IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Armstrong v. District of North Saanich,* 2024 BCSC 1844

Date: 20241007
Docket: S233677
Registry: Vancouver

Between:

Robert Douglas Armstrong and Margaret Jean Latham

Petitioners

And

District of North Saanich, James Grier, and Mary Jean Alger

Respondents

- and -

Docket: S234489
Registry: Vancouver

Between:

James Grier and Mary Jean Alger

Petitioners

And

Robert Douglas Armstrong and Margaret Jean Latham

Respondents

Before: The Honourable Justice Greenwood

Reasons for Judgment

Counsel for James Grier and Mary Jean Alger:	N. Carfra
Counsel for Robert Armstrong and Margaret Lathan:	N. Baker F. Lin
Counsel for the District of North Saanich:	S. Dubinsky
Place and Date of Hearing:	Vancouver, B.C. May 9-10, 2024
Place and Date of Judgment:	Vancouver, B.C. October 7, 2024

Overview

[1] There are two separate but related petitions before the Court, both of which concern stairs built on an easement that facilitates access to the waterfront of Saanich inlet in the District of North Saanich. The stairs were built without a permit, but the District of Saanich subsequently issued a permit confirming that they met all environmental and regulatory requirements and were therefore in compliance with the applicable regulations.

[2] James Grier and Mary Jean Alger are the beneficial owners of the easement and arranged for construction of the stairs. They seek a declaration that the easement included the right to build the stairs.

[3] The easement is located on the property of their neighbours, Robert Armstrong and Margaret Latham, who are opposed to the stairs. Mr. Armstrong and Ms. Latham have brought a petition for judicial review, seeking to set aside the decision of the District of Saanich to process and issue permits for the stairs. They are also asking the Court for an order that the stairs be removed.

[4] For the reasons that follow, I have concluded that: (1) the easement granted in this case included the right to build a staircase as a necessary ancillary right, (2) the District's decision to process the permit application and issue a permit was not unreasonable, and (3) there is no proper basis upon which to grant the relief sought by Mr. Armstrong and Ms. Latham in the context of judicial review.

Background

[5] Robert Armstrong and Margaret Latham [the "Armstrong petitioners" or "Armstrong respondents"] purchased waterfront property located at 11410 Chalet Road in 2018. At the time of purchase, there was an easement registered on title over a 25-metre long strip of land running along their western property line. The easement granted the owners and occupiers of a neighbouring property located at 11416 Chalet Road the right to travel over the identified strip of land for the purpose of access to and from their property, on foot.

[6] James Grier and Mary Jean Alger [the “Grier petitioners” or “Grier respondents”] are the owners of the 11416 Chalet Road property which is immediately to the North of the 11410 Chalet Road property. Their property is not waterfront property. The strip of land covered by the easement extends from their property to the beach below both properties.

[7] In 2021, the Grier petitioners had a staircase built within the easement area. No notice was provided to the Armstrong respondents, and the Grier petitioners did not request approval from them in advance.

[8] It is common ground that a development permit, building permit and occupancy certificate were required for the staircase. No approval or permit was sought prior to construction. After a series of communications with both parties, the District of North Saanich [“the District”] ultimately issued permits to the Grier respondents almost two years after the stairs were built.

[9] The Armstrong respondents objected to the stairs, and to the issuance of permits. Their petition for judicial review seeks an order setting aside the decision to issue a permit, and an order that the “Grier respondents remove all works and construction they completed at 11410 Chalet Road.”

[10] The Grier petitioners, for their part, have brought a petition in this Court seeking a declaration that the stairs are “a necessary ancillary right within the easement,” and therefore may remain.

Determining the easement petition should be given priority

[11] The essence of the conflict in this case is a dispute between neighbours who own private property. While the Armstrong petitioners argue that the District’s decision to issue a permit was unreasonable, they also seek an order for removal of the stairs.

[12] There is a live issue as to whether there is any basis upon which this Court could grant the Armstrong petitioners an order for removal of the stairs, either in the context of judicial review, or by virtue of their being respondents to the Grier petition.

[13] An order that the stairs be removed would normally require an action in trespass (e.g. *Gambling v. Dykes*, 2021 BCSC 938, aff'd 2021 BCCA 434), or an application pursuant to s. 36(2)(c) of the *Property Law Act*, RSBC 1996, c 377, which provides a basis on equitable grounds for resolving disputes over encroachments and can support an order of removal brought by an owner whose land has been encroached upon (*Taylor v. Hoskin*, 2006 BCCA 39 at para. 2; *Vanziffle v. Coulter*, 2003 BCCA 350; and *Robertson v. Naramata Resorts Ltd*, 2005 BCSC 467).

[14] For present purposes, it is sufficient to observe that any jurisdiction the Court might have to order the stairs removed depends on the resolution of the issues raised in the petition brought by the Grier petitioners. If they are correct that the stairs are a necessary ancillary aspect of the easement, then there is no trespass, and no basis for a finding of encroachment that would support an order of removal.

[15] The application for judicial review will not resolve the property dispute between the parties. Even if the decision of the District were set aside, that alone would not support an order for removal of the stairs, or clarify the respective rights of the parties in so far as the easement is concerned.

I - The easement petition

Facts

[16] The Grier petitioners live at the 11416 Chalet Road property. Ms. Alger is 78 years old, and Dr. Grier is 82 years old. Ms. Alger has lived on the property since 2003 and Dr. Grier has lived there since 2013.

[17] In 2016, the former owner of the 11410 Chalet Road property granted an easement to the Grier petitioners. The easement plan registered in the land title office describes the 11416 Chalet Road property (belonging to the Grier petitioners)

as “Lot A”, and the 11410 Chalet Road property (belonging to the Armstrong respondents) as “Lot B”. Lot A is the dominant tenement and Lot B is the servient tenement in relation to the easement.

[18] Lot B is waterfront property that borders on the beach in an area referred to as Deep Cove. Lot A is directly north of lot B and is not waterfront, but the existing easement grants the owners and occupiers of Lot A the right to travel over an identified strip of Lot B that extends from the southern property line of Lot A to the end of the southern property line of Lot B where crown land begins and where the beach is located.

