

CANADA / JUDGMENT

Yu v. Richmond (City)

2021 BCCA 226

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 226 Yu v. Richmond (City)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Yu v. Richmond (City),

2021 BCCA 226

Date: 20210609

Dockets: CA46822; CA46823

Docket: CA46822

Between:

Fu Li Yu and Jing Yang

Respondents

(Petitioners)

And

City of Richmond

Appellant

(Respondent)

- and -

Docket: CA46823

Between:

Minster Enterprises Ltd.

Respondent

(Petitioner)

And

City of Richmond

Appellant

(Respondent)

Before:

The Honourable Madam Justice MacKenzie

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Butler

On appeal from: Orders of the Supreme Court of British Columbia, dated

March 30, 2020 (Yu v. City of Richmond, 2020 BCSC 454,

Vancouver Docket S-196425; Minster Enterprises Ltd. v. City of Richmond,

2020 BCSC 455, Vancouver Docket S-192839).

Counsel for the Appellant (CA46822 and CA46823)

(via videoconference):

R. Harding

N.S.A. Falzon

Counsel for the Respondents Fu Li Yu and Jing Yang (CA46822); and Minster Enterprises Ltd.
(CA46823)

(via videoconference):

R.U. Bennett

Place and Date of Hearing:

Vancouver, British Columbia

May 3-4, 2021

Place and Date of Judgment:

Vancouver, British Columbia

June 9, 2021

Written Reasons by:

The Honourable Madam Justice MacKenzie

Concurred in by:

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Butler

Summary:

The City of Richmond appeals from orders quashing the City's decisions that the respondents' building permits had expired by operation of the City's Building Bylaw. The City decided pre-building soil densification measures do not constitute "construction pursuant to the applicable permit" within the meaning of the Building Bylaw. Therefore, the building permits had lapsed for the respondents' failure to commence "construction pursuant to the applicable permit" before the permits' expiration dates. The chambers judge found the City's decisions to be unreasonable, quashed the decisions, and declared the building permits to be valid. Held: Appeals allowed, orders set aside and the City's decisions restored. The City's interpretation was reasonable based on the relevant factual and legal constraints, including the text, context, and purpose of the Building Bylaw. The Building Bylaw, read as a whole, supports the City's position that not all "construction" is regulated by the Building Bylaw; building permits only authorize the construction of "buildings" or "structures". The City's interpretation is consistent with preventing the mischief at which the expiry provision was aimed--ensuring permit holders are committed to completing approved projects within a reasonable time. Nothing in the City's Soil Bylaw is contrary to the City's interpretation, nor are the costs incurred in conducting preloading sufficient to make the City's interpretation unreasonable. While the City did not provide reasons for its decisions, the respondents did not request reasons and advanced no procedural fairness argument. Finally, the City's decisions were consistent with a public bulletin issued by the City's Building Approvals Department.

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Reasons for Judgment of the Honourable Madam Justice MacKenzie:

Introduction

- [1] The City of Richmond appeals from the orders of a judge of the Supreme Court of British Columbia quashing the City's decisions that the building permits of the respondents, Fu Li Yu and Jing Yang (the "Yus") and Minster Enterprises Ltd. ("Minster"), had expired under its Bylaw No. 7230, Building Regulation Bylaw (11 March 2002) (the "Building Bylaw").
- [2] The respondents each obtained building permits from the City to construct single-family homes on properties located in the Agricultural Land Reserve ("ALR") in Richmond, BC. The ALR is known for its moist, loose soil from accumulated silt deposited by the Fraser River. To ensure the structural integrity of construction in that area, certain steps must be taken to densify the soil before buildings are erected.
- [3] The issue in these two appeals, heard together, is whether those pre-building soil densification measures constitute "construction pursuant to the applicable permit" within the meaning of s. 5.10.1 of the Building Bylaw. The City decided they do not, and therefore the respondents' building permits had lapsed for the respondents' failure to commence construction before the permits' expiration dates as required by the Building Bylaw. The chambers judge found the decisions to be unreasonable. He quashed the decisions and declared the permits to be valid and in full force and effect on the basis that this was the only reasonable outcome.

[4] For the reasons that follow, I would allow the appeals.

Statutory Scheme

The Community Charter

[5] The City derives its authority to enact the Building Bylaw from s. 8(3)(l) of the Community Charter, S.B.C. 2003, c. 26, which provides:

8

(3) A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:

(l) buildings and other structures;

The Building Bylaw

[6] Part One of the Building Bylaw, "General Provisions", sets out the following "Application" provisions (with terms defined in the Building Bylaw in bold):

1.1.1 This bylaw applies to the geographical area of the City, and to land, the surface of water, air space, buildings and structures in the City.

1.1.2 The requirements of the building code and of this bylaw apply to construction, use and occupancy or a change in use, occupancy or both of a building or structure.

[7] Part Two sets out a list of prohibitions. Relevant to these appeals are s. 2.2.1(a)(i) and (g):

2.2.1 A person must not:

(a) commence or continue:

(i) any construction unless the person has a building permit;

(g) undertake any work which is not in accordance with the description, plans and supporting documents for a building permit, gas permit or, plumbing permit unless the building inspector, the gas inspector, or the plumbing inspector, respectively, has reviewed and authorized the work;

[8] Part Five of the Building Bylaw deals with permits. The provisions relevant to these appeals include the following:

5.1.1 Every owner must obtain:

(a) a building permit prior to commencement of construction, or prior to a change in the use, occupancy or both, of a building or structure;

5.3.1 An application for a plan review for a building permit, gas permit, or plumbing permit, must:

- (a) be made to the building inspector, the gas inspector or the plumbing inspector respectively;
- (b) be in the form prescribed by the appropriate inspector;
- (c) be signed by the owner;
- (d) state the intended use or uses of the building or structure, or part of the building or structure in which the construction is to be undertaken, or in which the gas work or plumbing is to be located;
- (e) when required by the building inspector, include a minimum of two complete sets of plans, drawn to scale, and supporting documents for the building, structure or part of such building or structure to be constructed, and must indicate the nature and extent of the work or proposed construction;
- (f) when required by the plumbing inspector, include a minimum of three complete sets of plans showing the location and size of every building drain and every trap, sump, and plumbing fixture that is on a building drain, and a sectional drawing showing the size and location of every soil or waste pipe, trap and plumbing vent pipe; and
- (g) contain any other information necessary to satisfy the building inspector, the gas inspector, and the plumbing inspector that when completed, the proposed construction, gas work, or plumbing, respectively, will comply with the requirements of this, or other applicable bylaws of the City, and any applicable Provincial statutes.

