

CANADA / JUDGMENT

Hill v. Herd

2024 BCSC 797

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2024 BCSC 797 Hill v. Herd

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hill v. Herd,

2024 BCSC 797

Date: 20240510

Docket: 21119

Registry: Nelson

Between:

Tammy Arlene Hill, James Robert Hill and James Daniel Hill,

by his guardian Tammy Arlene Hill

Plaintiffs

And

William L.W. Herd, Herd & Smith Holdings Ltd. DBA

Warfield Petro-Canada, Regional District of Kootenay Boundary,

The Corporation of the Village of Warfield

Defendants

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

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April 4-6, 2022:

April 11-14, 2022; January 30-31; February 1-3, 6-10 and August 9-10, 2023

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Place and Dates of Trial:

Nelson, B.C.

April 4-6, 11-14, 2022,

January 30-31, February 1-3, 6-10,

and August 9-10, 2023

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Nelson, B.C.

May 10, 2024

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Introduction

- [1] This case arises out of an unfortunate dispute between neighbours in the small Village of Warfield ("Warfield"). The plaintiffs, Mr. and Mrs. Hill and their son, JD, for whom Mrs. Hill is the litigation guardian (collectively, the "Hills"), complain of noise pollution, light pollution and gasoline fumes emanating from a gas station located across the alley behind their home, which is located on Forest Drive in Warfield. The alley is vested in land vested in the Village. The Hills bought and moved to their home on Forest Drive in 2014.

- [2] A gas station has operated since 1947 at 800 Schofield Highway. Since 1989, the gas station has been operated by the defendant, William Herd, or the defendant, Herd & Smith Holdings Ltd. (collectively, the "Herds" or the "Herd defendants"). For the first years of its existence under the Herds' ownership, until 2009, it operated as a Shell station. In 2009 or 2010, it began operating as a FasGas station. In 2018, pursuant to an agreement with Suncor Energy Products Partnership ("Suncor"), it was rebranded to become a Petro-Canada station.
- [3] The gas station is now managed by the Herds' two daughters, Christine Coombes and Margaret-Ann Baziw (whom I also refer to from time to time as the "Herds"). The gas station operates pursuant to business licences issued by the Village of Warfield annually.
- [4] The gas station is located in the Warfield commercial district, a relatively small area. 800 Schofield Highway provides access to the commercial district, and runs immediately adjacent to Highway 3B/22, the highway going from Trail up the hill to Rossland, through the Village of Warfield. Schofield Highway is separated from Highway 3B/22 by concrete blocks.
- [5] The noise and light pollution and fumes complained of all relate to changes made to the gas station and its operations in 2018 when it changed from being a FasGas station to a Petro-Canada station. Those changes included an above ground tank nest being built at the rear of the gas station property, close to the alley, and the installation of a new 80,000 litre fuel tank in that tank nest. Prior to October 2018, fuel deliveries to the then existing tank nest had been made from Schofield Highway on the north side of the gas station property. Since that time, fuel has been delivered to the new tank nest at the rear of the gas station, from the alley on the south side of the gas station property, directly across from the rear of the Hills' property. In order to deliver fuel, a tanker truck and pup trailer (also known as a B-train or eight axle configuration) parks in the alley and pumps fuel from the truck's tanks into the tanks on the gas station property.
- [6] The Hills complain about the noise and fumes associated with the large B-train delivery trucks delivering fuel to the tank nest from the alley. They also complain about light pollution emanating from several lights on the gas station property, in particular a large light installed above the new tank nest, a light on the exterior side of the convenience store that is part of the gas station, and a light on a stand in the forecourt. The Hills allege that the Herds have been negligent in allowing these things to occur, and that the noise, smells and lights constitute a nuisance. They also plead the tort in *Rylands v. Fletcher* with respect to the escape of noxious fumes. They allege that JD, who has a number of special needs, is particularly adversely affected by the noise and smells.
- [7] In addition to the Herd defendants, the Hills have named the Village of Warfield (the "Village") and the Regional District of Kootenay Boundary (the "RDKB") as defendants to this lawsuit. The RDKB administers aspects of the Village's Building Bylaw pursuant to a services agreement between the two local governments. It also provides fire protection services within Warfield pursuant to its bylaw.

- [8] The Hills claim in nuisance against the Village. The Hills allege that the two local governments acted unlawfully in permitting the 2018 renovations to occur. They also allege that the Village and the RDKB were negligent in doing so. The case as against the two local governments is legally complex, as it encompasses both public law requests for declarations in the nature of a judicial review, and private law causes of action. I will describe it in greater detail later in this decision.
- [9] By way of remedy, the Hills seek damages for the alleged nuisance, escape of noxious fumes and negligence. They also seek a permanent injunction to prevent the nuisance from continuing. They also seek a number of declarations relating to the local governments allegedly permitting the construction related to the rebranding to occur in breach of the Fire Code and relevant Village bylaws.
- [10] The Hills initially also named Suncor and Austin Engineering as defendants to this claim. Austin Engineering Ltd. ("Austin Engineering") was the engineering firm retained by the Herds with respect to the renovations. On February 23, 2022, the Hills entered into a BC Ferries Agreement with Suncor and Austin Engineering, by which they agreed to discontinue the claims against those defendants.
- [11] The remaining defendants all deny any liability on any of the grounds alleged. I shall address their positions, to the extent necessary, in the course of my legal analysis.
- [12] This was a 20-day trial, unfortunately spread out over nearly a year and a half. Prior to final argument, the parties provided comprehensive written submissions, totalling 355 pages. Their written submissions were of great assistance to me.

Witnesses

Plaintiffs

- [13] The plaintiffs, Mr. and Mrs. Hill, both testified as part of their case. Mrs. Hill is a stay-at-home mother, and the primary caregiver for JD. Mr. Hill works at Teck Metals in Trail as a Production Coordinator.
- [14] Simon Hillis attended the Hills' home on November 9 and 11, 2021, where he observed the property and surrounding neighbourhood and a truck delivering fuel. He recorded video, drone and camera footage before and during a delivery. Mr. Hillis is independent of the Hills.
- [15] Nicola Pipes is a friend of Mrs. Hill. She had witnessed 10-12 fuel deliveries in the two years preceding her testimony and she testified about her observations.

- [16] Karen Trotter is a former neighbour of the Hills, who lived in the home directly to the east of the Hills, together with her husband, Gordon Trotter. Mrs. Trotter testified about her experiences with fuel deliveries and complaining about them to the Village. The Trotters sold their home to Leana Monteith and Chris Morisseau in 2019. Ms. Monteith also testified about her experiences with fuel deliveries following their purchase of the home.
- [17] Kim Peebles was JD's educational assistant. She testified about JD's personal characteristics and school activities.
- [18] Tye Coldwell is employed with Suncor, and was the territory manager for the area, including the Warfield gas station, between about 2017 and 2019.
- [19] Roger Austin is the principal of Austin Engineering, the firm retained by the Herds for the gas station renovations in 2018. He was called by the plaintiffs as an adverse witness.
- [20] Chief Daniel Derby is the senior officer in the Kootenay Boundary Regional Fire and Rescue in Trail. As such, he is responsible for fire protection in the Village of Warfield.
- [21] Larry Bergquist was the author of an expert report, and qualified to give opinion evidence with respect to retail petroleum service station mechanical design and construction, including corollary design issues flowing from mechanical design.
- [22] Jennifer Ross and Dr. Icenius deZwart were the authors of the Masse Environmental Report, and qualified as experts to give opinion evidence with respect to actual and potential petrochemical contamination of the soil in the alley and on the Hills' property.

Herds

- [23] Margaret Baziw and Christine Coombes are the daughters of William Herd and Willa Herd, and the co-managers of the gas station. Both testified as part of the Herds' case.
- [24] Robert Clarke lives in an apartment rented from the Herds above the convenience store at the gas station. He testified about his observations.
- [25] Lance Taylor is a long-time employee of the Herds who is now retired. He lives in an apartment located behind the convenience store rented from the Herds. He too testified about his observations.
- [26] Bruce MacLeod delivers fuel to the gas station for G&B Fuels ("G&B") and had done so for two years at the time he testified. He testified about the process of delivering fuel.
- [27] Nathan Gregory installed the vapour recovery system in February and April 2019.
- [28] Fraser MacKinnon, together with his father and sister, was involved in collecting decibel readings of various sounds at locations around the Hills' property. He is the brother of junior counsel for the Herds.

- [29] Jim Johnston was formerly employed by G&B. He testified about the process of delivering fuel to the gas station and his role in assessing the alley for fuel delivery.
- [30] Robert Stevens was qualified to give expert evidence with respect to an acoustical engineering report written by Mr. Bonsma, as the latter was unable to testify.
- [31] Kris De Witt is a realtor who testified about listing the Trotter house for sale in the summer of 2018.

RDKB

- [32] Sara Bradley is an assistant in the RDKB Building Department. She testified about the building permit process.
- [33] Don Lepitre was a Building Inspector with the RDKB. He testified about his role in issuing the building permits for the renovation project.
- [34] Brian Champlin is the Manager, Building Services for the RDKB. A significant amount of his discovery evidence was read in.

Village

- [35] Jody Cox was the sole witness called by the Village. At the time she testified, Ms. Cox was the Chief Administrative Officer with the Village, a position she had held since mid-2021. At the time of the renovations, she was the senior administrative clerk, and was not privy to any of the relevant Village decisions. She had no personal knowledge of the facts in dispute except for attending one in-camera Council meeting in January 2019, at which she took the minutes.
- [36] The Chief Administrative Officer at the time of the renovations, Jackie Patridge, is no longer employed by the Village, nor is the subsequent acting Chief Administrative Officer, Lelia Cresswell. The Mayor at the time is no longer in office. None of these individuals were called as witnesses. The Village's documentary evidence was also limited due to computer issues which had resulted in the loss of some documents.

Facts

Credibility

- [37] The parties made submissions about the credibility and reliability of some witnesses. The principles for assessing credibility and reliability are well-established: *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187.

- [38] For the most part, I agree with the Hills' submission that it has not proven necessary for me to make many express credibility determinations in this case. For the most part, I found that the witnesses in this trial did their best to testify truthfully. Where I have found it necessary to comment on the credibility or reliability of any evidence, I do so in considering the evidence of the witness in question.
- [39] I have reviewed in detail the evidence which I consider necessary to my decision. In light of the conclusions I reach in my legal analysis, it is not necessary to review all of the evidence in the same depth.

The Hills

JD

- [40] JD was born in February 2006. He has special needs, and has been diagnosed with a number of conditions, including: global developmental delay, seizure disorder, severe intellectual disorder, autism, scoliosis, severe speech apraxia and hypotonia. He is very small in stature for his age. He weighed 93 pounds when Mrs. Hill testified in January-February 2023.
- [41] When Mrs. Hill testified, she described JD, who was then about to turn 17, as functioning at the level of a neurotypical five year old. While he has made gains over time, she does not believe that JD will ever be able to live independently. Mr. and Mrs. Hill plan to have JD live with them for as long as they can care for him, after which the family plan is to have JD live with one of his older sisters.
- [42] JD was described by his parents and his educational assistant, Ms. Peebles, in many positive terms, including being sweet, kind, funny and far smarter than people give him credit for.
- [43] JD attended Webster Elementary in Warfield for his elementary education starting in kindergarten. In 2020, he moved on to J. L. Crowe in Trail for secondary school. He has an individualized educational plan, and spends much of his school time in the school resource room with an educational assistant. When this trial began in April 2022, JD was in grade 10.
- [44] Due to his conditions, JD is limited in his ability to communicate verbally. While his speech has improved over time, his communication remains idiosyncratic. His parents and others close to him are able to understand more of what JD is communicating than others are. JD has better receptive communication than expressive communication, which means he understands more than he can say.
- [45] JD has a very hard time adapting to any changes in his routine, but Mr. Hill says he eventually adapts. His parents try to keep his schedule and routines predictable. JD experiences sharp swings of emotion, and is very affected by his parents' moods, especially his mother's. He becomes upset if his parents have a disagreement or fight in front of him, so they try to avoid doing so.

- [46] JD is disturbed by loud noises, more so than other children his age. He uses noise-cancelling headphones, both at school and at home, when he is bothered by loud noises. At school, Ms. Peebles has observed JD be emotional and scared when bothered by loud noises. The Hills testified that JD uses his noise cancelling headphones when he is bothered by the noise from the truck refueling in the alley. Mrs. Hill testified that even with his headphones on JD will still alert them continuously to the fact that truck is there delivering fuel.
- [47] JD does not like bad smells. For example, Ms. Peebles testified that he does not like smelly bathrooms. He will not use a smelly bathroom, and can get upset or angry about it. Mrs. Hill testified that JD does not like the smell from the fuel deliveries. He scrunches up his nose and says "cack".
- [48] JD's bedroom in the Hills' residence faces Forest Drive. He, therefore, is not disturbed in his bedroom by the light emanating from the gas station. Mrs. Hill testified that when he uses the washroom, which faces the alley, where he likes to go with his iPad, he will complain about the light from the gas station, saying that he wants it dark.
- [49] Mrs. Hill testified that when she is at home with JD and the truck comes into the alley she often leaves the home with JD. They may also do so if Mr. Hill is at home. The Hills described the process of getting JD ready to leave, and getting him into a vehicle. Depending on the time of day, JD may need his medication. The Hills have to do everything for him, including dressing him and putting on his shoes. Mr. Hill said that JD is not little, he is strong, and if he is stressed out it is difficult to put his jacket on, all of which escalates the anger and frustration everyone is feeling. Mrs. Hill testified that if she is home alone with JD the process of getting him ready, out the door, and into the vehicle, takes her 20-25 minutes. The process is easier if Mr. Hill is at home. Once in the vehicle, Mrs. Hill and JD might go visit Grandma or go shopping or run other errands. They will stay out for a minimum of two hours because of how long the truck stays to deliver fuel. When Mrs. Hill returns to their home, she then has to do the same process in reverse.
- [50] Mrs. Hill testified that JD has become more reactive to the truck as he has gotten older. When he was younger it was easier to distract him.

Move to the current Hill home, renovations to the Hill home and situation prior to 2018 gas station renovations

- [51] The Hills formerly lived roughly two blocks down Forest Drive, in the direction of Trail, from their current residence. They decided to purchase their current home in November 2014. They wanted to maintain as much stability as possible for JD, including keeping him at his then current school, Webster Elementary. They were attracted to their current residence for a number of reasons, including its proximity to their former home, neighbourhood and Webster Elementary, and the fact that the street was on a cul de sac, which they thought would be quieter, and they felt would be beneficial for JD. They felt that it would be the perfect house for their family. They planned for it to be their "forever home". The Hills do not want to move from the current home for a number of reasons, including especially to

maintain stability for JD.

- [52] The Hills did not think much about the fact they were moving to a home located across an alley from a gas station. Their backyard is sunken 12 feet down from the level of the alley, so they could not see much of the gas station from their backyard.
- [53] Mr. Hill testified in cross-examination that they did not anticipate that they would be near more smells, noise and lights in moving closer to the commercial district than their last home was. He acknowledged that, looking back on it, he should have anticipated that. He said that they did experience more noise, light and smells from when they moved in in 2014 until late 2018 than they had at their old house, but it was to a limited extent, nothing harsh that really bothered him.
- [54] Mr. Hill acknowledged in cross-examination that he has no direct control over developments in Warfield, or what properties might be used for. He acknowledged that, from time to time, properties would be renovated, including developments in the commercial district.
- [55] The Hills' home is a two level, five bedroom, three bath house. After they moved in, the Hills extensively renovated the home over several years. Among many other things, they renovated it to better suit JD's special needs, including installing things like grab bars and rails. They put in a basement suite in the hope that JD could have his own living space there when he is older. They put in new double pane windows, which significantly reduced any noise from outside. Mr. Hill did most of the work himself. They had plans to continue the renovations, but stopped when the Petro-Canada renovations happened in November 2018. They had intended to replace the fence between the back of their property and the alley, put in a gate to the alley and stairs down to the lawn from the alley for a patio area, but they have put those plans on hold pending the conclusion of this lawsuit. As matters stand, there is no direct access from their backyard to the alley.
- [56] Mr. Hill testified that the gas station did not have any significant impact on their enjoyment of their home from when they moved in until late 2018. With their doors and new windows closed, they could barely hear any noise from outside, except for things like the occasional loud motorcycle on the highway or a neighbour mowing their lawn. These sorts of occasional noises did not impact the Hills' enjoyment of their property.
- [57] Prior to the Petro-Canada renovations, Mr. Hill testified that there were no exterior lights at the gas station which had any impact on their enjoyment of the interior of their house. Mr. Hill testified that he did not recall any occasions where he could smell petroleum fumes inside their house before the renovations.
- [58] Mr. Hill testified that the only aspect of the gas station operations which bothered the Hills before the Petro-Canada renovations was waste oil burning, which he said smoked out their backyard and the entire block. According to Mr. Hill, this was a continuous problem until a town meeting in 2015. He did not remember the meeting very well, but he did know that

after the meeting the gas station stopped burning waste oil. Mrs. Hill also testified about this meeting, at which she said Ms. Coombes and Mrs. Trotter got into a yelling match. She described it as a "bad scene". Mrs. Trotter testified they had words, and Ms. Coombes, in Mrs. Trotter's words, asked her to "step outside". After that, Mrs. Trotter said she did not speak to "them", meaning Ms. Coombes and her family.

- [59] Mrs. Hill testified that before the renovations she could occasionally smell the odd whiff of gas fumes in her yard. She could not say how frequently.

Hills' evidence about impact of changes to operations following Petro-Canada rebranding

Gas station renovations and first deliveries

- [60] The Hills did not have any forewarning about potential changes to the gas station when they moved to their home. In August or September 2018, they noticed that the Herds were removing debris, garbage and junk cars from the site. They learned that substantial renovations were planned only after construction started. Mrs. Hill heard "rumblings in the neighbourhood", then big trucks came and started excavating. They did not know for what purpose.
- [61] Mr. Hill testified that he believed he was at home the first time fuel was delivered to the gas station from the alley. That was on November 8, 2018. Mr. Hill was bothered by the noise that day. He was not sure if he was first bothered by the smell that day or a couple of deliveries after. Mr. Hill testified that the Herds first lit up the lights around the tank nest around that day, or perhaps a couple of days before.
- [62] Mrs. Hill was also home the day fuel was first delivered from the alley. She testified that she could not believe the smell, which she described as awful and nauseating. She believed she complained about it immediately.
- [63] The Hills testified that they talked to each other about the delivery, and Mr. Hill told Mrs. Hill they should give them the benefit of the doubt, as he did not believe it could be a permanent thing.

Ceiling crack

- [64] The Hills allege that the construction of the renovations to the gas station caused or contributed to a crack in the ceiling of their home. Mrs. Hill testified that in October 2018, while construction was going on, the house was shaking and the ceiling in the living room cracked.
- [65] The Hills did not complain to the Herds or anyone else about this issue at the time it occurred, and made a claim for it with their insurance company on January 31, 2019.
- [66] Mr. Hill testified that there had been a similar crack in the ceiling of their home prior to the Petro-Canada renovations.

- [67] Pennco Engineering (BC) Ltd. was retained by the insurance company to assess the cracking that occurred in the ceiling. They visited the Hills' home on November 28, 2018. The report indicates that there had been an earlier crack in approximately the same location in 2016 that had been repaired. The report concluded that the original crack was likely caused by heavy snow loading on the roof and related to a number of issues with the roof. The report further concluded that conditions continued to exist for further cracking to happen in future, and that it was likely that vibrations from construction on the gas station renovations, namely pile driving, would have been severe enough to cause the ceiling to crack in October 2018.
- [68] The engineering company made a number of recommendations to address problems with the roof. The Hills carried out those recommendations, such as installing new gussets that bridge from the beam up to each rafter. The total cost to repair the crack and strengthen the roof was \$6,200, of which insurance covered all but \$500-\$1000, which was paid by the Hills.

Ongoing impact

- [69] Mr. Hill works as a production coordinator at Teck Metals, the local refinery and smelter in Trail. At time of trial, Mr. Hill's usual shifts were from 4:00 a.m. to 12:00 or 12:30 p.m., although he sometimes stays at work significantly later. His usual bedtime is 8:00 p.m. and he wakes up work for work at 3:15 a.m. He is scheduled to work 40 hours a week, but usually works 50 hours, and sometimes more. In his position as production coordinator he is allowed to manage his own time. Mr. Hill's hours of work and bedtimes are important for understanding some of his evidence about the impact of gas station operations on him.
- [70] Mrs. Hill is a stay-at-home mom, and the primary caregiver to JD, and she is usually at home during the day. This too is important for understanding the impact of the gas station operations on her.
- [71] At time of trial, a truck was delivering fuel to the tank nest from the alley two to three times a week. According to Mrs. Hill, the truck stays for two and a half to three hours each time. The delivery times are variable, and the Hills never know when the truck is going to come. The truck pretty much fills the alley when it is parked to deliver fuel. The usual configuration is a B-Train truck with a pup trailer.

Noise

- [72] Mr. Hill testified that the noise inside the house, with the windows and doors closed, of the truck delivering fuel in the alley is like a constant droning or vibrating sound. He said it can be heard globally throughout the house, wherever you are. You would need to turn the volume of the television up substantially to watch a movie. It is annoying if you are sitting at the dining room table; he tries to block it out. You have to raise your voice if you are having a conversation, but not to the point of yelling. Mr. Hill testified that the noise has sometimes prevented him from going to sleep in the master bedroom, which faces the alley.

- [73] Mr. Hill testified that the noise of the truck delivering fuel in the alley if you were outside on the sundeck of the house varied, as not all of the delivery trucks are the same. Some are brutally loud and some are just loud. Either way, you have to yell at each other to be heard from three feet away. Mr. Hill compared it to the sound of an industrial vacuum truck. If the Hills are on the sundeck when a delivery commences, their normal practice is to go inside the house or leave the property entirely. He said they do so because it is irritating, and it was better, he said, to just leave.
- [74] Mr. Hill testified that hearing the delivery truck in the alley increases his stress. He feels helpless as "they" control whether he goes outside or opens the windows in his own house. He feels like "they" control his life with the truck. He gets frustrated and angry, and argues with Mrs. Hill. Mr. Hill also testified that his and Mrs. Hill's moods affect JD and JD does not like it when they argue. Mr. Hill also testified that he has experienced more migraine headaches since November 2018. He has not seen a doctor for them. He treats them with ibuprofen. He believes the noise from the fuel deliveries aggravates his migraines on occasion.
- [75] Mr. Hill testified that the Hills have a barbecue on their sundeck, but they have not planned any barbecues for years and they cannot have people over in their back yard or on the deck because the trucks are excessively loud. He said there was a brief period where "they" would give them a delivery schedule or call them to notify them about deliveries, but only when the truck pulled up. As a result, they could not schedule inviting people over to avoid deliveries.
- [76] Mrs. Hill has a practice of writing down notes about things that happen with the deliveries. She did not write down every time the truck came, but did make a note of things that stood out. She would then clean her notes up and send them to her husband who would print out the final log. Some of Mrs. Hill's notes and a final log were entered into evidence. On May 12, 2021 at 9:29 a.m., Mrs. Hill received a notice from G&B, the delivery company, that the truck would be making a delivery. The truck had arrived four minutes before she received the notice. This was during the period that G&B was supposed to send Mrs. Hill a notification that they were coming. However, as on this occasion, Mrs. Hill testified that she would often receive the notification after the truck had already arrived. This system was only in place for a very short period of time.
- [77] Mr. Hill testified in cross-examination that since January 2020 he had heard the truck maybe five times while he was going to bed. The last time he could recall was within the last six months, and it lasted for over an hour. He also testified that he had heard the truck after he had gone to bed. He had never heard it before he went to work.
- [78] For her part, Mrs. Hill testified that when she hears the fuel truck she scrambles around making sure all the windows are shut. She testified that the noise grates on you, and it was difficult to describe. She said you could hear the truck over a conversation at the dinner table, that you need to turn up the sound on the television, and you cannot sleep in the bedroom.

- [79] Mrs. Hill testified that the noise stresses her out, irritates her, and she finds it annoying. It has affected her sleep. Overall the fuel deliveries make her feel stressed and frustrated. She has taken it out on her husband and lost patience with JD, which she normally never does, telling him "I know the truck is here, drop it", when JD goes on about it.
- [80] Mrs. Hill testified that while a delivery is occurring they cannot sit on the deck and have a conversation because you cannot hear a person three feet away.
- [81] Mrs. Hill said that sometimes the truck causes a vibration in their home that will make their metal wall art on the dining room wall to make noise. The evidence in support of this assertion was not strong, and I do not place much weight on it.
- [82] The Hills say that a number of different trucks are used, and that some are much louder than others. Mrs. Hill says that overall, the noise situation has not improved since 2018.

Vapour smells and related issues

- [83] Mr. Hill gave evidence about a specific delivery which occurred on April 1, 2022, between 3:00 and 6:00 p.m., shortly before he testified in April 2022. He said it was louder than ever and it smelled like gas. The extent of this gas smell was unusual by this time, because the Herds had installed a vapour recovery system, which improved the smell, but for the three and a half years before that Mr. Hill testified that the smell was terrible.
- [84] Mr. Hill was not sure when the vapour recovery system was installed, but he knew the Herds had done so as he saw the pipes being installed. According to the parties' Agreed Statement of Facts, it was in February 2021. The Herds' evidence is that it was completed in April 2021. Before it was installed, Mr. Hill testified that it smelled like they were pumping gas into his back yard. How bad it was would depend on which way the wind was blowing. The smell made it intolerable to be in the backyard.
- [85] Mr. Hill testified that, before the vapour recovery system was installed, he had also smelled fuel inside the house on one occasion that he could recall. He came home and went in the front door. He remembered smelling vapours in the house and gagging. He believed Mrs. Hill had left the house with the windows open. He did not believe the delivery truck was still there when he got home. He sat outside and called 911. According to Mr. Hill, the dispatcher said they would not dispatch anyone because they already knew what the issue was. Someone did respond after 45 minutes. It took about an hour before he was able to go back into the house and not smell the vapours. This occurred in April 2019. Mr. Hill testified that since that day they have not opened their windows.
- [86] I note here that an RDKB incident report dated April 14, 2019 about this incident was entered into evidence. It indicates that firefighters attended and "checked house with gas detector, nothing found." There was also an email from a firefighter to Chief Derby reporting on the situation, in which the firefighter wrote "Upon arrival there was a very strong smell of gasoline in the home, but our gas detector did not pick up any abnormal readings". I accept

the Hills' submission that the fact the fire department could not detect fumes with the gas detector does not mean that there was not a strong smell of gasoline in the home. There was a strong smell of gasoline in the home on this occasion, caused by the truck unloading fuel.