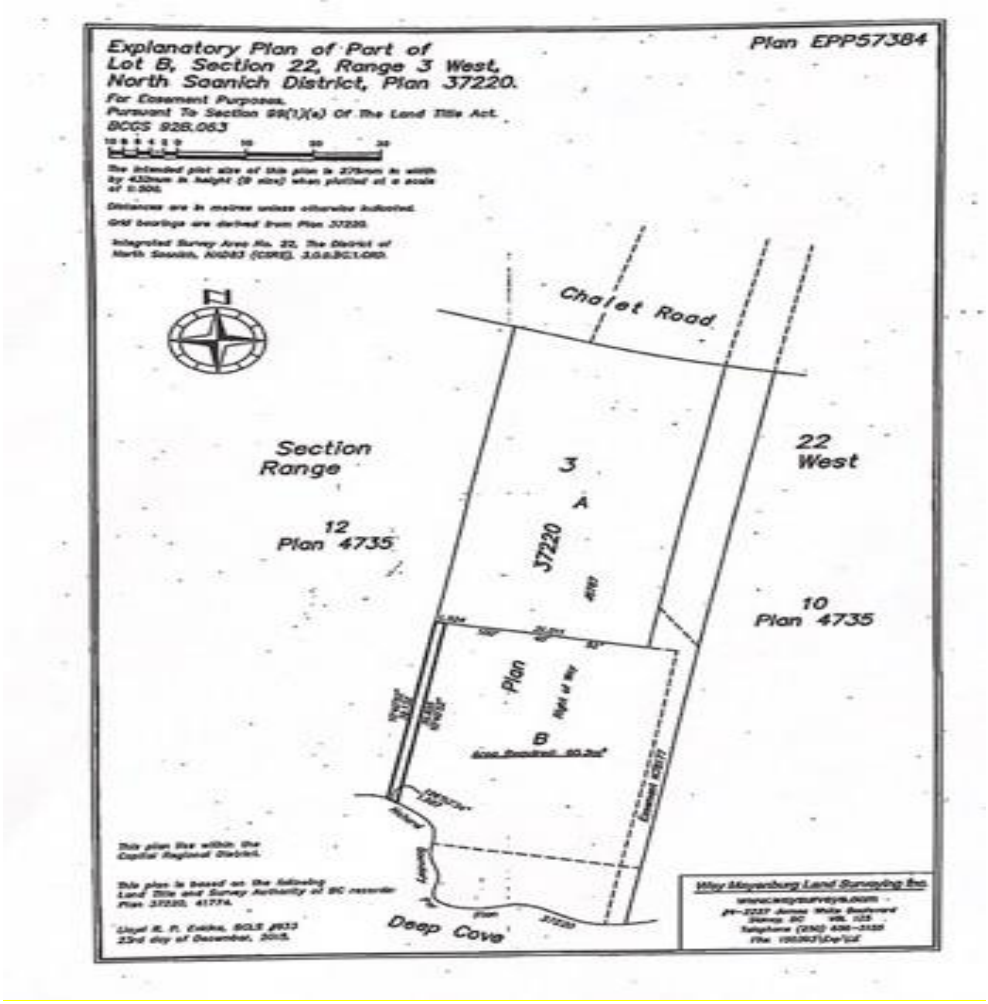
[19] The previous owner of Lot B was a woman named Wanda Hull, who was a friend of the Grier petitioners. She allowed them to access the beach by means of a different path and staircase on her property that were outside the area of the easement.

[20] Dr. Grier’s affidavit sets out the fact that the purpose of the easement was so that after Ms. Hull no longer owned lot B, Ms. Alger and Dr. Grier would continue to be able to access the beach, albeit in a different location than their previous access. Ms. Hull’s lawyers drafted the terms of the easement and she charged Ms. Alger and Dr. Grier $1.00 for the easement.

[21] The relevant portions of the easement itself read as follows:

> Whereas:
>
> …
>
> C. The Parties have agreed that the Grantor shall grant to the Grantee an easement for access over that part of Lot B shown on Reference Plan EPP57384 a copy of which is attached hereto…
>
> Grant of Easement for Access:
>
> The Grantor hereby grants in perpetuity to Grantee, and to the owners and occupiers from time to time of the Lot A, and their servants, agents and invitees, the right at all times to enter on and travel over that part of Lot B, section 22 Range 3 West, North Saanich District, Plan 37220 marked on Reference Plan EPP57384 attached hereto, for the benefit of Lot A, Section 22, Range 3 West, North Saanich District, Plan 37220, for the purpose of access to and from Lot A, on foot.[emphasis added]

[22] The reference plan diagram of lots A and B and the easement appears as follows (the easement runs along the western boundary at the bottom left of Lot B):



[23] Dr. Grier deposes that the location of the easement is such that it runs over a steep slope down to the sea, and in its unimproved state, the land cannot be safely used by anyone on foot as it is too steep and slippery.

[24] Mr. Armstrong deposes that about two thirds of the easement is not a steep slope and is sufficiently level to accommodate safe access. He says there used to be small logs embedded in the soil to facilitate travel.

[25] After the easement was granted, the Grier petitioners continued to access the beach below Lot B using the path and Ms. Hull's stairs with her permission.

[26] After Ms. Hull and the Armstrong respondents purchased Lot B, it became clear that the Grier petitioners would no longer have permission to use the same path and old stairs to the beach that they had exercised with Ms. Hull's permission. By that time, the stairs in question were in disrepair and had become unsafe.

[27] In 2021, the Grier petitioners engaged a carpenter to build a set of wooden stairs in three segments with short sections of path between them at a cost of $7,000. They did not apply for a permit which was required, and did not ask the Armstrong respondents for their permission or consent to build the stairs.

[28] Mr. Armstrong deposes that he knew about the easement when purchasing Lot B, but it was not a cause for concern because it did not authorize the construction of stairs or any other structures. If it had, they would have reconsidered the purchase. He says the stairs have interfered with his property rights in a number of ways, including reducing his privacy, creating potential liability, destroying a wooden chute, and reducing his ability to move machines or equipment down towards the shoreline to perform repair or construction work.

[29] The parties met in an effort to resolve the dispute about the stairs in August of 2022. It is clear that they discussed an agreement to allow the stairs to remain on certain conditions, but the evidence diverges when it comes to what those conditions were. Suffice to say, in the end no agreement was reached.

Position of the parties

[30] The Grier petitioners maintain that the right to build stairs was an ancillary right that was reasonably necessary to the exercise and enjoyment of the easement that was granted. They say that the purpose of the easement was to allow permanent access to the beach below Lot A, and there is no safe or practical way to do so without the stairs, which do not significantly interfere with the respondents' proprietary rights.

[31] The Armstrong respondents say that the easement is a contractual document and it does not authorize the building of any structures. Neither the express terms of the easement nor the circumstances surrounding the granting of the easement suggest an intention on the part of the grantor to allow stairs to be built. As for the doctrine of ancillary rights, their position is that while the stairs may be convenient, they are not necessary in order to use the easement.

