

CANADA / JUDGMENT

New Edge Construction Ltd. v. White Rock (City)

2025 BCSC 1489

COURT

Supreme Court of British Columbia

DECIDED

1 August 2025

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2025 BCSC 1489 New Edge Construction Ltd. v. White Rock (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

New Edge Construction Ltd. v. White Rock (City),

2025 BCSC 1489

Date: 20250801

Docket: S244816

Registry: Vancouver

Between:

New Edge Construction Ltd.

Petitioner

And

The Corporation of the City of White Rock

Respondent

Corrected Judgment: The text of the judgment was corrected on January 23, 2026

Before: The Honourable Justice Dion

Reasons for Judgment

Counsel for the Petitioner:

D.P. Davison

Counsel for the Respondent:

M.R. Voell

Place and Dates of Hearing:

Vancouver, B.C.

March 5-7, 2025

Place and Date of Judgment:

Vancouver, B.C.

August 1, 2025

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Overview

- [1] The petitioner, New Edge Construction Ltd. ("New Edge" or the "Petitioner") seeks judicial review pursuant to section 2 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, in respect of building and lot servicing permits. The permits were issued by the respondent, the City of White Rock (the "City" or the "Respondent") in 2024 for a residential home located at 15097 Victoria Avenue in White Rock, B.C. (the "Property").
- [2] More specifically, the Petitioner seeks to quash one or more of the permits on the basis that the City was unreasonable and acted outside of its jurisdiction in requiring them to erect a new retaining wall to provide support to the Property and remove part of the existing retaining wall that encroaches upon an adjacent City highway. They also seek an order for mandamus directing the Respondent to amend the building permit in the terms sought by the Petitioner to allow them to carry out the proposed development as they intended.
- [3] The Respondent says that the petition must be dismissed. City staff acted reasonably when they required the Petitioner to address the removal of a portion of an encroaching retaining wall from the adjacent City highway and demonstrate that the proposed development had lateral support independent from the encroaching retaining wall.
- [4] For the reasons that follow, the petition is dismissed with costs to the Respondent.

Background

- [5] New Edge is the registered owner of the property with the civic address of 15097 Victoria Avenue, White Rock, B.C., legally described as:

Lot 28 Block 8 Section 10 Township 1, New Westminster District Plan 525

PID 011-635-495 (the "Property").

- [6] Commencing in October 2022, New Edge initially began planning a development project on the Property as agent for the then owner, Mr. Allan Safarik, who had applied for a building permit. While the building permit application was under review, New Edge acquired the Property in or about January 2023. Building permits are not transferrable, so New Edge had to reapply for redevelopment permits.
- [7] The Property size is 3,510 feet, bordered by a residential property to the west, Foster Street to the east, and Victoria Avenue to the south, and a back lane to the north. The single-family house, initially built in 1978, was demolished for prospective home development. Victoria Avenue and Foster Street are highways owned and operated by the City.
- [8] The Property is subject to a number of City Bylaws, including:
 - a) The City of White Rock Building Bylaw, 2012, No. 1928, as amended ("Building Bylaw").

- b) The City of White Rock Sewer Connection and Rental Charges Bylaw, 1970, No. 396 ("Sewer Connection Bylaw").
 - c) The City of White Rock Road Subdivision Bylaw (including Engineering Standards) Bylaw, 1980, No. 777, as amended (the "Engineering Standards Bylaw").
 - d) The City of White Rock Street and Traffic Bylaw, 1999, No. 1529, as amended ("Street and Traffic Bylaw").
- [9] A concrete retaining wall ("Retaining Wall") is located along Victoria Avenue, which supports nine residential properties running westward. It is approximately 10 to 15 feet high. The City says it is not clear from their records by whom or when the Retaining Wall was built, however, they estimate it was built around 1960 by the then owners of the Property. A portion of the Retaining Wall runs north and south onto the Property.

Is the Retaining Wall on City Property?

- [10] The City says the Retaining Wall, while largely located on City land designated as highway, supports the privately-owned Property. A part of the Retaining Wall contains stairs that allow access from the street to the Property. In their oral submissions, New Edge acknowledged that a part of the stairs encroaches onto City property. The City says the Retaining Wall is partially located within the highway dedications of Victoria Avenue and Foster Street.
- [11] The City has enacted various policies that apply to properties along Victoria Avenue that are supported by the Retaining Wall.

City Policies Regarding Existing Retaining Walls

- [12] In an effort to address unpermitted and unlawful encroachments on City highways, the City of White Rock Council ("Council") adopted bylaws and policies directing City staff to, inter alia, preserve road rights of way for public use and reclaim existing encroachments on City property when adjacent properties are redeveloped.
- [13] Section 35 of the Street and Traffic Bylaw prohibits encroachments onto the City's highways unless the property owner first obtains a permit from the City and enters into an encroachment agreement with them.
- [14] City of White Rock Roads/Road Allowance Policy No. 600, adopted September 11, 2000, provides that:
- 2) Encroachments or improvements on the Road Right of Way are not permitted. If a geotechnical engineer determines that (sic) retaining wall is necessary to support the City's highway, protect trees or support a neighbouring property's driveway, the City engineer may permit the installation of a retaining wall through a Road and Right of Way Use Permit and an encroachment agreement.

