

CANADA / JUDGMENT

Taylor v. Vancouver (City)

2022 BCSC 1487

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2022 BCSC 1487 Taylor v. Vancouver (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Taylor v. Vancouver (City),

2022 BCSC 1487

Date: 20220826

Docket: S220112

Registry: Vancouver

In the Matter of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Between:

Shannon Joan Taylor

Petitioner

And

City of Vancouver, Saul Schwebs in his capacity as Chief Building Official, John Greer in his capacity as Approving Officer and Theresa O'Donnell in her capacity as Director of Planning

Respondents

Before: The Honourable Madam Justice J. Hughes

Reasons for Judgment

Counsel for the Petitioner, appearing via videoconference:

N. Baker

B.A. Fortugno

Counsel for the Respondents, appearing via videoconference:

B.S. Williamson

Place and Dates of Hearing:

Vancouver, B.C.

March 29-30, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 26, 2022

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Introduction

- [1] The petitioner, Shannon Joan Taylor, applies under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA], seeking declaratory relief and an order of mandamus in respect of certain decisions made by the City of Vancouver (the "City") concerning redevelopment of a residential property located at 70 West 18th Avenue (the "Property"). The Property is zoned RS-7 under the City of Vancouver, Bylaw No. 3575, Zoning and Development By-law (17 May 1956) [Zoning Bylaw], and is subject to the RS-7 District Schedule of the Zoning Bylaw.
- [2] The property had an existing single-family character home on it and the petitioner sought to redevelop it to take advantage of additional floor space and other incentives offered by the City to encourage retention of character homes. The petitioner obtained a positive character assessment and began the process of applying to redevelop it into a two-family multiple conversion dwelling ("MCD") and construct an additional infill unit (the "Infill") at the rear of the Property (collectively, the "Project"). The petitioner applied for a development permit and submitted drawings indicating that approximately 60% of the character home would be retained. After obtaining development and building permits on that basis, the petitioner subsequently determined that it would be more economical to demolish the character house and replicate it with new construction, but did not amend the existing development permit application or apply for a new development permit reflecting this change.
- [3] As construction was nearing completion, an issue with the fire suppression rating and sprinkler system came to light, which resulted in the City suspending the building permits. In the course of addressing those issues, the City discovered the discrepancy in the scope of character retention between the development permit and the building permit. After reviewing the Project as constructed, the City advised the petitioner that because the character home had been demolished, the Project no longer qualified for the zoning incentives that permitted construction of an MCD and Infill consequent on character retention. The City refused to lift the suspension of the building permits and advised the petitioner that she would need to apply for a new continued development permit.
- [4] The petitioner raises multiple grounds on which she says the City's decisions to suspend the building permits and require a new development permit application were unreasonable. She also says that she is entitled to an order of mandamus compelling the City to lift the building permits suspension. For the reasons that follow, I find that the City's decisions to suspend the building permits and require the petitioner to apply for a new development permit were reasonable. I reject the petitioner's contention that, despite having found the City's decisions reasonable, she is nonetheless entitled to an order of mandamus, compelling the City to permit the development of the Property contrary to the Zoning Bylaw.

Statutory Scheme**The Zoning Bylaw**

- [5] The City's statutory authority to make zoning bylaws derives from s. 565(1) of the Vancouver Charter, S.B.C. 1953, c. 55, which provides that Council may make bylaws dividing the City into districts or zones, regulating the use or occupancy of land and the construction, use, or occupancy of buildings within such zones, and regulating the maximum floor-space ratio permissible in any zone.
- [6] The City's authority to require and issue development permits derives from s. 565A of the Vancouver Charter, which provides, among other things, that Council may make bylaws:
- a) prohibiting any person from undertaking any development without having first obtained a permit;
 - b) providing that a development permit may be time-limited and subject to conditions, and making it an offence to fail to comply with such conditions;
 - c) providing that no building permit shall be issued for the construction of any building until a development permit has been obtained; and
 - d) delegating powers of discretion relating to zoning matters as Council deems appropriate.
- [7] Pursuant to s. 565(2) of the Vancouver Charter, the City has the authority to permit outright and conditional approval uses for land. Outright approval uses for RS-7 zoned properties are those that "shall" be permitted and "shall" be issued a permit, as long as the proposed use complies with the Zoning Bylaw and the regulations of the RS-7 District Schedule. There is no residual discretion to refuse to issue a development permit for an outright approval use. The parties agree that the only outright approval use for the Property under the RS-7 District Schedule is as a single-family dwelling.
- [8] Conditional approval uses are uses permitted at the discretion of Council. Section 3.1 of the RS-7 District Schedule provides that conditional approval uses in the RS-7 zone may be approved with or without conditions, provided that the Director of Planning considers: (a) the intent of the Schedule and all applicable Council policies and guidelines; and (b) the submission of any advisory group, property owner, or tenant. Section 3.1 of the RS-7 District Schedule prescribes the circumstances in which conditional approval uses in the RS-7 zone may be approved, and requires consideration of all applicable policies and guidelines:
- 3.1 Subject to all other provisions of this By-law, the Director of Planning may approve any of the uses listed in section 3.2 of this schedule, with or without conditions, provided that the Director of Planning first considers:
- (a) the intent of this Schedule and all applicable Council policies and guidelines; and
 - (b) the submission of any advisory group, property owner or tenant.

[Emphasis added.]

[9] Section 4 of the Zoning Bylaw deals with development permits. Development permits are issued in accordance with s. 4.4, which provides, in material part, as follows:

4.4.2 The approval of plans or drawings and the issuing of a development permit and any inspection in connection therewith made by the Director of Planning or the Director of Planning's accredited representatives shall not in any way relieve the applicant from full responsibility for the carrying out of the development in accordance with the provisions of this By-law.

4.4.3 The approval of any application and plans or drawings, or issuing of a development permit, shall not prevent the Director of Planning from thereafter requiring the correction of errors or from prohibiting a development from being carried out when the same is in violation of this or any other By-law.

[]

4.4.5 The issue of a development permit shall not absolve the applicant from complying with all City by-laws.

[10] Section 4.5.1 of the Zoning Bylaw requires a new development application to be made for any deviation from approved plans or drawings, other than where the amendment is deemed to be minor in nature by the Director of Planning:

4.5.1 If at any time it is desired to alter in any manner, or to deviate from, the particulars of the application or plans or drawings previously submitted for which a development permit has already been issued, a new application shall be made. However, if an amendment is of a minor nature whereby a new application is deemed unnecessary, the Director of Planning may waive this requirement and endorse any necessary amendment to the application, plans or drawings and development permit accordingly.

[Emphasis added.]

[11] Section 6 of the Zoning Bylaw sets out various general prohibitions, which the City says apply in the present circumstances to prevent it from lifting the suspension of the building permit and permitting construction of an MCD plus Infill on the Property. In particular, ss. 6.1 and 6.2 provide that no person shall use or occupy any land or building in contravention of the Zoning Bylaw or the conditions of a development permit, respectively.

[12] Finally, s. 6.4 of the Zoning Bylaw prohibits development on land or in any building unless a valid development permit has been issued. In turn, s. 6.7 requires compliance with the conditions of a development permit. Section 6.6 prohibits development in contravention of the Zoning Bylaw:

A person must not carry out any development or engage in any uses described in section 5 in contravention of this By-law, other City By-laws, an Official Development Plan, or any development permit, to the extent any of them apply to that person's site.

Character Retention Incentives Under the Zoning Bylaw

[13] The RS-7 District Schedule contemplates the granting of incentives or additions to the permitted floor space ratio ("FSR") consequential to the retention of a character house. Section 4.7.1(e) of the RS-7 District Schedule provides for an increased FSR to a maximum of 85% in conjunction with retention of a character house:

4.7.1 The floor space ratio for all uses except for two-family dwelling or two-family dwelling with secondary suite shall not exceed 0.60, except that:

[]

(e) the Director of Planning may increase the maximum permitted floor space ratio to 0.85 for infill in conjunction with retention of a character house, if the Director of Planning first considers the intent of this Schedule and all applicable policies and guidelines adopted by Council.

[14] In October 2017, the City adopted the "Guidelines for Additions, Infill and Multiple Conversion Dwelling in Association with the Retention of a Character House in an RS Zone" (the "Character Guidelines"). The Character Guidelines provide the basis upon which City staff evaluate projects for approval of incentives in the nature of conditional floor area, conditional uses of Infill and MCD, and discretionary variations in regulations--all when associated with the retention of a qualifying character house.

[15] Section 2.2 of the Character Guidelines provides that to be eligible for incentives--including conditional floor area, infill, or conversion--the existing character house must be retained and restored to its original character as viewed from the street. Minimum expectations for the level of structural retention of a character house undergoing major renovations and seeking conditional benefits in zoning are outlined in the City's Planning By-law Administration Bulletin, entitled "Retention and Renovation of Character Merit Buildings - Scope and Documentation" (the "Retention Bulletin"). Section 2.1 of the Retention Bulletin deals with scope of retention:

The retention of Character Buildings usually enables discretion in the zoning (i.e. additional floor area) which necessitates a clear retention scope and method of documentation.

