

CANADA / JUDGMENT

Pendergast v. Sidney (Town)

2020 BCSC 1049

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1049 Pendergast v. Sidney (Town)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pendergast v. Sidney (Town),

2020 BCSC 1049

Date: 20200715

Docket: S195271

Registry: Victoria

Between:

Cindy Pendergast

Petitioner

And:

Town of Sidney

Respondent

Corrected Judgment: The front page of the judgment
was corrected on August 6, 2020.

Before: The Honourable Madam Justice J. A. Power

Reasons for Judgment

Counsel for the Petitioner:

L. J. Alexander and K. A. Smith

Counsel for the Respondent:

G. W. Patterson

Place and Date of Hearing:

Victoria, B.C.

February 19 and 20, 2020

Place and Date of Judgment:

Victoria, B.C.

July 15, 2020

INTRODUCTION

- [1] This judgment involves a petition for judicial review that arises in the context of municipal law.
- [2] The petitioner Cindy Pendergast, an experienced businessperson, is seeking to operate a cannabis retail store in Sidney, British Columbia, which she intends to name "Happy Buddha Cannabis." On January 31, 2019, she applied to the Liquor and Cannabis Regulation Branch ("LCRB") of the provincial government for a licence to operate a non-medical cannabis retail establishment under the Cannabis Control and Licensing Act, S.B.C. 2018, c. 29 [the Act] and associated regulation, the Cannabis Licensing Regulation, B.C. Reg. 202/2018 [the Regulation].
- [3] On May 6, 2019, the LCRB sent the petitioner's application to the respondent Town of Sidney seeking a referral response in accordance with the statutory scheme. The statutory scheme under the Act prohibits the sale of non-medical cannabis without a licence issued by the LCRB. However, the LCRB will not issue a licence unless the relevant local government which is given notice of the application, recommends that the licence be issued. Under the statutory scheme if the relevant local government does not respond to the referral at all, the LCRB will not issue a licence.
- [4] Between May 6, 2019 and October 28, 2019, the referral by the LCRB was under consideration by the Town of Sidney (the "Town"). During this period of time, on July 1, 2019, the petitioner entered into a five-year fixed term lease for a business location on Beacon Avenue which she intended to use for Happy Buddha Cannabis. Ms. Pendergast was aware when she did so that she was taking a certain amount of risk, since at that time, the sale of cannabis in the Town was not permitted under the Town's zoning bylaw. Between May 6, 2019 and October 28, 2019, Ms. Pendergast was actively working with the Town's Senior Manager of Long Range Planning and the staff at the LCRB to ensure that her business premises, particularly the storefront, would meet the requirements of the provincial legislation and also the needs of the Town.

- [5] On August 12, 2019, the Town's elected council (the "Town Council") passed a resolution approving a policy to assist the Town in making decisions under the Act ("Policy DV-015"). At that time, the Town Council also passed an amendment to the zoning bylaw to allow the retail sale of recreational cannabis in most parts of the Town zoned C1. The proposed location on Beacon Avenue is zoned C1.
- [6] On October 28, 2019, by resolution, the Town Council directed the Town staff to respond to the LCRB that since the application did not meet the Town's Policy DV-015, primarily with respect to the retail storefront design, the application should be denied.
- [7] On June 24, 2020, while this judgment was on reserve, I received a letter from counsel for the respondent to the effect that there had been a change to the Regulation. This change was made on June 18, 2020 by way of order in council. As I will discuss, this change addresses a central issue between the parties relating to the August 12, 2019 resolution.
- [8] Ms. Pendergast now brings this petition challenging the August 12, 2019 resolution adopting Policy DV-015 and the October 28, 2019 resolution recommending against the issuance of a cannabis retail licence to the petitioner.
- [9] For the reasons that I will explain, I have concluded that the October 28, 2019 resolution was not reasonable and that the matter should be returned to the respondent for reconsideration in accordance with these reasons.
- [10] As I am returning this matter to the respondent on the October 28, 2019 resolution, I did not require counsel to make submissions on the June 2020 change to s. 5(1)(p) of the Regulation, which related to the August 12, 2019 resolution.

ORDERS SOUGHT

- [11] The petitioner seeks six different orders, summarized in the written argument as follows:
1. An order that Town of Sidney Council Resolution 2019.37.503 on a referral for a non-medical cannabis retail store licence at 2410 Beacon Avenue, resolving that the referral application be denied, be set aside.
 2. An order that Town of Sidney Council Resolution 2019.30.387 adopting liquor and cannabis Licencing policy DV-015 be set aside and, in the alternative, that section 2ii(b) of the said policy be set aside.
 3. An order or a declaration that it is ultra vires of the power of the Council of the Town of Sidney to adopt a policy, rule or bylaw or make decisions regarding non-medical cannabis retail store licence applications that has the effect of altering zoning, or that are in direct collision with or contradict the Cannabis Control and Licensing Act or the Cannabis Licensing Regulation, and in particular, section 5 of the said Regulation.

