Appendix E

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pinnacle Care Group Ltd. v. White Rock (City),* 2022 BCSC 2272

Date: 20221230
Docket: S222151
Registry: Vancouver

Between:

Pinnacle Care Group Ltd., John Cordell De Valois, Deborah Leah Schaan, Louise Webber, and Gary Webber

Petitioners

And

The City of White Rock

Respondent

Before: The Honourable Mr. Justice Stephens

Reasons for Judgment

Counsel for the Petitioners:	N.J. Baker
Counsel for the Respondent:	M.R. Voell
Place and Dates of Hearing:	Vancouver, B.C. August 18 and 19, 2022
Place and Date of Judgment:	Vancouver, B.C. December 30, 2022

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OVERVIEW

[1] In the City of White Rock, Centre Street is a statutory "highway" which runs northeast/southwest, but on its southward path, the developed physical road terminates two blocks from Semiahmoo Bay where it intersects with Columbia Avenue. From Columbia Avenue to the water, running southwest to Marine Drive at Centre Street's terminus, Centre Street continues to exist as a "highway" within the meaning of the *Community Charter*, S.B.C. 2003, c. 26, but it is not a developed physical road: I call this portion of Centre Street "Unroaded Centre Street".

[2] Unroaded Centre Street takes on a significantly different character than a developed physical road used for vehicle transportation: it is a largely grassed, downward slope with a pedestrian walkway, except those portions where it intersects with Victoria Avenue, Victoria Lane, and Marine Lane, where those streets cross perpendicularly.

[3] Unroaded Centre Street has been used historically by the petitioners, who are adjacent landowners, for their personal use, including vehicle parking and vehicular ingress and egress to their homes.

[4] If a municipal council wants to "close all or part of a highway that is vested in the municipality to all or some types of traffic", it must adopt a bylaw: *Community Charter*, s. 40(1)(a). In such cases, a council resolution is not legally sufficient: s. 122(2). Before any such bylaw is adopted, public notice is required, and statutory process rights are granted to affected members of the public: s. 94.

[5] The petitioners are residential landowners in White Rock, who seek judicial review of Resolution 2021-361, dated October 4, 2021 ("Resolution"), whereby the municipal council decided to support moving forward with the construction of a walkway improvement project on Unroaded Centre Street. The project would eliminate the petitioners' previous use of that public land. No bylaw was proposed nor adopted. The petitioners contend that this was a municipal act which triggered s. 40, the council's decision to proceed by resolution (not bylaw) was unreasonable, and they were denied procedural fairness.

[6] For the reasons which follow, I find that this petition for judicial review shall be dismissed.

FACTUAL BACKGROUND

Centre Street

Description

[7] Centre Street is a public highway in the City of White Rock, which runs northeast/southwest through part of the City.

[8] The history of the dedication of Centre Street, known as “E Street” until 1959, is not important for the purposes of this case. All parties agree it constitutes at law a “highway” pursuant to the *Community Charter*.

[9] The portion of Centre Street located between Columbia Avenue and Marine Drive is not developed for vehicle use as a public road, in the sense that it is chiefly grassed and contains terraces, walkways, and stairs in various conditions of repair.

Petitioners’ Use of Centre Street

[10] The petitioners John Cordell De Valois and Deborah Leah Schaan (“De Valoises”) live on the southwest corner of Columbia Avenue and Centre Street, adjacent to the west of Unroaded Centre Street. They drive to their property from Columbia Lane, which is within the boundaries of Columbia Avenue, and use a portion of Unroaded Centre Street to turn around and for pad parking. The turnaround was authorized by City staff in 1992. After the implementation of the project, they will no longer be permitted or able to use Centre Street for either purpose. The south portion of the De Valoises’ property backs onto Victoria Lane, which will be unaffected by the project authorized by the Resolution.

[11] The petitioner Pinnacle Care Group Ltd. (“Pinnacle”) owns property located on the southeast corner of Unroaded Centre Street and Columbia Avenue on its eastern boundary, which it acquired in 2015. Pinnacle’s property fronts Victoria Lane to the south of the lot, but Pinnacle and its predecessors have not chosen to apply

for or construct a driveway for access from Victoria Lane. Pinnacle instead uses Unroaded Centre Street, where it intersects with Columbia Lane, for vehicle access and parking. Pinnacle accesses the property via Columbia Lane (Columbia Avenue) coming from the west and drives over Unroaded Centre Street to get to its property. A parking pad sits on Unroaded Centre Street adjacent to the Pinnacle property.

