From: Johnston, Sadhu
Sent: Thursday, October 20, 2016 2:10 PM
To: Direct to Mayor and Council - DL
Cc: City Manager's Correspondence Group - DL; Corporate Management Team (COV) - DL
Subject: Petition Challenging the First Shaughnessy HCA DISMISSED
Attachments: Judge Fitzpatrick, re Cummings v. City of Vancouver, 10-20.pdf

Greetings Mayor and Council

I am pleased to inform you that this morning the City received Madam Justice Fitzpatrick's decision dismissing the petition brought by a number of residents seeking to quash the First Shaughnessy Heritage Conservation Area Bylaws. The Court found that the City acted in good faith and within its jurisdiction in enacting the First Shaughnessy HCA.

The First Shaughnessy HCA is the city's first-ever Heritage Conservation Area and is an important move by City Council toward preserving and protecting valuable heritage homes in Vancouver. This decision will enable the City to continue our work on the Heritage Action Plan and greatly assist in encouraging the retention of character homes and other heritage assets in Vancouver. Big thanks to our legal team for their great work on this case.

The reasons for judgment are attached.

Sadhu Aufochs Johnston
City Manager
Sadhu.johnston@vancouver.ca
O. 604 873 7627

T. Sadhuajohnston

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cummings v. City of Vancouver,*
2016 BCSC 1918

Date: 20161020
Docket: S158899
Registry: Vancouver

Between:

Mary Ann Cummings, Jonathan Rubenstein Hilary Benson, Rodney Benson and Neil Rogic

Petitioners

And

The City of Vancouver

Respondent

Before: The Honourable Madam Justice Fitzpatrick

(In the matter of an application pursuant to the *Judicial Review Procedure Act,* and s. 524 of the *Vancouver Charter*)

Reasons for Judgment

Counsel for the Petitioners:	J. Kenneth McEwan, Q.C. Eileen M. Patal
Counsel for the Respondent:	David R. Brown Angela Crimeni
Place and Date of Hearing:	Vancouver, B.C. June 20-23, 2016
Place and Date of Judgment:	Vancouver, B.C. October 20 ,2016

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INTRODUCTION

[1] At first blush, a person might think that this case involves the mundane world of municipal bylaws and their validity. That would be wrong; this case is mostly about money.

[2] It is well-known that, in recent years, real estate prices in the Lower Mainland have skyrocketed, driven by high demand, including from offshore investors looking for desirable places to park their money. In Vancouver, that demand has fueled an incredible increase in the number of home sales and sale prices. These new owners or investors have shown an immense propensity toward tearing down existing homes and replacing them with new homes.

[3] One of Vancouver's oldest residential neighbourhoods is called "First Shaughnessy". First Shaughnessy was built up in the early 1900s, and is locally known as the place where Vancouver's first wealthy families built their large and grand homes, many of which still stand today. The neighbourhood is widely considered a very exclusive place full of lovely, wide streets with mature trees, which wend their way in front of the large lots in the neighbourhood. I would venture to say that it still largely remains an enclave for wealthy people who can afford to purchase homes there.

[4] First Shaughnessy has not escaped the dramatic escalation in Vancouver's home prices or the drive for newer, larger homes that comes with it. In recent years, as in other neighbourhoods in the Lower Mainland, many older homes in First Shaughnessy have been demolished to make way for new homes on these large lots.

[5] Many people in our communities have increasingly voiced concerns about the impact of this type of investment on the Lower Mainland real estate market as it relates to local citizens and our communities generally. It is no secret that all three levels of government have been asked to, and appear to be considering, the issues. One of the major concerns voiced by many in our communities has been the large scale destruction of homes in our neighbourhoods without regard to their heritage

value. That is an acute concern in First Shaughnessy where, given its history, many of such homes exist.

[6] One governmental response to date has been taken by the respondent, City of Vancouver (the "City"). City Council recently passed of a number of bylaws in relation to First Shaughnessy, pursuant to the *Vancouver Charter*, S.B.C. 1953, c. 55 (the "*Charter*"). These bylaws, called the "HCA Bylaws" in these reasons, are the subject of this proceeding.

[7] The owners of residential lots in First Shaughnessy, including the petitioners, have no doubt seen recent, large gains in their property values to date. At least some of the petitioners see the HCA Bylaws as impinging on their ability to maximize that value in the future. They seek to overturn all or at least one aspect of the HCA Bylaws.

OVERVIEW OF THE ISSUES

[8] In substance, the HCA Bylaws designate First Shaughnessy as a "Heritage Conservation Area" or "HCA", which was intended to ensure that adequate protections are in place to prevent any further destruction of heritage buildings in the neighbourhood. In addition, specific buildings or homes in First Shaughnessy have been designated as "protected heritage property" in a schedule ("Appendix A4") to the HCA Bylaws based on the date they were constructed; namely, buildings built prior to 1940.

[9] The petitioners, all owners of First Shaughnessy pre-1940 homes scheduled in Appendix A4, advance a number of arguments as the basis upon which Appendix A4 should be set aside; that it was beyond the jurisdiction of the City; that it was unreasonable; that it was enacted in bad faith; and, that it resulted from an unlawful delegation in the decision-making process.

[10] All of these arguments rest on the central contention that the City could not have listed pre-1940 buildings in Appendix A4 without having conducted an actual assessment of the individual properties toward making a specific determination as to

whether they were of sufficient heritage merit to justify conservation. The City did not conduct such an assessment before passing the HCA Bylaws.

[11] In the alternative, the petitioners argue that the entirety of the HCA Bylaws were adopted in breach of the requirements of procedural fairness and, as a result, should be set aside.

BACKGROUND FACTS

(1) First Shaughnessy Created

[12] This new subdivision of Vancouver was created in the early 1900s when the Province of British Columbia granted lands to the Canadian Pacific Railway ("CPR"). In 1907, CPR announced that it was embarking on the development of a new, prestigious and elite area of estate properties to be called "Shaughnessy Heights", named after Sir Thomas Shaughnessy, then president of the CPR.

[13] The wealthy and socially elite of Vancouver flocked to this new neighbourhood, building large and grand homes designed by Vancouver's most prominent and well-respected architects of the day. CPR sought to create First Shaughnessy as an example of "garden style" urban planning, with large single-family homes built on large lots with generous setbacks and lush private gardens amidst extensive street landscaping in carefully designed streets.

[14] The fortunes of many people, including those living in Shaughnessy Heights, would, of course, change dramatically in later years. The stock market crash of 1929 and the Great Depression in the 1930s resulted in many homes being abandoned or broken into smaller units. This deterioration of many large homes in First Shaughnessy would continue after the Second World War started in 1939.

[15] "First Shaughnessy", as Shaughnessy Heights would later be called, is roughly bounded by 16th Avenue to the north; King Edward Avenue to the south; East Boulevard to the west; and Oak Street to the east.

(2) First Shaughnessy Official Development Plan / Heritage Inventory

[16] It is of some significance that the City's efforts to conserve older homes in First Shaughnessy, particularly those built prior to 1940, have been ongoing now for some 34 years.

[17] In 1982, the City rezoned the area to be described as First Shaughnessy District ("FSD"). The City also adopted the First Shaughnessy Official Development Plan ("FS ODP"), which restricted certain development and then only in accordance with design guidelines. The FS ODP expressly stated that the prime goal was to "preserve and enhance First Shaughnessy's unique character, without compromising its estate image and single family character". One of the broad "heritage" goals identified at that time, and which continues to be identified now, was:

> to discourage demolition and promote conservation and restoration of meritorious pre-1940 homes.

[18] As the City notes, the pre-1940 date was not selected at that time based on any individual assessment of the actual heritage merit of pre-1940 homes.

[19] In 1994, Council adopted the First Shaughnessy Heritage Inventory (the "Heritage Inventory"), which lists all pre-1940 homes in the neighbourhood. This included 353 homes. The Inventory states:

> The properties listed in this inventory were originally developed before 1940 and maintain building and landscape elements representative of that time. … As examples of the early development of the First Shaughnessy District, these properties have historical significance to the City of Vancouver. …

[20] These homes were listed on the Heritage Inventory for planning purposes and, in particular, to identify them as eligible for development incentives to encourage retention, as provided for in the FS ODP. This was consistent with the earlier policy adopted by Council in 1982 to preserve and discourage demolition of "meritorious pre-1940 buildings". It does not appear that there was any individual assessment as to heritage merit of the homes at the time the Heritage Inventory was created. The Heritage Inventory specifically noted that:

> Some listed properties may have buildings or landscapes which have been unsympathetically renovated. They are included so that they may one day be restored.

[21] Despite these further efforts, such as being listed in the Heritage Inventory, this did not impart any heritage status or protection on the listed properties. Many homes were listed on Vancouver's Heritage Register (the "Heritage Register"), however, even that did not protect a building from demolition. Only a small percentage of buildings (3.4%), were protected by a specific heritage designation or a heritage revitalization agreement, as I will discuss below.

(3) 2012 Administrative Bulletin

[22] In response to the increase in proposals to demolish pre-1940 homes, an administrative bulletin was prepared in May 2012 (the "2012 Bulletin"). Again, the stated objectives outlined in the FS ODP were confirmed toward preserving and protecting First Shaughnessy's special character through the retention of pre-1940 houses of merit. The 2012 Bulletin required all pre-1940 homes to be evaluated for merit prior to approval of demolition permits:

> The objective of the FS ODP and Guidelines is to preserve and protect First Shaughnessy's special character through the retention of pre-1940 houses of merit. If a new house is proposed on a site replacing a pre-1940 house, a process of careful analysis will be required to answer the question of merit of the existing pre-1940 house. Through a review of the analysis, the Director of Planning will determine whether or not the house has merit, and, if so, will encourage its retention. The director of Planning may also seek Council designation of the house as a heritage property.

[23] For homes on the Heritage Register, or those with "potential heritage value", applicants for permits were required to prepare a Statement of Significance for their property and, if such merit was "significant", to explore retention options. Lastly, the 2012 Bulletin noted that if the Director of Planning favoured retention, but the homeowner still wished to demolish the home, the Director could recommend to Council that the house be protected by a designation as "protected heritage property". In that event, the City would be required to compensate the homeowner for any loss of value.

(4) Heritage Action Plan

[24] On December 4, 2013, Council approved the Heritage Action Plan to update and strengthen the City's heritage conservation programme, which was originally established in 1986.

[25] Action item #7, identified in the Heritage Action Plan, was a review of the FS ODP to consider the establishment of a heritage conservation area for First Shaughnessy as a "unique and historic neighbourhood". The stated rationale for this action item was described as follows:

> The First Shaughnessy District was originally laid out by the Canadian Pacific Railway in 1907 and was marketed as Vancouver's premier neighbourhood at the time. It has been identified as a highly valued historic area since Council approved the First Shaughnessy Official Development Plan and Design Guidelines in May 1982.
>
> …
>
> In the past few years there have been increasing concerns in First Shaughnessy including the number of demolition proposals for houses, the use of double height interior spaces which result in large-scaled or bulky houses, and the loss of some of the area's landscape features. A comprehensive review of the [FS ODP] has not been undertaken since it was approved in 1982, even though periodic reviews and updates of the adopted document were intended.

[26] The HCA Bylaws are the product of the City's Heritage Action Plan, which was directed at, among other things, reviewing the FS ODP.

(5) Heritage Control Period

[27] On June 24, 2014, to allow matters to proceed under the Heritage Action Plan, City Council enacted Bylaw 10991, the Heritage Control Period (First Shaughnessy) Bylaw, which was operative for one year. The purpose of this bylaw was to ensure that no pre-1940 buildings were demolished unless authorized by a heritage alteration permit, while work to review the FS ODP was underway.

[28] In accordance with s. 590(2) and (5) of the *Charter*, such a heritage control period is effective for no longer than one year and can only be implemented in a single area once in a ten-year period.

[29] The Heritage Control Period was effectively extended for a 120-day period following Council's first reading of the proposed bylaws, which are the subject of this application, pursuant to s. 589A(1) of the *Charter*. That extension was set to expire October 6, 2015, a week after the HCA Bylaws were adopted.

PROCESS LEADING TO PASSING OF HCA BYLAWS

[30] In a report dated May 29, 2015, the City's General Manager of Planning and Development Services issued a report (the "May 2015 Report"). The May 2015 Report is a substantial document comprising over 400 pages. The authors of the report recommended various actions items, including that the FS ODP be repealed, and that Council enact a city-wide Heritage Conservation Area Official Development Plan which would designate First Shaughnessy as the first heritage conservation area in the City.

[31] The May 2015 Report explained that the current FS ODP has been declining in its effectiveness to manage the conservation of heritage buildings and character in First Shaughnessy.

