

CANADA / JUDGMENT

Sunshine Coast (Regional District) v. Vanderhaeghe

2024 BCCA 169

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 169 Sunshine Coast (Regional District) v. Vanderhaeghe

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Sunshine Coast (Regional District) v. Vanderhaeghe,

2024 BCCA 169

Date: 20240502

Dockets: CA48748; CA48749

Between:

The Sunshine Coast Regional District

Appellant

(Respondent)

And

Lorna Vanderhaeghe

Respondent

(Petitioner)

Before:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Fitch

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated December 1, 2022 (Vanderhaeghe v. Sunshine Coast (Regional District), 2022 BCSC 2100, Vancouver Docket S216560).

Counsel for the Appellant:

P.A. Hildebrand

S. Dubinsky

Counsel for the Respondent:

N. Baker

K.G. Ho

Place and Date of Hearing:

Vancouver, British Columbia

January 22-23, 2024

Place and Date of Judgment:

Vancouver, British Columbia

May 2, 2024

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The respondent received permits from the appellant, Sunshine Coast Regional District, to demolish and rebuild a lakeside cottage. The construction of the new cottage did not align with approved plans. The District rejected the respondent's application for a development variance permit ("DVP"). She successfully applied for judicial review of that decision. The District's cross-petition to obtain an order compelling the respondent to bring her home into compliance with its bylaws was dismissed. The District appeals both orders.

Held: Appeal from judicial review allowed in part; appeal from cross-petition allowed. The District erroneously treated the cottage as a non-conforming structure and thereby mistakenly focused on its equivalence with the old cottage's volume and mass. But it was not unreasonable for the District to require the respondent to obtain a variance to address development within the

setback that differed substantially from the approved plans. It was unreasonable for the District to require her to apply for new permits; any changes should be considered as amendments to the existing permits. It was reasonable for the Board to deny the DVP and it did not breach its duty of procedural fairness. An injunction should be issued to require the respondent to bring her building into compliance with the approved plans.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] The appellant, Sunshine Coast Regional District, rejected the respondent Lorna Vanderhaeghe's application for a development variance permit to bring a newly constructed cottage on Sakinaw Lake into compliance. She successfully petitioned for judicial review of that decision. The District's cross-petition to obtain an order compelling Ms. Vanderhaeghe to bring her home into compliance with its bylaws was dismissed. The District appeals both orders.

Background

- [2] Ms. Vanderhaeghe wanted to replace an older waterfront cottage (the "Old Cottage") with a three-storey building roughly the same size (the "New Dwelling"). The Old Cottage was a legally non-conforming structure. Built in the 1970s, it was located only 9.5 metres from the lake, well within the 20-metre setback subsequently imposed by Sunshine Coast Regional District Electoral Area A Zoning Bylaw No. 337, 1990 [Zoning Bylaw]. Ms. Vanderhaeghe worked closely with the District Planning Department to obtain the necessary permits. The District was of the view that she could construct an entirely new building on the footprint of the Old Cottage under s. 529 of the Local Government Act, R.S.B.C. 2015, c. 1 [the Act], which provides for structures conforming as to use--but non-conforming as to siting--to be "maintained, extended or altered" so long as there is no further contravention of the relevant bylaw.
- [3] In March 2019, the District issued a demolition permit, a development permit and a building permit authorizing the demolition of the Old Cottage and the construction of the New Dwelling 9.5 metres from Sakinaw Lake. The development permit attached plans prepared by the petitioner's residential designer, and a letter from the petitioner's Qualified Environmental Professional explaining that the development permit application was exempt from the Riparian Areas Regulation (now the Riparian Areas Protection Regulation), which required an assessment of environmental impacts.
- [4] In April 2019, the Old Cottage was demolished and construction of the New Dwelling began. Over the course of the next few months District staff conducted inspections, approving the work as the construction proceeded. In October 2019, the petitioner contacted Mr. Pady, the new Manager of Planning and Development for the District, about making a minor change to her approved plans in order to square off a corner of the New Dwelling located within the 20-metre setback. That change would add 28 square feet to the building's overall dimensions, which had originally been approved at 4,800 square feet. Mr. Pady expressed

the opinion that a development variance permit ("DVP") would be required for the addition because the structure was subject to the lawful non-conforming structure provisions under the Act, and as such had to be "volumetrically identical" to the Old Cottage. Ms.

Vanderhaeghe followed that direction and on November 12, 2019 applied for a DVP for the additional square footage.

- [5] It is fair to say that from this point on, matters became complicated.
- [6] In early December 2019, Ms. Vanderhaeghe submitted a site plan for the property. It indicated that a deck post of the New Dwelling was located 9.4 metres from the natural boundary of the lake, a further impingement into the setback area of 0.1 metres (3.9 inches). At about the same time, the builder constructing the New Dwelling for Ms. Vanderhaeghe received an engineering report recommending that an additional retaining wall be built between the New Dwelling and the lakeshore, within both the 20-metre zoning setback and the 30-metre Streamside Protection and Enhancement Area ("SPEA"). The report noted that the wall should be approved by the District. The builder forwarded that report to the District, suggesting that it be part of the pending variance application. In addition, the neighbour immediately to the west complained to the District that the new structure, then at the framing stage, was higher than the Old Cottage and impeded his view of the lake. In response, Ms. Vanderhaeghe provided some new drawings and survey data, confirming the building was higher than the approved plans.
- [7] District staff, who were treating the New Dwelling as a legally non-conforming structure under s. 529 of the Act, advised Ms. Vanderhaeghe that she needed variances to address both the deck support and any additional height beyond that approved in the original permits. The District also confirmed that a new development permit was required for the proposed retaining wall because it was within the SPEA. It stated that it was unclear how the wall would fit with the Riparian Area Regulation; due to amendments to the regulation in November 1, 2019, an assessment report would now be required by the Provincial government.
- [8] On December 17, 2019, the District placed a partial stop work order on Ms. Vanderhaeghe's residence, prohibiting work within the 20-metre setback. The parties disagree on whether work continued in contravention of that stop work order. The petitioner says that she continued with construction only on that part of the house falling outside of the 20-metre setback. On February 28, 2020, the stop work order was extended to the entire site after it was alleged that work was continuing in the setback area, i.e., in contravention of the first stop work order.
- [9] It is common ground that despite the second stop work order, Ms. Vanderhaeghe continued construction and completed the residence. She was issued, and paid, six bylaw offence notices between January 31, 2020 and August 23, 2020. In April 2021, the District's building officer observed that the construction was complete and that Ms. Vanderhaeghe and her family were living in the residence without an occupancy permit. Ms. Vanderhaeghe

deposed that, faced with the ongoing delays in having her DVP application processed, she made the "difficult decision" to forge ahead and complete the work without District approvals. She was concerned that otherwise her cottage would suffer from the impact of harsh winter weather and be susceptible to rot.

