IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:	*O'Shea/Oceanmount Community Association v. Town of Gibsons,* 2020 BCSC 698

Date: 20200505
Docket: S187934
Registry: Vancouver

Between:

O'Shea/Oceanmount Community Association

Petitioner

And

Town of Gibsons and 464 Eaglecrest Drive Properties Ltd. formerly known as TCD Developments (Gibsons) Ltd.

Respondents

Before: The Honourable Madam Justice Shergill

Reasons for Judgment

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Place and Dates of Hearing:	Vancouver, B.C. November 25-27, 2019
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I. OVERVIEW

[1] In this judicial review proceeding, the petitioner, O'Shea/Oceanmount Community Association (the "Association"), challenges the validity and legality of Zoning Amendment Bylaw No. 1065-41, 2018 (the "Amending Bylaw"), on the grounds that it is in conflict with the Official Community Plan ("OCP") for the Town of Gibsons. The Amending Bylaw approves a high-density development in Gibsons.

[2] The Association challenges the Amending Bylaw under s. 2(2) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*] and s. 623 of the *Local Government Act*, R.S.B.C. 2015, c. 1 [*LGA*] and asks that it be quashed or set aside for illegality or invalidity.

[3] The respondents are the Town of Gibsons (the "Town") and 464 Eaglecrest Drive Properties Ltd., formerly known as TCD Developments (Gibsons) Ltd. (the "Developer"). They say that the Amending Bylaw is a validly enacted piece of delegated legislation that is consistent with and furthers the goals of the Town as expressed in the Town's OCP.

II. ISSUES

[4] The following issues are raised in this proceeding:

a) What is the applicable standard of review?

b) What evidence is admissible in this judicial review hearing?

c) What is the purpose and effect of an OCP?

d) What is the relationship between an OCP and a zoning bylaw?

e) Does the Amending Bylaw conflict with the Gibsons OCP?

f) Did the Town lose jurisdiction by rendering a decision that was unreasonable?

g) If the Town acted unreasonably, should the Court exercise its discretion to grant a remedy and if so, what is the appropriate remedy?

[5] I begin first with a brief background to the events leading up to this litigation.

III. BACKGROUND

[6] The setting for this dispute is the scenic Town of Gibsons. Gibsons is located in southern British Columbia, along what is commonly referred to as the Sunshine Coast. Gibsons is just north of Vancouver, and can only be accessed by ferry or air travel.

[7] The Association is a British Columbia member-funded society formed under the *Societies Act,* S.B.C. 2015, c. 18. Its members are residents of and include property owners in the O'Shea/Oceanmount Community in Gibsons (the "Community").

[8] The Developer is the registered owner of property located at 464 Eaglecrest Drive, in Gibsons (the "Property"). The Property is approximately 4.77 acres in size (1.93 hectares) and was purchased by the Developer around 2016. A condominium/townhouse complex now known as Eagle View Heights (the "Development") is in the process of being developed and constructed on the Property.

[9] The Council of the Town is the governing body for the Town (the "Council"). For certain matters, the Council may be advised by other bodies, such as the former Advisory Planning Commission, the Committee of the Whole, the Planning and Development Committee, and staff members.

A. Chronology

[10] Gibson's OCP was passed by Council in April 2005.

[11] The Council adopted Zoning Bylaw No. 1065, 2007, on November 6, 2007 (the "Zoning Bylaw"). The Zoning Bylaw has been amended many times since it was adopted.

[12] In early 2015, Council considered and adopted Bylaw No. 985-18, 2014, which amended the OCP.

[13] Beginning on or around December 2015 to November 2018, the Town considered the construction of the Development on the Property.

[14] On May 19, 2017, the Planning Commission considered a Development Permit Application for the Development, and made recommendations regarding the proposed form and character of the proposed development.

[15] On July 26, 2017, Council considered the Development Permit Application that had been presented to the Planning Commission and changes that had been made to the proposed Development. At that meeting, Council moved to encourage the applicant for the Development to revise the plans to reduce the scope of the Development plans to fit within the land use designation of Low Density Residential 1 in the Town's OCP.

[16] The Committee of the Whole (the "COW") is a standing committee of the Town. Members of the COW are the elected Councillors of the Town. On January 23, 2018 and March 6, 2018, the COW considered the Development and its relationship to the OCP. Staff were directed to forward the Amending Bylaw to Council.

[17] On March 20, 2018, the Amending Bylaw was given its first reading. The second reading was given on April 17, 2018. A public hearing was held with respect to the Development and the Amending Bylaw on May 9, 2018.

[18] The Amending Bylaw was given its third reading on May 22, 2018 and was approved by Council on June 19, 2018. On July 10, 2018, Council authorized the issuance of a Development Permit for the Development.

B. The Development

[19] The proposed Development is about 1.93 hectares. Of the 87 units in the Development, 79 of the units are single-level suites and the remaining eight units are two-storey townhouses.

[20] The Association argues that the Development is entirely dissimilar to the surrounding neighbourhood which is otherwise populated by single-family homes of "modest" size. The Association members are also concerned that the Development will place a greater demand on resources and change the community's character and landscape.

IV. COURT'S ROLE ON JUDICIAL REVIEW

[21] The function of judicial review is "to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes": *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28. It is not to substitute the court's decision for that of the decision maker: *Harrison v. British Columbia (Information and Privacy Commissioner)*, 2009 BCCA 203 at para. 68, leave to appeal ref'd [2009] S.C.C.A. No. 455.

[22] The court's role in a judicial review proceeding is to ensure that the decision maker acted within the authority bestowed upon it by the legislature: *Dunsmuir* at para. 28; and *Lang v. British Columbia (Superintendent of Motor Vehicles),* 2005 BCCA 244 at paras. 22 and 24. A judge conducting a judicial review is not sitting in appeal. Hence, the reviewing judge is not to hear new evidence or argument, or to decide or re-decide the case: *Actton Transport Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 272 at paras. 19-23.

[23] The court's role in a judicial review proceeding was succinctly summarized in *Budlakoti v. Canada (Minister of Citizenship and Immigration),* 2015 FCA 139 at para. 28. There are three aspects to the review. The court must first address any preliminary objections about why the judicial review hearing should not proceed. These objections usually concern discretionary bars to review, such as mootness,

delay, or deficient pleadings. Second, the court must consider the application on its merits. This is accomplished by (a) determining whether the decision maker acted within the scope of its statutory authority, and (b) whether the decision maker lost jurisdiction by failing to provide a fair hearing, or rendering a decision that was either incorrect or unreasonable, depending on which standard of review is applicable. Finally, if the court concludes that the tribunal committed an error, the court must determine (a) whether to exercise its discretion to grant a remedy, and if so, (b) what remedy to grant.

