
CANADA / JUDGMENT

Penticton (City) v. Laturus

2018 BCSC 2080

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2018 BCSC 2080 Penticton (City) v. Laturus

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Penticton (City) v. Laturus,

2018 BCSC 2080

Date: 20181126

Docket: S42783

Registry: Penticton

Between:

The Corporation of the City of Penticton

Petitioner

And

Linda Ann Laturus

Respondent

- and -

Docket: 42940

Registry: Penticton

Between:

Linda Ann Laturus

Petitioner

And

City of Penticton

Respondent

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for The Corporation of the City of Penticton:

E. Lund

Counsel for L.A. Laturus:

M. Welsh, Q.C.

Place and Date of Hearing:

Penticton, B.C.

August 2-3, 2018

Place and Date of Judgment:

Penticton, B.C.

November 26, 2018

Introduction

- [1] These two petitions concern residential property at 890 Three Mile Road in Penticton, B.C. (the "Property"), owned by Ms. Laturus.
- [2] In the first petition, the City of Penticton (the "City") alleges that by occupying the house on the Property, Ms. Laturus is in breach of City building bylaws. In 1995 and 2004, a total of four building permits were issued for renovations to the house. The City says no final inspections, or completion certificates, or an occupancy permit were issued for the four building permits. The City further alleges that by excavating on the Property in 2013, Ms. Laturus is in breach of a City building bylaw. The City says the excavation requires a retaining wall to maintain a slope at the rear of the Property.
- [3] The City seeks:
- a) injunctions restraining occupancy, and any further construction or excavation on the Property, until:
 - i. Ms. Laturus applies for new building permits;
 - ii. the Property satisfies City building bylaws in relation to previous permits and a new retaining wall; and

- iii. an occupancy permit is issued for the Property;
- b) orders requiring Ms. Latusus to take the above steps, in addition to certain specific steps such as executing a geotechnical covenant, to comply with the City building bylaws; and
 - c) an order that if Ms. Latusus does not comply with the above orders within 24 months, that she apply for a demolition permit and demolish the house on the Property.
- [4] The City is agreeable to a stay of the injunction regarding occupancy on the condition that Ms. Latusus is taking steps to meet the City building bylaws within a reasonable time.
- [5] Ms. Latusus says she does not require building permits or inspections from the City. She says to the extent that previous owners of the Property in 1995 and 2004 required inspections for renovations, these were done. She denies she caused an excavation in 2013 requiring a permit or a retaining wall, and denies the City has the legal authority to request that she take certain steps such as executing a geotechnical covenant.
- [6] In the second petition, Ms. Latusus seeks orders:
- a) in the nature of mandamus requiring the City to issue an occupancy permit for the Property; and
 - b) in the nature of certiorari quashing a notice filed in the Land Title Office by the City against the Property pursuant to s. 57 of the Community Charter, S.B.C. 2003, c. 26. That section permits a municipality to file a notice against land, where council considers that a building or structure contravenes a municipal bylaw or building regulation, or where a permit or inspection was required and not obtained.
- [7] The events that concern these petitions can be divided into those that concern the house, and those that concern the walls near the perimeters of the Property. The events are separated by more than a decade and concern different sections of the City's building bylaw, City of Penticton, Bylaw No. 94-45, Building Bylaw (20 June 1994) (the "Building Bylaw"). After a review of the law applicable to statutory injunctions, I divide the evidence and analysis between those two series of events, and then address the specific orders sought.

Law re: Statutory Injunctions

- [8] The City seeks injunctions pursuant to s. 274 of the Community Charter. That section provides:

274 (1) A municipality may, by a proceeding brought in Supreme Court, enforce, or prevent or restrain the contravention of,

- (a) a bylaw or resolution of the council under this Act or any other Act

- [9] This section provides for a statutory injunction, not an equitable injunction. The discretion of the court to refuse a statutory injunction once the City has established a clear breach of a bylaw, is very limited.

[10] In *Vancouver (City) v. Maurice*, 2005 BCCA 37 at paras. 34-35, the Court stated:

[34] Contrary to the submissions made by the appellants, where a public authority, such as the City, turns to the courts to enforce an enactment, it seeks a statutory rather than an equitable remedy, and once a clear breach of an enactment is shown, the courts will refuse an injunction to restrain the continued breach only in exceptional circumstances: *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 47 M.P.L.R. (2d) 249 (B.C.C.A.), and *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2000), 187 D.L.R. (4th) 664 (B.C.C.A.).

[35] The following passage from the decision in *City of Toronto v. Polai* (1969), 8 D.L.R. (3d) 689 at 696-697 (Ont. C.A.), *aff'd* [1973] S.C.R. 38, 28 D.L.R. (3d) 638, is useful in explaining the role of a city corporation in the enforcement of its by-laws:

As members of the city corporation the inhabitants are entitled to look to the duly elected representatives who comprise the municipal council for enforcement of the provisions of by-laws passed for their protection, and in enforcing those by-laws the corporation, whether by means of a prosecution or in a suit for injunctive relief, acts on behalf of all the inhabitants. The municipality, acting through its council and duly appointed officials, occupies in a more restricted sense the same position as does the Attorney-General who represents the Crown in its capacity as *parens patriae* charged with the responsibility of enforcing the rights of the public when they are violated. The decision whether or not the Attorney-General should prosecute or sue is a matter for him, and the Courts have no power to question his right to do so or to refrain from doing so as distinct from his right to relief.

[Emphasis in original.]

[11] The considerations for an equitable injunction - irreparable harm and the balance of convenience - are not required on an application for a statutory injunction: *Peachland (District) v. Peachland Self Storage Ltd.*, 2011 BCCA 466 at para. 27. As a general rule, the duty of a municipality to carry out the provisions of a statute or its bylaws, is of such a public nature that it cannot be waived, lost or vitiated by mere acquiescence, laches or estoppel: *Langley (Township) v. Wood*, 1999 BCCA 260 at para. 12.

[12] In exercising its limited discretion, the court may weigh the public interest against any hardship an injunction would impose. However, the hardship imposed on a particular party from an injunction will rarely outweigh the public interest in having a law obeyed: *Capital Regional District v. Smith* (1998), 115 B.C.A.C. 76, 168 D.L.R. (4th) 52, at para. 20 (C.A.) [Capital Regional District] quoting from *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 109 B.C.A.C. 188, 162 D.L.R. (4th) 203 (C.A.).

[13] The parties cited cases where a statutory injunction was stayed for a period of time, or where modifications were made to the injunctive relief sought. In those cases, the court considered the utility of the injunction, or made orders that would alleviate the hardship an injunction would cause.

- [14] In *Osoyoos (Town) v. Nelmes*, 2009 BCSC 704 [Osoyoos], the Court temporarily stayed a mandatory injunction for one year. In that case, the respondent had constructed a retaining wall without a building permit. The wall encroached on a road allowance. The town did not have immediate plans to upgrade the road to its full width, but had considered doing so. There was no immediate utility to requiring the removal of the retaining wall. The Court granted a stay for one year so that the hardship to the respondent was mitigated. The stay would give the respondent time to make financial arrangements for the significant cost of removing the wall, and to investigate possible solutions to the encroachment.
- [15] In *Alberni-Clayoquot Regional District v. Durmuller*, 2013 BCSC 2533, a blueberry farmer, who was using a bird cannon that emitted a gun-like fire every few minutes, was found to be in breach of a noise bylaw. The farmer maintained the bird cannon was permitted under the bylaw, but during the course of the litigation, the bylaw was amended to prohibit all bird cannon. The application was heard at a time when the berries were about to ripen and an immediate injunction would have caused economic hardship to the farmer. It was too late to employ another method of bird control. This was weighed against the inconvenience of another six weeks of the use of the bird cannon. The injunction was granted, but stayed for six weeks.
- [16] The parties also referred to Capital Regional District as an example of when a court may refuse an injunction. In that case, the homeowner had a cabin on a three-acre property that was communally owned by a group of persons. In total there were 17 cabins on the property. After the cabins were built, the District adopted a zoning bylaw that regulated density. The number of cabins on the property exceeded the density permitted by the bylaw. The cabins became authorized non-conforming use. Subsequently, the cabin in issue suffered a fire and was about 50% damaged. The Municipal Act in force at the time permitted the repair and reconstruction of a non-conforming building so long as no more than 75% of the value of the building was destroyed. The homeowner decided not to do repairs, and invited the local fire department to do a "practice burn" of the cabin. As a result, the cabin was completely destroyed.
- [17] The homeowner began to rebuild the cabin without a building permit, and the District sought a mandatory injunction preventing use of the new cabin and requiring that it be removed. The Court of Appeal found at para. 24 that this was "one of those rare cases" where the court could exercise its discretion to refuse to grant a statutory mandatory order. The Court considered that removal of the cabin would have little effect on the nature of the communally owned property. The Court questioned the utility of removing the cabin as the present group of cabins would still be non-conforming and nearly identical to what existed prior to the fire. The reconstructed cabin was similar to the previous cabin. Removal would result in a substantial loss to the homeowner. The Court found it would be highly inequitable to require removal of the cabin.