- [87] Mrs. Hill testified in cross-examination that at times she had noticed a difference in the smell since the vapour recovery system was installed. She testified that she still smells something during every delivery, but it is not as strong some of the time. She was not sure if what she continues to smell is diesel truck exhaust or the fuel which is being delivered.
- [88] Mr. Hill testified that there were times when he had noticed wet areas on the surface of the alley after fuel deliveries. He could smell them and they smelled of fuel. Mrs. Hill testified that she had observed spills left behind after deliveries. Starting in or about the first week of trial in April 2022, deliverymen started using buckets to collect drips from fuel hoses. The spills have an odour and appear "rainbowy". Mrs. Hill identified a photograph of what she called a "big spill" when a truck had stayed parked in the alley for 24 hours. A stain can be seen that almost completely crosses the alley.
- [89] Mrs. Hill testified that because of the smell she cannot hang clothes on the line because the clothing will smell of exhaust or gasoline fumes.
- [90] If they are outside when a delivery happens, they go inside, and shut the doors and windows. Mrs. Hill testified that since the 911 call in April 2019 they do not open their windows unless it is absolutely necessary, for example if something got burned on the stove. They have central air conditioning which they use to cool their home. The air intake is at the back of their house. Mrs. Hill testified that on occasion she has smelled fuel or diesel fumes inside the home with the windows shut.
- [91] Mrs. Hill testified that the odour situation has improved somewhat since the vapour recovery system was installed. She says she can still smell the truck idling in the alley, and that she sometimes still smells gas, in varying degrees.

Lights

- [92] In order to understand the evidence about the impact on the Hills of light emanating from the gas station, it is necessary to attempt to establish the pre-renovation and post-renovation lighting, and subsequent changes to the lights on the property. It is also necessary to understand what the plaintiffs pleaded about lighting. In the further amended notice of civil claim, the Hills pleaded the following facts related to light:
63. Herd's industrial lights above the retail forecourt and tank nest are on tall stands and shine down harsh, uncontained light. The addition of an unsatisfactory metal plate on the tank nest stand to "shield" the luminescence over the nest has not stopped it from shining brightly into the Hill's residence.

64. The lights over the retail forecourt turn on by 5:00 a.m. and turn off at approximately 9:00 p.m., making it impossible for the Hills to enjoy their back yard and deck in the evenings. At night, it lights up the interior of their home unless the Hills' window coverings are closed. As of October 3, 2019 the lights over the tank nest are being turned off irregularly. Initially, the tank nest lights were on 24 hours a day, seven days each week.
- [93] Many photographs of the lights at the gas station were entered into evidence. From those photographs, and the parties' evidence, it is not entirely clear what lights were in place prior to the renovations. It is clear there was a light on the canopy of the FasGas sign which was angled towards the forecourt. Whatever the precise configuration, I accept Mr. Hill's evidence that the gas station lights did not bother the Hills prior to renovations.
- [94] As part of the renovations, an illuminated Petro-Canada light was installed in the forecourt. It is not alleged by the Hills that that Petro-Canada light creates a nuisance.
- [95] Also as part of the renovations, the Herds installed a light on a stand over the forecourt area where fuel is dispensed. During the trial, the Herds initially took the position that they were taken by surprise that this forecourt light is in issue, however, the further amended notice of civil claim makes clear that the lights in the retail forecourt are alleged to be a nuisance.
- [96] Also as part of the renovations, the Herds installed a light on a stand over the new tank nest, towards the back of the gas station property. Initially, the tank nest light was on 24/7.
- [97] Also as part of the renovations, the light which was formerly attached to the FasGas canopy was moved to the side of the convenience store.
- [98] At some point after the renovations, the Herds installed a light deflector shield on the tank nest light. At some point thereafter, the Herds put the tank nest light on a timer, scheduled to turn on at 5:00 a.m. each morning, and off at 9:00 p.m. each evening. At some point after that, likely in or about June 2021, although it was sometimes suggested it was in 2020, the Herds shut the tank nest light off completely. Since that time it has been turned on manually on an occasional basis, the Herds say only rarely when required for safety reasons during evening deliveries in the winter. I accept that that is true.
- [99] The forecourt and convenience store lights are operated manually. According to the Herds, they are generally turned on when the gas station is open between 5:00 a.m. and 9:00 p.m. daily, but there is some variability depending on when employees perform the task of turning them on or off.
- [100] There was a dispute in the evidence about the orientation of the convenience store light. The Herds say that it faces away from the Hills' home towards the forecourt. The Hills say that initially it was angled towards the forecourt, but that at some point prior to or during trial, it was turned to shine on the Hills' property. The evidence about when, if ever, the angle of the light on the convenience store was changed is quite unclear. I find that the Hills have failed to establish that the orientation of the light on the side of the convenience store was changed to shine towards their home. I nonetheless accept that the light on the side of

the convenience store is bright and is easily seen from the Hills' home.

- [101] With that by way of background, I turn to the Hills' evidence about the impact of the lights on them. Mr. Hill testified that he does not go outside very often at night, but the exterior lights installed at the gas station affect him inside the house. When they had had barbecues in the past, the lights would bother them outside after it got dark. He testified that the lights light up the whole backyard.
- [102] The Hills have installed internal blinds on the French doors leading to the sundeck, roll-up custom blinds on the windows in the kitchen and dining room area, privacy glass in the bathroom, and black out blinds in the master bedroom. The gas station lights can be seen glowing through the blinds in the dining room. Light can be seen on the floor, but it is not very bright. Mr. Hill said that if the blinds are not closed it is "almost like an aura". In the bedroom, the light glows along the sides of the blackout curtains. Mr. Hill struggles to get back to sleep if he wakes up in the middle of the night because of the light. In the bathroom, the light from the gas station is bright enough that you do not need to turn on the light.
- [103] Mr. Hill testified that the lights in the retail forecourt were never left on after the gas station closed for the night. Those lights do not impact him. He testified that the lights which had an impact on him were the ones over the tank nest and the one on the side of the convenience store.
- [104] Mrs. Hill testified that for the first week or so after deliveries from the alley started, the lights above the tank nest were on 24/7. She called the Village to complain, asking them to do something. Mrs. Hill said the lights in this period were brighter than sunlight in the house and in the yard. A Village councillor, Jim Hill, came out and had a look, and Mrs. Hill said the Herds put some kind of deflector on the light. That made it less bright.
- [105] At the time she testified, Mrs. Hill said the tank nest lights came on at about 5:00 a.m. and shut off at 9 p.m., although it is not entirely consistent. She has seen deliveries happen both with and without the lights being on, including being done in the dark at night.
- [106] The other lighting change Mrs. Hill testified about was the light on the side of the convenience store. She said the Herds put another light there which is extremely bright. She said that it was initially pointed towards their house, but was later re-oriented to point to the gas station forecourt. I have already dealt with that allegation. That light is on at the same times as the light in the forecourt.
- [107] In cross-examination, Mrs. Hill was asked about the tall light in the tank nest. It was suggested to her that since 2019 that light has been off continuously except for a handful of times. She disagreed, but could not say how many times it had been on.

[108] Mrs. Hill testified that they bought roller black out blinds for their bedroom, the best they could buy. If the lights are on, they can see light around the edges of the blinds. She has tried putting curtains up around the sides, and taping down the edges, but she can still see the light around the edges. She said the lights wake her up if they come on when she is sleeping or napping. She goes to bed early, like Mr. Hill, and the light bothers her.

Other issues

[109] Mrs. Hill described a situation she observed in which a car tried to get around the fuel truck in the alley while it was delivering fuel. It could not do so, and an angry confrontation ensued between the fuel truck driver and the driver of the other vehicle.

[110] Mr. Hill described steps they had taken to try to mitigate the impact of the gas station operations. They planted some blue spruce trees along the fence line. They are five to six feet tall, but he is hoping they will grow to obscure their view of the lights. Unfortunately, to date they have not grown much. The Hills have not installed a new fence to function as an acoustic barrier. When asked why not in cross-examination, Mr. Hill testified that he did not know if it would be effective.

[111] Mr. Hill testified about safety concerns he had due to the delivery of fuel in the alley. Those concerns had grown during the course of this lawsuit as he learned more about the alleged breaches of the Fire Code and other issues. Mrs. Hill has concerns about the risk of fire or an explosion. She sometimes wakes up in the middle of the night worried about it, thinking she smells smoke and running around the house checking. She worries about how she would get JD out if there was a fire.

[112] Mr. Hill testified about the family's financial circumstances. He is the family's sole income earner. He testified that the reason the Hills did not apply for an interim injunction in this matter was due to the financial risk associated with giving an undertaking to pay damages.

Neighbours and friends of the Hills

[113] Nicole Pipes is a friend of Mrs. Hill. She has visited the Hills' home on a number of occasions. Between June and September 2020, she did so every Monday to have coffee with Mrs. Hill. JD was at home. Over a two-year period, she had been at the Hills' home 10 or 12 times when the truck delivered fuel. On those occasions, she smelled fumes if she was outside having a cigarette on the deck. The smell did not bother her because she happens to like the smell of gasoline. The noise was annoying. She described it as being like someone mowing their lawn for two hours.

- [114] Ms. Pipes and Mrs. Hill mainly stayed inside. Ms. Pipes could still hear the truck outside when inside the house. She recalled a particular occasion when they were sitting in the living room at the front of the house with windows closed and the air conditioning on. There was a high pitched whine like a faulty compressor during the entire delivery. It was annoying.
- [115] Ms. Pipes knows JD quite well, and has often seen him interact with his mother. They are very close. JD is a generally happy child. On one occasion when the fuel truck was there he came into the living room. He did not have his noise canceling headphones on and he looked worried and was pointing to his head, saying "mama". Mrs. Hill found his headphones, ushered him into his bedroom, and calmed him down.
- [116] Ms. Pipes testified that Mrs. Hill gets aggravated when the truck is there. When JD is not there, her frustration or irritation is obvious. She does not transfer those emotions to JD.
- [117] The Trotters lived in the house next door to the Hills' residence from about 1983 until they sold their home in June 2019. As discussed elsewhere, the Trotters did have a number of concerns and complaints about gas station operations prior to the renovations. Clearly, relations between the Trotters and the Herds were poor for some years.
- [118] Mrs. Trotter testified that the changes made to fuel unloading at the gas station weighed heavily in their decision to sell their home. She said that they did not want to deal with the problem any more. They could not get the Village to stop the Herds and they could not afford to be involved in this court case. She said the noise from the truck unloading was maddening, that they never knew when the deliveries were going to happen, and if they had company over they could not sit on their back deck. She said that the noise was like trying to talk to someone when they are mowing the lawn. She also referred to the smell. She had to close every window when the truck arrived or her house would be full of fumes. They did not have air conditioning, so the house would heat up with the windows closed. She did not want to continue having to deal with the stress.
- [119] Mrs. Trotter testified that she was lucky because they had tall trees in their backyard which blocked the sun which kept the house a bit cooler. Those trees also blocked quite a bit of the light from the gas station, unlike the Hills, who had the lights shine directly on their home.
- [120] There were also other factors that caused the Trotters to sell and move. They sold their home through a private sale to Ms. Monteith and Mr. Morisseau. Mrs. Trotter did not recall her or her husband listing their home for sale through a realtor before selling it privately, although the evidence from the realtor, Mr. De Witt, shows that they did so between August and October 2018. I do not draw any negative inference about the reliability of Mrs. Trotter's evidence from her failure to recall this fact. It likely reflects the fact that some of the Trotters' concerns with gas station operations pre-dated the changes to fuel delivery in November 2018.

- [121] Ms. Monteith testified about buying her house from the Trotters and her experience with the fuel truck deliveries. She testified that the engine noise during deliveries is very loud. She can hear it with the windows closed. It is even louder in the back yard. She said that the fuel truck is quieter than a diesel engine but louder than her own truck running in the front yard. It is loud enough to interfere with her ability to listen to the radio or have a conversation on the deck. The neighbourhood is otherwise very quiet, and that is pretty much the only noise they get. If she is in the backyard when the truck arrives she packs up and goes inside. She does not like the fumes from the fuel truck. She closes all the windows that face the backyard. They installed air conditioning a year after they moved in. The first summer, before they installed the air conditioning, the house would warm up with the windows closed, and they would move into the basement where it is cooler.
- [122] Ms. Monteith has not noticed any significant change in the smell and noise associated with fuel deliveries, nor their frequency, since she moved in. The lighting at the gas station does not impact her enjoyment of her property, which again, is shielded by trees.

Hillis evidence

- [123] Mr. Hillis was the videographer hired by the Hills to film their home both during and in the absence of fuel truck delivery. He provided his own lay observations of the noise during a delivery. He also provided drone and handheld video footage.
- [124] The drone footage does not have any audio. The handheld video footage does have audio, but its utility is limited for the purposes of this decision. That is because, as Mr. Hillis testified, the handheld camera has a directional microphone, which filters white noise and accentuates sharp clear noise, such as the sound of a latch being opened or footsteps. I cannot rely on the audio from the handheld camera to determine how loud a delivery is in and outside the Hills' home.
- [125] The drone and handheld video evidence is of assistance in helping me visualize the layout of the neighbourhood, including the gas station and the Hills' home, and the visual impact of the fuel truck being present in the alley. I agree with the Herds that I cannot, as the Hills' have submitted I ought, use the video to "eyeball" various distances depicted in the footage. For example, I cannot tell from the video footage alone what the distance is between the two tanks in the tank nest.
- [126] I do find Mr. Hillis' lay evidence about the sounds he heard of assistance. He compared the truck noise to being in a small propeller plane. The noise level would go up and down with the engine and pump cycling. It only took a short time before Mr. Hillis was annoyed by it, while he was inside the house with all windows and doors closed. By the time he had finished filming he wanted to leave. This is persuasive independent evidence of the impact of the noise caused by a fuel delivery.

Complaints and defendant responses

- [127] There was evidence that the Hills and the Trotters had some complaints about gas station operations before the renovations. In particular, they complained about the gas station burning waste oil. There were also concerns raised by the Trotters about the premises being kept in an unsightly fashion. In general, the Trotters appear to have been much more vocal with complaints about the gas station before the renovations than the Hills were.
- [128] Prior to 2014, Ms. Baziw could recall only the Trotters complaining about unsightly premises and a Mr. Anderson complaining about smelling gas in 2009.
- [129] After 2014, Ms. Baziw testified that the Hills complained about them using a furnace to burn waste oil. She could not remember if the Hills contacted them directly about the smell. She recalled attending a Village Council meeting to listen to the complaints about the furnace. She could not recall if anyone else was complaining at that time about the furnace. No one at the Village or the RDKB told them they had to stop burning waste oil but they decided to switch to burning wood. The complaints continued and they eventually took the furnace out entirely to alleviate the problem.
- [130] Ms. Baziw also recalled hearing from the Village that the Hills and the Trotters were complaining about the state of the gas station lot. Her dad has always stored vehicles on the lot. Those vehicles were removed during the 2018 renovations.
- [131] Ms. Baziw testified that, on one occasion, Mr. Morisseau talked to her and her sister about his daughter's upcoming birthday party and asked that they not have fuel delivered that day. They contacted G&B and did their best to accommodate his request. She believed that fuel was not delivered that day.
- [132] Ms. Baziw first became aware that the tank nest light was bothering the Hills almost right away after the renovations were complete. Originally the light was on 24/7 for safety reasons. She believed the Village Mayor got a hold of her and asked if they could do something about it. They put a timer on the light so it would turn off at 9:00 p.m. The Mayor asked if they could do anything more about it, so they installed a shield to try to keep the light from shining on the Hills' property. She understood it was still bothering them, so in the summer of 2020 they decided the tank nest light only needed to be on for night time loading when it was dark out. They turned the light off, and only turn it on manually when necessary for safety during night time deliveries. She testified that they do that only when necessary. They try to have the fuel truck come in the morning after JD goes to school.
- [133] Ms. Baziw testified that the lights in the forecourt are turned on when the gas station opens at 5:00 a.m. and are turned off when it closes at 9:00 p.m. Occasionally, if there are customers, the forecourt lights may be turned on slightly before 5:00 a.m. or after 9:00 p.m. She testified that it was only during the course of this trial that she became aware that the Hills had concerns about the forecourt lights. As I have already addressed, this issue was pleaded in the further amended notice of civil claim

- [134] Ms. Baziw testified that until they received the Notice of Civil Claim she was unaware that anyone was concerned about the noise associated with fuel deliveries. She said that they are trying to make sure trucks do not arrive before 8:00 a.m. or in the evening. She has talked to dispatch, but it is up to G&B when they come. Their regular driver, Mr. MacLeod, comes around 8:30 a.m. She did not know what else they could do about noise, other than perhaps building an acoustical fence for the Hills.
- [135] Ms. Baziw testified that after becoming aware of the extent of the Hills' complaints about fuel being delivered from the alley she and her sister went around the neighbourhood knocking on doors asking them to let them know of any concerns.
- [136] Mr. Hill testified that he had only complained once, but Mrs. Hill had complained a lot about the gas station operations. He said they had complained because the alley fuel deliveries were a ridiculous nuisance that had interrupted their lives. They wanted the Herds to go back to having fuel delivered the way they used to.
- [137] Mrs. Hill made a large number of complaints to officials with the Village and the RDKB about the gas station operations following the renovations. The first appears to have been on November 8, 2018, when Mrs. Hill emailed the Village Mayor, Diane Langman, and the Village councillors through an online portal about fuel being unloaded from the alley. She wrote that the smell was "obnoxious", and referred to having a special needs child that could not be around this. She wrote that she was concerned both about the smell and that they were blocking the alley for at least two hours, blocking access to their property.
- [138] On November 13, 2018, Mr. Trotter wrote a letter to the Village complaining that the fences at the back of the gas station property extended beyond the property line and into the alley by approximately three feet. The Hills signed that letter.
- [139] Mrs. Hill and Mr. Trotter attended the Village Council's regular meeting on November 21, 2018. According to the minutes, they "expressed their feelings" about the gas station.
- [140] Mrs. Hill emailed Ms. Langman on December 11, 2018. She wrote that "the gas truck has gotten out of control". She wrote that they block the alley for two and a half hours each time. She provided four dates on which this had occurred between November 17 and December 8, 2018, and said these were just the dates she knew of. She referred to a court order, which she said prohibited them from doing this. Mrs. Hill asked a number of questions, including why the Village was doing nothing about this problem and why there had been no notification to those affected by these changes.
- [141] Ms. Langman responded that same day. She said they were meeting with legal counsel about the court order. She said that other than a notice provided every quarter, the Village does not get information about building permits that are taken out. She explained that the Village has a contract with RDKB to do building inspections and permits, and the Herds applied for a building permit to the RDKB. She said that her understanding was that the Herds had complied with the Building Code. She said the Village would contact residents if

there was a zoning bylaw change, but that did not occur here, and the Village was not involved at all. She suggested Mrs. Hill might want to follow up with the RDKB.

- [142] Mrs. Hill did so on December 11, 2018 by writing an email to Brian Champlin, the Manager of Building Inspection Services with the RDKB. She asked Mr. Champlin a number of questions about the process, including the Village's involvement, whether the Herds would have had to get a building permit to move their gas tanks, and whether the Village or the RDKB gave them permission to load the tanks from the alley.
- [143] Mr. Champlin replied by email. He copied Don Lepitre. Mr. Champlin said they had issued a couple of building permits for the gas station this year. One was for a new Petro-Canada sign and the other was for a commercial alteration to the gas station, including removing the existing retaining walls and stairs and rebuilding them, along with new concrete pads to support the new tanks. He said that the Building Code only regulates buildings and structures, and that they have no authority to regulate or review the fuel tanks or other tanks holding fossil fuels. He said that all of that type of equipment is regulated by the Fire Code. He said that the placement and set up of such equipment must be reviewed by a registered professional, i.e. an architect or engineer and they normally consulted with the Fire Commissioner's Office or the local fire department regarding minimum safe distances that such tanks can be placed away from neighbouring buildings.
- [144] Mr. Champlin wrote that before the RDKB was able to issue a building permit, the Village had to approve a development permit, and that according to their records the project was approved by the Village and a building permit was issued upon receipt of a copy of the development permit. Ms. Cox testified that that portion of Mr. Champlin's email was in error and that no development permit was required. Mr. Champlin closed by saying that the RDKB's responsibility does not include the placement or filling of fuel tanks.
- [145] Mr. Lepitre also emailed Mrs. Hill on December 12, 2018. He wrote that the RDKB issued a building permit for a retaining wall and sign only. He said that gas tanks do not require building permits, and the RDKB Building Department has no jurisdiction regarding them. He wrote that the gas station's tanks met the set back requirements in the Village's Zoning Bylaw #635, so they are permitted. He invited her to contact him for any building permit questions [his underlining]. Mrs. Hill followed up, and Mr. Lepitre asked her to contact the Village for non-building permit-related questions.
- [146] On December 12, 2018, Mrs. Hill emailed the Mayor and Councillors. She said the alley was blocked again by the fuel truck and it smelled like gas in her home and stated that she did not feel they were dealing with the problem in a timely manner. She gave six dates since November 17, 2018 during which the alley had been blocked, for a minimum of seven and a half hours total per week.

- [147] On December 30, 2018, Mrs. Hill emailed the Mayor and Councillors again. She provided nine dates in December when the fuel truck had blocked the alley and filled her house up with gas. She said the situation was "completely out of hand".
- [148] Mrs. Hill emailed the Village Chief Operating Officer, Ms. Patridge, about fueling from the alley and traffic being blocked on January 8, 2019. She wrote that she had contacted Ms. Patridge, the Mayor and Council on many occasions but she had yet to hear back about her complaints about the alley being blocked. She referred to a court order she had provided that she said stated that "all the business regarding the gas station must be conducted on their property". Ms. Patridge replied on January 9, 2019. She wrote that they are not parking in the alley, they are offloading product. Her email continued "They have the right to do that, and it will not stop". She said they had been researching the court order, and it did not say they could not load gas into their tanks.
- [149] The court order referred to was a July 5, 2002 order of Madam Justice Humphries. In it she declared that the Herds were in violation of the Village's Untidy and Unsightly By-law due to improperly storing vehicles and junk on their property. A permanent injunction was granted prohibiting them from doing so. A permanent injunction was also granted prohibiting them from carrying on their business activities other than on their property or with a valid business licence. On my reading of it, the 2002 Humphries Order does not prohibit the delivery of fuel to the gas station from the alley, and the plaintiffs did not argue otherwise in front of me.
- [150] On January 10, 2019, the Village Council held a closed meeting. Ms. Langman emailed Mrs. Hill on January 16, 2019 about the meeting. She said that there were several action items that were being worked on, and that Council had obtained a legal opinion on the 2002 court order. She was unable to provide any further information as the meeting was closed. She told Mrs. Hill she would let her know anything as soon as she could, however, her "job is to protect the process and the municipality".
- [151] The minutes from the January 10, 2019 closed meeting indicate that the gas station was discussed. The relevant portion reads:

Gas Station

Mr. Herd is required to keep his business within his premise.

The gas station is accepting deliveries up to 2 hours, being done "within" his premises. State of the premises is still untidy.

Discuss the original order about tidiness of his premises and our property surrounding.

The complaint goes back n forth between the smell and the blocking of the ally.

We should try to do something on the residents' behalf but we have to be sensible.

Motion to staff to set up a meeting about moving the fence back to provide space for the tankers. Go forward with the court order to clean up also and make arrangements to make space for fuel tankers to be on their property.

Mayor and staff will give an update by next council meeting.

Upon receipt of emails, from residents (Tammy hill) the resident has been given direction to call 911 when the tanker is filling, which she has not done.

- [152] Meanwhile, Councillor Cyra Yunkws emailed Mrs. Hill on January 14, 2019 about the situation and Mrs. Hill's complaints. She told her that the process was to go first to staff and then to the Mayor, and she was forwarding Mrs. Hill's complaint (it is not clear which one) to the Mayor.
- [153] On January 16, 2019, Mrs. Hill emailed the Mayor and members of Council. She wrote that she was "beyond frustrated with the fuel truck filling up gas tanks behind my house. They are here again today and my house and property smell terribly of fuel".
- [154] On January 24, 2019, Village Council held a regular meeting and another closed meeting. The minutes of the regular meeting indicate that a motion was carried for Council to write the two concerned residents, being Mrs. Hill and Mr. Trotter. The minutes of the closed meeting indicate that Mayor Langman reported to Council about her meeting with the Herds. She reported that fuel is being delivered in a B train truck, so it is not possible to pull off the alley to unload fuel, and the truck must remain parked in the alley. The minutes state that "Council may amend the bylaw to extend the time allowed to park in the alley to unload gas", and that "Council sees unloading from the back of the building preferable to unloading from the front". Council was prepared to observe the situation for a time to see how it worked out. The minutes further state that the Herds were researching the possibility of a fume recovery system. The Mayor was to write a letter to the two concerned neighbours to keep them informed.
- [155] In her evidence, Ms. Baziw said that she and her sister spoke with the Mayor a few times, including about delivery options.
- [156] On January 25, 2019, Mrs. Hill sent another email to the Mayor and Councillors stating that the fuel truck was there again, and had also been there late Sunday afternoon. She wrote that "you Cant imagine the smell of gas in my home".
- [157] On January 28, 2019, Ms. Langman wrote Mrs. Hill on behalf of the Village. An essentially identical letter was sent to Mr. Trotter. Ms. Langman wrote that Council had addressed the 2002 court order with their legal counsel and they would be pursuing the Unsightly Premises Bylaw. She said that she and Ms. Patridge had met with the Herds, who had agreed to clean up the premises by the end of May. With respect to fuel delivery, she wrote:

After lengthy discussions and legal advice, Council has agreed that the safest route for the delivery of fuel is in the alley behind the gas station where the fuel tanks are legally located. Council has granted the gas station a temporary permit to park in the alley as required to make their delivery. By changing the location to the alley for delivery, Council feels that this is safer for our residents who are out walking in the business district along with those driving in that area.