[24] The reviewing court is not compelled to grant a remedy in the face of an otherwise meritorious application. Rather, the court retains the discretion to refuse relief even where it is found that the decision maker acted outside the scope of its statutory authority, or lost jurisdiction for failure to provide a fair hearing or by rendering an incorrect or unreasonable decision: *JRPA*, *s.* 8; *Lowe v. Diebolt*, 2014 BCCA 280 at paras. 38-40.

V. STANDARD OF REVIEW

[25] At the hearing, all parties agreed that the standard of review of a municipal council's decision is "reasonableness".

[26] Following the hearing, and while the matter was still under reserve, the Supreme Court of Canada released its decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]. As *Vavilov* had direct bearing on the issues at hand, on January 8, 2020, I invited the parties to provide written submissions on the application of the reasonableness standard of review in light of *Vavilov*.

[27] On January 10, 2020, counsel for the Town brought *Wells v. Victoria (City*), 2019 BCSC 2267 [*Wells*] to my attention. Oral judgment in *Wells* was pronounced before *Vavilov* on November 22, 2019, though written reasons were not released until January 7, 2020. In *Wells*, the Court considered the validity of a bylaw amendment alleged to be inconsistent with the City of Victoria's Official Community

Plan. The petition in *Wells* was brought under s. 2(2) of the *JRPA* and s. 623 of the *LGA*, the same legislative enactments that are raised in this case.

[28] Counsel for the Town sent *Wells* to me without comment, and did not apply to reopen its case. Nevertheless, the petitioner objected to the Town raising *Wells* as the hearing had already concluded.

[29] It is well settled that judges have the discretion to allow reopening of an argument at any stage before the order is entered, although this discretion is not "unfettered": *Hansra v. Hansra*, 2017 BCCA 199 at para. 44. The overarching consideration is whether reopening a case would be in the interests of justice: *Hansra* at para. 54.

[30] The standards for reopening are relaxed in cases where an application to reopen is brought before judgment is pronounced: *Peier v. Cressey Whistler Townhomes Limited Partnership*, 2011 BCSC 773 at para. 74, rev'd on other grounds 2012 BCCA 28.

[31] I determined that it was in the interests of justice to allow the parties to make submissions on *Wells*. After I had received written submissions from all parties on both *Vavilov* and *Wells*, the parties brought three more recent decisions to my attention. The Developer asked me to consider *G.S.R. Capital Group Inc. v. The City of White Rock*, 2020 BCSC 489 [*GSR*], and the Association asked me to consider *Yu v. City of Richmond*, 2020 BCSC 454 [*Yu*] and *Minster Enterprises Ltd. v. City of Richmond*, 2020 BCSC 455 [*Minster*]. The Town was of the view that the latter two cases would not assist the Court.

[32] While these three recent decisions all interpret *Vavilov* in a municipal setting, I determined that there was nothing new raised in them that required further submissions from counsel.

A. The Petitioner's Revised Position

[33] The petitioner now takes the position that the applicable standard of review in this case is correctness. The reasoning in *Vavilov* is central to the petitioner's changed position. The respondents maintain that it is reasonableness.

[34] What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it (reasonableness), and not on the conclusion the court itself would have reached in the administrative decision maker's place (correctness). The reviewing court on a reasonableness review must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. A correctness review requires less deference, and permits the court to substitute its own view for that of the decision maker: *Vavilov* at para. 15.

[35] In *Vavilov*, a majority of the Supreme Court of Canada adopted a revised framework for determining the standard of review in an administrative law context. It begins with a presumption that the decision will be reviewed on the standard of reasonableness ("reasonableness review"), rather than the standard of correctness ("correctness review"). The presumption that the reasonableness standard applies to the review of decisions made by administrative tribunals is rebutted only by a clear expression of intent by the legislature, or the rule of law: *Vavilov* at para. 10.

[36] The "rule of law" requirement relates to matters that raise constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies: *Vavilov* para. 53.

[37] Legislative intent can be expressed through explicit provisions in a statute that prescribe the applicable standard of review. Alternatively, if no standard is explicitly prescribed and the legislature has provided a statutory appeal mechanism from an administrative decision to a court, then appellate standards apply to the

review. A statutory appeal mechanism exists when the legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave: *Vavilov* paras. 33 and 36.

[38] The petitioner advances both the legislative intent and rule of law arguments to support a correctness review. It argues that s. 623 of the *LGA* represents a statutory appeal provision, and further that s. 623 involves a question of illegality.

B. The Proceeding

[39] A challenge to a bylaw can be brought under s. 2(2) of the *JRPA* or s. 623 of the *LGA*. The Association has brought its challenge under both enactments.

[40] It is common ground that reasonableness review applies to a proceeding commenced under s. 2(2) of the *JRPA*. Section 2 of the *JRPA* provides:

> Application for judicial review
>
> 2 (1) An application for judicial review must be brought by way of a petition proceeding.
>
> (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
>
> > (a) relief in the nature of mandamus, prohibition or certiorari;
> >
> > (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

[41] Where the parties differ is on whether a proceeding brought under s. 623 of the *LGA* requires a correctness review or a reasonableness review. Section 623 provides:

> 623 (1) An application to the Supreme Court to set aside a municipal bylaw or another municipal instrument may be made by
>
> > (a) an elector of the municipality, or
> >
> > (b) a person interested in the bylaw, order or resolution, as applicable.
>
> (2) On an application under subsection (1), the Supreme Court may
>
> > (a) set aside all or part of the municipal instrument for illegality, and

> (b) award costs for or against the municipality according to the result of the application.
>
> …
>
> (5) Except for a municipal instrument referred to in subsection (4) (a), an order under this section relating to a municipal instrument must not be made unless the application is heard within 2 months after the adoption of the instrument.
>
> [Emphasis added.]

[42] The parties' divergent views turn on matters of statutory interpretation.

C. Legislative Intent

[43] The parties agree that there are no explicit statutory provisions prescribing what standard of review applies in this case.

[44] The Association relies on the phrase "An application to the Supreme Court to set aside a municipal bylaw", found in s. 623(1), to argue that the legislature intended for the court to apply a correctness standard of review. The petitioner submits that this provision should be interpreted as express authorization of "an appeal to a court" as contemplated in *Vavilov* at para. 51.