Legal framework

[32] Easements are to be interpreted as contractual documents. The Court must determine the intent of the parties by reading the contract as a whole and giving the words used their ordinary and grammatical meaning. Surrounding circumstances will be considered, but should not "overwhelm" the words of the agreement. The wording of the instrument governs issues of interpretation unless there is an ambiguity, or the surrounding circumstances demonstrate that the parties could not have intended a particular use or interpretation (*Tessaro v. Langlois*, 2019 BCCA 95 at para. 19; *Robb v. Walker*, 2015 BCCA 117 at para. 31; and *Fallowfield v. Bourgault*, 2003 CanLii 4266 (ONCA) at para. 10).

[33] Evidence of the surrounding circumstances is generally limited to objective background facts that were either known by the parties, or reasonably ought to have been known by the parties at or before the easement or contract was entered into. (*Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633 at para 58 and *Murphy v. Huber Estate*, 2021 BCSC 1334 at paras. 11-14, aff'd 2022 BCCA 353).

[34] Easements do not give the dominant tenant exclusive or unrestricted use of a piece of land. The grant of an easement gives rise to "two sets of rights that co-exist over the easement property." The property owner may assert his or her remaining rights over the easement to the extent that they do not derogate from or interfere with the rights granted under the easement. What actions by the holder of an easement constitute substantial interference with a property owner's residual rights

depends on the circumstances (*Lotzkar v. The Owners, Strata Plan BCS2715*, 2012 BCSC 1500 at paras. 35-40, 44).

[35] Ancillary rights that are not expressly set out in an easement may arise. The grant of an easement is *prima facie* also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment (*Kasch v. Goyan*, 1993 CanLii 2291 (B.C.C.A.) at paras. 9-10 and *Fallowfield* at para. 11).

[36] Whether an easement gives rise to an ancillary right that is reasonably necessary depends on a consideration of all the relevant circumstances. (*Kasch v. Goyan*, at para. 11). The right must be necessary for the use or enjoyment of the easement, not just convenient or even reasonable (*Fallowfield*, at paras. 11 & 23).

[37] The issue of ancillary rights can be approached in two stages. The first task is to interpret the wording of the grant in the context that existed at the time it was granted. The next question is "whether there are any ancillary rights, not included in the wording of the granted easement, that are reasonably necessary for the respondents to be able to exercise their use of the easement (*Fallowfield*, at para. 19).

Analysis

What was the purpose of the easement and how should it be interpreted?

[38] I am satisfied that the clear purpose of the easement was to provide a land corridor from Lot A to the beach and the waterfront below Lot B. I base that finding on the wording of the easement, the surrounding circumstances, and the location of the easement as depicted on the diagram.

[39] The wording of the easement grants "access over that part of Lot B" identified in the diagram "for the purpose of access to and from Lot A on foot." As the diagram depicts, the easement is a narrow strip of land extending to the waterfront below Lot B. The only place to travel "over" Lot B to get to is the waterfront and beach area

below Lot B. Similarly, the only location that could be accessed by traveling over the easement “to and from Lot A” is the waterfront area. No other purpose makes sense.

[40] The Armstrong respondents argue that the easement says nothing about beach access, and its purpose is to provide access “to and from Lot A” not the beach. In my view, that narrow argument ignores the fact that the beach area is the only place to go when travelling “to and from Lot A.” This would have been obvious to the grantor and grantee at the time of the easement.

[41] The surrounding circumstances are equally clear as to the purpose of the easement. Ms. Hull and the Grier petitioners were good friends. She had been allowing them to pass over other portions of her property to access the waterfront. There would be no reason to grant the easement, other than to ensure that access to the waterfront from Lot A over Lot B would become a permanent arrangement even after Ms. Hull no longer controlled the property and was no longer in a position to grant permission.

[42] The Armstrong respondents argue that if beach access had been the intention of the grantor of the easement, then one might expect that to arise more clearly from the terms of the easement as it did in *Huber Estate*. In that case the easement included a 38 foot wide section of the grantor’s property adjacent to the lake. However, in *Huber Estate*, the beach area directly adjacent to the high-water mark of the lake was private property. In this case, the beach area below Lot B is not private property, so there would have been no necessity to include a similarly wide portion of Lot B in the easement in order for the easement owners to enjoy the beach.

[43] My conclusion that the purpose of the easement was to allow access to the beach and waterfront area does not mean there was a right to build stairs on the easement. There is clearly no express right to build any structure within the easement. If the right to build stairs was authorized at all, it can only be as an ancillary right.

Is the staircase necessary for the use and enjoyment of the easement?

[44] Based on all of the available evidence, I am satisfied that the right to put up wooden stairs is necessary for the use and enjoyment of the easement to fulfill its purpose of providing access to and from the beach area in Deep Cove.

[45] The basis on which I arrive at that conclusion is a factual conclusion that the steepness of the slope where the easement is located renders it unsafe to pass over the easement on foot without stairs, inviting potential injury, and making it practically impossible to access the waterfront as intended.

[46] The steepness of the slope is evident from a number of sources. The affidavit of Mr. Armstrong acknowledges that the topography of his property is that it slopes down toward Saanich inlet “with a steep slope along the coastline.”

[47] There are also two engineer’s reports and an arborist’s report that address the steepness of the property. An engineer’s report obtained by Mr. Armstrong shows that the elevation change from the coastline to the north portion of his property was 18 metres (29 metres if you include the driveway to Chalet road). Another engineer’s report (obtained by the Grier petitioners to support their permit application) states that the upper portion of the easement has a slope of 7 degrees but the lower portion has “a steep slope of over 20 degrees.” The arborist’s report states that the slope above the natural boundary near the shoreline “steepens to between 31% and near-vertical.”

[48] I have reviewed all of the photos that are available of the stairs and the slope that they pass over. While in places the slope is relatively gentle, it is apparent than in other places it is very steep. The easement is also very narrow, such that the option of “zig-zagging” down the easement area does not exist. I would describe the land underneath the stairs as very rough, with uneven ground, vegetation, rocks and dirt. I have no hesitation concluding it would be a safety risk to pass over the easement area in its raw state, particularly though not exclusively in the wet conditions that are so common in British Columbia.

[49] In essence, I accept the evidence that in its unimproved state, the land within the easement area could not be safely used by anyone on foot. The stairs are not merely "convenient." They are necessary to travel over the easement area safely to go to and from the waterfront and Lot A. This is not a case like *Englehart v. Holt*, 2014 BCSC 1969 at para. 134-135, where no evidence was tendered to demonstrate necessity.