The intent of retention is to keep the character of the existing house, not simply a quantity of construction material. The goal is to maximize retention of the exterior of the building. Unless otherwise described in the specific District Schedule or Guidelines, the minimum retention expected for a one-family dwelling, two-family dwelling or multiple conversion dwelling should not be less than 60%...

- [16] Section 2.2 of the Retention Bulletin addresses retention documentation. It provides that at the time of development permit application, a detailed colour-coded plan and elevation drawings from a registered architect or engineer are to be submitted verifying that the portions of the existing structure shown as being retained can in fact be retained, and that the architect or engineer will supervise the construction to ensure retention occurs.

The Building Bylaw

- [17] Once a development permit has been issued, a property owner may apply for a building permit in accordance with City of Vancouver, Bylaw No. 12511, Building By-law (23 July 2019) [Building Bylaw]. This is a separate approval stream than that through which the City reviews and approves development permits under the Zoning Bylaw.
- [18] Section C.1.4.1.7 of the Building Bylaw requires that the plans and supporting documents submitted for a building permit substantially conform with the approved development permit plans:

Compliance with Development Permit Plans

The owner shall ensure that the plans and supporting documents submitted for a permit conform substantially with the approved Development Permit plans and supporting documents, except that where differences exist, the owner shall make application for a "Development Permit Amendment" as required by the Zoning and Development By-law.

- [19] Thus, like the Zoning Bylaw, the Building Bylaw requires a new permit application for any significant changes from a development permit approved under the Zoning Bylaw.

Development and Construction of the Project

- [20] There is little dispute between the parties as to their dealings with each other over the course of development and construction of the Project. Where the parties part company, at times, is in their interpretation of certain communications between the petitioner's agent and the City, and the potential role of those communications within the confines of this judicial review.
- [21] The petitioner has owned the Property since 1992. The Property was improved with a single-family home, which the petitioner lived in with her family until 1996. Since then, the Property has been used as an investment/rental property.
- [22] In 2017, the petitioner retained a development company, CKO Construction Corporation (doing business as Lifestyle Renovations), to consider and ultimately act as the petitioner's agent in respect of a potential redevelopment of the Property. Kelly Oehlschlager is the principal of Lifestyle Renovations and represented the petitioner in her dealings with the City in respect of the redevelopment of the Property. Mr. Oehlschlager also works for the City as a solicitor in its legal department, but was not acting in that capacity in his role as agent for the petitioner.

- [23] In January 2018, Mr. Oehlschlager applied to the City for a character merit assessment for the Property. The City's planning department deemed the existing house to have sufficient "character merit" to qualify for consideration under the conditional use provisions of the Zoning Bylaw. This allowed the petitioner to take advantage of the character house retention incentives permitted by the Zoning Bylaw, in accordance with the Character Guidelines and the Retention Bulletin.
- [24] As noted above, the incentives provided in exchange for retention of the character house included an increase in the FSR, the ability to construct a two-unit MCD with Infill, and potential for stratification. The petitioner sought to take advantage of these incentives by altering and converting the existing single-family dwelling into three separate stratified units: conversion of the existing character house into a two-unit MCD and construction of an Infill. Absent character retention, the only outright permitted use for the Property was a single-family dwelling, and the maximum conditional approval use would be a one-family dwelling with secondary suite and a laneway house.

Issuance of the Development Permit

- [25] The petitioner's intended redevelopment of the Property from a single-family house to an MCD plus Infill is a conditional approval use under s. 3.2.1DW of the RS-7 District Schedule. The petitioner was thus required to obtain a development permit from the City authorizing redevelopment of the Property from a single-family house to an MCD plus Infill.
- [26] In August 2019, and following lengthy discussion between Mr. Oehlschlager and staff with the City's Development, Buildings & Licensing Department, Mr. Oehlschlager submitted the petitioner's development permit application for the Project, proposing to alter the existing character house on the Property and convert it to a two-unit MCD plus Infill. Following a design review meeting, the development application was authorized for approval with conditions. A "Prior to Permit Issuance" letter ("Prior to Permit Letter") was provided to the petitioner's agent indicating that her application to alter and convert the existing one-family dwelling to a multiple conversion dwelling containing two units and to develop an infill one-family dwelling at the rear of the Property had been approved. The Prior to Permit Letter for the development permit set out various revisions and conditions required to be fulfilled prior to issuance of a development permit, and included the following:

4.2 A new Development Application will be required for any significant changes. This approval is subject to any change in the Zoning and Development By-law or other regulations affecting the development that occurs before the permit is issuable. No permit that contravenes the by-law or regulations can be issued.

[Emphasis added.]

[27] On April 30, 2020, Development Permit DP-2019-00657 was issued in respect of the Property (the "Development Permit"). The Development Permit authorized the alteration and conversion of the existing one-family dwelling to a two-unit MCD and one-family Infill, described as follows:

To alter and convert this existing one-family dwelling to a multiple conversion dwelling (Building 1) containing two dwelling units and, to develop an infill one-family dwelling (Building 2) at the rear of the site, providing one parking spaces having vehicular access from the lane.

[28] The City was thus presumably satisfied that the drawings submitted and approved as part of the Development Permit showed sufficient character retention to meet the character retention expectations contemplated in the Retention Bulletin for a renovation and conversion of the existing single-family dwelling to an MCD. The total FSR noted on the Development Permit drawings also reflected the 85% maximum permissible FSR under s. 4.7.1(e) of the RS-7 District Schedule for an MCD plus Infill consequent on retention of a character house.

Change in Scope of Character Retention

[29] At some point in April 2020, shortly before the Development Permit was issued, the petitioner determined that it would be more economical and allow for a full seismic and structural upgrade if the character house was demolished--saving only the front façade--instead of altering and converting it. The change in scope from alteration and conversion to demolition and replication was a significant change from the Project described and authorized by the Development Permit and shown in the supporting drawings. The petitioner does not say otherwise, nor is it disputed that despite s. 4.2 of the Prior to Permit Letter and s. 4.5.1 of the Zoning Bylaw, she did not apply for a new development permit.

[30] Rather, on April 27, 2020, Mr. Oehlschlager wrote to Shannon Le, a Project Coordinator in the City's Development, Buildings & Licensing Department, with respect to the process for applying for building permits. Mr. Oehlschlager outlined the shift in the Project from retention to replication and asked whether the petitioner could apply for a building permit reflecting this change in scope:

Since the cost of lifting and lowering will add approximately \$100,000 to the cost, it would be much more economical to demolish the house (saving the front façade and storing on site for re-installation) thereby allowing for a full seismic and structural upgrade to the house as opposed to the current piece-meal approach. Of course the new structure would be built to replicate exactly the current structure except for the portions shown on the [Development Permit] as being modified (the extension on the rear and the small new dormer on the front).

So could you kindly confirm that we can apply for a [building permit] showing this approach and that this does not raise any issues with you (aside from triggering the requirement for a demolition permit)?

- [31] Mr. Oehlschlager did not ask whether, given the reduction in character retention, a new development permit application would need to be submitted. Rather, his request was directed at whether he could apply for a building permit. A City employee identified only as "Ally" responded on April 28, 2020, stating as follows in response to Mr. Oehlschlager's question about whether he could apply for a building permit:

As long as the plans match the drawings for the [Development Permit] set then yes you are able to apply for the [building permit] set. The foundation work would be noted on the [building permit] set of plans anyways and you would have a structural engineer on board to produce drawings.

[Emphasis added.]

- [32] The petitioner submits that this correspondence constituted advice from the City that she could "move to retention of the façade only by simply submitting building permit plans that were otherwise consistent with the [Development Permit] " (emphasis added), and that there was a carve out for alterations pertaining to the façade. The petitioner's submission is difficult to reconcile with the plain language used in the City's email.

- [33] Nonetheless, Mr. Oehlschlager's inquiries to the City continued in early May 2020, with his focus at the time being to determine whether a demolition permit would be required for the character house. On May 7, 2020, Ally wrote to Mr. Oehlschlager advising that a demolition permit was not required "unless you are demoing the entire house". She explained as follows:

What you're doing is simply called renovating and altering the house, so the [Development Permit] and [building permit] actually cover the removal of the existing foundation, putting the house back on whatever you need to then build the new foundation and put the house back down, renovating the interior and exterior, all the new work, everything!

[Emphasis added.]

Issuance of the Building Permit

- [34] On June 25, 2020, Mr. Oehlschlager submitted a building permit application on behalf of the petitioner, which included structural and architectural drawings, and other documents required by the City.
- [35] In July 2020, Paolo Volpi was assigned as the Project Coordinator for the petitioner's building permit application and was responsible for, among other things, reviewing the Project for building plan compliance. The petitioner submits that Mr. Volpi confirmed Ally's earlier advice that demolition permits were not necessary so long as part of the front façade of the character house was being retained. On July 21, 2020, Mr. Oehlschlager emailed Mr. Volpi seeking to confirm that advice. Mr. responded that demolition requirements did not fall within his purview.