[45] At para. 44, the Court in *Vavilov* explained its rationale for applying the appellate standard of review to statutory appeal provisions. The Court held that the word "appeal" is to be interpreted consistently across statutes. The legislative use of the word "appeal" indicates that the same type of procedure must apply, regardless of whether it is used in the administrative, criminal, or commercial law contexts. The Court went on to say that:

> … Accepting that the legislature intends an appellate standard of review to be applied when it uses the word "appeal" also helps to explain why many statutes provide for both appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts: see, e.g., *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 27 and 28. This offers further support for giving effect to statutory rights of appeal. …

[46] The Court made three additional points about how the presence of a statutory appeal mechanism should inform the choice of standard of review analysis:

> [50] … First, we note that statutory regimes that provide for parties to appeal to a court from an administrative decision may allow them to do so in all cases (that is, as of right) or only with leave of the court. While the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard.
>
> [51] Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the *Federal Courts Act*, which confer jurisdiction on the Federal Court and the Federal Court of Appeal to hear and determine applications for judicial review of decisions of federal bodies and grant remedies, and also address procedural aspects of such applications: see *Khosa* , at para. 34. Another example is the current version of s. 470 of Alberta's *Municipal Government Act*, R.S.A. 2000, c. M-26, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply "[w]here a decision of an assessment review board is the subject of an application for judicial review": s. 470(1).
>
> [52] Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.

[47] The respondents collectively argue that s. 623 cannot be considered a statutory appeal clause because the word "appeal" has not been employed in that provision as described at para. 44 of *Vavilov*. Further, they say the court's review function in s. 623 is limited to illegality, making it a circumscribed review at best.

[48] Though I would not go so far as to say that the absence of the word "appeal" means that a provision cannot be considered a statutory appeal clause, I find it hard to imagine how a statutory appeal mechanism can be created without employing the

word "appeal". Further, when compared to other provisions of the *LGA* which employ the word "appeal", the absence of the word "appeal" in s. 623 is informative.

[49] Section 544 of the *LGA* states as follows:

> 544 (1) A person may apply to a board of variance for an order under subsection (2) if the person alleges that the determination by a building inspector of the amount of damage under section 532 (1) *[end of non-conforming use protection if building of other structure is seriously damaged]* is in error.
>
> (2) On an application under subsection (1), the board of variance may set aside the determination of the building inspector and make the determination under section 532 (1) in its place.
>
> (3) The applicant or the local government may appeal a decision of the board of variance under subsection (2) to the Supreme Court.
>
> [Italic emphasis in original; underline emphasis added.]

[50] The select usage of the word "appeal" in s. 544 of the *LGA*, and its omission in s. 623, indicates that the Legislators did not intend all provisions in the *LGA* that contemplate a court reviewing an administrative decision to provide a right of appeal.

[51] I agree with the Town's submission that s. 623 of the *LGA* exists only to confer a limited right of standing to bring judicial review of bylaws and municipal resolutions. It extends the right of review to an elector of a municipality or a person interested in the bylaw, order or resolution, without requiring that there be a *lis* between the parties. In other words, s. 623 serves to clarify for whom a right to judicial review exists, the powers the court can exercise on such a review, and what procedural requirements must be met to assert that right.

[52] As held by the Court in *Vavilov* at para. 51, not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. I find that s. 623 of the *LGA* fits within the category of provisions which "simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context". Section 623 lays out the procedure for challenging certain municipal decisions, without providing for a full appeal of those decisions.

[53] A similar conclusion was reached by Justice Forth in *GSR.* In *GSR*, the City of White Rock had denied a developer's application for a building permit because the development did not comply with a new zoning bylaw proposed by city council. The developer applied under s. 2(2) of the *JRPA* and s. 623 of the *LGA* to have the decision set aside. The developer argued that these provisions provide an example of the "dual role" for courts contemplated at para. 44 of *Vavilov*, and that the correctness standard applied.

[54] Justice Forth rejected the developer's argument, and concluded that both s. 2(2) of the *JRPA* and s. 623 of the *LGA* contemplate judicial review rather than an appeal. She stated as follows at para. 69:

> … The *JRPA* provides general rules of procedure for judicial review of administrative decisions in B.C., while s. 623 of the *LGA* provides a particular procedure that applies to the judicial review of decisions of local governments. Section 623 of the *LGA* fits into the category of legislative provisions discussed at para. 51 of *Vavilov* that contemplate a court reviewing an administrative decision without actually providing a right of appeal, and as such, the presumption of reasonableness is not rebutted.

[55] As the Court held in *Vavilov*, rebuttal of the reasonableness standard requires a clear expression of intent by the legislature. That expression of intent is lacking in this case.

D. Rule of Law

[56] I turn now to the second argument of the petitioner, that the correctness standard applies by virtue of the fact that s. 623 of the *LGA* involves a question of illegality.

[57] The respondents argue that the petitioner is prevented from seeking an order under s. 623 by virtue of s. 623(5) of the *LGA*. Section 623(5) prohibits the court from making "an order under this section relating to a municipal instrument… unless the application is heard within 2 months after the adoption of the instrument". While this petition was filed within two months of the passing of the Amending Bylaw on June 19, 2018, it was not set down for hearing until May 14, 2019.

[58] The petitioner objects to the respondents raising the limitation defence at this late stage of the proceeding. The Association submits that the respondents could have relied on s. 623(5) at the initial hearing but chose not to, and should not be able to raise this new argument now.

[59] The respondents say that s. 623(5) was not at issue in the original hearing because all parties agreed the applicable standard of review was reasonableness. They submit that if the petitioner is able to make new arguments regarding the interpretation of s. 623 in view of *Vavilov*, the respondents should be able to advance their defence under s. 623(5) in reply.

[60] I agree with the respondents. Given the parties' prior agreement that the reasonableness standard applied, whether the petitioner argued under the *LGA* or the *JRPA* was effectively moot prior to *Vavilov*. The respondents' need to rely on a limitation defence only became apparent when the petitioner changed its position after the conclusion of the hearing to argue for a correctness review. In these circumstances, it would be unfair to deprive the respondents of the opportunity to raise the s. 623(5) defence while permitting the petitioner to revise its position on the applicable standard of review.

[61] In the alternative, the Association submits that it should not be bound by the two-month time limit prescribed in s. 623(5) of the *LGA* as it is almost impossible to meet this in the current BC court system. It is argued that parties have no control over the scheduling of matters of more than two hours' duration, because those dates are set by the court registry. Further, in this case it would not have been possible to have the matter heard within the two-month time frame, as the respondent did not file a response until after two months had passed.