[12] The petitioners Louise Webber and Gary Webber ("Webbers") own a lot situated on the southwest corner of Victoria Avenue and Centre Street. It has road access via Marine Lane, which will not be impacted by the walkway project on Unroaded Centre Street. However, the Webbers choose to access their property by driving over Unroaded Centre Street from Victoria Avenue. A hedge has been constructed to enclose parking that sits on Victoria Avenue. The Webbers also had annexed part of Unroaded Centre Street with an arched hedge to effectively widen their personal space beyond their lot. The hedge was created with permission of City staff. After the project, the Webbers will lose the hedged area on Unroaded Centre Street and the access to their home via Unroaded Centre Street, and parking on Victoria Avenue.

[13] As a result of the Resolution, none of the petitioners' properties will be landlocked. Each property fronts a road that could provide access: for the De Valoises, Columbia Avenue (Columbia Lane); for Pinnacle, Victoria Lane and Columbia Avenue; and for the Webbers, Marine Lane and Victoria Avenue. However, as noted above, each of the petitioners had previously used Unroaded Centre Street for vehicular access, including parking.

City Council Proceedings

2014: The Centre Street Task Force

[14] On December 16, 2013, the City Council adopted Resolution 2013-453, which created the Centre Street Road Allowance Improvement Task Force ("Task Force") for a one-year term, commencing January 1, 2014. The purpose of the Task Force was:

> To oversee the preparation of landscape and hardscape plans to improve the accessibility and safe usage of the road allowance from Columbia Street to Marine Drive, to improve the community amenities, including the possibility of providing community garden space, and to engage the public in the preparation of the plans. The plan should have public acceptance and be in a "grant ready" state to be able to take advantage of funding opportunities as they arise.

[15] In February 2014, Council directed staff to schedule meetings with residents adjacent to the road allowance for public input. On March 31, 2014, Council resolved to endorse that a sculpture garden be incorporated into the mandate of the Task Force.

[16] The Task Force, among other things, held public information meetings or open houses from May to September 2014, where members of the public were provided an opportunity to provide input and ideas for the development of Centre Street.

[17] On October 20, 2014, City Council received a report of the same date from the Director of Engineering and Municipal Operations titled "Update on Progress of Centre Street Road Allowance Improvement Task Force". A slideshow at the meeting identified the issues for Centre Street, including: (a) disrepair and unsafe access; (b) intrusion into public space; and (c) underutilized public space. The staff report stated that the proposed development of the Centre Street right of way was "an opportunity to enhance pedestrian linkages between Marine Drive, and Town Centre, to develop open parks and green spaces, and to enhance the existing pedestrian linkages and through fares". The report summarized feedback received from the public meetings and attached a walkway improvement "conceptual design" or "Concept Plan".

[18] The City did not take further action in relation to the proposed development of Centre Street between October 2014 and 2021 due to budgetary reasons.

[19] Both the De Valoises and Webbers provided input during the 2014 walkway improvement process. On July 9, 2014, Mr. De Valois and Mrs. Webber were

granted permission to attend a Task Force meeting and made representations to it voicing their views.

2021: The Walkway Improvement Project

[20] In 2021, the Centre Street improvement project came back to the fore.

[21] On March 8, 2021, Council received a recommendation from the City Director of Engineering and Municipal Operations to move forward with consideration of improvements on Centre Street. On March 8, 2021, Council passed a resolution approving a budget of $900,000, based on the conceptual design for the Centre Street Walkway provided to Council in 2014, and directed staff to commence the initial project steps, including preliminary design, as described in the March 8, 2021 report. The Council minutes were posted online.

[22] By letters dated August 3, 2021, each of the petitioners received correspondence from the City advising that it "[was] planning to upgrade the Centre Street Walkway from Columbia Avenue to Marine Drive". It required the petitioners to arrange for the removal of all encroachments, which were stated to include driveway access and parking pads, among other things. In addition, Pinnacle was advised that it could submit an application for driveway access to the City.

2021: The October 4 Resolution Decision

[23] On October 4, 2021, the Director of Engineering and Municipal Operations prepared a report for Council recommending that it support a preliminary design, titled Option B. In the background section of the report, staff advised:

> The City retained R.F. Binnie and Associates to develop a preliminary design for two options….
>
> Option B adapts to the existing topography to reduce erosion, includes longer ramps and fewer staircases, which makes it more walkable for pedestrians, particularly desirable for the senior residents, considering the high ratio of seniors in the neighborhood. As a result, Option B requires less excavation and less retaining walls, thereby reducing the construction cost. In addition, Option B accommodates more trees and was developed to maximize durability and lifespan of the walkway with minimal maintenance requirements.

Under “Legal Implications”, the report referred to adjacent landowners as follows:

> Six out of the eight properties within the project corridor have encroachments on the City’s Right of Way (ROW). Staff has been working with these property owners to remove the encroachments. Property impact letters were sent to the property owners on August 3, 2021, with a deadline to remove the encroachments by December 31, 2021.