- [10] I come back now to the period of construction after the District became aware that the building was higher than expected. In early January 2020, the petitioner updated her DVP application to include a variance for the additional height, but noted in her application that the height of the New Dwelling complied with the Zoning Bylaw and was well below the 11-metre maximum. In March 2020, she sent Mr. Pady height calculations he had requested and advised that the difference in height between the New Dwelling and the approved height on the plans was 1.07 metres (the difference between the original plan of 8.89 metres and the as-built height of 9.96 metres).
- [11] Before the DVP application could be considered by the District's Board, it had to be reviewed by the Advisory Planning Committee (the "AP Committee") which consisted of some Board members and some members of the public. Mr. Pady prepared a report for the AP Committee, the first of four such reports. The petitioner objected to parts of that report and as a result, the AP Committee meeting was postponed. Mr. Pady then prepared a second report which was considered by the AP Committee on April 29, 2020. That report:
- (a) Observed that the variance requested did "not seem unreasonable";
 - (b) Noted the District's concern about granting a variance in the face of continued construction despite stop work orders, and recommended penalties; and
 - (c) Recommended that the District seek input from neighbours before making a decision.
- [12] In May 2020, the petitioner built the retaining wall in the setback area without obtaining approval from the District to do so. She deposed the work was done on an emergency basis and was therefore exempt from the requirement for a development permit under s. 3.10.9(g) of the Egmont/Pender Harbour Official Community Plan Bylaw No. 708, 2018 [Community Plan]. The District disputed that the work was done on an emergency basis.
- [13] Over the next six months, the petitioner's DVP application moved through various procedural steps. The Planning and Community Development Committee ("PCD Committee") is a standing committee of all Board members which makes recommendations on planning and development issues. It was the next step after the AP Committee. Its consideration of the petitioner's DVP application was adjourned twice. The first adjournment occurred in July 2020 at Ms. Vanderhaeghe's request, after she objected to the manner in which Mr. Pady had presented part of the application in his third report (breaking the excess height issue into three areas of the roofline for separate consideration, and recommending a compromise of allowing some areas but not others). A second hearing date was adjourned at the last minute by District staff, who cited the receipt of new information.

[14] Ms. Vanderhaeghe's DVP application finally came on for hearing on November 12, 2020. The PCD Committee had before it Mr. Pady's fourth and final report which recommended that the application be denied. It characterized the variances requiring approval as:

1. A height variance from 12.92 metres to 15.05 metres;
2. A reduction in the required setback from the lake from 20 metres to 9.4 metres; and
3. Increased floor space to square off the corner of the building.

The report also noted that while the deck post had only moved from 9.5 metres to 9.4 metres from the lake, the foundation and works necessary to support the new post resulted in encroachment into the SPEA. The report also addressed the retaining wall built within that area, noting that a new assessment report would have to be submitted to and accepted by the province because the wall was subject to riparian area regulations. The report also addressed volume and massing of the New Dwelling, observing that changes had been made to the roofline, and that the changes in floor to ceiling heights and deck configuration placed the deck about 0.6 metres higher and roughly 0.6 metres more westerly toward the neighbouring property.

[15] Ms. Vanderhaeghe attended the PCD Committee meeting along with her Qualified Environmental Professional, residential designer, builder, and legal counsel. She also submitted a package of material in support of her DVP application including all four staff reports prepared by Mr. Pady, reports by qualified professionals, surveys and correspondence with staff and her neighbour who opposed the DVP application. After hearing from her and the sole neighbour who opposed the application, the PCD Committee recommended refusal.

[16] On November 26, 2020, the Board met to vote on the DVP application. Ms. Vanderhaeghe's lawyer asked to be permitted to make a further presentation at the Board meeting, but that request was denied. The Board adopted its earlier decision sitting as the PCD Committee, and voted to formally reject the application.

[17] On December 16, 2020, legal counsel for the District wrote to Ms. Vanderhaeghe's lawyer, setting out the following "[District] staff pathway to compliance":

In order to bring the building into compliance, a new development permit and building permit that address Development Permit Area requirements and the non-conforming siting of the building (meeting LGA s. 911(10)(a)) will be required, with inspections completed as work proceeds, and final approval granted.

This will involve:

- Provide a condition and impact assessment report (first), followed by an updated or new riparian assessment (QEP will determine what is required).

- Develop a plan to address aspects of building design that represent a further contravention of zoning as compared to prior building (height, setback, volume, addition). [District staff] can clarify prior dimensions based on information previously provided to us. The owner may apply for a new, different development variance permit if desired. [District staff] will review plan and, working with applicant through revisions if required and subject to any required permits, authorize work .

[Emphasis added.]

As noted above, the requirement for a riparian assessment report reflected amendments to the Riparian Areas Regulation which had come into effect on November 1, 2019.

- [18] Ms. Vanderhaeghe did not submit a new development permit and building permit application as directed. Instead, in May 2021 she applied to amend the existing permits to account for the New Dwelling's increased height and additional square footage, taking the position that the height and square footage complied with the Zoning Bylaw and did not require a variance permit. The District refused to process the amendment application as presented.
- [19] At this point Ms. Vanderhaeghe metaphorically threw up her hands and in July 2021 filed a petition for judicial review of the District's decisions to reject her DVP application, to require her to start over by seeking new development and building permits, and to refuse to consider her amendment application. The District in turn filed a petition in October 2021 seeking various declarations and an order requiring Ms. Vanderhaeghe to bring the property into compliance with its bylaws. The two petitions were heard together over seven days.

Chambers hearing

- [20] The judge concluded that an owner's right to "maintain, extend or alter" an existing legally non-conforming building under s. 529 of the Act did not extend to demolition and replacement with an entirely new building. As a result, she found the District's insistence on restricting the New Dwelling to the mass and volume of the Old Cottage to be misguided, and the source of unnecessary demands that put Ms. Vanderhaeghe in a "Kafkaesque situation" given that the Old Cottage's precise mass and volume had not been determined before it was demolished.
- [21] The judge found nonetheless that the District had jurisdiction to vary the Zoning Bylaw to allow a new build on the footprint of the Old Cottage within the 20-metre setback. She recognized that Ms. Vanderhaeghe's original development permit application did not seek a variance, that the development permit on its face did not grant one, and that it was not the practice of the District to have staff make such decisions. But she concluded that the District nonetheless had issued a development permit with a variance of the 20-metre setback because it granted a valid permit to build 9.5 metres from the natural boundary of Sakinaw Lake. The judge reasoned that it would be absurd to suggest that the District issued a development permit allowing the construction of an illegal structure; the presumption

against absurd outcomes weighed in favour of inferring that the development permit varied the relevant bylaw: at para. 152.