[32] The result of lack of protection for pre-1940 buildings to this point in time in First Shaughnessy is more than apparent from the statistics. Between 1994 and 2015, 43 properties in First Shaughnessy, which were listed on the Heritage Inventory, some having significant heritage value, were demolished. In the 18 months leading up to the approval of the Heritage Control Period in June 2014, the number of enquiries proposing to demolish pre-1940 buildings in First Shaughnessy had risen from an average of 0.4% per year to 5% per year, with 19 enquiries active at that time.

[33] The May 2015 Report also recommended implementing zoning changes to enhance the advantages provided to pre-1940 building owners:

> A key objective of the proposed zoning changes is to balance the opportunities, or level the playing field, for both pre- and post- 1940 homes. It is widely acknowledged that much of the pressure to demolish pre-1940 homes in recent years is due to the advantages the current zoning affords to new buildings, such as minimal setbacks, significant buildable floor area, and

> large floor area exclusions. The proposed changes will provide new and improved benefits in the zoning for pre-1940 homes, while at the time introducing updated regulations for new buildings that will result in homes more compatible with the area's heritage character and scale.

[34] The May 2015 Report concluded that the adoption of the proposed regulatory structure for heritage property generally in the City and, more specifically, in First Shaughnessy, would:

> … uphold Council-adopted goals and objectives for the heritage protection of the unique and important part of the City. This action will ensure the on-going intrinsic and tangible heritage values of this area are maintained for future generations. In turn, this will ensure that property owners in this neighbourhood will be assured the area will remain one of Vancouver's most prestigious residential areas, as was the initial plan for this neighbourhood at the time it was established by the CPR in 1907.

[35] Jane Pickering, the Acting Director of Planning for the City, states that one advantage of adopting the HCA Bylaws was that no compensation would be payable to homeowners. She states that *Charter* protection from exposure to compensation claims is an essential component of a successful heritage preservation system. Further, she states that if the City were exposed to compensation claims in connection with the preservation of the heritage value and character of the landscape and architectural features found in First Shaughnessy properties, City staff and/or City Council may well have concluded that the City simply could not afford such protection.

[36] It is manifestly clear that the authors of the May 2015 Report did not act and make any recommendations precipitously and without adequate study of the issues, including obtaining input from outside experts.

[37] The May 2015 Report appended two consultant's reports for City Council's consideration: (1) a report from Donald Luxton and Associates Inc. ("Luxton"), dated May 29, 2015 (the "Luxton Report"); and (2) a report by Coriolis Consulting Corp. ("Coriolis"), dated April 2015 entitled "Economic Analysis of Proposed Changes to First Shaughnessy District Regulations and Policies" (the "Coriolis Report #1).

(1) The Luxton Report

[38] The Luxton Report is an important document in this proceeding and is the subject of some controversy, particularly as it relates to the procedural fairness issue, which I will discuss below.

[39] Luxton was asked to analyze the effectiveness of the current heritage regulatory regime and to provide recommendations on how to strengthen the retention of the heritage character of First Shaughnessy homes.

[40] The Luxton Report recommended that the City adopt a city-wide heritage conservation area official development plan bylaw which would designate First Shaughnessy as the first Heritage Conservation Area (or HCA) in Vancouver. The Luxton Report noted that, in the future, additional districts can be designated as heritage conservation areas under the official development plan. Luxton described that this framework was the most effective tool available to the City to preserve and enhance First Shaughnessy's unique character.

[41] The Luxton Report also recommended that the new HCA Bylaw include a schedule of all properties in First Shaughnessy that contain pre-1940 buildings. In arriving at that recommendation, the Luxton Report identified, for the consideration of Council, three different options for creating a schedule with a specific listing of properties. Such a schedule could include:

a) only buildings designated as heritage pursuant to s. 593 of the *Charter*;

b) buildings designated as heritage (s. 593) and buildings on the Heritage Register (s. 582); or

c) all buildings on the 1994 Heritage Inventory, as updated.

[42] In furtherance of this recommendation, the Luxton Report attached, in Appendix C, a list of all properties in First Shaughnessy with pre-1940 built homes.

Specific statements found in Appendix C are discussed later in these reasons in the context of the procedural fairness issue.

[43] To assemble Appendix C, and as stated in the preamble in Appendix C, Luxton conducted research on all properties listed on the Heritage Inventory to confirm dates of construction and other historical information, as is noted in the specific listings. The details of this research are found in Appendix C to the Luxton Report. Field research was conducted to confirm addresses of pre-1940 sites and that there continued to be a pre-1940 building on-site. The Luxton Report describes the process as follows:

> Research was also conducted into all of the pre-1940s sites to confirm the date of construction and the historical information, following which a field review provided a confirmation of the addresses of pre-1940s sites.

[44] The Luxton Report confirms that this "exhaustive research process involving each parcel of land has led to a conclusive list of properties recommended for inclusion in the HCA Schedule" (later to be Appendix A4). The Luxton Report recommended that 43 properties that appear on the Heritage Inventory be removed from the list, since they were demolished from 1994-2015. In addition, seven properties were added, since they "maintain a level of historical integrity that warrants their inclusion". Therefore, a total of 317 properties were specifically listed.

[45] Similar to what had been noted on the 1994 Heritage Inventory, the Luxton Report specifically noted:

> A small number of these sites have been significantly and/or unsympathetically altered, however, these sites have been included so that they may one day be restored.

(2) The Coriolis Report #1

[46] Coriolis was asked to provide an economic analysis of the heritage planning being considered by the City. The Coriolis Report, as appended to the May 2015 Report, provided a market analysis of trends in the rate of sales and average sale prices in First Shaughnessy over the preceding five years, and an economic

perspective on the likely market impacts of the regulatory and policy changes being contemplated in First Shaughnessy.

[47] The Coriolis Report #1 concluded that actions already taken by the City had not reduced property values for non-renovated character homes, but had dampened the rate of price growth for pre-1940s character homes in First Shaughnessy compared to new homes in the neighbourhood. The Coriolis Report #1 concluded:

> Generally speaking, requiring the retention of an existing house limits options, potentially imposes costs (to the extent that heritage-sensitive renovation can be more expensive), and limits flexibility in house layout. For buyers that do not attach a premium to heritage characteristics, these restrictions are likely to reduce market interest.

(3) City Council Considers the May 2015 Report

[48] On June 9, 2015, following a Council meeting, City Council referred the recommended HCA official development plan (the "HCA ODP") and associated bylaws to public hearing.

[49] On July 21, 2015, the City's Planning and Development Services issued a memorandum to Council recommending revisions to the HCA ODP and associated bylaws. This department also provided Council with a supplemental report prepared by Coriolis in July 2015 with respect to the potential economic impacts of the proposed new HCA Bylaws ("Coriolis Report #2").

[50] The memorandum summarized the findings of the Coriolis Report #2, including as follows:

> The proposed requirement to retain pre-1940's homes would put downward pressure on the value of properties that would otherwise be candidates for demolition, if buyers do not choose to take advantage of the new benefits offered in the proposed zoning and do not factor them into the price they are willing to pay for a property. Should there be reduced market interest in these properties [Coriolis] estimates a worst case scenario of 5-10% decline in property value, which would only apply in cases where property owners or buyers choose to not pursue the off-setting benefits in the proposed zoning.

(4) The Public Hearings

[51] In July 2015, prior to the public hearings, the City released an information bulletin to the public titled “Proposed Regulatory & Zoning Changes for First Shaughnessy” (the “July 2015 Bulletin”). The July 2015 Bulletin references the public hearing and makes it clear that the proposed heritage conservation area would schedule all pre-1940 buildings in the First Shaughnessy as “protected heritage property”.

[52] Public hearings were held on July 21, July 28 and September 15, 2015 to consider the proposed HCA Bylaws.

[53] The public was provided access to all the materials that City Council was considering in relation to the proposed HCA or heritage conservation area and related bylaws. These materials consist of:

a) the May 2015 Report which appended the Luxton Report and the Coriolis Report #1;

b) the memorandum dated July 21, 2015 from the Deputy Director of Planning which appended the Coriolis Report #2;

c) a memorandum dated August 18, 2015, from the Assistant Director, Planning and Development Services; and

d) a memorandum dated September 14, 2015, from the Assistant Director, Legal Services.

[54] From June 9, 2015 to the conclusion of the public hearings on September 15, 2015, City Council received 316 letters and emails in support of the heritage conservation area and related bylaws, and 372 letters and emails in opposition. Further, approximately 26 people spoke in support of the HCA Bylaws at the public hearings; 46 people spoke in opposition, including the petitioner, Jonathan Rubenstein.

[55] At the public hearing, City Council directed staff that, should the HCA Bylaws be approved, to report back to Council after 15 projects had been completed so that the implementation and outcome of the heritage conservation area and heritage planning could be monitored. In the interim, City staff were also advised that it would be appropriate to report back to Council if further improvements could be made.

(5) Adoption of HCA Bylaws and Amendments

[56] The HCA ODP and associated bylaws, which I have called the "HCA Bylaws", were adopted by City Council on September 29, 2015. The HCA Bylaws included a schedule, which was attached as Appendix A4.

[57] This petition for judicial review was filed October 28, 2015. A response was filed by the City on December 21, 2015. In its response, the City maintained that the HCA Bylaws had been validly enacted on September 29, 2015; however, the City acknowledged that its staff were preparing recommended amendments for Council's consideration to ensure that the new provisions were "clear".

[58] On January 11, 2016, by way of a policy report addressed to Council, the Acting General Manager of Planning and Development and the Director of Legal Services recommended several amendments to the HCA Bylaws arising from, at least in part, a review of the HCA ODP and related bylaws undertaken as a result of this petition (the "2016 Amendment Report"). The 2016 Amendment Report stated that certain recommended changes to the HCA Bylaws were responsive to the petition, and to address "concerns" raised in the petition by "improving clarity".

[59] Certain of the proposed amendments addressed obvious deficiencies in the HCA Bylaws, such as the failure to set out a procedure by which homeowners could apply to have their properties removed from Appendix A4, and the purported authorization of the Director of Planning to enter a private home to conduct a heritage inspection, as might be ordered by the Director.

[60] The amendments also addressed one of the challenges set out in the petition; namely, that the HCA ODP unlawfully purported to schedule broad descriptions of

"real property" as opposed to "buildings, structures, land or features", as permitted by s. 596A of the *Charter*. A July 21, 2015 staff memorandum to the Mayor and Council had recommended amending the draft HCA ODP to provide that "all real property" at a given address in Appendix A4, was protected heritage property in order to clarify that "heritage protection extends to the property listed and also to all fixtures including buildings and landscape features that are on the property". The 2016 Amendment Report recommended changing the designation to the listed items (mainly buildings existing prior to January 1, 1940) in order, ostensibly, to "clarify" the matter.

[61] The 2016 Amendment Report also included a recommendation that City Council instruct the Director of Planning to publish an administrative bulletin titled "Procedure for Review of Protected Heritage Property Status in the First Shaughnessy Heritage Conservation Area (Heritage Character and Heritage Value Impact Assessment)" (the "Administrative Bulletin"). The Administrative Bulletin also set out in detail the process for making an application to demolish a property designated as protected heritage property in Appendix A4 or to remove the property from Appendix A4.

[62] Following a Council meeting on January 19, 2016, Council referred the proposed amendments to a public hearing.

[63] From January 19, 2016 to the close of the speakers list for the February 23, 2016 hearing, City Council received three pieces of correspondence in favour of the proposed amendments and 41 pieces of correspondence in opposition to either the HCA ODP generally, or some or all of the proposed amendments to the HCA Bylaws.

[64] At the February 23, 2016 public hearing, two people spoke in favour of the proposed amendments; 19 people spoke in opposition, including Mr. Rubenstein and his co-petitioner and partner, Mary Ann Cummings.

[65] As before, the public was provided access to all the materials that City Council was considering in relation to the proposed amendments. These materials consist of:

a) the 2016 Amendment Report;

b) a memorandum dated February 17, 2016 from the Acting General Manager of Planning and Development Services; and

c) a Summary and Recommendation Notice dated February 23, 2016.

[66] The proposed amendments were adopted by City Council on March 8, 2016, by way of Bylaw Nos. 11469, 11470, 11471, 11472, and 11473 and Council instructed the director of planning to publish the Administrative Bulletin.

[67] Again, where I refer to the "HCA Bylaws", I am referring to the consolidated bylaws in place as of March 2016, which include the amendments.

THE STATUTORY SCHEME

[68] The HCA Bylaws being challenged here must be considered within the entire scheme by which the City exercises its heritage conservation powers under Part XXVIII – Heritage Conservation of the *Charter*.