[24] On October 4, 2021, Council passed the Resolution to:

1. Support RF Binnie & Associates’ Centre Street Walkway Preliminary Design option B as circulated, as it is more walkable, sustainable, and cost effective; and

2. Direct staff to proceed with the detailed design and construction of option B.

[25] A transcript of the Council proceedings was filed in evidence. There was discussion before Council about the adjacent landowners including their vehicular use for parking, but no discussion as to whether a bylaw was or was not required by s. 40 of the *Community Charter*, nor the reasons the Council decided it had the jurisdiction to proceed by resolution.

PARTIES’ POSITIONS

The Petitioners

[26] The central position of the petitioners is that the decision taken in the Resolution triggered the application of ss. 40 and 41 of the *Community Charter*, which statutorily required, among other things, that Council proceed by bylaw (not resolution) and confer participatory rights pursuant to ss. 40(3) and 94. They submit that portions of Unroaded Centre Street are “currently used for vehicle traffic by the Petitioners”, who use it to get to their properties and park on it. They argue that the closure of the road for traffic triggers s. 40, thus requiring authorization by bylaw. They submit the Resolution was an unreasonable interpretation of the *Community Charter*, and pursuant to the principles set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], it was unlawful and should be set aside. Alternatively, the petitioners contend that the City breached the rules of

procedural fairness and natural justice in the making of the Resolution.
The petitioners seek declaratory relief and an order quashing the Resolution.

The Respondent

[27] The respondent City acknowledges that Centre Street is a highway, but submits that Council was not unreasonable in determining that the road was not being closed, such as to trigger s. 40 of the *Community Charter*. It submits the Resolution does not constitute a decision to "close" a highway, and that s. 40 instead embraces permanent closures. It submits that Council was not unreasonable to determine that upgrading a walkway does not constitute closing a road. It further argues that it owed no duty of fairness to the petitioners, but that if it did, any such procedural duties were met in this case.

ISSUES

[28] The parties agree the standard of review to be applied to the substantive review of the Resolution is reasonableness. The two issues on this judicial review are:

1. Is the Resolution unreasonable?

2. Was the Resolution adopted in breach of the duty of procedural fairness?

DISCUSSION

Judicial Review of Municipal Decisions

[29] Under *Vavilov*, in general, the reasons given by a decision maker are the central focus of a reasonableness review. Indeed, the majority of the Supreme Court state: "the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place": *Vavilov* at paras. 15, 81. The majority add that "[o]ur discussion of the proper approach to reasonableness review will therefore focus

on the circumstances in which reasons for an administrative decision are required and available to the reviewing court": *Vavilov* at para. 78.

[30] Nevertheless, judicial review of municipal decisions, which often are not accompanied by formal reasons, was also a topic specifically addressed in *Vavilov* as giving rising to special considerations. In *Vavilov* at para. 137, the Court states that a court may "uncover a clear rationale for the decision" by reading the record as a whole and should conduct a reasonableness review on this basis:

> Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opague. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw … clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.
>
> [Emphasis added.]

[31] *Vavilov* at para. 138 addresses the distinct situation where "no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision". In such circumstances, a robust reasonableness review nevertheless proceeds, and "the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable": *Vavilov* at para. 138. However, in many cases, that must "focus on the outcome rather than on the decision maker's reasoning process", which the majority describes as "tak[ing] a different shape": *Vavilov* at para. 138.

[32] In *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 [*Catalyst*], the reasons of the municipal council were evident, and the Court was able to discern the basis for the tax rates bylaw, ultimately finding that the bylaw was reasonable. There, the municipal council's reasons were articulated in the municipality's five-year plan: *Catalyst* at para. 33.

[33] In the case at bar, the question implicitly decided by Council was more technical than the tax policy question at play in *Catalyst*. Here, Council decided the jurisdictional question: does s. 40(1)(a), on its true construction, apply to the subject of the Resolution; or, in other words, did the municipality have to proceed by a s. 40 bylaw, instead of resolution?

[34] Subsequent cases have applied the analytical framework from *Vavilov* at paras. 137–138 in a municipal context. The case at bar is not unlike *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 [*1120732*]. There, a zoning bylaw had been passed, but "the record [did] not indicate the reasons why the council held that belief"—although the record disclosed the reasons the council wanted to enact the bylaw and that the council believed it had the requisite zoning power: *1120732* at paras. 50, 84. The Court of Appeal followed *Vavilov* by "assess[ing] whether the outcome is reasonable in light of the relevant constellation of law and facts" (*1120732* at para. 84, citing *Vavilov* at paras. 105, 138) and "examin[ing] the decision in light of the relevant constraints on the decision maker" (*1120732* at para. 51, quoting *Vavilov* at para. 138). The Court of Appeal explained how *Vavilov* should be applied where no reasons for decision can be discerned:

> [84] In the present case, there were no reasons given by the Municipality's council as to why it considered the Zoning Amendment Bylaw to fall within the s. 479 zoning power. The record discloses the reasons for the enactment of the Zoning Amendment Bylaw, but it does not cast any light on the reasoning of the council in this regard. In such a case, the reviewing court must assess whether the outcome is reasonable in light of the relevant constellation of law and facts: *Vavilov* at paras. 105, 138. To this end, it is necessary to consider whether there are any reasonable interpretations of s. 479 that would have authorized the Municipality's council to adopt the Zoning Amendment Bylaw: *Catalyst* at para. 24; and *Newfoundland and*

> *Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 12.