- [15] On November 18, 2019 City Council accepted a City staff report titled "Preserving Road Right of Ways for a Sustainable City", which included a recommendation that Council take steps to prevent new right of way encroachments and take back city land at the time of redevelopment. The aim was to make the City more sustainable. Over the past decades, property owners have encroached onto City land in various ways, including by way of retaining walls and garden beds. The Council also directed City staff to continue to administer the Street and Traffic Bylaw with respect to both new encroachments as well as existing encroachments at the time property is redeveloped.
- [16] The City of White Rock Integrated Transportation & Infrastructure Master Plan, adopted by the Council in July 2022, sets out the master plan for guiding the City's transportation investments, municipal infrastructure improvements, capital expenditures and decision making over the next 20 years (the "Transportation & Infrastructure Master Plan").
- [17] Among other things, the Transportation & Infrastructure Master Plan:
- a) identifies the use of City highways as "complete streets", accommodating all road users as an area of focus for future planning and development;
 - b) identifies encroachments onto public rights of way and private use of public property as a key issue to be addressed by the City;
 - c) endorses the strategy of "freeing up" City owned boulevard space from encroachment to support the development of an expanded network of sidewalks and pathways to create a more walkable and bikeable City; and
 - d) proposes that a future sidewalk be installed to the east of the Property on Victoria Avenue, that will connect with the sidewalk in front of the Property.
- [18] The City submits that these bylaws and policies require that redevelopment of private property in the area of the Property be done in a manner that supports the City's vision for the long-term build-out of Victoria Avenue, including the accommodation and development of active transportation and additional parking areas. Further, the City seeks to ensure that new construction and redevelopment of private properties supporting retaining walls complies with current engineering standards.

Proposed Redevelopment of the Property

- [19] As part of Mr. Safarik's application for redevelopment in October 2022, he applied to the City for the building permit and a lot servicing permit. Also submitted with the application, were various plans and drawings, including geotechnical drawings, dated September 2022. These drawings showed the location of the Retaining Wall located on the Property and on the adjacent highway. They also included site plans setting out the proposed connections to City sanitary sewer and water utilities.

- [20] After New Edge had been advised a new redevelopment application was required, in July 2023, they submitted applications to the City for permits to redevelop the Property.
- [21] The July 2023 permit application materials included a geotechnical report, dated July 5, 2023, which, the City says, purported to rely on the continued existence of the Retaining Wall, which encroached on Victoria Avenue to the south and southeast of the Property. The Petitioner did not provide any new plans or drawings, but rather, continued to rely upon the 2022 drawings.
- [22] On August 21, 2023, the City advised the Petitioner they were obliged to meet specific obligations so as to comply with the City's bylaws and policies respecting encroachments for redevelopment. Among other things, at this stage, the City advised the Petitioner that they were required to:
- a) submit plans to remove the portion of the Retaining Wall on the City highway to the southeast of the Property while ensuring that the Property was supported for the proposed development;
 - b) ensure that the remaining portion of the Retaining Wall, to the southwest of the Property (which did not have to be removed) was independent and did not provide the necessary lateral support for the Property, in order that it could be removed at a later date; and
 - c) insofar as the Petitioner intended to retain the southwest portion of the Retaining Wall, they were required to enter into an encroachment agreement with the City and provide the City with an evaluation of the remaining portion by a structural engineer to ensure its ability to stand alone.
- [23] Similar correspondence was sent to the Petitioner by the City on September 7, 2023. New Edge says the City advised them that the Street and Traffic Bylaw required the City's boulevard to be regraded as part of the proposed development and that New Edge would be required to design the lot separate of the portion of the Retaining Wall (the "Reasons" or "Decision").
- [24] As a result, the Petitioner submitted updated plans and drawings to the City on September 18, 2023, however the City determined that the updated materials were deficient in that they did not address the southwest portion of the Retaining Wall.
- [25] Over the next seven months, the parties' engagement intensified as did their work with various professionals. The City retained a geotechnical consultant to provide a second opinion relating to the ongoing issues involving the development of the Property and the retaining walls. Information was provided between the parties, including New Edge submitting multiple revised plans and drawings. Between April 3, 2024 and May 22, 2024, the parties exchanged various correspondence, and the plans and drawings were further revised.

- [26] The City ultimately issued the building permit ("Building Permit"), the lot service permit ("Lot Servicing Permit") and Highway/Right of Use Permit (together, the "Permits") to New Edge. The Permits expressly provide that they were issued to construct improvements pursuant to the plans received by the City from New Edge.
- [27] The final plans provided for,
- a) building a new retaining wall on the southern border of the Property which provides support to the Property;
 - b) New Edge's removal of the Retaining Wall and staircase fronting the Property up to the western property line; and
 - c) an encroachment onto Victoria Avenue and an Encroachment Agreement between New Edge and the City.
- [28] New Edge then commenced construction on the Property. However, they argue that the City should not have rejected the initial designs for the proposed development from 2022, resubmitted by New Edge in 2023.
- [29] New Edge says that the City should allow them to proceed with the proposed development in terms of the initial drawings submitted by the Petitioner to the City. In this regard, the Petitioner says that the orders sought by them are justified.