[18] Notably, however, the Court did not refuse to grant an injunction with respect to a flood plain setback bylaw. The new cabin was not in compliance with that bylaw. The Court found at para. 25 that this was "a safety issue much like applicable wiring standards and the like". The evidence indicated there might be methodologies to bring the cabin into compliance with the bylaw or obtain an exemption. The Court agreed with the trial judge that the homeowner should be required to, if at all possible, comply with the provisions of the bylaw, and dismissed the homeowner's cross-appeal of the order granting an injunction with respect to compliance with this particular bylaw.

A. The House

[19] The City alleges that Ms. Laturus is in contravention of sections 9.1(q) and 13.1 of the Building Bylaw. Those sections state:

9.1 The Owner, his agents, contractor, and sub-contractor shall be jointly responsible to ensure all construction is carried out in accordance with the requirements of this bylaw and the Building Code, and shall,

(q) not occupy or permit the occupancy of a building, or part thereof until there has been an Occupancy Permit issued therefore;

13.1 Prior to occupancy of a building or a part thereof after construction, wrecking, altering or moving, an occupancy permit must be obtained when required.

The Three 1995 Building Permits

[20] The information concerning the history of the Property comes from the affidavit of Mr. Ken Kunka, the City's Building and Permitting Manager since 2011, who reviewed the City's files concerning the Property. Mr. Kunka is also the Chief Building Inspector and supervises the Building and Licensing departments.

[21] Mr. Kunka swears that City staff have a duty to accurately record and file all pertinent information and documents, including the results of all inspections. This is consistent with s. 3.1(b) of the Building Bylaw, which states:

3.1 The Chief Inspector administers this bylaw, and

(b) keeps records of applications received, accepted drawings, the Permits, orders issued, the inspections and tests made, and retains pertinent papers and documents connected with this bylaw;

[22] The original house on the Property was built in 1968.

[23] In 1995, the owner of the Property was Ms. Farnholz. During that year, Ms. Farnholz obtained three permits (the "1995 Permits"):

- a) on August 21, 1995, she obtained a renovation permit to enclose a carport, make interior renovations, and construct an addition to the house;
- b) on August 29, 1995, she obtained a permit to construct a retaining wall that is near the southwest perimeter of the Property ("Wall A"); and
- c) on September 18, 1995, she obtained a permit to construct a second story addition to the house.

[24] The 1995 Permits were issued with conditions, one being that there be no occupancy until a completion certificate was obtained, as required by s. 13.3 of the Building Bylaw which states:

13.3 Prior to occupancy of a building or a part thereof after construction, wrecking, altering or moving a completion certificate must be obtained, when required.

- [25] The 1995 Permits were issued with letters of assurance from a professional engineer, Mr. Howard. Mr. Kunka explains that letters of assurance, also at the time known as Schedules A through C, are accountability documents under the British Columbia Building Code (the "Building Code"). They provide professional assurance that the work performed substantially complies with the Building Code and that the requisite field review has been completed by the appropriate professional.
- [26] In this case, Mr. Howard was responsible for the structural, and temporary and permanent geotechnical aspects of the construction. On January 8, 1996, Mr. Howard signed the final Schedule C report, certifying that those aspects of construction over which he assumed responsibility were in substantial compliance with the Building Code.
- [27] The City file also contains inspection reports and memoranda by City employees, dating from the autumn of 1995 into the autumn of 1996, concerning other aspects of the construction. No record of a final inspection leading to a completion certificate or occupancy permit has been found by the City. Mr. Kunka states that based on the City's records, no one called for completion inspections or final occupancy inspections, and the City did not issue a completion certificate or an occupancy permit for any of the 1995 Permits.
- [28] On September 13, 2015, approximately two weeks after obtaining the permit for Wall A, the City sent a memorandum to Mr. Howard stating that a "high hazard" covenant was required to be registered on the Property. An incomplete draft covenant is in the City file. The draft refers to Ms. Farnholz agreeing "to use the building/land only as determined and certified by the engineer as enabling the safe use of the property in the report attached". There is no attached report. On January 12, 1996, a \$100 fee was collected from Ms. Farnholz to register the covenant. No completed and signed covenant is in the file and no covenant was registered against the Property. For unknown reasons, the City either failed to have Ms. Farnholz sign a covenant, or if she signed, failed to register it.

- [29] Dr. Huck, who was then the common law partner of Ms. Farnholz, swears that he specifically recalls that a final inspection was done in 1996. He says he does not have a copy of the final inspection report, but he knows Ms. Farnholz arranged this because they needed it to occupy the house.
- [30] The Building Bylaw provides for joint responsibility between the owner and the City to call for inspections. With respect to the owner's responsibility, the Building Bylaw states:
- 7.4.1 The owner or his agent, contractor or sub-contractor shall be jointly responsible for calling for inspections.
- [31] With respect to the City's responsibility, the Building Bylaw provides that a building permit is cancelled after two years if all required inspections are not completed and that, prior to and after the expiration, the City must give notice to the owner:
- 7.2 A Permit shall be cancelled if:
- (b) all required inspections and the issuance of an occupancy permit have not occurred within two (2) years from the date upon which the permit was issued.
- 7.2.1 (a) One month prior to the cancellation of a building permit under this section the Chief Inspector shall notify, in writing, the owner and his agent of the pending permit cancellation. Upon cancellation of the building permit the Chief Inspector shall notify, in writing, the owner and his agent of the cancellation.
- (b) Where any permit becomes cancelled pursuant to this section, the owner or his agent shall ensure that all construction or work for which the permit was issued is ceased. Prior to any further work or construction occurring, the owner or his agent must re-apply for and obtain a new permit for the construction and pay the permit fees applicable at the time of the re-application, and the new permit shall be subject to the bylaws and regulations that are current at the time of issuance of the new permit.
- [32] There is no evidence that in the month prior to the expiry of the 1995 Permits, the City notified Ms. Farnholz or Dr. Huck that there had not been final inspections or an occupancy permit issued, and that the building permits would be cancelled if they were not obtained within a month. There is also no evidence that the City notified Ms. Farnholz or Dr. Huck when the 1995 Permits were cancelled.
- [33] Ms. Farnholz and Dr. Huck subsequently separated, and Dr. Huck purchased Ms. Farnholz' interest in the property. In September 2001, Ms. Laturus moved into the house with him.
- [34] Mr. Kunka states that in order to "close" the 1995 Permits and issue an occupancy permit for the house, the following needs to occur:

- a) Ms. Latusus must apply for and receive building permits for the work done to date, and for completion of any outstanding work required to bring the Property into compliance with the City's Building Bylaw and the Building Code. This may require letters of assurance from an appropriate professional;
- b) all necessary inspections need to successfully occur. This will include an occupancy inspection which may require the removal of drywall and the issuance of letters of assurance by an appropriate professional;
- c) a geotechnical report (this is concerning Wall A) must be provided and a geotechnical covenant must be executed and registered; and
- d) Ms. Latusus must obtain completion certificates.

The 2004 Permit

- [35] On April 2, 2004, Dr. Huck made an application to the City to install a wood stove, and on May 25, 2004, the City issued a building permit to do so.
- [36] Mr. Kunka swears that a building permit is required to install a wood burning appliance in the City, and that the City requires a professional who is WETT (Wood Energy Technology Transfer Inc.) certified to inspect and approve the installation.
- [37] Mr. Kunka states, based on his review of the City's records, that no inspection occurred for the wood burning stove and no WETT certification was provided. Mr. Kunka requested the Fire Inspector, Mr. Michael Richards to search the fire department records for this inspection, but no record was found.
- [38] Clause 3.2 of the Building Bylaw states:

The Chief Inspector may

- (a) (i) authorize the Fire Chief of the City of Penticton and any fire inspector appointed by him to be a building inspector of:

- (a) stoves, ranges and space heaters burning solid fuels

- [39] Dr. Huck swears that he purchased the wood stove from a dealer in Okanagan Falls and the dealer installed it. He understood the dealer was a fully certified wood fireplace installer. He was not asked by the City to obtain an inspection by a WETT certified inspector. After the wood stove was installed, someone from the City fire department did an inspection and approved it. Dr. Huck does not have a copy of the inspection report.
- [40] Mr. Richard Giles, who is Ms. Latusus' tenant and agent, states he spoke with Mr. Richards, who told him that two years ago the paper filing system was categorized for freedom of information and privacy purposes and that it was possible inspections such as this were purged. In an email exchange that is appended to one of Mr. Giles' affidavits, Mr. Richards states that he searched the back-up of the property management program used in 2004,

which is still available, and found no entries for the Property address. He states that while it is possible that Dr. Huck talked to someone at the fire department about the inspection, there is "absolutely no record of that happening".

- [41] Both Mr. Kunka's and Mr. Giles' evidence with respect to their discussions with Mr. Richard are hearsay, and not admissible on this application. The only conclusion I draw is that neither party has been able to locate any documentary evidence of a final inspection of the wood stove.
- [42] Mr. Kunka states that to "close" this permit and provide a completion certificate, Ms. Laturnus needs to provide proof that the installation has been inspected and certified by a WETT certified professional in a form acceptable to the City, and comply with all other permit and inspection requirements.