[35] Ultimately, in *1120732*, the Court of Appeal concluded that "there were at least three ways in which the Municipality's council could have reasonably concluded that s. 479 [of the *Local Government Act,* R.S.B.C. 2015, c. 1] gave it the power to adopt the Zoning Amendment Bylaw": *1120732* at para. 88. This was the only basis on which it was contended the bylaw should be set aside, and the Court accordingly sustained the bylaw on judicial review: *1120732* at paras. 85–88.

[36] The Court of Appeal has since confirmed that where a municipal decision maker does "not explain how [they] came to interpret" a provision in a particular manner, it is necessary for the court "to determine whether that provision could reasonably be interpreted in that way": *English v. Richmond (City)*, 2021 BCCA 442 at para. 58, citing *1120732* at para. 84. There, after a statutory interpretation analysis of an enactment (which was not the decision maker's home statute), the Court of Appeal concluded that the legislative provision left room for only a single reasonable interpretation and sustained the chambers judge's decision to set aside the decision on review: *English* at paras. 106, 122, 140.

[37] From these governing cases, I take the following principles to be applicable on judicial review of a municipal decision where no formal reasons are issued:

1. **Where the Reasons for the Municipal Decision Can be Discerned.** The reviewing court determines if the reasons can be inferred from the record before the decision maker or larger context: *1120732* at paras. 41–42, 49. If it can, the court conducts the reasonableness review on the basis of those reasons: *Vavilov* at para. 137; see e.g. *Catalyst*; *Wilson v. Cowichan Valley (Regional District)*, 2021 BCSC 1735 at paras. 51–54.

2. **Where the Reasons for Municipal Decision Cannot be Discerned** from the record or larger context, the court determines whether that provision could "reasonably be interpreted in [the decision maker's] way" (*English* at para. 58), or "whether there are any reasonable interpretations … that would

have authorized" the municipal act (*1120732* at para. 84), by "examin[ing] the decision in light of the relevant constraints on the decision maker" (*1120732* at para. 51; *English* at para. 66). A reviewing court does so with an eye to assessing whether the outcome is reasonable in light of the relevant constellation of law and facts: *Vavilov* at para. 138; *1120732* at para. 84.

Record of the Resolution

[38] Both parties took an expansive view of the record of the municipal decision: the Resolution. The evidence before me includes municipal records of significant breadth and depth relating to road allowances in general and Centre Street in particular, including:

- historical plans and surveys,
- municipal reports and records from as far back as 1986,
- email and other correspondence between municipal staff and property owners,
- a 2007 parks Master Plan,
- a 2019 municipal report entitled "Unopened Road Allowances",
- material before Council at meetings in 2014, and 2021 with respect to Centre Street,
- 2014 Task Force minutes,
- 2014 information provided to and received from the public in the Task Force process,
- a December 2014 Strategic Transportation Plan, and
- a 2021 City survey of encroachments.

[39] The respondent City contends that there is nothing before me in the evidence that was not part of the record for judicial review, referring to the above material. The City submitted that the entire contents of the City's affidavit filed in response to the petition, together with a 1986 City report and 2019 report, constituted the record.

[40] The petitioners also submit that the Court may refer to extrinsic material and the historical materials not before Council. It relies on *English* for an expansive view of use of extrinsic evidence on judicial review of administrative action.

[41] I take a different view of the scope of the record of the administrative decision on judicial review. There are at least three reasons why, in my view, the content of the record is an important analytical input on judicial review in this municipal context that should be defined with some precision:

a) in the absence of formal reasons, reasons can be gleaned from the record: *Vavilov* at para. 137;

b) *Vavilov*'s instruction that reasons, where given by the decision-maker, must be the focus of the court on a reasonableness review: paras. 14, 81; and

c) on judicial review, a court should generally not supplement the reasons that have been given by the administrative decision maker: *Vavilov* at para. 96.

[42] In the municipal bylaw context, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw": *Vavilov* at para. 137, citing *Catalyst* at para. 29; *1120732* at para. 49.

[43] The majority in *Vavilov* characterizes the record for judicial review purposes in this way:

> [94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence

> before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body.