- [22] The judge found there were three changes to the New Dwelling that arose over the course of its construction which lay at the centre of the dispute: the additional height, an increase of 28 square feet to square off the corner of the New Dwelling, and the deck post's impingement by 0.1 metres into the 9.5 metre variance. She rejected the District's assertion that these changes "substantially altered" the permitted height, area or location of the New Dwelling such that s. 15(1) of Sunshine Coast Regional District Planning & Development Procedures and Fees Bylaw No. 522, 2003 [Planning Bylaw] authorized the District to require new permits. The judge concluded that the District's concerns were based on its erroneous treatment of the New Dwelling as a legally non-conforming structure under s. 529 of the Act requiring volumetric equivalence to the Old Cottage. That concern, she found, "caused the District to overestimate the impact of the alterations made to the New Dwelling": at para. 165. She then said:
- [166] In my view, no development variance permit was required for the 0.1-metre impingement of the setback, the 28-square-foot Addition or the approximately three feet of additional height. None of these changes can reasonably be said to alter "substantially" the approved plans for the New Dwelling.
- [23] In the judge's view, the District's requirement that Ms. Vanderhaeghe apply anew was therefore unreasonable. It was required to process her amendment application "appropriately"--i.e., as an amendment without the need for new development and building permit applications or a variance application, and without concern for volumetric and massing equivalence to the Old Cottage.
- [24] Although the judge found this was sufficient to resolve Ms. Vanderhaeghe's judicial review petition, she addressed further issues for the sake of completeness.
- [25] First, she decided that even if a further DVP was required, the Board's rejection of the DVP application was unreasonable because the Board did not meaningfully grapple with the petitioner's application, "choosing instead to defer to the recommendations of District staff because of the issue's complexity": at paras. 177 and 184-185. Although this failure to grapple with the petitioner's arguments was sufficient to render the decision unreasonable, the judge also found that the decision was unreasonable because it relied on Mr. Pady's fourth report which contained "significant inconsistencies": at paras. 186-188.
- [26] Second, the judge rejected the District's submission that Ms. Vanderhaeghe had engaged in misconduct, said to consist of intentionally concealing and proceeding with work she knew to be outside of the permitted scope of the project, and intending to get approvals after the fact once the building was complete. The judge found it troubling that "so many allegations made against the Petitioner [were] simply not substantiated by the evidence:" at para. 199. The judge gave reasons for a mid-hearing ruling in which she refused to admit two affidavits the District wished to tender at the end of Ms. Vanderhaeghe's case. The affidavits attached

drawings provided to the petitioner's truss manufacturer, which were said to demonstrate that Ms. Vanderhaeghe intended to over-build early on in the construction process. The judge concluded there would be no injustice in refusing to receive that evidence, as she considered it speculative and possibly confusing, and because the petitioner had not had an opportunity to consider or respond to it during her case.

- [27] Finally, the judge addressed the hearing before the Board itself, saying she also would have quashed the rejection of the DVP application due to the lack of procedural fairness during the Board hearing alone: at para. 214. She found that, at a minimum, the Board was required to allow Ms. Vanderhaeghe's counsel to make submissions and to provide Ms. Vanderhaeghe with more than the ten minutes allotted to make her case, given the importance of the decision to her and the "lengthy and difficult history created in large part by the District's actions": at paras. 212 and 215. The judge declined to deal with the petitioner's allegation of bad faith in the District's dealings with her, finding it unnecessary to do so. She dismissed the District's petition on the basis of her conclusions on Ms. Vanderhaeghe's petition for judicial review. Having found that Ms. Vanderhaeghe had not contravened the relevant bylaws or provisions of the Act, there was no basis for an order requiring her to bring the New Dwelling into compliance.
- [28] The judge made a number of declarations reflecting her findings. She ordered the amendment application to be remitted to the District for reconsideration, and to be dealt with appropriately within 60 days. The judge retained jurisdiction to deal with any issues associated with costs "and/or remedies set out in this matter".

On appeal

[29] The issues on appeal can be stated as follows:

1. Was the Board's interpretation of s. 529 of the Act reasonable?
2. Was the Board's decision requiring a DVP reasonable?
3. Was the District's decision to require a new development permit and new building permit reasonable?
4. Was the Board's decision to deny the DVP application reasonable?
5. Did the Board breach its duty of procedural fairness?
6. Did the judge err in refusing to grant the injunction sought by the District?

[30] On appeal from a decision on judicial review, the question before the court is whether the chambers judge identified and applied the correct standard of review. This Court does not focus on specific errors on the part of the chambers judge, but rather steps into the shoes of the reviewing judge and focuses on the tribunal decision itself, reviewing it on the applicable standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47. However, when the judge makes original

findings of fact beyond the decision of the tribunal below, those findings are entitled to deference: *C.S. v. British Columbia (Worker's Compensation Appeal Tribunal)*, 2019 BCCA 406 at para. 44. Findings of fact made by the reviewing judge are to be reviewed on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33.

1. Was the Board's interpretation of s. 529 of the Act reasonable?

[31] The District contends the judge erred in finding that its interpretation of s. 529 of the Act was not open to it. That section reads as follows:

529 (1) If the use and density of buildings and other structures conform to a land use regulation bylaw but

(a) the siting, size or dimensions of a building or other structure constructed before the bylaw was adopted does not conform with the bylaw,

the building or other structure or spaces may be maintained, extended or altered to the extent authorized by subsection (2).

(2) A building or other structure or spaces to which subsection (1) applies may be maintained, extended or altered only to the extent that

(a) the repair, extension or alteration would, when completed, involve no further contravention of the bylaw than that existing at the time the repair, extension or alteration was started,

[32] The District acknowledged at the hearing of the appeals that interpreting s. 529 to allow an entirely new structure to be built on the site of the old non-conforming one falls at the "outer limits" of reasonableness, but insisted nonetheless that it was an interpretation available to it.

[33] First, the District says there is no express statutory prohibition on a non-conforming structure retaining its non-conforming status, in contrast to non-conforming uses, which are expressly restricted from retaining their status in certain circumstances under ss. 528(2) and 532. Second, the District says that the phrase "maintained, extended or altered" is broad enough to include a full rebuild of a non-conforming structure; that is particularly so given that governing statutes are to be construed liberally, in favour of the property owner. Adopting a liberal interpretation of s. 529 gave Ms. Vanderhaeghe a right to build in the setback area which she otherwise would not have had.