4. A declaration that the petitioner is entitled to a Town of Sidney Council Resolution regarding her licence application for 2410 Beacon Avenue which recommends that the licence as applied for be issued, or in the alternative that Council re-consider the application in accordance with directions from the Court.
 5. To adjourn the application for an Order or declaration that whether or not the Town of Sidney zoning Bylaw 2174 is further amended to restrict or prohibit the sale of recreational cannabis at 2410 Beacon Avenue, that use is a protected use or non-conforming use and/or a commitment to that use has been established by the petitioner.
 6. An order for costs.
- [12] The petitioner appears to have abandoned her request, outlined in the petition, for an order requiring the Town business licence inspector issue the business licence the petitioner applied for on November 12, 2019.
- [13] At the outset, I wish to say that I share the view of the respondent that the relief sought by the petitioner is overly broad. For instance, I do not believe it would be appropriate in the circumstances here to make an order in the nature of mandamus. Further, as argued by the respondent, I believe the ultra vires declaration sought in the third order is overly broad, relates to hypothetical future disputes and would have no practical effect. I have concluded that it is unnecessary for me to consider all of the relief sought since I will be returning the matter to the respondent under the first order sought.

BACKGROUND

- [14] On June 11, 2018, the Town Council adopted "Zoning Bylaw No. 2015, Amendment No. 35, Bylaw No. 2155." This bylaw added the retail sale of recreational cannabis to the list of prohibited uses throughout the Town.
- [15] As I have briefly outlined, the petitioner Ms. Pendergast is a businessperson who wishes to operate her recreational cannabis retail store, Happy Buddha Cannabis, in Sidney, British Columbia. On January 31, 2019, the petitioner applied to the LCRB for a non-medical cannabis retail store licence proposed to be located on Beacon Avenue in Sidney (the "Location"). On May 6, 2019, the LCRB sent the petitioner's application to the Town, seeking a referral response.
- [16] From May 6, 2019 to August 12, 2019, the Town Council considered the issue of the sale of non-medical or recreational cannabis and eventually determined it would proceed with a framework permitting the sale of such cannabis under certain conditions.
- [17] On May 28, 2019, a staff report was provided to the Town Council and the Town's Committee of the Whole. The report provides information regarding the decriminalization of cannabis and options to consider for the regulation of recreational cannabis retail sales, production, and distribution within the Town.

[18] The following excerpt summarizes the issues raised for the consideration of the Town Committee of the Whole and the Town Council:

Given the high level of Provincial regulation for cannabis, as well as the broad discretion of local governments to reject a retail cannabis application regardless of the zoning permissions in place, staff do not believe that a complex zoning regime ... is necessary. However, a policy to guide staff analysis and Council deliberations on applications may be useful; such a policy would also provide valuable guidance to potential applicants.

Another issue for consideration is the question of whether storefronts on Beacon Avenue should be eligible for cannabis retail stores. Currently, Zoning Bylaw No. 2015 includes a condition that prohibits many non-retail uses from fronting onto Beacon Avenue. This prohibition is intended to ensure that Beacon Avenue remains a primarily retail street with "active" storefronts that are inviting to shoppers and discourage uses such as offices with little to no retail presence. Provincial cannabis regulations stipulate that cannabis products cannot be visible from outside the store; consequently, staff are concerned that cannabis storefronts may tend toward shaded windows or other means of obscuring the interior of the store, which would in turn go against the objective of maintaining a streetscape of "active" retail storefronts along Beacon Avenue. Staff recommend that if zoning allowing cannabis retail is adopted, either cannabis retail be prohibited from fronting onto Beacon Avenue, or that specific policy guidance be developed to require that applicants submit a storefront design for approval. Staff would welcome Council feedback on this question.

[19] Attached to this staff report as Appendix A, which is referred to in the staff report as the "LCRB Guide to Local Governments," is a provincial government document called "Local Governments' Role in Licensing Non-Medical Cannabis Retail Stores." Of particular importance in that document are the following excerpts:

The role of local governments in the cannabis retail store licensing process

Upon receipt of notice, local governments can:

- choose not to make any recommendation in respect of the application for a cannabis retail store licence (Note: this would end a licence application in progress because the LCRB cannot issue a licence unless the local government gives the LCRB a positive recommendation that the licence be issue)
- choose to make comments and recommendations in respect of an application for a cannabis retail store licence. Note that:
 - o if the local government chooses to make a comments and recommendation on the licensee's application to the LCRB, it must gather the views of residents
 - o if it makes a recommendation to deny the application then the LCRB may not issue the licence

o if it makes a recommendation in favour of the application, then the LCRB has discretion whether or not to issue the licence, but must consider the local government's recommendation

Gathering residents' views

If the local government decides to consider the notice of application and to provide comments and recommendations as to the location of the proposed retail store, it must gather the views of residents of the area if the location of the proposed store may affect nearby residents. It may gather resident's views by using one or more of the following methods:

- Receiving written comment in response to a public notice of the application
- Conducting a public hearing in respect of the application
- Holding a referendum, or
- Using another method the local government considers appropriate.

It is up to the local government to determine the area, relative to the licensee's application, where resident's views must be gathered.

[Emphasis added.]