[44] *English*, relied on by the petitioners, is not of assistance in determining the scope of the record for purposes of judicial review in this context. There, the Court of Appeal addressed the distinct issue as to whether and when use can be made of material extrinsic to the record for the purpose of interpreting the provision before the statutory decision maker: *English* at paras. 79–94. That is a different use than importing material into the record to be used by a court, in the absence of any formal reasons, to discover the reasons of the decision maker.

[45] In my view, for the purposes of conducting a reasonableness review of the Resolution, I find that the record constitutes:

a) the October 4, 2021 City staff report, which includes the walkway improvement Concept Plan from 2014;

b) the transcript of the proceedings before Council on October 4, 2021; and

c) the October 4, 2021 minutes.

[46] I decline to define the record to include staff correspondence not placed before Council; the 2019 report on the "City Unopened Road Allowance Inventory 2019"; the content of material before Council in 1986 or 1988; and all the Task Force material from 2014. I find that the record as I have defined it is consistent with the case law and the definition of "record of the proceeding" in the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 1, and *Wilson* at paras. 51–55.

[47] I add that where, as here, a breach of procedural fairness has also been argued, a reviewing court is not restricted to the review of material within the record, and may look to extrinsic evidence to inform its analysis of that specific procedural ground: *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 at para. 17, citing *Ross v. British Columbia (Human Rights Tribunal)*, 2009 BCSC 1969 at paras. 26–27.

Reasonableness Review

Issue #1: Was Council's Decision to Proceed by Resolution, and Not by s. 40 Bylaw, Unreasonable?

[48] The answer to this question is somewhat technical and concerns the legal regime binding on a municipality related to making certain changes to a highway.

[49] As a starting proposition, the soil and freehold of a highway is vested in the municipality: *Community Charter*, s. 35(1)(a).

[50] Both parties agree that Unroaded Centre Street is a "highway" under the *Community Charter*.

[51] By proceeding with the project by resolution, Council necessarily determined that s. 40(1)(a) was not engaged and it need not proceed by bylaw; that it was not proposing to "close all or part of a highway that is vested in the municipality to all or some types of traffic". Did it give reasons for that interpretation, and was its decision unreasonable?

Can Reasons for the Decision Be Discerned?

[52] I find that the Resolution, read in light of the record (and larger context), does not provide a reason for Council's decision that ss. 40 and 41 were inapplicable. Neither the October 4, 2021 report, the transcript of proceedings, nor minutes reveal any reasons for interpreting the *Community Charter* in that way. The October 4, 2021 report, including the Legal Considerations section in it, says nothing about s. 40.

Were There Any Reasonable Interpretations That Would Have Authorized the Resolution?

[53] I nevertheless find that there were reasonable interpretations of s. 40 that authorized Council to proceed by resolution, not bylaw. Since the Resolution is not challenged on any other basis, I find the Resolution is not unreasonable: *1120732* at para. 88.

[54] I come to this conclusion by following the principles of judicial review set out in *Vavilov*, *112073* at paras. 40–46, and *English* at paras. 73–75.

[55] I further do so by engaging in a review of the relevant statutory provisions pursuant to the modern principle of interpretation: that the words of an enactment "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 1998 CanLII 837, citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

[56] Further, in making this assessment, I place no interpretative weight on the headnote to s. 40, which does not form part of the enactment: *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 11.

[57] The first reasonable interpretation is that s. 40 concerns a permanent step that constitutes the closing of a highway. Section 38 of the *Community Charter* specifically confers the power on a council to "temporarily restrict or prohibit all or some types of traffic on a highway". The wording "temporary restrict[ion]" contrasts with that in s. 40, which speaks of council taking steps to "close all or part of a highway". Reading s. 40 harmoniously as a scheme together with s. 38, it would have been reasonable for Council to conclude that s. 40 required a bylaw where it sought to permanently close a highway to all or some types of traffic, as opposed to temporarily restricting traffic.

[58] There was evidence in the record before Council that there was no such permanency in the Resolution. The land would remain owned by the City, and Unroaded Centre Street would continue to be used as a pedestrian walkway. Its use for highway purposes in future was not permanently compromised or impaired by the action Council took.

[59] The respondent City also submitted that Unroaded Centre Street was not open to vehicle traffic, and the petitioners' vehicular use of it did not render it open

to such “traffic” for the purposes of s. 40. In my view, the second reasonable interpretation open to Council was that “traffic” within the meaning of s. 40 was not impacted by the walkway improvement project because there was no permitted vehicular “traffic” on Unroaded Centre Street at the time of the Resolution. This is because “traffic” could reasonably be interpreted to mean permitted regular public use of a highway as a developed road or active public thoroughfare, and not use by the adjacent landowner petitioners of the public land for uses ancillary to their own private properties. In this regard, I agree with the City that it would be reasonable for Council to have taken the view that, as expressed in its written submissions:

> Centre Street is currently a walkway for the public, albeit in some disrepair, and vehicular traffic is not permitted on Centre Street. Nothing about Resolution 2021-361 changes that. It does not close Centre Street nor does it close it to any types of traffic that are currently allowed.