5.10.1 Subject to the provisions of section 5.11, a building permit, gas permit, or plumbing permit expires and is invalid and of no force or effect when:

- (a) to the knowledge of the appropriate inspector, construction, gas work, or plumbing pursuant to the applicable permit has not commenced within 180 days of the date the permit was issued; or
- (b) construction, gas work, or plumbing pursuant to the applicable permit is discontinued or suspended for a period of more than 180 days from the date of the last mandatory inspection by the appropriate inspector.

5.10.2 Where a permit has expired under the provisions of clause (b) of subsection 5.10.1, any inspections completed prior to the expiration of such permit remain valid and in effect.

5.11.1 The building inspector, the gas inspector, and the plumbing inspector may extend a building permit, a gas permit or a plumbing permit respectively, for a period of not greater than 180 days from the expiration date of the original permit, provided:

- (a) construction, gas work, or plumbing respectively, has not commenced;
- (b) an application to extend the permit is made within 30 days of the permit expiration date; and

- (c) the permit extension fees in the amount set from time to time in the Consolidated Fees Bylaw No. 8636 have been paid.
- [9] Part Thirteen of the Building Bylaw deals with inspections. Section 13.1.1 sets out a list of events in the construction process after which the owner is required to obtain an inspection:
- 13.1.1 The owner must obtain an inspection of the construction after each of the following:
- (a) forms for the footings and foundations are complete, but prior to the placing of concrete;
 - (b) forms for the floor slab, vapour barrier, perimeter insulation on inside of concrete foundation walls, reinforcing steel, heating ductwork or pipes for radiant heat are complete, but prior to the placing of concrete; plumbing located below the finished slab level must be inspected and approved prior to this inspection;
 - (c) all exterior doors, windows and roof membrane are completed, including the installation of flashing, but prior to installation of sheathing paper or exterior finish which would conceal such work;
 - (d) framing, fire stopping, bracing, chimney and duct-work, rough wiring, gas venting, and rough plumbing, but before the insulation, lath or other interior finish is applied which would conceal such work;
 - (e) the insulation and the vapour barrier are in place, but prior to the concealing of such work; and
 - (f) the building or structure has been completed and is ready for occupancy, but prior to occupancy.
- [10] Finally, Part Fifteen of the Building Bylaw sets out a list of defined terms. Those relevant to these appeals are:

BUILDING means a structure or a portion of a structure, including foundations and supporting structures for equipment or machinery or both, which is used or intended to be used for supporting or sheltering a use, occupancy, persons, animals, or property.

BUILDING INSPECTOR means the Manager, Building Approvals Department or those positions or persons designated by Council to act under this bylaw in the place of the manager.

BUILDING PERMIT means permission or authorization in writing by the building inspector under this bylaw to perform construction regulated by this bylaw.

CONSTRUCT/CONSTRUCTION means to build, erect, install, repair, alter, add, enlarge, move, locate, relocate, reconstruct, demolish, remove, excavate or shore.

STRUCTURE means all or part of a construction, whether fixed to, supported by, sunk into, or located in, land, water or airspace, and includes freestanding sign structures over 3.0 m in height and supporting structures for such signs, and includes a sewage holding tank, but excludes landscaping, paving, a fence, or a retaining wall under 1.0 m in height.

Facts

- [11] The respondents each purchased properties in the ALR with the intention of building single-family homes. The proposed homes were 13,482.77 square feet and 15,006 square feet.
- [12] In March 2017, the respondents each obtained geotechnical reports prepared by engineers recommending that steps be taken to densify the soil in preparation for building. These steps involved: excavating the topsoil beneath the building footprints of the homes, filling the excavated sites with permanent compacted structural fill, temporarily covering the structural fill with sand as preload material to further compress the soil over time (an estimated four to six months), and removing the preload sand just before pouring concrete for the foundations of the homes. The purpose of these measures was to ensure the soil would not sink under the weight of the new construction. The respondents submitted these geotechnical reports as part of their building permit applications.
- [13] The City approved both the respondents' building permit applications.

The Yus' Construction History and Communications with the City

- [14] The Yus received two building permits and a site service permit on August 30, 2017. The permits had an expiration date of "February 26, 2018 (if no construction activity)".
- [15] The Yus began excavating the site on August 11, 2017. The structural fill and sand preload were placed by October 1, 2017, and the site was surveyed at least once a month to measure settlement until March 7, 2018, when the final settlement gauge reading was taken. The sand removal process began on March 10, 2018, and was mostly completed by May 2018. Various steps were taken between May and September 2018 relating to the construction of a retaining wall.
- [16] On October 5, 2018, a building inspector arrived for a scheduled inspection. He refused to carry out the inspection on the basis the building permits had expired and told the Yus to contact the City's Inspections Manager, Mr. Fred Tewik.
- [17] On October 10, 2018, Perry Yu ("Mr. Yu"), the Yus' son, wrote to the Inspections Manager with a timeline of construction. He explained that the preloading period from October 2017 to March 2018 had delayed construction of the house, but they had been continuously working on the site since the permits were issued. The Inspections Manager wrote to Mr. Yu on October 16, explaining that he was liaising with the City's legal department to determine whether the activity from October 2017 to March 2018 aligned with the Building Bylaw's

requirements. In particular, he informed Mr. Yu:

I am still liaising with our law department as to best align bylaw requirements with the supporting documents you provided to support your position. The focus of our review at this time is on the activities you describe in the Oct 2017 - Mar 2018 period below (i.e. the permit validity period). While you have provided me with some material, if you could offer a more detailed timeline of your activities during this period (each activity supported by evidence), it will facilitate the ongoing review

[18] The Inspections Manager wrote again on October 23, advising that while certain activities performed after the permits' expiration date met the definition of "construction activities", the focus was on the permit validity period because any activity performed after that date was unauthorized if the permits had expired. Mr. Yu responded the same day. He wrote:

We do not agree with the interpretation of the bylaw that preload does not count as construction activity for a project in agricultural land. The building permit was valid for the duration of 6 months, which is the same amount of time that it can take up to for preload settlements on agricultural land (depending on the quality of the soil). The 6 months needed for preload is a both mandatory and necessary part of the construction process. Obtaining an approved building permit and site plan are necessary prior to the geoengineer confirming the preload required area; this is crucial because we do not want to spend \$210,000 for preload before we are 100% certain of the location.

The permit provided did not offer enough time for the preload settlement process, if preload does not count as construction activity. The permit's expiry date was on February 26th, 2018, with the condition if no construction activities. Therefore, we believed that our permit would stay valid since we were continuously working on this construction project, including our preload activities.