[50] While it is true, as the Armstrong respondents point out, that the entire easement area is not steep, the stairs in question are built in three distinct sections and cover only those steep areas that would be otherwise difficult or impossible to travel over. Based on the photos in evidence, the small logs that provide additional traction are not in the same location as the stairs, and cover areas of the path that can be travelled over on foot without the aid of stairs. The fact that parts of the path can be travelled in an unimproved state, or with the aid of small logs, does not detract from the necessity of stairs in other areas.

[51] In *Kasch v. Goyan* (#1), a similar fact pattern arose. The owner of a summer home had access over an easement on his neighbour's property to provide access to the waterfront. He had a walkway, staircase and railing constructed. Harvey J. found the construction to be reasonably necessary to ensure that the easement could be used safely (1992 CanLii 2251 (BCSC)). In the Court of Appeal, Lambert J.A. upheld the decision on the evidence provided, but pointed out that there were gaps in the evidence related to the necessity of the particular structure that was built which he described as "a remarkably elaborate structure." He dismissed the appeal but left open the possibility that if there was evidence that an alternative and less elaborate structure would suffice, then the application could be renewed. He encouraged the parties to discuss the matter and reach an agreement.

[52] Following the Court of Appeal's decision, a renewed application was brought on the basis of new evidence that included plans and estimates for a ground level walkway. In *Kasch v. Goyan* (#2), 1997 CanLii 3898 BCSC, Thackray J. found that

the existing walkway was unnecessary and urged the parties to settle. His factual findings are relevant, and included:

a) The existing walkway was an eyesore, did not meet safety standards and would collapse if any pressure was applied;

b) The post at the bottom of the stairs was seated on a cement block that had become dislodged creating “marked instability”;

c) The steps built were “dangerous, too steep, too narrow and too loose”;

d) The “flying walkway” (a raised wooden walkway) was unnecessary and some other form of low-lying path would suffice; and

e) Mr. Goyan could access the beach without using the walkway by walking a short distance on a path around the Kasch property which did not necessitate any rock climbing.

[53] In the present case, there is no evidence that the stairs are improperly built, unsafe, or an eyesore, nor is there any evidence of an alternative structure that would suffice in the circumstances. Nor is there any alternative route to the waterfront for the Grier petitioners. I am unable to conclude based on the evidence tendered before me, that the current structure is more elaborate than required, and hence unnecessary in that sense.

[54] My reading of *Kasch v. Goyan* is that while it will always depend on the facts, construction of a stairway to facilitate safe travel over an easement has been recognized as an ancillary right.

Should concerns over potential liability limit the ancillary right?

[55] As far as potential liability is concerned, the conclusion I draw from *Jones v. Pritchard*, [1908] 1 Ch. 630 and the analysis of Harvey J. in *Kasch v. Goyan* (#1) at pp. 5-7, is that the owner of a servient tenement is generally not liable at common law for failing to repair any construction erected by the easement holder

within the area of the easement. By contrast, if the easement holder fails to keep a structure he or she builds on an easement in a safe and workable condition, he or she may be liable in negligence if an accident should occur.

Is there substantial Interference with the Armstrong respondents' property rights?

[56] I have also considered the extent to which recognition of the stairs constitutes an interference with the Armstrong respondents' own property rights. I am satisfied that the existence of the stairs does not represent a substantial interference with their property rights.

[57] On this issue, the Armstrong respondents point to the removal of an existing wooden chute from the area, removal of vegetation, erosion and interference with a trench that would allow for movement of machinery across their property and then down the easement to the shoreline.

[58] While I do not suggest that the respondents' concerns are trivial, there are a number of salient facts that persuade me that there is no substantial interference. No trees were removed during construction, and it appears that any damage to foliage and brush was modest in the circumstances. The chute does not appear to be much more than a few sheets of plywood and a wooden frame built in the 1970's to slide rocks down. The trench area is between two of the sets of stairs erected on the easement and is still accessible.

[59] The Armstrong respondents' main argument about the trench is that it could be used in conjunction with the easement area to move heavy equipment to the shore if construction or repair work were required. However, it is difficult to see how heavy equipment or machinery could be safely taken down to the beach area in the absence of stairs over the easement area, without being a safety risk or causing significant damage to the area. The stairs could in fact be used by the Armstrong respondents if work needs to be done in the beach area since easement rights are not exclusive. Where necessary, larger equipment can be brought by barge or other vessel.

Does unauthorized use of Lot B affect the easement petition?

[60] The Armstrong respondents also point to a set of concrete steps to the water that can only be accessed by crossing their property outside of the easement area, and they have observed the Grier petitioners and their guests use them without permission. That type of intereference, however, has nothing to do with the easement. Nothing in these reasons would constitute permission for the Grier petitioners or their guests to use any portion of Lot B apart from the easement itself.

Conclusion

[61] For all of these reasons, I am satisfied that the construction and continued existence of the stairs is an ancillary right that attaches to the easement and is reasonably necessary to its exercise and enjoyment. I would grant a declaration to that effect. Accordingly, there is no basis for an order that the stairs be removed.

II - The judicial review petition

[62] That brings me to the judicial review petition. Some additional facts are necessary to put the issues in context.

Background

[63] The Grier respondents who arranged for the stairs to be built were not aware of it at the time, but permits were required because the easement is located within two development permit areas: one designated as “Marine Uplands and Foreshore” (DPA 1), and one designated as “steep slopes” (DPA 4). Accordingly, permits were required before undertaking construction.

[64] Once they learned that stairs had been built, the Armstrong petitioners voiced their concerns and told the Grier respondents that permits were required. When the parties met in early August 2022, the Grier respondents advised that they had contacted the district about applying for permits retroactively for the stairs.

[65] What followed were a series of communications from the parties to the district, and from the district to the parties, some involving legal counsel, and most

revealing a fundamental disagreement about whether the stairs should be allowed and whether a permit should issue.

Correspondence between the parties and the District

[66] On August 17, 2022, the Armstrong petitioners wrote an e-mail to the District asking for confirmation that the stairs would not impact their ability to obtain a certificate of occupancy for their new house, and asking the district to confirm it would not hold them liable for failing to obtain a permit, or for construction of the stairs if they were not built to code.

[67] Brian Green, the director of planning and Community Services for the District of North Saanich, advised the Armstrong petitioners that the Grier respondents were expecting to obtain the necessary professional reports and submit the development permit application. He explained that the district was hoping to achieve "voluntary compliance from them in order to legalize the unlawful structure."