[158] Ms. Langman concluded by stating that, as advised by the Ministry of the Environment, if Mrs. Hill felt the smell of gas in their residence was of concern, she should call 911 and firefighters would be able to assess. She also wrote that the gas station was in the process of researching options for fume recovery to recover lost fumes.

[159] On February 11, 2019, Mr. Trotter wrote members of Village Council in response to their January 28, 2019 letter. His letter is lengthy and it is clear that he continued to have many concerns about the changes in the way fuel was being delivered. The Village wrote Mr. Trotter on July 5, 2019. Among other things they said that Council determined no action was required regarding his concerns about environmental, noise and nuisance issues, and considered the matter now complete.

Rebranding and renovation process

[160] In the early summer of 2018, the Herds began to consider making changes to the gas station. They attended meetings of the Village Council on April 16, June 6 and July 18, 2018 to discuss their ideas. At the July 18, 2018 meeting Council asked them to prepare a development permit application and provide more information. It was later determined that a development permit was not required.

[161] In the summer of 2018, the Herds ceased operating as FasGas and explored options for fuel delivery. In July 2018, Suncor facilitated G&B quoting fuel delivery rates for delivery from the alley. Tye Coldwell testified that the rates were based on a larger truck delivering from the alley and pumping fuel into above ground storage tanks. According to Mr. Coldwell, the rates would have been higher if a smaller truck was used for delivery from the forecourt. Mr. Coldwell testified that Suncor was not involved in the redesign of the forecourt, as the Herds had their own engineer. He also said that the idea of delivery from the alley was developed before his involvement.

[162] On August 21, 2018, Suncor asked G&B Fuels to attend the station and advise on fuel delivery methods. In September 2018, Suncor's representative, Mr. Coldwell, and G&B's representatives, Mr. Johnston and possibly a person by the name of Glen (recollections vary on that point, but nothing turns on it), attended the station to meet Ms. Baziw and Ms. Coombes and to inspect the site. As explained in Mr. Johnston's evidence, they discussed the feasibility of delivery from the alley, and decided it was safe to do so long as ice and snow was removed from the alley in the winter months. Mr. Coldwell did not recall any discussion about the safety of the neighbourhood or the impact on the neighbourhood of delivery of fuel from the alley.

- [163] In September 2018, the Herds entered into a Retail Marketer Agreement and Retail Marketer Enhancement Agreement with Suncor. Under those agreements, the Herds were required to rebrand the gas station as a Petro-Canada station. Suncor agreed to provide financing to the Herds for the related enhancements by advancing a forgivable loan to the Herds. Further, the Herds were required to complete the required enhancements to Suncor's satisfaction. There is a volume sales rebate of 2.5 cents per litre.
- [164] Mr. Coldwell testified that the delivery cost component of fuel inventory costs would increase by about 45% if fuel was delivered using a smaller vehicle delivering to the forecourt.
- [165] On September 19, 2018, the Herds attended the Village Council meeting. A completed development permit application and plans for proposed construction were provided to Council.
- [166] The Herds hired Hil-Tech Contractor Ltd. (Hil-Tech) as the contractor. They also retained Austin Engineering to provide engineering services for the improvements to the gas station. Construction started in September or early October 2018.
- [167] On October 11, 2018, the RDKB received a building permit application from Austin Engineering on behalf of the Herds for tank upgrades and pump replacements. Mr. Austin signed the application as the Coordinating Registered Professional. The application included certified plans for the proposed construction.
- [168] The building permit application included the following standard term:
- In consideration of the granting of this permit, the undersigned: (a) releases the Village of Warfield and those acting on behalf of the Village of Warfield from all claims and expenses which the undersigned may have or incur as a result of the issue of this permit or the enforcement or non-enforcement of the Village of Warfield Bylaws or of the British Columbia Building Code; (b) indemnifies the Village of Warfield from all such claims and expenses which may be made by any other person; and (c) acknowledges that the Village of Warfield owes no duty of care to the undersigned or any one else in respect of these matters. When requesting an inspection, the owner or contractor must give 72 hours notice upon completion of the work. I/We have read the above agreement, release and indemnity and understand it.
- [169] Austin Engineering submitted Schedule A - Confirmation of Commitment by Owner and Coordinating Registered Professional, and Schedule B - Assurance of Professional Design and Commitment for Field Review for structural, mechanical, electrical and geotechnical aspects of the renovations, dated October 4, 2018, were submitted by Austin Engineering to the Village and RDKB for Permit No. 18-0382W.
- [170] Permit No. 18-0328W was granted on October 18, 2018. Mr. Lepitre signed as the Building/Plumbing Official. The particulars of the permit included that a second permit would be required for the sign, and that all work was to conform to the 2012 B.C. Building Code and relevant Village bylaws. Minimum setbacks were set out. William Herd executed a waiver of

indemnity on the permit by which he released the Village and those acting on its behalf from all claims and expenses the owner may have or incur as a result of the issuance of the permit, or the enforcement or non-enforcement of Village bylaws or the B.C. Building Code, and acknowledged that no duty of care was owed by the Village to the owner in respect of matters in the permit.

- [171] In her evidence, Ms. Baziw confirmed that the Herds understood the conditions of the permit.
- [172] By letter dated October 18, 2018, and signed by William Herd on behalf of the owner of the property, which letter was deemed by Permit No. 18-0328W to form part of the permit, the RDKB advised pursuant to s. 11.3 of the Village Building Bylaw that Permit 18-0382W was issued in reliance upon the certification of the registered professionals that the design and plans submitted in support of the application for the building permit complied with the Building Code and other applicable enactments related to safety. The RDKB further advised that when a registered professional provides letters of assurance, the Village will rely solely on field reviews undertaken by the registered professional and the letters of assurance submitted pursuant to the Village Building Bylaw as assurance that the construction substantially conforms to the design and that the construction substantially complies with the Building Code, Village Building Bylaw and other applicable enactments related to safety.
- [173] Ms. Baziw testified that the Herds understood from this letter that the Village was relying on the registered professional.
- [174] As requested by the RDKB, Austin Engineering submitted a second building permit application for the Petro-Canada sign.
- [175] On November 8, 2018 the RDKB issued Permit No. 18-0396W for the sign, referred to in the permit as "accessory structure" and "freestanding signage". Once again, William Herd signed the waiver of indemnity and the accompanying s. 11.3 letter.
- [176] Schedule C-B - Assurance of Professional Field Review and Compliance of each of the structural, mechanical, electrical and geotechnical aspects of the renovations, all dated December 10, 2018, were submitted by Austin Engineering to the Village and RDKB for Permit No. 18-0382W.
- [177] Schedule C-A - Assurance of Coordination of Professional Field Review, dated December 10, 2018, was submitted by Austin Engineering to the Village and RDKB for Permit No. 18-03282W.
- [178] All of Schedule A, C-A, and the Schedule Bs and C-Bs were received by the RDKB prior to final inspection and closure of the file by RDKB.
- [179] By November 19, 2018, the upgrades to the station were substantially complete.

[180] A final site inspection took place on December 7, 2018. The RDKB building inspection report indicates that a Schedule CB was received on that date, and that construction was as per registered professional's inspections. The report states that the project was completed and the file closed.

[181] As set out above, in January 2019, the Village granted a temporary parking permit to the Herds authorizing fuel delivery trucks to park in the alley to unload fuel to the tank nest located at the rear of the gas station property.

Role of Austin Engineering

[182] Roger Austin is a professional engineer and was the principal of Austin Engineering at the times relevant to this lawsuit.

[183] He confirmed that there were two building permits issued for the gas station conversion. The first attempted to deal with everything, and then the RDKB building inspection department asked them to submit a second application for the Petro-Canada sign. There were no as-built drawings prepared by Austin Engineering for this project.

[184] Mr. Austin testified that around November 1 or 2, 2018 a survey of the property on which the gas station is located, dated January 10, 2004, came to his attention. By this time the project was quite far along, and the tanks had been sited in the tank nest. Mr. Austin confirmed in his evidence that the survey shows the canopy, sign and gas pump islands that existed at the time the survey was done all extended into the Village roadway, that is Schofield Highway.

[185] The first project relating to the conversion of the station involved replacing and realigning the fuel dispensing units in the front of the station and rebranding the canopy. It also required the construction of a retaining wall to increase the retail forecourt area with a larger concrete driveable surface. The retaining wall both supported the forecourt, and created an area for the tank nest development near the alley. The diesel pump pad was moved northeast towards the canopy to provide more driveable space from the west. It continued to extend into the Village roadway. The canopy structure was not altered. New fascia was put up on it with Petro-Canada branding, which extended further into the Village roadway than the FasGas branded fascia had done. The main fuel dispensers under the canopy remained in the same location, extending into the Village roadway.

[186] The Herds obtained a new survey for the Petro-Canada conversion, dated September 25, 2018. The new survey was obtained, according to Mr. Austin, for two purposes: one was for the purposes of consolidating the five lots located along Schofield Highway owned by the Herds, and the other was for the purposes of construction.

[187] Mr. Austin believed he received a copy of the new survey around October 2, 2018. Mr. Austin signed the schedules for the project, other than the sign, and the permit application, on behalf of the owner, on October 4, 2018.

- [188] The new survey shows the face of the apartment building at 860 Schofield Highway is right on the property line. As a result, the surveyor could not put the iron pin on the corner of the property line, so they offset it .3 metres to the northeast. When Mr. Austin studied this survey plan he realized the construction could not comply with the 1.5 metre set back required on the front of the gas station property. Mr. Austin talked to Mr. Lepitre about this. That discussion was more focussed on whether the 1.5 metre set back was required due to zoning for commercial construction.
- [189] Issues arose with respect to work encroaching into Schofield Highway. On October 31, 2018, Ms. Patridge wrote the Herds, advising them that to continue with the renovations, the Village required them to obtain an easement for the use of Village property for the canopy, gas pumps and gas lines.
- [190] Mr. Austin talked to the Herds about whether they had anything that allowed them to occupy the space in front of the gas station extending into Schofield Highway. He thought both Ms. Coombes and Ms. Baziw were present. He told them there was a problem and that they would have to discuss it with the Village. They told him they thought they already had an agreement of some sort in place. That turned out to be a covenant related to the 2004 survey. Mr. Austin thought he got a copy of the covenant from Ms. Coombes.
- [191] The covenant in question was filed with the land title office on January 22, 2004. By it, the Village granted the Herds a licence to encroach onto Schofield Highway for the purpose of maintaining signage, canopy and a gas island.
- [192] Mr. Austin did not discuss the covenant with Mr. Lepitre. He discussed it with Ms. Patridge, the then chief administrative officer with the Village. At the time, they had already demolished the island and were in the process of rebuilding it and replacing the pumps. He believed the conversation was with regard to the piping. They were seeking approval to proceed. Ms. Patridge did not get back to Mr. Austin directly, but did to the Herds. It was Mr. Austin's understanding that Ms. Patridge told the Herds they could proceed under the existing easement. Mr. Austin did not make any further investigations, and just carried on. He never saw anything in writing confirming their permission to do so. He thought he spoke about it with Mr. Lepitre, but his memory was hazy on that.
- [193] By reference to photographic evidence, the examination of Mr. Austin established that the new pump island extended into Schofield Highway. Also by reference to photographic evidence, Mr. Austin testified about the blue fuel delivery lines that run from the storage fuel tanks to the primary and secondary pumps to bring fuel to vehicles. The fuel distribution system is on Village property. This was what Mr. Austin discussed with Ms. Patridge. There are also armoured electrical cables running from the secondary fuel pump that are installed in the same trench as the fuel delivery lines.
- [194] Mr. Austin testified that this was a fast-tracked project. There were a number of things going on concurrently to meet Petro-Canada's requirements. Design decisions were being made during the process. Mr. Austin described it as more of a design-build where they

partnered and worked with a contractor to design and build it. Initially, Mr. Austin was working with the contractor, Hil-Tech, and at some point, he transferred to working directly with the Herds. He testified that around the beginning of October 2018, around the first billing cycle, they sent the bill to Hil-Tech, and Hil-Tech told them no, they were to directly bill the Herds. This resulted in Austin Engineering's October 10, 2018 retainer letter to Ms. Coombes and Ms. Baziw, which provided their "proposal for civil/structural engineering support of the Warfield Petro-Canada gas station upgrade project". Among the terms and conditions of Austin Engineering's retainer letter were limits on the scope of its services and limiting its liability to the Herds to the price of its professional services.

[195] Mr. Austin's only real interaction with Suncor was at the front end when he was introducing himself and ascertaining what their requirements were, namely the sign and the "dog bone pump islands". Suncor provided him with sealed drawings for the signage and unsealed drawings for the pump islands.

[196] Mr. Austin signed the Schedule A under the Building Code dated October 4, 2018. It is date stamped as having been received by the RDKB on October 11, 2018. At the same time, he submitted the original application for a building permit, dated October 11, 2018 and date stamped as having been received that same day.

Lay sound measurements.

[197] Mrs. Hill measured the sound of trucks delivering fuel on a number of occasions. She initially used an app on her smart phone. On April 17, 2019, at 7:08 p.m. she measured 89.6 decibels in the backyard. On April 25, 2019, at 6:39 p.m. she measured 86.9.

[198] Mrs. Hill purchased a decibel reader. Using the decibel reader, she measured 89.6 on April 25, 2019 at 5:08 p.m. and 90.9 at 5:10 p.m. On May 2, 2019 at 4:32 p.m. she measured 82.9 and at 4:49 p.m. 83.3. On May 5, 2019 at 4:16 p.m. she measured 87.7.

[199] On September 14, 2020, Mrs. Hill used the decibel reader to measure sound in a variety of locations while a delivery was occurring. In the kitchen with the window closed it was 51.8 decibels. In the dining room it was 58.8 decibels. By comparison, she measured the sound of her husband outside mowing the grass at 35.2 decibels when he was some distance away and 69.5 decibels when he was closer to her.

[200] Mr. MacKinnon was hired by the Herds to measure decibel levels in the area of the gas station and the Hills' residence. Mr. MacKinnon is a civil engineer, but he was not put forward as an expert. He has no training or expertise in taking sound recordings. Mr. MacKinnon was assisted by his father and sister in taking the readings. He did the measurements on September 24, September 29 and October 21, 2020. His sister assisted in typing up the measurements.

[201] I did not find Mr. MacKinnon's evidence reliable or of assistance in determining the noise produced by the fuel truck, or how it compares to the ambient noise levels in the area.

The Herds' evidence

- [202] Neither William Herd nor his wife Willa Herd testified. They are both in their mid to late 70s. Their two adult daughters, Christine Coombes and Margaret-Ann Baziw, who co-manage the gas station, did.
- [203] Both Ms. Coombes and Ms. Baziw have worked off and on at the gas station for many years. Ms. Baziw started in 1989 when she was 16 years old, just after the renovations were completed by her parents after they bought the station in 1988. She left at various times to go to school, have children and work at other jobs. She has been working at the gas station full-time since about 2008. The gas station opens at 5:00 a.m. Ms. Baziw works Monday to Friday, and gets in at about 4:30 a.m. and works until 1:00 or 2:00 in the afternoon in the convenience store. She does paperwork at home on the weekends. She earns a salary which in 2022 was \$54,000, plus a Christmas bonus. She and her sister recently received a \$200 per month raise. She does not think she could take a higher salary from the gas station. She and Ms. Coombes do some cleaning on the side to make some extra money.
- [204] Ms. Coombes has worked at the gas station since she was 18 years old. Currently she usually works there nine hours a day, five days a week. Her total income in 2018 was \$57,831.
- [205] Mr. Herd is no longer employed with the gas station. Mr. Herd was a mechanic and worked at the gas station in that capacity for many years before his retirement. He is no longer on payroll, although he likes to come in every day. He has a number of health problems. Mrs. Herd used to do all manner of tasks related to the gas station, and remains a part-time employee doing book-keeping three days a week, for which she receives a salary of \$24,000 per year. Mr. and Mrs. Herd remain the sole shareholders in the company that owns the gas station. They receive dividends of \$20,000-\$30,000 per year. So far as Ms. Baziw is aware, their only other sources of income are Old Age Security and Canada Pension Plan.
- [206] Ms. Baziw lived in the Atco trailer behind the gas station between 2004 and 2010. In 2009-2010, they renovated to rebrand the station from Shell to a FasGas station. At that time, they put in their first above ground tank to replace three in ground tanks. She could smell gasoline occasionally when fuel was delivered in that period.
- [207] At the time Ms. Baziw testified in February 2023, the gas station employed 15 people including herself, her sister, and their mother. The gas station operates a take out restaurant and a convenience store, and sells gasoline, diesel and propane. It is a full-service station, one of only two in the area. They ceased to operate an autobody shop when their former mechanic retired in October 2022. They are the only gas station and convenience or grocery store in Warfield. There is one other gas station in Rossland. The closest gas station is in Trail. They know many of their customers by name, most of whom are from Rossland and Warfield, although some are from Trail and Fruitvale.

- [208] The gas station sells between 13,000 and 15,000 litres of fuel in total a day. In 2021, they sold over five million litres of fuel, according to a chart prepared by Petro-Canada. Ms. Baziw testified in direct that Herd & Smith usually makes between \$50,000 and \$100,000 a year in profit. In cross-examination, she was taken to Herd & Smith's 2020 Financial Statements. They indicate that in 2019 the company made a gross profit of 9% and 8% in 2020. They also indicate a loss from operations in 2019 of \$64,802 and of \$49,469 in 2020. A note refers to the forgivable loan provided by Suncor for the 2018 renovations. Ms. Coombes testified that the total amount of the loan was \$430,000. It is repayable in annual forgivable amounts of \$43,000. Provided the company meets Suncor's sales targets, the loan is forgiven. According to Ms. Coombes, the Suncor loan did not cover the whole cost of the renovations, although she was not sure how the Herds made up the difference. As of the date Ms. Baziw testified, the company had made its targets every year.
- [209] According to Ms. Baziw, they try to remain competitive, as their customers are price sensitive. There are times they sell fuel at or below cost. They pay Suncor for the PetroPoints loyalty program. They chose to go with a fuel supplier with a points loyalty system because their customers like to get the benefit. Fuel can be a loss leader, which gets people into the convenience store from which a greater profit can be made. When Ms. Baziw testified, shipping was costing the gas station almost exactly what they were selling fuel for.
- [210] In or about July 2018, the gas station ceased operating as FasGas. For a short period of time in the summer of 2018, while the two sisters looked for a new fuel supplier it operated as a "no name" station with Albert Benson supplying them with fuel. He had previously hauled fuel for them when they were a Shell station. Mr. Benson used a smaller truck with no trailer. Ms. Baziw thought he had one truck that holds 11,000 litres and another that holds 17,000 litres. They closed for renovations for a month or so in or about October 2018 until they reopened as a Petro-Canada station.
- [211] According to Ms. Baziw, they talked to a number of potential suppliers before deciding to enter into a contract with Suncor.
- [212] While operating as a Shell station, the gas station had two below ground tanks under the canopy between the front of the gas station and the highway. They also had a metal diesel tank further on the lot where the gas island is now located. They did not have an above ground tank at that time. The two underground tanks under the canopy were put in by the Herds as part of their original 1988 renovations. They each had a capacity of approximately 13,600 litres. They were single-walled fibreglass. Mr. Benson would pull his truck up to the canopy and fill the tanks from there. Because of the size of his truck, he could fit under the canopy, although part of the truck was on the road.
- [213] As part of the 2009 renovations to become a FasGas station the Herds put in a 50,000 litre above ground fuel tank. This was in addition to the two existing below ground tanks. They needed the larger tank as they were getting busier. Mr. Benson would have to come

multiple times on a Friday or on the weekend or on a Monday or they would run out of regular gasoline. In 2009, they took out the metal diesel tank. They had the soil tested when they did that. They decided to use the two remaining underground tanks for premium gasoline and diesel.

- [214] In cross-examination, Ms. Baziw testified that between 2009 and 2018 the 50,000 litre above ground tank was filled from the street in front of the gas station. The hoses from the fuel truck to the fill box where the fill valves were located for the tanks ran across the sidewalk beside the transit bus stop. Vehicles at the fuel pumps on the street side had to park on Village property to fill up.
- [215] According to Ms. Baziw, when they decided to switch to Petro-Canada, she and her sister decided it would be smarter to stop using the below ground tanks, as they were single walled and 30 years old. According to Ms. Baziw, it was Ms. Coombes who dealt with this issue. Ms. Coombes testified that they decided to transition to exclusively above ground tanks for safety reasons. She discussed the issue with Mr. Coldwell, who recommended a supplier for a larger above ground tank. They needed a larger capacity tank, so they decided to buy a new four compartment 80,000 litre above ground tank. The new 80,000 litre tank and the existing 50,000 litre tank were both installed in a new tank nest. The 50,000 litre tank had to be repositioned with a crane to sit at alley level. It was moved a significant distance towards the alley. They removed the retaining wall which used to be between the 50,000 litre tank and the forecourt area and built a new retaining wall, significantly increasing the size of the forecourt in the process.
- [216] Ms. Coombes testified about how fuel was previously delivered to the forecourt. A truck would pull up just past the canopy and run their fuel hoses under the canopy. The current location of the public bus stop on Schofield Highway is about eight feet away from where refuelling would occur. There are two pedestrian crosswalks in the Warfield where pedestrians can cross Highway 22; one of those is approximately 50 feet from the gas station. When the truck was unloading fuel, the hoses would run across the sidewalk to the fuel tank, right beside the bus stop. Pedestrians would have to step over the fuel hoses or walk around the truck into Schofield Highway. There were often cars parked across the street from the gas station. In order to pass by the fuel truck, vehicles and buses would have to squeeze between the parked cars and cones placed around the fuel truck.
- [217] Ms. Coombes testified that the school bus stop is approximately 30-40 feet away from the gas station outside the Kootenay Savings Credit Union.
- [218] According to Ms. Coombes the idea to change to fuel deliveries from the alley arose during a discussion between herself, her sister and a person from Centex Fuel. That person suggested that if the Herds were going to redo the retaining wall anyway, they could push it out further and move deliveries to the lane, which would enable more fuel to be delivered, without having to deal with the vehicles and pedestrian present in the front.

- [219] Ms. Coombes testified that safety considerations and a desire to accommodate G&B's B-trains motivated the decision to move deliveries to the alley. Ms. Coombes testified about conversations with different fuel suppliers they were considering contracting with, Ms. Langman, Ms. Patridge, Hil-tech Contracting and Kootenay Valley Petroleum about the idea of moving the location for fuel delivery and moving the retaining wall.
- [220] According to Ms. Coombes, she and her sister discussed lane delivery at a site meeting with Mr. Johnston and Mr. Coldwell. Her evidence was that the four of them met to assess whether B-trains could deliver from the alley. Ms. Coombes testified that Mr. Johnston raised concerns about neighbouring residential properties and wanting to ensure that deliveries would not upset the neighbours. They agreed that deliveries would not occur at night for that reason.
- [221] The Hills submitted that Ms. Coombes' evidence that they were concerned about the impact on neighbours lacked credibility, and was a recent fabrication on her part, designed to show that they relied on G&B. They note that neither Mr. Coldwell nor Mr. Johnston were cross-examined by counsel for the Herds' about Ms. Coombes version of this conversation.
- [222] I do not find that Ms. Coombes fabricated her evidence on this point. She was cross-examined on it, and remained firm in her recollection. However, I give it little weight as Mr. Johnston and Mr. Coldwell were not examined about it, and did not give any evidence that would substantiate it.
- [223] The Herds decommissioned the underground tanks. The tanks remain underground. In cross-examination, Ms. Baziw agreed it was possible that the fact they remain underground limits what can be done in the forecourt, such as relocating gas pipes which extend out under the Village street.
- [224] Ms. Baziw agreed in cross-examination that both before and after the renovations the gas islands, canopy posts and fuel dispensers are on Village property. She agreed that the fuel dispensers and canopy do not comply with the 1.5 metre set back from the property line required in the building permit her father signed. None of the fuel dispensers are set back 3 metres from the property line.
- [225] The various fuel suppliers have always played a role in deciding who would haul fuel to the gas station. Shell and FasGas both decided who the haulers would be. According to Ms. Baziw, Petro-Canada recommended G&B and that is who they went with. The Herds are obligated under their contract with Suncor to buy their fuel from Suncor. Ms. Baziw testified that under their contract with Suncor she was pretty sure that they were obligated to purchase a full B train of fuel. She said that it boils down to cost as it is more expensive to ship smaller loads of fuel. She was not sure what the minimum amount of fuel they are contractually bound to purchase is.