(1) Definitions

[69] Section 2 of the *Charter* contains the following definitions:

a) "conservation" includes "any activity undertaken to protect, preserve or enhance the heritage value or heritage character of heritage property or an area";

b) "heritage character" means the overall effect produced by traits or features which give property or an area a distinctive quality or appearance;

c) "heritage property" means property that

i. in the opinion of a person or body authorized to exercise a power under this Act in relation to the property, has sufficient heritage value or heritage character to justify its conservation, or

ii. is protected heritage property;

d) "heritage value" means historical, cultural, aesthetic, scientific or educational worth or usefulness of property or an area;

(2) "Protected Heritage Property"

[70] Section 2 of the *Charter* also defines "protected heritage property", as follows:

(a) protected under section 13(2) of the *Heritage Conservation Act*,

(b) designated as protected under section 593 [heritage designation protection], or

(c) listed in a schedule included under section 596A(3)(b) [designation of heritage conservation areas] in an official development plan.

[71] A designation or listing of property as "protected heritage property" means that it is automatically brought within the definition of "heritage property" (see (c)(ii)) set out in s. 2 of the *Charter*).

(3) Heritage Alteration Permits

[72] The City contends that the heritage alteration permit is the cornerstone of the City's power to conserve heritage properties. It says that the ability to create a requirement for and to refuse to grant a heritage alteration permit is the *Charter*'s key mechanism by which the City can achieve heritage conservation.

[73] To the extent that the conservation tools permit the City to prevent the alteration or demolition of heritage property, they do so largely by providing that no action can be taken to alter the property unless a heritage alteration permit has been issued to authorize the action.

[74] Section 597(1) of the *Charter* gives Council or its delegate the power to issue a heritage alteration permit, if one is required. Importantly, s. 597(4) of the *Charter* permits Council or its delegate to refuse to issue a heritage alteration permit, "for an action that, in the opinion of the Council or delegate, would not be consistent with the purpose of the heritage protection of the property". This mechanism provides City Council with its principal power to require conservation of heritage property, absent the voluntary agreement of the owner of the property.

[75] Section 578(1) of the *Charter* provides that:

> Every application for a heritage alteration permit or the amendment of a by-law under this Part must be considered by the Council or, if applicable, its delegate under section 579.

If the Council's delegate refuses to issue a heritage alteration permit, a home owner may seek a reconsideration by Council (s. 578(2)).

[76] A heritage alteration permit can impose obligations on a property owner which, in the view of the Director of Planning, are consistent with the purpose of the heritage conservation of the property, including:

a) conditions respecting the sequence and timing of construction (s. 598(2)(a));

b) conditions respecting the character of the alteration or action to be authorized, including landscaping and the siting, form, exterior design and finish of buildings (s. 598(2)(b)); and

c) …a requirement that the applicant provide a specified amount of security…to guarantee the performance of the terms, requirements and conditions of the permit (s. 598(2)(c)).

[77] Acting without a heritage alteration permit is punishable by a maximum $50,000 fine or a two-year term of imprisonment, or both (s. 606).

(4) Heritage Conservation Tools

[78] Conservation tools available to the City under the *Charter* are:

a) the Heritage Register (s. 582);

b) temporary protection (ss. 587-591);

c) heritage revitalization agreements (s. 592);

d) specific "protected heritage property" designations (ss. 593-595); and

e) the creation of heritage conservation areas (ss. 596A-596B).

(5) The Heritage Register

[79] Section 582 of the *Charter* gives Council the power to establish a heritage register to identify "real property that is considered by the Council to be heritage property". Section 582(2)(a) specifically requires that the heritage register, "must indicate the reasons why property included in a heritage register is considered to have heritage value or heritage character."

[80] Being identified on a heritage register does not, of itself, create a requirement for a heritage alteration permit or otherwise provide protection to a property. The implications of being on the Heritage Register are such that Council or its delegate can order a heritage inspection of the property (s. 583(1)(b)), and being on the Heritage Register is a basis upon which temporary protection can be achieved (ss. 587-588).

(6) Temporary Protection

[81] Division (3) - Temporary Protection of Part XXVIII of the *Charter* provides certain temporary protection measures, including by way of requiring a heritage alteration permit. Section 591(1) provides that while a property is subject to temporary protection under Division 3, it cannot be altered except as authorized by a heritage alteration permit.

[82] Consistent with the process by which the HCA Bylaws were enacted, as above (see Heritage Control Area), temporary protection can be implemented: for up to 120 days if Council considers that property is or may be heritage property (s. 589); for specified periods upon the first reading of a bylaw to implement or amend a heritage conservation area official development plan (120 days from first reading - s. 589A(1)) or a heritage designation bylaw (60 days from first reading - s. 589A(2)); and, for up to one year to facilitate heritage conservation planning (s. 590(2)).

[83] Additional temporary protections are provided in ss. 587-588 of Division 3:

a) Council has the power, by bylaw, to authorize a delegate to temporarily withhold the issuance of any approval for an action that might alter a property which meets certain heritage criteria, pending consideration by Council at its next regular meeting after the approval is withheld (s. 587); and

b) Council has the power, by bylaw, to authorize a delegate to withhold a demolition permit (s. 588(1)):

> (a) in the case of protected heritage property, until a heritage alteration permit and any other necessary approvals have been issued with respect to alteration or redevelopment of the site;
>
> (b) in the case of real property identified in the heritage register established under section 582, until a building permit and any other necessary approvals have been issued with respect to the alteration or redevelopment of the site.

(7) Heritage Revitalization Agreements

[84] Heritage revitalization agreements are voluntary on the part of property owners and do not provide Council with any unilateral power to protect heritage property (s. 592). No such agreements are engaged in this proceeding.

(8) Specific Protected Heritage Property Designations

[85] Section 593(2) of the *Charter* permits Council, by bylaw, to designate, as protected, any property as “protected heritage property”, as Council considers has

heritage value or heritage character, or which is necessary for the conservation of a protected heritage property. Section 593(3) provides that such a bylaw may apply to such matters a single property, part of a property or more than one property, and to interior building features or landscape features.

[86] Section 593(1) provides that property so designated may not be altered, except as authorized by a heritage alteration permit or specifically contemplated in the designation, in addition to a development permit, which is required for all properties.

[87] Section 565A, which is in Part XXVII (Planning and Development), also refers to protected heritage property in relation to development permits. Subsection (d.1) provides that Council may make bylaws:

> (d.1) Subject to sections 578(2) and 579(2) delegating to the Director of Planning, or to any board composed of officials of the city, the power to refuse to issue a development permit, if in the opinion of the delegate, the proposed action would detract from the heritage value or heritage character of protected heritage property.

[88] Section 594(1) addresses the heritage designation procedure. It provides that, before a heritage designation bylaw is adopted, a public hearing must be held. Section 594(5) and (6) provides that Council must prepare and make available for the public hearing a report that includes information respecting the heritage value or character of the property and other prescribed information.

[89] “Protected heritage property”, when designated as such, is subject to restrictions under the *Charter*, as follows:

a) the City may refuse a demolition permit (s. 588);

b) it is subject to heritage inspection (s. 583(1)) by order of the Director of Planning, and a person acting under such an order is authorized to enter the premises “at any reasonable time” for the purposes of the heritage inspection (s. 584);

c) the City may, by bylaw, establish minimum standards of maintenance (s. 596(1)(a)); and

d) designated protected heritage properties must have a note of that fact on title at the land titles office (s. 601(1)(b) and (2)).

[90] Various provisions in Part XXVIII (Heritage Conservation) of the *Charter* address the matter of compensation in the event of heritage designation. Section 577 of the *Charter* restricts claims for compensation for the City's exercise of its heritage conservation powers:

> 577. Except as provided in sections 583(7) and 595, no person is entitled to compensation for
>
> (a) any loss or damage, or
>
> (b) any reduction in the value of property
>
> that results from the performance in good faith of any duty under this Part or the exercise in good faith of any power under this Part.

[91] Section 583(7) of the *Charter* addresses damage that occurs to property in the course of a heritage inspection.

[92] Section 595 provides that if the designation of "protected heritage property" is made under s. 593 and that designation causes a reduction in the market value of the property, the City must compensate the owner:

> 595.(1) If a designation by a heritage designation by-law causes, or will cause at the time of designation, a reduction in the market value of the designated property, the Council must compensate an owner of the designated property who makes an application under subsection (2), in an amount or in a form the Council and the owner agree on or, failing an agreement, in an amount or in a form determined by binding arbitration under subsection (4).

(9) Heritage Conservation Areas

[93] Section 561(2)(c)(iv) of the *Charter* is found in Part XXVII (Planning and Development). That section permits Council to designate a heritage conservation area by way of development plan which, in turn, may, by bylaw, be adopted as an official development plan under s. 562(1):

> 561. (1) The Council may have development plans prepared or revised from time to time.
>
> (2) A development plan under this section may …
>
> (c) designate
>
> ....
>
> (iv) for the purposes of heritage conservation, heritage conservation areas in accordance with section 596A.
>
> [Emphasis added]

[94] The central legislative provision in the *Charter* at issue in this proceeding is s. 596A(1)-(3):

> (1) Subject to this section, if an official development plan designates a heritage conservation area, section 596B (1) applies to that area.
>
> (2) If an official development plan designates a heritage conservation area,
>
> (a) the official development plan must
>
> (i) describe the special features or characteristics that justify the designation, and
>
> (ii) state the objectives of the designation, and
>
> (b) either the official development plan or a zoning by-law must specify guidelines respecting the manner in which the objectives are to be achieved.
>
> (3) If an official development plan designates a heritage conservation area, the official development plan may do one or more of the following:
>
> (a) specify conditions under which section 596B (1) does not apply to property within the area, which conditions may be different for different properties or classes of properties;
>
> (b) include a schedule listing buildings, structures, land or features within the area that are to be protected heritage property under this Act;
>
> (c) for the purposes of section 596B (3), identify features or characteristics that contribute to the heritage value or heritage character of the area.
>
> [Emphasis added]

[95] In summary, s. 596A provides that:

a) if an official development plan designates a heritage conservation area under s. 561, there are certain mandatory requirements of the plan:

i. the official development plan *must* "describe the special features or characteristics that justify the designation" and "state the objectives of the designation", and

ii. the official development plan or a zoning bylaw *must* specify guidelines respecting the manner in which the objectives are to be achieved, and

b) in addition, an official development plan that designates a heritage conservation area may contain other elements. Specifically, a heritage conservation area official development plan *may*:

i. specify conditions under which the heritage alteration permit requirement does not apply (s. 596A(3)(a));

ii. "include a schedule listing buildings, structures, land or features within the area that are to be protected heritage property under this Act" (s. 596A(3)(b)); and

iii. "for the purposes of section 596B(3), identify features or characteristics that contribute to the heritage value or heritage character of the area" (s. 596A(3)(c)).

[96] Section 562(3) provides that, before adopting a bylaw under subsection (1), if the official development plan designates a heritage conservation area and includes a schedule referred to in section 596A(3)(b) [schedule listing buildings, structures, land or features that are to be protected heritage property], the Council must hold a public hearing. The *Charter* does not stipulate any other qualification or procedural requirement for the creation or population of such a schedule.

[97] Section 596B(1) provides that if a heritage conservation area is designated by official development plan, no building, structure or land within the area may be altered unless the action is authorized by a heritage alteration permit. In other words, it creates a blanket heritage alteration permit requirement for *all* property within the

area without reference to whether the property is or is not identified on a schedule attached or created under s. 596A(3)(b).

[98] There is nothing in the *Charter* that imposes or even permits a different or additional test or requirement with respect to the issuance of a heritage alteration permit for property that is listed on a s. 596A(3)(b) schedule. The heritage alteration permit requirement including, most significantly, the test for refusing a heritage alteration permit, is identical for all property in a heritage conservation area, including scheduled property.

[99] Section 596B(3) limits the ability of Council's delegate to act in respect of a heritage alteration permit required under section 596B(1):

> 596B(3) If a heritage alteration permit is required by subsection (1), a delegate may only act in relation to such a permit if:
>
> (a) the property is protected heritage property, or
>
> (b) the permit relates to a feature or characteristic identified under section 596A(3)(c).

In other words, Council's delegate has authority to act in respect of an application for a heritage alteration permit regarding the protected heritage property under s. 596B(3)(a). That delegate may do so without the need to determine whether the requested permit relates to a feature or characteristic that may have been identified in the official development plan as contributing to the heritage value or heritage characteristic of the area, under s. 596A(3)(c).

