IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Abbcar Properties, LLC v. Vancouver (City),* 2022 BCSC 190

Date: 20220207
Docket: S215703
Registry: Vancouver

In the matter of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241, and amendments thereto;

And in the matter of the *Vancouver Charter,* S.B.C. 1953, c. 55 and amendments thererto;

And in the matter of Development Application No. DP-2020-00849

Between:

Abbcar Properties, LLC

Petitioner

And

City of Vancouver

Respondent

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment

Counsel for the Petitioner:	J.E. Shragge
Counsel for the Respondent:	I.K. Dixon
Place and Dates of Hearing:	Port Coquitlam, B.C. November 18–19, 2021
Place and Date of Judgment:	Vancouver, B.C. February 7, 2022

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INTRODUCTION

[1] This is a judicial review of two municipal land development decisions made by the City of Vancouver (the "City") in relation to the City's proposal to construct a building that would contain an elementary school, a childcare facility, and affordable housing units (the "Project").

[2] The first impugned decision is that of the City of Vancouver Development Permit Board (the "Board") made on March 22, 2021 whereby it granted a development permit (the "Permit") in relation to the Project, subject to certain conditions. Those conditions included approval of the Project's form of development and the amendment of a by-law by Vancouver City Council ("Council").

[3] The second impugned decision is Council's June 30, 2021 motion by which it approved, in principle, the Project's form of development, and approved by-law amendments to allow for an increase to the building's allowable height, floor area, and dwelling unit count (the "Motion").

[4] The petitioner, Abbcar Properties, LLC ("Abbcar"), is a corporation that owns a strata lot in a residential building located close to the Project site. Abbcar opposes the Project as proposed, and seeks an order quashing the Board's Permit and Council's Motion on four grounds:

1) that both the Board and Council proceedings were tainted by a reasonable apprehension of bias given that the Project is being developed by the City itself;

2) that the Board's hearing was procedurally unfair since a draft transportation study in relation to the Project was not publicly disclosed beforehand;

3) that the Council hearing at which the Motion was approved was procedurally unfair because the City's Mayor limited public debate; and

4) that the Board's decision to grant the Permit is substantively unreasonable because it was issued prior to and conditional upon Council providing certain approvals in the future.

[5] The City disagrees. In the absence of actual evidence of bias, the City says that it is not precluded from assessing and approving its own land development projects. The City also submits that neither the fact that the Board hearing took place prior to disclosure of the transportation study nor the Mayor's remarks regarding the permissible scope of discussion at the Council meeting constitute denials of procedural fairness. Finally, the City says that the timing of the Board's conditional issuance of the Permit was reasonable and permitted by legislation.

[6] On my review of the petition record, I am not persuaded that Abbcar was denied procedural fairness by the Board or Council when they made their respective decisions in respect of the Project. Furthermore, I accept that the Board's decision to issue the Permit on condition that subsequent approvals be given by Council was a reasonable one that the Board was empowered to make. Abbcar's petition will therefore be dismissed.

BACKGROUND

The Project

[7] In or around 1996, the City acquired a parcel of land in the Coal Harbour, neighbourhood of downtown Vancouver.

[8] In 1997, a preliminary development permit application was approved for the building of a community centre, park, and underground parking on the eastern portion of this land. Those facilities, now known as Coal Harbour Community Centre and Coal Harbour Park, were built and completed in 2000.

[9] The application also contemplated the eventual construction of the Project on the western portion of this land. Located at 480 Broughton Street, the Project, as envisaged, would consist of an elementary school, a childcare facility, and affordable "non-market" housing units. In August 2019, the City retained Henriquez Partners Architects ("HPA") as the prime consultant to complete the functional programming, schematic design, and development phases of the Project.

[10] On September 1, 2020, the City's General Manager of Real Estate and Facilities Management delivered a report to the City's Finance Committee on the subject of the "Coal Harbour School, Childcare and Affordable Housing Project". The report recommended that certain legal and financial steps be taken to move the Project forward. The report's conclusion stated the following:

> School-childcare projects such as the one proposed for Coal Harbour School offer the City an efficient means of sharing project costs and co-locating complementary land uses and services on a single site. The proposed Project is unique in that it will also accommodate non-market housing units on-site, a land-use previously approved for this location under the zoning bylaw and one which is central to Council's mandate of improving increasing number of homes and housing affordability.
>
> This co-located project includes a new elementary school, a new 65-space childcare and a new 60-unit social housing development, and combined with the existing Coal Harbour Community Centre and Coal Harbour Park, represents final delivery of the vision approved 25 years ago. The strong working relationship between the VBE, Park Board, City and future non-profit operators combined with the contribution from other levels of government, is a great example of optimizing public land and partnership resources for enhanced and much needed community services for years to come.
>
> The General Manager of Real Estate and Facilities Management and the City Manager recommend Council's approval of the foregoing, such that the work can continue in order to expedite timely delivery of this Project.

[11] The Finance Committee adopted by consent the recommendations set out in the report on November 25, 2020. That same day, Council met and unanimously approved the recommendations and actions taken by the Finance Committee in respect of the report.

[12] HPA submitted to the City an application for a development permit and a re-zoning enquiry in relation to the Project on November 23 and 27, 2020 (collectively referenced as the "HPA Application").