- [36] In September 2020--before the building permits were issued--the wood that comprised the façade of the character home was disassembled and preserved on the Property. The petitioner says that in December 2020, Ed Loney, the City building inspector assigned to the Project, attended at the Property to conduct the "forms and foundation" inspection and had a discussion with Mr. Oehlschlager about the façade. Mr. Oehlschlager's evidence is that the building inspector advised him that it was not necessary to reinstate the façade. Shortly thereafter, the façade was removed from the Property and put into storage.
- [37] Following various revisions to the building permit application which are not material to the issues in this proceeding, the City issued two Prior to Permit Letters, one for each of the MCD and the Infill. On September 29, 2020, Mr. Oehlschlager submitted revised drawings addressing the issues raised in the building permit Prior to Permit Letters and showing significantly less character retention than the Development Permit drawings (the "BP Drawings"). The BP Drawings also contained the following notation:

Front façade: the front façade will be retained on site and used as a template to ensure exact replication of front façade utilizing the new 2x6 wall assembly and rain screen specific herein.

- [38] The material points--which are not in dispute--are that the BP Drawings did not match the drawings authorized as part of the Development Permit in relation to the scope of character retention, and the reduction in character retention was a significant change in the Project. The Development Permit authorized development of an MCD plus Infill contingent on approximately 60% retention of the character house, while on Mr. Oehlschlager's description, the BP Drawings contemplated no retention of the character house--only replication of the façade by new construction.
- [39] On October 7, 2020, the City issued building permits for the Project: BP-2020-02121 for the character house MCD and BP-2020-02122 for the Infill (collectively, the "Building Permits"). The description of work for the MCD was consistent with that in the Development Permit, namely to "alter and convert" the existing one-family dwelling.

Minor Amendment to Development Permit

- [40] In November 2020, Mr. Oehlschlager applied for a minor amendment to the Development Permit. The proposed amendments related to the plumbing design and interior layout of the MCD and Infill, and landscaping changes for limited common property configuration. The drawing set submitted as part of the minor amendment application identified the location of the proposed changes in red bubbles and by brief point form description in boxes on the drawings titled "Development Permit Minor Amendment". The identified changes also corresponded with a written list of changes provided by Mr. Oehlschlager in connection with the amendment application.
- [41] In relation to the scope of character retention, the drawings submitted for the minor amendment were consistent with the BP Drawings, in that they showed no retention and contained the same notation regarding the façade being retained as a template only.

However, unlike the proposed minor amendments to the plumbing, interior, and landscaping, the reduction in character retention was not identified by red bubbles, or in the narrative point-form description of the amendments noted in boxes on the drawings. Nor was this change from the Development Permit drawings otherwise brought to the attention of the City's Development, Buildings & Licensing Department staff who were charged with reviewing the minor amendment application.

- [42] On January 11, 2021, the minor amendment was approved and DP-2020-00871 was issued (the "Amended DP"). By its express terms, the Amended DP only authorized the amendments shown in the red bubbles and described in the amendment application. It did not authorize any other changes or deviations from the Development Permit that may have been shown on the drawings submitted for the amendment:

Any other changes or deviations from the originally approved development permit drawings under DP-2019-00657 that may have been shown on the drawings forming a part of this permit are not approved. You are further advised that this application has not been processed with regard to the requirements of the Building By-law. You must comply with any Building By-law requirements and obtain all the necessary relevant permits.

[Emphasis added.]

- [43] After the Amended DP was issued, Mr. Oehlschlager sought and obtained a corresponding minor revision to the Building Permits. In the course of amending the Building Permits, an inconsistency in the Building Permits relating to the required sprinkler standard was identified. Mr. Volpi subsequently advised that the Project could be sprinklered to the standard applicable to single-family dwellings and the City approved a minor amendment to the Building Permits. This is one example of multiple instances where the documentation shows a lack of clarity in the description of the two-unit MCD component of the Project: it was sometimes referred to as an MCD, and other times as a single-family dwelling with secondary suite. This lack of consistency appears to have contributed to the chain of events that resulted in the City's ultimate discovery of the discrepancy between the Issued DP and the Project as constructed.

Suspension of the Building Permits

- [44] Over the course of construction, Mr. Loney and other City staff conducted and passed multiple inspections of the Project. In early July 2021, a substitute inspector, Bram Cowan, attended at the Property and noted some discrepancies with the fire suppression requirements for the walls between the two units in the MCD and the type of sprinklers required. On July 16, 2021, Mr. Cowan suspended the Building Permits pending resolution of the fire suppression and sprinkler issues.
- [45] Correspondence ensued between Mr. Oehlschlager and various City staff, including Mr. Cowan, who advised Mr. Oehlschlager that the permits were suspended "until a clear direction has been established" and that the Building Permits stated "single family with

secondary suite" (i.e., not a duplex) but the plans as they then existed "did not support a duplex". It became apparent in the course of the ensuing discussions between Mr. Oehlschlager and City staff that there was confusion in terms of whether the Project was intended to have three units that could be stratified (i.e., two units in the MCD plus the Infill) or only two units (i.e., single-family dwelling with secondary suite and the Infill as a separate unit). The Project was elevated to the Deputy Chief Building Official, Matthew Lam, for review.

- [46] On August 25, 2021, John Greer, Assistant Director, Permitting Services with the City, wrote to Mr. Oehlschlager and advised that discrepancies between the Development Permit and what had been constructed had been brought to his attention--specifically, the lack of retention of the existing character house. The parties agree that this is accurate: nothing from the existing character house has been incorporated into the existing new construction or retained onsite, though some portion of the front façade remains in off-site storage. Mr. Greer also advised Mr. Oehlschlager that stratification would not be possible without retention of the character house (the "Stratification Decision"):

It has been brought to my attention that there are some discrepancies between the approved Development Permit and what has been constructed on site, specifically the lack of retention of the existing character house, in fact I believe nothing from the existing character house was retained. Staff are looking into how this happened and how now to proceed as the lack of an existing house entirely changes what can be developed under the RS-7 District Schedule of the Zoning and Development Bylaw. What I can advise you now is that "Part 5 of the Strata Title Policies RS, RT and RM" will prohibit you from strata-titling this development as the Character House was not retained in any way.

[Emphasis added.]

- [47] Mr. Oehlschlager was also simultaneously corresponding with various other City officials in an effort to have the Building Permits suspension lifted. The responses he received to those inquiries were consistent with the City's overarching position--namely, that demolition of the character house created zoning issues that were significant and would dictate the potential route forward for the Project in terms of what could be developed under the RS-7 District Schedule as it applies to new construction.
- [48] On September 8, 2021, Saul Schwebs, Chief Building Official for the City, responded to correspondence from Mr. Oehlschlager confirming that the July 16, 2021, suspension of the Building Permits would remain in place because the Project was no longer in compliance with the terms of the Development Permit and the Building Permits (the "BP Decision"). Mr. Schwebs explained his decision as follows:

It has been determined that your project is no longer in compliance with the terms of the Development and Building Permits that were issued.

DP-2019-00657 - To alter and convert this existing one-family dwelling to a multiple conversion dwelling (Building 1) containing two dwelling units and, to develop an infill one-family dwelling (Building 2) at the rear of the site, providing one parking spaces having vehicular access from the lane.

DP-2020-00871 - In accordance with section 4.4 of the Zoning and Development By-Law, your request is granted, thereby permitting to [perform interior alterations to main house and infill and landscape alterations to the North portion of the site] as shown on P-0, P-1, P-2, P-3, P-4 submitted by Lifestyle Renovations stamped "RECEIVED" by this Department on December 2, 2020 and now APPROVED as a Minor Amendment to Development Permit Number DP-2019-00657.

BP-2020-02121 - Building Permit for DP-2019-00657 [t]o alter and convert this existing one-family dwelling to a multiple conversion dwelling (Building 1) containing one dwelling unit and one secondary suite.

At no point was a demolition permit issued for the property at 70 West 18th. As the previous residence was not retained, your development must now comply with the District Schedule - RS7 Zoning and Development by-law for new construction.

The permits suspension will remain in place until you can provide proof of compliance.

[49] On September 14, 2021, Mr. Oehlschlager wrote to Mr. Schwebs, Andrea Law, Acting General Manager, Development Buildings and Licensing, and Corrie Okell, Director of Permitting Services, proposing that the Project proceed as follows:

If my client were to agree (hypothetically and in the interests of trying to resolve this matter in a mutually satisfactory way) to complete the main house as a single parcel (single family dwelling with secondary suite) but a strata lot with the infill as a second strata lot, could we not simply amend the permits to reflect this and move forward to completion on this basis?

Everything has been constructed in accordance with the approved plans and, as we understand it, this would immediately resolve the 13R versus 13D sprinkler issue as well as the 900mm firefighter access issue that were both recently raised by staff.

Alternatively, we would welcome any other options that you would like to propose.

[50] Ms. Law responded to Mr. Oehlschlager on September 17, 2021, confirming the City's position that the Project did not comply with the Building Permits or the Development Permit, and advising that City staff were assessing where the Project did not comply with the Zoning Bylaw:

Further to Saul's email dated September 8th, the development at 70 West 18th is not in compliance with the terms of the Development Permit and Building Permits that were issued for this site.

The Development Permit was approved and issued to retain and renovate the existing single family dwelling on the site. The specific conditions of approval around retention were fundamental to the incentives granted.