[100] Similar to the general protection of "protected heritage property", the listing of buildings, structures, land or features as "protected heritage property" in a schedule created under s. 596A(3)(b), such as was done in Appendix A4, gives rise to various restrictions, as follows:

a) the City may refuse a demolition permit (s. 588);

b) protected heritage property is subject to heritage inspection (s. 583(1)) by order of Council or its delegate, and a person acting under such an order

is authorized to enter the premises "at any reasonable time" for the purposes of the heritage inspection (s. 584);

c) the City may, by bylaw, establish minimum standards of maintenance (s. 596(1)(a)) (see Heritage Property Standards of Maintenance Bylaw, referred to below); and

d) properties listed in the schedule must have a note of that fact on title at the land titles office (s. 601(1)(d) and (2)).

[101] I have already referred to s. 577 of the *Charter*, which provides that no compensation is payable to a home owner in the event the City undertakes heritage conservation, with limited exceptions. Heritage conservation areas or HCAs are designated by way of official development plans enacted under Part XXVII (Planning and Development) of the *Charter*. As such, they are subject to s. 569, which provides, in part:

> 569(1) …where Council … exercises any of the powers contained in this Part, any property thereby affected shall be deemed as against the city not to have been taken or injuriously affected by reason of the exercise of any such powers … and no compensation shall be payable by the city or any inspector or official thereof.

[102] Accordingly, the creation of the protections under a HCA does not give rise to any obligation on the part of the City to compensate homeowners for any loss of value.

(10) Inspection / Impact Assessment

[103] Section 583 of the *Charter* permits City Council or its delegate to order an inspection for the purposes of assessing heritage value, heritage character or the need for conservation. Section 583 provides that inspections are available in the following circumstances:

a) the property is or may be protected heritage property;

b) the property is identified as heritage property in a heritage register;

c) the property is or may be heritage property according to criteria that Council may, by bylaw, establish for the purposes of this Part (i.e. Heritage Conservation).

[104] Section 585 provides that where an approval may affect protected heritage property, Council or its delegate may require the applicant to provide an impact assessment at the expense of the applicant.

(11) Use and Density

[105] Section 576(2) provides that Part XXVIII (Heritage Conservation) must not be used to prevent a use or development density that is permitted by zoning. The only exceptions are s. 593 heritage designations and Division 3 temporary protection.

[106] Similarly, s. 597(5) provides that if the refusal to issue a heritage alteration permit prevents use or development density that is allowed under applicable zoning, Council or its delegate must inform the applicant of the requirements or conditions under which the use or density would be allowed.

THE HCA BYLAWS

[107] The effect of the HCA Bylaws was to create the first Heritage Conservation Area in First Shaughnessy and provide regulations governing properties within that area. The HCA Bylaws (i.e. as consolidated after the March 2016 amendments) include:

a) Bylaw 11349, the Heritage Conservation Area Official Development Plan ("HCA ODP") which allows for city-wide heritage conservation area designation and which, under Schedule A, designates First Shaughnessy as a heritage conservation area (the "FS HCA");

b) Bylaw 11350, the "Heritage Procedure Bylaw" which outlines procedures for managing heritage property in the City, including procedures for obtaining heritage alteration permits and heritage inspections;

c) Bylaw 11351, the "Heritage Property Standards of Maintenance Bylaw" which regulates maintenance and upkeep of protected heritage property and property in an HCA;

d) Bylaw 11352, a bylaw to amend Zoning and Development Bylaw No. 3575 to create a new zoning district for First Shaughnessy;

e) Bylaw 11353, a bylaw to amend Heritage Bylaw No. 4837 regarding heritage alteration permits, heritage conservation areas, and protected heritage property; and

f) Bylaw 11354, a bylaw to amend Parking Bylaw No. 6059 with regard to First Shaughnessy District to extend current relaxation provisions for heritage buildings to include protected heritage property located in any heritage conservation area.

[108] The first three HCA Bylaws address the substance of the issues raised on this application. A brief description follows.

(1) The HCA ODP (Bylaw 11349)

[109] The HCA ODP applies to the City as a whole, but designates only First Shaughnessy as a Heritage Conservation Area (s. 3.1). First Shaughnessy is the first neighbourhood in Vancouver to be so designated.

[110] In s. 1, the HCA ODP states that its intent is to set out the mandatory requirements of the official development plan (s. 596A(2)) and also the optional elements of that plan (s. 596A(3)). Accordingly, one of the stated intentions is to:

> … designate as protected heritage property those buildings, structures, lands or features that, in the opinion of Council, have sufficient heritage character or heritage value to justify their conservation;
>
> [Emphasis added]

[111] The HCA ODP includes Schedule A, which are the First Shaughnessy Heritage Conservation Area General Guidelines (the "Guidelines"). In s. 1.3 of the Guidelines, there is a reference to the special features or characteristics that justify the designation of the First Shaughnessy Heritage Conservation Area and contribute to the heritage character or heritage value of the area. Those special features and characteristics are said to include:

> "a rich history that reflects the arrival of the Canadian Pacific Railway, the social history of Vancouver's powerful early families and the architectural revivals prior to the First World War"
>
> "a strategic central location on the crest of a hill overlooking downtown Vancouver and flanking Granville Street"
>
> "a distinctive pattern of planned development as expressed by: street layout centred around a crescent and park system; wide, curved streets following topographical lines; boulevards; large lot sizes; generous setbacks; large private gardens; enclosed site boundaries with rock walls, fences and perimeter plantings; and the grand scale of principal residences and estate properties"
>
> "generous landscaping"
>
> a cultural landscape of individually-designed homes built with superior materials and craftsmanship and conforming to traditional styles, linked by their large scale proportions, and demonstrating a variety of styles including British Arts and Crafts, Tudor Revival, Queen Anne Revival, Craftsman and Colonial Revivals;
>
> "many high-quality masterworks by British Columbia's most prominent architects..."
>
> These special features and characteristics are described in more detail in Appendix A2, the First Shaughnessy Heritage Conservation Area Historic Context and Statement of Significance and Appendix A3, the First Shaughnessy Heritage Conservation Area Design Guidelines, which are attached to and form part of these General Guidelines and this ODP.

[112] In s. 1.4 of the Guidelines, there is a statement of the HCA ODP's objectives:

> 1.4.1 Heritage
>
> (a) to protect this unique architectural and historical area;
>
> (b) to promote conservation of pre-1940 homes …

[113] Section 1.6 of the Guidelines creates a blanket requirement for a heritage alteration permit:

> Heritage alteration permits are required for new development and for any demolition of, or construction, alteration or change to existing buildings or to protected heritage property in accordance with the provisions of the Heritage By-law and the Heritage Procedure By-law.
>
> [Emphasis added]
>
> ["existing building" is defined in s. 2.2 of the HCA ODP as "a building that exists in a heritage conservation area at the time the heritage conservation area is designated and that is not protected heritage property"]

[114] Appendix A4 to Schedule A of the HCA ODP (i.e. the Guidelines) is at the heart of this petition.

[115] Section 1.10 of the Guidelines provides that "all buildings, structures, land or features listed under the column with the heading 'Protected Heritage Property' in Appendix A4 ... are listed as protected heritage property by this ODP".

[116] The petitioners contend that Appendix A4 arose from an improper exercise of City Council's authority under s. 596A(3)(b) of the *Charter*.

[117] Appendix A4 includes 320 (of a total of 595) properties in First Shaughnessy. Some include detailed descriptions and references to specific buildings, which had already been designated as protected heritage property, such as the well-known Hycroft mansion located on McRae Avenue. In most cases, under the "Protected Heritage Property" column of Appendix A4, the entries simply state: "Buildings existing prior to January 1, 1940".

[118] As discussed above, the listing of these properties in Appendix A4 as "protected heritage property" under the *Charter* imposes burdens. The City is clear as to the intended principal effect (and goal) of listing the Appendix A4 properties as protected heritage property; namely, to prevent their demolition. City officials are expressly authorized under the HCA Bylaws, pursuant to s. 588 of the *Charter*, to refuse a demolition permit for protected heritage property. There is no such

authorization with respect to non-scheduled properties within the First Shaughnessy HCA.

[119] Even so, the HCA ODP sets out the procedure to be followed for applying for a demolition permit for protected heritage property (s. 1.11), and for applying to remove a property from Schedule A4 (s. 1.12). In both cases, the exercise is stated to involve a determination as to whether the property "has sufficient heritage character or heritage value to justify its conservation".

[120] As recommended in the 2016 Amendment Report, the City has also published the Administrative Bulletin entitled "Procedure for Review of Protected Heritage Property Status in the First Shaughnessy Heritage Conservation Area (Heritage Character and Heritage Value Assessment)", setting out the procedure for making such applications. The Director of Planning may require an applicant to provide an impact assessment addressing such matters as the historic background of the property, an evaluation of the building, and its original features and a summary of development data. The Administrative Bulletin recommends that homeowners making such an application engage (at their expense), a design professional or heritage consultant to prepare the information required to be submitted with the application.

[121] City Council alone has the authority to add or remove a property from Appendix A4.

(2) Heritage Procedure Bylaw (Bylaw 11350)

[122] Section 596B(1) of the *Vancouver Charter* requires that a heritage alteration permit be obtained prior to taking a number of actions in relation to property within a heritage conservation area. Section 596B(3) limits the authority of a delegate to act in respect to a heritage alteration permit to where the application relates to either protected heritage property or a feature or characteristic identified pursuant to s. 596A(3)(c).

[123] The Heritage Procedure Bylaw repeats the general requirement for a heritage alteration permit. It states that the Director of Planning's authority to issue a heritage alteration permit with respect to property within a heritage conservation area is restricted to (a) protected heritage property, and (b) applications relating to a feature or characteristic identified in an ODP as contributing to the heritage character or heritage value of the area (s. 4.1). In s. 3.1, the Director of Planning may consider certain matters in determining whether a building, features, property, site or area may have heritage character or heritage value. One of those matters is the age of a building.

[124] In addition, the Heritage Procedure Bylaw sets out circumstances in which a heritage alteration permit is not required. These include such ordinary tasks as repainting one's house in the same colour, engaging in routine house and garden maintenance, and altering interior features that are not scheduled as protected on Appendix A4 (s. 4.5).

[125] The Heritage Procedure Bylaw authorizes the Director of Planning to impose conditions on a heritage alteration permit that, in the opinion of the Director of Planning, are consistent with the purpose of the heritage protection of the property (s. 4.6). The Director of Planning is also authorized to refuse a heritage alteration permit for an action that, in the opinion of the Director of Planning, is inconsistent with the purpose of the heritage protection of the property (s. 4.9).

[126] Heritage inspections are addressed in s. 7. Specifically, s. 7.3 provides that the Director of Planning may order a heritage inspection if the property has or may have heritage character or heritage value and the property is or may be at risk of deterioration or destruction due to failure to repair or maintain the property.

[127] Until a heritage alteration permit allowing such an action is issued, the Chief Building Official must withhold a demolition permit in respect of protected heritage property (s. 9.1). An applicant who is denied a heritage alteration permit by the Director of Planning may request a reconsideration by Council (s. 6.1).

(3) Heritage Property Standards of Maintenance Bylaw (Bylaw 11351)

[128] Section 596(1) of the *Charter* provides that "[t]he Council, by by-law, may establish minimum standards for the maintenance of real property that is (a) designated as protected by a heritage designation by-law, or (b) within a heritage conservation area".

[129] Section 2 of Bylaw 11351 sets out various standards of maintenance for properties within a heritage conservation area (whether protected heritage property or not). This bylaw specifies that a heritage alteration permit is not required for "routine" building or garden maintenance (s. 2.4).

ISSUES

[130] The petitioners seek the following relief:

a) specifically relating to Appendix A4, a declaration that s. 1.10 of Schedule A to Bylaw No. 11349 (the Guidelines), designating the properties in Appendix A4 as the First Shaughnessy Conservation Area List of Protected Heritage Properties, is *ultra vires* the City and/or illegal; and/or

b) a declaration that the City failed to disclose relevant information at the public hearings relating to the adoption of the HCA Bylaws, contrary to s. 566 of the *Charter*, as a result of which the entirety of the HCA Bylaws are illegal.

ULTRA VIRES ARGUMENTS

[131] The petitioners advance a number of arguments as to why the inclusion of Appendix A4 is *ultra vires* the City.

(1) Standard of Review

[132] The parties agree that the standard of review for determining whether the City acted within its jurisdiction is correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9. However, the Court in *Dunsmuir* describes "true" questions of jurisdiction as follows:

> [59]… "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.
>
> [Emphasis added]

[133] Accordingly, the correctness standard will apply in determining whether or not the City had the authority to enact s. 1.10 of the Guidelines so as to designate the properties in Appendix A4 on the basis that they were buildings constructed prior to 1940.