[62] In *Wells*, the petitioner alleged a zoning bylaw passed by the City of Victoria allowing the development of a 2.5-storey multi-unit residential development, was inconsistent with Victoria's Official Community Plan. As in the case at bar, the petition in *Wells* was brought within two months of the challenged instrument being enacted, but was not heard until more than two months after the instrument was

enacted. Justice Giaschi found that the bylaw amendment could not be challenged under s. 623 of the *LGA* because s. 623(5) required a party to have their application heard within the two-month timeframe. Bringing the application within that timeframe was not enough. Citing *Kalantzis v. East Kootenay (Regional District)*, 2019 BCSC 1001 at para. 9, Justice Giaschi noted the harshness of this short timeframe could be addressed by setting the petition down for hearing within the two months and then adjourning it to be heard later. As this had not been done, Justice Giaschi proceeded to hear the judicial review under the *JRPA* only.

[63] For similar reasons, I conclude that this matter cannot proceed under s. 623 of the *LGA*. The court can only make "an order under this section relating to a municipal instrument" if "the application is heard within 2 months after the adoption of the instrument". While I empathize with the petitioner that the two-month timeframe may be difficult to meet in our current court system, *Kalantzis* provides parties with an avenue to address scheduling delays. Similarly, there are procedures available to the petitioner in the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 in the event that a respondent is unduly delaying the scheduling of a proceeding by failing to file a timely response.

[64] Despite the Supreme Court of Canada's overhaul of the applicable standard of review analysis, some precedents are still instructive. The Court acknowledged that pre-*Vavilov* cases dealing with issues such as the effect of statutory appeal mechanisms, "true" questions of jurisdiction, or contextual analysis will have less precedential weight, but other cases will continue to inform the standard of review to be applied: *Vavilov*, para. 143.

[65] In that vein, *Residents and Ratepayers of Central Saanich Society v. Central Saanich (District)*, 2011 BCCA 484 [*Saanich*] is particularly helpful in this case. In *Saanich*, the Court found at para. 50 that the question of consistency between an official community plan and a bylaw was reviewable on a standard of reasonableness. The Court noted municipal councillors are elected, required to balance many competing interests, and are more aware of the exigencies within

their communities than courts, all suggesting that their decisions should be reviewed on a deferential standard: *Saanich* at paras. 46 and 49. *Vavilov* did not specifically address municipal decisions, and did nothing to change the logic underlying the decision in *Saanich*.

[66] The petitioner's reliance on *Ridley Bros. Development Co. v. Colwood (City),* 2010 BCSC 670 does not assist. Though the Court held at para. 38 that a correctness standard applied to a question of illegality, the issue was not canvassed extensively by the Court. Further, *Ridley Bros* was released prior to the BC Court of Appeal's decision in *Saanich*.

[67] I conclude that the reasonableness standard applies in this case.

E. Reasonableness Review

[68] Reasonableness review is founded in the principle of judicial restraint. It is a deferential standard which centers on respect for the role of administrative decision makers: *Vavilov* at para. 13. It is not the role of the reviewing court to impose the decision that it would have arrived at in the administrative decision maker's place: *Vavilov* at para. 15.

[69] A reasonable decision is one which is within the range of reasonable outcomes: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 [*Catalyst Paper Corp.*] at para. 25.

[70] The decision must not only be *justifiable*, but it must also be *justified*: *Vavilov* at para. 86.

[71] Before the decision can be set aside, the court must be satisfied that there are "sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" required of the decision maker. The Court goes on to say at para. 100:

> … It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party

> challenging the decision are sufficiently central or significant to render the decision unreasonable.

[72] The court must determine whether the decision as a whole is reasonable. This requires the reviewing judge to develop an understanding of the reasoning that led to the decision: *Vavilov*, at para. 85:

> … a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[73] The court must consider whether the decision is defensible in respect of the facts and law relevant to the decision: *Vavilov* at para. 105. In other words, is "there a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Vavilov* at para. 102.

[74] The reviewing court must also be sensitive to the administrative regime in which the decision was rendered: *Vavilov* at para. 103.

[75] Thus, a reasonableness review is a holistic review. It focuses on the outcome, the reasoning process, and the context in which the decision was rendered: *Vavilov* at para. 86 and 103.

VI. THE RECORD

[76] There is some dispute about the evidence that is admissible in this proceeding. The petitioner seeks to rely on the June 6, 2019 Affidavit #1 of William Baker. Mr. Baker is a director of the Association and a resident of Gibsons. The Town objects to certain portions of Mr. Baker's affidavit, arguing that they are irrelevant and not responsive to the issues before me. The offending paragraphs appear under the heading "Lack of Consultation". As the heading suggests, these paragraphs raise the petitioner's concerns of lack of consultation by the Town.

[77] The respondent argues that these paragraphs are "wholly inappropriate" because the petition does not raise any procedural challenges to the passage of the Amending Bylaw.

[78] Counsel for the Town concedes that the material I can consider in this case is of broader scope than if the decision maker was an adjudicative tribunal. In the case of adjudicative tribunals, the court can receive the "record of the proceeding", defined in s. 1 of the *JRPA*. This record mostly includes documents initiating the proceeding, filed in the proceeding, transcribing the proceeding and concluding the proceeding.

[79] *Vavilov* provides guidance at para. 126 on the type of material that is properly before the court when conducting a reasonableness review:

> … a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would also have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
>
> [Emphasis added.]

[80] *Yu* and *Minster* were companion cases that involved determinations by Richmond's Building Director and Manager of Inspections that building permits had expired. In both cases, the parties agreed the applicable standard of review was reasonableness. The Court reviewed the application of reasonableness post-*Vavilov*, and ultimately found the decisions were unreasonable.

[81] In *Minster* at para. 76, Justice Crerar refers to the reasoning in *Vavilov* regarding evaluation of the reasonableness of a decision within the "larger context" in which it was rendered:

> [76] The *Vavilov* passage at para. 138… also confirms that particularly where there are no reasons provided, the Court must consider the "larger context" to evaluate the reasonableness of the Decision. Elsewhere in the decision, the Court refers to the context of a decision as including such things as "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": *Vavilov* at para. 94.