[13] The HPA Application indicated that the permit was being sought in respect of a proposed 11-storey, mixed-use building containing 60 social housing units, a 340-student elementary school, and a 65-space childcare centre at 480 Broughton Street. It also sought by-law amendments to allow for the proposed scale of the building's residential floor area, height, and number of residential units.

[14] Specifically, because of the height density limitations imposed by *CD-1 (365), By-law no. 7677* ("*CD-1 By-Law*"), accommodation of the Project's dimensions required that the *CD-1 By-Law* be amended to increase the maximum allowable residential floor area from 4,170 sq. m (44,886 sq. ft.) to 5,473 sq. m (58,911 sq. ft.), the maximum allowable building height from 30 m (98.4 ft.) to 38.82 m (127.36 ft.), and the maximum allowable number of residential units from 40 to 60. To reconcile the amended *CD-1 By-Law* with the Coal Harbour Official Development Plan, the HPA Application also proposed consequential amendments to the *Coal Harbour Official Development Plan By-law, No. 6754.*

[15] The City issued a "Notice of Development and Zoning Amendment Application" in relation to the Project on December 14, 2020. The Notice stated that a virtual open house would be conducted from January 4 to 10, 2021 in which members of the public could view a visual presentation prepared by HPA, and submit written comments to the City by January 15, 2021. The Notice also advised that the Board will make its decision on whether to grant a development permit for the Project on March 22, 2021.

[16] Prior to the Board meeting, however, the HPA development permit application was also scrutinized by the City's Urban Design Panel ("Design Panel") and its Development Permit Staff Committee ("Staff Committee"). On January 20, 2021, the Design Panel met and decided to unanimously support the application with no recommendations. The Staff Committee met on March 3, 2021, and it recommended that the Board grant a development permit subject to certain conditions. The Staff Committee's report concluded that "… the proposed building will contribute positively to the community and character of this neighbourhood".

Abbcar and its Opposition to the Project

[17] The petition record contains only limited evidence in relation to Abbcar, the corporate petitioner. In his submissions, counsel for Abbcar described his client as "the owner of a residential strata lot in the building located at 499 Broughton Street, which is immediately across the street from the Development" at 480 Broughton

Street. He also said that Abbcar "is an extra-jurisdictional corporation controlled by Canadian permanent residents who have regularly resided in their unit since 2003". However, no affidavit was tendered by a director, officer, shareholder, or other agent who might be qualified to testify on behalf of Abbcar. Instead, Abbcar relies solely on affidavits made by its lawyer's legal administrative assistant to which certain documents are attached as exhibits, and an agreed statement of facts. This material contains no information about Abbcar's corporate identity, status, or particular interest in the outcome of this judicial review proceeding.

[18] With respect to the reasons for Abbcar's opposition to the Project, the only evidence in the record is that provided by its legal counsel. He wrote a letter to the City dated January 15, 2021 in response to the City's December 14, 2020 invitation for written comments on the Project. It states first that Abbcar is concerned by the conflict inherent in the City's "dual role on this development as the developer and approving body". It also promises supplementary submissions on this topic, which were later provided in a letter to the City's legal department dated March 2, 2021. Counsel for Abbcar's January 15, 2021 letter then proceeds to set out several criticisms of the Project, which can be summarized as follows:

a) the questionable need for the Project today compared to when it was originally conceived;

b) the Project's impact on the safety of children;

c) the Project's impact on panoramic water and mountain views;

d) the Project's impact on the environment;

e) the extent of First Nations consultation regarding the Project; and

f) the availability of alternatives to the Project.

[19] These concerns are all presented generically in the letter from Abbcar's counsel. There is no explanation of how these concerns impact the corporate petitioner's interests directly.

[20] Abbcar's lawyer also attended and spoke at both the Board and Council hearings at which the HPA Application in respect of the Project was considered, as is discussed further below. However, counsel's remarks were also generic and did not include any details regarding how the Project might prejudice his corporate client specifically.

Board Hearing and Decision

[21] The Board considered whether to grant a development permit in respect of the Project as proposed in the HPA Application at a virtual meeting that took place on March 22, 2021. Members of the public were in attendance, including counsel for Abbcar. He made submissions alleging that a reasonable apprehension of bias had been raised by the process employed by the City and Board to assess the Project. Abbcar's counsel also requested the Board to adjourn its hearing to address this issue, but his request went unheeded.

[22] After several hours of submissions, the two voting members of the Board in attendance granted the Permit on the terms and conditions recommended by the Staff Committee. The Board's decision to issue the Permit was confirmed by letter dated March 24, 2021 addressed to HPA, which stated the following (in part):

> Your application was considered by the Development Permit Board at its meeting of March 22, 2021, and it was resolved THAT the Board APPROVE Development Application No. DP-2020-00849 submitted, the plans and information forming a part thereof, thereby permitting the development of an 11 storey, mixed use building consisting of an elementary school, a child care and non-market residential units over the existing community centre and underground parking levels, subject to the following conditions and approval of a text amendment by Council …

[23] The letter also included an appendix setting out a number of conditions that must be met prior to the actual issuance of the Permit. Of particular note for these proceedings are the following three conditions:

a) the pending amendment to the *CD-1 By-law* can and does become enacted by City Council;

b) the proposed form of development can and does become approved by City Council; and

c) provision of a finalized Transportation Assessment and Management Study (TAMS).