- [226] Ms. Baziw testified that they have monitors in the tanks that send emails to them and G&B three times a day to let them know how much fuel they have and to determine the amount of fuel they need to have shipped. She did not know what the minimum amount of fuel that would trigger a delivery was. This is unlike how they would get fuel when they were a Shell and FasGas station, when they would physically dip sticks into the tanks and chart to determine how much fuel they had and how much they needed to have shipped. It was Ms. Baziw who did the dips, determine how much fuel was required, and order it.
- [227] Ms. Baziw testified that the fuel monitors they have now also monitor for water in the tanks and for leaks. She believed it would send an alert in the case of a leak, but they have not had one to date.
- [228] The new 80,000 litre tank has four compartments: a 25,000 litre tank for regular gasoline, a 25,000 litre tank for diesel, a 15,000 litre tank for premium gasoline, and a 15,000 litre back up regular gasoline tank. The 50,000 litre tank holds regular gasoline. The tanks can only be filled to 90% of their capacity to leave room for expansion.
- [229] With the increased tank capacity, Ms. Baziw testified that fuel deliveries are less frequent. If they were to return to having fuel delivered in the forecourt, they would have to come considerably more often.
- [230] Ms. Baziw testified that they decided to install a containment wall as something that could ease the Hills' safety concerns about containing potential leaks of fuel. They decided to do this during the trial, in April 2022. They hired Hil-tech to do the work. In direct, Ms. Baziw testified that Hil-tech did not think they needed to have a building permit for the containment wall, but they applied for one to err on the side of caution. In cross-examination, Ms. Baziw testified that the permit was submitted the day Chief Derby testified, one week after Mr. Austin testified. She said that they contacted Mr. Austin about building a containment wall, and he said it would not be a bad idea.
- [231] At the time of the 2018 renovations, the Herds had installed back sloping concrete for containment. Both the back sloping concrete and containment wall are now in place. Ms. Baziw could not remember how much the containment wall cost, but thought it was around \$3,000 - \$4,000.
- [232] Ms. Baziw said that since this litigation was commenced they had investigated the possibility of having fuel delivered to the forecourt. She said they had spoken to G&B about the possibility of using smaller trucks and that shipping rates would increase by about 45%. They also spoke to Benson. Because they have to buy their fuel from Suncor they could not buy from Benson. They would have to buy Petro-Canada fuel and store it elsewhere, like at Benson's lot, and then pay to have Benson bring it to the gas station in a smaller truck. They would have to increase the retail price of fuel a minimum of 2 cents a litre. This estimate did not include the cost of off-site storage. She did not think they could do so and remain competitive. In cross-examination, Ms. Baziw acknowledged that the idea of storing fuel off-site to deliver in smaller trucks arose during the trial as a result of a suggestion made by

counsel for the Hills. At no time have they retained a professional engineer to review different concepts for how they could have fuel delivered.

- [233] In re-examination, Ms. Baziw was asked about a November 17, 2021 email from Chris Neyrinck with G&B to Tye Coldwell. Among other things, he indicated that the cost of delivery of fuel would go up about 45% if fuel was being delivered in smaller amounts.
- [234] Ms. Baziw testified that when they did the 2018 renovations she did not turn her mind to compliance with codes and regulations. They hired Hil-tech Contracting, Kootenay Valley Petroleum and Austin Engineering, and relied on their respective expertise. She understood that it was Austin Engineering's responsibility to deal with any necessary permits.
- [235] In cross-examination, Ms. Baziw was asked if they got a permit from the Village to permit G&B to park in the alley for more than 30 minutes to unload fuel. She said that they did not have a physical piece of paper, but they did ask the Mayor for an extension to the bylaw. They did not obtain a permit to permit noise in the alley and she said she was not aware they needed one.
- [236] Ms. Baziw was asked in cross-examination whether she was aware of any written permission to lay new gas lines in the Village road. She testified that her understanding is that there was an easement granted to Herd & Smith when they opened to allow pumps and a canopy on the Village property. During construction they were shut down because of the gas lines until a copy of the easement was found. She understands that they are in compliance with the easement.
- [237] The easement in question was registered January 22, 2004, long after Herd & Smith took over the gas station. It permits the Herds to occupy a portion of the road for the purpose of maintaining signage, canopy and gas island. It requires them to obtain permission in writing from the Village before constructing any buildings, structures, works or improvements over the easement area. No written permission was obtained prior to laying the gas lines in the Village roadway in 2018.
- [238] Ms. Baziw could not remember if she was there for the fire department inspection conducted on May 16, 2022. She testified in direct that she believed that they do inspections annually. There are only two inspections since October 2018 revealed in the evidence at trial, however. Ms. Baziw did not know if the fire department has ever inspected the tank nest.
- [239] According to Ms. Coombes, after they learned about the Hills' complaints regarding noise, lights and sound, she and her sister canvassed the neighbourhood knocking on doors, and asking if they had any concerns. She recalled Mr. Morisseau later approaching them to ask that the fuel truck not deliver fuel the day of his daughter's birthday party. She recalled that her sister contacted G&B and asked that a delivery not occur that day.

[240] Ms. Coombes testified about the Herds' decisions to install a shield for the tank nest light, to later put the light on a timer, and eventually to turn it off altogether. She also testified about their decision to install a vapour recovery system.

Gas station tenants

[241] Two tenants that live on the gas station property testified as part of the Herds' case. They were Lance Taylor and Robert Clarke.

[242] Mr. Taylor lives in Apartment B, which is located in the same building as the convenience store, in a lower section closer to the alley. He can enter his apartment from a front door on the alley, from a flight of stairs, or he can enter from stairs down from the convenience store. In cross-examination, he agreed that the building his apartment is in is made out of three Atco trailers. His apartment is made out of two of those trailers.

[243] Mr. Taylor testified in direct that he has lived in this apartment for more than 16 years or close to 20 years. Given that Ms. Baziw lived in this apartment immediately before Mr. Taylor, and she moved out in 2010, he was mistaken in this time estimate. As he testified in cross-examination, he has lived there for 13 years at most. He pays \$450.00 for rent, and has done so since 2010.

[244] Mr. Taylor did not live there when it was a Shell station, but did when it was a FasGas station, and through the 2018 renovations. He used to be employed by the Herds at the gas station in the mechanic shop, but he retired in August 2022. Before he retired, Mr. Taylor was working four days a week, six hours a day. He was paid \$40.00 an hour based on a flat rate system.

[245] Now that Mr. Taylor is no longer an employee, he usually enters his apartment from the front door on the alley. His apartment is right beside the new tank nest, located to the southeast or Trail side of the tank nest or to its right if one is looking from the Hills' home. His two bedrooms have windows that overlook the tank nest. The B-train parks in front of his apartment when it delivers fuel, sometimes facing to the southeast and sometimes to the opposite direction.

[246] Prior to the 2018 renovations, when the tank was moved to the lower location, Mr. Taylor sometimes noticed fumes in his apartment from the tanks in the upper area. He did so more often in the summer because of the heat. Also, deliveries were more frequent at that time because of the smaller capacity of the tanks. After the renovations, and before the vapour recovery system was installed, he could sometimes smell fumes in his apartment when fuel was delivered. After the vapour recovery system was installed he testified that that disappeared. He then said that he can still smell fumes, but he is used to that because of his profession. He then said that the vapour recovery system had eliminated the smell of fumes in his apartment.

- [247] Mr. Taylor testified that the light that was installed in the tank nest does not affect him when he is at home and that he does not even know if it is on. He said that the only way he knows if it is on is because the whole area is covered in his cameras.
- [248] Mr. Taylor cannot see the light from the forecourt from his bedroom and it does not affect his ability to use his apartment. He is aware of the light on the side of the convenience store, but it does not affect him either. He could see it if he looked out of his window.
- [249] Mr. Taylor testified that lots of times he can hear noises from the outside while in his residence, such as teenagers racing up and down the alley on dirt bikes and quads. He said that there is a great amount of such traffic in the alley because people with unlicensed vehicles use it to get to the decommissioned railbed at the end of the alley by which they can travel up to Rossland. He said however that he can barely hear the fuel truck. He said it was far quieter than the dirt bikes.
- [250] In cross-examination, Mr. Taylor testified that the dirt bikes in the lane are particularly irritating to him because they are illegal. It used to be his profession to inspect those types of vehicles. He is also irritated because he could back out onto the alley and have a collision with them.
- [251] Mr. Taylor testified that he likes living in his apartment, and that the B train does not affect that at all. If he did not have cameras going every which way up and down the alley, most of the time he would not even know it is there.
- [252] Overall, I place little weight on Mr. Taylor's evidence. He pays a very modest amount to rent his apartment. He is clearly very loyal to the Herds and wished to present his evidence in the light most favourable to them. In cross-examination, Mr. Taylor testified that he wears hearing aids and he takes them out when he is at home. He was diagnosed with hearing loss in the 1980s, due to exposure to noise at work. Given this evidence, I place no weight whatsoever on Mr. Taylor's evidence about what noises he can and cannot hear in his apartment.
- [253] Mr. Clarke has lived in the two bedroom apartment above the gas station for approximately five years, since April 2018. He chose to move there after a co-worker moved out who told him noise was not a factor. The hours of operation of the gas station align with his hours of work. He usually leaves for work around 6:30 a.m. and returns around 3:30 p.m.
- [254] Mr. Clarke's apartment is beside the tank nest, on the Trail side. His deck is surrounded on three sides by fencing approximately 40-44 inches tall, and on the other side by his apartment. He sits out on his deck quite often in summer. He cannot see over the fencing when seated on his deck. He can see the top of one above ground tank from his deck if he makes an effort. He can see portions of the alley from his deck. His master bedroom faces the alley. His kitchen is on the Rossland side, nearest the tank nest. Mr. Clarke testified that he opens his kitchen and bedroom windows and typically keeps the rest closed.

- [255] Mr. Clarke has never seen the truck refueling in the back alley, and was not aware it does so. When shown a picture of the B train truck parked in the alley during cross-examination, Mr. Clarke said that he would have to make an effort to see it from anywhere in his apartment, and guessed it would only be possible from the corner of his deck.
- [256] Mr. Clarke has never smelled fumes, and unsurprisingly, given his evidence that he is not aware of the fuel truck, the noise from the truck has never bothered him. Mr. Clarke never notices any smells in his apartment.
- [257] Mr. Clarke is aware of the lighting in the forecourt of the gas station, the light on the side of the convenience store, and the light in the tank nest. The light in the tank nest has never bothered him. He sleeps in the master bedroom, which faces roughly south, while the tank nest light is roughly west of him. That light does not bother him in his kitchen, which faces in that direction. Mr. Clarke does not know if it is on 24 hours a day. He testified that he is relatively ignorant of its presence. He characterized the view in that direction as not spectacular and he does not spend much time looking in that direction.
- [258] Generally, Mr. Clarke does not notice lights from the gas station, although he does see the edges of the Petro-Canada sign in front. He characterized it as not terribly offensive, and said it was usually out by 9:00 p.m.
- [259] Mr. Clarke has roll down mesh blinds which he said are roughly 70% efficient at blocking light. They are usually up in the kitchen and down in the bedroom most of the time.
- [260] Mr. Clarke testified that he could not recall clearly anything happening in the fall of 2018, although he was aware of the transition from FasGas to Petro-Canada.
- [261] Mr. Clarke never hears any noises from the alley other than BC Hydro performing maintenance work. He hears a lot of noise from the highway, especially truck traffic. He hears air brakes from trucks coming down the hill two or three times a week. In cross-examination, he testified that there is an air conditioner or air handling unit on the roof of the convenience store very near to the corner of his deck. The noise from the fan is white noise, similar to a small car at a high idle.
- [262] Mr. Clarke enjoys living in his apartment.
- [263] I place little weight on Mr. Clarke's evidence. The location and orientation of his apartment is such that he has little opportunity to see the tank nest and lights or see, hear or smell the B train truck unloading fuel from the alley. It is noteworthy that he had no recollection or awareness of the 2018 renovations, which suggests that he is not particularly observant of his surroundings.

Evidence about fuel delivery

- [264] Evidence about fuel delivery from the point of view of those delivering it was provided mostly by Jim Johnston, Bruce MacLeod, and to a lesser extent by Tye Coldwell.

- [265] Mr. Coldwell, the Suncor representative, was present for the first fuel delivery from the alley on November 8, 2018. He was standing at the front of the truck. He could smell gasoline. He estimated that the noise of the truck was like five times the sound of a lawnmower.
- [266] Jim Johnston has worked for 43 years in the transportation industry, most of it hauling petroleum products. He worked for G&B for about 17 years before he left in November 2022. When he started at G&B he was driving, then he moved into operations and site specific management. In the latter role, Mr. Johnston would visit sites, and check out the onsite equipment to make sure it is relatively safe. He always drove truck off and on while at G&B.
- [267] Mr. Johnston mostly drove Super B tractor trailers, which involve a tractor and two small trailers. He delivered fuel to a variety of operators and sites in Alberta and southern British Columbia. The Warfield gas station was the last one acquired before he left. G&B both delivers its own fuel and fuel for other companies.
- [268] Mr. Johnston delivered fuel to the Warfield gas station once before it became a Petro-Canada station while it was still a FasGas station. He felt that deliveries at that site were very unsafe. His truck was parked uphill on the wrong side of the road, between the bus stop and the FasGas sign, with drip pails on the street and with the gas hoses under the truck to deliver fuel. Fuel was unloaded from the passenger side of the truck where the API is located, which meant that hoses had to go under the truck to get to the inground tanks. The operator had to stand in the roadway by the API, which meant that they could not see the point of delivery of fuel to the tanks.
- [269] Mr. Johnston went to the Warfield gas station when it was changing over to become a Petro-Canada station. He met with a Suncor representative before construction started. They discussed where to put the tanks. He brought up a concern about delivering in the alley which he believes was addressed after the fact. He explained that his biggest concern was tying up the traffic flow in the back alley for a minimum of an hour and a half. He understood that the Village council gave them approval to do so.
- [270] In cross-examination, Mr. Johnston agreed that when he met on site with the Suncor representative the purpose was to inspect the alley and determine if the turning radii at the ends of the alley were adequate to allow the B train with its eight axle configuration to enter and exit the alley. His particular concern was the west or top end of the alley where the community centre is located. By eyeballing the site and driving it in his pickup, Mr. Johnston was able satisfy himself that G&B would be able to deliver from the alley using the eight axle configuration. A vehicle using the eight axle configuration is 77 feet long. Mr. Johnston guessed that you would need a roadway 30 feet wide to make 90-degree turn. You could turn into a narrower road. He agreed that is what a truck is doing at the east side where the alley meets Lytton. Exiting to the west is more than a 90-degree turn, probably about a 160-degree or hairpin turn. To make that turn the truck needs to go probably 10 feet

into the parking lot at the community centre.

- [271] The tractor and lead trailer, without the pup, would be about 57 feet. As a result, the turning radius would be much less than with the eight axle configuration.
- [272] Mr. Johnston was asked in cross-examination about the possibility of delivering fuel to the Warfield gas station from the forecourt, a span of 86 and three quarter feet. He was asked if there was any reason why a tractor and lead trailer could not pull into the forecourt from either direction. After some debate, he agreed it could, provided there was no pup. If the standalone fuel dispensing pump and Petro-Canada sign were moved so that they were in line with the convenience store, a tractor and lead could barely fit onto the lot. Mr. Johnston thought you would still have part of your equipment on the street. Mr. Johnston was quite argumentative on this point. He did finally agree that it would have no problem fitting in there.
- [273] Mr. Johnston was asked in cross-examination whether a driver could leave Calgary with an eight-axle configuration fully loaded, drop the pup at a secure location, unload the lead at the Warfield gas station, return to the secure location, drop the lead and hitch up the pup, return to the station, unload the pup, then return to the secure location and retrieve the lead, and return to Calgary. He agreed it was feasible, although it would take much longer than the current system. There would need to be a secure location to drop the trailers because a driver cannot leave a loaded trailer unattended.
- [274] Mr. Johnston agreed in cross-examination that it is much faster to unload using the gravity feed method than using a pump off method. He said twice as fast.
- [275] Mr. Johnston agreed in cross-examination that fill valves could be located in the forecourt for the tanks where they are now located near the alley so they could be filled from the forecourt.
- [276] Mr. Johnston was asked in cross-examination whether a B-train with an eight axle configuration could enter the lot to the east of the gas station from the end of the alley travelling west and be entirely in that lot. That lot is owned by the Herds. Mr. Johnston agreed you could as long as there was a clear path to do it. He agreed you could create a secure fenced location there for the purposes of dropping the pup. He did not agree that if fill valves for the tanks were extended to that location that you could pump to the existing tank nest from there, because there is not a direct line of sight to the tanks.
- [277] Mr. Johnston was asked in cross-examination if you could extend the forecourt level over the existing tank nest towards the lane so you could gravity feed the tanks. He did not agree because there would be too much weight on the tank nest. He was then asked to assume that the tank nest was structurally designed for the purpose. Mr. Johnston was not sure he had done it that way because the above ground tanks are not designed for gravity drop. When asked to consider it purely from an operational as opposed to a design point of view, Mr. Johnston said he could not answer that question because he would not do it. He was

concerned about venting and access to the tanks. Ultimately, he said it could be done.

[278] Mr. Johnston came by again a few times after his meeting with the Suncor representative to see how things were progressing. He did not remember if he had any conversations with anyone from the gas station at that time; his focus was dealing with the Suncor representative.

[279] Mr. Johnston testified that at the time he was very relieved they were no longer going to be delivering off the street which he felt was a very unsafe environment for drivers, customers and the general public. By comparison, while delivering from the back alley unfortunately ties up the alley for up to an hour and a half, it has no direct impact on people, pedestrians can get safely around, and the operator can be well aware of what is coming at him without fear of being run over.

[280] Mr. Johnston delivered fuel numerous times from the alley since the changeover to Petro-Canada. Mr. Johnston described the basic process for delivering fuel from the alley. He said it was basically the same as from the forecourt, but now you are running 60 feet of hose from your back trailer to the pump that is mounted on your truck. Then there is another 20 foot hose that goes from the pump to the output inlets in the tank where the tank manifold is. Drips pails are used.

[281] In cross-examination, Mr. Johnston gave a detailed account of the steps required to connect and disconnect the hoses from the truck to the tank. If he had to stop and move the B train, for example because requested to do so by emergency personnel, he thought it would take him three and a half to four minutes to shut the truck pump off and disconnect the hoses. He would leave the hoses so long as they were out of the way. He could be out of the alley in seven minutes. If it was a fire emergency leaving the hoses would pose a risk, and packing them up would take more time. He emphasized that these were personal estimates, as drivers will vary.

[282] Mr. Johnston said that G&B did not give any specific instructions to drivers delivering fuel from the alley other than to be safety conscious. For himself, he preferred to enter the alley from the bottom, pointing to the west, so that everything he was doing was at the gate point for the tank services. This was more efficient and safer as it gave him a clear view of what he was doing. In cross-examination, he was asked about the fact there were many photographs in evidence of the truck being pointed in the opposite direction, with the hoses running under the truck. He thought the only thing that would be under the truck would be the vapour recovery hoses. He clarified that the pumps are designed so you can offload from either side of the unit. When shown photos that appeared to show other hoses running under the truck, he provided an explanation that made little sense, and would appear to be inconsistent with the preponderance of the evidence that fuel can only be offloaded from the passenger side.

- [283] When connecting hoses Mr. Johnston's biggest concern is drips or leaks because it is very bad for everybody, and it does not matter if the surface is dirt, pavement or asphalt. He also wants to have the area contained. He preferred the alley to the forecourt of the gas station because it is basically closed off to vehicles, and you can redirect any pedestrians to get them by you in a safer manner. He referred to a number of other gas stations in the area that make him more nervous than the alley because there is a high risk that the operator or the equipment could get hit. He referred to people driving over the hoses the drivers use to unload fuel and the risk it creates of a spill. He never had a problem with traffic in the back alley. By contrast, he did not think there was any way that you could unload safely in the front of the station for a number of reasons, including the truck being on the road, which is unsafe for everyone, and the risk of someone driving over the hose and causing a spill. He said that is a concern he has at every gas station he delivers to.
- [284] In cross-examination Mr. Johnston was asked whether he is aware of any other service station in British Columbia where he had delivered fuel from an alley or public roadway. He was aware of one in Invermere 15 years ago, which he described as not having quite the same "adventures", as it has a wider back alley so there was room for vehicles to get through so they were not obstructing traffic as they are in Warfield. When that station was last updated they redid their lot so all their tanks are now on site and delivery occurs on site. He could not think of any other example in his 43 years in the industry.
- [285] Mr. Johnston testified that because you are using a truck-mounted pump the truck is idling while fuel is delivered. Therefore, the noise of the delivery is the noise of the truck. In the summer, when it is warm, you will have a lot of fan noise to cool the motor down. He testified that there is no doubt that it can be quite loud.
- [286] Mr. Johnston testified about his experience with vapour recovery systems. So far as he knows they are required by law in the lower mainland south west of Hope, and the rest of the province is non-vapour recovery. The Warfield gas station is the only one he knows of in the rest of the province.
- [287] Mr. Johnston testified that at the time the decision was made to deliver fuel from the alley they did not investigate any other delivery options.
- [288] Bruce MacLeod testified about delivering fuel to the gas station for G&B. He has worked for G&B for about 13 years, and has been a truck driver for 20 years. He lives in Calgary and delivers fuel out of Kamloops. He delivers fuel to the Warfield gas station and other British Columbia gas stations. In the past he has delivered to stations in Alberta and to a lesser extent Saskatchewan. In total, he has delivered fuel to somewhere between 100 and 200 gas stations.
- [289] On average, Mr. MacLeod delivers fuel to the Warfield gas station about twice a week. He is the regular driver assigned to deliver fuel to the station. He testified that other drivers do not want to deliver to the station. It is more work, as a lot of guys have a hard time grasping vapour recovery. It is also mountainous to get to. Because fuel is delivered from the alley

using a pump rather than a gravity feed system, it also takes slightly longer to unload. It was suggested to him in cross-examination it would take two to three times longer, but he disagreed, saying that it takes him an hour and 15 minutes versus 45 minutes. He agreed that was twice as long.

- [290] Mr. MacLeod described his usual process when delivering fuel to the station. Depending on the season, he may stop in front of the store before going to the alley. He needs to get the keys to unlock the gate around the tanks. In the summer time he drives up the alley from the Trail side; in the winter, particularly if it is icy, he comes from the opposite direction.
- [291] Once he is parked in the alley, Mr. MacLeod logs onto his computer, shuts the truck off, gets the hoses and drip tanks, connects the vapour recovery system, and "fires up and lets her go". He shuts the truck off while he can because it is unnecessary, people are disturbed by it, he does not like it, and for 20 or 30 minutes he can save them the noise. Once connected, the physical unloading varies from an hour to more likely an hour and a half. Each time he changes to a different compartment he has to shut down and hook up again. In total the truck is turned on for an hour to more likely an hour and a half.
- [292] They prefer him to deliver in the mornings, no earlier than 8:30 a.m., when there is less activity, which he described as a concession G&B made. He has delivered at night when there was an emergency because the gas station had run out of fuel. He thought this had occurred only perhaps three times in the last two years. He prefers to deliver fuel in the daylight when he can see. He is usually heading back to Kamloops to reload, so he prefers to be gone by 10:30 a.m., so he can drive in the light.
- [293] Mr. MacLeod described how the vapour recovery system connects to the truck. There is a plunger system that connects it firmly both to the truck and the tank. He has never delivered to any other gas stations that have a vapour recovery system. So far as he knows, they are only in the Lower Mainland.
- [294] When asked how he feels about delivering from the alley as opposed to the front, Mr. MacLeod talked about how every problem you solve you create another one. If fuel was delivered from the front, as it used to be at the station, you would have to put pylons out to deal with people walking and driving through live hoses pumping fuel. He thought it would be potentially hazardous. In the alley, he has to deal with joggers and walkers which are no big deal. He likes the fact that because there is no one there he can control the environment.
- [295] Mr. MacLeod was asked about the possibility of delivering to the lot on the Trail side of the gas station if it was converted into a secure area, and whether it would be possible to drop the pup trailer there, drive the truck with the tanker to unload fuel, then drive back to the lot and pick up the pup, then drive back and unload the pup. He thought it would take a long time to do although he imagined you could do it. Two trailer trains are not really designed to take apart easily; you can do it, but it takes a lot of space. He described it as a "nightmare". You would need to have special ground to park a loaded tank because they are

very heavy to prevent them tipping over.

- [296] Mr. MacLeod was asked about what he does with his truck when he returns to Kamloops. He said he drives in and his two trailers stay on the truck. For the past 11 months he has driven the same truck all the time; before that he drove a large number of other trucks. He never disconnects the pup trailer from the lead trailer. He routinely disconnects the lead trailer from the tractor when he goes back to the yard in Calgary to drop off the trailers and go home. He said the process of doing so takes about ten minutes, as does the process of reattaching the trailers to the tractor. He has to back up to line the trailers up to drop them off and the same when he picks them back up again.
- [297] Mr. MacLeod said that it only takes minutes to disconnect his truck from the tanks when he is finished unloading, but that it takes longer, perhaps 20-30 minutes to do everything that needs to be done. In the case of a fire, you would basically shut off and get out. It would take an hour to reconnect to a full pup tank.
- [298] Mr. MacLeod testified that his safety concerns, if he unloaded from the front, would involve him having a big truck hanging out six feet into the road with people there. There could be buses and food delivery trucks there. He would have to hover around to protect the hoses on the ground from being driven over.
- [299] Mr. MacLeod has never delivered fuel to the front of the Warfield station. He agreed in cross-examination that his evidence about what unloading from the front would be like was speculation. He had been asked in preparation for his testimony to go and have a look at the gas station, which he did. They wanted to see if his truck would fit.
- [300] Mr. MacLeod has had a few interactions with Mrs. Hill while delivering fuel. Once she came from her backyard to a hole in the fence and asked him how it was done and how the vapour recovery system worked so he explained it.
- [301] Mr. MacLeod has only had one vehicle try to get past him while unloading from the alley. He found it shocking and could not believe someone would try to do that. His truck was pointed up hill at the time. There was enough room on one side for the other vehicle to start going around him. When he saw what they were trying to do he went underneath the truck and stopped him. He thought it was incredibly stupid. On this occasion, Mrs. Hill came out and wanted to know why he was telling the driver of the other vehicle to back up. She was concerned about the commotion.
- [302] For the most part, however, Mr. MacLeod testified that nobody comes into the alley when he is unloading. Sometimes a car will come by and will see him and back out and go around. The garbage truck driver or by law officer will come by, and will back up without any difficulty.