Admissibility of New Edge's Affidavits

- [30] Before moving on to the legal analysis, I wish to address issues raised by the City regarding the admissibility of some or portions of some affidavits filed by New Edge.
- [31] On July 19, 2024, the Petitioner served the Respondent and the Ministry of Attorney General Legal Services Branch with the Petition and Affidavit #1 of Anil Patel, made and filed on July 19, 2024. Anil Patel is the principal of New Edge. The Ministry did not participate in these proceedings.
- [32] On August 15, 2024, the Respondent filed and served its Response and in support, Affidavit #1 of City employee, Corrine Haer, sworn and filed on August 15, 2024 ("Haer Affidavit").
- [33] There were three notices of hearing issued in this matter.
- [34] The first notice of hearing was issued on August 20, 2024 and a second was issued on September 18, 2024. An Amended Petition was filed on February 4, 2025. No amended Response was filed. A third notice of hearing was issued on February 13, 2025, and the petition was heard March 5 to 7, 2025.
- [35] On November 5, 2024, the Petitioner served the Respondent with additional affidavits ("New Affidavits"):

- i. Affidavit #2 of Anil Patel, sworn on October 30, 2024, and filed on November 4, 2024 ("Patel Affidavit #2");
- ii. Affidavit #1 of Noel Nitish Lal, sworn and filed on November 4, 2024 ("Lal Affidavit");
- iii. Affidavit #1 of Susan Elaine Shumka, sworn on October 30, 2024, and filed on November 4, 2024 ("Shumka Affidavit");
- iv. Affidavit #1 of Kenneth George Bain, sworn on October 30, 2024, and filed on November 4, 2024 ("Bain Affidavit");
- v. Affidavit #1 of Shamsul Arifin, sworn on October 30, 2024, and filed on November 4, 2024 ("Arifin Affidavit"); and
- vi. Affidavit #1 of Gerald Charles Parson, sworn on October 30, 2024, and filed on November 4, 2024 ("Parson Affidavit").

[36] Mr. Lal is a lawyer in the office of counsel of record for the Petitioner. The other four New Affidavits are those of owners of properties which also run along the Retaining Wall on Victoria Avenue.

[37] The City seeks to strike:

- i. Paragraphs 3-5 and Exhibit "A" of the Patel Affidavit #2;
- ii. The entirety of the Lal Affidavit;
- iii. Paragraphs 2-12 and Exhibit "A" of the Shumka Affidavit;
- iv. Paragraphs 4-10 and Exhibit "A" of the Bain Affidavit;
- v. Paragraphs 4-11 and Exhibits "A"-"C" of the Arifin Affidavit; and
- vi. Paragraphs 5-13 and Exhibit "A" of the Parson Affidavit.

Analysis of New Affidavits

[38] The procedure for filing affidavit material in a petition proceeding is set out in Rule 16-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR], as follows:

- a) Rules 16-1(2) and (3) requires that a petitioner file "each affidavit in support" of a petition prior to service of the petition materials;
- b) Rule 16-1(4) requires a petition respondent file "all affidavits that have not already been filed and on which the [respondent] intends to rely at the hearing of the petition"; and
- c) A petitioner may then file 'reply' affidavits pursuant to Rules 16-1(6) and (7), which provide as follows:

Petitioner may respond

- (6) A petitioner may file affidavits in response to any document served on the petitioner under subrule (4) (c) and, in that event, must serve copies of those filed responding affidavits on each petition respondent no later than the date on which the notice of hearing is served on that petition respondent under subrule (8) (b).

[My emphasis.]

No additional affidavits

- (7) Unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (3), (4) and (6).
- [39] The City does not consent to the New Affidavits served on November 5, 2024, after the notice of hearing was filed on September 18, 2024.
- [40] They are also submit that the filing of the New Affidavits amounts to a splitting of the petitioner's case. The affidavits are not proper reply affidavits. *Masjoody v Motmaen-Far*, 2024 BCSC 2017 at paras. 43-46.
- [41] The New Affidavits, the City says, include:
- a) evidence that could and should have been gathered and prepared by the petitioner at the time the petition was filed and served on the City; and
 - b) evidence that is not responsive to the sole affidavit filed by the City in response to the petition.
- [42] Also, the City submits, this proceeding is in the nature of a judicial review whereby the petitioner seeks to quash a permit issued by the City and asks the Court to order the City to issue a new permit on different terms. The Petitioner argues that the issuance of the building permit was unreasonable and ultra vires the City's authority. The petitioner does not plead any allegations of a breach of procedural fairness.
- [43] The Petitioner says the New Affidavits are proper reply. They are in response to the documents and the Haer Affidavit the Respondent served on them. The New Affidavits were served before the Notice of Hearing was filed on February 13, 2025 as permitted by Rule 16-1(8)(b).