[34] The District contends the judge made two errors in rejecting its interpretation. First, she assumed the District began to treat the New Dwelling as a legally non-conforming structure under s. 529 only in November 2019, about eight months after the permits were issued: at para. 33. I agree with the District that the judge misapprehended the evidence on this point. In August and November 2018, staff emails to Ms. Vanderhaeghe clearly identified the District's intention to rely on s. 529, and explained its implications and restrictions. The development permit issued to Ms. Vanderhaeghe also expressly refers to s. 529:

No further encroachment of any building mass as it existed at the time of permit issuance, per Section 529(2)(a) of the Local Government Act, is permitted within the 20 metre natural boundary setback of Saginaw Lake

[Emphasis added.]

However, in my view the judge's misapprehension on this point was not a material error because it did not affect her review of the District's interpretation of s. 529.

[35] Second, the District submits the judge correctly identified reasonableness as the standard of review, but applied a correctness standard, saying in her reasons at para. 129:

Section 529, properly interpreted, does not apply to a building constructed after the bylaw with which it allegedly conflicts, as is the case here.

[Emphasis added.]

The District also relies on the judge's observation that the opinion of District officials was irrelevant because a municipal officer "cannot make the laws mean something other than what they mean as a matter of law": at para. 128.

[36] I cannot agree that the judge applied a correctness standard of review. Read as a whole, it is evident from her reasons that she concluded this was a case in which only one interpretation of the statutory provision was reasonable: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 124.

[37] Nor do I see an error in the judge's view that what s. 529(1) allows to be "maintained, extended or altered" is "a building or other structure constructed before" the adoption of the bylaw causing the edifice to be non-conforming. This cannot include a new building constructed after the bylaw has come into effect.

[38] Admittedly, the analysis also turns on the interpretation of the word "maintained"--the only word in the section which could be read as allowing something, even a "new something," to continue to occupy the non-conforming site. Read in the context of s. 529 as a whole, however, that interpretation does not stand. Section 529(2)(a) indicates that a building may be "maintained, extended or altered" only to the extent that the "repair, extension or alteration" would, when completed, involve no further contravention of the bylaw. It is apparent, then, that the word "maintained" as used in s. 529 is intended to be synonymous with "repaired". "Repair" connotes restoring something damaged, worn or faulty to a good condition: Catherine Soanes & Angus Stevenson, eds, *Concise Oxford English Dictionary*, (New York: Oxford University Press, 2006) sub verbo "repair". In my view, "repair" cannot reasonably capture the destruction of a building in its entirety and its replacement with a new building.

[39] In summary on this ground of appeal, I agree with the judge that the District's interpretation of s. 529 was an unreasonable one. I also agree with her conclusion at para. 153 that the District nonetheless issued a valid development permit to Ms. Vanderhaeghe, and thereby implicitly granted her a variance from the 20-metre setback in the Zoning Bylaw. The central question on this appeal is whether that development permit entitled Ms. Vanderhaeghe to build the New Dwelling as constructed. I turn now to that issue.

2. Was the District's decision requiring a DVP reasonable?

[40] Determining whether the District's decision to require a DVP was reasonable requires an understanding of what the variance granted in the original development permit encompassed.

[41] The judge concluded the petitioner did not require a DVP because, once the first development permit was issued varying the setback from 20 metres to 9.5 metres, the "New Dwelling was a legally conforming dwelling": at para. 93. The judge implicitly accepted the petitioner's position that once the 20-metre setback was varied, any construction within that space was simply subject to applicable height and square footage requirements under the general Zoning Bylaw: at para. 101.

[42] In my respectful view, the judge fell into error in her assessment of the effect of the variance granted in the original development permit in two ways. First, she did not consider and give effect to the terms and conditions on the face of the development permit, which read as follows:

The lands described herein shall be developed strictly in accordance with the terms and conditions and provisions of this Permit and any plans and specifications attached to this Permit which shall form a part thereof.

GENERAL CONDITIONS:

- (1) No further encroachment of any building mass as it existed at the time of permit issuance, per Section 529(2)(a) of the Local Government Act, is permitted within the 20 metre natural boundary setback of Sakinaw Lake, per Section 516(1)(c) of Zoning Bylaw No. 337.
- (3) Strictly adhere to the design specified in the drawings prepared by Amy Adams, attached to and forming part of this permit as Appendix B and dated January 17, 2019.

[Emphasis added.]

[43] The parties agree that, apart from s. 529, the issuance of a permit to build within the 20-metre setback is at the discretion of the District. In exercising that discretion, the District has the authority to impose conditions on the granting of a variance. The development permit issued to Ms. Vanderhaeghe contained such conditions. Of particular relevance to this appeal are the conditions prohibiting mass greater than the Old Cottage within the 20-metre setback, and requiring construction in strict compliance with the design drawings submitted with the development permit application.

- [44] In my respectful view, it was not open to the judge to either ignore or sever those conditions on the basis that the wrong section of the Act had been relied on. The doctrine of severance permits terms of an instrument to be invalidated only if it is clear that the balance of the instrument would have been enacted or issued separately: Ian MacFee Rogers, *Law of Canadian Municipal Corporations*, (Toronto: Thomson Reuters Canada, 2020) at §24:52; *Rempel Bros. Concrete Ltd. v. District of Chilliwack (Corporation of)*, 1991 CanLII 1133 (B.C.S.C.); *Salt Spring Island Local Trust Committee v. B & B Ganges Marina Ltd.*, 2007 BCSC 892 at para. 26, *aff'd* 2008 BCCA 544. I agree with the District that there is no basis to conclude that it would have issued a development permit to Ms. Vanderhaeghe to build a new cottage within the 20-metre setback without conditions restricting the site, mass and design of that structure. In my view, the District accepted the building plans filed with the permit application as a proxy for volumetric equivalence with the Old Cottage within the setback area.
- [45] Further, the judge's conclusion that the New Dwelling was a legal structure that did not require a variance as long as it did not go beyond the 9.5 metre setback and the square footage and height limits in the Zoning Bylaw is inconsistent with *579340 B.C. Ltd. v. Sunshine Coast Regional District and Wills*, 2005 BCSC 1203 [579]. Although that case dealt with a permit granted under an earlier version of what is now s. 529, and an extension rather than a rebuild of a legally non-conforming cottage, the reasoning is apt.
- [46] In that case, the owner wanted to extend and increase the height of an older cottage situated within five to six metres of the lake. The District took the position that the owner was not entitled to increase the roof structure and add height because it would create a larger building than the one that had existed before within the setback: 579 at para. 10. The owner argued that since the proposed plans were in compliance with the current District bylaws other than with respect to the setback from the lake, he was entitled to a building permit: 579 at paras. 17-18. The judge agreed with the District that the Zoning Bylaw did not just create a horizontal setback, but prohibited building within the three-dimensional volumetric area created by the setback regulation: 579 at paras. 21-22, 42. She said in this regard:
- [44] The respondent argues that the point of a setback regulation is that there should be no building in the volumetric area designated by the setback. I agree that the underlying purpose of the setback regulation in this case is to prohibit new building in the setback area not only at ground level, but also in the airspace above ground level. The purpose of the setback regulation in Bylaw 337, s. 516.1, is to keep the lakeshore clear of buildings within a 30-metre zone. One purpose of s. 911(9) and (10) of the Local Government Act is to ensure that owners of properties that pre-existed setback regulations such as s. 516.1 and that are therefore non-compliant as to siting, are able to do work on those properties so long as they do not worsen the bylaw contravention. In order to give effect to regional district purposes, consistent with s. 4(1) of the Local Government Act, s. 911(10) must be construed to mean that any expansion of the cottage within the setback area, whether toward the lake, upward