- [303] Mr. MacLeod was asked about safety considerations when refueling from the alley. He said it was pretty much the same as anywhere. He wears boots, fire resistant coveralls and rubber gloves. He is trained to put buckets underneath fillers so that if they drip the fuel is caught in the bucket. He testified that he always puts drip buckets out.
- [304] A fire would be bad in either location because fire and gas are a bad combination. In the back alley he could get out, while in the front he would have to back out and would have to wait for people to get out of his way. He said there are deliveries similar to the front of the Warfield station, and they are bad. You have to be aware or have a spotter. He said there are worse ones than the Warfield station.
- [305] In cross-examination, Mr. MacLeod was asked about Mr. Johnston's evidence that it would be doable to drop the pup tank and go to the front to unload. He agreed that different drivers have different views.
- [306] Mr. Coldwell was aware of G&B having concerns about dangerous winter delivery conditions from the alley in January 2020. The alley was not being cleared of snow and the truck was having difficulty getting through the alley.
- [307] Mr. Coldwell testified that it would be possible to gravity feed the tanks from a truck in the forecourt, provided new piping and venting was installed.

Installation of Vapour Recovery System

- [308] In February and April 2021, the Herds had a vapour recovery system installed by Gregory Petroleum Ltd. The total fee for the installation was \$19,676.21.
- [309] Ms. Baziw testified that they had looked into a vapour recovery system at the time of the 2018 renovations, but they did not have extra money to do it at that time. She said that when they had extra money they put in the system. In cross-examination, she agreed that there was no application to any local government authority to install the system. She talked to the Mayor about it and they all thought it was a good idea.
- [310] Nathan Gregory was the installer. He testified that the system works by taking the vapour out of the fuel tank while it is being filled, and vapour comes back into the truck. In the absence of such a system, the vapours would go into the atmosphere. Mr. Gregory testified that the system was designed to capture most of the vapours. The system is tied in only to the gasoline tanks, and not the diesel tank. This is because gasoline, by its nature vapours off and has much more of a presence in the air. He testified that such a system was not installed when the new tanks were installed in 2018.
- [311] Mr. Gregory rendered two invoices because there was a change in design following consultation with an engineer during the installation process. There was no engineer of record for the alterations he performed in 2021. Nor was there any permit application process. Mr. Gregory described the modifications he made to the tank nest to install the vapour recovery system, including adding four horizontal steel pipes between the two ASTs

to provide an alternate path for vapour to return to the truck. The maximum width between the new horizontal pipes and the tank walls is 16 inches. He testified that he believed there was a little bit of space between the pipes and the retaining wall at the end closest to the highway, specifically 36 inches.

- [312] Mr. Gregory testified that vapour recovery systems are very common on underground tanks, but that this is the only one he has installed on an above ground tank. He said that vapour recovery systems are usually installed as a result of statutory or regulatory requirements, but he was not aware of any such requirement in relation to the gas station.
- [313] In Mr. Gregory's experience, there is a lot more vapour when a tank is being filled than when it is not being filled. The more concentrated the vapour, the greater the smell.
- [314] Mr. Gregory also testified about the work he was involved in when that gas station was renovated to become a FasGas station. He testified that at that time they upgraded the forecourt, installed underground piping, removed the existing tank and installed a new above ground tank behind a retaining wall in a storage area. That tank was still present when he installed the vapour recovery system on the new tank. It was reoriented to be perpendicular to the forecourt rather than parallel. The new tank was added to the same nest.
- [315] Mr. Gregory did not assist the Kootenay Valley Petroleum crews in 2018 that washed the two remaining underground tanks, filled them with gravel and capped them, although he was aware that Kootenay Valley Petroleum provided that service. No one discussed with him the decision to wash and fill the underground tanks rather than remove them. He has experience with the environmental issues that may arise when underground tanks are removed.

Expert Evidence

- [316] The Hills introduced two expert reports, and the Herds introduced one expert report, all of which I will deal with in the next section of this decision.

The Bergquist Report

- [317] The first report relied upon by the Hills was written by Larry Bergquist. Mr. Bergquist has many years of experience in the field of retail and wholesale petroleum facilities, and has a limited licence from the Association of Professional Engineers of British Columbia in the field of petroleum facilities. The Bergquist Report deals generally with issues related to the codes, regulations and engineering standards that applied to the pump replacement project at the gas station; whether or how the drawings and as-built conditions departed from those codes, regulations and standards; best practices to control vapour impacts; and mitigation steps that could be taken to address any deficiencies.

- [318] Mr. Bergquist made two site visits to the Hills' property and the alley on July 24 and 25, 2019. He did not go onto the gas station property, and was only able to observe it from beyond its borders.
- [319] The Village objected to the admissibility of the Bergquist Report. In oral reasons rendered April 11, 2022, I ruled that the majority of the Bergquist Report was admissible. I held that certain portions of the Report, under the heading "Gasoline a Hazardous Material", were irrelevant, and directed that they be struck from the Report. I deferred ruling on Mr. Bergquist's qualifications until he was cross-examined. I held that the concerns raised by the defendants about the Bergquist Report could be addressed in cross-examination and closing submissions about the weight to be given to the report.
- [320] Mr. Bergquist was then cross-examined on his qualifications. The Hills sought to qualify Mr. Bergquist to give expert opinion evidence with respect to retail petroleum service station mechanical design and construction, including corollary design issues flowing from mechanical design. The defendants objected, saying, in essence, that he should be limited to the scope of his limited licence, and in particular to the mechanical components of retail petroleum facilities.
- [321] In an oral ruling on April 11, 2022, I accepted Mr. Bergquist as an expert in the areas for which he was put forward by the Hills.
- [322] Mr. Bergquist was then made available for cross-examination on his report; only the Village chose to do so, and its cross-examination focussed solely on certain changes made to his report following review by counsel for the Hills.
- [323] The key elements of the Bergquist report included his opinion that tank truck refuelling from the alley offends the unloading and supervision prescriptions and blocks firefighting access to the tank nest in breach of the Fire Code and good engineering practice. He opines that the Village does not have the authority to permit breaches of the Fire Code, both in that it is not the authority having jurisdiction, and because the process for receiving and accepting alternative measures to provide an equal level of performance to the prescribed minimum safety standards was not followed.
- [324] Mr. Bergquist made two recommendations to remedy the problems which he identified. The first was to move fuel delivery to the retail side, using a gravity drop system. The second was a series of recommendations, including installing a vapour recovery system, to address the fumes.
- [325] In closing submissions, the Village submitted that the Bergquist Report should be given little or no weight. It submits that all the report does is opine about what Mr. Bergquist says are breaches of the Fire Code and Village Bylaws, but he admitted on cross-examination that no expertise is required to opine about those enactments, that it is "just a matter of reading". It further submits he did not attend on the gas station property and did not inspect the equipment. He states in the report that he made "intelligent guesses" about the

type and condition of items, which may not be accurate. The Village also submits that Mr. Bergquist's opinion that fuel unloading from the alley is contrary to the Fire Code is premised on his incorrect understanding that the alley is a "street".

[326] The question of whether the alley between the Hill home and the gas station is a "street" was hotly contested throughout this trial. This is a convenient location to consider this question, as it directly affects the weight to be given to a significant aspect of the Bergquist Report. Fire Code, section 2.5.1.5. sets out the requirement to maintain access on streets. Fire Code Division A, Part 1, section 1.4.1.2(1) states: "Street means any highway, road, boulevard, square or other improved thoroughfare 9m or more in width, that has been dedicated or deeded for public use and is accessible to fire department vehicles and equipment".

[327] The Hills submit that the alley is a street. They write in their closing submissions that:

The proper construction of this list is that "improved thoroughfare 9m or more in width" is the last item in the list. In other words, the 9m or more qualifier only modifies "other improved thoroughfare". It does not modify "a public highway" or "road", etc. Examples of such an improved thoroughfare might include the plaza spaces between pavilions during Expo 86 or perhaps the Stanley Park seawall. To construe it otherwise means that the public access to homes on narrow streets, such as those shown in the next footnote references are not considered fire access routes under the Fire Code. Note that the definition of "street" in the Building Code is identical. These are safety regulations. They should be construed broadly and liberally to address the remedial objectives that they are intended to achieve.

[328] The Herds submit that the alley is not a street. They write in their closing submissions:

A plain reading of this language is clear that the width of the highway, road, boulevard, square or other improved thoroughfare needs to be at least 9m wide to be considered a Street. This is the view shared by Chief Derby and Mr. Austin, who are respectively the local assistant to the fire commissioner and the engineer of record in the renovations; Chief Derby and Mr. Austin are the two most qualified and proximate individuals to this question, and their interpretation should be give substantial weight.

[329] The Herds submit that Chief Derby and Mr. Austin's interpretation of the Fire Code is to be preferred to that of Mr. Bergquist. They submit that the Hills' interpretation is not only contrary to the plain language of the Fire Code, but would also create practical problems. In their submission, alleys are created for the very reason that they can be an exception to the meaning of a street. Alleys allow large commercial vehicles to load and unload for extended periods of time without impeding the front access to a building. They point out that Chief Derby's evidence was that the front of the building is where they fire department would be directed to go if called out to a fire event.

- [330] There is no dispute that the alley is less than nine metres in width. I agree with the Herds that the plain meaning of the definition of street in the Fire Code means that a highway, road, boulevard, square or other improved thoroughfare needs to be at least nine metres to qualify as a street. In other words, nine metres qualifies not only "other improved thoroughfare" but all of the items listed. As the alley is less than nine metres in width, it is not a street for the purposes of the Fire Code.
- [331] Based on the foregoing, clearly Mr. Bergquist's opinion that unloading fuel from the alley is contrary to the Fire Code is entitled to no weight, as it was based on an incorrect interpretation of the relevant provisions.
- [332] I place little weight on most of the remainder of the Bergquist Report. Mr. Bergquist has no particular expertise in the interpretation of enactments such as the Fire Code and Building Code. His opportunities for observation of the renovations was limited by his inability to access the gas station property, leaving him no option but to make "intelligent guesses as to the type and condition of items, which may or may not be accurate". I give some weight to his personal observation of smelling fumes immediately after a fuel delivery on his July 24, 2019 site visit. I also give some weight to his recommendations for means to resolve or mitigate the problems experienced by the Hills. The vapour recovery recommendation, in particular, was in fact ultimately implemented by the Herds.

Masse Report

- [333] The second report relied upon by the Hills was from Masse Environmental Consultants Ltd., and was written by Jennifer Ross and Dr. Icenius deZwart. It deals generally with fuel leakage in the alley and on the Hills' property. Both Ms. Ross and Dr. deZwart were cross-examined on their report.
- [334] The Herds objected to the admissibility of the Masse Report. In oral reasons rendered January 30, 2023, I ruled that the Masse Report was admissible.
- [335] Ms. Ross and Dr. deZwart are both registered professional chemists. Ms. Ross attended at the alley and the Hills' property on November 25, 2021 to take soil samples. She was the primary author, and Dr. deZwart the reviewer, of the Masse Report, dated December 21, 2021.
- [336] The authors were asked for their opinion on the following three issues:
- Has there been any petrochemical contamination of the soils in the Hills' back yard proximate to the lane?
 - If soil testing does not reveal the existence of petrochemical contamination in the Hills' back yard proximate to the lane, what may occur in the future with ongoing lane deliveries and minor spills, in light of the site, topography, surface water and ground water conditions?

· If a significant loss of fuel or spill event were to occur in and around the tank nest or in the lane, where would the contamination migrate to in light of the site, topography, surface water and ground water conditions?

[337] In their report, the authors answered those questions. In brief, their opinion is summed up in the report as "there is a potential pathway for petrochemicals that are spilled in the laneway to migrate onto the Hill's property; however, there is no evidence to indicate that this has occurred to date". Further information is provided with respect to the site-specific factors which inform the authors' opinions that "surficial flows are therefore not expected to migrate directly towards the Hill property", but "spills of large volume could potentially migrate downwards into the soil under the laneway, or depending on the location and volume, directly onto the property".

[338] The site-specific factors the authors take into account in offering these opinions include: the presence of "incompetent asphalt", i.e. cracks in the asphalt, in the alley providing a potential conduit; the coarse nature of the soils onsite, allowing for rapid infiltration; the overall site topography; the mobility of hydrocarbons in soils; the lack of shallow groundwater that may enhance migration of water-soluble compounds; and that gasoline may be expected to evaporate rather than accumulate in soil.

[339] Cross-examination of the authors of the Masse Report indicated that they were unable to identify the likelihood of such a spill migrating to the Hills' property, but it was conceivable if the spill was large enough. They could not say whether the risk was greater where the fuel tanks are currently located as opposed to in their previous location.

[340] On the basis of the Masse Report, and its authors' evidence at trial, I conclude that there is no evidence that petrochemicals spilled in the alley have migrated to the Hills' property to date. I further conclude that, in the event of a superficial spill in the alley, it would be unlikely, due to the topography of the alley and surrounding property, that petrochemicals would flow onto the Hills' property. In the event of a significant spill, petrochemicals could potentially migrate downwards under the soil of the alley or, depending on the location and size of the spill, could flow directly onto the Hills' property. The evidence does not establish the comparative risk of that occurring with the fuel tanks in their current location as opposed to their previous location.

Acoustical Engineering Report

[341] The Herds introduced one expert report. It is an acoustical engineering report with respect to the sound levels generated by fuel deliveries. It was written by Ian Bonsma. Mr. Bonsma was unable to testify due to illness, so Robert Stevens, a partner in Mr. Bonsma's firm, HGC Engineering, who had reviewed the report, attended for cross-examination in his stead.

[342] Both Mr. Bonsma and Mr. Stevens are acoustical engineers.

- [343] The sound engineers measured both the background sound level in the alley and the sound level during a routine fuel delivery. According to the report, an increase or decrease of 10 decibels (dB) is perceived as a doubling or halving of the loudness, while an increase or decrease of 3 decibels is typically considered imperceptible. Decibels measure the magnitude of the oscillations in air pressure, and thus the magnitude of the sound.
- [344] The human ear also perceives differences in the frequency or pitch of sound, which corresponds to the number of pressure oscillations occurring per second. Sound levels are usually measured using a frequency weighted filter referred to as the "A-scale", and sounds measured in this way are designated in units of A-weighted decibels (dBA). This is described as a reasonable single-number representation of the perceived overall loudness of a complex sound.
- [345] The report indicates that the sound level of the fuel truck deliveries can be greater than the background sound levels by 20 to 30 decibels (dBA), which the authors state is significant. Sounds that exceed background sounds by 10 dBA or more are typically considered to be clearly audible.
- [346] During a fuel delivery maximum sound levels in the order of 80 to 84 dBA were recorded. The recording site was at the rear property line of the Hills' property. The engineers were not able to access the Hills' property and thus could not measure the sound level on their rear deck, which is approximately 10 metres from the fuel truck, but measurements taken a similar distance from the truck were in the order of 72 dBA. The report concludes that the sound of a fuel delivery exceeds the background sound level sufficiently to be clearly audible outside the Hills' home or in the plane of open window of the home.
- [347] The acoustical engineers made some recommendations for mitigating the sound created by fuel deliveries. They said that physical noise barriers at the property line, such as acoustic barriers, would provide some benefit. Under ideal circumstances, barriers of practical height can provide 10 to 15 dBA reduction at most and would address some but not all of the sound. Such a barrier would need to be dense and free of cracks and gaps. The existing privacy fence at the rear of the Hills' home would not fulfil this purpose. According to the acoustical engineers, an acoustic barrier would mitigate the sound by 5 to 15 dBA. There would be little benefit from trees. There might be other options to address the truck engine noise, which is the dominant sound source.

Scope of the Hills' Claim

- [348] A contentious issue throughout this trial was the scope of the Hills' claim, and I issued a number of oral rulings relevant to that issue during the course of the trial.
- [349] First, I will note that shortly before trial, the notice of civil claim was amended to remove Austin Engineering and Suncor as defendants.

- [350] On the eve of trial, the plaintiffs applied to further amend their notice of civil claim. In oral reasons rendered April 1, 2022, I granted the substance of their application.
- [351] In my ruling I noted that, with respect to the Village and the RDKB, the plaintiffs alleged in the statement of facts and legal basis that they breached their jurisdiction under the Village Bylaws, Building Code and the Fire Code. Alleged breaches related to matter such as issuing the final inspection of the building permit, issuing the business licence and granting permission for parking in the alleyway to off-load fuel. It was this aspect of the pleadings that gave rise to the application to further amend the notice of civil claim. In general, the plaintiffs sought to replace several references in the relief sought to "quashing" the parking permission and business licence with declarations that those acts were ultra vires. They also sought to strike entirely the prayer for an order quashing the final inspection. Similar amendments were sought to three paragraphs of the statement of facts.
- [352] The background to the application to further amend the notice of civil claim included that the parties had recognized some time ago that the notice of civil claim was defective in that it sought to quash various local government decisions, relief available only through a petition for judicial review. Counsel for the plaintiffs and the Village had reached an agreement in October 2021 that it was not necessary for the plaintiffs to file a petition for judicial review and then apply to have it heard together with the trial. Counsel for the plaintiffs had thought that counsel for the RDKB was party to that agreement, when in fact she was not. When the plaintiffs then sought the RDKB's consent to amend the notice of civil claim, consent was not forthcoming, resulting in the need for the application before me.
- [353] I held that the plaintiffs could pursue the amended declarations sought in the action. I held that the case was fundamentally about alleged private wrongs of nuisance and negligence. I held that it made more sense to permit the plaintiffs to seek the declarations sought within the context of the action than to force them to file a separate petition for judicial review, which they would have to either apply to have heard together with the action or be heard separately.
- [354] On April 11, 2022, I made a ruling dealing with an objection the Village made to a question put to Chief Derby, regarding the use of foam to smother a petrochemical fire. In that ruling I held that the notice of civil claim, as amended, pleads that the project was completed in breach of the Fire Code, and that evidence that tended to establish whether or not the project was completed in breach of the Fire Code was therefore relevant. I also held that evidence that tended to establish whether there are safety risks to the Hills and their property, and the nature of those alleged risks, may be relevant to an assessment of the balance of convenience in considering whether or not to grant the injunctive relief sought by the Hills. In this connection, I held that only evidence of safety risks to the Hills and their property, and not to the community at large, was admissible.

[355] In an oral ruling, delivered April 13, 2022, and subsequently indexed at *Hill v. Herd*, 2022 BCSC 1300, I held that the Hills had failed to plead either the tort of abuse of public power, or negligence occurring after October 17, 2019, and therefore they could not pursue those matters in the absence of an application to further amend the notice of civil claim.

[356] The Hills did not plead that there has been any soil contamination or fuel migration onto their property. In my January 30, 2023 oral ruling on the admissibility of the Masse Report, I held that the evidence in the Masse Report and its authors' evidence at trial about the potential for soil contamination or fuel migration to occur was, therefore, irrelevant to the causes of action pled. It is relevant solely to the consideration of the balance of convenience with respect to whether a permanent injunction should be granted.

Nuisance

[357] The Hills submit that the Herds and the Village, but not the RDKB, are liable in nuisance.

[358] Both the Herds and the Village deny any nuisance.

Law

[359] As set out by the Supreme Court of Canada in *Antrim Truck Centre Ltd. v. Ontario* (Transportation), 2013 SCC 13, starting at para. 18, the requirements for proof of private nuisance are two-fold. First, a plaintiff must prove a substantial, that is to say, a non-trivial interference with their use and enjoyment of his property. Second, they must establish that the interference is unreasonable in all of the circumstances.

[360] At the first stage, the injury to the plaintiff's property interest must be more than a slight annoyance of trifling interference. Nuisance may include actual physical damage to the property, as well as interference with the health, comfort or convenience of the owner.

[361] At the second state, the focus of the balancing exercise is whether the interference is such that it would be unreasonable to require the plaintiff to suffer it without compensation. This requires the court to assess whether the interference is unreasonable by balancing the gravity of the harm suffered against the utility of the defendant's conduct.

[362] In assessing the gravity of the harm, matters such as the severity of the interference, the character of the neighbourhood, the sensitivity of the plaintiff and the frequency and duration of the interference may be considered. In assessing the utility of the defendant's conduct, the nature of the defendant's conduct is relevant. However, the focus of the reasonableness analysis is on whether it is reasonable for the plaintiff to bear the interference without compensation, not on whether it was reasonable for the defendant to undertake the work causing the interference.

[363] In *Baker v. Rendle*, 2017 BCCA 72 at para. 39, the Court of Appeal, after referring to *Antrim*, quoted *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at para. 77, for the proposition that the focus of the court is on the harm suffered by the plaintiff rather than the prohibited conduct of the defendant:

At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct (A. M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at p. 559; L. N. Klar, *Tort Law* (2nd ed. 1996), at p. 535). Nuisance is defined as unreasonable interference with the use of land (Linden and Feldthusen, at p. 559; Klar, at p. 535). Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance (Linden and Feldthusen, at p. 559). The interference must be intolerable to an ordinary person (p. 568). This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity (p. 569). The interference must be substantial, which means that compensation will not be awarded for trivial annoyances (Linden and Feldthusen, at p. 569; Klar, at p. 536).

[364] In *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft*, (1979), 95 D.L.R. (3d) 756 (BCCA), a case cited with approval in both of the cases just referred to, Mr. Justice McIntyre, speaking for the Court, explained at pp. 760-61:

In my opinion the rationale for the law of nuisance in modern times, whatever its historical origins may have been, is the provision of a means of reconciling certain conflicting interests in connection with the use of land, even where the conflict does not result from negligent conduct. It protects against the unreasonable invasion of interests in land. What is an unreasonable invasion of an interest in land? All circumstances must, of course, be considered in answering this question. What may be reasonable at one time or place may be completely unreasonable at another.

It is certainly not every smell, whiff of smoke, sound of machinery or music which will entitle the indignant plaintiff to recover. It is impossible to lay down precise and detailed standards but the invasion must be substantial and serious and of such a nature that it is clear according to the accepted concepts of the day that it should be an actionable wrong. It has been said, see McLaren, "Nuisance in Canada", that Canadian judges have adopted the words of Knight Bruce V.C. in *Walter v. Selfe* (1851), 4 De G. & Sm. 315 [at p. 322], 64 E.R. 849, affirmed on other grounds 19 L.T.O.S. 308 (L.C.), to the effect that actionability will result from an interference with ...the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions.

These words were approved by Middleton J.A. in the Ontario High Court in *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 at pp. 535-6. In reaching a conclusion, the court must consider the nature of the act complained of and the nature of the injury suffered. Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the occurrence of the nuisance, its duration and many other factors which could be of significance in special circumstances.

Analysis

- [365] The Hills rely, in part, on the alleged non-compliance with applicable regulations, including the Fire Code, in relation, among other things, to the placement of the tanks on the Herd property, in support of their nuisance claim. The Herds submit this reliance is misplaced, citing the decision of Mr. Justice Voith in *Grant v. Warman*, 2009 BCSC 886. In that case, the plaintiffs claimed in nuisance against their neighbours on Quadra Island. The plaintiffs submitted that the defendants had failed to comply with applicable municipal bylaws in the construction of a home on their land. Voith J. wrote the following in rejecting that line of argument:
- [39] The second matter that was argued before me, and which is addressed extensively in the materials that were filed, is whether the Siting Application filed on behalf of the Warmans with the Regional District of Comox-Stratcona, properly complies with By-law No. 1213 being the Quadra Island Zoning Bylaw 1990. That By-law establishes various requisites for the "Size, Shape and Siting of Buildings and Structures". It establishes requirements for the siting of buildings or structures in terms of their proximity to the foreshore and in terms of other prescribed set backs on the property's boundaries.
- [40] The plaintiffs assert that the Warmans failed in their Siting Application to identify both the cedar housing or casing that covers their sewage treatment equipment and the deck which was constructed on the front of their home. The plaintiffs say that the Siting Approval granted does not contemplate or provide for either of these structures. The defendants, in turn, deny this and assert that no regulatory authority has expressed any such concern to them.
- [41] The considerable emphasis placed on this issue appears to me to be misplaced. Any purported non-compliance by the Warmans with various regulatory requirements is of no consequence unless such non-compliance independently creates a nuisance. Conversely, compliance with these same requirements would be of no import if the structure in question actually created a nuisance. The real question is whether the particulars of nuisance alleged by the plaintiffs in their Statement of Claim are supported by the evidence [Emphasis added.]

- [366] I agree with the Herds that Voith J.'s comments in para. 41 of Grant are directly applicable to the case at bar. I agree with the Herds that "It is a red herring to focus on alleged breaches of the Fire Code, Building Code, or bylaws within the nuisance analysis, as compliance or noncompliance has no bearing on whether the structure in question actually creates a nuisance."
- [367] The non-compliance with regulatory requirements alleged by the Hills, if proven, would not independently create a nuisance. Many of the instances of alleged non-compliance have nothing whatsoever to do with the nuisances alleged. For example, the Hills submit that the placement of the fuel tanks is in breach of the Fire Code, Building Code, and other bylaws, but even if those allegations are true, it is not the non-compliance that would be the cause of the nuisances alleged. The same can be said about their submission that construction in Schofield Highway was allowed to occur contrary to the 2004 covenant and licence. If that were true, it would have nothing to do with the nuisances alleged by the Hills.
- [368] The question I must decide is whether the fumes, noise and lights complained of by the Hills constitute a nuisance. Further, if they constitute a nuisance, I must determine who is liable for the nuisance.
- [369] For the reasons that follow, I find that the fumes, noise and lights complained of by the Hills do constitute nuisances. The nuisances have been ongoing since November 2018, a period of approximately five and a half years.