From our perspective, the definition of conditional construction activity was not explicit nor specific enough; we believe that preload activities should logically be considered a mandatory and necessary part of the construction process. With all due respect, we hope that you can understand why we did not reapply for a construction permit given the reasons we have provided.

[19] The Inspections Manager responded on October 25, advising that he would consider Mr. Yu's position in the City's deliberation.

[20] Mr. Yu ultimately met with the Inspections Manager and the City's Building Director, Mr. James Cooper, on November 14, 2018. They reiterated to Mr. Yu the City's decision that the permits had expired because no construction had begun before the expiration date, but did not provide a written decision. An affidavit filed by the Building Director confirmed that while he did not recall exactly what was said at the meeting, the conclusion of the internal discussion at the City was that:

although preload to condition the soil was required for subsequent construction, it nevertheless was not a "permitted activity" through the building permit process. Preload was not within the scope of work that was described or approved in the Permit documents. The construction observed on the Property, and confirmed by Mr. Yu, was done after the expiry of the Permits.

Minster's Construction History and Communications with the City

- [21] Minster received three building permits and a site service permit on September 17, 2017, with an expiration date of "March 18, 2018 (if no construction activity)".
- [22] Minster hired an excavation contractor in October 2017, but they decided to postpone excavation until early 2018 because of anticipated wet weather. Excavation of the site began in February 2018. The structural fill was placed on March 1, and compacting of the structural fill began on March 10.
- [23] On March 13, 2018, Minster's general contractor, Mr. Raymond Liang, applied for an extension of the permits at City Hall. Mr. Liang was concerned that the City would take the position that "construction" only begins once preload has been placed.
- [24] On March 20, Minster's engineer gave approval to begin preloading the structural fill. He directed the preload be left for at least 16 weeks.
- [25] The City granted the building permit extensions on March 21, 2018. The new expiration date was "September 17, 2018 (if no construction activity)".
- [26] From April to September 2018, settlement at the site was monitored on an almost monthly basis. Minster's engineer conducted a site review on September 10, 2018. The next day, he advised Minster's contractor that the preload should be left in place until November 2018. On receipt of this instruction, Mr. Liang emailed the City's Inspections Manager (again, Mr. Fred Tewfik) to request a further extension of the permits out of concern that the permits would expire if the preload were left in place past the permits' expiration date. He attached a letter from Minster's director, advising of the steps taken on the project and that the engineer had recommended more preloading time. He explained:

The reason I started excavation and preloading late is that I had to wait until [the] building permit[s] got approved. If the house was not approved, I did not want to spend money to start the project. In fact, I had spent around \$250,000 on the excavation and preloading work. Even the septic field was already excavated and filled with sand. My lot is big, it took 3 months to finish excavation, clearing the soil, and loading the sand.

- [27] On September 17, 2018, the expiration date of the permits, the Inspections Manager and Building Director attended the property and observed no construction activity, only a hill of sand preload. That afternoon, the Inspections Manager replied to Mr. Liang's email. He informed Mr. Liang that:

Per the requirements and provisions in the [Building Bylaw], the City will consider all such permits as expired and void unless the permit holder can demonstrate permitted construction, plumbing or gas work activities to be taking place and verified through inspections.

At September 12, 2018, the date of your request - the City has not observed construction, plumbing or gas work related to the aforementioned permits. Accordingly, I have reviewed your request in relation to previously submitted materials, dating back to the permit application, review and issuance processes, and offer a summary of my findings and rationale for decision.

Summary of findings:

- All permit applications were received on March 24, 2017.
- All permits were approved and issued for construction on September 19, 2017.
- All permits expired on March 18, 2018.
- All permits were granted one-time 180-day extensions, on March 21, 2018, as per the provisions in [the Building Bylaw]
- All permits are to expire on September 17, 2018 if not meeting conditions stated in [the Building Bylaw] (Part 5) as summarized above.

A Geotechnical Report from Geocan Engineering, dated March 30, 2017, was submitted as part of the permit application process. The report recommends the pre-loading of the subject site for a period estimated to be 4-6 months. It is our understanding however that pre-loading did not commence until April 2018, approximately one (1) month after the initially issued permits were extended as no work had yet begun. While it is explained in your request that site preparation works took approximately three (3) months to enable pre-loading to begin, we have no evidence of works beginning in anticipation of the permit issuance in light of the stated duration of recommended pre-loading. Accordingly, it is requested that you provide some additional insight to the nature of the delayed start of site preparation.

Please understand that this request for additional information does not constitute approval of your permit's validity beyond September 17, 2018.

[28] Mr. Liang responded that day, clarifying the construction timeline with supporting documents and requesting an opportunity for himself and Minster's engineer to meet with the Inspections Manager.

[29] On September 27, 2018, the Inspections Manager sent Mr. Liang a letter signed by the Inspections Manager and the Building Director advising of the City's decision:

This letter is in response to your email of September 17, 2018, in which you provided documentation to support maintaining the validity periods for the above mentioned permits issued for construction at [the site].

Upon review of your circumstances and documentation we are unable to conclude compliance to the requirements to maintain the validity periods for the permits as outlined in the [Building Bylaw]. Accordingly, [the permits] effectively expired on September 17, 2018.

In order to proceed with construction, a new building permit application is required. City staff remain open to assist you in a re-application should you desire to proceed with construction.

Additional Information and Evidence before the Reviewing Court

[30] The respondents provided the chambers judge with information supporting their suspicion that the City's decisions to terminate the building permits were politically motivated due to controversies over the size of residential homes in the ALR during the 2018 municipal election campaign. This information included news articles and meeting minutes of City Council motions related to limiting the size of homes in the ALR. The chambers judge ruled the news articles were inadmissible and gave little weight to the City Council minutes, finding there was no evidence to support that the City's decisions were improperly based on the political controversy. The judge's ruling is not impugned on appeal.

[31] Finally, the City tendered two affidavits from the Building Director. The first affidavit includes a copy of the City's Bulletin No. Building-31, "Permits - Expiry and Extension", issued by the City's Building Approvals Department on May 30, 2018 (the "Bulletin"). The Bulletin states:

Issue:

Limitations to permit validity periods are incorporated into the [Building Bylaw] as a means to ensure permit holder commitment to the completion of approved projects, within a reasonable and justifiable time period. The varying nature of permit types, project complexities, schedules and phasing conditions, require flexibility in assessment and application of the requirements for each project, while ensuring a fair and transparent evaluation process to deal with expired permits, and requests for extension.

The Evaluation section below offers clarification to the most commonly observed issues arising when considering building permit expiration and requests for extension.