or outward, would constitute a further contravention of the bylaw.

[Emphasis added.]

- [47] I would adopt the reasoning of the court in 579. In my view it was reasonable for the District to require a variance for any development within the setback area, including siting, height and mass. In other words, the District had the authority to impose limits on construction within the setback area, beyond those prescribed in the Zoning Bylaw.
- [48] Ms. Vanderhaeghe argues that, under ss. 490(1) and (2) of the Act, the District's authority to impose conditions is limited to those that are implemented "to preserve, protect, restore or enhance fish habitat or riparian areas" in accordance with the guidelines found in the Community Plan: at para. 157. She submits that restricting the height and square footage of the building does not accord with these objects, noting that her Qualified Environmental Professional opined that the height and mass of the New Dwelling would not negatively affect the riparian environment. However, as Justice Fitch observed in *Cowichan Valley (Regional District) v. Wilson*, 2023 BCCA 25 at para. 18, under s. 185 of the Act, one of the purposes of a regional district is to foster the current and future environmental well-being of the community. Further, under s. 187(1) of the Act, the powers conferred on regional districts must be interpreted broadly in accordance with the purposes of the Act and those of the regional district. In my view the District's authority to limit construction within the 20-metre setback from a lake cannot be restricted to circumstances in which a direct riparian harm can be established. Sightlines of neighbours and preservation of open space along the lakeshore generally are also relevant considerations.
- [49] In summary, it was not unreasonable for the District to require the petitioner to obtain an additional variance of the Zoning Bylaw to address changes to the approved plans in relation to height, square footage and massing within the 20-metre setback.
3. Were the changes in issue substantial enough to require new development and building permits?
- [50] The judge focused on three changes to the structure Ms. Vanderhaeghe had been authorized to build under the original development permit and building permit within the 20-metre setback:
- (a) The further impingement into the setback area of a deck post by 0.1 metres;
 - (b) The addition of 28 square feet to square off one corner of the New Dwelling; and
 - (c) One metre of additional height.

- [51] There were, however, four other changes identified by the District. First, the District pointed to the retaining wall constructed in May 2020. The judge did not agree that a variance was required to accommodate the wall because, at a height of 1.2 metres, it was exempt from the requirement for a permit. However, the judge did not address the need for a permit for any type of structure within the setback area.
- [52] Ms. Vanderhaeghe submits the judge's error was a harmless one because the wall was exempt in any event under s. 3.10.9(g) of the Community Plan, as a structure built to address an emergency. She says it was built to control erosion after a slide on the slope between the New Dwelling and the lake. The District disputes this characterization of events. The judge did not resolve the dispute and this Court is not in a position to resolve it at first instance. What can be ascertained is that construction of the retaining wall within the 20-metre setback created further complexity for the District in addressing Ms. Vanderhaeghe's applications to amend her permits, since construction of the wall within the SPEA required Provincial approval and submission of an assessment report.
- [53] Second, the judge did not address changes to the size of the deck estimated to be 0.6 metres both to the west towards the neighbour's cottage, and towards the lake. Third, the District identified additional square footage added to the basement and main floor. Fourth, the judge did not address the District's concern with the change to the design of the roofline which created, at one point, a peak two metres above the approved roofline quite apart from the overall one-metre increase in the roof height.
- [54] Assessment of whether it was unreasonable for the District to require new permits, as a result of these changes, begins with s. 15 of the Planning Bylaw which provides:
15. In the event that a permit has been authorized for issuance pursuant to this bylaw, a new permit application is required to change or alter a development, variance, temporary commercial or industrial use or tree cutting that has been permitted, if in the opinion of the Manager of Planning & Development, the proposed change or alteration would have the effect of:
- (1) substantially altering the permitted location, setback, height, shape, size, floor area or parcel coverage of a building or structure;
 - (2) substantially altering the permitted grade, fill or drainage pattern of land.
- [Emphasis added.]
- [55] The judge concluded it was unreasonable for the District to require new permits for two reasons. First, because she found that once the original development permit granted a setback variance to 9.5 metres, the general Zoning Bylaw applied as to height and square footage, a conclusion I have above addressed and concluded to be in error. Second, the judge was of the view that the 0.1 metre impingement of the setback by the deck post, the 28 square feet addition, and the one-metre additional roofline height could not reasonably be said to "alter 'substantially'" the approved plans for the New Dwelling: at para. 166.