As there was no retention, we will be looking for the development to comply with the [Zoning Bylaw] and [Building Bylaw] regulations as these apply to new development and construction in RS-7.

City staff are currently carrying out an assessment of where the current development does not comply, and we will share that with you early next week for your information.

[51] On September 23, 2021, Ms. Law wrote to Mr. Oehlschlager to provide the City's assessment of the Project and confirmed that a new development permit application would be required (collectively with the September 17, 2021 email, the "DP Decision"). As Ms. Law explained, a new development permit was required because retention of the character house, as authorized by the Development Permit, was no longer possible:

Around the question of retention, I ask that you refer to the drawings forming part of the Development Permit - particularly S1 and S2, that detail to portions of the building being retained and renovated, as well as the clear wording of the Development Permit.

As the applicant you will be aware of the [Retention Bulletin] which provides direction on the general scope of retention and details the City's expectations around retention documentation.

The [Retention Bulletin] requires that all parts of the building shown as being retained will be retained in place and not removed from their original location within the building at any time.

It's important to note that the project would not have been eligible for incentives with replication and further, that conversations with City staff do not constitute an amendment to the Development Permit.

It's the City's position that a new Development Permit application is required given the retention of the character building as authorized by the Development Permit is no longer possible.

On that basis, we have included an assessment of where the current development does not meet the regulations under the [Zoning Bylaw] and the [Building Bylaw] for new construction.

[52] In October 2021, the petitioner proposed that the original façade be reinstalled and that the permits be amended to ensure consistency between the Development Permits and the Building Permits so that the Project could be completed. The City was not amenable to this proposal. As such, the Building Permits remain suspended and the City's position remains as set out in the DP Decision: the lack of character retention renders the Project ineligible for zoning incentives consequent on character retention, and by consequence, non-compliant with the Development Permit and the Zoning Bylaw.

[53] The City's position is that the petitioner must apply for a new development permit and can seek conditional approval uses for the Property that do not require character retention, including a one-family dwelling with secondary suite and laneway home. However, this is not without complication as, in addition to the issue of whether a single-family home with secondary suite and laneway home would be eligible for stratification, the permissible FSR of 0.16 for a laneway house is less than the permissible FSR of up to 0.25 for an Infill constructed in conjunction with retention of a character house. By consequence, the Infill as constructed exceeds the permissible height for a laneway home and is overbuilt in terms of the permissible square footage for a laneway home by approximately 335 square feet.

Issues

[54] The petitioner seeks judicial review of the BP Decision, the DP Decision, and the Stratification Decision, and seeks an order of mandamus compelling the City to lift the Building Permits suspension. The overarching issues on this petition are thus:

- a) whether the City's decisions are reasonable; and
- b) whether the petitioner is entitled to an order mandamus, which she says can be made in her favour even if the City's decisions were reasonable.

[55] Whether the petitioner relied on representations from the City in proceeding with the Project as demolition and replication by new construction is not before me on this judicial review. Rather, the scope of review is limited to the aforementioned issues pertaining to the reasonableness of the City's decisions and the petitioner's entitlement to an order of mandamus.

[56] The petitioner raises multiple grounds on which she says the City's decisions to suspend the Building Permits and require a new development permit application were unreasonable.

[57] First, she says the BP and DP Decisions are unreasonable because the City considered itself bound by the 60% character retention threshold in the Retention Bulletin and applied the Bulletin as if it were the Zoning Bylaw itself. Central to this question is whether it was reasonable for the City to consider the Character Guidelines and Retention Bulletin in interpreting the Zoning Bylaw, and whether the resulting interpretation of the Bylaw as requiring at least some character retention for a conditional approval use of MCD plus Infill for the Property was reasonable.

[58] Second, the petitioner asserts that the BP and DP Decisions are unreasonable because the City is "estopped" from refusing to lift the Building Permits suspension and requiring a new development permit application because it approved the Project as constructed. The petitioner points to the issuance of various permits for the Project and successful inspections over time as evidence in support of this submission. While the petitioner frames this second ground of review in terms of the City being "estopped" from requiring compliance with the Zoning Bylaw, in my view, the issue is more appropriately characterized

for the purpose of judicial review as whether the City's determination that issuance of the Building Permits and the Amended DP did not authorize the Project as constructed was reasonable.

- [59] Third, the petitioner says that the BP Decision is unreasonable for failure of internal rationality because the initial suspension of the Building Permits was triggered for one reason (i.e., discrepancy in fire rating and sprinkler standards) but then maintained for a different reason (i.e., lack of character retention rendering the Project non-compliant with the Development Permits, the Building Permits, and the Zoning Bylaw).
- [60] In my view, and for the reasons set out below, the BP and DP Decisions were reasonable given the factual and legal constraints within which the City made them. The City reasonably determined that the Zoning Bylaw required at least some character retention and that following demolition of the character house, the petitioner was required to submit a fresh development permit application. The City's decision that the Project had not been authorized as constructed was also reasonable. Accordingly, the City reasonably suspended the Building Permits, given that construction of the Project did not comply with the applicable bylaws.
- [61] As to the Stratification Decision, the petitioner conceded that if the Court finds the BP and DP Decisions were reasonable, then the Stratification Decision will also stand as reasonable. In light of this concession, my conclusion that the BP and DP Decisions were reasonable disposes of that aspect of the petition.

Analysis

Reasonableness Review

- [62] The parties agree that the standard of review for the City's decisions is reasonableness. The onus is on the petitioner to demonstrate that the City's decisions were unreasonable: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 100 [Vavilov]; *Yu v. Richmond (City)*, 2021 BCCA 226 at para. 54.
- [63] Reasonableness review ensures that the Court intervenes only where necessary to safeguard the legality, rationality, and fairness of the administrative process: Vavilov at para. 13. The reviewing court must consider whether the decision--including both the rationale and the outcome--is reasonable: Vavilov at paras. 83, 87. The reasonableness of a decision may be undermined where there is a failure of rationality internal to the reasoning process, or where the decision is untenable in light of the relevant factual and legal constraints: Vavilov at para. 101.
- [64] The proper approach to reasonableness review following Vavilov was helpfully summarized by the Court of Appeal in *English v. Richmond (City)*, 2021 BCCA 442, as follows:

[59] Vavilov tells us that in judicial review cases, "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (at paras. 90, 105, *emphasis added*). Contextual constraints will "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (at para. 90). See also, 1193652 B.C. Ltd. v. New Westminster (City), 2021 BCCA 176 at para. 60.

[60] A decision's legal and factual context includes:

the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies.

[*Emphasis added.*]

Vavilov at para. 106. See also, Yu at paras. 51-52.

[61] Because administrative decision makers "receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision": Vavilov at para. 108 (*emphasis added*). Decision makers are not "permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures" (at para. 108). While they "may have considerable discretion in making a particular decision, that decision must ultimately comply 'with the rationale and purview of the statutory scheme under which it is adopted'" (at para. 108, citing Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2 at paras. 15, 25-28, [2012] 1 S.C.R. 5).

[62] Consequently, an exercise of discretion "must accord with the purposes for which it was given" and "comport with any specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion": Vavilov at para. 108. Administrative decision makers must not "interpret the scope of [their] own authority beyond what the legislature intended" (at para. 109). They cannot "arrogate powers to themselves that they were never intended to have" (at para. 109). Nor are they entitled to issue a decision that "strays beyond the limits set by the statutory language [they are] interpreting" (at para. 110).

[*Italics emphasis in original; underlined emphasis added.*]

[65] When issues of statutory interpretation arise within the context of reasonableness review, the Court's task is to determine whether the interpretation adopted by the decision maker respects the relevant legal constraints: English at para. 66. A decision may be unreasonable if the decision maker fails to consider a pertinent aspect of the statutory provision's text, context, or purpose: English at para. 69. The legal context also includes consideration of publicly available policies or guidelines that informed the decision maker's work: English at para. 79, citing Vavilov at para. 94.

Was the City's Interpretation of the Zoning Bylaw as Requiring Some Character Retention Reasonable?

- [66] The Building Permits suspension was initially triggered in July 2021 when the discrepancy in fire rating standards for the MCD was discovered. However, the BP Decision maintained the suspension on the basis that the lack of character retention rendered the Project non-compliant with the Development Permit and the Zoning Bylaw. As Mr. Schwebs outlined to the petitioner, demolition of the character home resulted in the Project being required to comply with the Zoning Bylaw as it applies to new construction on RS-7 zoned properties, and the Building Permits suspension would remain in place until proof of compliance was provided. Similarly, the DP Decision was based on the City's conclusion that the Project would not have been eligible for the incentives that permitted MCD plus Infill using replication by new construction instead of altering and converting the existing character house.
- [67] As such, whether the BP and DP Decisions were reasonable turns in large part on the reasonableness of the City's interpretation of the Zoning Bylaw, and more specifically, whether it permits construction of an MCD plus Infill on the Property absent at least some (or as presently constructed, any) character retention. I must therefore consider whether the City's interpretation of the Zoning Bylaw--which included consideration of the Character Guidelines and the Retention Bulletin--is reasonable in light of the words of the applicable provisions considered in their context, the scheme and object of the bylaws, and the intention of the legislative body: English at para. 57.
- [68] The Project as constructed--a two-unit MCD plus Infill--is a conditional approval use of the Property. Section 3.1 of the RS-7 District Schedule of the Zoning Bylaw requires consideration of "all applicable Council policies and guidelines" prior to approving conditional uses. Section 4.7.1(e) of the RS-7 District Schedule then provides that an increased FSR to a maximum of 85% may be available in conjunction with retention of a character house. As is clear on the face of s. 4.7.1(e), an increase in FSR is only permissible where a character house is retained and the Director of Planning considers the applicable policies and guidelines.
- [69] Further, section 3.2.1DW of the RS-7 District Schedule of the Zoning Bylaw expressly ties approval of both an MCD and an Infill to retention of character homes:

3.2.1DW [Dwelling]

- Infill in conjunction with retention of a character house existing on the site as of January 16, 2018.