Evaluation - Criteria and Procedures:

- Construction activity, as defined in the [Building Bylaw], is not deemed to include site preparation works, mobilization of construction equipment and materials, or soil densification work (such as pre-loading).

[32] The second affidavit was prepared in response to a question from the judge about the City's position on whether it would require a permit for an owner building a large structure requiring preloading on non-ALR land.

- [33] The Building Director deposed that no building permit is ever required under the Building Bylaw for the removal and deposit of soil for preloading purposes, regardless of where that activity occurs. However, when preloading takes place in the ALR, a permit may be required under the City's Bylaw No. 8094, Soil Removal and Fill Deposit Regulation (13 November 2007) (the "Soil Bylaw"). The Soil Bylaw requires a permit to deposit or remove soil on land in the ALR, subject to exemptions. Any relevant provincial requirements in the Agricultural Land Commission Act, S.B.C. 2002, c. 36, must also be followed.
- [34] The Building Director asserts that the Building Bylaw and the Soil Bylaw are two separate regulatory schemes. Preloading is an activity that is only contemplated by the Soil Bylaw, not the Building Bylaw.

Judicial Review in the Supreme Court of British Columbia

- [35] The respondents petitioned for judicial review of the City's decisions. Their petitions were heard together in the fall of 2019, and the parties provided supplemental written submissions in January 2020 to address the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.
- [36] The chambers judge released his reasons on March 30, 2020, indexed as *Yu v. City of Richmond*, 2020 BCSC 454, and *Minster Enterprises Ltd. v. City of Richmond*, 2020 BCSC 455 [Minster]. The judge's analysis of the reasonableness of the City's decisions is addressed in Minster. He applied the same reasoning to the facts in Yu: Yu at paras. 37-38. Accordingly, this summary is based on the analysis in Minster unless otherwise specified.
- [37] The judge identified the issue before him as whether the City's conclusion that the soil densification process does not fall within the definition of "construction" in Part Fifteen of the Building Bylaw, such that no "construction" occurred during the validity period of the permits and the permits had expired, was reasonable. The parties agreed, as they do on these appeals, that the standard of review was reasonableness and as a matter of procedural fairness, reasons for the decisions were not required.
- [38] The judge found the City's interpretation that "construction" does not include soil densification steps was unreasonable as it was inconsistent with the text, context, and purpose of the enactment. These steps were necessary in the construction process and were expressly and implicitly contemplated in the issuance of the permits on receipt of the geotechnical reports.
- [39] The judge found "construction" is broadly defined in the Building Bylaw, and the soil densification process engages several of the verbs in the definition. He rejected the City's submission that the verbs must be read only to refer to a building being constructed and not to site preparation, noting that verbs like "demolish" included in the definition were indicative of a necessary preliminary step and not the actual erection of the building. This interpretation would not undermine the purpose of s. 5.10 (Expiration of Permits), which is to move matters forward.

- [40] The judge rejected the City's submission that a property owner could avoid a building permit expiring during the preloading process by preloading the soil before applying for and obtaining a building permit. He noted the soil densification process is timely and expensive. Requiring owners to undertake that process before knowing whether the project would ultimately be approved would be unreasonable. The judge also relied on the fact the Soil Bylaw contemplates the soil densification process to occur after a building permit has been issued.
- [41] As to the Bulletin, the judge found that while policies and guidelines are an important part of the broader context for the City's decision, they are not binding law and cannot be used to undermine lawful limits on the decision maker's authority. He concluded the Bulletin was of limited value because it was issued by City staff some 16 years after City Council enacted the Building Bylaw.
- [42] In conclusion, the judge found the City's distinction between physical construction and site preparation was untenable. The only reasonable decision in light of the facts and the law was that the soil densification measures constitute "construction" under the Building Bylaw, meaning construction had begun prior to the expiration dates and the permits remained valid. Accordingly, there was no need to remit the matter to the decision maker for reconsideration.

Issue

- [43] The critical facts in both appeals are not in dispute. The parties agree that soil densification steps took place during the permit validity periods. The sole issue in these appeals is whether the City's decisions that the respondents' building permits had expired by operation of s. 5.10.1 of the Building Bylaw were reasonable.

Standard of Review of the Chambers Judge's Decision

- [44] As Justice Tysoe explained in 1120732 B.C. Ltd. v. Whistler (Resort Municipality), 2020 BCCA 101 [Whistler]:
- [48] On an appeal of a judicial review decision, it is not necessary for the appellate court to identify a specific error on the part of the judge who conducted the judicial review. It has been said that the appellate court is "stepping into the shoes" of the reviewing judge and applying the appropriate standard of review to the decision under review: Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3 at para. 247.
- [45] In other words, the role of this Court is "to determine whether the chambers judge identified the correct standard of review and applied it correctly": Holojuch v. Residential Tenancy Branch, 2021 BCCA 133 at para. 15. In so doing, the Court's focus is on the administrative decision: Holojuch at para. 15; Whistler at para. 48. Although the reasoning of the court below may be instructive, the decision is not entitled to deference on appeal: 1193652 B.C. Ltd. v. New Westminster (City), 2021 BCCA 176 at para. 41.

Standard of Review of the City's Decisions

- [46] Under the Vavilov framework, courts reviewing an administrative decision on the merits start with a presumption that reasonableness is the applicable standard of review. This presumption is rebutted only where the legislature has indicated that it intends a different standard to apply or the rule of law requires that a correctness standard be applied: Vavilov at paras. 17, 23.
- [47] The parties agree, as they did in the court below and as did the chambers judge, that the presumption of reasonableness review applies. I agree that reasonableness is the appropriate standard on which to review the City's decisions. None of the indicators that would rebut the presumption of reasonableness--a legislated standard of review, statutory appeal mechanism, or rule of law concern--are present.

Were the City's Decisions Reasonable?

Legal Principles

- [48] In addition to revising the framework for selecting the standard of review of an administrative decision, Vavilov provided guidance for reviewing courts on how to conduct a reasonableness review. The Court's analysis focused on circumstances in which procedural fairness requires the decision maker provide reasons for their decision. It emphasized the importance of reasons for justifying administrative decisions to the affected parties, a factor that underpins institutional legitimacy and facilitates meaningful judicial review: Vavilov at paras. 74, 81. At the same time, reviewing courts should adopt a posture of restraint and respect for the legislature's choice to delegate decision-making authority: Vavilov at paras. 12-13, 75.
- [49] Where reasons are provided, the focus of reasonableness review includes both the decision maker's reasoning process and the outcome. A reviewing court is directed to put the reasons first, examining them with respectful attention to discern the decision maker's reasoning process in arriving at its conclusion: Vavilov at paras. 83-84. As a reasonable decision is one that is not only justifiable, but justified, an outcome that would otherwise be reasonable cannot stand if it were reached on an improper basis: Vavilov at paras. 86-87, 96.
- [50] Vavilov recognized that reasonableness review will be conducted differently in circumstances where procedural fairness does not require reasons to be provided: Vavilov at paras. 76, 136-138. In such circumstances, courts should conduct a careful review of the record and the circumstances in which the decision was made to attempt to discern, to the extent possible, the reasons for the decision. Where the basis for the decision is still unclear, the court's review will inevitably focus more on the outcome than the reasoning process. Regardless of whether there are reasons for the decision, reasonableness remains a single, robust standard and the reasonableness of a decision will always be constrained by the factual and legal context in which it was made: Vavilov at paras. 89-90, 138.