[82] In examining usage of the phrase "context", Justice Crerar states at para. 78 that "[a]ny evidence that is relevant to 'a genuine ground of judicial review' is potentially admissible". He concludes as follows:

> [79] Even so, the basic standard of admissibility remains the same: does the evidence shed some light on the actual decision-making process undertaken by the decision maker? The mere existence of some external factor is not enough: there must be some connection between that factor and the decision rendered by the decision maker.
>
> [80] It is with these principles in mind that the reference to "context" in *Vavilov* should be interpreted. The invocation of "context" is not a *carte blanche* to admit any evidence even remotely related to the issue before the decision maker. Rather, it reflects the fact that the formal record, if such a record even exists, may not contain all the evidence relevant to the review of the decision in question, depending on the nature of that decision, and the grounds on which it is challenged.

[83] This judicial review challenges the validity and legality of the Amending Bylaw on the grounds that it directly conflicts with and deviates from the OCP. No procedural challenge is raised with respect to the passing of the Amending Bylaw. Paragraphs 46-56 of Mr. Baker's Affidavit #1 relate to the consultation process (or lack thereof) prior to the passage of the Amending Bylaw. In my view, these portions of Mr. Baker's Affidavit #1 are inadmissible as they contain evidence which is not relevant to the issues before me.

VII. LEGAL FRAMEWORK

[84] The Town is a municipality incorporated under the *LGA*.

[85] Municipalities and their councils are recognized as a democratically elected order of government that provide for the municipal purposes of their communities: *Community Charter,* S.B.C. 2003, c. 26, s. 1(1).

[86] The purposes of the *LGA* are set out in s. 1:

> (a) to provide a legal framework and foundation for the establishment and continuation of local governments to represent the interests and respond to the needs of their communities,
>
> (b) to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, and
>
> (c) to provide local governments with the flexibility to respond to the different needs and changing circumstances of their communities.

[87] The purposes of the *Community Charter* are similar to those of the *LGA*.

A. Local Government Enabling Legislation

[88] Section 4(1) of the *Community Charter* stipulates that the powers conferred on municipalities and their councils under the *Community Charter* or the *LGA* must be interpreted broadly in accordance with the purposes of these statutes and in accordance with municipal purposes.

[89] This broad and purposive approach to the interpretation of municipal legislation is also consistent with the general approach to statutory interpretation endorsed by the Supreme Court of Canada: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 at para. 8.

[90] The manner in which this approach informs the reasonableness review was considered by the Court in *Catalyst Paper Corp.*:

> [19] The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal consideration. "Municipal governments are democratic institutions", per LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 33. In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.
>
> …
>
> [24] It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that

> elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.
>
> [25] Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw.

[91] Municipal legislation should be approached "with a view to giving effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose": *Society of Fort Langley Residents for Sustainable Development v. Langley (Township),* 2014 BCCA 271 [*Fort Langley*] at para. 13 quoting from *Neilson v. Langley (District)* (1982), 134 D.L.R. (3d) 550 (B.C.C.A.).

B. Purpose and Effect of an OCP

[92] The *LGA* authorizes municipalities to adopt an OCP, which is "a statement of objectives and policies to guide decisions on planning and land use management" within a certain area: *LGA*, s. 471(1).

[93] Although the creation of an OCP is optional, the contents of it are proscribed by s. 473 of the *LGA*. Pursuant to this provision, an OCP must include statements and map designations for the area covered by the plan. These are to address matters such as "the approximate location, amount, type, and density of residential development required to meet anticipated housing needs over a period of at least 5 years": *LGA*, s. 473(1)(a).

[94] As noted by Justice Forth in *GSR* at para. 43, pursuant to s. 478 of the *LGA*, "OCPs do not commit or authorize a local government to proceed with any project specified in the plan, but all bylaws enacted or works undertaken by the local government after the OCP has been adopted must be consistent with the OCP".

C. Zoning Bylaws

[95] Whereas the OCP is a broad policy document, zoning bylaws are a more specific form of land use control. Zoning is used to establish a more detailed regulatory framework such as proscribing building height, setbacks and parking standards (see Gibsons OCP s. 5).

[96] By regulating how land can be used, local governments enact zoning bylaws as a means towards achieving their land use plans.

[97] Sections 479 and 482 of the *LGA* provide local governments with the authority to pass zoning bylaws, and to regulate the use and density of land, buildings and other structures within each zone.

D. Interplay between OCPs and Zoning Bylaws

[98] There are a number of cases that have addressed the question of whether a particular zoning bylaw is consistent with an OCP. Through them have emerged some important principles.

[99] In *Rogers v. Saanich (District)* (1983), 146 D.L.R. (3d) 475 (B.C.S.C.) at para. 50, the Court held that an OCP is a policy document which is not to be given the same level of scrutiny "as would-be acts of Parliament". This was reinforced by the Court in *Saanich*, which held at para. 40 that the OCP is meant to capture a long-term vision or philosophy and cannot be construed with the scrutiny afforded a statute.

[100] Inconsistency with an OCP is only established if there is a clear or specific contradiction between the OCP and the bylaw in question: *Saanich* at para. 40.

[101] When judged on a standard of reasonableness, consistency is considered holistically, and in conjunction with other considerations that may have factored into the making of the decision by the municipality: *Saanich* at para. 57. The Court in *Greater Vancouver (Regional District) v. Langley (Township),* 2014 BCSC 414, aff'd 2014 BCCA 512 at para. 48 summarized the consistency analysis as thus:

> [48] Therefore I determine that "consistent" as used in the [*LGA*] is not an exacting standard and it must take into account the wide variety of factors that are identified in what is fundamentally a policy document meant to guide planning decisions. To paraphrase from *Catalyst*, the test I will apply is: The OCP and regional context statement are consistent if a reasonable body, informed by all applicable factors, could determine that they are (para. 20).

[102] I turn now to the specific facts of this case.

VIII. THE DISPUTE

[103] The Association says that it is not opposed to development or growth. Rather, its members want to ensure that development and growth in Gibsons is carried out "legally" in order to preserve their community's character and "follow the plan for the future of the Town". It is submitted that the Amending Bylaw directly conflicts with the Gibsons OCP. If left unchecked, it will significantly alter the character and quality of life in their community and undermine the importance of official community plans.

A. Gibsons OCP

[104] The Gibsons OCP provides a vision and philosophy for the development and maintenance of Gibsons. It is intended as a "long-range policy guide for land use planning". Its purpose is to inform and guide Council's decisions in relation to residential and commercial development, industrial activity, transportation infrastructure, and environmental considerations: OCP s. 1.1. After adoption of the OCP, all bylaws enacted by Council must be consistent with the OCP: OCP s. 1.1.