[20] On July 1, 2019, the petitioner entered a five-year fixed term lease to lease the Location for the purpose of opening Happy Buddha Cannabis, a recreational cannabis store. At the time that she did so, recreational cannabis retail was a prohibited use at the Location and elsewhere in the Town.

[21] On August 12, 2019, by motion 2019.30.0367, the Town Council adopted "Zoning Bylaw No. 2015, Amendment No. 38, Bylaw No. 2174," allowing for the retail sale of recreational cannabis in most of the Town's C1 commercial zone, which included the Location.

[22] On August 12, 2019, the Town Council also adopted the Liquor and Cannabis Licensing Policy, Policy DV-015, by resolution 2019.30.387. Of particular relevance for the purposes of this litigation is s. 2 ii (b) of Policy DV-015:

2 ii (b) The proposed retail storefront must present an attractive, pedestrian friendly face to the street by providing multiple points of visual interaction through doorways, clear windows and other pedestrian oriented features that promote activity and transparency.

[23] I pause to note that the requirement for clear windows in s. 2 ii (b) of Policy DV-015 directly conflicts with the requirement for non-transparent windows under s. 5(1)(p) of the Regulation, as will be seen below. This is one of the central conflicts between the parties on this petition.

[24] Since August 12, 2019, the petitioner relied on and continues to rely on the August 12, 2019 zoning bylaw to proceed with her plans and expenditures to open a cannabis retail store at the Location.

- [25] On October 4, 2019, a complete cannabis retail store licence application was received by the Town's staff.
- [26] On October 15, 2019, a report was provided from the Town's Senior Manager of Long Range Planning to the Town Committee of the Whole. The purpose of the report was to address the referral response requested from the LCRB on behalf of the petitioner. The report recommends under option 1, that the Town Council deny the petitioner's application on the basis that the proposed storefront design does not meet the transparent window requirements of Policy DV-015. Of particular relevance are the following excerpts:

At the time of adoption of Policy DV-015, staff were operating under the belief that a cannabis retail storefront display would be able to meet the requirements in (b) above. That is, staff assumed that a transparent window display of some kind (albeit not cannabis related) would be possible under the LCRB regulations. This assumption was based on a review of the applicable regulations, but did not include a discussion with LCRB staff. Further discussion with LCRB staff since the receipt of this application have clarified that a transparent window display is in fact not possible under the current regulations, and the LCRB requires that storefront windows be completely opaque.

Staff recognize that due to previous decisions made in other jurisdictions by the LCRB, this province-wide requirement for opaque windows is unlikely to change in the immediate future. Accordingly, staff advised the applicant, Happy Buddha Cannabis, to submit their application with the proposed opaque window covering, as this is essentially the only approach the LCRB will currently accept.

Staff note that this is contrary to the intent of Policy DV-015, which seeks to establish a visually interesting storefront display that supports Sidney's retail-focused downtown. Sign Bylaw No. 2058 supports this objective by limiting the overall size of window signs so they do not obscure the entire storefront window.

Zoning Bylaw No. 2015 also acts to support this goal by restricting certain types of non-retail uses (e.g. offices) on the ground floor along Beacon Avenue in order to support an attractive retail shopping environment.

The Downtown Commercial Development Permit Area in the Official Community Plan also contains the following relevant design guideline:

21.3.24 Commercial façades should be designed with treatments that are inviting to pedestrians and that avoid the impersonal look typically associated with the use of large expanses of glass, mirrored surfaces, and blank walls. On the ground floor of a building, materials that may impede visual connection between the interior of the building and the street should not be used.

Staff are of the opinion that the proposed storefront fails to achieve the intended objective of this guideline.

From the perspective of creating an "active" storefront on Beacon Avenue that supports the street's role as a retail shopping environment, staff's opinion is that the proposed storefront fails to establish the level of visual interaction needed to support this goal. Furthermore, while a single storefront may not significantly affect Beacon Avenue's desirability as a retail street, staff also have concerns about the cumulative effect over time of blank retail frontages on Beacon Avenue.

Staff are of the opinion that, within the confines of the LCRB requirements, the window signage is well designed and attractive. However, staff again note that the opaque signage is contrary to the intent of DV-015.

NEXT STEPS:

In general terms, the proposal meets many of the requirements of DV-015, with the notable exception of the storefront design requirement. Staff believe that the storefront component of the policy is significant given the proposed location on Beacon Avenue, and based on a review of the Town's policy and bylaw approaches noted above, staff are of the opinion that such a storefront design is not supportable in this location. While it is possible that there may be some beneficial effects of the proposed store in this location, such as increased foot traffic that may benefit adjacent businesses, staff recommend caution in allowing blank storefronts on retail-oriented Beacon Avenue. A staff recommendation reflecting this perspective is included as Option 1 below.

When Council considered changes to Zoning Bylaw No. 2015 that approved cannabis retail as a conditional permitted use, there was much discussion about whether or not to allow this use on Beacon Avenue. One of the concerns discussed was the issue of maintaining an "active and transparent" storefront, given Beacon Avenue's role as a retail main street. Had staff been aware of the LCRB's strict interpretation of the relevant regulation at time of the Bylaw No. 2174's introduction and consideration, the recommendation on whether or not to allow cannabis retail along Beacon Avenue may have been different.