- [51] In Vavilov, the Court explained that a reasonable decision is one based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: Vavilov at paras. 85, 99, 105. While there is no requirement to categorize types of issues that may render a decision unreasonable, two examples of such fundamental flaws include (1) a failure of rationality internal to the reasoning process, and (2) a decision that is in some respect untenable in light of the relevant factual and legal constraints: Vavilov at para. 101. Where no reasons are available, the focus will likely be on the latter type of flaw, unless the reasoning process can be determined from the record.
- [52] The Court provided, at para. 106, an overlapping, non-exhaustive list of factual and legal considerations that could constrain an administrative decision maker:
- (1) the governing statutory scheme;
 - (2) other relevant statutory or common law;
 - (3) the principles of statutory interpretation;
 - (4) the evidence before the decision maker and facts of which the decision maker may take judicial notice;
 - (5) the submissions of the parties;
 - (6) the past practices and decisions of the administrative body; and
 - (7) the potential impact of the decision on the individual to whom it applies.
- [53] While administrative decision makers may have considerable discretion in making a particular decision, the decision must ultimately comply with the language, rationale, and purview of the statutory scheme under which it is made: Vavilov at paras. 108, 110. For questions of statutory interpretation, the "modern principle"--that the words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act and the intention of the legislative body--applies. In some circumstances, this may lead to a conclusion that there is only one reasonable interpretation of the provision: Vavilov at para. 124. However, courts should not undertake a de novo analysis or measure the decision maker's interpretation against the one the court would have reached: Vavilov at paras. 116-118, 120-121, 124; Whistler at para. 39. Where an administrative decision maker has not provided explicit reasons for interpreting a provision in a particular way, the reviewing court should attempt to discern the interpretation adopted from the record and determine whether it is reasonable: Vavilov at para. 123.
- [54] In all cases, regardless of whether or not reasons are available, the challenging party has the onus of demonstrating the decision is unreasonable: Vavilov at para. 100.
- [55] To summarize the applicable Vavilov principles:

- Reasonableness review is concerned with both the process of arriving at the decision and the outcome.
- The burden is on the party seeking judicial review of the decision to demonstrate that it is unreasonable.
- In circumstances where procedural fairness does not require reasons be provided, the reviewing court should review the record to attempt to discern the rationale for the decision. If it is possible to determine the rationale, the reviewing court should consider, among other potentially relevant factors, whether the reasoning is internally rational and whether it is justifiable in light of the relevant factual and legal constraints.
- If reasons are not required and it is not possible to determine the rationale for the decision from the record, the reviewing court should consider whether the outcome of the decision is defensible in light of the facts and the law.
- For questions of statutory interpretation, reviewing courts should consider whether the decision maker's interpretation is reasonable in light of the words of the provision in their context, the scheme and object of the enactment, and the intention of the legislative body. Reviewing courts should refrain from conducting a de novo interpretation and measuring the decision maker's interpretation against it, even when the decision maker has not provided reasons for its interpretation. Instead, the focus should be on whether the decision maker's interpretation has been shown to be unreasonable.

Positions of the Parties

The Respondents' Position

- [56] The respondents submit the only reasonable conclusion is that by performing preloading activities before the permits' expiration dates, they commenced construction within the time frame required by s. 5.10.1 of the Building Bylaw. The preloading activities clearly engage certain verbs in the definition of "construction", including: "to install", "to alter", "to add", "to demolish", "to remove", and "to excavate".
- [57] Because the preloading activities were recommended in the geotechnical reports, which in turn were required to be submitted as part of the building permit application process, preloading activities must constitute construction "pursuant to" the building permits. The respondents suggest "construction pursuant to the applicable permits" should be read to mean "the doing of any of the activities listed under the definition of construction, provided that they are done at the property in question, and in furtherance of the project of raising the building or structure for which the permits were issued" (emphasis added by the respondents).
- [58] The respondents further submit that the interpretation advanced by the City on these judicial reviews is not supported by the evidence in the record of the City's reasoning.

The City's Position

[59] The City submits the judge misconstrued its interpretation of s. 5.10.1 of the Building Bylaw and therefore failed to assess the reasonableness of that interpretation, or to show appropriate deference to it. The City's interpretation centred not on whether the soil densification measures fit within the definition of "construction" in the Building Bylaw, but on whether the soil densification measures were construction pursuant to the applicable permit, as s. 5.10.1 requires.

Discussion

[60] The City accepts that certain soil densification measures fall within the broad language in the definition of "construction" in the Building Bylaw. However, when read in the context of the entire enactment, it becomes clear that the verbs included in the definition of "construction" are only engaged by the Building Bylaw when the construction is of a "building" or "structure". Thus, activity that engages a verb in the definition of "construction" but is not "of a building or structure" is not regulated by the Building Bylaw. No building permit is required to perform such activity.

[61] The City's position is that the only activity capable of preventing the expiration of a building permit under s. 5.10.1(a) of the Building Bylaw is activity for which a building permit is required. This is because "building permit" is defined in the Building Bylaw to mean "permission or authorization in writing by the building inspector under this bylaw to perform construction regulated by this bylaw" (emphasis added). Because activity for which a building permit is not required is not "regulated by" the Building Bylaw, it is incapable of constituting construction pursuant to the building permit for the purposes of s. 5.10.1. As soil densification measures are not construction "of a building or structure" and no building permit is required to engage in those activities, they are not construction regulated by the Building Bylaw and are not capable of preventing the expiration of the permits under s. 5.10.1.

[62] In my view, the City's interpretation is reasonable having regard to the relevant factual and legal constraints. I do not agree with the respondents' submission that the City's reasoning is "overly technical and pedantic". Rather, the City's interpretation is consistent with the text, context, and purpose of the enactment.