- [56] Stepping into the shoes of the judge in reviewing the District's decision in light of the full panoply of issues, I am not satisfied that the District acted unreasonably in deciding that the changes Ms. Vanderhaeghe made to the original plans substantially altered the height, shape, size and floor area of the New Dwelling. The change in the height of the structure and the raised and extended deck were noticeable to the affected neighbour to the west, and to District staff. A roofline one metre higher than approved, and two metres higher in one part, could in my view be viewed as a substantial change.
- [57] In this regard I note that s. 7.1(c) of the Sunshine Coast Regional District Delegation Bylaw No. 710, 2017 [Delegation Bylaw] empowers staff to amend development permits "that deal with form and character involving non-substantive design modifications" which are described as "having no bearing or impact on the permitted setback, height, shape[,] size, [or] floor area" [emphasis added]. Section 7.1(d) empowers staff to amend DVPs "to allow for minor, non-substantive design modifications, that would have no bearing or impact on the permitted location, setback, height, shape, size, [or] floor area ". The description in the Delegation Bylaw of what is non-substantive suggests that changes to height, shape and floor area are substantive changes. That is not to say that changes of this kind cannot be de minimis--I agree with the judge that the 0.1 metre impingement of the deck post falls into that category, particularly in light of the ambulatory character of the natural water boundary of the lake.
- [58] Although it was not unreasonable for the District to characterize the changes as substantial enough to meet the definition in s. 15 of the Planning Bylaw, that is not in my view the only consideration in the circumstances of this case. The District had for over a year directed Ms. Vanderhaeghe to apply for a DVP and then to bring her building permit and development permit generally into line with that variance. Their focus on s. 529 and the volume and mass of the Old Cottage, rather than the plans approved in March 2019, added considerably to the complexity of the permitting process. The District took an inordinately long time to address Ms. Vanderhaeghe's DVP application, cancelling a meeting at the 11th hour on one occasion. In these circumstances, it was unreasonable in my view to require her to start all over again.
- [59] I would accordingly find the District's decision to require Ms. Vanderhaeghe to apply for new development and building permits to be unreasonable. To the extent that changes must be approved, those changes should be considered as amendments to the existing permits.
4. Did the Board act reasonably in refusing the DVP?
- [60] The judge found the Board's refusal to grant the DVP to be unreasonable for two reasons. First, because the Board failed to grapple with the issues, relying instead on staff recommendations; and second, because the staff recommendations were based on flawed reports: at paras. 177 and 186. The District submits neither reason justifies setting aside the Board's decision. I will address each point in turn.
- a) Failure to grapple

[61] The judge interpreted the comments of Board members at the meeting on November 26, 2020 as indicating that they rubber stamped the recommendations of Mr. Pady and the other District staff. She gave as an example the statement of one Board member who said:

[179] [T]his is a difficult one, because this is a very complex matter with multiple jurisdictions as well as different timelines and all sorts of things that have come into it and apparently, yes, 5,000 pages of documentation were assembled to treat this file, and I don't think any of us are either willing, capable, or qualified to go through all those 5,000 pages and come up with a better solution than what staff has done.

I think staff has done a good job getting down to the essentials on this, and I'm going to put my faith in staff's recommendations at this point.

[Emphasis added in original.]

[62] Although the judge recognized that it was open to Board members to accept staff recommendations, she found it was "unreasonable to do so without even considering the subject matter at hand": at para. 180. She relied on *Party A v. The Law Society of British Columbia*, 2021 BCCA 130, a disciplinary case in which the Executive Director of the Law Society dismissed an application by a lawyer to anonymize a citation against him. The written reasons for that decision were found to have failed to address significant issues raised by the lawyer.

[63] The District says the judge's reliance on *Party A* is misplaced because the function and procedures of local government councils and boards are fundamentally different from those of the Law Society. Regional District Boards are legislative bodies which render decisions by vote. Most of their decisions are legislative, or have a legislative aspect--in this case, the variance of the Zoning Bylaw. They do not conduct adversarial hearings and generally do not issue reasons. It is typical for them to make their decisions following a review of staff reports on which they are entitled to rely.

[64] As to the "rubber stamping" of the staff report, the District says it is common for local government councils and boards to make decisions by accepting or endorsing recommendations and staff reports, with little else. The jurisprudence demonstrates that when recommendations in a staff report are accepted, the court infers that the Board has considered the matters raised in the report, and the validity of the decision is evaluated on that basis: *Yearsley v. White Rock (City of)*, 2009 BCSC 719; *48 Fr Hwy Land Ltd. v. Langley (Township of)*, 1999 CanLII 6476 (B.C.S.C.). The District accordingly submits that Mr. Pady's report should be read as part of the Board's reasoning for its decision.

[65] In my view, the comments of the Board members demonstrate an appreciation of the complexity of the issues and a desire to accept staff's recommendations. While the statement of the Board member quoted above demonstrates that he did not read the 5000-page file submitted by Ms. Vanderhaeghe, it cannot be equated with a failure to turn his mind to the issues before the Board. It must be remembered that the Board as a whole had

already considered the application sitting as the PCD Committee two weeks earlier. There was nothing to suggest that the Board members had not read and considered the report prepared by staff and the recommendations therein in advance of that meeting.

[66] Ms. Vanderhaeghe did not identify any case law supporting the principle that Board members must review and consider all material filed by an applicant or conduct their own analysis de novo. It was in my view sufficient for the Board members to review the staff report and listen to the delegations' submissions before reaching their conclusion.

b) Inaccurate reports relied on

[67] I turn now to the judge's finding that the reports prepared by staff were inaccurate and it was therefore unreasonable for Board members to rely on them. The judge touched on all four reports. However, only the fourth report was included in the agenda package for the November 12, 2020 meeting of the PCD Committee, and only that report was referred to by Board members in their deliberations on November 26. The judge identified three errors in this report: at para. 187. First, she found that the report incorrectly stated that the petitioner sought a height variance of 2.13 metres, when in reality the building was constructed only 1.07 metres taller than the schematic included in the permits. However, there was in fact a height discrepancy of approximately two metres at one point in the roofline.

[68] Second, the judge adopted the petitioner's submission that the fourth report did not mention the original reason for the DVP application, namely the addition of 28 square feet to square off the corner of the New Dwelling. To the contrary, however, the report mentions this change three times, and attached the original DVP application form, explanatory letter and follow-up letter from Ms. Vanderhaeghe, each of which spoke to the original reason for the application.

[69] The third error identified by the judge was the report's statement that the petitioner sought to vary the setback from 20 metres to 9.4 metres, when the setback had already been granted to 9.5 metres--thus requiring a variance from 9.5 to 9.4 metres. However, it is evident from the fourth report that the District did not dispute that the original setback to 9.5 metres had been granted. The reference to the petitioner seeking a setback from 20 metres to 9.4 metres to accommodate the deck post reflected the reality that a variance is granted from the Zoning Bylaw, not from the previous permit. Since the post was a new element of construction not in the original plans, it too required a variance from the original 20-metre setback in the Zoning Bylaw.

[70] In summary on this point, I respectfully conclude that the fourth report was not inaccurate, and it was accordingly reasonable for the Board to rely on it.

[71] It is helpful to consider at this point the substance of the 15-page report underpinning staff's recommendation to deny the variance sought. The report began by recognizing that the intent of the DVP application was to legalize construction that had occurred "in contravention of development and building permits". It noted that a "mismatch between

permitted construction and what was being built was identified at the framing stage". The report canvassed the 0.1 metre deck post impingement, the additional 28 square feet and the increase in height of the structure, but it also described additional deviations from the approved drawings including increased floor-to-ceiling heights on each of the three levels of the home which had the effect of placing the deck 0.6 metres higher and some distance further to the west, increasing the mass and volume of the design.