Lights - frequency, duration and impact

- [370] The light nuisance occurs on a daily basis. There are three lights in issue: the light over the tank nest, the forecourt light, and the light on the side of the convenience store. All are located on property owned by the Herds.
- [371] The tank nest light is very bright and, when on, shines directly onto the Hills' property. I accept that the Herds initially installed the tank nest light for safety reasons, to ensure the area was illuminated for deliveries. Initially, the tank nest light was on 24/7. At some point, due to the Hills' complaints, the Herds installed a shield on the tank nest light. That reduced the intensity of the light somewhat, but did not solve the problems experienced by the Hills due to the tank nest light. At some point after that, the Herds installed a timer which turned the tank nest light on at 5:00 a.m. and turned it off at 9:00 p.m. At some point, either in the summer of 2020 or 2021, the Herds turned off the tank nest light. Since that time, it has been turned on manually only when required for a delivery in the dark in the winter.
- [372] The evidence establishes that it was never objectively necessary for the tank nest light to be on at all times, or daily between 5:00 a.m. and 9:00 p.m. It is needed only if fuel is delivered in the dark from the alley, a relatively rare winter occurrence.

- [373] The forecourt and convenience store lights are manual, and are generally turned on between roughly 5:00 a.m. and 9:00 p.m. every day, during the gas station's hours of operation. They are also very bright. I accept that it is necessary for the forecourt and retail areas of the gas station to be illuminated during the station's hours of operation. These lights are not related to the delivery of fuel from the alley.
- [374] The cumulative impact of the lights on the Hills is substantial. The lights illuminate their back yard and deck, and limit the Hills' ability to enjoy their yard and deck in the evening. The Hills have purchased blinds and other window coverings to attempt to deal with the lights, but they are still bothered by the lights inside their home. They can see light around the edges of the blackout blinds in the master bedroom. This has adversely affected both Mr. and Mrs. Hill's sleep. In this connection, it is important to recall that the Hills go to bed at 8:00 p.m. due to Mr. Hills' work schedule. If he wakes in the night, Mr. Hills sometimes has difficulty going back to sleep due to the lights. The lights illuminate the bathroom, enough that it is unnecessary to turn the light on in the bathroom. The light from the gas station bothers JD when he goes in the bathroom to use his iPad.

Fumes - frequency, duration and impact

- [375] Fumes emanate from the truck when it delivers fuel. Fuel is delivered two to three times a week. Each delivery takes approximately an hour to an hour and a half, although the truck may be present longer than that. In their closing submissions, the Hills estimated that fuel delivery takes place approximately 30% of the days of the year, and that by November 2023 approximately 525 deliveries would have taken place. That is a reasonable estimate of the number of deliveries, and would mean that by the date of this decision, another approximately 50 deliveries will have occurred.
- [376] The deliveries occur without notice or warning to the Hills, so they never know when they will experience the fumes. There was a short period where G&B attempted to provide the Hills with emailed notices, but that system was ineffective, as the truck was often already there by the time Mrs. Hill received the notice. The Herds' evidence, which I accept on this point, is that they have attempted to coordinate with G&B to have a majority of deliveries occur in the morning. According to G&B's records, there were seven deliveries that ended after 8:30 p.m. in 2019, and from the fall of 2020 onwards the majority of deliveries have been in the morning, and almost all during regular business hours.
- [377] The Herds installed a vapour recovery system in February and April 2021. The vapour recovery system has mitigated the noxious smells produced when fuel is delivered, but has not eliminated them. There is no vapour recovery system on the diesel tank. Further, there is photographic evidence that demonstrates that the drivers delivering fuel do not always hook up the vapour recovery system.

[378] The smells prior to the vapour recovery system being installed were described by the Hills as terrible and intolerable. Mr. Hill said it smelled like they were pumping gas in his back yard. It was and remains impossible for the Hills to remain outside when the truck is delivering fuel. They keep their doors and windows closed. They often stop whatever they might be doing if the truck arrives and leave the home. This is especially onerous when Mrs. Hill is home alone with JD, given JD's special needs. JD is particularly sensitive to the smells. As a stay-at-home mother, Mrs. Hill is frequently at home when deliveries occur. Mr. Hill is often at work.

Noise - frequency, duration and impact

[379] The noise associated with the fuel deliveries occurs every time a truck delivers fuel. The noise comes from the idling truck and the pump it operates.

[380] The noise associated with the deliveries is very loud. If the Hills are outside in their yard or on the deck of their home they go inside. It is impossible to maintain a normal conversation outside while the truck is delivering fuel. You would have to yell at a person three feet away to be heard.

[381] With the doors and windows closed, they can still hear the truck inside their home. Mr. Hill testified that the noise inside the house, with the windows and doors closed, of the truck delivering fuel in the alley is like a constant droning or vibrating sound. It can be heard globally throughout the house. You would need to turn the volume on the television up substantially to watch a movie. It is annoying if you are sitting at the dining room table. You have to raise your voice if you are having a conversation, but not to the point of yelling. Mr. Hill testified that the noise has sometimes prevented him from going to sleep in the master bedroom.

[382] The acoustical report provides objective proof of the sound of fuel deliveries. The daytime background sound levels were measured in the range of 45 to 50 dBA. The fuel truck delivery measure on May 12, 2021 was in the range of 80 dBA. The sound of the fuel truck delivering fuel was therefore at least 30 dBA greater than background sound. This is significant and likely to cause disturbance or annoyance.

Utility of the activity

[383] The Warfield gas station has significant social utility. It contributes to the local economy, provides employment for approximately 15 people, and is the only gas station and retail establishment selling groceries in the Village of Warfield.

[384] I accept the Herds' evidence that the decision to move fuel deliveries to the alley was motivated, at least in part, by safety concerns related to the previous practice of unloading fuel in the forecourt. Delivering fuel in the forecourt posed obvious dangers due to the presence of other vehicles and pedestrians in an uncontrolled environment. The decision to move fuel deliveries to the alley was also economically beneficial to the Herds as it

enabled them to have more fuel delivered at lower cost than was possible from the forecourt.

[385] The Hills submit that the former mode of delivery was conceived of by the Herds when they converted from Shell to a FasGas station. They say that if there was a safety issue before 2018, it was the Herds' choice, and that it is "the ultimate bootstrap argument to say we had to change we did because what we did was unsafe".

[386] I am not persuaded by this submission. Accepting that the Herds made the choice back in 2009 to have fuel delivered in the manner they did, it would be ridiculous to say that they must now maintain that choice despite the fact that it was unsafe, when a safer alternative has now been identified.

Character of the neighbourhood

[387] Essentially, there are two neighbourhoods at issue here. The dispute arises, in large part, because the activities in issue happen on the border between them.

[388] The gas station is located on Schofield Highway, an access or frontage road running parallel to Highway 22/3B. It is located within Warfield's only, and small, commercially zoned area. A gas station has been operated at this location since the 1940s.

[389] The Hills' home is located on Forest Drive, in a pleasant, family-oriented residential neighbourhood. It is near an elementary school. They moved there from another home located a couple of blocks down Forest Drive because they thought it would be good for JD. Their home is on a cul de sac with less traffic than their former home.

[390] The alley at the centre of this dispute, figuratively and literally, is effectively the border between the commercial district and the residential district. The middle of the alley represents the precise border between the two.

[391] The Hills chose to move to their present home on Forest Drive, directly across the alley from the gas station. They appear not to have considered that, in doing so, they would likely experience more noise, lights and smell than they did at their former home. Nor did they turn their mind to the possibility that there could be renovations or developments at the gas station or elsewhere in the Warfield commercial district that might increase the noise, lights and smell to which they would be subjected. That said, at the time the Hills moved to their present home, fuel was being delivered to the forecourt of the gas station. They were not adversely affected by smells and noise, as they now are, by fuel being delivered at that location. Nor were they bothered by bright lights at the gas station, as they have been since November 2018. This cannot be construed as a situation where the plaintiffs moved to the nuisance. It was the Herds who chose to make changes to the method and location of fuel delivery, thereby giving rise to the problems with smells, lights and noise which the Hills now experience.

[392] In their submissions, the Herds emphasize the proximity of the area to Teck Metals Ltd.'s Trail operations. Teck is approximately five kilometres away from Warfield. I do not see much if any relevance to the fact that Teck is located there. There is no evidence, for example, of any noise, smells or lights emanating from Teck which affect the Hills' enjoyment of their property. It is true that traffic, including semi-trucks, to Teck passes through Warfield on Highway 22/3B. However, the evidence establishes that the sound of traffic on Highway 22/3B has very limited impact on the Hills. Mr. Hill thought he had heard semis using their airbrakes as they come down the hill from Rossland, but he could not remember for sure.

Sensitivity of the plaintiffs

[393] As stated in St. Lawrence at para. 77, which I have already referred to, "the interference must be intolerable to an ordinary person". This is to be assessed by considering, among other factors, "the sensitivity of the plaintiff's use".

[394] The Herds submit that JD is not representative of the standard of an ordinary person. They further submit that JD's special needs, and their impact on Mrs. Hill, are not relevant to the analysis of whether a nuisance is present. I agree with these submissions. The heightened impacts of the nuisance on JD and Mrs. Hill may be relevant to remedy, but not to whether a nuisance exists.

[395] Leaving aside the heightened impact on JD of the nuisances due to his special needs, and the ways in which that adversely affects both of his parents, and especially Mrs. Hill, I find that the interferences experienced by the Hills are intolerable from the perspective of an ordinary person. Mr. Hill, if anything, presented as a stoic plaintiff who was not given to exaggeration, and his evidence made clear that the noise, smells and lights are intolerable to him.

[396] An aggravating element of the interferences in this case is that they are, with the exception of the lights, unpredictable. The Hills do not know when the fuel trucks will arrive. They cannot plan their family and social life around a predictable schedule. Instead, they are at the mercy of the Herds' need for fuel and G&B's delivery schedule. Mr. Hill's evidence was that hearing the delivery truck in the alley increases his stress. He feels helpless as "they" control whether he goes outside or opens the windows in his own house. He feels like "they" control his life with the truck. This was not the evidence of an unduly sensitive plaintiff, but rather of a man who has become understandably frustrated by the effects of unpredictable fuel deliveries on him and his family.

[397] Further evidence in support of the intolerable nature of the interferences can be found in the testimony of Mrs. Trotter, Ms. Monteith, Ms. Pipes and Mr. Hillis, which I have already outlined in some detail. I do not find the evidence of Mr. Taylor and Mr. Clarke persuasive evidence to the contrary. Mr. Taylor is a now retired long-time employee of the Herds. He is hard of hearing and does not wear his hearing aids when he is home. Given his former

occupation, he has long experience and increased tolerance to fuel smells. Mr. Clarke appears to be rarely home when fuel is delivered and his evidence tended to indicate he is not particularly observant of his surroundings. Both have the benefit of affordable rents for the apartments they rent from the Herds. Given their circumstances, they are not representative of the perspective of an ordinary person.

Conclusion on nuisance

[398] The Hills have established that the smells, lights and noise emanating from the gas station caused by the 2018 renovations and ensuing delivery of fuel from the alley constitute a substantial interference with their use and enjoyment of their property. Balancing the gravity of the harm suffered by the Hills against the utility of the Herds' conduct, I conclude that the interference is, in all of the circumstances, unreasonable. The Hills should not be expected to suffer the interference without compensation.

Who is liable for the nuisances?

[399] There is no doubt that the Herds are liable for each of the nuisances I have found to exist. The real question is whether the Village is also liable in nuisance. The Village submits that it is not, as it has not engaged in any use of land from which the nuisances arise. In this regard, it should be recalled that the lights are located on the Herds' property. The alley, from which fuel is delivered, is vested in the Village.

[400] In support of its position, the Village relied on *Waterway Houseboats Ltd. v. British Columbia*, 2019 BCSC 581 [Waterway BCSC], rev'd on other grounds 2020 BCCA 378 [Waterway BCCA]. Waterway involved approvals granted by the Province to construct works in and around a waterway that later flooded. The Province owned the waterway, but not the works. The plaintiffs sued the Province on a number of grounds including nuisance. At paras. 377-381 of Waterway BCSC, the court held that the Province was not liable in nuisance:

[377] The Province denies that it can be found liable for private nuisance. The Province reiterates that it merely granted the Approvals for the McLaughlin Bridge Replacement and the Channel Restoration and that it did not undertake the actual construction of either project. Rather, those projects were the responsibility of the other defendants pursuant to their Water Act Approvals. The Province neither owned nor created the Works that the plaintiffs allege gave rise to actionable nuisance.

[378] The plaintiffs, however, do not claim against the Province as the owner of Sicamous Creek, but instead for issuing the Approvals that enabled the other defendants to cause the nuisance. They assert that by designing and approving the Channel Restoration and providing directions for the height of the McLaughlin Bridge Replacement, the Province failed to abate the nuisance and is therefore liable.

- [379] I cannot accede to this argument. Such a concept was rejected in *Hoffman v. Monsanto Canada Inc.*, 2005 SKQB 225 where the Court stated at para. 122:
- [122] The tort of nuisance imposes strict liability when the conditions for its application are met. The implications of holding a manufacturer, or even inventor, liable in nuisance for damage caused by the use of its product or invention by another would be very sweeping indeed. It is my conclusion that where the activity complained of is the activity of one who is not in occupation or control of adjoining land, and no independent malfeasance is alleged, then, at the very least, direct causation of the damage alleged must be alleged. This is not the case. I conclude that there are no facts alleged in this case that could support a finding that the defendants substantially caused the nuisance alleged.
- [380] Other than issuing the Approvals, there is nothing the Province did that directly impacted the Vinco Property. Respecting the plaintiffs' allegation that the Province failed to abate the nuisance, I agree with the Province that it had no obligation to do so considering the nuisance existed by virtue of a natural hazard resulting from a naturally occurring watercourse: *Lynds v. Runge*, 2002 BCSC 1579 at para. 52.
- [381] The plaintiffs' claim against the Province in private nuisance fails.
- [401] The Village also relied on the recent decision of the Court of Appeal in British Columbia (*Minister of Public Safety*) v. *Latham*, 2023 BCCA 104 [Latham]. At para. 72 of Latham, the Court held that nuisance "requires, at a minimum, that the defendant engage in some kind of use of land from which the interference emanates". At para. 74, the Court referred with approval to the passage from *Waterway BCSC* that I just quoted. At para. 75, the Court noted that the two cases were not entirely analogous, as the Province owned the creek in issue in *Waterway* but did not own the works. It went on to state at para. 75:
- It can nevertheless be inferred from *Waterway BCSC* that regulatory action alone cannot ground a finding of nuisance, as the judge, following a lengthy trial, found that the issuance of approvals was not a basis for liability.
- [402] At para. 77, the Court held that the governmental conduct in issue in the two cases was not entirely dissimilar, "as both involve allegations of nuisance on the basis of regulatory action effectively authorizing construction". At para. 78, the Court concluded with "the principle that a proper defendant in nuisance is one who has made at least some use of land".
- [403] I agree with the Village that *Waterway BCSC* and *Latham* are dispositive so far as the Hills' claim in nuisance against the Village is concerned. The Village has not made any use of the Herds' land, which is where the light nuisance emanates from. The Village cannot be liable in nuisance for the interference caused by the lights.

- [404] The Village does own the alley, which is where the fumes and noise nuisances emanates from. The Village issued the temporary parking permission on January 24, 2019, which permitted fuel delivery to occur from the alley. The Hills take issue with the validity of the temporary parking permission, an issue I deal with below. For the purposes of their nuisance claim, the validity or otherwise of the temporary parking permission is irrelevant: Latham at paras. 66-67.
- [405] What is relevant is that the Village's involvement in fuel being delivered from the alley is purely regulatory. The Village has not made any use of the alley; it has permitted others, namely the Herds and G&B, to use the alley to deliver fuel. That does not make the Village a proper defendant in nuisance. The Hills' claim in nuisance against the Village fails.

Remedy for nuisance

- [406] The Hills seek a permanent injunction to prohibit fuel deliveries from the alley. They submit that anything other than a permanent injunction would allow the Herds to treat a nuisance finding and damages as a licence fee for their operations. In addition, they seek non-pecuniary damages in the amount of \$375,000 or more for the damages they have suffered from November 2018 to date. They also claim relatively modest damages in the amount of approximately \$3,000 for various direct out-of-pocket expenses.
- [407] In the event they are found liable in nuisance, the Herds oppose any injunctive relief. They submit that essentially nominal non-pecuniary damages in the amount of \$3,000 for Mrs. Hill, \$2,000 for JD, and \$500 to Mr. Hill are appropriate and that those amounts should be reduced by 25% for Mr. and Mrs. Hill due to their alleged failure to mitigate the noise by installing an acoustical fence.
- [408] As outlined above, the parties are very far apart in what they submit would be an appropriate award for non-pecuniary damages, as well as taking diametrically opposed positions on whether injunctive relief should be granted.
- [409] It is useful to review the case law the parties rely on in support of their positions on remedies.
- [410] The Hills rely on *Suzuki v. Munroe*, 2009 BCSC 1403 [Suzuki]. The plaintiffs in that case complained about their neighbour's installation of a central air conditioning unit which caused noise. The plaintiffs sought both an injunction and damages. Mr. Justice Verhoeven found that the air conditioning unit caused a nuisance. At night, the noise from the unit was well above existing ambient night time noise levels. The defendants had taken some steps to ameliorate the noise produced by the air conditioner. The plaintiffs had also obtained an interlocutory injunction which ensured that the air conditioner did not run between 9:00 p.m. and 7:00 a.m.

- [411] At para. 108, Verhoeven J. awarded Mrs. Suzuki \$4,000 and Mr. Suzuki \$2,000 in damages. In doing so, he commented that if he were not granting an injunction, the damages awarded would be significantly higher.
- [412] Mr. Justice Verhoeven also granted an injunction. At para. 111, he found that the requirement that damages be inadequate was easily satisfied, and would be in any case where the nuisance was likely to continue absent an injunction. At para. 112, he found that the noise had caused the plaintiffs considerable distress and suffering which was likely to continue in the absence of an injunction. Regarding the balance of convenience, at para. 114 Verhoeven J. was confident that it was technically feasible for the defendants to enjoy central air conditioning without causing a nuisance. At para. 119, he ordered a permanent injunction that the defendants could not operate their air conditioner between 7:00 a.m. and 10:00 p.m. if it caused noise beyond 55 dB(A), and during the remaining hours if it caused noise beyond 45 dB(A) at the property line between the parties' properties.
- [413] The Hills submit that the facts in the case at bar are significantly more egregious than in Suzuki, in that the noise levels are much higher and the overall duration is much longer. Plaintiffs' counsel provided calculations based upon the comparative duration of the noise, and taking into effect inflation, by which each of the Hills would be entitled to \$39,900 in damages until November 2023, with no assessment of damages for non-delivery time fumes or light nuisances.
- [414] The Hills also relied on *Kenny v. Schuster Real Estate Co. Ltd.* 1990 CanLII 1092 (BCSC) [Kenny], aff'd *Schuster Real Estate Co. v. Kenny*, 1992 CanLII 1941 (BCCA). In that case, the plaintiff purchased a condominium in a mixed used strata which included four residential and two commercial strata lots. When Ms. Kenny moved in in 1983 she satisfied herself that the restaurants operating in the two commercial strata lots did not deep fry or cook foods. That changed in 1987, when the tenant in the commercial strata lot directly below hers installed an exhaust fan directly below her patio deck. This caused Ms. Kenny to experience both noise and unpleasant odours inside her unit. As a result, she sold her unit in 1988, and brought the action, claiming damages. Ms. Kenny took default judgment against the defendant owner. A trial before Mr. Justice Cohen ensued to assess damages. He ordered damages for the interference experienced by the plaintiff for one year in the amount of \$7,500.
- [415] The Hills refer to *Innes v. Kotylak*, 2018 SKQB 325, in which Kenny was referred to at para. 146, and the court noted that in 2018 dollars, the damages would amount to approximately \$12,700. They submit that in 2023 dollars the award in Kenny would now be worth \$15,000. On the basis of the nuisance continuing for five years, they submit that Mr. Hill would presumptively be entitled to \$75,000, and Mrs. Hill and JD would each be presumptively entitled to more, they say \$150,000 each. This would result in a total damage award of \$350,000. The Hills submit that this is between 63% and 75% of the increased costs of delivering fuel in a smaller truck to the forecourt. They submit that the court should increase the damages beyond what they term is this presumptive amount to adequately

compensate them.

- [416] The Herds submit that a court may award damages in a nuisance case in reference to the diminution in the value of the property. They submit that the Hills have not suffered any diminution in the value of their property. This is supported by the assessed value of the Hills' property, which has increased from \$378,100 as of July 1, 2019 to \$379,500 as of July 1, 2020 to \$476,300 as of July 1, 2021.
- [417] The Herds submit that neither Suzuki nor Kenny is comparable to the interference to the Hills' use and enjoyment of their property. They submit that the truck delivers fuel three times a week for approximately 90 minutes, for a weekly duration of the smell and noise nuisances of approximately four and a half hours, a far shorter duration than that suffered by the plaintiffs in cases relied upon by the Hills.
- [418] The Herds rely on *Zhang v. Davies*, 2017 BCSC 1180 [Zhang], aff'd 2018 BCCA 99. In that case Madam Justice Adair found that the glare from a metal roof caused by reflected sunshine constituted a nuisance. At paras. 87-90, Adair J. found that the glare was not continuous and that the plaintiff exaggerated its effect, but that when it occurred it was intolerable. The plaintiff sought \$15,000 in general damages; at para. 91 Adair J. considered Suzuki, and in light of it ordered \$7,500 in damages. At paras. 92-32, Adair J. declined to order an injunction, as the evidence before her did not establish that there was anything that could be done that would be effective to reduce the glare.

Permanent injunction

- [419] Justice Verhoeven summarized the principles applicable to granting an injunction in a case such as this in Suzuki:
- [109] An injunction is an equitable remedy, and therefore the granting of one is discretionary: R.J. Sharpe, *Injunctions and Specific Performance*, 3rd ed. (Aurora: Canada Law Book Inc., 2000) at para. 4.10, *Boggs v. Harrison*, 2009 BCSC 789 at para. 141.
- [110] A number of factors are relevant in determining whether or not to grant an injunction. The inadequacy of damages is frequently considered, along with the nature of the plaintiff's injury and the balance of convenience between the parties: Sharpe, *Injunctions and Specific Performance* at paras. 1.60-1.140, *Boggs* at para. 141, A.M. Linden & B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Canada Inc., 2006) at 594.
- [111] In situations where the nuisance is likely to continue without the granting of the injunction, as is the case here once the interlocutory order ends and the Munroes are no longer enjoined from operating the air conditioner at night, the inadequacy of damages is easily satisfied: Linden & Feldthusen, *Canadian Tort Law* at 594.
- [420] I am not persuaded that a permanent injunction is appropriate in the circumstances of the case at bar.

- [421] The nuisance will continue without an injunction being granted. That said, the Herds have taken some effective measures, namely turning off the tank nest light and installing the vapour recovery system, which have reduced the magnitude of the light and smell nuisances.
- [422] I do not minimize the impact of the nuisances on the Hills. The continuing impact is significant, albeit reduced due to the ameliorative measures taken by the Herds. The impacts are not continuous, with the noise and continuing smell issues only arising during deliveries, which occur approximately four and a half hours a week. The remaining lights are on daily from 5:00 a.m. to 9:00 p.m.
- [423] The balance of convenience between the parties strongly favours an injunction not being granted.
- [424] I find that delivery of fuel from the alley is safer than delivery of fuel from the forecourt. I have found that the alley is not a street within the meaning of the Fire Code. Delivery of fuel from the alley is not contrary to the Fire Code. There is an inherent danger of fire related to the delivery, storage and distribution of fuel. The evidence establishes that the risks associated with doing so in this case would be greater if fuel was delivered from the forecourt rather than from the alley.
- [425] It is more efficient and cost-effective to deliver fuel from the alley, as it allows larger trucks to be used, and more fuel to be delivered on each occasion, thereby reducing the total number of fuel deliveries required to keep the gas station supplied, and the cost per litre of fuel delivered.
- [426] It is of benefit to the community for the Warfield gas station to continue to operate. The evidence is that the Herds would experience a minimum financial burden of 45% of their shipping costs if they were required to try to use a smaller truck and deliver fuel from the forecourt. This does not include the additional expenses they would incur to renovate their premises to allow delivery to occur from the forecourt. As set out at para. 456 of their closing submission:
456. For example, Herd & Smith's annual shipping costs were \$212,237.70 from March 20, 2020 to February 1, 2021 and as such they would be looking at approximately \$95,506.97 in increased shipping costs. This is in addition to the costs of replumbing their tank nest to be filled from the forecourt. Herd & Smith's annual profit varies between \$50,000 and \$200,000 year to year. Between March of 2021 and February of 2022, Herd & Smith's profit was \$137,369.31.
- [427] The Herds submit that if they were required to increase their shipping costs by 45%, the business would close. I accept that is likely true. It is probable that an injunction would put the Herds out of business. That would be a very serious impact for the Herds, not to speak of their employees and the members of the community who rely on the gas station.

[428] Considering the circumstances as a whole, I conclude that it would not be equitable to order an injunction.

Damages

[429] None of the cases cited by the parties on damages are on all fours with the case at bar. Some of them are quite dated. In none of them were all of the nuisances I have found present. Suzuki related solely to the noise from an air conditioner. Zhang related solely to the glare from a metal roof. Kenney related to the noise and smell from a restaurant fan. In none of them had the interference continued for as long as the Hills have suffered the interference with their use and enjoyment of their property.