[105] The Gibsons OCP divides Gibsons into different land-use designations, such as Residential, Low-Density Residential 1, and Greenbelt/Natural Open Space areas. But because the OCP is not a zoning bylaw, these land use designations only provide guidance as to the type of future land use that would be desired in that location.

[106] Each land use designation stipulates the amount of density which is permitted in that area. Density is described in two ways: number of units per acre/hectare, and floor space ratio ("FSR"). The number of units per acre or per hectare determines how many houses, apartments or condominiums can exist on a single piece of

property based on the size of the property. The FSR stipulates how much space a building can occupy on a piece of property.

[107] Section 9.2 of the OCP addresses the policy approach that should be taken with regard to low density residential developments. It seeks to balance the desire to retain the low density characteristics of existing neighbourhoods, with the need to have a wide range of housing options available to the residents of Gibsons. It accomplishes this goal by including different types of residences, such as cluster single detached, townhouses, and multi-unit developments, into these neighbourhoods. Section 9.2 - Low Density Residential of the OCP states:

> Many residents indicated that they would like to retain the low density characteristics of existing single-detached neighbourhoods. Infill development within and adjacent to existing neighbourhoods should be sensitive to the scale, density, and form and character of existing dwelling units.
>
> …
>
> Given the predominance of detached family dwellings in Gibsons, there is a need to provide a range of other housing choices. Other low density forms of housing include small lot single-detached, cluster single detached, townhouses, multi-unit development in a single-detached form, granny cottages and suites over garages. All of these may provide compatible forms housing in new or existing neighbourhoods.

[108] Because of a desire for affordable and alternative housing options, the OCP recognizes that the Zoning Bylaw may need to be revised to establish base and maximum densities for all residential zones. Part of the goal is to "ensure that affordable housing units or complexes are integrated in the community and not segregated or concentrated in specific areas": OCP s. 9.4.1 and 9.4.5.

[109] The OCP specifically considers multi-unit housing and mixed residential uses as policy objectives for future land development in the O'Shea/Oceanmount community, as follows:

> O'Shea/Oceanmount – This area of Upper Gibsons consists of new subdivision and multi-unit housing, as well as established neighbourhoods on Poplar and Davis roads. Future land use will consist of similar mixed residential uses, with a White Tower Park and future community uses on adjacent Town-owned land providing a focal point. The forest backdrop along the hillcrest from approximately Oceanmount Boulevard South to Gospel Rock should be maintained as much as possible. (OCP s. 9.1.5)

[110] In order to ensure that the needs of each community or neighbourhood are met, the Gibsons OCP sets out implementation strategies to achieve the goals, objectives, and policies stated in the OCP. For example:

> 15.1 Consider innovative changes to zoning when improvements to the liveability of the community are demonstrated. This may include zoning amendments, which entail rezoning lands to a higher density, introducing policies that anticipate rezonings under certain conditions, reviewing rezonings on a case by case basis, or a mix of these approaches as determined by Council. Zones that permit residential land uses should be updated to promote affordable housing suitable for families and seniors.
>
> …
>
> 15.3 Conduct a review of Town bylaws to determine consistency with the Official Community Plan and Provincial legislation.

[111] The objective for residential neighbourhoods is to retain and protect their existing character, "while allowing for appropriate infill and redevelopment": OCP s. 9.

B. Development Permit Area

[112] The Property is located within the Intensive Residential Development Permit Area No. 8 in the Gibsons OCP (the "DPA"). A specific objective for the DPA in the OCP is to provide for high quality, liveable forms of housing and provide residents with high quality affordable housing options: OCP s. 16.9.

[113] The OCP provides guidelines for construction on cluster lots within the DPA. These include recognizing the varied housing needs and preferences within the community, allowing for a mix of housing types suitable for the changing population, and ensuring the most effective use of Gibsons' limited land base: OCP s. 16.9.

[114] The OCP stipulates that multiple dwelling units should be built on each cluster lot. It envisions increasing the density to approximately 16 housing units per acre, over the long term, as follows:

> If the maximum density is not achieved, buildings should be sited to allow for the future development of additional dwelling units such that a density of approximately 16 housing units per acre could be achieved over the long term. The proponent must submit a conceptual plan showing how multiple

> units could be accommodated on each lot. The conceptual plan should show future servicing and access plans.
>
> [Emphasis added.]

[115] There are 2.47 acres in a hectare. Sixteen units per acre for cluster lots translates to a density of approximately 40 units per hectare.

C. Amending Bylaw

[116] Until June 2018, the area on which the Property is located was zoned as Single-Family Residential Zone 1 (R-1) under the Zoning Bylaw. Section 9.1 of the Zoning Bylaw provides:

> … The intent of the R-1 zone is to provide for single-family homes and low density on lots not smaller than 700.0 m2 (7,584.0 ft2), within areas that the *Official Community Plan*, "Land-Use Plan" designates in the "Single-Family Residential Category".

[117] The area for the Property is currently designated as Low Density Residential 1. Its purpose is described in the OCP, Table 5-1 – Land-Use Designations as:

> To permit small lot single-detached dwellings, duplexes, cluster housing, or multi-unit housing in a single-detached building form with a FSR of 0.6 to a maximum FSR of 0.75 (generally 20 to 25 units per hectare).
>
> [Emphasis added.]

[118] The Amending Bylaw created a new cluster residential zone, Cluster Residential Zone 2 (RCL-2) ("Cluster Zone 2") for the Property. In addition, it rezoned the Property into Cluster Zone 2.

[119] The application and intent of Cluster Zone 2 is described in the Amending Bylaw as follows:

> CLUSTER RESIDENTIAL ZONE 2 (RCL-2)
>
> Application and Intent
>
> The regulations of this zone shall apply to the use of land, buildings and structures within Cluster Residential Zone 2 (RCL-2), as shown on the map attached as Schedule A to this bylaw [i.e. the Property]. The intent of the RCL-2 zone is to permit multi-unit housing in a single-detached form, while preserving open space."
>
> [Emphasis added.]

[120] Permitted principal uses for Cluster Zone 2 are: apartment use; townhouses; and in conjunction with townhouses, one secondary suite per townhouse unit.

[121] The Amending Bylaw specifies a density calculation with respect to the Property. The minimum FSR is 0.6, the maximum FSR is 0.75, and a maximum number of six dwelling units are permitted in an apartment building.

[122] The Amending Bylaw also added in a definition of the term "floor space ratio", as follows:

> "FLOOR SPACE RATIO" means a ratio calculated by the gross floor area of the buildings divided by the lot area upon which the buildings are located.
>
> [Emphasis added.]