Vancouver City Council Hearing and Decision

[24] On May 4, 2021, the City's General Manager of Planning, Urban Design and Sustainability delivered a "Referral Report" to Council on the subject of the proposed zoning by-law amendments in relation to the 480 Broughton Street Project. The Referral Report recommended that HPA's application for the amendments necessary to increase the Project building's allowable floor area, height, and dwelling unit count be referred to a public hearing, and that the application be approved. The Referral Report's conclusion stated the following:

> Assessment of proposed amendments to CD-1 (365) has concluded that the changes to residential floor area, number of social housing units, and building height are supported. If approved, this application would make a contribution to the achievement of key housing goals outlined in the *Housing Vancouver Strategy.*
>
> The General Manager of Planning, Urban Design and Sustainability recommends that the rezoning application be referred to a public hearing with a recommendation that, subject to the public hearing, the rezoning application be approved in principle, subject to the applicant fulfilling the conditions of approval in Appendix B.

[25] Council conducted a public hearing at which HPA's rezoning application in relation to the Project was considered on June 29 and 30, 2021. Council heard presentations from City Staff and members of the public, one of whom was counsel for Abbcar. He asserted that the City's procedure for assessing the Project continued to suffer from procedural unfairness, and suggested that the hearing be adjourned. Council proceeded regardless, debated the matter, and then voted unanimously in favour of a Motion containing the following elements:

a) approval in principle of HPA's application to amend the relevant by-laws to allow for an increase to the Project floor area, dwelling unit count, and height of the proposed 480 Broughton Street building;

b) approval in principle of the Project's form of development;

c) subjecting these approvals to the conditions contained in Appendix B of the Referral Report; and

d) the addition of a condition that HPA be required to provide a finalized Transportation Assessment and Management Study (TAMS) report that includes consideration of measures such as the School Streets program and the Climate Emergency Action Plan's active transportation objectives as well as other options such as raised street bumps or street bulges.

Abbcar's Petition

[26] On June 15, 2021, Abbcar filed the present petition with the Court to challenge the Board's March 22, 2021 decision to grant the Permit. It asks the Court to quash both the Board's decision and the Permit, and to direct the Board to reconsider the development permit application for the Project.

[27] Abbcar's petition was amended on October 4, 2021 to add a challenge to the Motion approved by Council on June 30, 2021. Further to the amendment, the petition now seeks an order that the Motion be quashed or set aside as well.

[28] The petition was heard on November 18 and 19, 2021. As noted earlier, Abbcar's supporting evidence consists of two affidavits made by a legal assistant employed by Abbcar's counsel. The City's responding evidence consists of two affidavits made by a municipal project facilitator employed in the City's Development, Buildings and Licensing Department, and one affidavit made by a City paralegal. The parties also tendered an agreed statement of facts.

ISSUES

[29] Adjudication of this petition requires consideration of the following four issues raised by Abbcar to challenge the City's Permit and the Motion:

a) was the City's process for assessing and approving the Project procedurally unfair because of a reasonable apprehension of bias?

b) was the Board's hearing procedurally unfair because it proceeded in the absence of disclosure of a draft transportation study in relation to the Project?

c) was Council's hearing procedurally unfair because the City's Mayor limited the scope of discussion regarding the Project?

d) was the Board's decision substantively unreasonable because the Board issued the Permit prior to and conditional upon Council approval of the Project?

[30] These questions will be addressed in turn after consideration of two preliminary issues: (1) Abbcar's standing; and (2) the applicable standard of review.

ANALYSIS

Abbcar's Standing

[31] The parties took the position that Abbcar's standing is not an issue in this proceeding. I am not so certain. As noted earlier, the petitioner filed no evidence from an authorized representative of Abbcar to explain the nature of this corporation, its status, and its interest in the Project and the City's decisions which Abbcar wants the Court to quash. This is a troubling lacuna as standing is always a threshold issue in judicial review proceedings. Only a petitioner who can either demonstrate private interest standing or who can persuade the Court to grant public interest standing will be entitled to seek judicial review of administrative decisions (see, for example: *Gonzales Hill Preservation Society v. Victoria (City) Board of Variance,* 2021 BCSC 2091 at paras. 53 to 88).

[32] That said, in the absence of any objection by the City, I am prepared to accept counsel for Abbcar's position that his client has the requisite private interest standing to advance this judicial review application in its capacity as the owner of a residential strata unit in a building that is in close proximity to the Project lands. Furthermore, in my view it would not be in the interest of justice to dismiss this particular proceeding summarily for lack of standing after having heard full submissions on Abbcar's petition, which revealed that it does raise arguable issues.

Standard of Review

[33] There is no dispute regarding the standard of review that applies to the adjudication of the four issues raised by Abbcar in this petition.

[34] With respect to Abbcar's three procedural fairness issues, the standard is correctness, sometimes termed "fairness". Practically speaking, this means that the

process undertaken by administrative decision-makers either complies with the duty of fairness or it does not, and no deference is afforded to their procedural choices or decisions: *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission),* 2021 BCCA 67 at para. 57. A non-deferential review of the procedure employed by the City, the Board, and Council in respect of the Project will therefore be conducted.