[134] In determining that jurisdiction or authority, the court must consider the exercise of the City's authority in the context of the overall statutory scheme. The modern approach to statutory interpretation in Canada has been stated and restated by the Supreme Court of Canada time and time again: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at para. 21; *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42 at para. 26, both citing E. A. Driedger, *Construction of Statutes,* 2d ed. (Toronto: Butterworths, 1983); *Canada Trustco Mortgage Co. v. Canada,* 2005 SCC 54 at para. 10. In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, the Court stated:

> [27] The proper approach to statutory interpretation has been articulated repeatedly and is now well entrenched. The goal is to determine the intention of Parliament by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute.

See also the *Interpretation Act,* R.S.B.C. 1996, c. 238, s. 8.

[135] Consistent with this approach to statutory interpretation, the Supreme Court of Canada has stated that the process of delineating municipal jurisdiction is an exercise in statutory construction and that the courts have adopted a broad and purposive approach to the interpretation of municipal powers: *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13 at paras. 18-20. In *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 at para. 6, this was described as requiring recognition that municipalities require greater flexibility in fulfilling their statutory purpose.

[136] The above authorities have been adopted and followed by our Court of Appeal: see *Langford (City) v. Dos Reis*, 2015 BCCA 55 at paras. 5-7; *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271 at paras. 9-16. In *Fort Langley Residents*, the court stated:

> [18] Frankly, the Court can take the hint -- municipal legislation should be approached in the spirit of searching for the purpose broadly targeted by the enabling legislation and the elected council, and in the words of the Court in Neilson, "with a view to giving effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose".

[137] In my view, this approach applies to the interpretive exercise here in relation to the City's powers in respect of heritage conservation. I disagree with the petitioners that these powers involve a "taking" of the petitioners' properties akin to expropriation, such that the legislation should be strictly construed in favour of the petitioners. Even if such a parallel could be drawn, the authorities still apply a broad and purposive approach to such legislation and a strict approach is called for only in the event of ambiguity: *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32 at 44-45.

[138] The City also refers to *Toronto Livery Assn. v. Toronto (City)*, 2009 ONCA 535 at para. 44, where the court indicated that any consideration of the exercise of municipal legislative power must proceed in light of a deferential standard. The Court further stated:

> [44] … This deferential approach requires a reviewing court "[to] respect the responsibility of elected municipal bodies to serve the people who elected

them and exercise caution to avoid substituting their views of what is best for citizens of those municipal councils": *Shell Canada*, at para. 19. Further, this approach to the interpretation of municipal powers presumes that municipal by-laws are validly enacted absent a clear demonstration that the by-law in question exceeds the municipality's powers: see *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)*, [2005] O.J. No. 4268 (C.A.), at para. 3, leave to appeal refused, [2006] S.C.C.A. No. 45.

(2) *Ultra Vires* Discussion

[139] The petitioners' argument on the *ultra vires* issue is as follows:

> HCA ODP and, in particular, the listing of the Scheduled Properties, is *ultra vires* the authority of Council under subsection 561(2)(c)(iv) and s. 596A of the *Vancouver Charter* in that it fails to meet the heritage conservation purpose of subsection 561(2)(c)(iv) and s. 596A, and of Part XXVIII in general, by purporting to designate as "protected heritage property" property in respect of which there is little or no heritage value or character and, more importantly, in respect of which the City has made no determination of the existence of heritage value or heritage character. The petitioners further say that the properties listed on a schedule to an HCA ODP must be justified in relation to their connection related to the identified features and characteristics of an HCA ODP which justify the creation of the HCA in the first place. Without an assessment of the Scheduled Properties, no such relationship can be drawn.

[140] The petitioners also argue:

a) there has been no specific assessment of the heritage value or heritage character of the pre-1940 buildings in First Shaughnessy for the purpose of determining whether any given property should be included on Appendix A4;

b) the City has acknowledged in its response to petition that the 1940 cut-off date acts only as a "presumption" of heritage merit. As such, rather than the City conducting such an assessment, the burden is shifted to homeowners to show that their properties "no longer" have such merit;

c) Mr. Luxton estimates that less than 5% of the Appendix A4 properties are "not meritorious", meaning that they may no longer retain heritage character worthy of conservation and that "[i]n order to reach a definitive conclusion on the integrity and heritage merit of [the petitioners'

properties], it would be necessary to conduct a comprehensive assessment, including an on-site investigation";

d) the inclusion of the pre-1940 properties on Appendix A4 is based on two criteria only: (1) the buildings were constructed before 1940 and (2) the buildings have not since been demolished; and

e) the "protected heritage property" is still overly broad in that all "buildings" built before 1940 are protected, which includes not only houses and significant accessory buildings (such as coach houses) identified by Luxton, but now potentially extends to minor structures, such as garages, carports, greenhouses and garden sheds.

[141] The essence of the petitioners' argument is that Appendix A4 could not be properly created and populated without a specific assessment of the heritage value and character so as to identify specific buildings, structures, features and lands that merit heritage conservation protection, and an expression of the reason why they are worthy of protection. Further, they say that there must be an explanation as to how any particular building, structure, land or feature relates to the heritage value and heritage character of the heritage conservation area in which it is located.

[142] I am substantially in agreement with the arguments on this point advanced by the City, which I will summarize below.

[143] The *Charter* is silent as to the criteria and process applicable to identifying property for inclusion on a schedule enacted under s. 596A(3)(b). That provision says nothing about requiring the City to conduct a specific assessment of properties to be included on such a schedule. As such, I agree with the City that this provision does not impose any express or implied requirement of an individual assessment of each property to be included on such a schedule.

[144] To similar effect, the Ontario Court of Appeal overturned a lower court decision which imposed an obligation to obtain a planning report before it passed a bylaw, which was not required by the legislation: *Equity Waste Management of*

Canada v. Halton Hills (Town), (1998) 35 O.R. (3d) 321 at 337-338. See also *338186 B.C. Limited v. City of Vancouver*, 2011 BCSC 336 at paras. 49-50.

[145] As the City notes, the City does not take the position that it has the power to assemble a s. 596A(3)(b) list, such as Appendix A4, on a random or unprincipled basis. To the contrary, the City accepts that it must act in good faith and employ measures that are not arbitrary but that are rationally connected to a legitimate municipal objective (in this case, heritage conservation). That includes having a good faith, rational basis for placing properties on such a schedule.

[146] As is evident from my statements above, the gravamen of the petitioners' argument is that there was no assessment by the City as to the heritage value or character of the scheduled pre-1940 properties prior to their inclusion on Appendix A4.

[147] It is not disputed that the City did not undertake a specific assessment of each and every property on Appendix A4 by, for example, coming onto the properties to view outside and inside features of the buildings, including the pre-1940 buildings. However, I agree with the City that it did undertake an assessment of these properties prior to Appendix A4 being populated. This is more than evident from the Luxton report, which refers to the heritage value and heritage character of the pre-1940 buildings, both individually and collectively, as part of the First Shaughnessy neighbourhood.

[148] Indeed, Luxton simply confirmed, in 2015, what the City already knew and had determined as early as 1982; namely, that buildings constructed prior to 1940 had heritage value and heritage character that were worthy of conservation and heritage protection. It was on that basis that all pre-1940 buildings in First Shaughnessy were included in Appendix A4.

[149] I also agree with the City that even though a small number of buildings listed in Appendix A4 may have been compromised to the point where their heritage value or heritage merit no longer justifies conservation, but that does not mean that they

do not *per se* have such value or that there is no rational justification for including them on Appendix A4. In other words, even if such buildings are in such a state, their fundamental nature and character as containing pre-1940 construction is not eliminated, simply negatively affected.

[150] Mr. Luxton addresses this in para. 9 of his affidavit:

> I confirm that my estimate, which is based solely on visual assessments of the pre-1940 buildings in First Shaughnessy, was and continues to be that the integrity of between 14 and 20 of the pre-1940 buildings have been compromised to such an extent that they may no longer be worthy of conservation. Given that I only had an opportunity to view the pre-1940 buildings from the street, I am unable to say whether some of these buildings might nonetheless be candidates for restoration notwithstanding their compromised integrity. That could be the case either because the compromised integrity is relatively superficial or because the heritage significance or value of the property is sufficiently high to merit substantial restoration efforts.

[151] In those circumstances, the inclusion of a property on a schedule such as Appendix A4 alerts any homeowner that the City sees that property as having heritage value and heritage character, which determination can be challenged through the heritage alteration permit or demolition permit process. This confirms to a homeowner that it is possible to convince the City to change its mind about the value of the pre-1940 home's construction.

[152] The petitioners also advance a number of other subsidiary arguments based on their interpretation of the scheme of the heritage conservation provisions found in the *Charter*. In my view, none of these have merit and, again, I would adopt the submissions of the City, which are summarized below.

[153] Firstly, the petitioners assert that the definitions of "conservation", "heritage value" and "heritage character" (set out above), support the interpretation that a specific assessment of the heritage character and value of an individual property must be undertaken and determined before the City exercises its conservation powers. The petitioners say this is because heritage conservation is concerned with preserving that which is already determined to have heritage character and value.

[154] A review of the relevant definitions makes clear that the City's heritage conservation efforts may relate to a specific piece of property *or* a geographical area. That is exactly what was done in First Shaughnessy. When applying blanket protection to an area through a heritage conservation area, there is no need for the City to conduct an assessment of the heritage character or value of a particular property. It is axiomatic that if the City can act to conserve heritage on an area-by-area basis, then no assessment of properties within that area should be required. Again, there is nothing in the *Charter*, or in above definitions, from which it can be inferred that an individual property assessment is required.

[155] Secondly, the petitioners argue the requirement in s. 596A(2)(a)(i) of the *Charter* to describe the special features or characteristics that justify the designation of a heritage conservation area should also apply to Council's ancillary power to create a schedule under s. 596A(3)(b). The petitioners argue that the City is required to conduct a heritage assessment of each scheduled property to identify those features or characteristics that relate to the special features or characteristics identified in s. 1.3 of the HCA ODP. They say that the City cannot make this connection without a heritage assessment of the property.

[156] Again, this amounts to the petitioners conflating the requirements on the City to create a heritage conservation area with its ancillary power to create a schedule.

[157] Indeed, as argued by the City, the City's power to designate a heritage conservation area does not require heritage assessments of individual properties, so the logic of the petitioners' argument actually supports the opposite conclusion - that the City does not need to conduct individual heritage assessments before listing properties on a schedule, such as Appendix A4.

[158] Section 596A(3)(b) of the *Charter* gives Council the power to create a schedule listing buildings, structures, land or features within the area that are to be protected heritage property. There is no requirement in the *Charter* to:

a) identify how the buildings, structures, land or features relate to the special features or characteristic that justify the creation of the HCA; or

b) articulate the reasons why the buildings, structures, land or features are being included on the schedule.

[159] The legislature could have imposed these obligations, but chose not to.

[160] Even so, there is ample justification and explanation for the inclusion of pre-1940 buildings in Appendix A4, by reference to the special features or characteristics that justified the creation of the First Shaughnessy HCA.

[161] In s. 1.3(e), the Guidelines describe the special features and characteristics of the First Shaughnessy HCA:

> … a cultural landscape of individually-designed homes built with superior materials and craftsmanship and conforming to traditional styles, linked by their large scale proportions, and demonstrating a variety of styles including British Arts and Crafts, Tudor Revival, Queen Anne Revival, Craftsman and Colonial Revivals.

[162] This is a quintessential description of the heritage character and value of pre-1940 buildings found in the neighbourhood.

[163] Luxton's Statement of Significance, incorporated by reference into the Guidelines, describes the significance of pre-1940 buildings as follows:

> First Shaughnessy represents a significant collection of excellent examples of Revival-style architecture … With few exceptions, all houses built prior to 1940 in First Shaughnessy exhibit historical reference to their architectural style. The architectural styles included English Arts and Crafts, Tudor Revival, Craftsman and Colonial Revival. As well as individual heritage value, this collection of unique properties has significant value as a grouping, illustrating a variety of styles and architectural design within one distinct area. These houses are also valued as examples of good workmanship and for their use of high quality materials.

[164] Further, the Guidelines state:

> With few exceptions, all houses built prior to 1940 in First Shaughnessy exhibit historical references in their architectural style. Deference to traditional

> styles is one of the distinguishing features of the neighbourhood; however none of the buildings were designed as replications of these styles of the past. Rather, these houses represent several styles, the forms and details of which were interpreted by various architects practising during Shaughnessy's early development period.

[165] To the extent that Appendix A4 lists every property with a pre-1940 building, the list falls squarely within the features and characteristics identified in the HCA ODP as justifying the creation of a heritage conservation area.