[]

- Multiple Conversion Dwelling in conjunction with retention of a character house existing on the site as of January 16, 2018, that contains no housekeeping or sleeping units.

[Emphasis added].

[70] Policies and guidelines are an accepted and important aspect of the administrative state. As explained by Guy Régimbald in *Canadian Administrative Law*, 2nd ed. (Toronto: LexisNexis, 2015) at page 165:

There are many types of subordinate legislation or regulation-making authority. To exercise their powers, public bodies may publish various types of documents to inform the public on how it may exercise its discretion. Those documents may be described as policies, guidelines, orientations, directives, instructions, circulars, manuals, bulletins, etc. All of these types of documents are generally referred to as "guidelines".

[71] Even if they do not have a normative value, guidelines are important for both public servants and the public at large, as they provide notice of the criteria that will be used in the decision-making process. Indeed, the Court in *Vavilov* reiterated the relevance of such policy documents, noting that the reviewing court must read a decision maker's reasons in light of, among other things, "publicly available policies or guidelines that informed the decision maker's work" and have regard to the potential for a decision maker to "have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member": *Vavilov* at para. 94; see also, *Yu* at para. 101.

[72] In the present circumstances, the policies and guidelines that the City was obliged to consider when interpreting the Zoning Bylaw--pursuant to s. 3.1(a) of the RS-7 District Schedule of the Zoning Bylaw and s. 3.2.1DW of the RS-7 District Schedule--were the Character Guidelines and Retention Bulletin. This is consistent with s. 1 of the Character Guidelines, which provides that they:

- a) "are to be used in conjunction with the RS district schedules of the [Zoning Bylaw] and pertain to the approval of the conditional uses of infill and multiple conversion dwelling when associated with the retention of a qualifying character house"; and
- b) will be used by the City as the basis on which City staff will evaluate projects for approval of conditional uses of MCD and Infill.

[73] Section 2.2 of the Guidelines clearly indicates that an existing character house must be maintained and addresses the extent of retention required, referring to the Retention Bulletin as setting the minimum expectations for structural retention of a character house when seeking conditional benefits in zoning:

2.2 Character House Retention Requirements

To be eligible for incentives, including conditional floor area, infill or conversion, the existing character house must be retained and restored to its original character as viewed from the street. At the pre-application stage, an assessment of the existing condition of the house will be undertaken by Planning staff to inform the amount of restoration required. This may include restoration of character elements, such as traditional window styles or opening up of entry

porches that have been enclosed. The extent of restoration will be determined by the scope of the proposal. Minimum expectations regarding the level of structural retention required in a character house undergoing major renovations and seeking conditional benefits in zoning are outlined in the [Retention Bulletin]...

[Emphasis added.]

[74] The purpose of the Retention Bulletin is to provide direction on the general scope of retention and documentation necessary for projects proposing to retain character buildings in exchange for incentives by way of conditional use approvals under applicable zoning bylaws. Section 2.1 of the Retention Bulletin sets the minimum expected retention at not less than 60%, unless otherwise described in the Zoning Bylaw or the Character Guidelines:

2.1 Scope of Retention

The retention of Character Buildings usually enables discretion in the zoning (i.e. additional floor area) which necessitates a clear retention scope and method of documentation.

The intent of retention is to keep the character of the existing house, not simply a quantity of construction material. The goal is to maximize retention of the exterior of the building. Unless otherwise described in the specific District Schedule or Guidelines, the minimum retention expected for a one-family dwelling, two-family dwelling or multiple conversion dwelling should not be less than 60%...

[Emphasis added.]

[75] The petitioner contends that the DP Decision is unreasonable because the City applied the Character Guidelines and Retention Bulletin as if they were the Zoning Bylaw and did not consider itself to have any discretion to depart from the 60% minimum character retention standard in the Retention Bulletin. The petitioner says that because the 60% retention standard is found in the Retention Bulletin, not the Zoning Bylaw, "as long as the [City] considered the intent of the [Zoning Bylaw] and applicable District Schedule and policies and guidelines, [it] had the discretion to permit the conditional use, even at much less than 60% retention".

[76] I agree with the petitioner that the City is not bound by the Character Guidelines and Retention Bulletin and cannot treat them as binding regulations. Administrative policies are necessarily "non-binding" and "intended to inform and guide those subject to regulation": *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 121 D.L.R. (4th) 79 (O.N.C.A.) at 86; *Party A v. British Columbia (Securities Commission)*, 2021 BCCA 358 at para. 231. Likewise, a decision maker cannot fetter their discretion by treating a policy as binding upon them and excluding other valid or relevant reasons for the exercise of their discretion: *Maple Lodge Farms Limited v. Government of Canada*, [1982] 2 S.C.R. 2 at 7. The City was thus required to consider the intent of the Zoning Bylaw and how it applied to the specifics of the present case, rather than applying the Character Guidelines and Retention Bulletin as binding regulations.

- [77] However, I find the City did not run afoul of these constraints in its consideration of the Character Guidelines and Retention Bulletin. Rather, the City properly used these policies and guidelines as tools to guide its exercise of discretion in respect of the Project. This approach is supported by the structure of the Zoning Bylaw, Character Guidelines, and Retention Bulletin. In particular, the Zoning Bylaw provides that the City must consider "all applicable Council policies and guidelines" prior to granting a conditional use approval, and the RS-7 District Schedule provides that the Director of Planning must consider the "intent of the Schedule" and applicable guidelines and policies prior to exercising its discretion. Moreover, the Character Guidelines provide that the existing character house should be retained and that the minimum retention guidelines are as set out in the Retention Bulletin, which in turn provides that the "minimum retention expected should be not less than 60%" (emphasis added). The wording of the Retention Bulletin is permissive, not mandatory--thereby preserving some discretion to grant conditional use approvals in circumstances where less than 60% retention is contemplated.
- [78] Within this context, I find that the City's interpretation of the Zoning Bylaw as requiring at least some retention of the original character structure for a property owner to take advantage of the development incentives that the City provides in exchange for character retention was reasonable. A contrary interpretation would ignore the express language of the Character Guidelines, which provide that "the existing character house must be retained", and the objective of the Retention Bulletin to "keep the character of the existing house, not simply a quantity of construction material" and "maximize the retention of the exterior of the building", and would thus also be contrary to s. 3.1(a) of the RS-7 District Schedule.
- [79] Likewise, I disagree with the petitioner's submission that the City considered itself bound by the 60% threshold set out in the Retention Bulletin and thus refused to authorize the Project as an MCD plus Infill because less than 60% of the character house was retained. The City interpreted the Zoning Bylaw as requiring at least some character retention, with replication not being a satisfactory alternative. As the City explained in the DP Decision, the Retention Bulletin "provides direction on the general scope of retention and details the City's expectations around retention documentation" and "requires that all relevant parts of the building shown as being retained will be retained in place and not removed from their original location within the building at any time".
- [80] The DP Decision did not state that the 60% retention expectation was a mandatory requirement, nor does the City appear to have treated it as such. This was not a case where an appreciable amount of the character house had been retained while falling short of the 60% threshold in the Bulletin, but the City refused to exercise its discretion. Nothing of the character house remained: the house was demolished and the façade removed from the site. Whether the character retention expectations set out in the Character Guidelines and Retention Bulletin could be met in the present circumstances by reassembling and reinstalling the façade is a determination for the City to make, not the Court.