[35] On the other hand, the substantive issue raised by Abbcar regarding the validity of the Board's decision in respect of the Permit is subject to a standard of reasonableness. This flows from the Supreme Court of Canada's pronouncement in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 [*Vavilov*] at paras. 16 and 17 that reasonableness review is presumed in respect of substantive challenges to administrative decisions. This presumption is only rebutted in two circumstances: (1) if the legislator has prescribed the standard of review, or (2) if rule of law considerations require a correctness standard to be applied. Neither of these are present in the case at bar. Accordingly, a deferential review of the Board's substantive decision to issue the Permit will be conducted on a standard of reasonableness.

Issue #1: The City's Process for Assessing and Approving the Project

Abbcar's Position on Issue #1

[36] Abbcar submits first that the City's process for assessing and approving the Project suffers from a fatal procedural flaw because no specific measures were implemented to manage the City's inherent conflict of interest arising from the City's ownership of the Project. Instead, the City simply followed its standard process for adjudicating development permit applications that are submitted by independent individuals and entities who have no financial or political ties to the City. In addition, Abbcar notes that on November 25, 2020, Council adopted a resolution authorizing the General Manager of Real Estate and Facilities Management, in consultation with the Director of Legal Services, to take "all steps necessary to deliver" the Project.

[37] Abbcar says that these facts demonstrate that the City violated the natural justice principle of *nemo judex in propria sua causa debet esse* (no one should be the judge in his or her own cause), thereby justifying an order quashing the Permit and the Motion. Furthermore, Abbcar also argues that the Court of Appeal's judgment in *Community Association of New Yaletown v. Vancouver (City),* 2015 BCCA 227 [*CANY*] at paras. 64 and 65 stands for the proposition that the City must actively manage its conflict in respect of the Project. While Abbcar cautions the Court not to dictate what specific conflict management measures should be taken, its counsel made this suggestion in his March 2, 2021 letter to the City's legal department:

> Some of our concerns might be ameliorated by the appointment of a person (or committee) who is independent of the City and could advise the [Board] free from any suggestion of bias or risk to tenure. (To this end, the status and function of Royal Commissioners provide some useful guidance.).

The City's Position on Issue #1

[38] In response to Abbcar's argument, the City submits that the assessment and approval process that was employed in respect of the Project is authorized by the *Vancouver Charter,* S.B.C. 1953, c. 55 and its duly enacted by-laws. In adopting that legislation, the Legislature understood that there would be circumstances where the City would be required to issue itself development permits and to rezone properties that it owns. In the face of this legislative authorization, the City says that it is not open to Abbcar to argue that the City has contravened the "*nemo judex*" rule against bias.

[39] The City also submits that the presumption of regularity applies to show that the members of the Board and Council considered the matters before them with an open mind, and that they were mindful of the need to separate the City's role as landowner from that of regulator.

Discussion and Conclusion regarding Issue #1

[40] For the purpose of adjudicating this specific issue, there is no dispute that the process followed by the City to assess the HPA Application in respect of the Project

and the approvals granted by the Board and Council in the form of the Permit and the Motion complied with the legislative framework prescribed by the *Vancouver Charter,* the *Zoning and Development By-law, No. 3575,* and the *Development Permit Board and Advisory Panel Bylaw, No. 5869*. There is also no issue that ss. 145(2), 190(1), 193, and 204(j)(vi) of the *Vancouver Charter* empower the City to acquire and develop real property for commercial, industrial, or social purposes, including housing and public education. The parties further agree that the standard development permit process that applies when such matters are referred to the Board (summarized in affidavit evidence accepted by the Court of Appeal in its reasons for judgment in *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City),* 2021 BCCA 160 [*Beedie*] at para. 6) was followed in this case. The only question is whether the fact that no "special steps" were taken to manage the City's alleged inherent conflict in relation to its Project constitutes a denial of procedural fairness that invalidates the Permit and the Motion.

[41] In my view, it does not. In the absence of actual evidence of bias by City officials, it is not procedurally unfair for the City to adjudicate a development permit and a rezoning application sought by the City using its standard assessment and approval procedure authorized by legislation. Indeed, it seems to me that deviation from the ordinary procedure when approval is sought for a City development may actually increase the risk of unfairness to the public as an identical project may then be subject to different degrees of scrutiny simply because of the identity of the proponent.

[42] In any event, I agree with the City that the statutory scheme which authorizes the review procedure in issue implicitly contemplates its use in respect of municipal development projects. This was effectively noted by our Court of Appeal in *CANY* at paras. 64 and 65 where Chief Justice Bauman wrote that "the statutory schemes are such that there will be occasions where a municipality's business interests potentially conflict with its legislative interests", and that "there is nothing wrong or sinister about such conflicts, which are inherent in the statutory scheme." This statutory scheme prevails over any common law notions of bias and conflict of

interest (*Raincoast Conservation Foundation v. Canada (Attorney General),* 2019 FCA 224 at para. 34, citing *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch),* [2001] 2 S.C.R. 781 at paras. 42 and 43), and precludes Abbcar from successfully impugning the Permit and the Motion based solely on allegations of impartiality inherent in the decision-making process.