Regardless of Council's decision on this particular application, staff believe that Section 2 (ii) (b) of Policy DV-015 should be amended to remove the requirement for an "active and transparent" storefront given this new clarity surrounding the LCRB's interpretation. This amendment to Policy DV-015 is proposed in both staff recommended options below.

Should Council decide to move this application forward, the next step would be to initiate a public notification process and have staff report back on the results. This is reflected in Option 2 below.

[Emphasis in original.]

[27] On October 28, 2019, the Town Council passed resolution 2019.37.503, "denying" the application. The motion read as follows, and adopted the language used by the Town's Senior Manager of Long Range Planning in his October 15, 2019 report to the Town Committee of the Whole:

Moved by Councillor [name removed], seconded by Councillor [name removed], that staff be directed to respond to the Liquor and Cannabis Licensing Branch regarding the Happy Buddha Cannabis application at [street number omitted] Beacon Avenue with a copy of the staff report dated October 15, 2019 related to the Happy Buddha Cannabis application, and the following decision:

- i. Whereas it is the Council of the Town of Sidney's opinion that a proposed cannabis retail store shall meet, to a high degree, the standards and requirements established by Town of Sidney Liquor & Cannabis Licensing Policy DV-015;
- ii. And whereas Policy DV-015 highlights the Town of Sidney's broader expectation that cannabis retail store locations will support the Town of Sidney's goals and policy objectives of creating and maintaining a pedestrian-friendly retail experience on Beacon Avenue that includes a variety of interesting and accessible window displays visible to the public;
- iii. And whereas the proposed Happy Buddha cannabis retail store's proposed storefront design does not provide a retail display or a level of visual interest that would address this expectation;
- iv. Therefore, based on the application not meeting the requirements of Policy DV-015, the Council of the Town of Sidney resolves that the application be denied.

OPPOSED: Councillors: [name removed], [name removed] & [name removed]
MOTION CARRIED 4:3

- [28] At the same October 28, 2019 meeting, after passing the resolution that the application be denied, the Town Council moved that an amendment be made to the zoning bylaw to prohibit cannabis retail locations on Beacon Avenue, including the Location. The Town Council also passed a further resolution directing staff to bring an amendment forward that removed s. 2 ii (b) of Policy DV-015 from the policy.
- [29] On October 29, 2019, the Senior Manager of Long Range Planning for the Town sent an e-mail to the LCRB with an attached copy of the October 15, 2019 staff report. The body of the e-mail contains the text of the October 28, 2019 resolution, excerpted above.
- [30] On November 12, 2019, the petitioner applied for a retail sales business licence for the Location and the Town has not responded to the application.
- [31] On November 26, 2019, the petitioner filed the petition in this proceeding.
- [32] On December 17, 2019, by consent and the order of Justice Basran, the matter was "commenced" and adjourned in order to preserve the limitation period under s. 623 of the Local Government Act, R.S.B.C. 2015, c. 1. It ultimately came before me on February 19, 2020 and February 20, 2020.

- [33] On January 10, 2020, after reviewing photographs attached to an affidavit filed by the respondent in this litigation, the petitioner prepared a new window treatment to align with what she believed was considered to be acceptable by the Town. The petitioner sent this to the Senior Manager of Long Range Planning and advised him that the LCRB had approved this new proposal.
- [34] Since January 20, 2020, the petitioner made several inquiries with the Town staff to determine whether or not they were taking any steps to put the new window treatment in front of the Town Council for approval. The petitioner has not heard back from the respondent.
- [35] On January 24, 2020, the LCRB confirmed to the petitioner and the respondent that the assessment of the eligibility of the petitioner's business licence was complete and that the petitioner's business is fit and proper for the purposes of the legislation.
- [36] On June 24, 2020, while this judgment was on reserve, I received a letter from counsel for the respondent to the effect that there has been a change to the Regulation which removed the opaque window requirement. This change was made on June 18, 2020 by way of order in council.

THE PARTIES' POSITIONS

- [37] I will set out the parties' respective positions as they were argued in February, although I note I am returning this matter on a limited ground.
- [38] Prior to outlining the petitioner's argument, I note that the petitioner is asking this Court to review two distinct resolutions: the August 12, 2019 resolution which adopted Policy DV-015 and the October 28, 2019 resolution, resolving that the petitioner's provincial licence application "be denied." I will say at the outset that as I am sending the October 28, 2019 resolution back to the respondent, I need not consider the August 12, 2019 resolution.

The Petitioner

- [39] The petitioner makes multiple arguments that essentially fall in two categories: the views of the residents requirement and the window display requirement.
- [40] First, the petitioner emphasizes that the Town Council was statutorily required by the legislation to gather the views of residents by either publishing a notice of her application, conducting a public hearing in respect of her application, holding a referendum, or some other method considered appropriate. No referendum, formal notification, public hearing or any other method employed by the Town to seek public input with respect to the petitioner's provincial licence application was undertaken prior to the Town Council considering the application in October 2019. The petitioner deposes there are many residences nearby: there are at least five residences on the same block of Beacon Avenue as the Location and a residential building recently constructed behind the Location contains

what she believes to be over 20 residences.