The 2005 Business Licence Inspection

- [43] In 2005, Dr. Huck and Ms. Laturnus, who was by then on title to the Property along with Dr. Huck, decided to open a bed and breakfast business. They applied to the City for a business licence, and as a condition of that licence, the house was inspected.
- [44] The building inspection report, which is on substantially the same form as the previous building inspection reports in 1995 and 1996, has boxes which are ticked that state it is "Final" and that "At the time of inspection, construction appears to conform reasonably with accepted plans and specifications & B.C.B.C. [Building Code]". The City subsequently issued the business license.
- [45] Ms. Laturnus relies on this inspection as a final inspection which would grant her the right to an occupancy permit. She also refers to s. 6.2 of the business licence bylaw, City of Penticton, Bylaw No. 2012-5020, Business Licence Bylaw (7 May 2012) (the "Business Licence Bylaw"), which states:

6.2 The Licence Inspector may inspect the Premises for which a Business Licence application is made or a Business Licence is issued and such inspection shall be for the purpose of and limited to:

6.2.2 observe the Business and Premises for compliance with the City Building Bylaw, and the City Fire and Life Safety Bylaw.

- [46] Mr. Kunka states that building inspectors who enforce the Building Bylaw are also inspectors under the Business License Bylaw. Although not employed by the City in 2005, Mr. Kunka swears he is familiar with the process in 2005 for issuing a business license. This included a zoning conformance check, a civic file search to ensure there were no deficiencies to the original building, and a site inspection. A resident with an open or expired building permit, unpermitted work, or without an occupancy permit or completion certificate should not have been issued a business license. In this case, the expired permits should have prevented the business license from being issued. There is no indication the

inspector at the time performed a civic file search and was aware of the expired permits.

- [47] Mr. Kunka also states the type of inspection done for a business license is not the same as an inspection done for a completion certificate and occupancy permit following construction. For a home-based business such as a bed and breakfast, the site inspection would be to ensure basic life safety. The major concerns are appropriate egress from the bedrooms, smoke alarms, and handrails and guardrails on stairs.
- [48] Mr. Kunka states the form used for the business license was a generic multi-purpose form that was also used for building permit inspections. The form does not indicate there was a final inspection under the Building Bylaw. Mr. Kunka notes there were no "accepted plans" for the Property for the purposes of the business licence inspection, as there would have been for an inspection under the Building Bylaw.
- [49] In 2009, Ms. Laturus purchased Dr. Huck's interest in the Property. She swears at the time she moved into the house in 2001, and at the time of purchase, she remained completely unaware of the circumstances of the construction done in 1995 and 1996. There was no notice on title to the Property of any potential breach of a City bylaw. As far as she knew, all construction on the house and Property was complete and the house she was living in was finished.

City Discovery of Cancelled Permits

- [50] On March 27, 2014, a complaint was made concerning excavation that was allegedly being carried out in the southeast corner of the Property. This is in connection with the perimeter walls issue, discussed below. As a result of this complaint, the City reviewed its file for the Property and discovered the four building permits had expired and had not been closed.
- [51] On December 15, 2014, 17 years after the 1995 Permits expired, the City first raised the issue of "open building permits" and advised Ms. Laturus that she did not have an occupancy permit to reside in the house. This is the first Ms. Laturus had knowledge of a potential issue with previous renovations or construction.
- [52] On January 12, 2015, the City passed a resolution granting Ms. Laturus 60 days to close the four building permits. Failing this, a notice pursuant to s. 57 of the Community Charter would be registered against title. Ms. Laturus did not comply with the City requests to resolve the issues. Subsequently, the s. 57 notice was registered on title.
- [53] The affidavits filed in this proceeding indicate that there has been a lengthy period of discord between the City, Ms. Laturus, and Mr. Giles. Mr. Kunka states that since 2014 the City has attempted to work with Ms. Laturus and Mr. Giles to bring the Property into compliance with the Building Bylaw. He has been involved in much of this effort which has consumed a great deal of time, and in which there has been voluminous correspondence. Mr. Giles similarly indicates there have been over a dozen meetings with the City in an attempt to resolve the issues between the parties. No resolution was reached.

[54] On October 3, 2017, the City passed a resolution to bring this petition.

Has the City Established a Clear Breach of the Building Bylaw?

[55] The City's position is that final inspections for completion certificates and an occupancy permit were not done. The City is required to keep records of inspections and permits. There is no evidence in the City's files that final inspections were done, or that completion certificates and an occupancy permit were issued.

[56] The City argues that it was the previous owners' responsibility to ensure the required inspections and occupancy permits were obtained. The City also admits that it had a responsibility under the Building Bylaw to notify the previous owners in writing that the building permits were about to expire, and again after the permits expired. The City admits there is no evidence in its files that it did this, but argues that it does not absolve the previous owners of their responsibility to call for inspections. The City argues that, as the current owner, Ms. Latusus is now responsible, and that occupancy of the Property without a completion certificate and occupancy permit is in breach of the Building Bylaw.

[57] Ms. Latusus has three arguments. I address them below.

1. The Permits are Cancelled

[58] Ms. Latusus argues that the four previous building permits have all been cancelled by operation of s. 7.2 of the Building Bylaw and there is nothing needed to be done to "close" them.

[59] The City agrees the permits have been cancelled, and says as a result the work performed under them has effectively become unpermitted. As there is no occupancy permit, occupancy is contrary to the Building Bylaw.

[60] I do not accept Ms. Latusus' argument. It ignores the specific conditions of the building permits (a completion certificate) and the requirements of ss. 9.1(q), 13.1 and s. 13.3 of the Building Bylaw which require a completion certificate and/or occupancy permit prior to occupancy. Section 7.2.1(b) sets out the procedure when a permit has been cancelled. To complete the work, the owner must apply for a new building permit, the satisfaction of which would lead to a completion certificate and occupancy permit. Section 7.2.1(b) is the procedure the City has attempted to have Ms. Latusus follow.

2. All Necessary Inspections were Done

[61] Ms. Latusus argues that all necessary inspections have been done under the building permits. The forms for footings were inspected August 22, 1995, the damp-proofing was inspected September 11, 1995, the rough-in plumbing was inspected August 24, 1995, the framing was inspected January 18, 1996, and the installation of insulation and vapour barrier was inspected on October 4, 1996. A final inspection was done in 1996. Further, letters of assurance were issued by Mr. Howard. Finally, there was an inspection in 2005 in connection with the business licence.

- [62] There is conflicting evidence as to whether a final inspection took place for the 1995 Permits. Dr. Huck swears he specifically recalls a final inspection in 1996. However, there is no evidence of a final inspection in the City file. If a final inspection took place, it seems unlikely that the records concerning it would be missing from the City file, when many other documents evidencing the inspection process are present.
- [63] However, it is not necessary to resolve this conflicting evidence because, even if a final inspection took place as stated by Dr. Huck, the inspection process was not completed. The results of the final inspection are not recorded (whether the renovations were satisfactory or whether there were deficiencies) and neither a completion certificate nor an occupancy permit were issued. The City has no assurance that the inspection did not reveal any deficiencies. I therefore find that no final inspections for the 1995 Permits were completed.
- [64] Ms. Laturnus also argues with respect to the 1995 Permits, that Mr. Howard, the engineer involved, issued letters of assurance. Section 7.4.2 of the Building Bylaw permits the City to rely upon the certificate of compliance of an engineer:

7.4.2 Where an Architect or a Professional Engineer is registered to practice in British Columbia and is engaged by the owner for the design and inspection of the construction of the building, a certificate of compliance with this bylaw and the Building Code may be accepted in lieu of inspections.

- [65] The City argues the Building Bylaw does not state that letters of assurance shall stand in substitution of a certificate of completion. Further, s. 7.4.2 is permissive only. More significantly, the letters of assurance given by Mr. Howard only address the structural, and temporary and permanent geotechnical aspects of the construction. They do not certify anything with respect to the many other aspects of construction, such as electrical and fire safety requirements.
- [66] I agree with the City that Mr. Howard was not certifying anything other than particular aspects of construction, and that his letters of assurance are not a substitution for the final inspection required by the City. I therefore reject Ms. Laturnus' argument that she can rely upon Mr. Howard's letters of assurance as entitling her to an occupancy permit.
- [67] With respect to the 2004 permit, there is conflicting evidence whether there was a final inspection of the wood stove installation. Dr. Huck recalls there was a final inspection and approval by the fire department. However, there is no City record of an inspection, and neither party has been able to produce a fire department record of an inspection. If a final inspection took place, it seems unlikely that the records concerning it would be missing from the City or fire department file, when other documents concerning the application and issuance of the permit are present.
- [68] However, like the situation for the 1995 Permits, it is not necessary to resolve this conflicting evidence because, even if a final inspection took place as stated by Dr. Huck, the inspection process was not completed. The results of the final inspection are not recorded (whether the

installation was satisfactory or whether there were deficiencies). The City has no assurance the installation was done appropriately. It is unclear on the evidence whether a certificate from a WETT certified installer was required in 2005. Ms. Laturnus argues it was not required in 2005 and there is nothing in the Building Bylaw requiring this now. It is required now according to Mr. Kunka. I find that the Building Bylaw does not need to specify this level of detail for the City to require a WETT certification as part of its approval process. Dr. Huck has not sworn that the installer was WETT certified but says he understood he was fully certified. I therefore find that no final inspection for the wood stove was completed.