- [72] The report also identified the need for compliance with the Riparian Areas Protection Regulation, noting that the regulation authorized local governments to permit repairs to a non-conforming foundation in a riparian area only under specific and very limited circumstances, and that a further riparian assessment would be required.
- [73] Finally, the report described the petitioner's non-compliance with the stop work orders, expressing concern that granting the variance "could be seen as validating unauthorized construction and retroactively approving construction that may not have received approval before the fact". The report concluded that if the Board accepted the recommendation to deny the application, Ms. Vanderhaeghe could apply to the Board of Variance who would judge if undue hardship existed, and if so, could consider the application. It also acknowledged that if the Board of Variance either did not consider or grant the application, Ms. Vanderhaeghe would need to partially deconstruct the building with oversight from the Building Inspection Division.
- [74] This was a complex application, made more so by the location of the building within the SPEA, a riparian area, and the petitioner's decision to ignore at least the second stop work order shortly after the height discrepancies were first discovered in December 2019. I see no basis upon which it could be said that the decision of Board members to rely on the fourth report and accept staff's recommendation was an unreasonable one.
- [75] It is convenient to address here the District's continued reliance on Ms. Vanderhaeghe's conduct as another factor supporting the reasonableness of the District's decision to reject her DVP application. In its submissions in the hearing below, and again on appeal, counsel for the District described Ms. Vanderhaeghe as a "knowing cheater" and a "blatant lawbreaker". I agree with the judge that these characterizations were misplaced. I would also add that they were unhelpful. They stand in stark contrast to District staff's courteous, patient and professional communications with Ms. Vanderhaeghe throughout the development process.
- [76] The District gave no indication during construction and processing of the DVP application that it did not accept Ms. Vanderhaeghe's explanation that the height discrepancy was due to her builder's error. Although the lawyer's explanation for that discrepancy in submissions was confusing--i.e., that the builder had blasted lower-than-expected resulting in the building being too high--Ms. Vanderhaeghe's original explanation to the District was not. She indicated that the builder had blasted four feet lower than originally planned in order to reach bedrock, and so assumed that he did not have to worry about complying with the

permitted height. He also believed that what ultimately mattered was the height maximum in the bylaw. As a result of these mistaken assumptions, the builder did not conduct an elevation survey, and as it turned out, the building exceeded the permitted height.

[77] It is also convenient to address here the District's contention on appeal that the judge erred in refusing to admit the two affidavits relating to the trusses ordered for the New Dwelling early in the construction process. The District says that the affidavits demonstrate that Ms. Vanderhaeghe was a blatant lawbreaker, because they show she intended, very early in the construction process, to build beyond the height approved in her permits.

[78] I would not accede to this submission. The judge had an obligation to manage the hearing and to exercise her discretion to ensure a fair and efficient process. I see no error in her conclusion that it would have been procedurally unfair for the District to adduce new evidence to support serious allegations of dishonesty, raised for the first time against Ms. Vanderhaeghe and her consultants at the end of her case: at para. 58.

5. Did the Board breach the duty of procedural fairness?

[79] The judge found that a lack of procedural fairness at the Board hearing also provided a basis for quashing its decision to reject the variance, quite apart from its failure to grapple with the issues and its reliance on what she saw as a flawed report. This question is reviewable on a standard of correctness: *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission)*, 2021 BCCA 67 at para. 57.

[80] Ms. Vanderhaeghe asserted that the Board breached the principles of natural justice at the November 12, 2020 meeting of the District PCD Committee and the November 26, 2020 meeting of the Board. The judge agreed, saying:

[212] In my view, considering the Baker factors, particularly the importance of the decision to the petitioner and the petitioner's legitimate expectations based on the lengthy and difficult history created in large part by the District's actions, I agree with and find that the District owed a high degree of procedural fairness.

[213] I agree with the petitioner that the District breached its duty of procedural fairness by limiting the Petitioner's time to make submissions; excluding the Petitioner's legal counsel from the November 12, 2020, meeting; denying the Petitioner and legal counsel's request to make submissions at the November 26, 2020, Board meeting; and, failing to provide the Board with a copy of legal counsel's November 24, 2020, letter at the November 26, 2020, Board meeting.

The judge concluded that allowing Ms. Vanderhaeghe more time to present and allowing her counsel to make submissions were the minimum required in the circumstances: at para. 215.

[81] In my respectful view, the judge erred in coming to this conclusion. First, she did not address Sunshine Coast Regional District Board Procedures Bylaw No. 717, 2018, s. 12(3) which provides:

12. Delegations

- (3) A delegation must appoint a speaker, or at the discretion of the Board, more than one speaker. A delegation will be limited to a maximum of ten (10) minutes to present, unless agreed to by a two-thirds vote of those Members present.

[Emphasis added.]

- [82] Second, the judge did not give effect to the context in which the hearing occurred. It was not the only opportunity Ms. Vanderhaeghe had to make her case. Ms. Vanderhaeghe made her position known in dozens of exchanges with District staff over the course of a year. She also copied some emails documenting her position directly to the Board or individual Board members, including a two-page email sent to the Board members on November 10, 2020, two days before the PCD Committee meeting. The application process itself permitted Ms. Vanderhaeghe to convey her position to the Board. Her position was also set out in the fourth staff report, including her points of disagreement with staff's assessment of what variances were required. Although Ms. Vanderhaeghe's lawyer was not allowed to make submissions in addition to Ms. Vanderhaeghe, the lawyer could have been designated as the spokesperson at the November 12 meeting. Unlike in *Keefer v. Clifton Corporation*, 2005 ABCA 144, relied on by the petitioner, Ms. Vanderhaeghe's consultants were all in attendance at the meeting and available to answer questions from the Board should that have been necessary.
- [83] As the judge recognized, there was no obligation on the Board to adopt a court-like hearing while exercising its wide discretion under s. 498 of the Act. In particular, there was no requirement that an applicant be heard at all. The content of the duty of procedural fairness is contextual. Relevant circumstances include the nature of the decision, the nature of the statutory scheme, and the importance of the decision to the individual affected: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 20-25; 1999 CanLII 699.
- [84] In *667895 B.C. Ltd. v. Delta (Corporation)*, 2018 BCCA 38, this Court rejected the argument that an affected party has a right to make oral submissions in the absence of a statutorily required hearing. The Court stated there is no authority for the proposition that written submissions are insufficient: at para. 41, adopting the summary of law in *Guy Régimbald*, *Canadian Administrative Law*, 2nd ed (Markham: LexisNexis Canada, 2015) at 297-299.
- [85] As Horsman J., (now J.A.) observed in *1139652 B.C. Ltd. v. Whistler (Resort Municipality)*, 2018 BCSC 1806 at para. 57, a board exercising discretion to grant a DVP under s. 498 of the Act is not adjudicating an interparty dispute but is rather considering whether the requested variance is in the interests of the community as a whole. In my respectful view, the judge in the present case placed too great an emphasis on oral submissions. Considered in context, the procedure adopted by the Board allowed Ms. Vanderhaeghe, and the neighbour opposed to her development, to communicate their positions to the Board in a fair manner.