- [41] The petitioner submits that there is no evidence that the Town Council turned their minds to or considered the mandatory consultation requirement with respect to the petitioner's application. Related to this argument, the petitioner also argues that the Town Council failed to consider the prescribed criteria of location.
- [42] Second, the petitioner argues that in the October 28, 2019 resolution, the Town Council refers to Policy DV-015, in particular as related to the window display. The petitioner argues that the Town Council's resolution is largely based upon her proposed storefront allegedly violating s. 2 ii (b) of Policy DV-015:

2 ii (b) The proposed retail storefront must present an attractive, pedestrian friendly face to the street by providing multiple points of visual interaction through doorways, clear windows and other pedestrian oriented features that promote activity and transparency.

- [43] The petitioner makes multiple arguments relating to this impugned portion of the policy. First, she argues s. 2 ii (b) of Policy DV-015 directly contradicts s. 5(1)(p) of the Regulation and should be set aside. Second, the petitioner argues that the clear window requirement essentially altered the "Zoning Bylaw No. 2015, Amendment No. 38, Bylaw No. 2174" (which allowed for retail sale of recreational cannabis on Beacon Avenue) by effectively prohibiting the operation of a recreational cannabis retailer on Beacon Avenue. Accordingly, the petitioner submits that the Town is required to go through all of the proper procedural requirements to alter zoning and cannot get around zoning requirements with a policy. The Town has not followed these procedural requirements and the petitioner submits the policy, or at least s. 2 ii (b), should be set aside. The petitioner makes a related sufficiency of reasons argument.

The Respondent

- [44] In response, the respondent argues that the discretion of a municipal council is broad and that the petitioner is seeking broad relief that the court should not entertain. In doing so, the respondent makes five arguments.
- [45] First, the respondent argues that the decision to adopt Policy DV-015 is no longer reviewable for two reasons. According to the respondent, the decision cannot be set aside for illegality under s. 623 of the Local Government Act as the limitation periods have expired and it cannot be challenged under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 as the Town Council's decision was not an exercise of a statutory power.
- [46] The respondent argues even if Policy DV-015 could be the subject of judicial review, there is no legal basis to interfere with it. The respondent argues it is not a zoning bylaw and no public hearing was required prior to the passing of the August 12, 2019 resolution adopting the policy; it is not a bylaw and accordingly s. 10 of the Community Charter, S.B.C. 2003, c. 26 does not apply; it does not conflict with the Regulation; and even if it does conflict with

the Regulation, according to the respondent "that is no basis for setting it aside or requiring Council to ignore it."

- [47] Second, the respondent argues that the Town was not required to gather the views of nearby residents before recommending against the issuance of the petitioner's cannabis retail licence. The respondent makes a statutory interpretation argument that a local government is not required to gather views before recommending against a licence. The respondent also argues that the Town Council determined the issuance of the licence would not affect nearby residents and accordingly the Town Council was not required to gather the views of nearby residents. The respondent emphasizes that this Court ought to defer to a decision-maker's reasonable interpretation of a statute, in accordance with *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov].
- [48] Third, the respondent argues that the Town Council was entitled to consider the appearance of the petitioner's proposed storefront when deciding whether and how to respond to her application. The respondent emphasizes that there is no basis to conclude the Legislature intended local governments to disregard the appearance of a proposed store when making recommendations on cannabis retail referrals.
- [49] Fourth, the respondent argues that the third order the petitioner seeks, "that it is ultra vires of the power of the Town Council to adopt a policy, rule or bylaw or make decisions regarding non-medical cannabis retail store licence applications that has the effect of altering zoning, or that are in direct collision with or contradict the Act or the Regulation, and in particular, s. 5 of the said Regulation," is not available because it is overly broad, relates to hypothetical future disputes and would have no practical effect.
- [50] Fifth, the respondent argues that if the petitioner succeeds in challenging either of the two decisions, an order of mandamus compelling the Town Council to provide a recommendation that the petitioner's licence be issued is not available.

STATUTORY FRAMEWORK

- [51] The retail sale of cannabis is primarily controlled by the provincial government. However, the applicable legislation gives local governments involvement in licensing decisions.
- [52] I will set out the relevant provisions:

The Cannabis Control and Licensing Act, S.B.C. 2018, c. 29:

Recommendations of local government or Indigenous nation

33 (1) The general manager must not issue a prescribed class of licence or make a prescribed type of amendment to a prescribed class of licence unless the local government or Indigenous nation for the area in which the establishment is proposed to be located or is located gives the general manager a recommendation that the licence be issued or amended.

- (2) After the general manager receives an application to issue or amend a licence referred to in subsection (1), the general manager must give the local government or Indigenous nation for the area in which the establishment is proposed to be located or is located notice of the application.
- (3) If a local government or Indigenous nation that receives notice under subsection (2) decides to give comments and recommendations, the local government or Indigenous nation must take into account any prescribed criteria and, in the prescribed circumstances, gather the views of residents of an area determined by the local government or Indigenous nation in respect of the application by one or more of the following methods:
 - (a) by receiving written comments in response to a public notice of the application;
 - (b) by conducting a public hearing in respect of the application;
 - (c) by holding a referendum;
 - (d) by using another method the local government or Indigenous nation considers appropriate.
- (4) The comments and recommendations under subsection (3) must be given in accordance with the regulations.
- (5) If the local government or Indigenous nation gives a recommendation that a licence be issued or amended, the general manager must take the recommendation into account in deciding whether or not to issue or amend the licence.

