed amendments to the water use purposes under the CWL, Mr. MacKenzie may still not be permitted to proceed.
- [95] As well, it is possible that after completing their due diligence process on the Home Occupation Application, the Regional District and / or the Board may wish to provide a different or modified interpretation, at least as it relates to Mr. MacKenzie's specific proposal. If this Court were to weigh in at this point on whether the Board's interpretation, as expressed through the March 21st Resolutions, is reasonable, there is a realistic risk that the Court's comments could impede or constrain the Regional District's proper exercise of its decision-making functions.

- [96] Third and finally, in the Related Resolutions, also passed March 21, 2023, the Board specifically and unanimously directed Regional District staff to "prepare a report for the Electoral Areas Services Committee regarding possible revisions [to the Zoning Bylaw] in regards to water sales as a home occupation use". Understandably and properly, on this application for judicial review of the March 21st Resolutions, the Court was not provided with any further information about any report that may have been prepared subsequent to April 2023, when the Regional District responded to the Ministry's referral. What is clear from the Related Resolutions is that the Board wished to give the issues of "water sales" and "home occupation uses" further consideration. As the language of the Related Resolutions directed staff to consider "possible revisions", it appears there is a realistic possibility of further amendments to the Zoning Bylaw that could clarify the Board's intentions with respect to permitted home occupation uses.
- [97] It would not be a beneficial use of judicial resources to address the merits of the reasonableness of the Board's interpretation of the Zoning Bylaw as it existed on March 21, 2023 when those very aspects of the Zoning Bylaw were to be reviewed and could be subject to amendment. Any decision by this Court might either have already been overtaken by subsequent changes, or could shortly become obsolete.
- [98] For the above reasons, I decline to exercise my discretion to consider the merits of the application for judicial review and whether the Board's interpretation of the Zoning Bylaw was reasonable.

Conclusion

- [99] For the reasons noted above, I have determined that this petition for judicial review must be dismissed on the basis of the first preliminary objection raised by the Regional District. I have also determined this is not an appropriate case for the Court to nonetheless consider the merits of the application for judicial review.
- [100] The March 21st Resolutions are not "decisions" that are amenable to judicial review. They are advisory opinions without legal effect that do not arise under a decision-making authority conferred on the Board, and therefore, they do not attract the supervisory jurisdiction of the superior courts. I have also determined a stand-alone declaration is not available. Given those conclusions, I have declined to consider if Mr. Gibbons lacks standing to advance this petition. Lastly, given the remaining uncertainty about whether Mr. MacKenzie will be permitted to establish a bulk water sales operation on the Sackville Road Property, and more importantly, the Board's clear request that possible revisions to the relevant provisions of the Zoning Bylaw be explored, this is not a case where I should engage with the merits of the application for judicial review. Doing so, especially where the record clearly indicates this issue remains under consideration by the Regional District, risks the Court usurping that public body's proper function.

[101] Accordingly, I decline to grant the relief sought at paragraphs 1 to 3 of part 1 of the petition, and instead, order that the petition is dismissed in its entirety.

Costs

[102] The Regional District requested their costs in the event they were successful in defending against this petition. The Regional District argues that where municipal decision-makers engage fully with the merits of the issues on judicial review and are successful, they are treated as any other party, including being awarded their costs: see, for example, *Taylor v. Vancouver (City)*, 2022 BCSC 1487 at para. 123; *V.I.T. Estates v. New Westminster (City)*, 2021 BCSC 573 at para. 74; *3L Developments Inc. v. Comox Valley (Regional District)*, 2019 BCSC 1342 at para. 158.

[103] As discussed with counsel during the hearing, there is also jurisprudence to the effect that, as a general rule and with some exceptions, costs are not awarded for or against administrative decision-makers: see, for example, *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 at paras. 45-54; *18320 Holdings Inc. v. Thibreau*, 2014 BCCA 494 at paras. 55-59. As Justice Fitch noted in *Gonzalez Hill Preservation Society v. Victoria (City) Board of Variance*, 2022 BCCA 384 (in Chambers), while there is greater clarity about the qualified immunity that administrative decision-makers enjoy against being required to pay costs, there does not yet appear to be a considered decision of the British Columbia Court of Appeal addressing whether and in what circumstances a decision-maker is entitled to its costs where it fully argues a judicial review (*Gonzalez Hill Preservation Society* at paras. 27-28). Although leave was granted in *Gonzalez Hill Preservation Society* to address the entitlement to costs of, in that case, a board of variance, the appeal was not ultimately pursued.

[104] In these proceedings, the Regional District played the role of a full party, engaging with the substance of the relevant issues in the same manner as occurred in the cases to which I have referred. Given the circumstances, including my conclusion that it was not acting as a decision-maker per se, it was appropriate for the Regional District to do so. In the absence of further direction in this regard, and in light of the fact that the Regional District successfully defended against the petition, I find the Regional District is entitled to its costs, payable by Mr. Gibbons at Scale B. No costs are ordered for or against Mr. MacKenzie.

"K. Wolfe J."

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