6. Did the judge err in refusing to grant the District's petition for an injunction?

[86] The District sought an order under s. 420 of the Act and s. 274(1) of the Community Charter, S.B.C. 2003 c. 26, requiring Ms. Vanderhaeghe to bring the property into compliance with the Zoning Bylaw, the Act, the Sunshine Coast Regional District Building Bylaw No. 687, 2014 [Building Bylaw] and the Community Plan. They also sought an order permitting the District to demolish, remove or modify any illegally constructed structures on the property in order to bring the property into compliance.

[87] To obtain a permanent statutory injunction, the local government must prove, on a balance of probabilities, a breach of the relevant bylaw: *Abbotsford (City) v. Mary Jane's Glass & Gifts Ltd.*, 2017 BCSC 237 at para. 43; *Thompson-Nicola Regional District v. 0751548 B.C. Ltd.*, 2014 BCSC 1867 at para. 119. As a general rule, once the local government demonstrates there has been a breach of a bylaw, the court has limited discretion to deny a statutory injunction to enforce a public right: *District of West Vancouver (Corporation of) v. Liu*, 2016 BCCA 96 at para. 68; *Burnaby (City) v. Oh*, 2011 BCCA 222 at para. 41, leave to appeal to SCC ref'd, 34373 (8 December 2011).

[88] Where an injunction is sought to enforce a public right, the courts will be reluctant to refuse it on discretionary grounds. To the extent that the subject of the injunction may suffer hardship from its imposition and enforcement, that will not outweigh the public interest in having the law obeyed: *Maple Ridge (District of) v. Thornhill Aggregates Ltd.*, 1998 CanLII 6446 (B.C.C.A.) at para. 9.

[89] The judge dismissed the District's petition for an injunction in one paragraph, saying:

[221] My above analysis and conclusions essentially dispose of the District Petition. I find that Ms. Vanderhaeghe has not contravened the relevant District bylaws or provisions of the Act and decline to grant the relief sought by the District.

[Emphasis added.]

[90] In short, having found no need for a variance, no breach of any bylaws or provisions of the Act, and no substantial departure from the work authorized by the development and building permits granted in March 2019, the judge found there was no basis on which to make the order sought.

[91] I have, with respect, come to a contrary conclusion, finding that it was not unreasonable for the District to require a variance and to determine that the New Dwelling, as built, contained substantial alterations from the approved plans. Departure from the approved plans is significant, even though it demonstrates non-compliance with permits rather than the bylaws, because s. 501(2) and the Building Bylaw require compliance with the building plans as approved:

(2) Land must be developed strictly in accordance with the land use permit or permits issued.

[92] The Building Bylaw includes the following provisions:

2.5 No person shall do any work that is substantially at variance with the accepted design or plans of a building, structure or other works for a which a permit has been issued, unless that variance has been accepted in writing by a Building Official.

16.5 No aspect of the work referred in section 16.4 of this bylaw shall be concealed until a Building Official has accepted it in writing.

16.7 (1) No person shall occupy a building or structure or part of a building or structure until the Building Official has given written authorization.

[Bold and italics in original; underlining added.]

[93] I have already addressed substantial changes relating to increased floorspace, increased floor-to-ceiling heights totaling one metre, with a further roofline height increase of two metres in one area, and increased deck space, including a further protrusion of the deck post into the 20-metre setback. In addition, there is no dispute that Ms. Vanderhaeghe is occupying the New Dwelling without an occupancy permit in contravention of s. 16.7 of the Building Bylaw.

[94] Having said that, I see no basis to interfere with the judge's finding that the District has not proved that Ms. Vanderhaeghe concealed work that should have been inspected, given the exemption from inspections where the work is overseen by a registered professional.

[95] Nor would I issue an injunction on the basis of the petitioner's failure to comply with the stop work orders issued. Although it is apparent that Ms. Vanderhaeghe breached the second stop work order, there is no purpose in ordering her to comply with it given that the building is now finished. In short, there is nothing left to stop.

[96] I accept that the District has proved non-compliance with some sections of the Act and Building Bylaw as noted above, and that an injunction would ordinarily follow. Ms. Vanderhaeghe asks this Court to exercise its discretion to refuse to issue the injunction given the hardship she would experience if required to alter the form of the residence, and given the complexity, confusion and delays occasioned by the District's insistence on treating the New Dwelling as a legally non-conforming structure under s. 529 of the Act.

[97] I have considerable sympathy with Ms. Vanderhaeghe's frustration over the length of time the District took to address her DVP application, but her decision to proceed in contravention of the second stop work order, and to ignore the District's concerns about the increased height and impingement into the setback, does not weigh in her favour. Although Ms. Vanderhaeghe ran into difficulties which appear to have resulted from her builder's mistake as to building height, ultimately she was given permits to build a particular structure within the setback area in strict compliance with the development and building permits, and built something different. In these circumstances, I see no basis on which this

Court could depart from the usual principle that an injunction should be issued to require Ms. Vanderhaeghe to bring her building into compliance with the approved building permit drawings.

- [98] The District agrees that the effect of this order should be stayed for 16 months to give Ms. Vanderhaeghe an opportunity to seek an appropriate variance, amendments to existing permits, and approval from the Board of Variance if necessary.

Disposition

- [99] The appeal from the orders made on judicial review is allowed in part and the appeal from the order dismissing the District's petition is allowed, on the following terms:

1. Ms. Vanderhaeghe is to bring the New Dwelling into compliance with the approved building permit drawings.
2. The effect of the above order is stayed for 16 months to give Ms. Vanderhaeghe an opportunity to obtain amendments to permits to address differences between the approved building plans and the New Dwelling as constructed.
3. Applications to amend or vary are to be assessed against the approved building plans, not the mass and volume of the Old Cottage under s. 529 of the Act.
4. The requisite approvals should be sought through applications to amend the existing development and building permits.
5. The judge below retains jurisdiction to address matters arising out of the implementation of these orders.
6. In light of their divided success, the parties should each bear their own costs of the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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