[60] The word “highway” in the *Community Charter,* Schedule, s. 1 is defined expansively:

> "highway" includes a street, road, lane, bridge, viaduct and any other way open to public use, other than a private right of way on private property;

[61] The words “public use” in the definition of “highway” stand in contrast to the words “traffic”, with “public use” being a broader term. The word “traffic” is not precise and narrow, but instead somewhat open textured, qualitative language, capable of a variety of interpretations. Its application implies interpretative flexibility and a choice of possible meanings: *Vavilov* at para. 110. Further, the dictionary meaning of “traffic” includes “vehicles moving in a public highway” and “the transportation of goods, the coming and going of people or goods by road, rail, air, sea, etc.”: *Concise Oxford English Dictionary*, 9th ed by Henry Fowler, Della Thompson & Francis Fowler (Oxford, UK: Clarendon Press, 1995).

[62] Considered textually and contextually within the *Community Charter*, the word “traffic” could reasonably be construed to mean permitted regular vehicular traffic on a developed road open to the public, as opposed to ancillary use by adjacent landowners or members of the public (made possible because the road is not subject to regular public vehicular use).

[63] The petitioners contend that there was "traffic" on Unroaded Centre Street at the time of the Resolution (*i.e.* the petitioners' use for parking or to access their homes) and the Resolution eliminates it, triggering s. 40. The affidavit filed by Pinnacle deposed that Unroaded Centre Street was "used for vehicular traffic", but whether it was or not was subject to Council's interpretation and application of the *Community Charter*. I find that it would be a reasonable interpretation for Council to view the petitioners' ancillary use of Unroaded Centre Street to not render it open to "traffic" within the meaning of s. 40.

[64] The record before Council indicates that it was informed the petitioner landowners (or some of them) used Unroaded Centre Street to access their properties and to park. However, Council appreciated that Unroaded Centre Street was not a developed road and was not open to regular, public vehicle use.

[65] Since it was reasonable to conclude that Unroaded Centre Street was not open to vehicle "traffic", by extension it would have also been reasonable for Council to determine on the facts before it that by removing the petitioners' vehicular uses, the project did not "close all or part of" Unroaded Centre Street "to all or some types of traffic".

[66] It must be recalled that the municipal enactment should be construed "in the spirit of searching for the purpose broadly targeted by the legislation": *Society of Fort Langley Residents for Sustainable Development v. Langley (Township),* 2014 BCCA 271 at para. 18; *Community Charter*, s. 4. In my view, it would have been reasonable for Council to conclude the purpose targeted by s. 40 was a proposed decision with respect to a highway that would broadly impact the public, as opposed to the adjacent landowners' use of public land; and that its purpose is not served by triggering a bylaw process where a walkway is upgraded on an undeveloped highway which is not (before and after that upgrade) open to permitted regular vehicular use by the public at large. Such a view as to s. 40's purpose is consistent with the two possible reasonable interpretations noted above.

[67] Further, and relatedly, I find that the outcome of Council proceeding by resolution was not unreasonable. Section 40 requires the legislative act of adoption of a bylaw and the associated statutory procedural machinery of public notice and participation where a highway-related decision may impact the public use. It was open to Council to consider that s. 40 is triggered by major impacts to the public due to changes to a highway—but not by decisions solely impacting adjacent landowners' ancillary use of public land. It was also reasonable for Council to consider that the disruption of adjacent landowners' use, who had heretofore benefitted from the fact that the highway was not developed into a roaded public thoroughfare, does not have the broad public impact that triggers the s. 40 bylaw process. In my view, it was a reasonable outcome for s. 40 to not be engaged here when the decision taken by Council did not have broad impact on the public's highway use but instead affected the petitioner adjacent landowners' ancillary use of the public space which comprises Unroaded Centre Street.

[68] As was the case in *1120732*, I find there was a possible reasonable interpretation of the applicable statutory provision open to the municipal decision maker*:* para. 88. In my view, the decision by Council to proceed by resolution did not step outside the bounds of the attendant factual or legal constraints.