- [81] What the petitioner is seeking here is exactly that which is not contemplated in either the Retention Bulletin or the Character Guidelines--namely, conditional zoning benefits being granted in the absence of any character retention. That would be the effect of acceding to the petitioner's submission that "replication" ought to be treated synonymously with "retention" for the purpose of interpreting the Zoning Bylaw and that conditional zoning benefits ought to be granted with "much less than 60% retention" (or no retention at all, as occurred here following demolition of the character home and removal of the façade). This would ignore the Character Guidelines and Retention Bulletin, and in doing so, fail to respect the legal constraints imposed by s. 3.1(a) of the RS-7 District Schedule. Such an outcome is clearly contrary to the purpose and intent of the Zoning Bylaw, as it would allow the petitioner to benefit from incentives that are conditional on character retention, while failing to actually retain the character house.
- [82] The reasonableness of the City's interpretation of the Zoning Bylaw as precluding completion of the Project in the present circumstances (i.e., absent any character retention) is further supported by the additional factual constraints within which the BP and DP Decisions were made, namely that:
- a) the Project was not constructed in accordance with the Building Permits;
 - b) the BP Drawings were not consistent with the drawings approved as part of the Issued DP; and
 - c) the Amended DP did not authorize the reduction in scope of character retention or replication by new construction instead of alteration and conversion of the character house.
- [83] In my view, the existence of any one of these factual constraints alone supports the reasonableness of the BP and DP Decisions, considered in light of the legal constraints imposed by the Zoning Bylaw. Taken together, they make the reasonableness of the BP and DP Decisions all the more evident.
- [84] In the circumstances, I find that the City's interpretation of the Zoning Bylaw as requiring at least some character retention was reasonable. By consequence, the BP Decision refusing to lift the Building Permits suspension and the DP Decision requiring a new development permit application were also reasonable. A contrary interpretation would be unreasonable, as it would allow property owners to unilaterally substitute replication by new construction in place of character retention, thereby negating the intended effect of the administrative scheme set out in the Zoning Bylaw, Character Guidelines, and Retention Bulletin.

Was the City's Determination that the Project was not Approved as Constructed Reasonable?

- [85] As a second ground of review, the petitioner asserts that both the BP and DP Decisions were unreasonable because the City approved the Project as constructed, and is therefore "estopped" from suspending the Building Permits and requiring a new development permit. More specifically, the petitioner says that, having issued the Building Permits and the Amended DP, and conducted various inspections over the course of the Project, it is unreasonable for the City to now require compliance with the Zoning Bylaw.
- [86] The petitioner's submission puts in issue the City's determination that the Project had not been approved as constructed and that a new development permit application would therefore be required prior to construction resuming. While the petitioner frames this as the City being "estopped" from requiring compliance with the Zoning Bylaw, in my view, the issue is more appropriately characterized for the purpose of judicial review as whether the City's determination that the Project was not approved as constructed was reasonable.
- [87] In support of this submission, the petitioner relies heavily on Mr. Oehlschlager's correspondence with the City as evidence of the City having approved the Project. In particular, the petitioner says that Mr. Oehlschlager's April and May 2020 correspondence with the City constitutes authorization for the Project to proceed as new construction (i.e., replication) instead of character retention (i.e., alteration and conversion) without the need for a new development permit application. Mr. Oehlschlager repeatedly asserted that the City had reviewed, signed off on, inspected, and approved everything applied for and constructed in the course of the Project. In one instance, Mr. Oehlschlager asserted that the petitioner had "emails and amendment approvals for everything and [is] confident that the 'zoning issues' are not issues at all". The petitioner makes the same assertions on this judicial review. I disagree. Based on the record before me, it was not unreasonable for the City to conclude that--contrary to Mr. Oehlschlager's assertions--the petitioner did not have "approvals for everything" and therefore maintain the Building Permits suspension.
- [88] The petitioner's interpretation of Mr. Oehlschlager's correspondence with the City cannot be reconciled with the April 28, 2020, email being expressly predicated on the BP Drawings matching the drawings that were approved as part of the Issued DP (which was no longer the case by this time), and the clear contemplation in the May 7, 2020, email that the original character house would be retained to an extent that it could be "put back" on a new foundation. The petitioner's interpretation of Mr. Oehlschlager's correspondence with the City is also inconsistent with the express language of the Prior to Permit Letter for the Development Permit, the Development Permit itself, and the Zoning Bylaw--all of which included the requirement to apply for a new development permit for any significant change to the Development Permit.
- [89] The petitioner also points to the various permits that were granted for the Project after the reduction in character retention--principally, the Building Permits and the Amended DP--as further evidence of the City having "approved" the Project as constructed.

[90] As a starting point, the right of a municipality to carry out its bylaws and policies is well established: *Langley (Township of) v. Wood*, 1999 BCCA 260 at para. 13 [Langley]. Municipal rights, duties, and powers are of such public nature that they cannot be waived, lost, or vitiated by mere acquiescence: *Langley* at para. 12; *0940460 BC Ltd. v. Burnaby (City)*, 2020 BCCA 142 at para. 42 [Burnaby]; *Corporation of the Township of Esquimalt v. Crosson*, 2010 BCSC 1490 at para. 43 [Esquimalt]. Moreover, the fact that a municipal officer has given permission does not make an act lawful: *Esquimalt* at para. 37.

[91] These concepts are reflected in s. C.1.4.1.5(4) of the Building Bylaw which provides, in relevant part, as follows:

the issuance of a permit, the acceptance of plans and supporting documents submitted for a permit, or the making of inspections by the Chief Building Official shall not relieve the owner of a building from the full responsibility for carrying out the work or having the work carried out in accordance with this By-law and all other applicable enactments.

[92] The Building Bylaw thus requires that construction be carried out in accordance with the Zoning Bylaw (another "applicable enactment") and by consequence, with the Development Permit issued pursuant to the Zoning Bylaw. The petitioner did not obtain a new or amended development permit authorizing the Project as constructed, namely as an MCD plus Infill absent character retention. The petitioner's submission that the BP and DP Decisions were unreasonable because the City is "estopped" from requiring compliance with the Building Bylaw and the Zoning Bylaw is thus inconsistent with the express wording of Section C.1.4.1.5(4) of the Building Bylaw: see also, *0940460 BC Ltd. v. Burnaby (City)*, 2018 BCSC 1495 at para. 49, *aff'd* 2020 BCCA 142 at paras. 42-44.

[93] Further, issuance of a building permit that does not conform with the approved development permit does not have the effect of amending or varying the development permit. This is codified in s. C.1.4.1.7 of the Building Bylaw, which requires that the plans and supporting documents submitted for a building permit substantially conform with the approved development permit plans. It is also consistent with the requirement that building permits be interpreted in accordance with the relevant zoning bylaw: *Clark v. Kelowna (City)*, 2004 BCCA 271 at para. 17; *Esquimalt* at para. 44.

[94] In *Clark*, the petitioner sought an order of mandamus compelling the city to issue addresses for third dwelling units on two properties. The petition was dismissed on the basis that the third dwelling units were never lawful non-conforming uses of the properties: *Clark* at para. 18. The petitioner purchased the properties not knowing that maintaining three dwelling units on each property was contrary to the applicable zoning bylaw, which only permitted two dwelling units on each property. The city had issued permits for both properties: in one instance approving the construction of "summer kitchen facilities" and in the other approving addition of a duplex to a single-family dwelling. In both instances the prior owners covenanted with the city that the properties would not be used as three-dwelling units, but those covenants were not binding on the petitioner. The petitioner appealed, but

the appeal was dismissed, with Justice Donald for the majority concluding as follows:

- [17] In my view, the permits do not on their face authorize three-family units nor can they be reasonably construed as having that effect. The permits should, in my view, be interpreted in accordance with the zoning by-law. The purpose of the R-2 zoning is to restrict use to two-family dwellings.
- [95] Nor can a building inspector amend a zoning bylaw. That was the conclusion reached in Esquimalt, where the township brought a petition seeking declaratory relief for breach of a zoning bylaw and a statutory injunction against a property owner requiring removal of a secondary suite. The Court found that the township either approved construction of a third kitchen by the prior owner contrary to the bylaw, or was at the very least aware of it, but nonetheless granted the relief sought, concluding as follows:
- [45] Although the respondents seek to rely on the fact that Mr. Downs's renovation in 1992-1993 was permitted, I do not believe that fact assists them. Even if the installation of the third kitchen was permitted, use of the building as three dwelling units was not.
- [46] Further, the law is clear that a building inspector cannot amend a zoning bylaw. If the building inspector had authorized the construction of three separate dwelling units (I have found no evidence to support that conclusion), they would have been as non-compliant when they were built as they are today.
- [47] Thus this is not a situation where a use that was consistent with a previous bylaw may remain a non-conforming use when the bylaw changes. It was never consistent with the zoning to have three dwelling units in the building.

[Emphasis added.]

- [96] In my view, the same reasoning applies here. The Building Permits must be interpreted consistent with the Zoning Bylaw, which the City reasonably interpreted as requiring at least some character retention to obtain conditional use approval for construction of an MCD plus Infill on the Property. The subsequent inspections conducted, and approvals granted, by the City's building inspectors did not have the effect of amending the Zoning Bylaw to permit conditional use incentives to be granted in the absence of any character retention.
- [97] This is particularly the case given that pursuant to s. C.1.4.1.7 of the Building Bylaw, the petitioner was obliged to ensure that the plans and supporting documents submitted for the Building Permits substantially conformed with the Development Permit. The petitioner concedes that this was not the case. The BP Drawings were not consistent with those approved as part of the Development Permit and this discrepancy was not brought to the City's attention in the building permitting process.
- [98] Moreover, the City's approval of plans and drawings, or the issuance of a development permit, does not prevent it from thereafter prohibiting a development from being carried out in contravention of the Zoning Bylaw: s. 4.4.3. A similar argument to that being

advanced by the petitioner here was made and rejected by this Court and the Court of Appeal in Burnaby. In that case, the property owner appealed the dismissal of their petition for judicial review of the city's decision refusing to regularize operation of a restaurant that included a pizza oven that did not comply with the applicable zoning bylaw. The property was damaged by fire in 2011 and the property owner did not obtain a preliminary plan approval or building permit before relocating the pizza oven afterwards. A building permit was subsequently issued by the city in 2013--likely by mistake. On appeal, the property owner argued, among other things, that the city's failure to request or require a preliminary plan approval before issuing the 2013 building permit estopped it from requiring one later. The appeal was dismissed, with the Court concluding that it was reasonable for the city to determine that the permit issued in 2013 did not legitimize the pizza oven. Moreover, the Court held it was reasonable for the city to consider the non-compliant pizza oven in deciding whether to grant preliminary plan approval for further alterations to the property.