[166] Given this approach, it is, in my view, manifestly the case that all pre-1940 buildings were put on Appendix A4 because there was a rational basis on which to identify their significant heritage value and character on such a list, consistent with the overall objectives of the City under the *Charter* and its heritage conservation mandate.

[167] As the City states, the creation of Appendix A4 was consistent with the creation of the HCA, in that these buildings were very much part of the reason why the HCA was created in the first place.

[168] Thirdly, the petitioners argue that the provisions relating to refusing or imposing conditions on heritage alteration permits require Council to have regard to the "purpose of the heritage protection of the property" (see *Charter*, ss. 597(4) and 598(1)). They say that this can only be accomplished if there has been some expression as to why a particular property is being protected.

[169] However, these provisions apply to all property within a heritage conservation area and the requirement for a heritage alteration permit applies whether or not the property has been listed on a schedule created under s. 596A(3)(b) or not. The trigger for requiring a heritage alteration permit is simply that the property is located in a heritage conservation area.

[170] Further, when considering an application for a heritage alteration permit, I agree that there is ample guidance on the purpose of the heritage protection within a heritage conservation area, such as First Shaughnessy. This guidance arises from

the mandatory requirements found in s. 596A(2) of the *Charter*, which require that the HCA ODP set out: the special features and characteristics that justify the heritage conservation area designation; the objectives of the designation; and specific guidelines on how the objectives are to be achieved.

[171] Fourthly, the petitioners argue that the *Charter* gives the City far-reaching powers to ensure that it has the information needed to make an assessment of the heritage value and character of a property. These include the power to order a heritage inspection (s. 583), the power to enter private premises to conduct an inspection (s. 584), and the power to undertake or obtain an impact assessment as to any proposed action on heritage property (s. 585). The petitioners argue that it is evident from the mere existence of those powers that they are intended to be used *prior* to the exercise of the City's conservation powers and that, if not, the powers are unnecessary and superfluous.

[172] There is no merit to this argument. In fact, to the contrary, both of the powers to which the petitioners refer either contemplate or require a prior exercise of the City's conservation powers. Section 583(1) refers to a heritage inspection in relation to property that *is or may be* protected heritage property or heritage property. Section 585(1) only operates where the property in question has already been designated as protected heritage property.

[173] Sections 583 and 585 contemplate providing City Council with further information relating to property that is already "protected heritage property" or may be. These sections contemplate that the authority granted is being used after Council has exercised its heritage conservation powers or is about to, and when some further action is contemplated with respect to a property, such as the granting of a heritage alteration permit.

[174] The petitioners also assert that s. 590 of the *Charter*, which permits Council to declare a heritage control period "for the purposes of heritage conservation planning for an area", requires City Council to gather information about the heritage character and value of assets the City is considering protecting. I agree that it is implicit that

the City will gather some information during such a control period; however, heritage conservation planning is inevitably a wide-ranging exercise. Again, there is nothing express or implied in the *Charter* that that information-gathering exercise will include a specific assessment of the individual properties.

[175] Fifthly, the petitioners argue that s. 582(2)(a) of the *Charter* requires that the City give reasons for including a property on the Heritage Register. Further, s. 593 of the *Charter*, relating to the designation of protected heritage property, requires that the City provide a report as to the heritage value or heritage character of the property (s. 594(5)) and that such designations give rise to compensation being payable by the City (s. 595). The petitioners argue that the legislature could not have intended to provide fewer procedural restraints to properties scheduled under s. 596A(3)(b).

[176] This argument is met by a plain reading of the *Charter* provisions relating to the creation of a schedule under s. 596A(3)(b). It must be taken that the legislature would have been aware of the more strict requirements under ss. 582 and 593 and chose not to include those or similar provisions in creating a schedule under s. 596A(3)(b). They are not a requirement in the latter case and, as such, one must presume that the legislature deliberately chose not to impose such requirements on the City: see *Equity Waste Management*.

[177] The legislature does require, in s. 596A(2), that City Council provide a substantial amount of information regarding the justification and objectives of creating a heritage conservation area. Presumably, the legislature concluded that this information would be sufficient for that purpose and also in relation to any schedule, such as Appendix A4, that the City chose to include as part of that process.

[178] Sixthly, the petitioners argue that s. 562(3) requires Council to hold a public hearing where a bylaw is proposed to adopt a development plan and give notice to homeowners whose properties are affected by any schedule to be included under s. 596A(3)(b). They say that this is to allow homeowners to hear why their properties

are considered worthy of conservation. They argue that the *Charter* requires Council to hold a public hearing so as to give notice to owners and occupiers of property as to the reasons why their properties are considered worthy of conservation before their private property rights are impacted.

[179] I agree with the City that the notice provision is a broad one and reflects the fact that all owners of property within a heritage conservation area – including any that are listed on a s. 596A(3)(b) schedule - are potentially impacted by the enactment of a heritage conservation area development plan. More particularly, such notice would highlight the obvious implications of the schedule to these scheduled homeowners; namely, that it is their properties which have been particularly identified as having special features and characteristics that the heritage conservation area is intended to protect, preserve and enhance, and that they are therefore most likely to be impacted by the requirements for a heritage alteration permit. As I will discuss below, under the procedural fairness question, all of the requirements in this regard were met by the City.

(3) *Ultra Vires* Conclusion

[180] The petitioners have failed to convince me that there is any basis upon which the City can be said to have acted outside of its jurisdiction or authority under the *Charter*. In particular, I conclude that the *Charter* does not require the City to undertake an individual assessment of the heritage value or heritage character of each property prior to including it on a s. 596A(3)(b) schedule, such as Appendix A4.

REASONABLENESS ARGUMENTS

[181] In the alternative, the petitioners argue that s. 1.10 of the Guidelines, designating the properties in Appendix A4, is unreasonable. They advance essentially the same arguments that I have discussed above.

(1) Standard of Review

[182] If the City had the authority or jurisdiction to include Appendix A4, then the question is whether the City acted reasonably in designating the pre-1940 properties in Appendix A4.

[183] In *Toronto Livery*, the court addressed an argument that the legislation in question unfairly and arbitrarily discriminated against the interests of the limousine industry, and in doing so said:

> [47] In this context, it was for the City, acting within its authority under the *Toronto Act*, to determine what measures for the regulation of the limousine industry are in the public interest. So long as the measures chosen are not arbitrary and are rationally connected to a legitimate municipal objective, the court is precluded from second-guessing City Council on what regulatory measures are in the public interest of the citizens of the City. As this court explained in *Howard and Toronto*, at p. 567:
>
> > What is or is not in the public interest … is a matter to be determined by the judgment of the municipal council; and that what it determines, if in reaching its conclusion it [acted] honestly and within the limits of its powers, is not open to review by any court. [Citations omitted.]

[184] The comments of the Court in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 are also helpful on the reasonableness issue:

> [13] A court conducting substantive review of the exercise of delegated powers must first determine the appropriate standard of review. This depends on a number of factors, including the presence of a privative clause in the enabling statute, the nature of the body to which the power is delegated, and whether the question falls within the body's area of expertise. Two standards are available: reasonableness and correctness. See, generally, *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190, at para. 55. … If the applicable standard of review is reasonableness, the reviewing court requires that the decision be reasonable, having regard to the processes followed and whether the outcome falls within a reasonable range of alternatives in light of the legislative scheme and contextual factors relevant to the exercise of the power (*Dunsmuir*, at para. 47).
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> …
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> [24] It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The

> fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.
>
> [25] Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw.
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> [Emphasis added]

[185] The Court in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59, reminds us that I am not to substitute my own opinion in place of the decision of the City in exercising its legislative mandate.

[186] Decisions of this Court confirm that this Court is to afford a high degree of deference to decisions of the City, particularly given the privative clause found in the *Charter*, s. 148: *Sahota v. Vancouver (City)*, 2010 BCSC 387 at para. 49; aff'd 2011 BCCA 208; *WEN Residents Society v. Vancouver (City)*, 2014 BCSC 965 at paras. 58-60.

[187] Finally, the City states that if property owners are dissatisfied with its decision to enact a heritage conservation area for First Shaughnessy, and to include Appendix A4, the remedy is provided by principles of political accountability in our democratic system, not judicial review. This statement is supported by the comments found in *Community Association of New Yaletown v. Vancouver (City)*, 2015 BCCA 227:

> [62] A duty of care can arise when the City exercises its business powers and a duty of procedural fairness can arise when the City exercises its quasi-judicial powers. These are legal duties and aggrieved parties can seek legal remedies in court. However, when the City exercises its legislative powers (assuming it is acting within its jurisdiction), the principles of traditional political accountability provide the remedy: it is at the ballot box. As Chief Justice McLachlin wrote for a unanimous Court in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at para. 19:
>
> > review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and its legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economical, political

> and other non-legal considerations. "Municipal governments are democratic institutions", per LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 33.
>
> [63] The Chief Justice went on to stress that "courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable" (at para. 19).

(2) Reasonableness Discussion

[188] The petitioners advance the same arguments, as above, in respect of the reasonableness argument and in relation to Appendix A4. They can be similarly rejected for the reasons I have set out above.

[189] I have already accepted the City's argument that, contrary to the assertions of the petitioners, there was an assessment of the heritage value and heritage character of the buildings built prior to 1940. Mr. Luxton has repeatedly stated that the pre-1940 buildings listed on Appendix A4 have "historical significance" to the City, given their heritage character and heritage value, both individually and to the extent that they greatly contribute to the overall heritage value of First Shaughnessy. I will repeat again that this simply confirms what the City had determined as early as 1982.

[190] Mr. Luxton stated in the Luxton Report:

> …pre-1940 sites define the architectural and heritage character of First Shaughnessy and should form the collection of sites that are to be protected as part of the new HCA legislation.

[191] In addition, Mr. Luxton confirms, as I have recounted above, that these pre-1940 buildings continue to have heritage character and value worthy of conservation although a small minority may have suffered some degradation of the quality of that heritage character or value.

[192] Appendix A4 is intended to identify every pre-1940 building located in First Shaughnessy. Appendix A4 was not compiled in an arbitrary manner. The criterion for inclusion on the list is a valid one and indicates the City's view that such buildings presumptively have heritage value and character worthy of conservation. The

accuracy of the list is based on that criterion, as confirmed by Luxton, who specifically recommended each property for inclusion on Appendix A4.

[193] The particularization of protected heritage property as "buildings existing prior to January 1, 1940" provides property owners and City staff with adequate notice of what constitutes protected heritage property. The designation extends to any building on the property constructed prior to 1940. As the City notes, the precise implications of the designation in any particular instance are not known unless and until an application is made for a heritage alteration permit; however, that is equally true for all property within a heritage conservation area. Nevertheless, the fact that there may be later decisions by the City relating to these pre-1940 buildings and the appropriateness of preserving them does not detract from their fundamental character at this time; namely, that they are architecturally and otherwise valuable in terms of heritage protection.

[194] To the extent that the definition of "building" includes coach houses, garages, sheds and other more minor structures, I agree with the City that the description is rationally connected to the work performed by Luxton. In the Statement of Significance, Mr. Luxton identified "early outbuildings" as contributing to the heritage character of the First Shaughnessy.

[195] Accordingly, the City did not just pick the "pre-1940" date out of the air. There was a rational connection between this designation and the City's overall objective towards ensuring heritage conservation in First Shaughnessy.

[196] The petitioners assert that the City's HCA heritage conservation regime in First Shaughnessy upsets the balance of interests between private owners and the City in three critical ways:

a) it transforms the burden of establishing heritage value to a burden on the homeowner of disproving heritage value or character;

b) it shifts the costs of heritage assessment onto individual property owners who must engage expensive experts to prepare heritage

assessments if they wish to have their property removed from the list; and

c) no compensation is payable even where a loss of property value occurs.

[197] It must be kept in mind that the petitioners do not challenge the jurisdiction and reasonableness of the overall legislative scheme to create the First Shaughnessy HCA. I have already outlined the lengthy history of the City in terms of addressing heritage conservation in First Shaughnessy. Those early efforts, beginning in 1982, were of limited success. The First Shaughnessy HCA designation was seen as a more comprehensive solution, particularly given increasing demolition applications over the last few years in this neighbourhood which the City sought to preserve.

[198] Overall, the HCA ODP and Appendix A4 are a reasonable and measured approach to advancing an important City goal of conserving the heritage character and heritage value that exists in First Shaughnessy based on the heritage conservation powers granted to the City in the *Charter*.