[43] Furthermore, I do not agree with Abbcar that the Court of Appeal in *CANY* established a binding principle that the City cannot fairly assess and approve its own Projects unless it imposes additional procedural safeguards. The petitioner in *CANY* did not raise a structural bias argument akin to the one advanced by Abbcar and therefore this issue was not before the Court of Appeal in that case. Furthermore, Chief Justice Bauman's reasons for judgment do not prescribe any specific requirements for City officials who are evaluating City development projects; rather, the reasons simply caution municipalities to ensure that when their business interests conflict with their legislative interests regarding land use and development, they must not let the former overwhelm the latter:

> [64] The statutory schemes creating municipal corporations contemplate a municipality wearing many hats. Sometimes a municipality will wear several hats in the implementation of a single plan, for example when it exercises its business functions to acquire a property and then its legislative functions when regulating the development and use of that property. The statutory schemes are such that there will be occasions when a municipality's business interests potentially conflict with its legislative interests.
>
> [65] Good business may not serve the same interests as good land use planning and development control. There is nothing wrong or sinister about such conflicts, which are inherent in the statutory scheme. What is required of a municipality in such situations is to ensure that it manages the conflict, that it not let its business interests overwhelm its duty to make good law. The City must carefully separate the business and legislative and ensure it complies with the statutory requirements (and any quasi-judicial duties that may arise) for the exercise of each power; it must not allow the exercise of its business powers to fetter the discretion it must have when exercising its legislative powers (*Pacific National Investments Ltd*. v. *Victoria (City)*, [2000] 2 S.C.R. 919 at para. 65).

[44] There is no evidence that the mischief identified by the Court of Appeal in para. 65 of *CANY* materialized in the case at bar. While Abbcar points to the wording

of a sentence contained within the November 25, 2020 Council resolution as being indicative of the City's bias in favour of the Project, in my view, this is a simple instruction from Council to two municipal officials to move the Project planning process forward. Paraphrasing the well established test for reasonable apprehension of bias stated by the Supreme Court of Canada in *Committee for Justice and Liberty et al. v. National Energy Board et al.,* [1978] 1 S.C.R. 369 at 394, an informed person, viewing the matter realistically and practically, would not think that this resolution renders it more likely than not that the Board and Council would be unable to fairly consider whether the Project should ultimately be given approvals in the form of the Permit and the Motion.

[45] Finally, I also agree with the City that, in the absence of actual evidence of bias, the presumption of regularity which holds that public officials will act fairly and impartially in discharging their adjudicative responsibilities applies: *University of British Columbia v. University of British Columbia Faculty Association,* 2007 BCCA 201 at para. 84. In the face of this unrebutted presumption, Abbcar's bias argument must be dismissed.

Issue #2: Non-Disclosure of Transportation Study Before the Board

Abbcar's Position on Issue #2

[46] Abbcar's second procedural fairness argument arises from the fact that a draft Transportation Assessment and Management Study ("TAMS") in relation to the Project was not disclosed prior to the Board's meeting and decision regarding the Permit. The draft TAMS was not put before the Board, although it was considered by the Staff Committee that met several weeks before the March 22, 2021 Board meeting. Counsel for Abbcar had requested a copy of the draft TAMS from the City on March 10, 2021, but this request was refused. The draft TAMS was subsequently published by the City some time after the Board granted the Permit.

[47] Abbcar acknowledges that the extent of disclosure obligations owed by the Board to meet its duty of procedural fairness when considering whether to issue a development permit has yet to be authoritatively considered by the courts in British

Columbia. However, Abbcar urges that it should be similar to what the Court of Appeal stated is required for public hearings in relation to zoning by-laws in *Pitt Polder Preservation Society v. Pitt Meadows (District),* 2000 BCCA 415 [*Pitt Polder*] at para. 54. In that case, Madam Justice Rowles wrote that "reports and other documents that are material to the approval, amendment or rejection of the bylaws by local government" must be disclosed "in order to provide the opportunity for informed, thoughtful, and rational presentations".

[48] Abbcar therefore submits that the draft TAMS ought to have been disclosed prior to the Board hearing so that the public in attendance could make informed, thoughtful, and rational comments on whether the Project should be granted a development permit. Abbcar says that the Project's impact on traffic congestion, and the attendant safety and environmental concerns, was one of the issues most commonly cited by those members of the public opposed to the Project. They should have had an opportunity to see the draft TAMS and obtain advice, from experts if necessary, to understand and respond to its contents. Abbcar says further that the relevance of the draft TAMS is demonstrated by the fact that both the Board and Council ultimately imposed as a condition for issuing the Permit and amending the by-laws that a finalized TAMS be prepared and produced.

The City's Position on Issue #2

[49] The City disagrees that the lack of disclosure of the draft TAMS in advance of the Board meeting constitutes a denial of procedural fairness. It also says that Abbcar is wrong to urge the Court to import the *Pitt Polder* standard for disclosure of documents at rezoning public hearings and incorporate them into the context of Board development permit hearings. While the former impact landowners' rights to use their land, the latter involve simply a consideration of whether a proposed development meets municipal policies and regulations, and what conditions must be satisfied in order to do so. Furthermore, the City notes that in *CANY*, the Court of Appeal held that even when a municipal body conducts a rezoning public hearing, only those materials that the decision-maker will actually consider need be disclosed.

[50] In this case, the draft TAMS was not before the Board when it made its decision on the Permit. Further, the City says that a TAMS simply provides information regarding changes to traffic patterns as a result of the development so that the City can decide what measures ought to be taken to address these changes. The TAMS does not dictate the form of development or whether a development permit should be issued. The City also notes that it was the practice of the Board not to consider the underlying technical reports or to disclose those reports to the public, which the City argues was not unreasonable in light of the type of decision the Board had to make.