[68] The Armstrong petitioners wrote back to Mr. Green and said "we should probably have been clearer about our conversation with our neighbours. We do not agree with the stairs being constructed on our property." They then explained that, as owners, they would not have signed an application for a permit and expressed the hope that the district would not achieve voluntary compliance. Mr. Armstrong stated, "we should not have to accept the illegal structure now installed."

[69] Trevor Parkes, a senior planner for the district of North Saanich, met the Grier respondents at the front counter of the district office. He advised them what steps would be required to bring the stairs into compliance, and advised them that they should ensure that the easement granted them the authority to install the stairs prior to proceeding further.

[70] On August 24, 2022, Mr. Parkes e-mailed the Grier respondents and alerted them to the fact that the terms of the easement did not expressly grant the right to contract works within the easement, and that such works could only be constructed by the registered owner. He advised the Grier respondents that the District required

a signed authorization from the Armstrong petitioners in order to accept the application for a permit. He suggested the Grier respondents obtain legal advice, and warned them that if the stairs were not brought into compliance they would have to be removed.

[71] On September 20, 2022, the Armstrong petitioners lodged an official complaint with the district about the construction of stairs on their property.

[72] On September 28, 2022, a Bylaw enforcement officer from the District of Saanich wrote a letter to the Grier respondents advising them that a formal complaint had been filed. The letter outlines two options for the Grier respondents: (1) to remove the stairs, or (2) to obtain permission from the Armstrong petitioners to proceed with the permit process.

[73] On October 4, 2022, counsel for the Grier respondents wrote to the district and requested some additional time to respond to the District's recent letter, which was granted.

[74] On October 17, 2022, the Grier respondents requested a meeting the next day with Mr. Parkes to discuss the permit issue further as they had obtained a letter from their lawyer for the district. They provided the letter from their counsel (dated October 14, 2022) at the meeting, but there is no evidence of any discussions that took place.

[75] The letter provided by the Grier respondents enclosed the necessary professional reports, and requested that the District accept the permit application despite the absence of authorization from the owners of Lot B. The letter cited *Development Applications Procedures Bylaw* No. 1519, s. 4.1(a) which provides that applications for permits shall be executed in writing by "the Owner(s) of the site that is subject to the application." The letter went on to say that owner was defined in the same bylaw as the registered owner of the property as verified through a "Land Title Office search," or an agent of the owner designated in writing. The letter pointed out that under the *Land Title Act*, RSBC 1996, c 250, owner includes an owner of "land

or of a charge on land…" As the owners of an easement, the letter explained, the Grier respondents were owners of a charge on land and entitled to apply for a permit.

[76] On November 2, 2022, Mr. Green wrote to counsel for the Grier respondents on behalf of the District and advised that they would accept the permit application, and review it in accordance with the applicable permit guidelines. The District sent a follow up letter confirming their decision to accept the permit application. Mr. Parkes was the planner assigned to the file.

[77] On November 16, 2022, Mr. Armstrong emailed the District asking when they could expect a resolution of the matter and offering to have his contractors remove the "illegal stairs." Mr. Green responded on behalf of the District, and explained that they had accepted the development permit application "given the definition of owner in the *Land Title Act*," and that it would be processed by staff. He explained further that "it is not the role of the District to determine what ancillary rights the easement confers and any property ownership issues are between yourselves and the owners of 11416."

[78] On November 17, 2022, the Armstrong petitioners wrote to Mr. Green and advised him that their legal advisors were of the opinion that the District did not have the right to give the Grier respondents a veto over the interests of the registered owners, and requested the District put its review of the application on hold until they had an opportunity to review the circumstances.

[79] On November 18, 2022, Mr. Green replied and advised the District would continue to process the application in accordance with development permit guidelines, but he requested that the Armstrong petitioners send any opinion they had obtained for the District's review. He reiterated that "it is not the role of the District to determine what ancillary rights the easement confers and any property issues are between yourselves and the owner of 11416." Mr. Armstrong replied the same day advising he understood, and that his advisor's concern was that they were also owners under the *Land Title Act*, and the District's decision took away their

rights as the registered owner. The e-mail then stated “if necessary, we will address easement rights in a separate forum.”

[80] On November 22, 2022, Mr. Armstrong wrote to Mr. Green by email and encouraged the “District to consider all aspects of how the existence of these illegal stairs may be captured by the Code or other standards with respect to safety and purpose.”

[81] On November 28, 2022, Mr. Green wrote the Armstrong petitioners a formal letter to outline the district’s position. The second paragraph reads as follows:

> The District is aware of the disagreement between you and your neighbours over the stairs. This disagreement cannot be resolved by the District as the regulator of development and land use. In this role, the District receives and processes permits to verify compliance with regulatory requirements. It is not a court with the jurisdiction to make findings with respect to property rights. The District routinely and regularly processes applications for permits for people who are not the registered owners in fee simple of land, including holders of leases and licences and the others of different types of interest in land.

[82] The letter went on to express Mr. Green’s view that there was no statutory or common law authority that would allow the district to refuse to consider the permit, and added the following:

> In any event, a refusal to issue a development permit for the stairs would not automatically result in their removal. The District cannot solve the disagreement between you and the owners of 11410 [Sic] Chalet Road by withholding a development permit.”

[83] Finally, the letter outlined the fact that the District had advised the Grier petitioners that the permit would only confirm that there has been no contravention of the Official Community Plan policies and guidelines, and that it would be incumbent on the permit holder to ensure they did not build on or encroach on property that they were not entitled to do work on.

[84] On December 14, 2022, counsel for the Armstrong petitioners wrote in response to Mr. Green’s letter and outlined her view that the Grier respondents were not owners under the *Local Government Act*, RSBC 2015, c 1, and therefore were

not entitled to apply for a development permit, and the District was not legally entitled to issue one. She requested that the District confirm by December 23, 2022, that the District would cease processing the development permit application.

[85] On December 15, 2022, Mr. Green wrote to counsel for the petitioners and counsel for the respondents. He again expressed the view that the District's role was "limited to verifying that the construction referenced in the permit is consistent with the applicable land use bylaws." He explained, again, that the District "cannot resolve your differences of opinion and it accepts that such a resolution may be necessary for your clients." He invited both parties to contact legal counsel for the district for further discussions.

[86] On February 16, 2023, the Grier respondents e-mailed Mr. Parkes and requested that he expedite their application.

[87] On February 23, 2023, a development permit was issued. The next day, Mr. Green sent a copy of the permit to the Grier petitioners and advised them to direct any questions to Mr. Parkes since it was his (Mr. Green's) last day with the District of North Saanich.