[Emphasis added.]

The Cannabis Licensing Regulation, B.C. Reg. 202/2018:

Rules and requirements

5 (1) The following rules and requirements apply to a retail store licence:

- (p) the retail store must be located in a permanent building or structure and be enclosed by floor-to-ceiling walls that are not transparent;

Recommendations of local governments and Indigenous nations

13 (1) For the purposes of section 33 (1) of the Act with respect to issuing licences, the prescribed class of licence is the retail store licence.

- (2) For the purposes of section 33 (1) of the Act with respect to types of amendments to a retail store licence, the prescribed type of amendment is the permanent relocation of the retail store to a new location, unless the general manager is satisfied that the residents who will be affected by the new location are substantially the same residents who are affected by the retail store.

- (3) The prescribed criterion for the purposes of section 33 (3) of the Act is the location of a proposed retail store.
- (4) The prescribed circumstances for the purposes of section 33 (3) of the Act are that the issuance of the licence may affect nearby residents.
- (5) For the purposes of section 33 (4) of the Act, comments and recommendations must be given in accordance with the following requirements:
 - (a) the comments and recommendations must be in writing;
 - (b) the comments must include the views of the local government or Indigenous nation on the general impact on the community;
 - (c) if the local government or Indigenous nation has gathered the views of residents under section 33 (3) of the Act, the comments must include
 - (i) the views of the residents, and
 - (ii) a description of the method used to gather those views;
 - (d) the recommendations must include a recommendation
 - (i) that the licence be issued or amended, or
 - (ii) that the licence not be issued or amended;
 - (e) the recommendations must include the reasons on which they are based.

[Emphasis added.]

STANDARD OF REVIEW

- [53] Counsel for the petitioner argues that the applicable standard of review is correctness on the issues on which s. 623 of the Local Government Act applies. Presumably this is in relation to the October 28, 2019 resolution, as the limitation periods within s. 623 of the Local Government were met with respect to this resolution. Counsel argues that the presumptive standard of review of reasonableness applies to the remaining issues, as outlined by the Court in Vavilov. This appears to be in relation to the August 12, 2019 resolution, as the limitation periods within s. 623 of the Local Government Act were not met in relation to this resolution.
- [54] Counsel for the respondent disagrees, arguing the presumptive standard of review of reasonableness applies to both resolutions. Counsel appears to argue that the presumptive standard of reasonableness applies to the October 28, 2019 resolution, and in the event counsel's argument that the August 12, 2019 resolution is not reviewable fails, the presumptive standard of review of reasonableness applies to that decision as well.

- [55] The Court in *Vavilov*, clarified and simplified the law relating to judicial review. The standard of review of reasonableness presumptively applies to all cases and should only be deviated from where required by either "clear legislative intent or by the rule of law" (para. 10). Clear legislative intent exists where the Legislature either explicitly prescribes the standard of review or provides a statutory appeal mechanism from an administrative decision to court (para. 17). "Rule of law" operates to shift the presumptive standard of review of reasonableness to correctness for any of the following three questions: constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies (paras. 17, 53).
- [56] In the circumstances before me, the only potential exception to the presumptive standard of review of reasonableness is the fact that the Legislature has within s. 623 of the Local Government Act, provided what may arguably be regarded as a statutory appeal mechanism from an administrative decision to this Court.
- [57] In addressing the standard of review, I am guided by the recent decision of Justice Forth in *G.S.R. Capital Group Inc. v. White Rock (City)*, 2020 BCSC 489, which was released after I heard this matter. Justice Forth found that in applying the *Vavilov* framework, the standard of review for s. 623 applications is reasonableness. I adopt her analysis:
- [68] With respect to the substantive review of the City's decisions, including the interpretation of its enabling legislation, I find that the appropriate standard of review is one of reasonableness. *Vavilov* is clear that true questions of jurisdiction no longer warrant a separate category for correctness review, and in my view, none of the exceptions to the presumption of reasonableness apply in this case.
- [69] I disagree that s. 623 of the LGA and s. 2(2) of the JRPA provide an example of the "dual role" for courts discussed in *Vavilov*. The example given in *Vavilov* of such a "dual role" - the Federal Courts Act - involved one piece of legislation that expressly provided for appeals and for judicial review mechanisms in different contexts. The LGA and JRPA are two different pieces of legislation, and in my view, they both contemplate judicial review rather than an appeal. The JRPA provides general rules of procedure for judicial review of administrative decisions in B.C., while s. 623 of the LGA provides a particular procedure that applies to the judicial review of decisions of local governments. Section 623 of the LGA fits into the category of legislative provisions discussed at para. 51 of *Vavilov* that contemplate a court reviewing an administrative decision without actually providing a right of appeal, and as such, the presumption of reasonableness is not rebutted.
- [58] I find the applicable standard of review with respect to the October 28, 2019 resolution is the presumptive standard of reasonableness.