[123] The terms "gross floor area" and "lot area" were already defined in the Zoning Bylaw, as follows:

> "GROSS FLOOR AREA" means the sum of the horizontal areas of each storey of a building measured from the interior faces of the exterior walls providing that in the case of a wall containing windows, the glazing line of the windows may be used. The measurement is exclusive of basement areas used only for storage or service to the building, unfinished attic space, attached garages, carports, breezeways, porches, balconies, exit stairways, corridors, and terraces. In the case of apartments, public corridors, common amenity spaces, and building mechanical systems are also excluded. In the case of congregate housing, communal dining and kitchen facilities are excluded.
>
> "LOT AREA" means the total horizontal area within the lot lines of the lot, but excluding:
>
> i. except in the CDA-4 zone, sloping portions of the lot having a slope of more than 50%, over a horizontal distance of 6.0 m (19.7 ft) or more;
>
> ii. land covered by the surface of water, as defined by its high water mark;
>
> iii. portions of the land in easement for major electrical or other energy transmission lines; and,
>
> iv. portions of a panhandle lot within "panhandle" portion of the lot.

[124] The FSR in the Amending Bylaw is the same floor space ratio as set out in Table 5-1 of the OCP. A note at the end of Table 5-1 ("FSR Note"), explains FSR as follows:

> Floor space ratio (FSR) is the ratio of the total floor area of buildings to the area of the site or lot upon which the buildings is [sic] proposed to be located. In Table 5-1, floor space ratio limits apply to the net surface area for individual properties, exclusive of areas that would be dedicated for roads, parks, etc.
>
> [Emphasis added.]

[125] The petitioner relies on the FSR Note to argue that the FSR definition inserted into the Amending Bylaw is inconsistent with the Town's OCP.

IX. ANALYSIS

[126] It is argued that the decision to pass the Amending Bylaw was unreasonable not only because the Amending Bylaw conflicts with the Gibsons OCP, but because it was founded on incorrect or misleading information.

[127] The Association submits that the staff for the Town incorrectly told the Council that the new bylaw was compliant with the Gibsons OCP, when in fact it was not. It is argued that a "decision by Council cannot be reasonable when it is based on inaccurate and false information".

[128] The Association says that the Amending Bylaw conflicts with the Gibsons OCP not only in terms of the character and vision for the Community, but also in more measurable ways. Specifically:

a) It permits the Development (and future developments) to be constructed at a density that exceeds the limits set out in the OCP for Low Density Residential 1 properties.

b) It arbitrarily excludes the units per hectare measurement set out in the OCP.

c) It alters the definition of FSR.

[129] As noted elsewhere, the Gibsons OCP describes density in two ways: number of units based on the size of the property, and floor space ratio. The

Association argues that the Amending Bylaw conflicts with both of these density measurements as they are contained in the OCP.

A. Units per Hectare

[130] The Development has 87 units over a total Property size of 1.93 hectares. This works out to 45 units per hectare. The petitioner submits that the Amending Bylaw directly conflicts with and deviates from the Gibsons OCP which "directs 20 to 25 units per hectare" since the Development actually has 48 [*sic*] units per hectare.

[131] To arrive at this conclusion, the petitioner relies on the phrase "generally 20 to 25 units per hectare" under the OCP's description of a Low Density Residential 1 zone. Based on the size of the Property, the petitioner submits the maximum permissible density on the Property is 48 units, versus the 87 units that Council has approved by passing the Amending Bylaw.

[132] There are two difficulties with this argument. The first is the petitioner's insistence that the phrase "generally 20 to 25 units per acre" should be interpreted to mean "always 20 to 25 acres". The *Oxford Dictionary of Current English,* 2nd ed (New York: Oxford University Press, 1992), *sub verbo* "generally", defines "generally" as:

> 1 usually; in most respects or cases *(generally get up early; was generally well-behaved).* 2 in a general sense; without regard to particulars or exceptions *(generally speaking).* 3 for the most part *(not generally known).*

[133] If one inserts the word "usually", the OCP's description of a Low Density Residential 1 zone translates as a zone which "usually" has 20 to 25 units per acre. It is evident from this that 25 units is not the maximum allowable density for units, but rather one that would usually be permitted in the Low Density Residential 1 zone.

[134] This interpretation is supported when one looks at the process behind the adoption of the units per hectare and FSR ranges. The documentation reveals that the Town considered multiple options for controlling density before it adopted the Bylaw No. 985-18, 2014, which amended the OCP.

[135] At a September 14, 2014 meeting, the OCP Steering Committee discussed the reasoning behind the wording for the density designations, explaining that replacing the previous "maximum" density figures with the current "general" ranges would provide more flexibility for projects that might fall outside of the range. The meeting Minutes reveal that Council was alert to the concerns raised by the petitioner and opted to strike a balance between the two density controls, with the FSR range being expressed as a "maximum" range while placing a "general" designation on the units per hectare.

[136] Thus the OCP contemplates that there will be exceptions or circumstances in which there may be deviation from the 20-25 units per acre provision. In this case, the exceptions are embedded right within the OCP, when one looks at the provisions for the DPA in which the Property is located. This brings me to the second problem with the petitioner's argument.

[137] As noted elsewhere, the DPA allows "approximately 16 housing units per acre", or a density of approximately 40 units per hectare, or 80 units for two hectares. Given the size of the Property, this means that to conform to the OCP vision for cluster lots, the Property should aim to have close to 77 units. The usage of the word "approximately" allows for deviation higher or lower than that number. In my view, a deviation of 10 units is within a range of reasonable options open to the Council.

[138] As noted by the Court in *Fort Langley*, municipal legislation should be approached "with a view to giving effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis ...". It was the intention of Council to create flexibility in the number of units per hectare, while maintaining control of FSR. It is reasonable to conclude that 87 units is approximately close to 77 units. Thus, when Council passed the Amending Bylaw which would permit 87 units to be constructed on the Property, this was within a range of reasonable options available to it.

B. Floor to Space Ratio

[139] I turn now to the petitioner's argument that the OCP violates the FSR restrictions.

[140] The respondents concede that whereas the provision for units per hectare is a general guideline and not meant to be restrictive, the rule with respect to FSR is more specific. However, they say that the Development is within the maximum allowable density measurement of 0.75 FSR, and consequently does not conflict with the OCP.