[69] Finally, Ms. Laturnus argues that the 2005 inspection for the business licence is a final inspection that would entitle her to an occupancy permit.

[70] The City relies on Mr. Kunka's evidence and argues the inspection for a business licence is not the same as an inspection under a building permit. The City notes that the inspection report specifically states "OK to issue Business license". It does not reference the earlier building permits.

[71] I accept the evidence of Mr. Kunka that the type of inspection carried out by the City for a business license is not the same inspection that is done for a building permit. I reject Ms. Laturnus' argument that the 2005 business license inspection can stand in substitution of a final inspection for an occupancy permit under the Building Bylaw.

[72] I also do not accept that s. 6.2 of the current Business Licence Bylaw indicates that a business licence inspection stands in substitution of a building permit inspection. Ms. Laturnus referred to the 2012 bylaw. Even if the 2005 bylaw is the same, the wording supports Mr. Kunka's evidence that they are not the same inspections. Any inspection by the business inspector is "limited to" certain aspects and involves "observing". An inspection for a business licence for an existing building would be visual only, as one would not expect such an inspection to require the possible tearing down of walls absent a reason for doing so.

3. No Authority to Request a Geotechnical Covenant

[73] Ms. Laturnus argues the City never had any legal authority to require the geotechnical covenant in connection with Wall A. Prior to the issuance of the building permit for Wall A, the City did not seek a geotechnical covenant. It was only two weeks after the permit was issued that the City requested a high hazard covenant. The legislation in effect at the time was s. 734 of the then Municipal Act. The applicable portion of that section is nearly identical to Part 14 of the Building Bylaw.

[74] The applicable sections of Part 14 are:

PART 14 GEOTECHNICAL CONDITIONS

14.1* Where the Chief Inspector considers that construction would be on land that is subject or likely to be subject to flooding, mud flows, debris flows, debris torrents, erosion, land slip, rock falls, subsidence or avalanche, he may require the owner of the land to provide him with a report certified by a Professional Engineer with experience in geotechnical engineering that the land may be used safely for the use intended.

14.1.2 For the purpose of this part "Construction" means new construction of a building or structure, or the structural alteration of or addition to an existing building or structure, but does not include the repair of an existing building or structure;

14.1.3 Where a professional Engineer with experience in geotechnical engineering determines that land may not be used safely for the use intended, the Building Inspector shall refuse to issue a Permit.

14.1.4 Where a Professional Engineer with experience in geotechnical engineering determines and certifies that land may be used safely for the use intended, subject to conditions contained in his report with respect to:

- (d) other conditions respecting the safe use of the land, buildings, structures or works, the Building Inspector may issue a Permit on the condition that:
 - (i) the registered owner of the land covenants with the City to use the land only in the manner determined and certified by the Engineer as enabling the safe use of the land for the use intended;
 - (ii) the covenant contains conditions respecting reimbursement by the registered owner for any expenses that may be incurred by the City as a result of a breach of a covenant under subsection (d)(i);
 - (iii) the covenant be registered under Section 215 of the Land Title Act;

14.1.5 Upon application of the registered owner, Council may, by resolution, direct the Building Inspector to issue a Permit but subject to the condition that a covenant referred to in 14.1.4 be entered into and registered.

[75] Ms. Laturnus refers to *McKeown v. City of Port Moody*, 2000 BCSC 73 [McKeown] at para. 17:

On a plain reading of Section 699 of the Act [previously s. 734] it would appear that it must be resorted to by the Building Inspector prior to the issuance of the initial building permit and that it cannot be invoked before the issuance of a final occupancy permit. Here the City did not require this inspection and report prior to the issuance of the building permit. That Section 699 can only be invoked prior to the issuance of a building permit is clear upon a consideration of the entire section, and, in particular, from a perusal of subsections 4, 5, 6, and 7 of Section 699.

- [76] Relying on this passage, Ms. Laturus argues that once the building permit was issued in 1995, the City could no longer seek the covenant which would be registered pursuant to s. 215, now s. 219 of the Land Title Act, R.S.B.C. 1996, c. 250. It matters not that Ms. Farnholz was apparently voluntarily agreeable to such a covenant.
- [77] In response, the City says the issue is not whether the City could have required a geotechnical covenant in 1995. McKeown is therefore not applicable. Currently, Ms. Laturus does not have valid building permits for the work that has been done. She will need to apply for new building permits, and as soon as she does so, the City will likely require a geotechnical covenant in connection with any future permits.
- [78] I agree with the City, and find, that once Ms. Laturus applies for new building permits to complete the four previous building permits, the City has authority under Part 14 of the Building Bylaw to require a geotechnical covenant if the conditions of that Part are met.
- [79] In summary, I find that the City has established a clear breach of the Building Bylaw. Final inspection reports were not completed, and completion certificates and an occupancy permit were not issued for the 1995 Permits, and a final inspection report was not issued with respect to the wood stove. Pursuant to s. 9.1(q) and s. 13.1, the Property may not be occupied without an occupancy permit, and it is currently being occupied.

B. The Perimeter Walls

- [80] The Property, and its neighbouring properties, are situated at the base of an embankment that is six to eight metres high. The bottom of the slope starts near the rear, south perimeter of the Property and neighbouring properties, and increases in elevation to the south.
- [81] The City alleges that Ms. Laturus and/or her agent Mr. Giles excavated into the toe of the slope contrary to s. 9.1(r) of the Building Bylaw.
- [82] That section states:

9.1 The Owner, his agents, contractor, and sub-contractor shall be jointly responsible to ensure all construction is carried out in accordance with the requirements of this bylaw and the Building Code, and shall

- (r) not fill or excavate any portion of the property unless such fill or excavation is properly maintained by a retaining wall or other acceptable method;

Walls Prior to March 2013

- [83] In 1996, pursuant to one of the 1995 Permits, Ms. Farnholz installed Wall A, near and parallel to the southern perimeter of the Property, on the western half of that perimeter. It is cast-in-place concrete, 1.8 to 2.4 metres high, 10 metres in length, and retains the slope to the south of it.

- [84] In addition to Wall A, there was a three-course high Allan Block wall, installed at some unknown time, and present when Ms. Laturus moved to the Property in 2001 ("Wall C"). Wall C, like Wall A, runs parallel to and near the southern perimeter of the Property, except it is on the eastern half of that perimeter; it starts at the eastern end of Wall A, and extends further eastward, within what I estimate (from photographs) to be approximately six to 10 feet of the eastern edge of the Property. Wall C is about 60 centimetres high and 13 metres long.
- [85] The parties disagree whether Wall C is a retaining wall or simply demarcates the back yard of the Property. Mr. Giles says that Wall C has no foundation, no drainage, is constructed with empty Allan Block and had started to lean in places. He states it was clearly never installed to retain the embankment. Ms. Laturus also states that Wall C was not intended to be a retaining wall, and simply demarcated the area of her back yard. Mr. Glen, a geotechnical engineer whose opinion is discussed below, does not state that Wall C was intended to retain the slope, but does say it is providing little or no support for the adjacent slope. Mr. Kunka believes Wall C was intended to retain the slope. None of these persons were present when the wall was built at some unknown time in the past.
- [86] Up until March 2013, the eastern edge of Wall C abutted a concrete wall that ran diagonally in front of the southeast corner of the Property, and then continued parallel to and in front of the eastern edge of the Property ("Wall E"). Wall E is about 66 cm high. The level of the land behind this wall was raised, and extended to the southeast corner and eastern border of the Property. Ms. Laturus had a raised garden space behind Wall E. The southeast corner of the Property had some galvanized metal, a lattice fence and trees along the Property line, and an elm tree in the corner. This provided Ms. Laturus with privacy.

Walls after Neighbour Began Construction

- [87] In 2012, the owner of the property to the east of the Property embarked on residential construction and yard work. The owner obtained variance permits from the City that included a retaining wall between the two properties, to a height of up to 2.4 metres in the southeast corner of the Property. Ms. Laturus, through Mr. Giles, made submissions to the City opposing these variances, but the permits were issued.
- [88] Ms. Laturus and Mr. Giles have a strained relationship with the neighbour and the neighbour's contractor.
- [89] The neighbour constructed a retaining wall ("Wall B"), along or near the border between the two properties. This is the eastern edge of the Property. Wall B was constructed in three segments. The longest segment, in the middle ("Wall B-1"), was constructed in August 2013. Part of Wall B-1 was built along the raised area behind Wall E. According to Ms. Laturus, when Wall B-1 was completed, its footings were fully exposed above the grade of the Property by approximately 15-30 centimetres. She considered Wall B-1 an eyesore. Wall B-2, which is the most northern segment of Wall B, is not in issue in these proceedings.