[199] I would venture to say that most decisions and legislative changes made by the City negatively and positively affect people in the community, both financially and otherwise. Zoning is one example. Bikes lanes are another. The introduction of the HCA Bylaws is no exception in that some of the homeowners in First Shaughnessy are, to some extent, at least in their view, negatively affected.

[200] The authorities support that it is entirely legitimate for the City to limit or even remove property rights in order to address and achieve long-term planning objectives.

[201] In *Canadian Pacific Railway Co. v. Vancouver (City)*, 2004 BCCA 192 at para. 45, aff'd 2006 SCC 5, the Court was considering CPR's challenge to the City's bylaw which restricted CPR's rights to develop what is locally known the Arbutus Corridor lands. In the Court of Appeal, Justice Esson referred to many case

authorities where such legislative actions were upheld even in the face of removal or restriction of such property rights. He stated:

> [45] The authorities cited by Professor Todd provide ample support for his summary of the law. All of those cases accept that it is a legitimate exercise of municipal powers to give priority to long term planning and development objectives by removing or placing limits on the right of property owners to deal with their property as they wish.
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> …
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> [50] A common factor in all of these cases is that, as in the case at bar, the existing bylaws or other municipal regulations governing development of property had the effect of removing or at least freezing for a time the land owner's right to deal with the property in accordance with the bylaws in force to the point of the amendment or other change. In each case, the change was made in order to give effect to Council's view of what was needed for proper planning and development.

[202] The evidence indicates that the interests of all homeowners were considered by the City, particularly given the Coriolis Reports #1 and #2, which considered the financial and economic impact on homeowners of this type of scheme. The clear inference from the evidence is that the City considered the matter in terms of balancing the interests of individual property owners in First Shaughnessy against the overall community interests in favour of preserving these valuable heritage properties. This balancing exercise did not take place in a vacuum; it arose from an extensive consultative process with experts, such as Luxton and Coriolis, and no decisions were made until after public input was received.

[203] As the City has noted time and again on this application, Appendix A4 itself does not trigger the need for a heritage alteration permit, which is required generally in respect of all properties within the HCA. In other words, the same standards apply for all properties within the HCA, regardless of whether they are listed in Appendix A4 or not (see s. 1.6 of the Guidelines cited above). Appendix A4 does, however, identify and indicate the City's presumptive determination that such sites have heritage value that is intended to be preserved. The notation on title is notice to all who might be interested in the property that this has been done.

[204] Further, I see nothing unfair or unreasonable in the process relating to heritage alternation permits and demolition permits in the HCA scheme by which individual homeowners can seek to displace that determination by convincing the City that the heritage value of their pre-1940 home has been so altered or renovated such that there is no merit in further preserving it.

[205] The petitioners initially sought relief in terms of a declaration that they are entitled to compensation under the HCA Bylaw scheme, although they later indicated that they did not seek such relief. There are ample reasons for doing so, in that the *Charter* is clear to the effect that no compensation is payable to property owners for any loss in value as a result of a designation in a heritage conservation area. I see nothing ambivalent in the plain reading of the statutory provisions on that point.

(3) Conclusion on Reasonableness

[206] What then is the rationale or purview of the statutory scheme under the HCA Bylaws per *Catalyst Paper*?

[207] The City has clear statutory authority to protect, preserve or enhance heritage properties under Part XXVIII of the *Charter*, including the power to designate a heritage conservation area with or without a schedule under s. 596A(3)(b), such as Appendix A4. Here, the City has exercised its authority over heritage conservation in the City and in First Shaughnessy particularly. This neighbourhood has attracted more attention than others, perhaps by reason of its rich history, as I have outlined above.

[208] In achieving the legislative objective of heritage conservation under the *Charter*, the City has enacted the HCA Bylaws, and also included Appendix A4 as part of that process.

[209] I see nothing in the HCA Bylaws or Appendix A4 that is inconsistent with the rationale of the statutory scheme. In my view, the HCA Bylaws and Appendix A4 are entirely within the range of reasonable approaches that might have been made by

the City toward achieving its objectives. While there might have been other approaches, that chosen approach is entitled to a high degree of deference from this Court.

[210] As the reasoning in *Toronto Livery* makes clear, it is not my role to second-guess the City on how it meets its legislative objective and serves the public interest.

[211] I conclude that it was reasonable for the City to adopt the HCA Bylaws and designate, as protected heritage property, all pre-1940 buildings in First Shaughnessy. In addition, adopting the HCA Bylaws with Appendix A4 fell within a "reasonable range of outcomes" available to City Council.

MISCELLANEOUS ARGUMENTS

[212] The petitioners advance other miscellaneous arguments.

(a) Inconsistent with HCA ODP

[213] The petitioners argue that the scheduling of individual properties in Appendix A4 "without assessment" is contrary to the HCA ODP. They say that the HCA ODP precludes Council from listing properties on Appendix A4 on the basis of a presumption. Section 1(e) of the HCA ODP states that the intent of the official development plan includes:

> (e) To designate as protected heritage property those buildings, structures, lands or features that, in the opinion of Council, have sufficient heritage character or heritage value to justify their conservation.

[214] This argument is without merit. As I have stated above, the City has made an assessment that pre-1940 buildings do have heritage value. Appendix A4 is consistent with the intention behind the HCA ODP in that it identifies and designates as protected heritage property every building that, based on the advice of its consultant, Luxton, the City believes has or is likely to have heritage character and value worthy of conservation. The fact that the City may be convinced later that any property is not worth preserving in the future does not detract from this assessment having been done in terms of populating Appendix A4.

[215] I conclude that Appendix A4 is not inconsistent with the overall intention of the HCA ODP. The City's objective in the HCA ODP was to designate as protected heritage property, those properties which have sufficient heritage character and value to justify their conservation. Appendix A4 serves that goal.

(b) Unlawful Delegation

[216] The petitioners argue that ss. 1.11 and 1.12 of the Guidelines unlawfully delegate to the Director of Planning the authority to decide whether property is "protected heritage property". Those sections deal with granting a heritage alteration permit for scheduled property and removing scheduled property from the schedule, respectively.

[217] Section 1.11 of the Guidelines does not delegate the power to determine whether property is protected heritage property. Property listed on a s. 596A(3)(b) schedule is protected heritage property, by definition.

[218] There is nothing in Part XXVIII of the *Charter* or the HCA ODP that prevents granting a heritage alteration permit, including for demolition, for protected heritage property, if the permit is warranted – that is, if the test for refusal set out in s. 597(4) is not made out. In effect, the delegate is to determine not whether the property is protected heritage property, but whether protected heritage property has sufficient heritage value to justify continuing its conservation.

[219] Section 596B(3)(a), which specifically authorizes the delegation of the power to act with respect to a heritage alteration permit involving protected heritage property, supports the grant of authority to the delegate. When an application is made for a heritage alteration permit relating to protected heritage property, the delegate must make the decision required by s. 597(4); namely, whether granting the permit would be inconsistent with the purpose of the heritage protection of the property. If the property owner disagrees with the delegate's decision, he or she has the right to request that Council reconsider the decision.

[220] Section 1.12 of the Guidelines deals with the question of whether properties listed in Appendix A4 should be removed from the list, and cease to be protected heritage property pursuant to s. 596A(3)(b). However, that provision is clear that this is a decision made by City Council, not by any other person. Section 1.12.1 provides that an application for removal from Appendix A4 must be made to Council. In that event, where removal is requested, the delegate's role is limited to ordering an inspection (for which s. 583(1) of the *Charter* provides authority) and making a recommendation to Council (see ss. 1.12.2 and 1.12.3 of the HCA ODP).

[221] In conclusion, there is no basis upon which it can be said that the City has improperly delegated its core responsibility to determine what is or is not protected heritage property.

BAD FAITH

[222] The petitioners argue that the City included Appendix A4 in bad faith, because it distinguishes among classes of properties in an arbitrary and unfair manner and without regard to valid and *bona fide* planning purposes.

[223] I have been referred to a number of authorities on this issue.

[224] The types of conduct coming under the rubric of "good faith" were described by Justice Finch (as he then was) in *MacMillan Bloedel v. Galiano Island Trust Committee*, (1995) 10 B.C.L.R. (3d) 121 (C.A.):

> 153 The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact.
>
> 154 Bad faith, however, is also used to describe the exercise of power by an administrative body, that is beyond the scope or the ambit of the powers delegated to that body by the legislature. In those cases the exercise of powers is sometimes described as unauthorized, or beyond the scope, or

> outside the limit of the delegated power. It is an act that is ***ultra vires***. Frequently, allegations of bad faith include both the aspect of illegality in the first sense, and in the sense of ***ultra vires***. To the extent that the allegation focuses on the way the delegated power was exercised, or on the conduct of the administrative body, there is an issue of fact. In those cases where powers are said to have been exceeded, however, there is another issue. That is the scope, or the amplitude, of the powers delegated by the legislature. That issue invariably requires an interpretation of the empowering statutes, and that raises an issue of law.

[225] Bylaws are presumed to have been enacted in good faith, unless the contrary has been proven by the person challenging the bylaw: *MacMillan Bloedel* at paras. 144 and 156. The onus of proof rests on the party alleging bad faith: *Toronto Livery* at para. 41.

[226] The Court in *MacMillan Bloedel* stated:

> [178] … courts should be slow to find bad faith in the conduct of democratically elected representatives acting under legislative authority, unless there is no other rational conclusion.

[227] In the context of considering the reasonableness of the HCA Bylaws, I have already referred to the City's ability to negatively affect property owner's rights in the face of proper legislative action: see *Canadian Pacific Railway*. In a similar vein, the Court in *Re Monarch Holdings Ltd. and District of Oak Bay et al.*, (1978) 4 B.C.L.R. 67 (C.A.) at 92 addressed that scenario in the context of good faith:

> …The mere fact that the economic interest of the appellant was adversely affected by the rezoning, and that its right to use its property was limited, and that the value of its property was adversely affected, will not justify a finding of bad faith on the part of the municipality for it is inevitable that in the exercise of its zoning powers a municipality will affect adversely from time to time the property of landowners. …

See also *Brentwood Lakes Golf Course Ltd. v. Central Saanich (District)*, [1991] B.C.J. No. 2302 (S.C.) at p. 18 (QL).

[228] The petitioners argue that by eschewing a proper, merit-based assessment of heritage, the City's actions create an arbitrary and unfair distinction among properties with pre-1940 buildings and those without, which amounts to discrimination.

[229] The petitioners rely on *Rocky Point Metalcraft Ltd. v. Cowichan Valley (Regional District)*, 2012 BCSC 756 where the Court stated:

> [83] Unlawful discrimination may be found where a bylaw singles out one property without regard to valid and *bona fide* planning principles, or where there is an improper motive to favour or hurt one property without regard to the public interest: see *Hollett v City of Halifax* (1975), 66 DLR (3d) 524 (NSSC AD); *Lees v Corporation of the District of West Vancouver* (1979), 15 BCLR 233 (CA).

[230] However, as stated by the City, there is no evidence that either of the circumstances discussed in *Rocky Point* are present here. The HCA ODP and Appendix A4 do not single out property owners without regard to a valid and *bona fide* planning purpose. The HCA ODP applies to all property owners in First Shaughnessy. I have already described the purpose of creating Appendix A4. Both were enacted or created in accordance with the legitimate heritage conservation efforts of the City.

[231] This is similar to this Court's conclusion in *Rocky Point* at paras. 99-100 that no bad faith arose because, while there landowner's property was, in some ways, singled out, "the CVRD was acting in accordance with pre-existing planning policy and in the public interest". There is ample evidence that the City's impetus for the HCA Bylaws and Appendix A4 in particular was, as permitted under the *Charter,* to preserve pre-1940 buildings in the neighbourhood as having heritage character and value for that reason.

[232] Further, there is no evidence that the City was improperly seeking to harm homeowners who have pre-1940 homes without regard to the public interest in heritage conservation of those homes.

[233] The petitioners also refer to *356226 B.C. Ltd. v. Vancouver (City of)* (1998), 54 B.C.L.R. (3d) 253 (C.A.). That case involves discrimination in the imposition of development cost levies within a particular area of the city. The bylaw excluded certain properties within an area from paying the levy for what the court characterized as "policy reasons". The *Charter* only permitted the City to discriminate on the basis of area. The court upheld this Court's decision that the

"true purpose" of the bylaw was to excuse some developers from payment of the levy which was to be paid by others (see paras. 26, 41-43).

[234] *356226 B.C. Ltd.* does not assist the petitioners. Here, the *Charter* expressly permits the City to designate a heritage conservation area and to identify and protect those features and characteristics that contribute to that area's heritage character and value. The "true purpose" of the HCA Bylaws and Appendix A4 is to preserve heritage property in First Shaughnessy, which has been particularly identified as including pre-1940 buildings.