[69] I add three comments. First, I do not find any previous case law considering s. 40 of the *Community Charter* to be of assistance in my reasonableness analysis: *District of West Vancouver (Corporation of) v. Liu*, 2016 BCCA 96 at paras. 26, 74; and *667895 B.C. Ltd. v. Delta (Corporation)*, 2018 BCCA 38 [*Delta CA*]. Nor did I find these cases relied on by the petitioners concerning highways to be of assistance in this assessment: *Einhorn v. Maple Ridge (District of)*, 85 B.C.L.R. (2d) 115, 1993 CanLII 1432 (C.A.); *Kehler v. Corp. of the District of Surrey*, 70 B.C.L.R. (2d) 381 (C.A.); *Maple Ridge (District of) v. British Columbia (Registrar, New Westminster Land Title Office),* 1991 CanLII 871, [1991] B.C.J. No. 974 (S.C.) [*Maple Ridge*]; *Montcalm Aggregates Ltd. v. Maple Ridge (District of),* 86 B.C.L.R. (2d) 359, 1994 CanLII 3294 (C.A.); and *Stevenson v. Surrey (District of),* 1990 CanLII 2251, [1990] B.C.J. No. 1104 (C.A.). None of the cases decided the interpretative point with

respect to the application of s. 40 which was before Council and is the subject of this judicial review. I reject the petitioners' related argument that the Resolution was adopted for an impermissible or non-highway purpose.

[70] Second, I do not consider Hansard to be of assistance in the reasonableness review as contended by the Respondent City.

[71] Third, I have addressed the reasonableness of Council's decision against the ground on which it has been challenged: *1120732* at para. 88. It is not necessary for me to decide, and I decline, to comment on the application of s. 40 in any other of its possible applications to "highways" under the *Community Charter*.

[72] In summary, in my view it was not unreasonable for Council to find that by improving the walkway that existed on Centre Street it was not closing it to all or some types of traffic within the meaning of s. 40.

Issue #2: Was the Duty of Fairness Breached?

[73] The petitioners submit that the City failed to provide reasonable notice and denied the petitioners the right to make representations under s. 40(3), which constituted a breach of fairness.

[74] Section 40(3) stipulates a statutory procedure when council proceeds by bylaw to "close all or part of a highway … to all or some types of traffic":

> **40** (1) A council may, by bylaw,
>
> (a) close all or part of a highway that is vested in the municipality to all or some types of traffic, or
>
> (b) reopen all or part of such a highway that has been closed.
>
> …
>
> (3) Before adopting a bylaw under this section, the council must
>
> (a) give notice of its intention in accordance with section 94 [*public notice*], and
>
> (b) provide an opportunity for persons who consider they are affected by the bylaw to make representations to council.
>
> [Underline emphasis added.]

[75] Section 40(3) has no application since I have found that Council determined, not unreasonably, to proceed by resolution and not by bylaw under s. 40.

[76] However, despite the absence of statutory procedural requirements, there remains the issue of whether the City's conduct, viewed procedurally, breached the duty of fairness at common law: *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5 at para. 40 [*CPR*].

[77] I find that the common law duty of fairness was not breached.

[78] The petitioners contend the City failed to provide each of them with an opportunity to make representations to Council regarding the project design and construction; failed to notify the petitioners and other affected property owners of Council's intention to consider the Resolution during the October 4, 2021, Council meeting; and breached the petitioners' legitimate expectation that they would be consulted regarding the project, particularly if a new proposal would be considered. The petitioners contend that the City proceeded with and approved a "significantly different proposal that would negatively impact" their properties without consulting or even notifying the petitioners—despite their prior involvement in the 2014 consultation process.

[79] The duty of fairness applies to an administrative decision where it affects "the rights, privileges or interests of an individual": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 20, 1999 CanLII 699, citing *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 653, 1985 CanLII 23; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 79. Matters of procedural fairness are reviewable on a standard of correctness of fairness, and "the reviewing court owes no deference to the decision maker on procedural fairness issues": *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission)*, 2021 BCCA 67 at para. 57.

[80] I do not agree with the respondent that no duty of fairness arises because the Council's decision was legislative in nature, relying on *Attorney General of Canada*

v. Inuit Tapirisat et al., [1980] 2 S.C.R. 735, 1980 CanLII 21. I find the Resolution was administrative and did have a land-use impact on the petitioners' interests giving rise to a duty of fairness: *CPR* at para. 39; *Baker* at para. 20. In my view, the *Community Charter* did not oust any such common law duty of fairness.

[81] The existence and content of a duty of fairness is case-specific: each case must be considered on its own facts and its own statutory context. The petitioners rely on *Fisher Road Holdings Ltd. v. Cowichan Valley (Regional District)*, 2012 BCCA 338 (requirements of procedural fairness with respect to public hearing for a down-zoning bylaw) and *Rocky Point Metalcraft Ltd. v. Cowichan Valley Regional District*, 2012 BCSC 756 (requirements of procedural fairness with respect to a rezoning amendment bylaw), which are different contexts than the one before me.

[82] As to the content of the procedural fairness, administrative decisions must be made "using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context": *CPR* at para. 38, citing *Baker* at para. 22.

[83] *CPR* holds that the content of the duty of fairness is variable and:

> 39 … depends on a number of factors, including: the "nature of the decision being made and the process followed in making it"; the "nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'"; the "importance of the decision to the individual or individuals affected"; the "legitimate expectations of the person challenging the decision"; and the requirement to "respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances": *Baker*, at paras. 22-27.