Discussion and Conclusion regarding Issue #2

[51] As noted by both parties, the only binding authority that appears to have considered the nature of the Board's duty of procedural fairness in relation to development permits is the Court of Appeal's recent decision in *Beedie*. The issue in that case was whether a judicial review application of a Board decision to deny a development permit should be heard in chambers or converted to a trial. At para. 84 of the reasons for judgment, Madam Justice Newbury, for the Court, wrote:

> The chambers judge did not consider each of these [*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817] factors individually, but it seems clear that the nature of the impugned decision and the statutory scheme in this case are complex and multi-staged, and that they involve high stakes for applicants for development permits. As we have seen, this court has characterized a discretionary power to grant or refuse a permit or license as a *quasi-judicial* function (as opposed to a *policy* one) that must be exercised judicially by municipal authorities, and using objective standards set out in legislation: *Prince George (City) v. Payne*, [1978] 1 S.C.R. 458 at 463*, per* Mr. Justice Dickson, as he then was; and *Westfair Foods Ltd. v. Saanich* [*(District)* (1997), 49 B.C.L.R. (3d) 299 (C.A.)] at para. 17, *per* Mr. Justice Finch, as he then was.

[52] The Court of Appeal in *Beedie* did not, however, prescribe the actual scope of disclosure that a Board must provide in order to meet its procedural fairness obligations. Accordingly, I am inclined to agree with the City that given the nature of the decision the Board was required to make, that scope need not be broader than the disclosure obligations that apply to a municipal body that is conducting a rezoning hearing. In *CANY,* the Court of Appeal held that those obligations are

limited to documents that will actually be considered by the decision-maker, and that they are not akin to what is required of a party to a civil litigation discovery:

> [88] The City submits that, interpreted in light of these authorities, procedural fairness requires it to disclose, before a public hearing triggered by s. 566 of the *Vancouver Charter*, the materials that the City Council will consider when deciding whether to enact the rezoning by-law at issue. It says that such disclosure will ensure citizens can make informed, thoughtful and rational comments on the by-law at the public hearing. I agree.
>
> […]
>
> [91] The City complied with this by-law in this case. There is a long line of authority to the effect that a municipality will generally meet its disclosure obligations if, as By-law 9756 requires, it discloses everything that was or will be considered by council (see e.g., *Fisher Road; Hubbard; Eddington; Eadie; Pollard v. Surrey (District)* (1993), 76 B.C.L.R. (2d) 292 at para 23 (C.A.); *Eaton v. Vancouver (City)*, 2008 BCSC 1080 at paras. 41-42).
>
> [92] To the extent the chambers judge or CANY suggest a much broader scope of disclosure is required, I would respectfully suggest that they are in effect positing disclosure or discovery in a civil litigation context. Indeed, the judge went as far as to say that "the public was entitled to an explanation that was more like what the court was given in this proceeding" (at para. 123). That level of disclosure simply cannot be supported in the context of s. 566 public hearings.

[53] In the case at bar, the draft TAMS was not before the Board. Furthermore, one of the conditions attached to the Permit was the requirement that a finalized TAMS be provided, effectively confirming that the draft TAMS was not considered by the Board in making its decision. Accordingly, the fact that the draft TAMS was not disclosed to Abbcar prior to the Board meeting is not a denial of procedural fairness. This ground for challenging the Permit is therefore dismissed.

Issue #3: Scope of Discussion of the Project Before Council

Abbcar's Position on Issue #3

[54] Abbcar's third and final procedural fairness argument concerns the Council meeting that took place on June 29 and 30, 2021. That meeting was chaired by the City's Mayor who moderated the hearing attended by members of the public. At its conclusion, Council unanimously passed the Motion which approved amending the necessary by-laws to allow for the size of the Project building as proposed, and approved the form of development of the Project building as proposed.

[55] Abbcar alleges that the City's Mayor, in breach of principles of natural justice, refused to allow public participants to speak to the Project's proposed form of development, and restricted the discussion to the proposed by-law amendments only. In support of this assertion, Abbcar highlights the following remarks made by the City's Mayor set out in the transcripts of the public hearing:

> [June 29, 2021 Transcript]
>
> K. STEWART: -- [indiscernible] okay. Thank you. Just also a reminder that, you know, this is a quasi-judicial process and we're only supposed to consider the application that's in -- in front of us today, which is not to -- whether or not we -- about the school at Coal Harbour, it's about the extra height for the childcare in-housing.
>
> So, you know, so that is the rules here and so I'll just -- just remind you of that as you have your extra three minutes is that, again, we're not debating whether or not the school goes ahead, that has been decided. It's whether or not we give the extra height in order to allow the childcare and in-housing.
>
> […]
>
> K. STEWART: Speaker, I just want to interrupt you there for a second. So as I explained to previous participants in this, this is a quasi-judicial hearing where we have pretty strict guidelines laid out in the Vancouver Charter. And so what we're evaluating tonight is the additional height to this project, the already approved school, so I need you to limit your comments to the additional height we need for the childcare and housing portion of this. So not to really re-prosecute the case from the previous approval, but to really focus on the extra height that would accommodate the social housing and the childcare. Thank you.
>
> […]
>
> **********
>
> [June 30, 2021 Transcript]
>
> K. STEWART: … Speakers will have five minutes to make their comments and should limit their comments to the Mayor to the report being considered….
>
> […]
>
> We're in a public hearing. So we're a quasi-judicial body this evening meaning that council is only to consider the merits of the rezoning application. ...