[88] On February 26, 2023, the Grier respondents replied to Mr. Green's e-mail thanking him for getting it done before departing the scene, and expressing gratitude to both Mr. Green and Mr. Parkes.

[89] On March 1, 2023, Mr. Parkes replied that he was glad to get the development permit done and issued before Mr. Green left the district. He provided further information about the necessary building permit.

[90] On March 28, 2023, the Grier respondents dropped off a thank you card and gift for Mr. Parkes for his encouragement and his assistance to them in seeing them through the permit process.

[91] On March 29, 2023, Mr. Parkes e-mailed the Armstrong petitioners and thanked them for the card and gift they had given him, but explained that he could

not accept the gift, or any gifts related to the performance of his duties. He arranged to leave the gift in an envelope for the Grier petitioners to pick up at their convenience, which they did the next day.

Terms of the development permit

[92] The development permit was issued almost two years after the stairs were constructed. It was issued in accordance with a series of professional reports confirming that (1) the stairs had not caused severe negative impacts to the Marine Upland Foreshore area, (2) they had not negatively affected any species or ecosystems at risk, (3) no detrimental effects to the slope stability had been caused by the construction, (4) the staircase had minimal, if any, effect on rainwater run-off, and (5) the stairs complied with the building code.

[93] The permit itself stated that it was approved "on the basis of your ownership interest in the registered Easement CA5243442," and there were a number of conditions attached, including:

a) The District took no position on the extent of the rights granted under the easement and the permit was subject to determination of that issue;

b) The permit only covered improvements within the easement area; and

c) The permit only approved the stairs until "the fee simple owners have consented to or been ordered to permit the improvements in their current location."

[94] The development permit outlined the need for a separate building permit. The building permit was issued on March 29, 2023, and identified the applicants as "easement owners." It also required all works to be located within the easement area. The occupancy certificate issued on April 25, 2023, identified the Grier respondents as "Easement Owners" and also required all work to be located within the easement area.

Position of the parties

[95] The Armstrong petitioners argue that the only reasonable interpretation of the relevant legislation is that "owners" do not include those who hold a registered charge such as an easement, and therefore there was no basis under which to consider the application or issue the development permit.

[96] Alternatively, they say, that even if the Grier respondents could be considered "owners," the District required the consent of all owners in accordance with the decision in *Este v. West Vancouver (District*), 2022 BCCA 445, and it was unreasonable to proceed in the absence of such consent.

[97] Finally, they say that the District acted in bad faith and breached procedural fairness as evidenced by the private meeting between the Grier respondents and Mr. Parkes, and the apparent about face in the District's position without providing the petitioners with an adequate opportunity to respond.

[98] The District denies that its acceptance of the permit application was unreasonable, and says it had authority to process the applications on the basis that the applicants qualified as "owners" in respect of the easement area. They say there is no legal requirement that every owner sign a permit application form, and the evidence does not establish bad faith or a breach of the duty of procedural fairness.

[99] The Grier respondents argue that it was reasonable to treat them as "owners" for the purposes of the permit, and since the competing interpretations of "owner" were before the District, this court should defer to the District's interpretation.

Legal framework – standard of review

[100] The parties agree that that the reasonableness standard of review applies to the issue on this petition, as set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653.

[101] Both the contours of procedural fairness and the nature of judicial review will vary depending on the specific context. Not all statutory decision makers will be

required to provide formal reasons for their decisions. Whether or not reasons are provided will affect how a court conducts reasonableness review (*Vavilov* at para. 76 and *Central Saanich (District) v. McHattie*, 2023 BCCA 461 at para. 31). Where reasons are not required, the reviewing court will look to the record as a whole to ascertain the basis of the decision (*Vavilov*, para. 137, *McHattie*, para. 33).

[102] Reasonableness, among other things, seeks to determine whether a decision is justified in relation to the facts and law that constrain the decision maker in the exercise of its delegated power. Decisions that are untenable in light of the relevant factual and legal constraints will be unreasonable (*Vavilov* at paras. 101, 105; *McHattie* at paras. 34-35; and *Vancouver (City) v. Pender Lodge Holdings Ltd*., 2024 BCCA 37).

[103] The relevant factual and legal constraints include the governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker, submissions of the parties, past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies (*Vavilov*, para. 106, *McHattie*, para. 36, and *Pender Lodge*, para. 86).

[104] Where issues of statutory interpretation arise, a reviewing court's role is to determine whether the decision maker applied the principles of statutory interpretation and arrived at an interpretation that was reasonable (*Vavilov* at paras. 120-121 and *McHattie* at paras. 37-38).

[105] Administrative decision makers are presumed to be able to fulfill their mandates and interpret the law that applies to all issues that come before them. The proper approach on review is not to determine the "correct" interpretation of a disputed provision, but to discern the interpretation adopted by the decision maker and assess whether it is reasonable. However, it may sometimes become clear that there is only one reasonable interpretation of a statutory provision in issue (*Vavilov* at paras. 24, 123-124).

Was the decision to allow the Grier respondents to apply for a permit as "owners" a reasonable interpretation?

[106] The Armstrong petitioners bear the burden of showing that the District's decision was unreasonable (*Vavilov* at para. 100).

[107] The Court must look at the record as a whole and examine the decision in light of the relevant restraints. In the present context my task is to consider whether there are any reasonable interpretations of the statutory provisions in question that would have authorized consideration and issuance of the permits (667895 B.C. Ltd. V. Delta (city), 2024 BCSC 766 at para. 79). If the District's interpretation was reasonable in light of the relevant restraints, it should not be disturbed on judicial review.

[108] In this case, the Armstrong petitioners do not contest the merits of the issuance of the permit, but only the basis for processing the application. They argue that the definition of "owner" in both the *Local Government Act*, schedule, s. 2, and the *Community Charter,* S.B.C. 2003, c. 26, schedule, s. 1 includes "the registered owner of an estate in fee simple," but makes no reference to the holder of a charge such as an easement. Pursuant to section 40 of the *Interpretation Act*, RSBC, 1996, c. 238, the same definitions are applicable to all enactments related to municipal or regional district matters, which includes bylaws by virtue of the definitions in s. 1 of the *Interpretation Act*.

[109] The plain wording of the statutes in question offers relatively strong support for the Armstrong petitioners' position. There is no reference to the holder of a charge in land or an easement in the definition of "owner." Their interpretation of the legislative framework is clearly reasonable, but the question is whether that is the only reasonable interpretation, and that therefore in accepting and processing the permit, the District exceeded its statutory authority.