- [99] Importantly, both Courts rejected the property owner's contention that the City's decision was unreasonable because it was estopped from relying on the lack of preliminary plan approval on account of having issued a building permit for the pizza oven in 2013. On this point, the Court of Appeal concluded as follows:
- [40] Although in this age of comprehensive property development regulation, a member of the public might expect that a building permit issued long ago in respect of a building feature would resolve that feature's legitimacy, and that in the least the law would not allow the municipality to go back on a permit issued by the very authority assigned responsibility for administering the Zoning Bylaw, the general law of municipal government and the language of this bylaw provide otherwise for this case.
- [41] In *City of Toronto v. Solway* (1919), 49 D.L.R. 473 (Ont. C.A.), Chief Justice Meredith stated, at 476, concerning a building permit, that "a permit by a corporation official to do something that was prohibited by the by-law is of no force or validity". Mr. Justice Locke applied *Solway* in *Neilson v. Langley (District)* (1980), 116 D.L.R. (3d) 462 (B.C.S.C.), in a statement approved in this court on appeal in *Neilson v. Langley (District)* (1982), 134 D.L.R. (3d) 550 (B.C.C.A.).
- [42] Reinforcing this approach is the general notion that a municipality may proceed under its bylaws without the application of estoppel: *Langley (Township) v. Wood*, 1999 BCCA 260.
- [43] These general approaches are given voice in the language of Burnaby's bylaws. The result is that although an individual member of the community might expect to rely on a permit, a permit does not always protect the property owner from a later municipal complaint. As the judge noted in this case, assuming a preliminary plan approval was required for the pizza oven, s. 4(1) of the Building Bylaw puts the obligation to obtain a preliminary plan approval on the property owner. Further, s. 4(2) of the Building Bylaw negates the concept of estoppel arising from inspection and issuance of a permit where work is contrary to a bylaw: see also s. 4(5) of the Building Bylaw. Further, s. 4.1 of the Zoning Bylaw prohibits the use of land and buildings "unless in conformity with this Bylaw".

[44] In the result, it was reasonable for Burnaby to consider that the permit issued for the pizza oven in 2013 did not legitimize the pizza oven in the event it was non-compliant with the Zoning Bylaw, or was constructed without a preliminary plan approval, if required.

[Emphasis added.]

[100] The reasoning in Burnaby applies equally to the case at bar. Section C.1.4.1.7 of the Building Bylaw obliged the petitioner to ensure that the drawings submitted for the Building Permits matched those approved as part of the Development Permit. Section C.1.4.1.5(4) of the Building Bylaw in turn negates any estoppel arising from the various inspections and permits issued by the City where the Project was being constructed with significantly less character retention than was approved in the Development Permit and, therefore, contrary to the Zoning Bylaw. Finally, ss. 6.1 and 6.2 of the Zoning Bylaw prohibit the use or occupation of land or buildings in contravention of that bylaw or the conditions of a development permit. As such, I find that the City's decision--reflected in both the BP and DP Decisions--that the various permits and approvals provided over the course of construction did not legitimize the Project's non-compliance with the Development Permits and the Zoning Bylaw, was reasonable.

[101] The City's determination that the Amended DP did not preclude it from requiring that the Project be brought into compliance with the Zoning Bylaw by way of a new development permit application was also reasonable. The change in development concept from alteration and conversion of the existing character house to replication by new construction was a major change and resulted in the Project being constructed in a manner that did not comply with the Development Permit. The reduction in character retention--to the point of replication only--also rendered the development non-compliant with the Zoning Bylaw relating to the conditional use approval of an MCD plus Infill in the RS-7 zone: RS-7 District Schedule, s. 3.1. As noted above, the incentive of an increased FSR of 85% and conditional use approval for an MCD plus Infill on the Property is only permissible where a character house is retained. Absent character retention, the maximum FSR under s. 4.7.1(e) no longer applies to the Property.

[102] While the petitioner argues that the reduction in character retention was shown on the drawings submitted in support of the Amended DP, by its express terms, the Amended DP did not approve any changes or deviations from the Development Permit, other than those properly demarcated. The petitioner asserts that the changes were plainly "there to be seen" by City staff, but concedes that unlike the other amendments being sought, the reduction in character retention was not brought to the City's attention by demarcation in red bubbles--despite the obligation on her to do so.

[103] The City's decision is also reasonable in light of the legal constraints imposed by s. 4.5.1 of the Zoning Bylaw, which only permits changes that are "of a minor nature" to be approved through amendment of a development permit, rather than a new application. The shift from alteration and conversion of the existing character house to demolition and

replication by new construction was clearly not "minor"; it fundamentally changed the nature of the Project. Thus, even leaving aside whether or not the reduction in character retention was properly demarcated in red bubbles, by virtue of s. 4.5.1, the Amended DP could not have authorized the change in scope of character retention from that which was approved in the Development Permit.

[104] As such I find that the City's determination that the Project was not approved as constructed was reasonable and, by consequence, that the BP and DP Decisions refusing to lift the Building Permits suspension and requiring a new development permit application were reasonable. The petitioner's position that the BP and DP Decisions are unreasonable because the City approved the Project as constructed is defeated by her inability to identify any validly issued development permit authorizing the substantial change in the Project from alteration and conversion of the pre-existing character home to replication by way of new construction. Put differently, the City reasonably determined that issuance of the Building Permits and the Amended DP did not authorize construction of an MCD plus Infill in the absence of character retention, contrary to the Development Permit and in contravention of the Zoning Bylaw.

[105] In the result, I conclude that the BP or DP Decisions are not unreasonable because the City previously approved the Project as constructed and is thus "estopped" from now requiring the Project to brought into compliance with the Zoning Bylaw.

Was the City's Decision to Uphold the Building Permits Suspension Unreasonable?

[106] The petitioner also contends that the BP Decision is unreasonable because the suspension of the Building Permits was initially triggered for one reason (i.e., discrepancy in fire rating and sprinkler standards) but then maintained for a different reason (i.e., lack of character retention rendering the Project non-compliant with the Development Permits, the Building Permits and the Zoning Bylaw). I disagree.

[107] Vavilov instructs that to be reasonable, a decision must be based on reasoning that is both rational and logical. The reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic: Vavilov at para. 101. A decision will be unreasonable where it fails to reveal a rational chain of analysis: Vavilov at para. 103. I find nothing irrational or illogical in the chain of analysis underlying the BP Decision. The fact that the Building Permits were initially suspended because of issues with the fire suppression rating and sprinkler system does not make it irrational for the suspension to be maintained on another valid ground--namely, non-compliance with the Zoning Bylaw.

- [108] Section C1.4.1.7 of the Building Bylaw requires building permit plans and supporting documents to substantially conform with the approved development permit plans and documents. Section C1.4.1.5(2) mandates that all construction be carried out in accordance with the Building Bylaw and all other applicable enactments. The combined effect of these provisions is to prohibit construction that is not in accordance with the approved development permits.
- [109] Thus, irrespective of the reason for the initial suspension, it was reasonable for the City to maintain the suspension on a different--but equally valid--ground. A finding to the contrary could potentially create an untenable situation where the City would be hesitant to suspend a building permit for what might be a relatively minor issue in fear of not being able to subsequently maintain that suspension if--as occurred here--a more significant contravention is discovered in the course of investigating the initial issue. I find that the BP Decision was based on a rational chain of analysis and was therefore reasonable.

Is the Petitioner Entitled to Relief Despite the BP and DP Decisions Being Reasonable?