- [59] As indicated above, as I am returning this decision to the respondent on the basis of the October 28, 2019 resolution, I need not consider the standard of review as related to the August 12, 2019 resolution.

ANALYSIS

- [60] The application made by the petitioner seeks to set aside the October 28, 2019 resolution for illegality (ss. 622 and 623 of the Local Government Act). The applicable limitation periods under subsections 623(4) and (5) are met and the respondent does not argue otherwise. Thus, I have the ability under subsection 623(2)(a) to set aside all or part of the resolution for illegality. As discussed, in considering whether to set aside the resolution for illegality, I must consider the reasonableness of the resolution.
- [61] Accordingly, I will discuss the principles emerging from Vavilov in applying the reasonableness standard of review. I will then consider the reasonableness of the October 28, 2019 resolution, particularly focusing on the respondent's interpretation that it was not required to gather the views of residents.
- [62] The Court in Vavilov discussed how to apply the reasonableness standard of review and emphasized that the correct approach to a reasonableness review is concerned with both the process and outcome.
- [63] The Court emphasized that the burden is on the party challenging the decision to show it is unreasonable, and that party must show there are sufficiently serious shortcomings in the decision that are more than superficial or peripheral to the merits of the decision (para. 100).
- [64] In determining the reasonableness of a decision, a reviewing court is to ask two questions (para. 99). First, whether the decision bears the hallmarks of reasonableness, justification, transparency, and intelligibility. Second, whether the decision is justified in relation to the relevant factual and legal constraints that bear on it.
- [65] To help answer these two questions, the Court outlined two fundamental flaws that would render a decision unreasonable.
- [66] The first flaw targets the "failure of rationality internal to the reasoning process" (para. 101). This underscores the need for reasoning to be rational and logical (para. 102). A decision would be unreasonable under this fundamental flaw where the overarching logic is fatally flawed; where the reasons fail to reveal a rational chain of analysis or reveal an irrational chain of analysis; where the conclusion reached cannot follow from the analysis; where the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a key point; or where the reasons exhibit clear logical fallacies (paras. 102-104).

- [67] The second flaw applies "when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it" (para. 101). In addressing this second fundamental flaw, the Court addressed non-exhaustive factors or elements that will guide the reviewing court in deciding whether a given decision is reasonable (para. 106). These factors include the governing statutory scheme; other relevant statutory or common law; principles of statutory interpretation; the evidence that was before the decision maker and the facts on which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the affected individual (para. 106).
- [68] With respect to looking at matters of statutory interpretation that come before reviewing courts, the Court in *Vavilov* explained how to apply the reasonableness review to questions of statutory interpretation:
- [116] Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.
- [117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.
- [118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: *Sullivan*, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law -- whether courts or administrative decision makers -- will do so in a manner consistent with this principle of interpretation.

- [119] Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.
- [120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.
- [121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior -- albeit plausible -- merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.
- [122] It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

- [123] There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.
- [124] Finally, even though the task of a court conducting a reasonableness review is not to perform a de novo analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

[Emphasis added.]

- [69] When I consider the guidance of the Court in *Vavilov*, I have come to the conclusion that in reviewing the text, context and purpose of the Cannabis Control and Licensing Act and accompanying Cannabis Licensing Regulation, there is only one single reasonable interpretation of the statutory provisions at issue with respect to the gathering the views of the residents requirement. Section 33(3) of the Act states "(3) If a local government or Indigenous nation that receives notice under subsection (2) decides to give comments and recommendations, the local government or Indigenous nation must take into account any prescribed criteria and, in the prescribed circumstances, gather the views of residents of an area determined by the local government or Indigenous nation in respect of the application" (emphasis added). There is nothing in the ordinary meaning of this provision that suggests considering the prescribed criteria and gathering the views of the residents in the prescribed circumstances only applies when the municipality seeks to give a positive recommendation.
- [70] Rather, in looking at the overall context of the Act and Regulation, it appears clear that only one interpretation is reasonable: residents' views must be gathered in the prescribed circumstances and the prescribed criteria must be considered regardless of whether the recommendation of the Town will be for or against the issuing of the provincial licence. Section 13(5) of the Regulation read in its entire context makes this clear:

- (5) For the purposes of section 33 (4) of the Act, comments and recommendations must be given in accordance with the following requirements:
- (a) the comments and recommendations must be in writing;
 - (b) the comments must include the views of the local government or Indigenous nation on the general impact on the community;
 - (c) if the local government or Indigenous nation has gathered the views of residents under section 33 (3) of the Act, the comments must include
 - (i) the views of the residents, and
 - (ii) a description of the method used to gather those views;
 - (d) the recommendations must include a recommendation
 - (i) that the licence be issued or amended, or
 - (ii) that the licence not be issued or amended;
 - (e) the recommendations must include the reasons on which they are based.
- [71] In recommending against the issuing of the licence and providing comments on such, the Town Council was required to take into account the prescribed criteria and in the prescribed circumstances gather the views of the residents.
- [72] The prescribed criterion is the location of the proposed store (s. 13(3) of the Regulation). In reading the resolution in conjunction with the record, it is clear that the Town Council considered the criterion of location. In particular, the October 15, 2019 staff report considered "the impact the cannabis retailer will have when they are located within 100 metres (328 feet) of other cannabis retailers, liquor stores, child care facilities, daycares, educational facilities, libraries, public recreation centres, public community centres, parks, places of worship and other family-oriented facilities." The report specifically considered the impact on a local daycare and museum. The Town Council attached the October 15, 2019 report to the October 29, 2019 e-mail sent to the LCRB containing the text of the resolution. Further, the language used in the October 28, 2019 resolution is verbatim that used in the recommendations in the October 15, 2019 report. I conclude the Town Council clearly had this report before them and relied on its contents in passing the October 28, 2019 resolution. I find that in reviewing the decision in conjunction with the record, the Town Council took into account the prescribed criterion of location.
- [73] As indicated, because the Town chose to give comments and recommendations against the issuing of the provincial cannabis licence, the Town was required to gather the views of residents in an area determined by the Town in the prescribed circumstances. The prescribed circumstance is that the issuance of the licence may affect nearby residents.

- [74] I have read the resolution in conjunction with the record, and it is not clear the Town Council turned its mind to this requirement.
- [75] In neither the resolution nor the October 15, 2019 staff report, is there any mention of the existence of nearby residents or any consideration of whether they may be affected, whether positively or negatively, by the granting of the provincial cannabis licence. I note the unchallenged evidence of the petitioner that there are many residences nearby, and in particular there are at least five residences on the same block of Beacon Avenue as the Location, and a residential building recently constructed behind the Location contains what she believes to be over 20 residences. I conclude that in failing to turn its mind to whether the issuance of the licence may affect nearby residents, the Town failed to comply with s. 33(3) of the Act and s. 13(4) of the Regulation. For this reason, I find the decision to be unreasonable and I set it aside for illegality.
- [76] My conclusion on the unreasonableness of the October 28, 2019 resolution is buttressed by the fact that the Town Council appears to have relied on s. 2 ii (b) of Policy DV-015, which I agree directly contradicts s. 5(1)(p) of the provincial Regulation, as it stood at the time this matter was before the Town Council. The Town Council appears to recognize the problematic nature of enacting a policy in direct contravention of a provincial regulation by their actions of instructing their staff to remove s. 2 ii (b) of Policy DV-015 on October 28, 2019.

REMEDY AND CONCLUSION

- [77] I have found that the October 28, 2019 resolution is unreasonable and must be set aside for illegality. However, I now turn my mind to the appropriate remedy and in particular, the directions I am to provide to the Town. I am guided by Vavilov, where at para. 142 the Court stated:
- [142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, at paras. 18-19 (CanLII). An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017

ONCA 319, at paras. 54 and 88 (CanLII). Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

- [78] I am concerned that if I send the decision back to the respondent to consider the low threshold of whether nearby residents "may" be affected by Happy Buddha Cannabis, that this could lead to "an endless merry-go-round of judicial reviews and subsequent reconsiderations." I have concluded that I will not remit the matter back to the respondent on the question of whether Happy Buddha Cannabis may affect nearby residents. It is clear to me that the inevitable outcome, whether decided by the Town or this Court in a subsequent judicial review, is that Happy Buddha Cannabis may affect nearby residents, either positively or negatively. I am guided by the unchallenged affidavit evidence of the petitioner that there are many residences nearby. Remitting this question to the respondent serves no useful purpose.
- [79] Thus as I have decided the inevitable outcome is that Happy Buddha Cannabis may affect residents, the prescribed circumstances in s. 33(3) of the Act were met. Accordingly as the respondent decided to give comments and recommendations, it was statutorily required to "gather the views of residents of an area determined by the local government in respect of the application by one or more of the following methods: (a) by receiving written comments in response to a public notice of the application; (b) by conducting a public hearing in respect of the application; (c) by holding a referendum; (d) by using another method the local government considers appropriate." In accordance with s. 33(4) of the Act and s. 13(5) (c) of the Regulation, the comments and recommendations given to the LCRB must have included the views of the residents and a description of the method used to gather those views.
- [80] The respondent of course did not gather the views of nearby residents nor provide such views and a description of the method used to gather those views to the LCRB.
- [81] I am directing that the Town Council must reconsider the LCRB referral response and prior to doing so, obtain the views of the residents in a fashion that satisfies ss. 33(3) and 33(4) of the Cannabis Control and Licensing Act and associated Regulation. The public consultation shall take the form that the Town Council determines provided it fulfills the requirements of s. 33(3) and s. 33(4) of the Act.
- [82] This reconsideration can take into account the storefront appearance, but such consideration should not conflict with the Act or the current Regulations, as amended.

[83] Unless there is something I am unaware of, the petitioner is entitled to her costs at Scale B.

[84] In summary, I grant relief under orders 1 and 6, dismiss relief under orders 3 and 4 and adjourn the relief sought in orders 2 and 5.

"J. A. Power, J."

The Honourable Madam Justice J. A. Power

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