Setting application for hearing

- (8) A petitioner wishing to set a petition down for hearing must,
- (a) in the case of a petition to which no response to petition has been served under subrule (4) (c), file a notice of hearing in Form 68 at any time before the hearing of the petition, or

- (b) in the case of a petition to which a response to petition has been filed and served under subrule (4) (c), file a notice of hearing in Form 68, and serve a copy of the filed notice of hearing on each petition respondent, at least 7 days before the date set for the hearing of the petition.

[44] Moreover, the Petitioner says:

- a) that the Respondents have not been taken by surprise; they have had the New Affidavits for months;
- b) the New Affidavits are responsive to the Haer Affidavit;
- c) the Lal Affidavit attaches as exhibits, photographs of the area in question and therefore act as important visual aides for the court it would not otherwise have; and
- d) the affidavits provide the court the broader context of concerns the neighbours who live along the retaining wall on Victoria Avenue.

[45] The text of Rules 16-1(6) and (7) appear somewhat ambiguous as it applies to this case because the reference to "the notice of hearing" appears to only contemplate the service of one notice of hearing. I have been unable to find a case where, as here, this Court was faced with multiple notices of hearing and thereby forced to determine which of those notices of hearing was "the notice of hearing" referred to in Rule 16-1(6), after which no reply affidavits could be filed and served without the consent of the opposing party or an order of the court.

[46] Rule 16-1(7) provides this Court with a discretion to admit additional affidavits. Recent exercises of the Court's discretion under Rule 16-1(7) suggest that both the (lack of) surprise to the party receiving the late-filed evidence and the usefulness of the evidence to the Court are factors that may properly be considered.

[47] The balancing requires the judge to give effect to the underlying rationale for the rule: permitting the petition to be heard fairly and efficiently and resolved on its merits. The weight of the proposed evidence must be weighed against the prejudice that may result from its admission: *Tietz v. Affinor Growers Inc.*, 2022 BCCA 307 at para. 75, leave to appeal to SCC ref'd, 40632, 40459 and 40453 (25 May 2023).

[48] Other decisions have addressed this discretionary balancing required in determining whether to admit additional affidavits: *Sea House Restaurant Ltd. v. One West Holdings Ltd.*, 2023 BCSC 1993, at para. 54 and 55. Others have emphasized that the discretion is to be applied sparingly and only in cases where excluding the evidence would result in a substantial injustice: see e.g. *See also: Delta Automotive Ltd. v. 4846 Elliott St Ltd.*, 2024 BCSC 2246 at paras. 21-24; *Vanderhaeghe v. Sunshine Coast (Regional District)*, 2022 BCSC 2100 at paras. 51-52, var'd on other grounds 2024 BCCA 169; *G&G Education Development Corporation v Langley Flying School, Inc.*, 2018 BCSC 1796 at paras. 204-205. Yet, in other cases, however, this Court appears to have adopted a more flexible approach: *V.I. Camelot Homes Ltd. v. Eberwein*, 2024 BCSC 966 at paras. 6-10.

- [49] The Respondent say that it is trite law that a judicial review proceeding is conducted "on the record". The "record" normally includes only the evidence that was before the tribunal (here the City) when it made the decision under review. In general, extraneous or other material that was not before the decision-maker is inadmissible as it offends the "limited supervisory jurisdiction of the court". See *English v. Richmond (City)*, 2021 BCCA 442 at paras. 76-94.
- [50] The City also says there are some exceptions to the general rule, including the admission of 'general background information'. General background information will only be admissible if it is confined to what the 'tribunal' actually knew or acted upon (*English* at para. 86). The evidence contained in the New Affidavits was not before the City when it issued the impugned building permit, and does not contain general background information that was considered by the City. Accordingly, the new evidence does not properly form part of the record in the judicial review proceedings.
- [51] Finally, the City submits, the New Affidavits contain inadmissible opinion evidence, hearsay evidence, speculation and argument.
- [52] The general rule is affidavits can only contain facts which would be admissible in evidence at trial: SCCR Rule 22-2(12). Opinion evidence is inadmissible unless it is given by an expert: *Home Equity Development Inc. v. Crow*, 2002 BCSC 546 at para. 30. Argumentative components of affidavits are inadmissible: *603262 B.C. Ltd. v. Eiyom Properties Ltd.*, 2014 BCSC 1155 at para. 9.
- [53] The Patel Affidavit #2 contains statements about the financial costs New Edge has incurred in connection with the Property. None of that information is responsive to the Haer Affidavit. Accordingly, paragraphs 3-5 and Exhibit "A" of the Patel Affidavit #2 are struck.
- [54] The Shumka Affidavit contains opinion, speculation and argument. It also refers to matters involving the development of her property over a decade ago, which information would not have been before the City when it was making its decision in respect of the Property. Accordingly, paragraphs 2-12 and Exhibit "A" of the Shumka Affidavit are struck.
- [55] The Bain Affidavit also suffers from the same frailties of opinion and argument, which is not admissible. Accordingly, paragraphs 4-10 and Exhibit "A" of the Bain Affidavit are struck.
- [56] Similarly, the Arifin Affidavit consists almost entirely of conclusory statements and opinions. In addition, Mr. Arifin deposes about matters he says occurred in October 2024, months after the Permits were issued by the City. The October 2024 events would not have been before the City at the time the Permits were issued.
- Accordingly, paragraphs 4-11 and Exhibits "A" and "C" of the Arifin Affidavit are struck.
- [57] The Parson Affidavit is replete with opinion, argument and conclusory statements. Accordingly, paragraphs 5-13 and Exhibits "A" of the Parson Affidavit are struck.