[430] The Hills have provided creative calculations to support the quantum of damages they seek. I do not find them persuasive. That said, I acknowledge the Hills' submission that damage awards for nuisance are arguably "behind the times", and have not developed in the same way that non-pecuniary damages have in personal injury cases.

[431] In Suzuki, in 2009, Verhoeven J. ordered damages of \$4,000 and \$2,000 to the two plaintiffs. In doing so, he said the damages would have been significantly higher had he not granted an injunction.

[432] I am not granting an injunction. In my view, that is a significant factor to take into account in assessing the amount of damages to be ordered.

[433] In Kenny, \$7,500 was ordered for a nuisance that lasted one year. Taking into account the five and a half years the nuisance has lasted in this case, the mitigating steps the Herds took after approximately two years had passed, the fact the nuisance is likely to continue in the future, and the impacts on the plaintiffs' due to their individual circumstances, I order the Herds to pay the following damages:

- a) Mr. Hill: \$20,000
- b) Mrs. Hill: \$30,000
- c) JD (in trust to the Public Guardian): \$30,000.

[434] The Herds submit that the Hills have failed to mitigate their damages by failing to build an acoustical fence as recommended in the acoustical engineering report relied on by the Herds. The author of that report, Mr. Bonsma, estimated that such a fence could result in a 5-15 dBA reduction in noise. Mr. Hill testified that he did not build such a fence because the estimated noise reduction was not guaranteed. The Herds submit that a reasonable person would have at least tried the recommendation in the report or sought independent advice as to its merits. On this basis, the Herds submit that Mr. and Mrs. Hills' non-pecuniary damages should be reduced by 25%.

- [435] In reply, the Hills submit that it would not be reasonable to expect them to spend significant sums of money on a fence when the primary relief they are seeking is an injunction which would eliminate the noise issue. They also submit that a fence might not have worked given the zoning fence height restrictions.
- [436] I find that in all of the circumstances there was no obligation on the Hills to attempt to mitigate their damages by building an acoustical fence. It would have been a financial risk, and not one a reasonable person in their circumstances would have taken. The Village's Zoning Bylaw prohibits rear yard fences over 1.8 metres in height. Mr. Stevens' evidence in cross-examination tended to indicate that an acoustical fence of that height would not be sufficient to block sound to the Hills' deck, dining room, kitchen, bathroom and master bedroom. At best an acoustical fence would only have reduced, but not eliminated, the noise nuisance, and would have done nothing to address the smell and light nuisances. I decline to reduce the Hills' non-pecuniary damages on the basis of this alleged failure to mitigate.
- [437] In addition to non-pecuniary damages, the Hills sought an award in the range of \$3,000 for special damages related to matters such as increased insurance premiums due to the cracked ceiling claim, the portion of the cost of repairing the ceiling not covered by insurance, unreimbursed expenses for an iPad for JD, noise cancelling headphones and the cost of the trees planted by Mr. Hill along their fence line. It is not clear on the Hills' submissions whether these special damages are sought as a result of negligence, nuisance or both.
- [438] In response, the Herds take issue with most of the various items claimed, in general arguing that items such as iPads and noise cancelling head phones were not required due to any of their conduct, and that the renovations did not cause the crack in the Hills ceiling.
- [439] I find that the Hills have not established most of the special damages claimed. The expenses related to the repair of the roof and subsequent increased insurance do not relate to the nuisances I have found. It may have been caused or contributed to be the construction, but that is not the nuisance alleged or found. The evidence does not establish that the nuisances were the cause of the Hills purchasing noise cancelling headphones or iPads for JD; these are items they would likely have purchased for him due to his special needs in any event. The only exception is the trees, which I find the Hills purchased and planted in an effort to mitigate the nuisances I have found. Mr. Hill testified, and I accept, that the cost of the trees was between \$600 and \$700. I award \$650 in compensation for the cost of the trees.
- [440] There is also an issue with respect to the respective responsibility for damages of the Herd defendants, that is, Mr. William Herd and Herd & Smith Holdings Ltd. The Hills submit that Mr. Herd is responsible for a portion of the damages from November 2018 until he sold lots 10 to 13 to Herd & Smith on February 28, 2019. They rely on the fact that he applied for the building permit and signed the Suncor loan agreement. They further submit that Herd

& Smith is solely responsible for damages from November 2018 to the date of judgment, as the operator of the enterprise.

- [441] The Herds submit that the Hills have failed to demonstrate that Mr. Herd is personally liable in negligence. They do not appear to have responded to the Hills' submission that Mr. Herd is personally responsible in nuisance for a portion of the damages between November 2018 and February 28, 2019.
- [442] As outlined above, a proper defendant in nuisance is one who has made at least some use of land. The renovations and fuel delivery occurred on and from lot 9, which Mr. Herd was not the owner of at the relevant times. Herd & Smith was the owner of lot 9. Herd & Smith was at all times the operator of the gas station which caused the nuisances. I find that Herd & Smith is solely liable for the nuisance damages I have assessed.
- [443] The Hills also sought punitive damages against Herd & Smith for amplifying and continuing the light nuisance during the course of this litigation. This relates to the Hills' allegation that at some point the Herds turned the light on the side of the convenience store to shine on their property. I have not found that allegation to have been established on the evidence, and there is therefore no basis for an award of punitive damages.

Declarations Sought by the Hills

- [444] As set out in the further amended notice of civil claim, the Hills sought the following declarations:
- a) "A declaration regarding construction in breach of the building permit";
 - b) "An order declaring the temporary parking permission for B-train deliveries of over 30 minutes from the alleyway is ultra vires"; and
 - c) "An order declaring the current business licence issued to Warfield Fas Gas Plus, Mr. Herd or Herd Ltd. is ultra vires".
- [445] In their closing submissions, the Hills seek declarations that extend far beyond those set out in the further amended notice of civil claim. At paragraph 5, the Hills summarize the declarations sought as follows:
5. The plaintiffs seek declarations related to, but not dependent on, the permanent injunction; namely, that construction of the renovations in question was in breach of:
 - a) Village bylaws including the zoning and building bylaws;
 - b) The Fire Code;
 - c) The conditions of the permit,

and that the operation of the Warfield Petro-Canada station, including bulk delivery of fuel from the lane, is in breach of:

- d) Village bylaws including the noise, traffic and business licence bylaws;
- e) The Fire Code.

[446] At paragraph 247, in their final summary of the orders sought, the Hills seek the following declarations concerning these alleged breaches:

- b) A declaration that the renovations to the Warfield Petro-Canada station in the fall of 2018 were carried out in breach of the building permit, which incorporates the relevant Village bylaws, including, the Zoning, Building, Traffic and Noise bylaws, the Building Code and the Fire Code, in many ways, including:
 - (i) Constructing structures and fuel dispensing units straddling the front property line in breach of the zoning and Fire Code setback requirements and the express conditions of the permit;
 - (ii) Constructing structures within the interior side property line setback of 3m in breach of the zoning and the express conditions of the permit;
 - (iii) Placing AST's in breach of the firefighting access and set back requirements in the Fire Code and the express conditions of the permit;
 - (iv) Constructing structures in breach of the zoning and Fire Code set back requirements regarding the rear property line at the lane;
 - (v) Constructing fuel dispensing units without crash protection of an adequate island height or guardrails in breach of the Fire Code;
 - (vi) Constructing a tank nest without spill containment or crash protection in breach of the Fire Code;
 - (vii) Installing an AST with a capacity in excess of 80,000L in breach of the Fire Code;
 - (viii) Approving a design that requires fuel delivery from a public street or fire access route in breach of the Fire Code and the Traffic and Noise Bylaws; and,
 - (ix) Approving a design without spill control and that requires customers to refuel their vehicles while parked on a street at pumps 2, 4 & 6 in breach of the Fire Code and the express conditions of the permit;
- c) A declaration that the improvements carried out in 2018 are not in compliance with the Zoning Bylaw; therefore, the business licence issued to Herd & Smith was beyond the power of the Village officer to issue;
- d) A declaration that Village Council is not the authority having jurisdiction and does not have power to permit alternate measures to compliance with Fire Code minimum standards of safety; therefore, its decision to permit fuel delivery from the lane is beyond its power;

- e) A declaration that neither the CAO nor the Village Council has the authority pursuant to a licence to occupy or otherwise to permit the installation of fuel dispensers within the Village road dedication in breach of the minimum standards of safety prescribed by the Fire Code;
- f) A declaration that Village Council does not have authority under the Traffic Bylaw, which was promulgated pursuant to Motor Vehicle Act, RSBC 1996, c. 124, to grant parking exemptions; therefore, its permission to allow unloading from the lane contrary to the terms of its bylaw is beyond its power;
- g) A declaration that the noise created by the fuel delivery vehicles while unloading in the lane contravenes the qualitative measure set out in the Village Noise Bylaw.

[Footnotes omitted.]

[447] The Village submits that the Hills should not be permitted to seek relief, in particular declaratory relief, beyond that which was sought in the further amended notice of civil claim.

[448] I agree with the Village's submissions on this point. An action is framed by the pleadings: *Homalco Indian Band v. British Columbia* (1998), 1998 CanLII 6658 (BCSC) at paras. 5-6. As stated by Justice Karakatsanis, as she then was, in *Dagarsho Holdings Ltd. v. Bluestone*, 2004 CanLII 11271 (ONSC) at paras. 65-66:

[65] I agree that pleadings are important and define the case that each party must meet as well as the case the judge must decide. Parties should be bound by the position taken in their pleadings. Each party is entitled to know the case it must meet and cannot be taken by surprise at the trial. Cases must be decided on the issues on the record; and if it is desired to raise other issues, they must be placed on the record by amendment.

[66] In *Kalkinis (Litigation Guardian of) v. Allstate Insurance Co. of Canada* (1998), 1998 CanLII 6879 (ON CA), 41 O.R. (3d) 528 (Ont. C. A.), the court stated:

It has long been established that the parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings: see rule 25.06. The trial judge cannot make a finding of liability and award damages against a defendant on a basis that was not pleaded in the statement of claim because it deprives the defendant of the opportunity to address that issue in the evidence presented at trial. Any amendment to the pleadings to have them conform to the evidence after the parties have closed their cases is a matter of discretion but should only be exercised where no prejudice results that cannot be compensated for by costs or an adjournment: see rules 26.01 and 26.02(c).

[449] The Village refers to *Naderi v. Naderi*, 2012 BCCA 16, in which the Court of Appeal held that declarations ordered following a summary trial application must be set aside on the basis that they were not properly pleaded. At para. 20 of that decision, the Court quoted at length from the decision of Justice Smith in *A.L.M. v. K.H.*, 2004 BCSC 1420 as follows:

[20] In *A.L.M. v. K.H.*, 2004 BCSC 1420, Madam Justice C. Lynn Smith dealt with a mother's appeal from a Master who had ordered interim access to a father greater than the scheduled access he specifically sought in his notice of motion. She found the mother had been prejudiced in having had no opportunity to consider her position and to provide evidence bearing on the access that was awarded. Her following remarks are apt in these circumstances:

[30] The principle that a party has the right to know the case to be met is well established. As Wilson J. stated in *Borsato v. Basra*, [2000] B.C.J. No. 2855, 2000 BCSC 1898 at para. 5:

... the real test as to the validity of an interlocutory notice of motion is whether it gives the legal entities to whom it is directed reasonable notice of the application against them, and what is being sought in that application.

Wilson J. relied on *Bache Halsey Stuart Shields Inc. v. Charles Estate*, (1982), 1982 CanLII 730 (BC SC), 140 D.L.R. (3d) 378 (B.C.S.C.) where Spencer J. observed (at para. 5) that a party, particularly an unrepresented party, ought not to be left to guess at the relief which the plaintiff will seek but should have his attention drawn specifically to what it is that the chambers judge will be asked to do.

[31] I agree with the proposition stated in those two cases that "any question arising on the application" must be limited to questions raised by the specific form of the notice of motion and does not extend to questions which go substantially beyond the motion

[450] I agree with the Village's submission that it is confounding that the Hills now seek a number of declarations for the first time in closing submissions given that they applied to further amend the notice of civil claim to articulate the precise declarations they would seek by application filed March 17, 2022, heard on March 31, 2022, and decided on April 1, 2022. Further, in a mid-trial ruling, indexed at *Hill v. Herd*, 2022 BCSC 1300, I addressed the foundational role of pleadings and directed that if the Hills wished to pursue torts not pleaded in the further amended notice of civil claim, they would need to apply to amend their pleadings. I agree with the Village's submission that the same is true with respect to declaratory relief sought.

[451] The only declaratory relief which I will consider is that set out in the further amended notice of civil claim, the relevant parts of which I have quoted above.

[452] The first declaration sought is factual, that is that the construction was carried out in breach of the building permit. I will deal with it in connection with the Hills' claim in negligence. The second two declarations are relief in the nature of judicial review under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA]. As submitted by the Village, the Hills do not seek to have the temporary parking permission or the business licence quashed, and in fact explicitly abandoned that relief in making their application to further amend the notice of civil claim.

[453] The Village submits that in seeking declarations that the temporary parking permit and business licence are ultra vires, the Hills are necessarily taking the position that the permit and licence were void ab initio, that is, that they fell outside the jurisdiction of the decision-makers, not that they are voidable due to being unreasonable.

[454] The Village submits that the Hills could establish standing to challenge the parking permission and licence under either s. 623 of the Local Government Act, R.S.B.C. 2015, c. 1 [LGA] or pursuant to the JRPA. It submits that the Hills do not have standing on either basis to challenge the licence, but do have standing under the JRPA to challenge the parking permission.

[455] Section 623 of the LGA reads as follows:

Court application to set aside bylaw or other instrument

623 (1)An application to the Supreme Court to set aside a municipal bylaw or another municipal instrument may be made by

- (a) an elector of the municipality, or
- (b) a person interested in the bylaw, order or resolution, as applicable.
- (2) On an application under subsection (1), the Supreme Court may
 - (a) set aside all or part of the municipal instrument for illegality, and
 - (b) award costs for or against the municipality according to the result of the application.
- (3) Subsections (1) and (2) do not apply to a security issuing bylaw providing for the issue of debenture or other evidence of indebtedness to the Municipal Finance Authority of British Columbia.
- (4) Notice of an application under subsection (1), stating the grounds of the application, must be served on the municipality as follows:
 - (a) if the municipal instrument is an instrument requiring the assent of the electors and the council purported to adopt the instrument without assent, the notice may be served more than one month after the adoption of the instrument, but must be served at least 10 days before the hearing;
 - (b) in any other case, the notice must be served at least 10 days before the hearing and not more than one month after the adoption of the municipal instrument.
- (5) Except for a municipal instrument referred to in subsection (4) (a), an order under this section relating to a municipal instrument must not be made unless the application is heard within 2 months after the adoption of the instrument.

- [456] Section 623(1) of the LGA authorizes an elector of a municipality or person interested in a bylaw, order or resolution to apply to Supreme Court to set aside a municipal bylaw or municipal instrument. The Village submits that the business licence issued to the Herds is neither a municipal bylaw nor a municipal instrument. As a result, the Village submits, and I agree, that the Hills cannot establish standing to challenge the business licence under s. 623 of the LGA.
- [457] The temporary parking permission is a resolution or order of Village Council which therefore falls under the definition of municipal instrument, and therefore would appear to be subject to challenge by the Hills under s. 623 of the LGA.
- [458] The Village submits, however, that the Hills failed to comply with the notice and limitation period requirements set out in s. 623(4) and (5), and that this is fatal to their standing to challenge the temporary parking permission under s. 623 of the LGA. In this connection, it relies on the decision of Justice Shergill in *O'Shea/Oceanmount Community Association v. Town of Gibsons*, 2020 BCSC 698 at para. 51, where she wrote "s. 623 serves to clarify for whom a right of judicial review exists, the posers the court can exercise on such a review, and what procedural requirements must be met to assert that right". At paras. 61-63, Shergill J. held that the applicants in that case had failed to comply with the two-month timeframe to commence the hearing of the application, and that they therefore lacked standing under the LGA.
- [459] I agree with the Village on this point. While Mrs. Hill's complaints through the Village's web portal may well have been sufficient to comply with the notice requirement, this trial did not commence within two months after the Village Council issued the temporary parking permission.
- [460] The Hills lack standing under s. 623 of the LGA to seek declarations with respect to either the business licence or the temporary parking permission.
- [461] I turn to whether the Hills have standing under the JRPA to seek declarations regarding the business licence or temporary parking permission. The Village concedes the Hills do have standing to seek the declaration regarding the temporary parking permission under the JRPA, but submits that they do not have standing thereunder to challenge the business licence. It relies on the decision of Justice Tucker in *Force of Nature Society v. City of Surrey*, 2021 BCSC 2511 at para. 102 for the principles applicable to standing under the JRPA.
- [462] In taking the position that the Hills lack standing under the JRPA to seek a declaration with respect to the business licence, the Village points to the fact that the Hills were not parties before the Village with respect to the issuance of annual business licences to the Herds. It also submits that the Hills are not directly affected by the decision to issue the business licence, by which it means that the Hills are not affected by the business licence, but rather by fuel being delivered from the alley. Finally, the Village submits that the Hills are not uniquely aggrieved or affected, nor do they suffer some exceptional prejudice, by reason of

the issuance of the business licence.

[463] I agree with the Village's submissions on this point. The Hills do not have standing under the JRPA to seek a declaration with respect to the business licences issued to the Herds.

[464] What is left to deal with in terms of the declarations sought is the declaration that the temporary parking permission is ultra vires. As an application for relief in the nature of judicial review, this is a review on the record. The Village identifies at paragraph 44 of its closing submission what the record consists of with respect to the temporary parking permission:

- i. The Community Charter and Village bylaws;
- ii. Council agendas and minutes from the July 18, 2018, Sept 18, 2018, Nov 21, 2018, January 10, 2019, January 24, 2019 meetings of Village Council.
- iii. The plans for the construction submitted to Village Council by the Herd Defendants;
- iv. The 2004 encroachment agreement;
- v. The January 28, 2019 letters to Mrs. Hill and Mr. Trotter; and
- vi. The February 7, 2019 email to Mrs. Hill.

[465] It seems to me that Mrs. Hill's complaints sent via the Village's web portal may well also have formed part of the record for the purposes of the temporary parking permission. I will proceed on the basis that they do.

[466] It will be recalled that the Hills seek a declaration that the permission is ultra vires, that is, that the Village council did not have the jurisdiction to grant the permission. The standard of review of the Village's decision that it had the requisite jurisdiction is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; 1120732 B.C. Ltd. v. Whistler (Resort Municipality), 2020 BCCA 101 at paras. 33-46; and *Zheng v. Sechelt (District)*, 2022 BCSC 2378 at para. 43.

[467] Applying the requisite reasonableness standard of review, I conclude that the decision to issue the temporary parking permission was not ultra vires the Village.

[468] As I understand the Hills' position on this point, they submit that the Village did not have the authority under the Traffic Bylaw, which was promulgated pursuant to the Motor Vehicle Act, R.S.B.C. 1996, c. 318, s. 124, to grant parking exemptions. As a result, they say that the permission to allow fuel delivery from the alley contrary to the terms of the Bylaw was beyond its power. As elaborated upon in their reply submission, they say that they are using the term ultra vires not in the sense of the permission being beyond the legal capacity of the Village, but in the sense of being beyond the power of an officer to whom authority has been delegated by the Village. They go on to write that the Traffic Bylaw:

gives the power to the CAO. Council did not amend the bylaw, pass a form of resolution or otherwise act in accordance with its powers. Having vested the power by bylaw in the CAO, on the face of its bylaw the council did not have the power to informally grant the permission. In addition, the permission constitutes a breach of the Fire Code. Council is not the authority having jurisdiction to grant alternate solutions. Therefore, any alternate solution on the basis that lane delivery is the safer option is ultra vires council on a plain reading of the Fire Services Act, which establishes Local Assistants to the Fire Commissioner as the authority having jurisdiction.

[469] In other words, the Hills' position is that because s. 2.01(1) of the Traffic Bylaw provides that the Village Clerk may authorize and issue parking exemption permits, it was beyond the power of the Council to grant the temporary parking permission. Further, the Hills submit that the parking permission is a breach of the Fire Code, which the Council does not have the authority to authorize.

[470] I do not agree with this submission. It was reasonable for the Village Council to determine that it had the jurisdiction to grant the temporary parking permission.

[471] The alley is a highway within the meaning of the Community Charter. The Community Charter provides the Village with the authority to regulate in relation to highways. This includes s. 36, which provides that a council may, by bylaw, regulate highways, and s. 38, which provides that a council may temporarily restrict or prohibit traffic on a highway. Section 15 provides that a council may provide for a system of licences, permits or approvals; it need not do so solely by means of a bylaw. Section 114 provides that Council is the governing body of the Village, and specifically under (4) that it has "all necessary power to do anything incidental or conducive to the exercise or performance of any power, duty or function conferred on a council or municipality by this or any other enactment".

[472] The issue of fuel being delivered from the alley had been brought to Council's attention by the Herds, Mrs. Hill and Mr. Trotter. At the closed meeting on January 24, 2019, Council considered the issue and found delivery from the alley "preferable to unloading from the front". Council advised Mrs. Hill of its decision by letter dated January 28, 2019. While it may have been unusual for Council, rather than the Village Clerk, to deal with this issue, Council's determination that it had the jurisdiction to do so was reasonable, given the statutory and factual context of the decision.

[473] The Village's decision to grant the Village Clerk the discretionary power under the Traffic Bylaw to issue parking exemptions did not divest the Council of its continuing power to do the same. I agree with the Village's submission that to do so would amount to an impermissible fettering of the Council's statutory powers: *Ocean Wise Conservation Association v. Vancouver Board of Parks and Recreation*, 2019 BCCA 58 at paras. 71-72.

[474] The primary basis upon which the Hills submit that delivery of fuel from the alley is a breach of the Fire Code is that the alley is a street and that unloading from the alley is therefore a breach. I have already considered and rejected this interpretation of Division A, Part 1, sentence 1.4.1.2(1) of the Fire Code. The alley is not a street. The Hills submit in the

alternative that if the alley is not a street it is firefighting access within the meaning of Fire Code sentence 4.3.2.4(2). Chief Derby's evidence was that if the tanks being on or near a fire, he would not instruct firefighters to insert themselves between the two fuel tanks as it would be unsafe. Further, he testified that in the event of a fire, the fire department would be directed to go to the front of the building. The Hills have not established that unloading fuel from the alley constitutes a breach of this or any other provision of the Fire Code. The Village Council's jurisdiction to grant the temporary parking permission was not limited by reference to the Fire Code.

- [475] To conclude on this point, there is no basis for this court to grant the declaration sought with respect to the vires of the temporary parking permission.
- [476] I have already determined that the Hills lack standing to seek the declaration with respect to the business licence. If they had standing, I would conclude that declaration sought ought not be granted in any event.
- [477] The Hills frame the declaration sought as "a declaration that the improvements carried out in 2018 are not in accordance with the Zoning Bylaw; therefore, the business licence issued to Herd & Smith was beyond the power of the Village officer to issue."
- [478] I agree with the Village that this amounts to an attempt by the Hills to enforce the Village's Zoning Bylaw. The Village submit that as private citizens the Hills do not have standing to require it to enforce its bylaws, and the court cannot make an order forcing the Village to enforce its bylaws. This position is well taken in law: *Spraggs v. Greater Vernon Services et al*, 2006 BCSC 176 at paras. 18-19 and *Drager v. Lojstrup*, 2016 BCSC 1447 at para. 37.

Negligence

- [479] The Hills allege that all three defendants were negligent.
- [480] The foundational test for negligence is not in dispute. As set out in *Waterway BCCA* at para. 198, the plaintiff must demonstrate:
- a) The defendant owed them a duty of care;
 - b) The defendant's behaviour breached the standard of care;
 - c) The plaintiff sustained damage; and
 - d) The damage was caused, in fact and in law, by the defendant's breach.
- [481] I will deal separately with the Hills' negligence claims against the Herds and the local governments, as different issues are raised.

Local Governments

[482] Negligence actions against government raise unique issues because of the range of government conduct that may be in issue. As stated in *Marchi v. City of Nelson*, 2021 SCC 41 at para. 39:

At one end are public policy choices that only governments make, such as decisions taken "at the highest level" of government to adopt a course of action based on health policy or other "social and economic considerations" (*Imperial Tobacco*, at para. 95). Courts are reluctant to impose a common law duty of care in relation to these policy choices (see *Dalehite v. United States*, 346 U.S. 15 (1953), at p. 57, per Jackson J., dissenting). At the other end of the spectrum, government employees who drive vehicles or public authorities who occupy buildings clearly owe private law duties of care and must act without negligence (*L. N. Klar and C. S. G. Jefferies*, *Tort Law* (6th ed. 2017), at p. 348). Tort law must ensure that liability is imposed in this latter category of cases without extending too far into the sphere of public policy decisions.

[483] The Hills say that the nuisance was created by the Village's and the RDKB's negligence in granting regulatory approvals for the renovation project. This encompasses their request for a declaration that the Village and the RDKB were negligent in permitting construction to be done in violation of the building permit.

[484] The Hills submit that the Village owed the Hills a duty of care under the recognized category established in *Kamloops v. Nielsen*, 1984 CanLII 21, [1984] 2 S.C.R. 2 [Kamloops]. They say that in permitting the renovations to occur contrary to its bylaws, the terms of the covenant and licence to occupy, the Village breached that duty. They submit that "this building permit should never have been issued. Having issued, it should have been stopped".