Text

[63] For ease of reference, I will reproduce the text of the provision at issue:

5.10.1 Subject to the provisions of section 5.11, a building permit, gas permit, or plumbing permit expires and is invalid and of no force or effect when:

- (a) to the knowledge of the appropriate inspector, construction, gas work, or plumbing pursuant to the applicable permit has not commenced within 180 days of the date the permit was issued; or
 - (b) construction, gas work, or plumbing pursuant to the applicable permit is discontinued or suspended for a period of more than 180 days from the date of the last mandatory inspection by the appropriate inspector.
- [64] The parties disagree about whether it is reasonable for the City to read the words "pursuant to" in this section to mean "authorized by". The respondents suggest the City's distinction between construction and site preparation is untenable. The Building Bylaw does not expressly distinguish between construction and site preparation, and several of the verbs in the "construction" definition have site preparation as their primary purpose. They submit that "pursuant to" should be read to mean "in furtherance of" the ultimate project, even if a permit was not specifically required to perform that work.
- [65] The respondents further submit the City's interpretation is based on an "arbitrary preference for one of several equally valid ways of describing" the preloading activities. They submit it would be equally tenable to describe the excavation of soil in the first step of the preloading process as the excavation "of the foundations"--which is included in the definition of "building"--in the sense that "[t]he foundation is the thing that will be placed in the hole that the respondent is excavating." This, the respondents submit, suggests the City chose an interpretation that is inferior but expedient, contrary to the caution at para. 121 of Vavilov. They argue it is an arbitrary distinction with no basis in the context of the Building Bylaw.
- [66] In my opinion, the City's interpretation is reasonable having regard to the text of the provision. It is consistent with the definition of "building permit" in the Building Bylaw, which only authorizes construction "regulated by" the Building Bylaw. It is also consistent with the words "pursuant to", which, according to Black's Law Dictionary, 11th ed. (St. Paul, Minn.: Thomson Reuters, 2019), is defined in the following way:
1. In compliance with; in accordance with; under <she filed the motion pursuant to the court's order>.
 2. As authorized by; under <pursuant to Rule 56, the plaintiff moves for summary judgment>.
 3. In carrying out <pursuant to his responsibilities, he ensured that all lights had been turned out>. -- Also termed in pursuance of.

[Italics in original.]

- [67] It is apparent the respondents' submissions invite this Court to fall into the Vavilov error of conducting its own interpretation of s. 5.10.1 and assessing the City's interpretation against it. This is the same error the chambers judge made in his application of the standard of review, leading him to the erroneous conclusion that his interpretation of the Building Bylaw was the only reasonable one.
- [68] The respondents focus on why their suggested reading of the Building Bylaw is an acceptable alternative. But that does not answer the question for determination in these appeals: whether the respondents have demonstrated the City's interpretation is unreasonable. The fact other potentially reasonable interpretations may exist is not enough to make the City's interpretation unreasonable. And even in circumstances where there is only one reasonable interpretation of a provision, it does not mean the reviewing court should apply a correctness standard by conducting its own interpretation: Whistler at paras. 39, 44.
- [69] As I will develop below, the City's interpretation is also consistent with the context of the Building Bylaw and the activity it regulates. I will also explain why the record does not suggest the City purposefully chose an inferior but expedient interpretation.

Context and Purpose

- [70] The Building Bylaw, read as a whole, supports the reasonableness of the City's view that not all "construction" is regulated by the Building Bylaw; it is only intended to apply to the construction of buildings or structures.
- [71] Under the "Application" provisions in Part One, s. 1.1.2 of the Building Bylaw provides that the requirements of the Building Bylaw apply to the construction of a "building" or "structure", as defined in the Building Bylaw. In addition, s. 5.1.1(a) specifies that a building permit must be obtained prior to commencement of construction "of a building or structure".
- [72] The respondents rely on s. 2.2.1(a)(i) to support their argument that the Building Bylaw regulates construction that is not "of a building or structure". Section 2.2.1(a)(i) prohibits "any construction unless the person has a building permit", and does not on its face confine its application to construction of a building or structure. The respondents suggest this means the Building Bylaw prohibits activity involving any of the verbs included in the definition of "construction" without a building permit, regardless of whether the object of the activity is a building or structure. Because building permits "legalize" any such activity, it is unreasonable to suggest the activity could be carried out other than "pursuant to" the building permits.
- [73] In my view, the fact that the general prohibition in s. 2.2.1(a)(i) is not expressly limited to construction "of a building or structure" does not undermine the reasonableness of the City's interpretation. I agree with the City that when read in the context of the entire enactment, it is clear s. 2.2.1(a)(i) does not prohibit any of the activity in the verbs that fall within the

definition of "construction", regardless of the object of that activity. As noted, the "Application" provisions in Part One of the Building Bylaw, including s. 1.1.2, limit the scope of the construction activities regulated under the Building Bylaw to the construction "of a building or structure". To interpret the Building Bylaw as prohibiting any of the activities in the definition of "construction"--which includes very generic verbs like "build", "repair", "add", "move", and "remove"--regardless of the object of the activity, could lead to absurd results and may well be outside the jurisdiction afforded to the City under s. 8(3)(l) of the Community Charter.

- [74] The respondents also rely on s. 2.2.1(g) of the Building Bylaw, which prohibits a person from undertaking "any work which is not in accordance with the description, plans and supporting documents for a building permit unless the building inspector has reviewed and authorized the work". (I note "work" is not defined in the Building Bylaw.) The respondents point out the geotechnical reports filed with the building permit applications expressly called for the preloading activities to be undertaken before the erection of the buildings. Thus, the respondents say they would be in breach of this section had they skipped the preloading activities.
- [75] Again, I disagree that this provision of the Building Bylaw undermines the reasonableness of the City's interpretation. It does not follow from the fact the Building Bylaw prohibits permit holders from undertaking "work" contrary to the building permit's supporting documents, that such "work" constitutes construction pursuant to the building permit for the purposes of s. 5.10.
- [76] The City interprets "construction" as beginning with the activity that is the subject of the first mandatory inspection under s. 13.1.1(a) of the Building Bylaw. Section 13.1.1 requires an owner to obtain an inspection of the "construction" after each of an enumerated list of activities, beginning with the completion of the forms for the footings and foundations. The City notes that if soil densification or other site preparation work were interpreted to constitute "construction" pursuant to the permit, it would create an unjustifiable anomaly as it would mean that permits could never expire under the Building Bylaw once the preloading process began.
- [77] There are two ways in which a building permit can expire under s. 5.10.1: (a) if construction pursuant to the applicable permit has not commenced within 180 days of the date the permit was issued, or (b) if construction pursuant to the permit is discontinued or suspended for a period of more than 180 days from the date of the last mandatory inspection. As noted, the first mandatory inspection is triggered after the forms for the footings and foundations are complete, but before the concrete is placed--a step that occurs after the preloading process is complete.
- [78] The respondents' interpretation creates what they refer to as a "loophole" in the expiry provision (rather than an anomaly). The loophole is this: if preloading constitutes "construction" pursuant to the building permit and it is commenced within 180 days of the

issuance of the permit, s. 5.10.1(a) could not apply to invalidate the permit. However, because preloading activity occurs before any mandatory inspection is required, the discontinuance provision in s. 5.10.1(b) similarly could never apply to invalidate the building permit. This would lead to a situation in which an owner could begin preloading, then leave the site untouched for years without any possibility of the building permit expiring. It would also have the undesired effect of shielding the site from any zoning or regulatory changes that would otherwise affect the construction.