- [58] With respect to the Lal Affidavit, as I noted, Mr. Lal is a lawyer in the same office as counsel of record for the Petitioners. Not only did Mr. Lal act as the commissioner in the taking of the Shumka, Bain, Arifin and Parson affidavits, and the Patel Affidavit #2, and he swore a separate affidavit wherein he deposes with respect to:
- a) being informed by Mr. Patel about contentious matters at the heart of this dispute,
 - b) being informed by Ms. Shumka about the development of her property over 10 years ago, and
 - c) the location of the residences along Victoria Drive, with accompanying photographs of those homes as well as photographs in and around the Property marked as exhibits.
- [59] Generally, lawyers should refrain from swearing an affidavit in any proceedings: Affidavit Secrets, The Continuing Legal Education Society of British Columbia, 2014, at 1.1.11.
- [60] Mr. Lal deposing to what Ms. Shumka and Mr. Patel told him is hearsay. Statements made otherwise than in testimony at the proceeding at which it is offered, are inadmissible if such statements are tendered either as proof of the truth or as proof of assertions complicit therein: *L.M.U. v. R.L.U.*, 2004 BCSC 95 at para. 13.
- [61] That said, some of the photographs that Mr. Lal attaches as exhibits are helpful visual aids. Some exhibits attached numerous unnumbered photographs as one exhibit, while other exhibits contained only one photograph, the latter being preferable. I exercise my discretion and will permit Exhibit "A", pages 1, 3 and 4 and Exhibit "D" of the Lal Affidavit into evidence as they show the location of the Property and the southeast portion of the Retaining Wall the City wants removed in relation to the City's streets. The remainder of the Lal Affidavit is struck.

Legal Analysis

The Standard of Review of the City's Decision

- [62] There is no disagreement among the parties that the standard of review of the issuance and the terms of the Building Permit and Lot Servicing Permit issued to the Petitioner is reasonableness. See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 16, 23-24, 26, 30, 33 [Vavilov]; *English v. Richmond (City)*, 2021 BCCA 442 at para. 56; *Auer v. Auer*, 2024 SCC 36 at paras.19-44
- [63] The onus is on the Petitioners to show that the impugned decision was not reasonable. See *Yu v. Richmond (City)*, 2021 BCCA 226 at paras. 46-47 and *Vavilov*, supra, at para. 100
- [64] Our Court of Appeal stated in *Yu* that,

- [46] Under the Vavilov framework, courts reviewing an administrative decision on the merits start with a presumption that reasonableness is the applicable standard of review. This presumption is rebutted only where the legislature has indicated that it intends a different standard to apply or the rule of law requires that a correctness standard be applied: Vavilov at paras. 17, 23
- [48] Vavilov provided guidance for reviewing courts on how to conduct a reasonableness review. The Court's analysis focused on circumstances in which procedural fairness requires the decision maker provide reasons for their decision. It emphasized the importance of reasons in justifying administrative decisions to the affected parties, a factor that underpins institutional and facilitates meaningful judicial review: Vavilov, at paras. 74, 81. At the same time. Reviewing courts should adopt a posture of restraint and respect for the legislature's choice to delegate decision-making authority: Vavilov at paras. 12-13, 75.
- [65] The Court in Yu went on,
- [49] Where reasons are provided, the focus of reasonableness review includes both the decision makers reasoning process and the outcome. A reviewing court is directed to the reasons first, examining them with respectful attention to discern the decision maker's reasoning process in arriving at its conclusion: Vavilov at paras. 83-84. As a reasonable decision is not one that is not only justifiable, but justified, an outcome that would otherwise be reasonable cannot stand if it were reached on an improper basis: Vavilov at paras. 86-87, 96.

The Reasons

- [66] Ultimately, the Reasons or Decision upon which this dispute rests is contained in an email from City Engineer, Corrine Haer, dated September 7, 2023, to Anil Patel, principal of New Edge, which provides,

The easement is a civil matter and you will need to work with your neighbour to discharge it. As part of working through this with your neighbour, you or your neighbour will need to apply for and pay for a new water connection prior to discharging the easement.

The concrete retaining wall at the southeast corner of the property must be removed as part of your development. This is a requirement in the City's Street & Traffic Bylaw to regrade the City's boulevard as part of all new developments.

You will be required to design your lot separate of the portion of the retaining wall that will remain so that the wall may come down in the future. No encroachment agreement will be required for the wall that will remain as you will be designing separate from it.