[56] Abbcar submits that this constitutes a denial of procedural fairness that warrants being sanctioned by an order quashing Council's Motion.

The City's Position on Issue #3

[57] The City denies that the Mayor in fact prevented any member of the public from speaking to the Project's form of development, as Abbcar alleges.

[58] In support of its position, the City contextualizes the Mayor's June 29, 2021 remarks by noting that they were made after members of the public had made lengthy submissions regarding traffic issues created by the school. The speakers were not attempting to address the Project's form of development, but were raising issues in relation to traffic and approval of the school, which was already permitted by the existing zoning. The City says that the Mayor was simply trying to manage the public input so as to not re-litigate previous approvals.

[59] As for the Mayor's remarks made at the outset of the June 30, 2021 continuation of the hearing, they were a reminder to the speakers that comments should be limited to the report and rezoning application before Council. As the Project's form of development was part of the report and integral to the application for rezoning, these remarks cannot be seen as restricting the public's ability to debate the form of development.

[60] The City also notes that numerous speakers were heard over two nights, and that they were given ample opportunity to address the proposed zoning amendments and the form of development. None of these speakers were in fact denied the opportunity to make submissions regarding the proposed form of development.

Discussion and Conclusion regarding Issue #3

[61] As noted by counsel for Abbcar, s. 566 of the *Vancouver Charter* requires the City to hold a public hearing before amending a zoning by-law. Further, s. 566(4) provides that "[a]t the hearing all persons who deem themselves affected by the proposed by-law shall be afforded the opportunity to be heard in matters contained in the proposed by-law, and the hearing may be adjourned from time to time". Section 13.14(a) of the City's *Procedure By-law, No. 12577* imposes upon the Chair

of these hearings the obligation to "ensure that speakers limit their remarks to matters related to the proposed by-law".

[62] Having reviewed the transcripts of the June 29 and 30, 2021 public hearing before Council, I am satisfied that these statutory requirements were respected. I am also not persuaded that the Mayor's remarks, when appropriately contextualized, demonstrate that members of the public were denied the opportunity to comment on the issues that were properly before Council, including the Project's form of development.

[63] Furthermore, there is no evidence in the record that Abbcar intended to make any specific submissions to Council regarding the Project's form of development but was prevented from doing so by the City's Mayor. To the contrary, counsel for Abbcar was permitted to address Council and elected to only make generic submissions alleging procedural unfairness. That included counsel's statement that:

> I gather that there's been a number of times where speakers have sought to raise issues and concerns with the development generally and those speakers have been shut down because it didn't necessarily directly deal with the by-law at question.

However, it is important to note that Abbcar has neither sought nor obtained public interest standing to bring this judicial review application. Accordingly, Abbcar is not in a position to advance procedural fairness arguments on behalf of others.

[64] As Abbcar has not substantiated its allegation that the Mayor's comments denied Abbcar's right to be heard at the Council meeting, this argument must be rejected as well.

Issue #4: Conditional Approval of Development by the Board

Abbcar's Position on Issue #4

[65] Lastly, Abbcar argues in the alternative that if the Board complied with its duty of procedural fairness, the Board's decision to grant the Permit with conditions must nevertheless be quashed because it is substantively unreasonable. That unreasonableness stems from the fact that the Permit was issued on March 22,

2021, over three months prior to Council's approval of the Project's form of development on June 30, 2021. Abbcar argues that this was contrary to the legislative framework that applies to the Project as it is situated within a CD-1 (Comprehensive Development) District.

[66] That legislative framework was established by the City through the authority bestowed upon it by s. 565(1)(f) of the *Vancouver Charter*, as follows:

> Zoning by-law
>
> 565(1) The Council may make by-laws
>
> […]
>
> (f) designating districts or zones in which there shall be no uniform regulations and in which any person wishing to carry out development must submit such plans and specifications as may be required by the Director of Planning and obtain the approval of Council to the form of development, or in which any person wishing to carry out development must comply with regulations and guidelines set out in a development plan or official development plan;
>
> […]

[67] Under this authority, Council has enacted the CD-1 (Comprehensive Development) District Schedule ("CD-1 District Schedule"), which is a schedule to the *Zoning and Development By-Law, No. 3575,* and which expressly incorporates the *CD-1 By-Law* by reference. Section 1.1 of the CD-1 District Schedule provides:

> Where an area is zoned CD-1 (Comprehensive Development) District and Council has approved the form of development, the Development Permit Board may approve the issuance of permits for the uses listed in the by-law designating the district, subject to such conditions as it may decide, provided however:
>
> (a) the development is consistent with the intent and purpose of this by-law and any applicable official development plan; and
>
> (b) legal instruments are provided, where necessary, to ensure that all features related to each individual development are used, operated and maintained in accordance with the development as approved.
>
> [Emphasis added.]

[68] Abbcar says that these words clearly and unequivocally remove from the Board any discretion to allow permitted development within the CD-1 District Schedule absent Council's prior approval of the form of development.

[69] That said, Abbcar acknowledges that the Board has the authority to issue conditional permits, and that the Permit in the case at bar was issued with the condition that the proposed form of development and the required by-law modification be subsequently approved by Council. However, Abbcar does not accept that the inclusion of this condition suffices to render the Board's permitting decision reasonable.