- [79] I agree with the City's submission that the reasonableness of its interpretation is supported by the fact it is consistent with preventing the mischief at which the expiry provision under the Building Bylaw is aimed: ensuring that permit holders are committed to completing approved projects within a reasonable time. I am not persuaded by the respondents' submission that financial considerations would prevent all but the most wasteful person from exploiting the "loophole" that arises from their suggested interpretation, given the costs incurred by soil densification. As the City suggests, there are a variety of reasons an owner might put a project on hold for a significant time even after having incurred costs.

Other Relevant Enactments

- [80] The respondents agree with the judge's conclusion that the City's interpretation is inconsistent with other enactments regulating soil densification activities. In particular, the judge considered s. 3.2.1(d) of the Soil Bylaw, which provides an exemption to the requirement to obtain a permit for the deposit or removal of soil in the ALR when that deposit or removal is required for the erection of a building or structure under a valid building permit. The relevant provisions of the Soil Bylaw provide (with terms defined in the Soil Bylaw in bold):

3.1.1 Subject to a Provincial enactment and any procedure, authorization or permission thereunder, no person shall deposit soil, or cause, suffer or permit the deposit of soil on any land within the agricultural land reserve except in accordance with this bylaw.

3.1.2 Except as otherwise provided in this bylaw, but subject to any procedure, authorization, or permission respecting activity regulated under an applicable Provincial enactment, no person shall carry out, cause, suffer or permit the removal of soil from, or the deposit of fill on, any land located within the agricultural land reserve without first making application for and obtaining a permit from the City, and every such deposit or removal shall conform in all respects to the requirements and regulations of this bylaw and the terms and conditions of the permit.

3.2.1 Despite Section 3.1.2, a permit is not required where the deposit or removal:

- (d) is required for the erection of a building or structure under a valid building permit or development permit issued by the City, where the deposit or removal is in accordance with the approved drawings submitted as part of the application for the building permit;

- [81] To support his conclusion that the City's interpretation was unreasonable, the chambers judge relied on the fact s. 3.2.1(d) contemplates a building permit being issued before the soil densification process occurs.
- [82] I disagree that this provision indicates the City's interpretation is unreasonable. The fact this provision anticipates a building permit may be issued before soil densification occurs does not mean this soil densification work must constitute "construction" pursuant to the building permit within the meaning of the Building Bylaw.
- [83] The effect of s. 3.2.1(d) of the Soil Bylaw is to exempt a person from having to obtain a soil permit in circumstances where the soil removal or deposit is contemplated in the supporting documents for an approved building permit. As the City notes, a building permit is not required under the Building Bylaw for soil deposit or removal work, regardless of the circumstances in which that activity occurs and the Soil Bylaw does not suggest otherwise. In my view, there is nothing in the Soil Bylaw to indicate this soil deposit or removal must therefore constitute "construction" pursuant to the building permit for the purposes of s. 5.10.1 of the Building Bylaw.

The Impact of the Decision on the Affected Parties

- [84] The respondents submit the City's interpretation means owners who wish to build homes on land on which soil densification is required will be put in financial jeopardy. It is not feasible to begin soil densification work before the building permits are approved because the specifics of the approved buildings will affect the area that requires soil densification. This means that once the permits are approved, they will be required to spend thousands of dollars on soil densification without knowing whether the densification process will be completed in time to allow construction to begin within the six-month time frame required by s. 5.10.1(a).
- [85] I agree, as does the City, the costs incurred by the owners in conducting preloading activities is a factor to consider in the reasonableness analysis. However, in these circumstances, it is not sufficient to render unreasonable the City's interpretation, which is consistent with the text, context, and purpose of the provision.
- [86] Owners whose building permits expire before preloading is complete are not without a remedy. The approval of building permits is mandatory, as long as the submitted application meets regulatory requirements. It is not subject to the building inspector's discretion. Section 5.7.1 of the Building Bylaw provides (underlining emphasis added; terms defined in the Building Bylaw in bold):

5.7.1 If the building inspector, gas inspector, or plumbing inspector is satisfied that the construction, gas work, or plumbing respectively, will comply with the building code, the gas code, and the plumbing code respectively, and with the provisions of this and any other applicable bylaws of the City, and applicable Provincial statutes, the inspector must issue a building permit, a gas permit, or a plumbing permit respectively, to the owner.

[87] Thus, the expiry of the building permits does not mean an owner will be unable to build on their land. As long as the plans comply with the applicable enactments, an owner will receive a new building permit on application to the City, subject to any changes in the enactments. The City communicated this to Minster in its decision letter of September 27, 2018, when it offered to assist in a re-application if Minster wished to proceed with construction.

[88] Further, because preloading is not considered to be "construction" of a building or structure, an owner who becomes aware that the preloading process will not be complete within six months may be entitled to a partial refund of building permit fees under s. 5.6.2 of the Building Bylaw if they submit a written request before the permit's expiration date. Section 5.6.2 provides:

5.6.2 A building permit fee, a gas permit fee, or a plumbing permit fee may be partially refunded only when:

- (a) the owner has submitted a written request for such refund;
- (b) (i) the building inspector has certified that the construction has not been started on the building or structure;
- (c) the applicable permit has not expired.

[89] As the respondents' permits have already expired, this relief will be unavailable to them. However, it may assist in reducing some of the financial impact for other owners who face similar circumstances in the future.

Is the City's Rationale Supported by the Record?

[90] The respondents argue the evidence in the record does not support that the City decided as it did for the reasons it advances on these appeals. The respondents point to the communications from the Inspections Manager, noting he never informed the respondents that site preparation work is incapable of constituting construction pursuant to the applicable permits. Instead, he asked them to provide details about the timing of the site preparation works in a manner suggesting he was verifying whether or not those works took place during the permits' currency.