An evaluation of the all by a structural engineer will still be required to ensure its integrity and ability to stand alone.

[67] The Petitioner says that the Reasons appear to have their genesis in the new approach by the City to address unpermitted and unlawful encroachments on City highways. However, they say that the plans or policies are directed toward encroachments installed by private property owners, which they say is not the case here. The Retaining Wall was not installed by New Edge or a previous private property owner. Further, New Edge says, it is not an encroachment by them onto City property. The new policies do not empower Ms. Haer or the City to act outside the authority in the Street and Traffic Bylaw.

Was the City's Decision Reasonable?

[68] The Petitioner says the City claims the Retaining Wall is an encroachment on City property and the only justification for this position is that the Retaining Wall benefits New Edge's property. This, they say, is flawed logic. They make the analogy that the City is demanding private citizens upgrade the sewer system because they benefit from water flow or that they have to upgrade a traffic light if they are building on one of the corners.

[69] The Petitioners say there are no bylaws that allow the City to force a private citizen to fix a City problem in exchange for a building permit. Further, they submit that the bylaws the City rely upon to direct New Edge to remove the Retaining Wall deal with the elimination of encroachments on City property. This they say, is not the case here. They say the City's actions in relation to the Permits is ultra vires.

[70] The City says City staff applied the applicable bylaws and policies for redevelopment where there is an encroachment on an adjacent City highway, which is the situation in respect of the Property.

Applicable Statutory Authority

[71] The Petitioner argues that all of the statutes cited by the City require the Retaining Wall to be a New Edge encroachment onto City property in order to be applicable. This, they argue, is not the case which makes all of the City's reasons, logic and the Decision unreasonable and ultra vires. The City has no authority to order New Edge to remove the Retaining Wall.

[72] The City says a reasonableness review ensures that courts intervene in administrative matters only where it is truly necessary to do so to safeguard the legality, rationality and fairness of the administrative process: *Vavilov*, at paras. 68, 74, 82, 83, 100, 136-138; *Auer v. Auer*, 2024 SCC 36 at paras. 46 and 50.

[73] The City submits that the authority of a municipal corporation must be broadly interpreted in accordance with the purposes of the Community Charter and Local Government Act, R.S.B.C. 2015, c.1: Community Charter, S.B.C. 2003, c. 26, ss. 3-4; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, at paras. 6-8.

[74] In keeping with Yu, municipal enactments must be construed "in the spirit of searching for the purpose broadly targeted by the legislation".: *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271 at para. 18.

[75] In this regard, the City points to express statutory authority granted to them to regulate, prohibit and impose requirements in relation to:

- a. Buildings and other structures (Community Charter, s. 8(3)(I), ss. 53-56);
- b. Municipal services (Community Charter, s. 8(3)(I)); and
- c. Public places and highways (Community Charter, s. 8(3)(b) and ss. 35-46).

[76] Section 506.02 of the Local Government Act provides:

506.02 (1) If a local government, an improvement district or greater board operates

- a. a community water or sewer system, or
- b. a drainage collection or disposal system,

the local government may, by bylaw, require that a system referred to in section 506(1)(b) [works and services requirements] be connected to the local government, improvement district or greater board system, in accordance with standards established in the bylaw.

[77] Section 506.03(2) of the Local Government Act further provides that:

506.03

(2) As a condition of the issue of a building permit, a local government may require the owner of the land to provide the following:

- a. works and services, in accordance with the standards established in a bylaw under section 506 or 506.02, on the site being developed;
- b. works and services, in accordance with the standards established in a bylaw under section 506 or 506.02, on that portion of a highway immediately adjacent to the site being developed, up to the centre line of the highway.

(3) Requirements under subsections (1) and (2)

- a. may be made only to the extent that they are directly attributable to the development of land, and
- b. must not include specific services that are included in the calculations used to determine the amount of a development cost charge, unless the owner agrees to provide the services.

[78] Sections 36(1) and 39(e) of the Community Charter expressly provides that:

36(1) In addition to its authority in relation to highways as a service, a council may, by bylaw, regulate and prohibit in relation to all uses of or involving a highway or part of a highway.

39 A council may, by bylaw, do one or more of the following:

- e) require persons to take specified actions for the purpose of maintaining the cleanliness or safety of a highway that is next to property that they own or occupy, or that is affected by property that they own or occupy

[79] On this basis, I agree with the City that their statutory authority includes the power to regulate, prohibit and impose requirements, as applicable, respecting persons, property, things and activities in relation to the matter (s.8(7) and (8)).

[80] The City further submits that a municipal bylaw may, pursuant to section 12 of the Community Charter:

- a) make different provisions for different areas, times, conditions or circumstances as described by bylaw; and
- b) establish different classes of persons, places, activities, property or things and make different provisions, including exceptions, for different classes.

[81] Section 15 of the Community Charter provides that the City may prohibit any activity or thing until a required licence, permit or approval has been granted and may establish terms and conditions that must be met for obtaining a licence, permit or approval.