- [90] At the end of October and early November 2013, the neighbour's contractor cut down the elm tree and excavated two large stumps near the southeast corner of the Property. The elm tree was either close to or on the property line. There is a dispute in the evidence as to whether Ms. Latusnus authorized the removal of the elm tree, but it is not material to the issues to be decided in these petitions.
- [91] In March 2014, Ms. Latusnus authorized Mr. Giles to remove Wall E. Ms. Latusnus and Mr. Giles planned to replace Wall E with an Allan Block wall of under 1.2 metres in height that would join Wall C. Ms. Latusnus states that with the elm tree gone, the neighbour's excavation left open all winter, and the neighbour's retaining wall, she was experiencing water problems on the Property. She had no privacy and the southeast corner of her Property was unsightly. She planned to build up soil behind this new wall to bury the exposed footings of Wall B-1. She and Mr. Giles also planned to do some repairs along Wall C. They would then plant some trees and shrubs to restore some privacy to Ms. Latusnus' back yard.
- [92] On March 27, 2014, the City received the complaint, previously referred to in these reasons, regarding alleged excavation work being carried out on the Property in furtherance of the above plan. The complaint was that the footings of the neighbour's Wall B-1 were being undermined and there was an excavation into the embankment at the rear of the Property.
- [93] On March 28, 2014, Mr. Mann, a building inspector with the City, attended the Property. Mr. Mann has a diploma in Civil and Structural Engineering Technology. He has been a building official for local governments for over 30 years, 24 of which were as a Chief Building Official. He swears that over his career, he has gained a great deal of experience with soil stability and landslides.
- [94] Mr. Mann states that Mr. Giles was on the Property. Mr. Mann looked at the area of excavation. It was approximately five and a half feet high, ten feet wide and four feet deep. He says it was divided into two distinct areas, one closer to the neighbouring property, and one to the west of that, on the Property. Mr. Giles told him he did the excavation. He informed Mr. Giles that by undercutting the existing bank he may have compromised the stability of the soil in the area, creating a potential for a slide. Mr. Giles disagreed with him and did not think this was unsafe. Mr. Mann told Mr. Giles that a building permit was required because of the surcharge behind the wall. Mr. Mann thought this required the opinion of a geotechnical engineer and would require an engineered retaining wall.
- [95] Mr. Giles and Ms. Latusnus interpret Mr. Mann's affidavit as implying that a very large volume of soil was removed. They deny this. They and a friend who helped remove the soil say it was about eight wheelbarrows of soil. I do not read Mr. Mann's affidavit as implying that a cube of soil in the dimension of the excavation was removed. The area where the excavation took place was sloped prior to excavation. The exact amount of the excavation is not as important as whether the excavation requires a retaining wall to properly maintain it.

[96] On April 3, 2014, Mr. Mann posted a notice to stop work at the Property. He advised Mr. Giles to retain a geotechnical engineer to inspect the site and submit a report to the City on how to stabilize the excavation and make it safe.

[97] Mr. Kunka states he directed the stop work order pursuant to s. 3.3 of the Building Bylaw. That section states:

3.3 The Chief Inspector may

(f) direct:

(v) the correction of any unsafe condition

[98] Between late April and early May 2014, Mr. Giles constructed, with Mr. Kunka's approval, an Allan Block wall ("Wall D") parallel to and forming a planter about 1.2 metres west of Wall B-1. Wall D is about one metre high. The area behind Wall D was filled with soil and covered most if not all of the footings of Wall B-1.

[99] In late June 2014, the southwest corner of the neighbour's property was excavated by the owner's contractor, in preparation for the construction of the southernmost segment of Wall B ("Wall B-3"). Ms. Laturus and Mr. Giles allege that while doing so the neighbour excavated into the southeast corner of the Property, and the slope in that area. The neighbour and the neighbour's contractor deny this. In late June 2014, the final segment, Wall B-3 was completed by the neighbour's contractor.

[100] On January 12, 2015, the council of the City passed the resolution, discussed earlier in these reasons, that Ms. Laturus was granted 60 days to allow for a geotechnical assessment and/or building permit to address the issues on the Property, failing which the s. 57 notice would be registered on title. Ms. Laturus did not comply with City requests and the s. 57 notice was registered on title.

Mr. Glen's Expert Opinion

[101] One year later, the City obtained an order allowing it to enter the Property with an engineer for the purposes of an assessment of the perimeter walls. Mr. Paul Glen, an engineer, attended the Property on July 14, 2016 and subsequently produced the expert report filed in these proceedings.

[102] Mr. Glen is a professional engineer specializing in geotechnical and geological engineering. His experience includes slope stability assessments for several properties on Three Mile Road.

[103] Mr. Glen opines that the slope behind the Property is predominantly silt materials, which are moderately to highly erodible and sensitive to moisture. Slope instability can result from excess water in these soils. Stability could also be reduced by removal of soil support from the base of the slope. There are no large-scale active landslides noted on the slopes adjacent to the Property, but landslides are present on higher silt bluffs to the north and

south of Three Mile Road. The slope above the Property is well vegetated. He identifies a series of scarps 30 to 60 centimetres high on the natural slope above and to the southeast of the Property. These are caused by shallow soil creep and small landslides or slumps. These indicate the slope is "marginally stable and prone to failure and movement when conditions are changed. The gradual creep will continue and could accelerate if soil moisture conditions increase."

- [104] Mr. Glen describes, and provides opinions and recommendations, on the four walls. He concludes that Walls A, B and D are satisfactory, and no further work is required for these walls. Wall C, however, is in need of repair. I note here that although Mr. Glen says that Wall D is presently functioning satisfactorily to protect the footings of Wall B, Mr. Kunka states that a significant portion of the footings of Wall B are still exposed. I prefer Mr. Glen's evidence on this point as the last time Mr. Kunka was on the Property was in early 2015, and Mr. Glen was on the Property in July 2016.
- [105] Mr. Glen describes Wall C as leaning and providing little or no support for the adjacent slope behind it. It appears no proper drainage was installed behind it, nor is there "geogrid" which is a type of reinforcing material that should be used with Allan Block walls. Mr. Glen recommends replacement of Wall C with a minimum two metres high retaining structure from the east end of Wall A to the end of Wall C "to buttress the steep slopes" above the rear yard of the Property. Proper drainage and geogrid is required for the replacement wall (this assumes the replacement wall would be Allan Block).
- [106] Mr. Glen also recommends that the "existing cutslope" in the southeast corner of the Property should not be left exposed "as it increases the vulnerability of the silt soils to moisture ingress. These silt soils, when exposed to water lose strength and can collapse causing overall slope instability". Mr. Glen recommends that a retaining wall should be constructed in the southeast corner of the Property "to protect the exposed cutslope and footings for Wall B". (Wall C does not extend to the southeast corner of the Property, so this is a separate recommendation in addition to replacement of Wall C.) Mr. Glen states: "A cast-in-place wall is preferred in this location as the steep slopes prohibit geogrid which would be required for an Allan Block wall. In addition, the installation of a cast-in-place wall would ensure minimal disturbance of the adjacent slopes and footings." This should extend to the highest point of Wall B to "buttress the steep exposed slope area".

Has the City Established a Clear Breach of the Building Bylaw?

- [107] The only expert opinion evidence tendered on these petitions is the report of Mr. Glen. Mr. Mann and Mr. Kunka have given evidence regarding the opinions they formed. Those individuals have many years of building inspection experience. Under the Building Bylaw, Mr. Kunka is given authority to form opinions with respect to construction on land that he considers may require geotechnical expertise, and to direct and take certain actions based on those opinions. I recite their opinions because they are the basis of the City's actions.