- [91] The Yus submit the Inspections Manager's October 23, 2018 email indicates that in addition to verification of the activities, the City was concerned with whether site preparation satisfied the definition of "construction" as opposed to whether that construction was done "pursuant to" the building permits. Minster also suggests that while reasons were not required in this context, if the actual rationale for the decision was that the construction fell outside the purview of the permits, the City could easily have said so in its decision letter.
- [92] While the rationale underlying the Inspections Manager's communications to the parties is at times somewhat ambiguous, I disagree with the contention that the communications demonstrate a different rationale from the one advanced in these appeals. The fact the Inspections Manager asked the parties to provide details of their activities during the validity period of the permits is equally consistent with an attempt to discern whether any of the activities that occurred constituted "construction" pursuant to the building permits within the meaning the City advances on these appeals. Certain communications, such as the September 17, 2018 email to Mr. Liang, specifically suggest that the City was looking for "permitted construction" that is "verified through inspections."
- [93] Other information in the record supports that the City did make its decisions based on the rationale advanced in these appeals. For example, the fact the City granted Minster's application for an extension of the building permits after it had begun preloading is consistent with its interpretation that preloading activity is not "construction" within the meaning of the Building Bylaw. This is because, under s. 5.11.1(a) of the Building Bylaw, a permit holder can only obtain an extension in circumstances where construction has not commenced.
- [94] I would not accede to the submission that the actual rationale of the City's decisions is undermined by the fact it did not give reasons. The respondents did not request reasons and did not advance any procedural fairness arguments in this Court or below. I acknowledge "the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable": Vavilov at para. 81. However, in this context, where both parties took the position that reasons are not required as a matter of procedural fairness, the fact none were provided does not call into question the reasonableness of the City's decisions.
- [95] I pause to note that where reasons are not required and the decision maker's rationale cannot be discerned from the record, there may be a concern that an unjustified reasoning process was employed, but never discovered. This could allow a decision based on a flawed reasoning process to stand due to the reasonableness of the outcome, contrary to the suggestion in Vavilov that it is not sufficient for a decision to be justifiable; it must also be justified. It may be this state of affairs is justified on the basis that the factors for assessing procedural fairness requirements set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, will ensure that where a decision is sufficiently important to the individual, reasons will be required. However, as this point was not argued by the parties, I leave this question for another day.

[96] Finally, I note the City's decisions are consistent with the Bulletin. The Bulletin specifically deals with the question of whether preloading activities count as "construction" pursuant to the building permit for the purpose of s. 5.10.1. The Bulletin states the following as a clarification of commonly observed issues arising when considering building permit expiration and requests for extension:

- Construction activity, as defined in the [Building] Bylaw, is not deemed to include site preparation works, mobilization of construction equipment and materials, or soil densification work (such as pre-loading).
- An extension will not be granted in circumstances where changes to Regulations, Bylaws or Codes affecting land use and/or density have occurred since the issuance of the permit, and which would be in contravention of the changes.
- Expired permits, without extension, will be subject to a new application process, should the permit holder wish to continue work. The new application process will be subject to any and all changes to Regulations, Bylaws or Codes in affect at the time of the new application.

[97] The Bulletin also provides, under the "Process" heading:

Requests for extension must be made in writing, by the permit holder on record, to the Director, Building Approvals at building@richmond.ca. The request must include:

- Permit Number(s);
- Circumstances for delayed project start; and,
- Anticipated start of construction date (first inspection).

[Emphasis added.]

[98] These excerpts from the Bulletin, issued several months before the City made the decisions at issue, are consistent with the arguments the City advances on these appeals. In particular, the excerpts are consistent with the City's stated concern about preloaded land being immune to changes in the regulatory regime, and with the City's position that construction pursuant to the building permit starts with the activity forming the subject of the first inspection, and does not include site preparation activities such as preloading.

[99] The respondents object to the City's reliance on the Bulletin in support of the reasonableness of its interpretation. They argue the Bulletin is not binding law, and cannot be used to retroactively change the meaning of the Building Bylaw. Their position essentially mirrors the chambers judge's analysis on this issue: see *Minster* at paras. 111-18.

[100] In my opinion, the respondents and the chambers judge misinterpret the City's use of the Bulletin on these reviews. The City does not suggest the Bulletin is binding law or that it can retroactively change the meaning of the provision at issue. Instead, the City relies on the Bulletin in support of the argument that its interpretation is reasonable by showing that its interpretation is consistent with the rationale communicated to the public by the

department of the City in which the decision makers worked. It is not an interpretation advanced for the first time on appeal.

- [101] Both the majority and the concurring judgment in Vavilov held that publicly available policies or guidelines are relevant context in assessing the decision under review. As the majority said, such information "may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency": Vavilov at para. 94. Although the majority's comments were directed to a context in which reasons are provided, in my view, guidelines like the Bulletin can also assist in shedding light on the decision maker's rationale where reasons were not provided. In their concurring reasons, Justices Abella and Karakatsanis note:
- [303] Some materials that may help bridge gaps in a reviewing court's understanding of an administrative decision include: the record of any formal proceedings as well as the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review (see Matthew Lewans, "Renovating Judicial Review" (2017), 68 U.N.B.L.J. 109, at pp. 137-38). Reviewing these materials may assist a court in understanding, "by inference", why an administrative decision-maker reached a particular outcome ([Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817], at para. 44; see also [Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4], at para. 37; Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal (Ont.), 2008 ONCA 436, 237 O.A.C. 71, at paras. 38-39). It may reveal further confirmatory context for a line of reasoning employed by the decision-maker -- by showing, for example, that the decision-maker's understanding of the purpose of its statutory mandate finds support in the provision's legislative history (Celgene Corp. v. Canada (Attorney General), [2011] 1 S.C.R. 3, at paras. 25-29). Reviewing the record can also yield responses to the specific challenges raised by an applicant on judicial review, responses that are "consistent with the process of reasoning" applied by the administrative decision-maker ([Canada (Attorney General) v. Igloo Vikski Inc., 2016 SCC 38], at para. 45). In these ways, reviewing courts may legitimately supplement written reasons without "supplant[ing] the analysis of the administrative body" ([Delta Air Lines Inc. v. Lukács, 2018 SCC 2], at para. 24).
- [102] For these reasons, I reject the respondents' submission that the interpretation advanced by the City on these appeals is inconsistent with the interpretation that can be discerned from the record. I similarly reject the suggestion that the City unreasonably chose an inferior but expedient interpretation.

Disposition

- [103] I would allow the appeals, set aside the orders of the chambers judge, and restore the City's decisions.

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Butler"

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