[82] The City has enacted a number of bylaws in accordance with these broad grants of statutory authority, including:

- a. The City of White Rock Building Bylaw, 2012, No. 1928, as amended ("Building Bylaw").
- b. The City of White Rock Sewer Connection and Rental Charges Bylaw, 1970, No. 396 ("Sewer Connection Bylaw").
- c. The City of White Rock Road Subdivision Bylaw (including Engineering Standards) Bylaw, 1980, No. 777, as amended (the "Engineering Standards Bylaw").
- d. The City of White Rock Street and Traffic Bylaw, 1999, No. 1529, as amended ("Street and Traffic Bylaw").

[83] I now turn to the relevant sections of these bylaws.

The Building Bylaw

[84] Section 6 of the Building Bylaw prohibits any person from constructing any building or structure (including retaining walls larger than 1.2m in height) unless they first have a valid and subsisting permit.

[85] Section 8.1 of the Building Bylaw provides that every person shall apply for and obtain a building permit before constructing a building or structure.

- [86] The Building Bylaw authorizes the Building Official to require site servicing drawings, prepared and sealed by a registered professional (s. 9.2) and structural and geotechnical drawings (s. 9.2(c)).

The Sewer Connection Bylaw

- [87] The Sewer Connection Bylaw requires that every owner of real property who makes an application for a building permit must concurrently make an application for the installation of a sewer connection (s. 3(b)).

The Engineering Standards Bylaw

- [88] The Engineering Standards Bylaw sets out the engineering works and services standards for highway and utility connections and improvements required by the City at the time of subdivision and upon the proposed development of private property.

Street and Traffic Bylaw

- [89] The Street and Traffic Bylaw:

- a. Prohibits the excavation, improvement, damage, and encumbrance or obstruction of any portion of any highway in the City (s. 35(a));
- b. Authorizes the City Engineer to direct the removal of any structure, object or thing found upon a highway in contravention of the bylaw (s. 37); and
- c. Establishes a process by which a property owner may apply for a Road Alteration Permit to otherwise alter or excavate a highway when constructing upgrades to a highway adjacent to a private property (s. 36(d)). The application must contain satisfactory plans and detailed specifications, and the applicant is responsible for removal of any prior boulevard encroachments.

- [90] Pursuant to these City bylaws, and policies and directions adopted by City Council, as a term of Lot Servicing Permit (including the corresponding Highway and/or Right of Way Use Permit), which were applied for by and issued to the Petitioner on May 22, 2024, the City required that a portion of the Retaining Wall that was historically used to support the Property but encroached on the City's highway, be removed and replaced with a retaining wall located on the Property itself.

- [91] Similarly, in terms of both Building Permit and Lot Servicing Permit, the City required that the Petitioner and his consultants demonstrate that the proposed development on the Property had lateral support, independent of the Retaining Wall - such that the Retaining Wall could be removed, as required by City policies and bylaws.

- [92] I agree with the City that there can be no dispute that the City has the jurisdiction to require the Petitioner to apply for and obtain the required permits, including the Building Permit and Lot Servicing Permit, and impose conditions on those permits, including requiring the Petitioner to:
- a. ensure that the Property was developed independent of the Retaining Wall - so that it could be removed (either by the Petitioner or the City, or both); and
 - b. remedy the issue of the unauthorized encroachment on the City highway as part of the construction authorized by those permit applications.
- [93] The Petitioner argues that the City has no authority to impose terms or conditions on the Permits issued to them, including the condition that, as part of the development of the Property, the Petitioner remove a portion of the Retaining Wall. I do not agree.
- [94] I am satisfied that the evidence shows that the Retaining Wall is partially located within the highway dedications of Victoria Avenue and Foster Street. The Petitioner acknowledges that part of the staircase to the property encroaches onto City property. The applicable policies and bylaws apply, inter alia, to all redevelopment.
- [95] Again, the City only required the Petitioner to remove the portion of the Retaining Wall east of the stairs. However, the Petitioner chose to submit plans contemplating the removal of the entirety of the wall on and adjacent to the Property.
- [96] Sections 8(7), 8(8) and 15(1)(d)(ii) of the Community Charter expressly contemplate the City's ability to impose terms and conditions that must be met for obtaining a permit. The City cannot be said to be unreasonable in imposing the conditions it did.
- [97] Notwithstanding the Petitioner argues otherwise, it is clear that the City has authority to require that the Petitioner demonstrate that the development of the Property be done in a manner consistent with the City's bylaws and policies.
- [98] The City also has clear and express authority to require that encroachments be removed from a highway: *Pinnacle Care Group Ltd. v. White Rock (City)*, 2022 BCSC 2272 at para. 23; see also: *White Rock v. Mashiana*, 2023 BCSC 2352.
- [99] Upon review, the City's policies and Council directions, including the:
- a. Street and Traffic Bylaw, including sections 35 and 36;
 - b. City of White Rock Roads/Road Allowance Policy No. 600;
 - c. November 18, 2019 Council Resolution;
 - d. June 26, 2023 Council Resolution; and
 - e. Transportation & Infrastructure Master Plan

each expressly state that encroachments on public property (highways) should be addressed in City decision-making and public property should be recovered or 'taken back' at the time of redevelopment of private property.