The City's Position on Issue #4

[70] The City agrees with Abbcar that s. 1.1 of the CD-1 District Schedule forbids the Board from approving the issuance of a development permit until the form of development is approved by Council. However, the City says that the Board did not actually "approve the issuance of a permit"; rather, the Board stated that if certain conditions are met, including approval of the form of development by Council, then a permit will be issued. The Board's decision therefore complies with the intent of s. 1.1 of the CD-1 District Schedule. Accordingly, the City argues that the Board's decision to conditionally issue the Permit falls within the range of possible conclusions that was open to the Board.

Discussion and Conclusion regarding Issue #4

[71] Abbcar's challenge to the Board's decision in relation to the Permit is fundamentally a "*vires* argument". Specifically, it is an assertion that the Board exceeded its statutory authority when it issued a development permit for the Project in advance of and conditional on Council's approval of the form of development. Abbcar says that the Board's decision is therefore invalid, or *ultra vires.*

[72] In *1120732 B.C. Ltd. v. Whistler (Resort Municipality),* 2020 BCCA 101 [*1120732*] at paras. 33 to 46, the Court of Appeal addressed the question of how such municipal law *vires* arguments are to be adjudicated within the judicial review framework established by the Supreme Court of Canada in *Vavilov,* particularly when a municipality has not provided express reasons to explain its impugned actions. Essentially, it held that reviewing courts are to consider whether there is a reasonable interpretation of the municipality's enabling legislation which would

authorize the act or decision that is being challenged. If so, the court is to defer to the municipality and should not interfere.

[73] In *1120732,* the issue was whether a municipality could validly enact a particular zoning amendment bylaw. No reasons were provided by the municipal council to explain its apparent view that its statutory authority was sufficient to enact the bylaw in question. Mr. Justice Tysoe explained the analytical process that must then be used to conduct such a judicial review at paras. 80, 84, and 88 of *1120732*:

> [80] I turn now to the central question in determining whether the Zoning Amendment Bylaw should be set aside. Was it unreasonable for the Municipality's council to implicitly conclude that s. 479 of the *Local Government Act*[, R.S.B.C. 2015, c. 1] authorized it to adopt the Zoning Amendment Bylaw?
>
> […]
>
> [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.
>
> […]
>
> [88] As there were at least three ways in which the Municipality's council could have reasonably concluded that s. 479 gave it the power to adopt the Zoning Amendment Bylaw and the reasonableness of the decision to adopt the Bylaw is not being otherwise challenged, it has not been shown that the council's decision to enact the Bylaw was unreasonable. Hence, the council's decision should not be disturbed on judicial review.

[74] This approach was followed by this Court in *V.I.T. Estates Ltd. v. New Westminster (City),* 2021 BCSC 573 [*V.I.T. Estates*], a judicial review application in which the petitioners were also arguing that certain municipal bylaws were *ultra vires.* After reviewing the Court of Appeal's guidance set out in *1120732,* Mr. Justice Saunders formulated the issue before him as follows:

> [47] Considering all of the above, and, in particular, that *Vavilov* expanded the category of municipal council decisions that are subject to a deferential

> reasonableness standard to include a council's implicit consideration of a bylaw as being *intra vires* their delegated statutory zoning power, the primary question before me is this: Was the City's interpretation of s. 481.1 of the [*Local Government Act*] as including the power to restrict the form of tenure of the Six Buildings in perpetuity to residential rental tenure, through Bylaw 8123, one that no reasonable municipality could have made?

[75] Turning to the case at bar, I will also follow the analytical framework set out by our Court of Appeal in *1120732*. In particular, as the Board did not explain why it felt that it had the statutory authority to issue the conditional Permit when it did, I will examine the Board's decision in light of the relevant constraints on the Board in order to determine whether its permitting decision was reasonable: *Vavilov,* at para. 138. I will also paraphrase the words penned by Saunders J. in *V.I.T. Estates* to set out the question that must be determined to adjudicate Abbcar's *ultra vires* argument: Was the Board's apparent interpretation of s. 1.1 of the CD-1 District Schedule as including the power to issue a development permit for the Project prior to and conditional upon Council approval of the form of development one that no reasonable municipality could have made?

[76] In my view, given the deference that I am required to afford to the Board, this question must be answered in the negative.

[77] In particular, the wording of s. 1.1 of the CD-1 District Schedule reveals that two key elements of the legislator's intent in adopting this provision are to ensure that the Board: (1) only issues development permits for projects in respect of which Council approves the form of development; and (2) has the discretion to impose conditions on the project. This wording is sufficiently broad to bear an interpretation which allows the Board to authorize development permits in advance of Council approval of the form of development, so long as such authorization is conditional upon Council ultimately bestowing that approval. Provided there is no suggestion that such conditional development permits take effect prior to the requisite approval from Council, the Board can issue them without running afoul of the legislator's intent with respect to s. 1.1 of the CD-1 District Schedule.

[78] Accordingly, I conclude that the Board's decision to issue the Permit as it did is a reasonable one that it had the statutory authority to make. There is no basis for me to set it aside on judicial review.

DISPOSITION

[79] The petition is dismissed with costs payable by Abbcar to the City on Scale B.

"Brongers J."