[485] The Hills submit that the RDKB owed them a duty of care under the Kamloops recognized category of direct neighbours. They submit that it was foreseeable that negligence in the discharge of the RDKB's duties under its contract with the Village could cause harm to the Hills. Here, they rely on matters such as Mr. Lepitre's alleged error in accepting construction within the three meter zoning set back, and not ensuring that the tank nest construction was reviewed by an authority having jurisdiction, among others. They say that it is clear that Mr. Lepitre failed to understand his mandate and the task at hand.

[486] In the alternative, the Hills submit that "if the court is not satisfied that the duty of care is within a recognized category, then the two stage *Anns/Cooper* test applies and a full proximity analysis is required". They do not provide further submissions about what that analysis would entail.

[487] The Hills submit that "the bylaws of the Village establish the standard of care: compliance with relevant Village bylaws, including the zoning and building bylaws and other enactments respecting safety, such as the Fire Code, as well as the traffic and noise bylaws."

[488] The Hills submit that issuing the building permit and finalizing the permit process in breach of its conditions had two consequences: it enabled the Herds to begin the operations which created the nuisances; and "it created the miasma of lawfulness which blinded the Village to its responsibilities and role". On this basis, they say that the RDKB was a cause in fact of the Hills' loss, as but for the construction, fuel would not be being delivered from the lane.

[489] The Hills submit that the damages for nuisance and negligence may be the same, but not necessarily. It is not clear on the Hills' submissions what they say the damages in negligence, as opposed to nuisance, are for each of the defendants. In their closing argument they failed to say that they were seeking any damages in negligence against the RDKB. When this was noted in the RDKB's closing submission, the Hills said in reply that that was an oversight, but the RDKB's damages are modest, because the intentional acts of the Herds and the Village after the nuisances were identified break the chain of causation from the initial negligence in granting the regulatory approvals.

Duty of care

[490] The Hills say that both local governments owed them a duty of care analogous to that found in Kamloops. The local governments both deny that they owed the Hills a duty of care, whether under Kamloops or a novel duty of care.

[491] The analysis required to determine if a duty of care exists was summarized by the Court of Appeal in *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at para. 50 as follows:

- 1) Does a sufficiently analogous precedent exist that definitively found the existence or non-existence of a duty of care in these circumstances;

If not;

- 2) Was the harm suffered by the plaintiff reasonably foreseeable;

If yes;

- 3) Was there a relationship of sufficient proximity between the plaintiff and the defendant such that it would be just to impose a duty of care in these circumstances;

If yes, a prima facie duty arises;

- 4) Are there any residual policy reasons for negating the prima facie duty of care established in question/step 3, aside from any policy considerations that arise naturally out of a consideration of proximity.

If not, then a novel duty of care is found to exist.

- [492] The Hills say that the duty of care owed by the local governments to them comes under the recognized category at the heart of Kamloops. In that case, the City's building inspector, acting under the City's bylaws, inspected the footings of a house and issued a stop work order pending the submission of a plan to correct structural deficiencies. Work on the house continued despite the stop work order. The plaintiffs were subsequent purchasers of the house. They sued the City and the vendor for negligence. They were successful at trial, with that result being ultimately upheld by the Supreme Court of Canada.
- [493] The Supreme Court held that the City of Kamloops made a policy decision to regulate construction by bylaw and charged its building inspector with the enforcement of the bylaw. In discharging this operational duty, the City owed a duty of care to persons whose relationship was sufficiently close that they ought to have been reasonably within its contemplation as likely to be injured by a breach of its duty. The subsequent purchasers fell within this category.
- [494] The Village submits, and is echoed by the RDKB, that the Kamloops case is not sufficiently analogous to the case at bar for the following reasons:
- Schedules were provided to the Village's building inspector by Mr. Roger Austin, certifying that the work was conducted in conformity with the relevant municipal bylaws and enactments respecting safety;
 - Mr. Lepitre relied upon Mr. Austin's certification of the work completed and was entitled and reasonable to do so. It is not the case, as it is alleged, that the Village permitted construction contrary to its bylaw and the terms of its covenant and licence to occupy;
 - No stop work order was issued by the Village and then ignored;
 - The plaintiffs are not the subsequent purchasers of the Petro Canada gas station; and
 - The Village's Building Bylaw does not contain an obligation on the building inspector to enforce the provisions of that bylaw - the language in section 7 of that bylaw is merely permissive.
- [495] I agree with the Village's submission on this point. I view the final three points as particularly important in distinguishing Kamloops from the case at bar: the Village did not issue a stop work order then fail to enforce it, the Hills are not subsequent purchasers of the gas station, and the Village's Building Bylaw does not create an obligation on its building inspector to enforce its provisions.
- [496] The Village further submits that there are precedents that have definitively found the non-existence of a duty of care in circumstances analogous to the case at bar. I turn to a consideration of those authorities.
- [497] In *Wu v. Vancouver (City)*, 2019 BCCA 23 [Wu], the Court of Appeal considered whether a public authority's negligent breach of a statutory duty is a breach of a private law duty of care. The trial judge had held that the City owed the plaintiffs a novel duty of care to "make

a decision on the plaintiffs' development permit application, in accordance with the applicable laws, and to do so within a reasonable time": at para. 34. The Court of Appeal overturned the trial judge. At para. 39, the Court of Appeal held that the duty of care characterized by the trial judge was "equivalent to and no different from the public law duty owed to applicants". At para. 42, the Court of Appeal further held that "the duty as defined by the judge is nothing more than the public duty articulated as or converted into a private law duty of care." The Court went on to hold as follows in a passage worth quoting in full at paras. 43-47:

- [43] This brings us to the first problem with the judge's analysis. It is a settled principle that Canadian law does not recognize a nominate tort of breach of statutory duty. As *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, and *Holland v. Saskatchewan*, 2008 SCC 42, make clear, there is no duty of care imposed on officials to act in accordance with authorizing statutes or regulations. Standing alone, a breach of a statutory duty is not a breach of a private law duty of care. While a breach of statutory duty is subsumed within the law of negligence, a breach of a statutory duty can be evidence of negligence. As a general rule, a breach of a public law duty is not sufficient to establish the breach of a private law duty. The first is not readily converted to the second. The existence of a private law duty of care must be established by the application of common law principles.
- [44] This proposition is illustrated by the decision of the Supreme Court of Canada in *Holland*. In that case, the Supreme Court of Canada upheld a decision of the Saskatchewan Court of Appeal striking a claim in negligence based on a failure of public officials to act in accordance with the authorizing acts and regulations. The statement of claim had explicitly alleged a duty of care to ensure that the legislative framework at issue was "administered in accordance with the law". McLachlin C.J., writing for the Court, outlined the alleged acts of negligence as follows:
- [7] The statement of claim, read generously as required in an application to strike, focused mainly on two alleged acts of negligence: requiring the game farmers to enter into the broad indemnification agreement, and down-grading the status of those who refused to do so. In both cases, the alleged fault may be described as failing to act in accordance with the authorizing acts and regulations.

[Emphasis added.]

- [45] The Supreme Court of Canada relied on *Saskatchewan Wheat Pool* for the principle that the law does not recognize an action for negligent breach of statutory duty and that mere breach of statute is not negligence. The Court endorsed the view that the law has not recognized an action against a government authority for negligent breach of statutory duty by acting outside or contrary to the law. The issue thus became whether a new instance of negligence should be permitted, by reference to the principled *Anns/Cooper* analysis (*Anns v. Merton London Borough Council*, [1978] A.C. 728; *Cooper v. Hobart*, 2001 SCC 79). The Chief Justice reasoned:

[9] In my view, the Court of Appeal was correct in these conclusions. The law to date has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute negligence: *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 (S.C.C.). The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity. The appellant pursued this remedy before Gerein C.J.Q.B. and obtained a declaration that the government's action of reducing the herd certification status was unlawful and invalid. No parallel action lies in tort.

[10] The next question was whether a hitherto unrecognized relationship of potential liability in negligence should be recognized under the *Anns* test. Assuming, without deciding, that the legislative and regulatory matrix established proximity between the Class and the government at the first step, policy considerations would negate recognition of liability, as the Court of Appeal detailed. These include the chilling effect and specter of indeterminate liability. As Richards J.A. stated at para. 43 of the Court of Appeal's decision:

... the respondent's theory of liability would fundamentally shift the way in which the public and private spheres historically have carried the consequences or burden of governmental action which is shown to be *ultra vires*. I see no policy reason which would warrant such a dramatic revision in the shape of the law and, as indicated above, see much which cuts tellingly against shaping the law in the manner sought by the respondent.

[46] The principles set out in this case were quoted and relied on by this Court in *Ari v. Insurance Corporation of British Columbia*, 2015 BCCA 468, albeit in a somewhat different context.

[47] With respect, the analysis in *Holland* appears to me to be directly applicable to this appeal. The duty described by the judge is no more than an action for negligent breach of statutory duty by a public authority. The proper remedy is judicial review. A failure to act as required by statutory authority is properly remedied by an order in the nature of *mandamus* compelling the authority to decide. The duty recognized by the judge amounts to a fundamental shift in the way in which public and private spheres have historically addressed improper governmental action.

[498] The Village places particular reliance on the decision of Madam Justice Watchuk in *Suncourt Homes Ltd. v. Cloutier*, 2019 BCSC 2258 [Suncourt]. That case arose out of a dispute between neighbours over a renovation project. The City of Kelowna was the authority responsible for issuing the relevant permits. The plaintiffs alleged that the City was negligent in allowing the project to proceed in violation of its Soil Removal and Deposit Regulation Bylaw.

[499] Justice Watchuk commenced her analysis of the claim against the City at para. 136. At para. 143, she referred to *Wu* at para. 50 in support of the proposition that in determining whether there is a *prima facie* duty of care, there is an increasing emphasis on proximity at the expense of foreseeability.

- [500] Starting at para. 145, Watchuk J. considered the nature of the relationship between the plaintiffs and the defendant City, and whether it was sufficiently proximate to ground a duty of care. At para. 145, she wrote that "only where that relationship is sufficiently 'close and direct', may the defendant "be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs". At para. 147, she wrote:
- [147] The relationship between a public regulator and an individual member of the regulated public does not generally give rise to sufficient proximity to ground a private duty of care. Although "public officials are under statutory duties to act in accordance with obligations imposed on them by statute", these duties are public, rather than private in nature, and give rise to public law remedies: Wu at paras. 39-40. Subject to rare exceptions, statutory duties owed by public authorities are insufficient to ground private law duties arising out of interactions inherent in the exercise of the public law duty: Wu at para. 58. A breach of such a duty does not in itself give rise to private liability: Wu at para. 43.
- [501] At para. 148, Watchuk J. discussed the policy rationale for the principle that the relationship between a public regulator and a member of the public is not generally sufficiently proximate to give rise to a duty of care. In that connection, she wrote "although they owe a public duty to enforce these standards generally, they 'are not liable for losses simply because a legislated standard is not enforced". Absent bad faith, public regulators are entitled to determine whether and how regulations are to be enforced.
- [502] At para. 149, Watchuk J. considered what is needed for a private duty of care to arise:
- [149] Something more is needed to give rise to a private duty of care. Such a duty will only arise when a public authority steps outside its strict regulatory role and engages with risk on an individual, rather than collective basis. To fall under a private duty of care, a public authority must assume responsibility for the private interests of specific individuals, as opposed to its responsibility to the collective interests of the public at large.
- [503] Justice Watchuk held that the City did not owe the plaintiffs a private duty of care. At para. 156, she held that the City had not stepped outside of its role of public regulator to assume the specific responsibility for protecting the plaintiffs' individual interests. The City's statutory duty to issue permits in accordance with its bylaw did not give rise to a duty of care. At para. 158, Watchuk J. noted that "if there is no proximity between a regulator and an applicant for a permit, there is even less between a regulator and the neighbour of such an applicant".
- [504] The Village submits that Suncourt is so directly analogous to the case at bar as to be a binding horizontal precedent that the local governments in this case did not owe the Hills a duty of care.

[505] The RDKB also relied on Suncourt. The RDKB emphasized a passage at paras. 167-172, in which Watchuk J. considered whether circumstances might arise in which the City might have a duty of care in the course of administering a building bylaw. At paras. 169-170, she wrote:

[169] Finally, the plaintiff suggests the City stepped outside its regulatory role by adopting a policy of effectively ignoring the Soil Bylaw. This abdication of regulatory responsibility, it argues, justifies the imposition of a duty of care in this case.

[170] In my view, this argument also confuses the City's public law duties with a private law duty of care. I accept, as the plaintiff argues, that the City did not consider the Soil Bylaw when issuing the Cloutiers' building permit. It was the City's policy not to require residential applicants to possess soil removal permits for the purposes of the Building Bylaw. In applying this policy, however, I do not conclude that the City's employees stepped outside their regulatory role as the plaintiff suggests. At worst, they erred in their performance of that role, either by fettering their discretion or adopting an incorrect or unreasonable interpretation of the bylaw. Without ruling on the validity of the City's decision, it is sufficient to observe that these are issues of public law, which should be addressed by way of judicial review and not by an action in negligence.

[Emphasis added.]

[506] The RDKB submits that the same is true in the case at bar so far as it is concerned. Even if the court adopted a different view of the Building Bylaw or Building Code than Mr. Lepitre, that would be a matter of public law, not negligence. In this regard the RDKB notes that the Hills have not sought judicial review of any decision made by the RDKB

[507] The Village also refers to *Westcoast Landfill v. CVRD*, 2009 BCSC 53 in support of its submission that it did not owe the Hills a duty to enforce its bylaws against others. In that case, the court held at para. 361 that the enforcement of CVRD's bylaw was at its discretion and a matter of policy. The plaintiff had no cause of action against the CVRD for its failure to enforce its bylaw.

[508] The Village submits that its Building Bylaw contains no requirement for a duty of enforcement. Section 7, which refers to the duties of building officials, is permissive, using the word "may" to describe what such officials may or may not do in the administration of the bylaw. I agree with the Village that the Building Bylaw is permissive.

[509] The basis for the Hills' negligence claims against both the Village and the RDKB is that they failed to ensure that the renovation project complied with the relevant codes and bylaws. This theme appears throughout the Hills' closing and reply submissions. At para. 227 of their closing submission, they argued that the Village owed the Hills a duty of care and that "in permitting the 2018 construction contrary to its bylaws and the terms of its covenant and licence to occupy, the Village breached that duty". The core of the Hills' case in negligence is perhaps most clearly summarized at para. 33 of their reply submission,

where they argue:

- a) The regulatory approvals in this case were negligently granted;
- b) By virtue of that negligence, the use of the land to cause the nuisance began;
- c) The plaintiffs, as neighbours in this fact pattern, were owed a duty of care (proximity and foreseeability based on a recognized category);
- d) Alternatively, if the court does not accept an existing category, the full Anns/Cooper analysis is required;
- e) The regulatory approvals were the cause in law of the plaintiffs' damage; that is, the damage was foreseeable;
- f) The regulatory approvals were a cause in fact of the plaintiffs' damage; that is, the initial nuisance, damage to the home, and non-pecuniary loss;
- g) The regulatory approvals to renovate in 2018 were not the cause of the damages sustained by the plaintiffs after the nuisances were identified and the Herd defendants and the Village were aware of them because the ongoing nuisances are intentional conduct of the Village and Herd defendants with each nuisance a new cause of action creating further damage. In other words, the intentional acts have broken the chain of causation from the negligence.
- h) The negligence damages are modest, at large and in the discretion of the court to remedy the harm.
- i) The noise and smells emanating from land owned by the Village and the smells emanating from the Herd defendants land are uses of land causing the interference with the plaintiffs' enjoyment of their land.
- j) The Village consents to the Herd defendants using the Village's land to cause the nuisances. The Village did not just issue approvals, it is making "some use of land". It consents to the use of the Village's own land to create the interference.

[510] I agree with Village's and the RDKB's submissions with respect to the absence of a duty of care. The Hills have alleged nothing beyond the breach of statutory duties by either local authority. There is nothing alleged that would take this case outside of the holdings in Wu and Suncourt. The negligence case against both the Village and the RDKB falls at the first hurdle, as sufficiently analogous precedents exist that definitively found the non-existence of a duty of care in these circumstances. Neither local government owed the Hills a private law duty of care in the administration or enforcement of its bylaws.

[511] In light of this conclusion, it is unnecessary for me to consider further the Hills' claim of negligence against the Village or the RDKB.

The Herd defendants

[512] The Hills claim that the Herds were negligent. Their theory of this aspect of the case is summarized at paragraphs 220-223 of their closing submissions:

220. The Herd defendants' duty of care: the Hills are direct neighbours. The Herd defendants had the Hills in their contemplation. Ms. Coombes testified, although not credibly, that in the lane assessment with Mr. Coldwell and Mr. Johnston, she and Ms. Baziw were concerned with and specifically asked about the impact on the neighbours. Neither Coldwell nor Johnston supported this evidence and neither were cross examined by Herd's counsel on Ms. Coombes version of events. This effort at recent fabrication was insightful as it indicated what Ms. Coombes thought they should have been asking G&B and what would insulate them from responsibility based on reliance on others. It is powerful evidence of foreseeability in this case.
221. In this case the bylaws of the Village establish the standard of care: compliance with relevant Village bylaws, including the zoning and the building bylaws and other enactments respecting safety, such as the Fire Code, as well as the traffic and noise bylaws. Ms. Coombes, in signing the building permit application as agent for Mr. Herd, undertook that the owner would do so. This is the primary obligation of the owner of property. The Herd defendants did not contract with Austin Engineering Ltd. for the professional to fulfil those primary obligations. Its retainer is limited. The fact that a property owner hires a professional to assist does not alleviate the owner of that primary obligation. As between Austin Engineering Ltd. and the Herd defendants there are many issues for them to work out in subsequent proceedings, including the limited scope retainer and the limitation of liability provision in its contract. There is strong authority for the proposition that Mr. Austin owed no duty of care to the Hills. On the evidence before the court, it was the property owner who took responsibility as demonstrated by the permit applications, the permits themselves and the section 11(3) letters, and who is the person who owes the duty of care to the Hills, not the owner's advisor. The RDKB holds out to the public that the entire building bylaw process is intended to "ensure that development meets health, fire, structural and general safety requirements for the protection of the individual, the consumer and the community as a whole": see ex. 6, p. 290. The Hills are individuals. They are direct neighbours. The Herds are the consumer of the building bylaw service and all proximate neighbours are certainly members of the community as a whole.
222. The Bergquist report was delivered with the notice of civil claim putting the Herd defendants on notice that there were serious concerns with the Fire Code. The only alteration undertaken as a result of the Bergquist report was to place the 911 sign on the lane gate to the tank nest.

223. The Herd defendants have not done anything to ameliorate the impact of their negligence, nor have they taken any meaningful steps to abate the continuing nuisances. The damage to the Hills was foreseeable (legal causation) and their negligence was the cause in fact of the Hills damage.
- [513] In response, the Herds accept that they owed a duty of care to the Hills as their neighbours.
- [514] The Herds disagree that the standard of care proposed by the Hills is appropriate. While they accept that legislative standards are relevant to the standard of care, they submit that they are not necessarily co-extensive: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28-29. They submit that the standard of care applicable in the case at bar should be determined by posing the question what a reasonable person would have done in the circumstances. That is, would a reasonable person have completed the 2018 renovations in the same manner as the Herds, and operated the gas station such that fuel deliveries would take place from the alley?
- [515] The Herds rely on *Reaton Leasing Ltd. v. Glenmore-Ellison Improvement District*, 2004 BCSC 386 [Reaton] with respect to the standard of care analysis. In that case, the plaintiff's golf course was flooded by water from a nearby dam licenced to the defendant. The defendant had relied on the advice of its consulting engineer. Unbeknownst to the defendant or its engineer, the reservoir was being filled beyond the limits of its licence. Mr. Justice Cole found that the defendant acted reasonably, despite not knowing its licence limit or that it was operating in violation of it, in acting on the advice of its engineer.
- [516] The Herds submit that their conduct did not fall below the applicable standard of care. They say at paras. 348-349 of their closing submission:
347. Like the defendant in *Reaton*, it was reasonable for Herd and Smith to rely on Austin Engineering Ltd., a professional engineer that they retained for expert advice.
348. A reasonable person in the position of Herd & Smith would have taken the same steps as Herd & Smith with respect to the 2018 renovations and fuel deliveries. A reasonable person would have consulted with people who it intended to do business with regarding the suitability of delivery in the back alley. A reasonable person would have retained engineering professionals to design and oversee the renovation project. A reasonable person would have met with contractors regarding the execution of the construction project. A reasonable person would have consulted with local government as to the suitability of the proposed change in business operations. A reasonable person would have applied for and obtained all requisite permits, licenses, and approvals from local government. These are things that Herd & Smith did.
- [517] The Herds further submit that the Hills have failed to establish damages or causation. In particular, they submit that the Hills have failed to establish that any act or omission on their part was the proximate cause of any loss the Hills have suffered.

- [518] I propose to deal with the question of whether the Herds are liable in negligence relatively summarily. I have already found them liable in nuisance. If the Herds were negligent, it would not alter the damages award I have already made with respect to the nuisances suffered by the Hills. So far as I can determine, the Hills claim the same damages from the Herds with respect to both causes of action, and any negligence on the Herds' part would not alter the damages I have awarded in nuisance.
- [519] In the circumstances, there would appear to be no utility in engaging a lengthy analysis of whether the Herds were negligent. For the sake of completeness, I will say that I agree with the concession made by the Herds that they owed the Hills a duty of care. I also agree with the Herds with respect to the requisite standard of care.
- [520] I also agree with the Herds that they acted reasonably, and fulfilled the requisite standard of care, with respect to their decision to move fuel delivery to the alley and to have the renovations conducted that were necessary to allow that to occur. Their view that delivery from the alley would be safer than delivery from the forecourt finds ample support in the evidence. They reasonably consulted with Mr. Austin, representatives of Suncor, G&B and the Village, among others, in deciding how to go about doing so. They obtained the permits and licences necessary to do the renovations and to deliver fuel from the alley, and reasonably relied on Mr. Austin that they were in compliance with all relevant bylaws and statutes. They had no reason to question the advice they received or whether the works undertaken on their behalf were safe and in compliance with all applicable regulations and bylaws.
- [521] There are two exceptions, where I would find that the Herds' conduct fell below the requisite standard of care. The first has to do with the tank nest light. There is no evidence that the Herds relied on any expert for their decision to have that light on 24/7 initially, to install a shield to reduce the illumination of the Hills' property, to chose to have it on a timer so that it was on from 5:00 a.m. to 9:00 p.m. daily, or to ultimately turn it off and only turn it on manually when required. All of that would appear to have been decided by the Herds on their own, with the ameliorative steps taken in response to complaints from the Hills.
- [522] While the Herds may initially have thought that the constant illumination of the tank nest light was necessary for safety reasons, the experience of the past five years has shown that to be untrue. A reasonable person in the position of the Herds would have realized from the outset that the tank nest light would cause an intolerable degree of light pollution for the Hills, and would have ensured that it was only illuminated when actually necessary to conduct a fuel delivery in the dark. It was never necessary for it to be on continuously or between 5:00 a.m. and 9:00 p.m. daily. The Herds' failure to ensure it was only on when required for an evening delivery was a breach of the requisite standard of care, and was the cause, in law and fact, of the damages suffered by the Hills which I have already described.

- [523] The other exception arises from the installation of the vapour recovery system. That system was installed by the Herds in February and April 2021 to contain the gasoline fumes released during fuel delivery. The Herds investigated a vapour recovery system at the time of the 2018 renovations, and discussed it with the Village in late 2018 or early 2019. A reasonable person in the position of the Herds would have realized from the outset that fuel delivery in the absence of a vapour recovery system would result in fumes being released, and that the Hills, given the location of their property in relation to the alley, fuel trucks and tanks, would be disproportionately affected by them. From the Herds' evidence, it would appear that the reason they did not install a vapour recovery system at the outset was cost. Their failure to install a vapour recovery system during the 2018 renovations was a breach of the requisite standard of care, and was the cause, in law and fact, of the damages suffered by the Hills which I have already described.
- [524] I have already taken the foregoing into account in assessing damages for the nuisances suffered by the Hills and need not consider them further.

Summary

- [525] For the foregoing reasons I have concluded that Herd & Smith Holdings Ltd. is liable in nuisance to Mr. Hill, Mrs. Hill, and their son JD for the fumes, noise and lights emanating from the Warfield Gas station as a result of the changes made to the method and location of fuel delivery in 2018.
- [526] I have declined to order a permanent injunction, as the balance of convenience favours the Herds being permitted to continue to deliver fuel from the alley.
- [527] I have assessed general damages for nuisance against Herd & Smith Holdings Ltd. as follows:
- a) Mr. Hill-\$20,000
 - b) Mrs. Hill-\$30,000
 - c) JD (to be paid in trust to the Public Guardian and Trustee)-\$30,000
- [528] In addition, I have assessed special damages in the amount of \$650, payable by Herd & Smith Holdings Ltd. to Mr. and Mrs. Hill.
- [529] I have dismissed the action in nuisance against the Village of Warfield.
- [530] The tort in *Rylands v. Fletcher* was not extensively canvassed in the parties' submissions. In my view it would add nothing to the nuisance analysis in the circumstances of this case, and I decline to consider it further.

[531] I have dismissed the action in negligence against all defendants, with the two limited exceptions just discussed with respect to the Herds. Neither the Village of Warfield nor the Regional District of Kootenay Boundary owed the Hills a duty of care to comply with their bylaws or to enforce or otherwise ensure that others complied with their bylaws. The Herds did owe the Hills a duty of care, but complied with the requisite standard of care, with the two exceptions just discussed.

[532] I have declined to make any of the declarations sought by the Hills.

[533] Success has been divided, at least as between the Hills and the Herds. If the parties are unable to agree on costs, they may seek to appear before me to address costs by contacting Supreme Court Scheduling within 30 days of the date of this decision.

"L.M. Lyster J."

LYSTER J.

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