[100] The conditions which form part of the Permits, including a requirement that the construction be done in conformity with the plans submitted to the City by the Petitioner, I find, are justified and are reasonable. Again, reasonableness review is not an examination of policy merits of a decision. See *Auer v. Auer*, 2024 SCC 36 at paras. 55-57.

[101] Relying on 0742848 B.C. Ltd. v. Squamish (District), 2011 BCSC 747 [Squamish], the Petitioner argues that a city cannot have qualifications and requirements for a development permit that are not set out in a bylaw.

[102] The City argues and I accept, that Squamish is of limited or no relevance in this case:

- a. First, unlike the case at bar, in Squamish, the District had denied a development permit to the petitioner. In our case, the relevant permits were issued to the Petitioner.
- b. Second, Squamish involved the application of an Official Community Plan to the petitioner's application for a development permit - a statutory scheme not engaged in this case. The OCP/development permit regime in place at the time required that a development permit be issued if the development complied with the guidelines set out in the OCP (paras. 14-15).
- c. The Court determined that Squamish had not applied the guidelines and as such its decision was unreasonable. The Court made an order of mandamus requiring the District to issue the permit in question.

[103] It is also notable that the Squamish case was decided in 2011, nearly a decade before the Supreme Court of Canada provided new guidance on reasonableness review in *Vavilov*.

[104] In the case at bar, unlike the Squamish case, I have found that the City has express statutory authority to impose requirements in permits relating to the development of private property, including with respect to components of the proposed buildings and structures being developed (the Building Bylaw) and with respect to the connection of the private property to City utilities and highways (the Engineering Standards Bylaw and the Street and Traffic Bylaw).

[105] The City has complied with the terms of its bylaws and policies, and in any event, has already issued the Permits sought by the Petitioner.

[106] The Petitioner relies on *Kollen and Piercey v. City of Vancouver et al.*, 2004 BCSC 684 where the Court found that the decision - which was not in the nature of a judicial review - of the city was unreasonable and should be quashed because the city councillor based her decision on an erroneous assumption that the parties had been breaking the law. *New Edge* argues that the erroneous assumption here is the City's determination that the Retaining Wall is a *New Edge* encroachment. I do not agree. The southeast portion of the Retaining Wall encroaches on a City highway. Any new redevelopment is subject to the applicable

bylaws and policies.

- [107] Similarly, I agree with City that the Petitioner's reliance upon the case of 1909988 Ontario Limited v. North Cowichan (Municipality), 2020 BCSC 166 is misplaced. This case cannot stand for the proposition that because the City had not previously required neighbours on Victoria Avenue to remove portions of the Retaining Wall from the City highway, it cannot require the petitioner to do so.
- [108] Further, I agree with the City that the chambers decision that has been relied upon by the Petitioner was overturned by the Court of Appeal in North Cowichan (Municipality) v. 1909988 Ontario Limited, 2021 BCCA 414. The Court held that the chambers judge had erred as the Court of Appeal was "unable to identify any longstanding practice on the part of the Municipality or any established internal authority on the question " (para. 82). The Court held that there were no internal Municipal directives or statements of policy on point, and that the Municipality had made only one prior inconsistent decision.
- [109] The Court went on to hold that "it is an unacceptable overreach to conclude that the language in Vavilov supports invocation of a justificatory burden in the absence of a demonstrated deviation from historical practices or decisions" (at para. 82).
- [110] In the case at bar, the Petitioner refers to Ms. Shumka's 2012 development of her property which also benefits from the Retaining Wall. The City did not require the removal of a retaining wall, however there is no evidence about whether that property owner applied for and was granted lot servicing permits, or even the scope of the development or connections to City utilities for that property. I note as well, that many of the plans, bylaws and policies which now direct City staff to recover highways covered by unauthorized encroachments at the time of redevelopment of adjacent private property, were passed after 2012.
- [111] I also agree with the City that not only are there no historical practices or decisions on which the Petitioner can rely (like the Cowichan case), but even if there were, the City has adopted clear policies and decision-making processes supporting the decisions that were made. It would be a departure from these established policies to permit the New Edge to leave the Retaining Wall in place.
- [112] The path to the Reasons is clear on the evidentiary record. Aside from the bylaws and policies referred to above, the sheer volume of communications between the City and Petitioner over an extended period show that City staff expended considerable time and effort working through the applicable requirements with the Petitioner, upon which and pursuant to, they acted and secured the Permits.
- [113] While the Petitioner may not agree to the terms of the Permits ultimately issued to them, I am satisfied that they understood why City staff came to the conclusions that they did. See Mak v. Vancouver (City), 2018 BCSC 888; Vavilov at paras. 137-138.

Conclusion

[114] In conclusion, I find that the City was reasonable in making the Decision they did when issuing the Permits and that doing so was not ultra vires. The petition is dismissed with costs to the City.

"Dion J."

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Prepared on 25 October 2026 · Esheria