[141] For its part, the petitioner does not dispute that the maximum FSR density measurement of 0.75 in the Amending Bylaw is the same as that contained in Table 5-1 of the OCP. To this extent then, there is no conflict between the two provisions.

[142] At issue is whether the Amending Bylaw is consistent with *how* the FSR is calculated as per the OCP. The Association says that the Amending Bylaw looks at the total surface area upon which the buildings are located in order to arrive at the FSR, whereas the OCP requires the Development to consider only the net surface area, which excludes the space that cannot be used for development such as parks, roads, and ponds. In doing so the petitioner relies heavily on the FSR Note.

[143] There are three problems with this argument.

[144] First, I do not agree that the FSR Note is a definition. The FSR Note is a part of the OCP and not the Zoning Bylaw. Its location at the end of Table 5-1 in the OCP supports the conclusion that it is a guideline or explanatory note that helps explain the FSR Table at 5-1. To read anything more into it is to give the OCP more power than was intended.

[145] Second, the petitioner has led no evidence that the Development includes spaces such as dedicated roads and parks. To the contrary, one can conclude on

the evidence that the Town did not take into account dedicated roads or parks when calculating the FSR, because the Development contains neither.

[146] Third, even if the FSR Note is taken to be a definition, it does not follow that the FSR Note applies to any area of "public use and access". The petitioner's contention that *any* proposed green space or product should be deducted from the FSR calculation is simply not supported. At best, if one were to consider the FSR Note to be a binding definition, then it is only areas that would be dedicated for roads, parks, and the like that are excluded.

[147] In *Brooks v. Courtenay (City)* (1991), 78 D.L.R. (4th) 662 (B.C.C.A.), the petitioners sought to quash a rezoning bylaw both on the grounds that the public notice was insufficient and that the bylaw conflicted with the City of Courtenay's OCP. The petition was dismissed by Justice Cowan. In dismissing the petitioners' appeal of Justice Cowan's decision, the appellate Court noted that the rezoning bylaw did not itself authorize any particular plan of development for the plan in question, which would be decided under the terms of a development permit. Similarly, the Amending Bylaw here simply provides for the manner in which the FSR is to be calculated. It does not itself authorize a particular plan or development.

C. Conflict with the OCP Character and Vision

[148] I turn to the final argument of the petitioner that the Amending Bylaw conflicts with the character and vision of the OCP.

[149] The Association concedes that the OCP allows for "Cluster Developments" within the area, but says that it is subject to certain stipulated criteria, which include:

a) The objectives of [the DPA] designation are to: Ensure that intensive residential development fits with the character of the Town and its neighbourhoods.

b) Guidelines for subdivision including cluster lots and / or small lots ... Building lots and streets / lanes should be subdivided so as to retain existing trees, vegetation, and other important natural features.

c) Retain the existing natural landscape to the extent possible...

d) To achieve harmonious integration with surroundings, development should be sensitive to the scale, mass, and form of adjacent buildings.

[150] The Association submits that the Development does not accomplish these development goals for the DPA because: it does not maintain the residential character of the town, the community, or the neighbourhood; it is entirely dissimilar in size and character to the surrounding homes; it blocks the use of and access to the parklands to the south; and if built, the Development would not preserve the existing berm which is contrary to all of the elements of the OCP in which the importance of maintaining the natural environment and landscape is a key principle.

[151] Where the only contradiction is on matters of vision and philosophy, bylaws will generally be found not to contradict the guiding official community plans. This is so even where the conflict on the surface may seem quite dramatic.

[152] In *Striegel v. Tofino (District)*, [1994] B.C.J. No. 550, the bylaw under attack was one that rezoned a beach headland from "Forest Rural" to "Tourist Commercial", which permitted the construction of a motor hotel. The petitioners' primary submission was that the bylaw was in conflict with the stated goal of Tofino's official community plan, which was to "protect and enhance the natural features of the District, including the shorelines of the Esowista Peninsula". The Court found that "when the bylaw is viewed in the context of the entirety of the plan, the perceived conflict disappears. The thrust of the official community plan expressed as one objective is to permit commercial development while accommodating environmental protection".

[153] While the Amending Bylaw does allow changes to the area of the Development, change alone is not a bar to the Amending Bylaw. Aside from density, the OCP also sets out a range of objectives relating to economic development, recreation, infrastructure, and the natural environment.

[154] As noted in *Saanich* at para. 46, councillors are required to consider a wide variety of competing objectives, and their efforts to balance these objectives are owed deference. Here, the Amending Bylaw was adopted after extensive consideration by Council, and there is no evidence that Council improperly balanced the OCP objectives when approving the Amending Bylaw. While there may appear to be some inconsistencies with the OCP when parsed out into smaller sections, those inconsistencies are minor, and when viewed as a whole they disappear.

[155] In my view the petitioner relies on an overly rigid reading of the OCP, and loses sight of the overarching purpose of the OCP. It is intended to guide and to achieve a balance between preservation and development: *Lypka v. White Rock (City)*, 2015 BCSC 550 at paras. 40 and 41. Any shortcomings or flaws that may exist in the decision to pass the Amending Bylaw are not sufficiently central or significant to render the decision unreasonable.

X. CONCLUSION

[156] To the extent that the parties agree that the power to pass a zoning bylaw is lawfully delegated to the Town, this case does not involve a true jurisdictional inquiry. Rather, the question here is, when looking at the two lawfully adopted documents, whether the Amending Bylaw is consistent with the OCP for the purposes of s. 478(2) of the *LGA*. The Town is owed significant deference in this inquiry.

[157] Reasonableness "takes its colour from the context", such that a bylaw will only be set aside where no reasonable body, informed of the "wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws", could have passed the bylaw: *Catalyst Paper Corp.* at paras. 18 and 24.

[158] Having regard to the whole of the circumstances in this case, I am unable to find a conflict between the OCP and the Amending Bylaw.

[159] I conclude that the Amending Bylaw was within a range of reasonable outcomes available to the Town. The petition of the O'Shea/Oceanmount Community Association is dismissed.

XI. COSTS

[160] The general rule is that costs follow the event. I am not aware of any reason that warrants a departure from this rule. The respondents were successful and as such they are entitled to their costs at Scale B for a matter of ordinary difficulty.

[161] If a party wishes to make submissions on the issue of costs, they may prepare written submissions up to a maximum of five pages in length, for the Court's consideration. These should be submitted through Supreme Court Scheduling within 21 days of this Order. Responding submissions should be provided seven days thereafter. Absent further submissions, this costs order will stand.

"Shergill J."