- [108] The City relies upon the expert opinion of Mr. Glen and alleges Ms. Laturnus is in breach of s. 9.1(r) of the Building Bylaw by excavating a portion of the Property without the fill and excavation being properly maintained by a retaining wall or other method. The City alleges that in late March 2014 Mr. Giles, acting on behalf of Ms. Laturnus, removed part of Wall C and excavated behind it and in the southeast corner of the Property, into the embankment. This includes the removal of Wall E. The City also says that when excavating, Mr. Giles undermined the neighbour's engineered retaining wall (Wall B-1).
- [109] The issue with the exposure of the footings of Wall B-1 appears to have been resolved with the construction of Wall D and the backfilling of material behind it with the approval of Mr. Kunka. However, the City argues that an engineer will still need to certify Wall D for the purpose of protecting the footings of Wall B-1. The City says Mr. Glen did not certify this.
- [110] Although the parties referred to this generally as the "Wall C" issue, there are two distinct areas that Mr. Glen addresses. First, there is the southeast corner of the Property that is actually behind the old Wall E and possibly a small part of Wall C. For this, Mr. Glen recommends remedial work and a cast-in-place concrete wall. Second, there is the entire length of Wall C, which is 13 metres long. Mr. Glen states this is in need of repair and should be replaced with a wall that could be either Allan Block or cast-in-place concrete.
- [111] The City bases its petition for an alleged breach leading to an injunction solely on s. 9.1(r) of the Building Bylaw. The City agrees that for the section to be engaged, there must be an "excavation" that needs to be properly retained by a wall or other acceptable method.
- [112] Ms. Laturnus makes a number of arguments which I address below.
1. No Convincing Evidence that Mr. Giles Excavated
- [113] Ms. Laturnus argues there is no convincing evidence that Mr. Giles engaged in any excavation to support the alleged violation of s. 9.1(r) of the Building Bylaw. She says to the extent there is any undermining of the embankment, it has been done by the neighbour's contractor. To the extent Mr. Giles removed any soil, he was just taking out loose soil and roots left by the neighbour's removal of the elm tree and stumps in the southeast corner of the Property. Thus, Ms. Laturnus argues because there was no "excavation", s. 9.1(r) is not engaged.
- [114] There is conflicting evidence between Mr. Giles and the neighbour's contractor, Mr. Cowe, as to who did what. Mr. Giles swears that any excavation work in the southeast corner of the Property was done by the neighbour's contractor as part of the removal of the trees near the Property line. Ms. Laturnus gives similar evidence and says it was the neighbour's contractor who excavated in the area. Mr. Giles says he never used anything but a shovel to remove loose soils.
- [115] Mr. Cowe swears that other than what was necessary to remove an elm tree in the southeast corner of the Property, he did not perform any excavation on the Property.

- [116] With respect to the two distinct areas of excavation identified by Mr. Mann in March 2014, and shown in photographs filed in these petitions, Mr. Cowe states that the area of excavation to the east, which is near the Property line, is his own excavation from removing the elm tree. Having reviewed the photographs taken over time, I accept Mr. Cowe's evidence over that of Mr. Mann on this point. The one area of excavation near the Property line appears in the photographs after the elm tree was removed, and pre-dates Mr. Giles' work in March 2014. Mr. Cowe states that the second area of excavation to the west and identified by Mr. Mann in March 2014, is on the Property and was not done by him.
- [117] Mr. Giles also denies he undermined any portion of Wall B-1, or exposed the footings along Wall B-1, when he removed Wall E. He says the footings of Wall B-1 were not constructed on natural grade, but were placed on the built-up grade of loose soil that was behind the old concrete wall (Wall E). Over time, the loose fill started crumbling out from under the footings. This was frequently disturbed soil used for a whimsical garden space. He says he removed loose fill and remnants of the stump root system of the elm tree in the soil behind the old low concrete wall (this is behind Wall E and in front of Wall B-1).
- [118] Mr. Cowe states Wall B-1 was not constructed on loose fill. He believes it to be built on natural grade supported by a retaining wall on the Property (this is the old Wall E). The ground below Wall B-1 started crumbling after Mr. Giles removed Wall E and the fill behind it.
- [119] The conflict in the evidence between Mr. Giles and Mr. Cowe can be resolved by reviewing, in date order, the many photographs of the Property taken at different times over four years. I find that when Wall E was removed in March 2014, Mr. Giles excavated adjacent to the footings of Wall B-1 and into the southeast corner of the Property into the slope of the embankment. While the neighbour's contractor did remove the elm tree and other materials along the border between the two properties, the second area of excavation to the west, that is on the Property, and clearly depicted in the March 2014 photographs, is not present in earlier photographs after the elm tree was removed. Further, the excavation for Wall B-3 in the southwest corner of the neighbour's property, did not take place until June 2014. I also rely upon Mr. Mann's affidavit. When Mr. Mann attended the Property in March 2014, Mr. Giles told him that he was the one who did the excavation. I find the excavation on the Property was done by Mr. Giles. I also find that the excavation done by Mr. Giles into the embankment was not merely removal of loose soils. The photographs clearly show the embankment has been cut away.
- [120] With respect to the smaller area of excavation to the east that relates to the elm tree removal, it is possible that when the neighbour's contractor removed the elm tree and stump, some of this work crossed over to the Property. However, I am unable to decide this as the exact position of the Property line is not shown on the photographs.

- [121] The parties devoted significant time and evidence to who was responsible for the excavation. Although I have made some findings of fact with respect to this, in my view, who was responsible for doing so is not relevant to a determination of the City's allegation that there was an excavation on the Property that triggers s. 9.1(r). It is clear from the photographs, and I find, that there was an excavation in the southeast corner of the Property.
- [122] I turn now to the remainder of the length of Wall C for which Mr. Glen makes a different recommendation than the southeast corner of the Property. The critical issue is whether there was an excavation along Wall C such that s. 9.1(r) is engaged.
- [123] I am not persuaded, on the evidence presented, that Mr. Giles excavated behind Wall C as opposed to the area behind Wall E and into the embankment in the southeast corner of the Property, where I find he did excavate. The photographs show that Mr. Giles moved some Allan Blocks on a small portion of the eastern end of Wall C. If he excavated behind Wall C, the photographs indicate it would have been to a very small extent at the far eastern portion. Wall C is 13 metres long.
- [124] The City argues that there must have been an excavation at the time Wall C was built because Wall C runs along the foot of the embankment. That does not necessarily mean there was an excavation at the time it was built. Ms. Laturus and Mr. Giles state the wall was never intended to be a retaining wall - it was merely a landscape feature and it only demarcates the usable area of the Property. It is impossible to tell from the photographs whether there was an excavation when Wall C was built, or whether there has been a gradual creep of soil over time into the wall, as Mr. Glen opines the slope is at risk of doing. Neither Mr. Glen nor Ms. Laturus nor Mr. Giles were present when Wall C was built.
- [125] In summary, there is no persuasive evidence there was an excavation when Wall C was constructed, and there is no evidence that in 2014 Mr. Giles or Ms. Laturus excavated along the length of Wall C, other than possibly to a very small area at the far eastern end. I find that the City has not established a clear breach of s. 9.1(r) for almost the entire length of Wall C.

2. The Excavation does not Require a Retaining Wall

- [126] Ms. Laturus argues that "there is no expert evidence to show the embankment is unstable. Mr. Glen notes some small evidence of sloughing and Mr. Kunka is not qualified to express any opinion. Thus the proposed work has not been shown to be necessary."
- [127] Mr. Giles states that the scarps identified by Mr. Glen are actually remnants of an old road above the Property and that the embankment has not changed for more than 50 years. He relies upon historical photographs from 1953 to 2017 in support of this. I do not find the photographs clear or determinative. There is no evidence Mr. Giles is a geotechnical engineer. I therefore do not accept his opinion that the scarps are not actually small landslides or slumps as opined by Mr. Glen.

- [128] The uncontradicted expert evidence of Mr. Glen is that the excavation into the southeast corner of the Property requires a cast-in-place retaining wall to adequately retain the cutslope behind it. I find that the excavation in the southeast corner of the Property requires a retaining wall, and the City has established a clear breach of s. 9.1(r) with respect to that specific area of the Property.
- [129] I accept Mr. Glen's uncontradicted opinion that the embankment behind Wall C is marginally stable and prone to failure and movement when conditions are changed. I also accept his opinion that Wall C is providing little or no support for the adjacent slope. However, I have found there was no excavation along the length of Wall C, and there is nothing in Mr. Glen's report that links what Mr. Giles did in the southeast corner of the Property with the condition of the embankment along the 13 metre length of Wall C. The embankment behind Wall C is in the same condition it was prior to Mr. Giles doing any work in the southeast corner of the Property. There is no evidence that anything Mr. Giles did in that corner made the embankment behind Wall C less stable.
3. No Authority to Require Removal and Replacement of Wall C
- [130] Ms. Latus argues there is no provision in the Community Charter or the Building Bylaw on which the City can found its claim to require her to remove Wall C, for which no permit was required in the first place, or to replace it with a structure for which a permit is necessary, or to impose a geotechnical certification.
- [131] I pause here again to say that although the parties referred to this generally as the "Wall C" issue, in my view, it is necessary to divide the analysis into the excavation in the southeast corner which included the removal of Wall E, and the length of Wall C.
- [132] Wall E was under 1.2 metres, and Wall C is under 1.2 metres. Pursuant to ss. 5.1, 6.1 and 7.1.4 of the Building Bylaw, walls that are over 1.2 metres in height are subject to the Building Code and require a building permit and a registered professional's opinion:

PART 5 REGULATE CONSTRUCTION

5.1 The British Columbia Building Code as adopted pursuant to Part 21, Division 5 of the Municipal Act shall form the regulations for construction and fire limits within the City of Penticton including regulations for:

- (b) the erection of any retaining wall over 1.2 meters in height;

PART 6 PERMITS REQUIRED

6. Except as permitted in 6.2, no building or part of a building shall be constructed, altered, reconstructed, demolished, removed, relocated, occupied, or a change in class of occupancy take place; or
- (b) the erection of any retaining wall over 1.2 meters in height;

until a permit has been first obtained pursuant to this bylaw.

PART 7 CONDITIONS OF PERMIT

7.1.4 A registered professional must undertake the design and conduct field reviews of the construction or structural repair of a retaining wall over 1.2m in height. Sealed copies of the design plan and letters of assurance prepared by the registered professional for all retaining walls must be provided by the registered professional for all retaining walls.