- [110] In the alternative, the petitioner submits that even if the City's BP and DP Decisions were reasonable, the Court nonetheless has "discretion not to enforce the Zoning Bylaw and to allow completion" of the Project within the confines of this judicial review.
- [111] In support of this submission, the petitioner relies on jurisprudence developed in the context of statutory injunctions for the proposition that "there exists a limited discretion not to grant a statutory remedy": see e.g., *Capital (Regional District) v. Smith* (1999), 61 B.C.L.R. (3d) 217 (C.A.) at para. 20 [Smith]; *Burnaby (City) v. Pocrnic*, 1999 BCCA 652 at para. 15 [Pocrnic]; *Osoyoos (Town) v. Nelmes*, 2009 BCSC 704 at para. 16 [Nelmes]. This proposition appears to be well-founded in the context of a civil action seeking statutory injunctive relief to enforce a public right. In such circumstances, the Court has a limited discretion to refuse statutorily-based injunctive relief, but that discretion must be exercised as the exception rather than the rule, and private hardship to a property owner will rarely outweigh the public interest in having the law obeyed: *Nelmes* at paras. 17-20, 29-30. However, a review of the jurisprudence relied on by the petitioner illustrates why the limited discretion available in statutory injunction cases where a municipality seeks to enforce its bylaws does not apply equally in the context of an application for judicial review challenging the reasonableness of a municipality's decision.
- [112] In *Smith*, the regional district sought injunctive relief against the defendant property owners prohibiting them from occupying, and requiring removal of, their cottage because it did not comply with the applicable zoning bylaw. The cottage was one of 17 on a parcel of land and was initially permitted as a non-conforming use. The cottage was destroyed by fire and the property owners reconstructed the cottage without obtaining a building permit and in contravention of the zoning bylaw (though there was an issue at the time as to whether the bylaw applied to each cottage individually or all 17 as a whole). The reconstructed cottage was virtually identical to the one that burnt down and the total number of cottages

on the land remained the same pre- and post-fire. In those circumstances, the Court held that it would be "highly inequitable to grant an order for the removal of [the] building" and that this was "one of those rare cases where the court can properly exercise its discretion to refuse to grant a mandatory order of destruction": Smith at paras. 23-24.

- [113] Likewise in Pocrnic, the City of Burnaby sought an order that the defendant property owners remove an unauthorized basement suite from their residence and restore it to its previously approved condition. Justice Esson cited Smith for the proposition that there is a narrow discretion to refuse a statutory injunction once a breach has been established: Pocrnic at para. 15. However, he then came to the opposite conclusion, noting that in Smith, permitting the cottage to remain would not offend the purpose of the impugned statute, while in the case before him, the factual circumstances brought the property owners "directly within the scope of the mischief which the legislation seeks to prevent": Pocrnic at para. 19. In dismissing the appeal and upholding the trial judge's order requiring the property to be brought into compliance with the bylaws, Justice Esson concluded that the circumstances before him amounted to "a case of owners deliberately flouting the bylaw for their own benefit and in the hope of not being detected": Pocrnic at para. 19.
- [114] Finally, in Nelmes, the municipality brought a civil action seeking a mandatory injunction compelling the defendant to remove a retaining wall he had constructed on his property without a building permit, contrary to the applicable building bylaw. The defendant conceded that the wall was constructed without a building permit, but argued that the Court ought to exercise its discretion not to issue the injunction sought by the municipality, among other things. The Court characterized Smith as an instance where refusing to grant an injunction was appropriate because it would cause significant hardship but serve no particular purpose: Nelmes at para. 29. However, the Court went on to note that the circumstances in Smith were a "marked contrast" to the matter at hand, where granting the injunction would permit the municipality to use its property for the intended use as a road: Nelmes at para. 30.
- [115] Considered in light of this jurisprudence, the petitioner's submission is problematic on two grounds. First, the authorities cited by the petitioner involved situations where municipalities sought statutory injunctions against property owners. No such relief is sought by the City in this case. The petitioner acknowledges this, but says that the City's refusal to allow her to complete the Project and requirement for her to apply for a new development permit is to the same effect as a statutory injunction. I disagree. The City is the respondent on this petition and does not seek any relief against the petitioner, let alone injunctive relief. Rather, the petitioner initiated these proceedings and she is the one seeking to compel the City--by way of an order for mandamus--to permit her to complete the Project in circumstances where I have found that the BP and DP Decisions were reasonable. The statutory injunction cases relied on by the petitioner are inapplicable to the case at bar and the petitioner has not identified any authority supporting the proposition she urges upon the Court--namely, that despite having found the BP and DP Decisions

reasonable, this Court has the discretion to usurp the City's role as decision maker and grant the petitioner permission to complete the Project.

- [116] Second, the petitioner fails to reconcile her submission with the proper role of the Court on judicial review. The Court's task is limited to determining whether the City's impugned decisions were reasonable. The Court is not enforcing compliance with the Zoning Bylaw; it is exercising its supervisory role by reviewing the reasonableness of the BP and DP Decisions.
- [117] Further, even if such a discretion does exist within the confines of a judicial review, I am of the view that this is not one of the rare circumstances in which it ought to be exercised. The petitioner says that her circumstances are akin to Smith, insofar as "the only concern is that the [p]etitioner used new wood instead of keeping the old wood" in relation to the façade and that "[t]he buildings were otherwise built exactly as approved". I reject this submission: it is an oversimplification of what in fact transpired with construction of the Project and demonstrably inconsistent with the record before the Court. It is also another instance in which the petitioner's position is predicated on the assertion that she had "received all the necessary City approvals" from the City for the Project as constructed. Regardless, I am not satisfied that the BP and DP Decisions impose a "significant hardship" on the petitioner for "no particular purpose", such that it would be "highly inequitable" to allow the Decisions to stand: *Nelmes* at para. 29; *Smith* at para. 23.
- [118] The petitioner goes on to suggest in the further alternative that the discretion provided in s. 565A(e)(i) of the Vancouver Charter to relax provisions of a zoning bylaw where enforcement would result in unnecessary hardship permits me to remit this matter back to the City for reconsideration despite having found the BP and DP Decisions reasonable. I disagree. Section 565A(e)(i) bestows discretion on the City to relax the application of its bylaws where strict enforcement would result in unnecessary hardship. As noted in *F.C.R.A. False Creek Residents Association v. Vancouver (City)*, 2015 BCSC 322 at para. 52, "the [Vancouver] Charter clearly intended to bestow on City Council or its delegate the power to relax, that is, to make less stringent, the provisions of a zoning bylaw" (emphasis added). There is nothing in s. 565A of the Vancouver Charter or the case law which suggests the same discretion somehow extends to the Court. Indeed, such an order would arrogate the City's statutorily-designated power to the Court and derogate from the Court's supervisory role on judicial review. This imprudence is only magnified by the fact that the City's underlying decisions were reasonable in the circumstances.
- [119] Finally, the petitioner notes that *Vavilov* emphasized that the importance of the decision to the person affected by it may impact the decision makers' responsibility to the petitioner. Accordingly, she says that because the BP and DP Decisions involve significant personal impact on her, the City was obliged to ensure that its reasons demonstrate that it considered the consequences of those decisions and that the consequences are justified: *Vavilov* at para. 135. Notably, however, the types of decisions that were characterized in *Vavilov* as having "particularly harsh consequences for the individual" were those with consequences

that "threaten an individual's life, liberty, dignity or livelihood": Vavilov at para. 133. The petitioner conceded in oral argument that the present circumstances do not engage her life, liberty, dignity or livelihood. That concession is sufficient to dispose of this aspect of the petitioner's submission.

Is an Order of Mandamus Appropriate?

- [120] Finally, the petitioner seeks an order of mandamus compelling the City to lift the Building Permits suspension. An order for mandamus can only issue if the petitioner has satisfied all conditions precedent that gave rise to the City's duty to issue development and building permits: English at para. 131; Paldi Khalsa Diwan Society v. Cowichan Valley (Regional District), 2014 BCCA 335 at para. 56 [Paldi]. Put differently, for an order of mandamus to issue, the petitioner must establish a "clear right to performance" of the impugned public duty: Paldi at para. 56. To establish this right, the petitioner must demonstrate that she has satisfied the conditions precedent giving rise to the duty.
- [121] The relief sought by the petitioner here is similar to that which was overturned by the Court of Appeal in English, which was an appeal by the City of Richmond of a decision on judicial review ordering it to issue a building permit. The petitioner challenged Richmond's refusal to grant a building permit for a cannabis greenhouse. The chambers judge found the decision unreasonable and granted an order for mandamus, finding that there were no more "technical issues" for the building inspector to consider, and thus Richmond had a duty to issue the permit: English at para. 127. The Court of Appeal upheld the chambers judge's finding that the decision was unreasonable, but it overturned the order of mandamus, concluding that the petitioner's building plans still had to be vetted to ensure their compliance with the relevant regulations--with the benefit of the Court's direction. In particular, the Court found that the chambers judge had effectively usurped the role of the administrative decision maker by determining the structure met the requirements of the regulations: English at para. 135.
- [122] Similarly, in the present case, the impugned public duty is issuance of a further development permit authorizing the Project as an MCD plus Infill. The only outright approval use for the Property is as a single-family dwelling. Any other use--including an MCD plus Infill--is a conditional approval use, granted at the discretion of the City where the necessary preconditions are met. Absent retention of the character home, it cannot be said that the petitioner has met all of the conditions necessary to trigger a right to performance of the public duty. To the contrary, demolition of the character house resulted in the Project failing to maintain sufficient character retention to meet the requirements set out in the Zoning Bylaw, Character Guidelines, and Retention Bulletin. The conditions precedent necessary to give rise to a duty on the part of the City to lift the Building Permits suspension have not been met. Accordingly, no order of mandamus is warranted in the present case.

Conclusion

[123] The BP Decision and the DP Decision were reasonable and the petitioner is not entitled to an order of mandamus compelling the City to lift the Building Permits suspension. The petition is dismissed, with costs to the City.

"Hughes J."

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