[84] The content of procedural fairness owed to the petitioners was on the low end of the spectrum. The nature of the decision was not legislative and instead operational and administrative, constituting the improvement to a walkway on public land. While that decision had the potential to impact the petitioners as adjacent landowners and users of that public land, its importance to the petitioners was

related to their use of public land to complement or enhance their use of private land, not a direct impact on any use they were placing on their own lands.

[85] Further, I find that the petitioners had no legitimate expectation of procedural rights from their earlier dealings with the respondent in respect of Unroaded Centre Street. The doctrine of legitimate expectation:

> … is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers [and] it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

See *Baker* at para. 26.

[86] The conditions which must be satisfied to establish a legitimate expectation, as set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, is as follows:

> [95] … The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified.
>
> [Emphasis in the original.]

[87] The City made no promises to the petitioners nor representations as to a specific procedure that would be followed regarding the development of Unroaded Centre Street, nor back-tracked from any such promises or representations. There was no practice or conduct which was "clear, unambiguous and unqualified" so as to give rise to a legitimate expectation by the petitioners that they would be consulted regarding the project after 2014, including if there were any changes to the project.

[88] I find the cases relied on by the petitioners with respect to the cancellation of an unused road dedication (*Acro Pace Projects Ltd. v. New Westminster Land Title*

District, 35 B.C.L.R. 315, 1982 CanLII 536 (S.C.), and *Maple Ridge*) also to not be of assistance in the procedural fairness analysis.

[89] Having regard to the low level of procedural rights owed, I find the City met its duty of fairness. The City's intention to develop Centre Street was made public by 2014, and some of the petitioners had made specific representations to the City at that time. The March 2021 resolution by Council to direct staff to commence initial project steps was posted online. The petitioners received notice by letter dated August 3, 2021, that the City was planning walkway upgrade construction work. The petitioners engaged with City staff directly. The petitioners had an opportunity to seek to make representations directly to Council. They had fair notice of the City's intention and an opportunity to make representations. The agenda for the October 4, 2021, Council meeting was posted online in advance, and that included City staff's report setting out options for the development of the walkway including the Option B subsequently approved by Council. None of the petitioners provided written submissions to Council in advance or applied to be heard by Council, even though the Webbers and De Valoises had done so before the City's Task Force in July 2014.

[90] The duty of fairness owed to the petitioners did not require the City to invite their participation at the October 4, 2021, Council meeting in general or by an in person oral hearing audience with Council in particular. In this latter regard, even the procedural rights arising under s. 40(3) (in the event of a highway closure to traffic) would not entitle a person the right to an oral hearing: *Delta CA* at para. 40. It follows that no such right arises at common law where s. 40 has not even been engaged.

[91] In short, the petitioners had notice something was afoot with respect to a walkway improvement project on Unroaded Centre Street that could potentially impact them. I do not find there was any breach of procedural fairness to them when, after receiving that notice, they thereafter did not seek an opportunity to address Council prior to the Resolution being made.

[92] Further, the *Community Charter* did not require the petitioners' consent prior to making of the Resolution. Section 41(2) provides:

> **41** …
>
> (2) If the effect of
>
> (a) a proposed highway closure under section 40 (1) (a), or
>
> (b) a proposed highway alteration
>
> will be to completely deprive an owner of the means of access to their property, the municipality must either
>
> (c) obtain the consent of the owner before the owner is deprived of access, or
>
> (d) in addition to paying any compensation required under section 33 (2) [*compensation for injurious affection*], ensure that the owner has another means of access that is sufficient for this purpose.

[93] Council reasonably concluded that s. 40(1)(a) did not apply, and in addition, the walkway improvement project did not "completely deprive" any of the petitioners "of the means of access to their property". To constitute such a deprivation, "all access to a property must be cut off": *667895 B.C. Ltd. v. Corporation of Delta*, 2016 BCSC 2356 at paras. 34–38, aff'd *Delta CA* at paras. 56–57. I agree with the City's submission that each of the petitioners will continue to have road access to their properties by other means notwithstanding the implementation of the walkway improvement project authorized by the Resolution.

CONCLUSION AND ORDER

[94] I find that the Resolution is not unreasonable on the substantive ground advanced by the petitioners, and that the City did not breach the duty of fairness owed to the petitioners when making the Resolution.

[95] The petition is dismissed.

[96] If the parties cannot agree on costs and wish to make submissions on costs, they may do so in writing, with the respondent providing submissions of no more than five pages within ten days, and the petitioners providing responsive

submissions of no more than five pages within ten days thereafter. The respondent shall have five days to provide a written reply, if any, of no more than three pages.

"Stephens J."