[133] Ms. Laturus says that none of the walls that Mr. Giles worked on or intended to build are over 1.2 metres in height, and therefore she was not required to obtain a building permit. She argues the City has no legal basis to require a permit or a geotechnical opinion.

[134] Ms. Laturus argues that the only avenue open to the City is through s. 73 of the Community Charter. That section provides:

Hazardous conditions

73 (1) Subject to subsection (2), a council may impose a remedial action requirement in relation to any of the following:

- (a) a building or other structure, an erection of any kind, or a similar matter or thing;
- (b) a natural or artificial opening in the ground, or a similar matter or thing;
- (2) A council may only impose the remedial action requirement if
 - (a) the council considers that the matter or thing is in or creates an unsafe condition, or (b) the matter or thing contravenes the Provincial building regulations or a bylaw under section 8
- (3) (1) [spheres of authority -- buildings and other structures] or Division 8 [Building Regulation] of this Part.

[135] I do not accept the natural extension of Ms. Laturus' argument that any wall of less than 1.2 metres could never require a permit or geotechnical opinion. If there is an excavation that is not properly maintained, s. 9.1(r) of the Building Bylaw is engaged, and there is nothing in that section that makes it only applicable to walls over 1.2 metres.

[136] With respect to the southeast corner, the uncontradicted expert evidence of Mr. Glen is that this excavation requires a retaining wall to maintain the slope behind it, and it requires a cast-in-place concrete wall over 1.2 metres high. As such, it requires a permit.

[137] Mr. Kunka swears that as Chief Building Inspector, pursuant to s. 14.1 of the Building Bylaw, it is his opinion that the Property is subject or likely to be subject to erosion, landslip, subsidence or avalanche. Pursuant to Part 14, he may require a geotechnical opinion and a covenant under s. 219 of the Land Title Act, as a term of a permit, provided the conditions of Part 14 are met.

[138] With respect to the length of Wall C, the City agrees that Wall C is less than 1.2 meters in height, and in its current form does not require a permit. There is no claim that Ms. Laturnus is in breach of the Building Bylaw by failing to obtain a permit for Wall C. However, the City says Wall C is inadequately constructed and "fails to properly maintain the fill and excavation that is behind it". To properly maintain the embankment there must be a wall greater than 1.2 metres and for that Ms. Laturnus requires a building permit. The City states: "it is likely to certain that a building permit will be required along with the services of an engineer to construct a retaining wall in the place of Wall C that complies with s. 9.1(r)."

[139] I have already found that there was no excavation along the length of Wall C and therefore no authority within s. 9.1(r) for the City to seek a mandatory injunction with respect to that area. Ms. Laturnus argues that the only authority of the City to require Wall C to be replaced is s. 73 of the Community Charter. As the City's application was limited to a breach of s. 9.1(r), and I have not found a breach of this section for the length of Wall C, it is not necessary for me to decide this.

[140] In summary, I find that the City has established a clear breach of s. 9.1(r) of the Building Bylaw with respect to the excavation in the southeast corner of the Property. The City has not established a clear breach of s. 9.1(r) with respect to almost the entire length of Wall C.

Should the Court Exercise its Discretion to Refuse an Injunction?

[141] The City argues the Building Bylaw exists for the safety of the public, and not just Ms. Laturnus. It is part of the City's function to safeguard the public. It is not just Ms. Laturnus who takes a risk when the Building Bylaw is not followed; it is, for example, the public and visitors to the Property, banks that lend money on the security of the Property, and subsequent owners.

[142] The City argues the house is potentially not safe since final inspections for the renovations and additions were not completed. Wood stoves are a source of danger and the wood stove is potentially not safe since a final inspection after its installation was not completed. The City relies upon the opinion of Mr. Glen to argue the excavation in the southeast corner of the Property is not safe.

[143] With respect to the house, the City says there are no exceptional circumstances to refuse an injunction, and that neither the passage of time, nor any failure of the City to notify Ms. Farnholz and Dr. Huck of the cancelled permits should prevent the Court from ordering an injunction.

[144] Ms. Laturnus says she is an innocent person and the City does not come to Court with "clean hands". She argues the City:

- a) failed to issue the 1995 Permits without requiring a geotechnical covenant, and then when Ms. Farnholz was apparently agreeable to executing a covenant (despite the City not having the authority to do so), failed to register a covenant;
- b) did not follow its own bylaws and did not notify Ms. Farnholz and Dr. Huck that the permits were about to expire and later had expired; and
- c) is attempting, decades after these events, to withhold occupancy to Ms. Laturus.

[145] I have considered that Ms. Farnholz was responsible for having final inspections, completion certificates and an occupancy permit issued for the 1995 Permits. Ms. Laturus had no involvement in creating those problems, which have arisen for the first time many years after the construction. There was no notice on title which would have alerted Ms. Laturus to the issues when she bought the Property. I have considered that the City was also responsible in creating this problem for Ms. Laturus as it did not follow its own Building Bylaw by alerting Ms. Farnholz and Dr. Huck that the permits were cancelled. However, as stated in *Langley (Township) v. Wood*, as a general rule, the duty of a municipality to carry out the provisions of a statute are of such a public nature that they cannot be waived, lost or vitiated by mere acquiescence, laches or estoppel.

[146] Ms. Laturus is concerned that the City may require her to tear down walls or expose work that was done to confirm whether there are possibly any construction issues from 23 years ago. Ms. Laturus argues this is a hardship for little practical utility, given the extent of inspections that were already done in 1995 and 1996 (up to the vapour barrier). While this is possible, I do not think it is likely, and I do not consider this a likely hardship.

[147] I have concluded that the facts with respect to the house issues do not fall within the exceptional circumstances where the Court may refuse an injunction. I find the public interest in ensuring houses that are safe, and in citizens complying with the Building Bylaw, is not outweighed by the unfortunate circumstances in which Ms. Laturus finds herself.

[148] I therefore conclude the City has established a right to an injunction concerning the house. The City has indicated it is agreeable to a stay so long as Ms. Laturus is working towards compliance with the Building Bylaw within a reasonable time. As many of the specific orders sought by the City relate to both the house and the perimeter walls issues, I will address the specific wording of the orders after I have discussed the perimeter walls.

[149] With respect to the perimeter walls, Ms. Laturus and Ms. Giles express concern regarding the cost to construct the walls recommended by Mr. Glen. Both state that access to the rear of the Property is limited, and they believe construction of the walls will require equipment and materials to be airlifted on to the Property. They think this will be prohibitively expensive and Ms. Laturus says she will have to leave her home.

- [150] There is no evidence as to the probable cost of the recommended walls. Ms. Laturus is a social worker, and there is no evidence of qualifications that would enable her to provide a reliable opinion regarding the cost of what is required for the construction. Similarly, there is no evidence of Mr. Giles' qualifications. There is no estimate from a contractor regarding the potential cost of the work recommended by Mr. Glen. Regardless, I think it can be fairly concluded that the wall construction will be expensive for Ms. Laturus.
- [151] I find the cost and the resulting potential hardship, in the circumstances of this case, is not sufficient to come within the limited circumstances where the Court should exercise its discretion not to order an injunction. An excavation in a large embankment that is marginally stable, and requires a retaining wall, is a safety issue, not just for Ms. Laturus but also for neighbouring properties and those who may be visiting the property. Significant cost was not sufficient in Osoyoos to prevent the Court from ordering an injunction, but the Court did order a stay for a period of time to allow the homeowner to investigate other methods to comply with the bylaw and to mitigate some of the hardship.
- [152] I therefore find that the City has established a right to a mandatory injunction concerning the excavation in the southeast corner of the Property.

Specific Orders Sought by the City for the House and the Perimeter Walls

- [153] As modified at the hearing, the City's petition seeks the following declarations, which I have summarized:
1. Ms. Laturus is the registered owner in fee simple of the Property.
 2. Ms. Laturus has violated s. 9.1(r) of the Building Bylaw by excavating and filling a portion of the Property without the fill and excavation being properly maintained by a retaining wall or other applicable method.
 3. [Withdrawn by the City - This was seeking an order that there had been construction contrary to a stop work order.]
 4. Four building permits were issued for the Property in 1995 and 2004 under the Building Bylaw and cancelled by operation of s. 7.2 of the Building Bylaw after work had been commenced but prior to it being completed. These are building permit numbers are: 4658-95 (renovation and addition); 4685-95 (retaining wall); 4690-95 (second story addition); and 2004 8553-04 (wood stove) (collectively the "Cancelled Permits").
- [154] I grant the declaration in paragraph one above. The declarations in paragraphs two and four are granted with amendments, so that they read:
2. Ms. Laturus has violated s. 9.1(r) of the Building Bylaw by excavating in the southeast corner of the Property without the excavation being properly maintained by a retaining wall or other applicable method.