[110] In accepting the permit application, the District was interpreting and applying its own bylaw, namely the *Development Applications Procedures Bylaw,* No. 1519 (the "Applications Procedure Bylaw"). S. 4.1(a)(i) of that bylaw provides as follows:

> An Application made pursuant to this bylaw shall be made to the Director and shall be executed in writing by the Owner(s) of the Site that is subject to the Application, or by a person authorized by the Owner(s).

[111] The bylaw in question defines the term “owner” as follows:

> In respect of real property, the registered owner of such property, as verified by the District through either a Land Title Office search or BC Assessment Roll search, or such owner’s agent designated by the owner in writing.

[112] The reference to registered ownership being verified through a Land Title Office search was relied on by the District. S. 1 of the *Land Title Act* defines “owner” as “a person registered in the records as owner of land or of a charge on land, whether entitled to it in the person’s own right or in a representative capacity or otherwise, and includes a registered owner.”

[113] The reference to land titles for confirmation of ownership introduces the concept of how the Land Title and Survey Authority treats ownership, and brings the definition under the Land Title Act into play, which includes easements. The easement in this case is registered in the land title office, and the Grier respondents are the owners of the easement charge on land and as the owners of Lot A.

[114] In my view, the district was confronted with a unique factual circumstance. The stairs had been built, and there was an obvious need to assess whether they met environmental and regulatory standards. The District had no ability to resolve the private dispute between the parties. The sole question was whether they could accept an application and commence the permit process.

[115] In my view, there were two competing interpretations of the relevant legislation. While the Armstrong petitioner’s interpretation may be stronger on a strict statutory interpretation basis, I am not persuaded it is the only reasonable interpretation of the District’s authority in light of the legal and factual constraints they were under, and the common law nature of an easement.

[116] The general definition of “owner” in the *Community Charter*, SBC 2003, c 26, simply does not address the situation of an easement. The bylaw that is specific to

the application process makes explicit reference to the land title office in verifying ownership, and the the *Land Title Act* contemplates an easement holder being an owner. In my view, as noted in *Este v. West Vancouver (District)*, the District "took a rational approach to a problem that presented itself."

[117] Weighing the relevant factual and legal constraints, and taking a broader view of reasonableness, I am not persuaded that the District acted unreasonably. The relevant factors include:

a) The governing statutory scheme did not explicitly address the factual situation confronting them;

b) Common law principles related to easements were at the heart of the dispute;

c) There were no past practices or decisions that could be used to guide the District's approach; and

d) The potential impact of the decision to process the application on the individuals involved was limited to an assessment of whether the stairs met regulatory and environmental requirements. It would not determine property rights or resolve whether the stairs could stay or would have to be removed.

[118] Pursuant to section 460(2) of the *Local Government Act*, a local government "must" consider every application for the issue of a permit under Part 14, which includes development permits. While that obligation would not compel the district to accept an application from someone with no connection to the property whatsoever, in this case it supports the district's approach to a novel issue.

[119] In the circumstances of this case, the terms of the permits that were issued are fundamental to the issue of reasonableness. The development permit was only valid until the Armstrong petitioners consented to the stairs or were ordered to permit them. The Grier respondents were only treated as "owners" for improvements within

the easement area, and the District took no position on the extent of rights granted by the easement.

[120] The potential impact on the Grier respondents was also a valid consideration. If the Armstrong petitioners' interpretation is accepted, there would be no ability to even consider the merits of the permit application, leaving the regulatory and environmental situation in limbo. The Grier respondent's ancillary right to construct a staircase would be hollow if they had no ability to even apply for a permit to bring the stairs into compliance. In my view, it was reasonable for the District to assess the merits of the permit application, and leave it to the parties to resolve the property dispute in an appropriate forum.

[121] I do not agree with the Armstrong petitioners that the District's decision fails to reveal a rational chain of analysis. The reasons for the District's decision emerge from the record as a whole. The fact that the District disagreed with the Armstrong petitioners does not mean there was no basis upon which the decision could be understood. Nor do I agree that the District did not explain why it changed its position. This was clearly spelled out in the correspondence. The District interpreted its own authority as including the right to receive and process the permit application from the Grier respondents in their capacity as owners of the easement, and in light of the District's general obligation to consider applications from appropriate parties.

[122] In short, this was a novel situation that is not expressly dealt with in the relevant legislation. In the circumstances, I would defer to the District's interpretation of the scope of their authority to receive and process development permit applications, which I do not consider unreasonable in the circumstances.

Did the district require the consent of the Armstrong respondents before agreeing to assess the permit application?

[123] The Armstrong petitioners argue, in the alternative, that even if it was reasonable for the Grier respondents to be treated as owners for the purposes of processing the permit applications, it was unreasonable for the District to proceed without their consent.

[124] There are no statutory provisions, regulations or bylaws that expressly require the signature of every owner before an application for a permit may be processed. In my view, there is no basis upon which to read in an implicit requirement to that effect.

[125] The Armstrong petitioners rely on *Este v. West Vancouver*, where the district of West Vancouver refused to accept an application for a permit by one property owner over the objections of another. I do not read the case as setting down a rule of general application that the consent of all owners will always be required before a permit application may be considered. The issue before the court was whether the district's interpretation of "the Bylaw as a whole is reasonable" (para. 14). The Court of appeal found that the bylaw in question "bears the interpretation given to it by the district" (para. 17). In my view, that represents a case specific conclusion, and does not mean that a different decision by another municipality on different facts is necessarily unreasonable. I do not agree that in this situation the District ignored "binding precedent."

[126] The Armstrong petitioners argue that they are exposed to potential liability in the same manner as the owners in *Este.* However, in that case there was a building bylaw that imposed potential liability on "any owner" for damage to municipal property resulting from work covered by the permits. In this case, construction of the stairs was already complete and had not caused any damage. In addition, as previously noted, the owner of a servient tenement is not generally liable for failure to keep structures built by an easement holder in good repair.

[127] In *Este*, the Court of Appeal upheld the District of West Vancouver's decision as a rational approach to the problem presented. In my view, even though the District arrived at a different conclusion on the facts of this case, it was an equally rational and reasonable approach to the problem that presented itself.

Did the District breach the rules of procedural fairness or act in bad faith?

[128] The Armstrong petitioners also contend that they were denied an opportunity to be heard, and that the District acted in bad faith when they had a private meeting with the Grier respondents and then changed their position.