4. Four building permits were issued for the Property in 1995 and 2004 under the Building Bylaw and cancelled by operation of s. 7.2 of the Building Bylaw after work had been commenced but prior to completion certificates or an occupancy permit being completed. These are building permit numbers 4658-95 (renovation and addition), 4685-95 (retaining wall), 4690-95 (second story addition) and 2004 8553-04 (wood stove) (collectively the "Cancelled Permits").

[155] The remaining orders sought, modified slightly to conform with the defined terms in these Reasons and modifications made by counsel at the hearing, are as follows:

5. Ms. Laturnus, and all others with notice of this order, are enjoined and restrained from occupying the residence upon the Property or any portion thereof except (a) in accordance with a valid completion certificate or occupancy permit under the Building Bylaw; or (b) with the express written permission of the City and in accordance with any terms or conditions imposed by the City.
6. Ms. Laturnus is restrained and enjoined from undertaking, proceeding with or continuing any construction, alteration or change of occupancy of any kind whatsoever on the Property, including without limitation constructing or altering any retaining wall of any height, without first applying for and receiving building permits or other written permission from the City specifically permitting the work to be performed;
7. Ms. Laturnus is restrained and enjoined from proceeding with any further construction upon the Property contrary to any notice issued now or in the future by the Chief Inspector under the Building Bylaw directing the cessation of construction;
8. Ms. Laturnus shall within 12 months cause all fill and excavation upon the Property to be properly maintained by a retaining wall or other applicable method and shall within 13 months, provide a report certifying compliance with this order under seal from a qualified member of the Association of Professional Engineers and Geologists of British Columbia with experience in geotechnical engineering (a "Professional Geotechnical Engineer") to the City. Unless the City directs otherwise, this will include, at a minimum the following:
 - a. backfilling over the footing of Retaining Wall B;
 - b. removing Retaining Wall C;
 - c. replacing Retaining Wall C with an engineered wall constructed of poured-in-place concrete to a minimum of two metres that buttresses the steep exposed slope above the rear yard of the Property;
 - d. obtaining all necessary building permits and inspections required by the City in connection with this work;

- e. providing the City with letters of assurance (Schedules A, B, C-A, C-B) under the BC Building Code by the appropriate registered professionals for all work, including a structural engineer for the new concrete retaining wall;
 - f. providing the City with written certification under seal from a qualified member of the Association of Professional Engineers and Geologists of British Columbia with experience and training in geotechnical engineering that complies with s. 56 of the Community Charter (i.e. that once the work is completed the Property may be used safely for the purpose intended); and
 - g. agree to and cooperate in the registration of a geotechnical covenant in registerable form under Part XIV of the Building Bylaw and s. 56(5) of the Community Charter in a form prepared by the City's solicitor.
9. Ms. Laturus shall apply for and obtain valid building permits from the City pursuant to the Building Bylaw for all construction previously performed under the Cancelled Permits and all construction required to bring the Property into compliance with the BC Building Code to the satisfaction of the City (the "Permits") within three months of this order and shall bring the Property into compliance with the terms of the Permits within 15 months of this order;
10. Ms. Laturus shall, as soon as reasonably possible and in no event more than 16 months schedule at the convenience of the City and pass to the satisfaction of the City all inspections required by the Building Bylaw for the Permits including without limitation a final inspection and obtain an occupancy permit or completion certificate for the Property, as required by the City. Unless directed otherwise by the City, this will include, without limitation, the following:
- a. executing a geotechnical covenant in registerable form prepared by the City under s. 56(5) of the Community Charter and providing it to the City for filing with the Land Title Office;
 - b. providing the City with letters of assurance in a form acceptable to the City under the BC Building Code certified by appropriate registered professionals for the work performed under the Cancelled permits and the Permits;
 - c. supplying a sealed survey from a qualified BC Land Surveyor under s. 47 of the Land Surveyors Act in a form satisfactory to the City; and
 - d. obtain verification from a WETT certified technician for any wood burning appliance (stove) in the Property.
11. If Ms. Laturus does not obtain completion certificates for the Permits within 24 months from the date of pronouncement of this order, then, in addition to any other sanctions, the respondent shall apply for and obtain a demolition permit and demolish the residence upon the Property at Ms. Laturus' expense.

[156] As the City is agreeable to a stay of the injunction concerning occupancy so long as Ms. Laturus is working toward compliance with the Building Bylaw, the order in paragraph five is granted with amendments, so that it reads:

5. Ms. Laturus, and all others with notice of this order, are enjoined and restrained from occupying the residence upon the Property or any portion thereof until the City issues a valid completion certificate or occupancy permit, as required by the City under the Building Bylaw. The injunction in this paragraph is immediately stayed upon Ms. Laturus complying with the orders in paragraphs 9 and 10 below. In the event Ms. Laturus does not comply with either of the orders in paragraphs 9 and 10 below, this injunction is effective immediately.

[This refers to the numbered paragraphs in the petition, and counsel will need to adjust the numbers in the entered order.]

[157] Paragraph 6 is too broad. It would enjoin any construction or alteration, no matter how minor, and whether or not it required a building permit under the Building Bylaw. There is no basis for it, given that there is no evidence of any continued construction on the Property without permits, after June 2014. There is also no need for it given the mandatory orders in paragraphs eight through 10. The order in paragraph 6 is not granted.

[158] With respect to paragraph 7, there is no evidence that Ms. Laturus or Mr. Giles have continued with any construction on the Property after June 2014. In my view, it is not appropriate to restrain a person from acting under a future unknown notice, and when there is no established basis for doing so. The order in paragraph 7 is not granted.

[159] With respect to paragraph 8 which concerns the excavation, I have found there is no breach with respect to most of the length of Wall C and therefore no basis for some of the specific orders concerning that portion of the wall. Also, the City seeks an order that there be a cast-in-place wall. There may be other methods which could be proposed by Ms. Laturus that would lessen the cost to her and which would be satisfactory to the City, although she did not file any evidence of this on the petition. Despite this, the City reasonably and generously indicated at the hearing it was willing to consider an opinion from a geotechnical expert Ms. Laturus hires.

[160] Paragraph eight is granted with amendments, those being that:

- a) the first two lines of the order shall read:

Ms. Laturus shall within 12 months cause all fill and excavation in the southeast corner of the Property to be properly maintained by a retaining all or other applicable

- b) subparagraph b. is deleted, and
- c) subparagraph c. shall read:

- c. an engineered retaining wall constructed of poured-in-place concrete in the southeast corner of the property as described by Mr. Glen in his geotechnical report dated May 19, 2017.

[161] With respect to the orders in paragraphs nine and 10 which concern the house and Wall A, and in particular subparagraph 10b., there is no explanation before the Court why letters of assurance are required for construction performed under the 1995 Permits when Mr. Howard has already provided a Schedule C. Similarly, Mr. Howard approved Wall A, and Mr. Glen, a geotechnical expert, has provided a report that Wall A is functioning well and does not require any remedial work. Ms. Laturus points to a letter authored by Mr. Kunka on May 30, 2017 stating that no additional testing or remedial work is required for Wall A. Without an explanation why further letters of assurance are required, I will not order that Ms. Laturus provide these as a condition of her application for an occupancy permit. I am not ruling that the City may not require a letter of assurance if it becomes indicated (e.g. if a structural issue was revealed), but I am not agreeable to ordering that one must be provided for the 1995 Permits.

[162] The orders in paragraphs nine and 10 are granted, except subparagraph 10b. shall be amended so that it reads:

- b. providing the City with letters of assurance in a form acceptable to the City under the BC Building Code certified by appropriate registered professionals for the work performed under the Permits.

[163] Finally, the City seeks an order that:

11. If Ms. Laturus does not obtain completion certificates for the building permits for the house and the building permit for Wall C within 24 months from the date of this order, then in addition to any other sanctions, Ms. Laturus shall apply for and obtain a demolition permit and demolish the residence upon the Property at her own expense.

[164] The City acknowledges this is an order of last resort. I decline to make this order. Such an order may cause irreparable harm for possible events in the future where there is no information on which to decide if such an order at that time would be appropriate. If that time comes to pass, the City is at liberty to make such an application.

Ms. Laturus' Petition

[165] Given my findings with respect to the City's petition, I dismiss Ms. Laturus' petition.

[166] Ms. Laturus seeks an order in the nature of mandamus that the City issue an occupancy permit. Relying on the history of the inspections, Dr. Huck's evidence of a final inspection, and the 2005 inspection, Ms. Laturus argues that the City cannot now refuse a completion certificate and an occupancy permit. For the reasons I have given previously, I find that final inspections were not completed for the four building permits, and therefore there is no basis upon which Ms. Laturus may seek that an occupancy permit be issued.

[167] Ms. Laturnus also argues that the passing of the s. 57 Community Charter resolution and the registration of it on title is unlawful and outside the City's jurisdiction. For the reasons I have given previously, I find that City has established contraventions of the Building Bylaw, and is entitled to register the s. 57 notice.

Costs

[168] The City seeks costs of these Petitions at Scale B. In my view, the City has been substantially successful, and is therefore entitled to its costs. Such costs shall be treated as though there was one petition since the issues in the two petitions are essentially the same.

"Norell J."

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