[129] There is no question that public decision makers, including local governments, have a duty to act fairly when making decisions that affect the rights and privileges of an individual, but the duty of fairness is flexible and context specific (*RNL Investments Ltd., v. British Columbia (Agricultural Land Commission)*, 2021 BCCA 67 at paras. 58-59).

[130] The relevant context here is that the District were faced with a set of stairs that had already been built, and an application aimed at assessing the impact of the stairs on the slope and the marine environment. This was not an adjudicative proceeding where the Armstrong petitioners had defined statutory rights of participation. Rather it was an objection by them to what is designed to be a relatively informal process. The decision was important to them, but it did not purport to be a final determination of their rights vis-à-vis their neighbours.

[131] The streamlined nature of a permit application is evident from the legislative framework. The issuance of development permits is governed by sections 488-491 of the *Local Government Act*, and there are no statutory requirements for public notice or a hearing process. The specific bylaw in question, *North Saanich Development Approval Procedures Bylaw* No. 1519 (2021), does not include a requirement of notice, or any provisions suggesting a particular obligation to hear from parties other than those who are applying for a permit.

[132] Given the nature of the process, the District was not obliged to adopt a Court-like hearing in considering whether to consider and issue a development permit (*Sunshine Coast (Regional district) v. Vanderhaeghe*, 2024 BCCA 169 at paras. 82-85).

[133] In any event, I find that the District did provide the Armstrong petitioners multiple opportunities to communicate their position to the District before the permit was ever issued. They advised the Armstrong petitioners that the permit application would be processed and on what basis on more than one occasion. They received correspondence from the Armstrong petitioners outlining their position. They invited receipt of any legal opinion that the Armstrong petitioners might provide. They received and considered a detailed letter from the Armstrong petitioner's legal counsel that fully outlined their position, and they responded to that letter. All of this took place well before the permit was issued.

[134] It is evident that ultimately the District did not agree with the Armstrong petitioners, but they did not deny them an opportunity to be heard. I would not accede to the argument that there was a breach of procedural fairness in the circumstances.

The Armstrong petitioners have not established bad faith

[135] The Armstrong petitioners also allege bad faith based on the in-person meeting between the Grier respondents and Mr. Parkes in December 2022. They contend that it has the appearance of impropriety, particularly since there is no record of what was said, they were never invited, and the District did an "about face" after that meeting. They say the District acted "unreasonably and arbitrarily, and without the degree of fairness, openness, and impartiality required of a municipal government."

[136] It is important in my view, to distinguish between conduct that might be simply unreasonable, and conduct that can properly be characterized as "bad faith." Institutions and individuals exercising statutory powers are obliged to do so in good faith, but what constitutes bad faith?

[137] The parties have referred me to *Grosvenor v. East Luther Grand Valley (Township)*, 2007 ONCA 55 and *Macmillan Bloedel Limited v. Galiano Island Trust Committee*, 1995 Canlii 4585 (BCCA), which address the question. Without attempting to define all of the circumstances that might constitute bad faith, I am

satisfied that it can include arbitrary, partial or unfair conduct falling clearly below the standard expected of a municipal government.

[138] However, I am unable to conclude on the evidence that the District, or any of its representatives, acted partially, unfairly, or improperly so as to amount to bad faith. While Mr. Parkes met with the Grier respondents in private, the main result of the meeting was simply the hand delivery of a formal letter from counsel for the Grier respondents. It is evident that the content of the letter is what influenced the District's decision, and the substance of that decision was clearly communicated to the Armstrong petitioners. There is simply no evidence of any improper influence or partiality, and I am not prepared to infer bad faith from the absence of evidence.

[139] The Armstrong petitioners stress the "about face" of the District, but once again it is clear from the record as a whole that their change in position arose as a result of the letter they received from counsel for the Grier respondents, and their further consideration of the private nature of the dispute between the parties. The development of a formal position, along with communication to the Armstrong petitioners in writing, and an invitation to submit further information, all undermines the assertion that there was partiality or bad faith on the part of the District.

[140] Considering the evidence as a whole, I find that the Armstrong petitioners have not established bad faith.

III – Is there a basis to grant relief in the context of Judicial Review?

[141] While I have found in favour of the Grier respondents and the District in the petition for judicial review, it is important to point out that even if I had accepted the Armstrong petitioners' argument, it is not clear to me that a remedy would be warranted in the circumstances.

[142] It is well established that relief in the context of judicial review is discretionary (*Judicial Review Procedure Act*, RSBC. 1996, c. 241, s. 2, 8, *Strickland v. Canada (Attorney General*), 2015 SCC 37, [2015] 2 S.C.R. 713).

[143] As noted, the relief sought by the Armstrong petitioners included an order that the stairs be removed. During the hearing of the petition, counsel conceded that there was no jurisdiction to grant such an order in the context of judicial review. In my view, that simply underlines the reality that the fundamental dispute between the parties depended upon the resolution of the easement issue.

[144] The development permit issued by the District was, to some extent, a red herring. The District made it clear that the permit was at all times contingent on the resolution of the property dispute between the parties, and merely represented a determination that the stairs complied with all necessary environmental and regulatory requirements. Thus, even if the permits were set aside, that alone would not necessarily lead to removal of the stairs as the District pointed out in its correspondence to the parties.

[145] It is also unclear what purpose would be served by setting aside the decision to issue a permit. Depending on the outcome of the easement question and any related proceedings, the issue would either be entirely moot (since the stairs would have to be removed), permanently in limbo, or the district would be required to reconsider the permit application on exactly the same grounds in a situation where the substance of the decision to issue a permit is not challenged.

[146] Even if I had agreed with the Armstong petitioners' argument, it seems to me that judicial review was premature until such time as the property rights between the parties had been resolved, and alternative remedies were available to the Armstrong petitioners such as an action in trespass or an application pursuant to s. 36(2)(c) of the *Property Law Act* to have the stairs removed.

Conclusion

[147] For all of these reasons, the order of this Court is as follows:

a) A declaration that the existence of the stairs on the easement over that part of Lot B shown on Reference Plan EPP57384 is lawful as a necessary ancillary right for the use and enjoyment of the easement; and

b) The petition for judicial review and related application for an order of removal of the stairs is dismissed.

[148] In my view, in light of the fact that both petitions were heard together and intertwined, the District is entitled to its costs on the judicial review petition and any additional costs incurred as a result of both petitions being heard together.

[149] Unless there are facts I am unaware of, in which case the parties may arrange to make further submissions within 30 days of the release of this ruling, the Grier petitioners/respondents and the District are entitled to their costs on scale B in relation to both petitions.

"Greenwood J."