[235] The fundamental point in the petitioners' argument that Appendix A4 is discriminatory is that the creation of Appendix A4 was "not used for the purpose of heritage conservation because the City had no basis to inform itself of the basis on which to justify such conservation".

[236] I have already rejected this submission, having found a substantial basis upon which the City formed the view that pre-1940 buildings have significant heritage value and should be conserved. The *Charter* expressly permits City Council to designate a heritage conservation area and protect those features and characteristics that contribute to that area's heritage character and value. The City relied on evidence from its consultant, Luxton, that pre-1940 buildings contribute to the heritage character of First Shaughnessy and, on that basis, designated those buildings as protected heritage property. The *Charter* permits and contemplates the identification and protection of characteristics and features in this manner and there is no basis to conclude that the City acted other than in good faith in employing the powers available to it.

[237] To suggest that Appendix A4 was not created for the purpose of heritage conservation is entirely specious.

[238] In conclusion, there is no evidence, let alone compelling evidence, that the City acted in bad faith in enacting the HCA Bylaws and in its decision to include all pre-1940 buildings in Appendix A4. The HCA Bylaws and Appendix A4 do not

unlawfully discriminate between property owners in First Shaughnessy with pre-1940 buildings and those without. As such, the petitioners have failed to meet the onus of proving that the City was acting in bad faith when it enacted the HCA Bylaws and Appendix A4.

PROCEDURAL (UN)FAIRNESS

[239] The petitioners also challenge the fairness of the overall process leading to the adoption of the HCA Bylaws. The parties agree that the standard of review is correctness: *Mission Institution v. Khela*, 2014 SCC 24 at para. 79; *Fisher Road Holdings Ltd. v. Cowichan Valley (Regional District)*, 2012 BCCA 338 at para. 23.

[240] The requirements for notice to affected homeowners leading to the adoption of the HCA Bylaws are set out in the *Charter*:

a) s. 562(3) requires the City hold a public hearing before adopting an official development plan; and

b) s. 596A(4) requires that where a public hearing is to be held pursuant to s. 562, each owner and occupier of the properties that are to be listed in a schedule to be included pursuant to s. 596A(3)(b) must be given notice of the hearing in writing at least 10 days in advance.

[241] The petitioners assert that these requirements indicate the legislature's recognition of the need for a high degree of procedural fairness where designation of private properties as protected heritage property is proposed. As was noted in *Fisher Road Holdings*, at para. 33, this statement has support in the comments of Chief Justice McLachlin in *Congrégation des témoins de Jéhovah de St Jérôme Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at para. 9, where she states that, in considering the importance of the decision, "the stringency of procedural protection is directly proportional to the importance of the decision to the lives of those affected and the nature of its impact on them".

[242] Further, the petitioners cite various authorities that underscore the importance of notice provisions toward ensuring that anyone who is or could be affected by the proposed legislation have full disclosure of what is proposed and why, so that they may formulate an informed position on the matter that will allow them to provide input to the City.

[243] In *Pitt Polder Preservation Society v. Pitt Meadows (District),* 2000 BCCA 415, the Court stated:

> [43] It appears to me that, in the present context, determining the content of the duty of fairness would include consideration of the nature of the statutory scheme for making decisions on land use and zoning bylaws, the process that must be followed in making such decisions, the function that a participatory process serves in the ultimate decision being made by local government in respect of the bylaws, and the importance and consequences of the decision to those who might be affected by it.
>
> [44] The *Municipal Act* requires that notice be given of the public hearing on land use and zoning bylaws. There is an abundance of jurisprudence on the fundamental importance of notice to the legitimacy of the decision-making process in land use and zoning cases. Simply put, failure to comply with the notice requirements in relation to a public hearing undermines the opportunity afforded the public to participate in the decision-making process. Failure to comply with the notice requirement for a public hearing on proposed land use or zoning bylaws generally results in the bylaw being quashed.
>
> [45] A public hearing on land use and zoning bylaws serves at least two important functions: it provides an opportunity for those whose interests might be affected by such a decision to make their views known to the decision-maker and it gives the decision-maker the benefit of public examination and discussion of the issues surrounding the adoption or rejection of the proposed bylaw.
>
> [46] Procedures aimed at ensuring a minimum standard of rationality in the decision-making process are more likely to enhance the quality of the decision and the public's acceptance of it than decisions based on undisclosed information, or on incomplete or ill-considered facts.

[244] The Court in *Pitt Polder*, following *Karamanian v. Township of Richmond*, (1982) 38 B.C.L.R. 106 (S.C.), also confirmed the importance of the public being provided with full information and documentation which are in the hands of the City and upon which the decision to legislate has been made. Justice Rowles in *Pitt Polder* said:

> [54] In my opinion, the cases to which I have just referred support the view that in order to provide the opportunity for informed, thoughtful, and rational presentations in relation to proposed land use and zoning bylaws it is necessary that interested members of the public have the opportunity to examine in advance of a public hearing not only the proposed bylaws but also reports and other documents that are material to the approval, amendment or rejection of the bylaws by local government.

[245] The comments found in *Pitt Polder* as to full disclosure of materials were confirmed by the Court of Appeal in *Fisher Road Holdings* at paras. 27-31 and *Community Association of New Yaletown* at para. 88.

[246] Here, there is no dispute that the City complied with its obligations in terms of notice to the homeowners and that the City disclosed materials to the public, with the indication that these were the materials upon which the City intended to rely in enacting the HCA Bylaws. The City disclosed all material that was before City Council when considering the HCA Bylaws, including their initial introduction and enactment and the later amendments.

[247] The petitioners' argument in this respect is more nuanced than simply alleging a failure to disclose materials in the hands of the City. They argue:

> Council failed to adequately disclose, in a timely manner, or misrepresented to the public, material information considered in deciding whether to enact the by-laws at issue. In particular, Council failed to disclose to members of the public, until such time as it was too late to provide time for residents to make informed, thoughtful and rational comments on the by-laws at a public hearing, that no actual assessment of heritage merit had been performed or sought with respect to any of the properties on the proposed Schedule A4 to the HCA ODP.
>
> [Emphasis added]

[248] Following from the City's previous arguments, which I have accepted, the petitioners' arguments again rest on the foundation that being listed on Appendix A4 has a material and detrimental impact on the rights of property owners beyond what other property owners in the neighbourhood might suffer by reason of the HCA Bylaws. It remains the case that the most significant impact on the rights of property owners comes from the imposition of the HCA designation to the entire neighbourhood, requiring homeowners to obtain a heritage alteration permit.

Nevertheless, I accept that being listed on Appendix A4 did have impacts not faced by others, including the notation on title and being subject to a s. 583 heritage inspection.

[249] The true dispute here is:

a) whether there was non-disclosure or misrepresentation concerning the development of Appendix A4 such that members of the public, including those who own property included on Appendix A4, could not make informed, thoughtful and rational comments on the HCA Bylaws at the public hearing; and

b) if "non-disclosure or misrepresentation" occurred, was this corrected in a timely manner?

[250] The petitioners argue that the Luxton Report, which was circulated with the May 2015 Report, mislead the public by leaving the impression that each of the properties on the list had undergone an evaluation of its heritage merit (or lack of merit) before inclusion on Appendix A4. They rely on certain statements found in Appendix C to the Luxton Report.

[251] In considering this issue, I agree with the City that one cannot cherry pick only portions of the Luxton Report (as the petitioners seek to do); rather, the Luxton Report must be considered in its entirety, along with the May 2015 Report.

[252] The May 2015 Report confirms that the proposed schedule of protected heritage property (Appendix C to the Luxton Report and what would eventually be Appendix A4), was an updated version of the Heritage Inventory, which was an inventory of all pre-1940 buildings in First Shaughnessy. The May 2015 Report includes the following comments:

a) the Heritage Inventory is mentioned in the City Manager's/General Manager's Comments at pp. 4-5 under "Background/Context":

> …In 1994, Council adopted the First Shaughnessy Heritage Inventory, which is a list of all buildings in First Shaughnessy that were constructed prior to 1940.

b) under "Heritage Value of First Shaughnessy, the Report states: "[t]here are currently 595 properties in First Shaughnessy, of which 317 were constructed before 1940" (p. 6);

c) the second option described in the report listed among its advantages "[c]larity of heritage merit for pre-1940s homes through a detailed list of pre-1940 properties scheduled under the HCA" (p. 7). Further at page 8:

> Based on the analysis undertaken, the consultant recommends Option 2 and that Council designate First Shaughnessy as an HCA and schedule all pre-1940 properties in the area as protected heritage property under the HCA ODP.,

and;

d) finally, the May 2015 Report includes the following at p. 9:

> **Updated First Shaughnessy Heritage Inventory**
>
> The current Council-adopted First Shaughnessy Heritage Inventory was reviewed and updated by the consultant as described in their report attached as Appendix I (See Appendix C of the consultant report for details). The final recommended list to be scheduled in the HCA ODP as protected heritage property includes 317 properties (exclusive of separate strata lots within a property that has been subdivided by strata plan). A total of 43 properties were removed from the existing list of 353 properties that comprised the First Shaughnessy Heritage Inventory as they are now demolished, while 7 properties have been added that were not previously listed but have been now confirmed by the consultant as being built prior to 1940.
>
> …
>
> The consultant notes that a small number of sites have been significantly and/or unsympathetically altered, but should remain on the list as they might one day be restored.

[253] Turning to the Luxton Report, that document is extensive and provides various comments as to how Appendix C (later incorporated into Appendix A4) was developed:

a) in the Introduction, it describes the research that was conducted for the purposes of the Report (p. 3):

> …Research was also conducted into all of the pre-1940s sites to confirm date of construction and other historical information, following which a field review provided a confirmation of the addresses of pre-1940s sites.

b) when discussing ”Options for Identifying Heritage Resources”, Luxton refers to the Heritage Inventory that “lists the buildings constructed pre-1940” (p. 12);

c) under “Community and Stakeholder Feedback”, Luxton states a p. 16:

> … 36% were in favour of maintaining the pre-1940 properties as a scheduled list under the HCA (as protected heritage property). Another 34% prefer to maintain the pre-1940 property criteria as an Appendix to the First Shaughnessy Design Guidelines. …
>
> …
>
> We heard that pre-1940 may not be an appropriate criterion for determining conservation in the HCA, with comments suggesting homes or streets from the subsequent decades (post-1940) may also be worth conserving. …;

d) the Report recommends that the City “ESTABLISH A HERITAGE CONSERVATION AREA AND SCHEDULE ALL PRE-1940 PROPERTIES”. Further at p. 18:

> … there should be a Planning initiative to photograph each house that appears on Appendix C (recommended properties for the HCA Schedule) to ensure there is an accurate snapshot of the neighbourhood that can be used as a reference into the future as the neighbourhood continues to mature.

and

e) the Report then describes at p. 19 the actions necessary to implement the recommendation:

> A list of buildings, structures, land or features within the area that are to be protected heritage property under the FSHCA would be scheduled. This schedule would include all pre-1940 sites within the area, based on the updated list in Appendix C.

[254] The petitioners, in particular, highlight the statement in the May 2015 Report that refers to the Heritage Inventory being "reviewed and updated".

[255] With that background in mind, one must then turn to Appendix C of the Luxton Report. In support of their argument, the petitioners rely on the majority of the statements in the introduction to Appendix C. That introduction, in full, reads as follows (although I have underlined the portions upon which the petitioners rely):

> An exhaustive research process involving each parcel of land has led to a conclusive list of properties recommended for inclusion in the HCA Schedule. These pre-1940 sites define the architectural and heritage character of First Shaughnessy and should form the collection of sites that are to be protected as part of the new HCA legislation. A variety of sources were utilized through the research process, including historic CPR Plan Approval books, newspaper articles, permit databases, architectural plans, archival fonds and other historic publications. A research profile has been developed for each site appearing on the recommended properties list.
>
> The process has updated and confirmed the merit of those 353 sites appearing on the existing 1994 Heritage Inventory (part of the current FSODP). Current research has uncovered seven additional pre-1040 sites that were not listed on the original 1994 Heritage Inventory; these additional pre-1940 sites maintain a level of historic integrity that warrants their inclusion on the recommended list. Additionally, forty-three houses have been removed from the 1994 Heritage Inventory, most of them demolished between 1994 and 2015. The final recommended list consists of 317 pre-1940 meritorious sites that each contribute to the historic character of First Shaughnessy. A small number of these sites have been significantly and/or unsympathetically altered, however, these sites have been included so that they may one day be restored.

[256] One must not stop, however, at the introduction to Appendix C of the Luxton Report. What follows is an extensive and detailed listing of all the individual properties, entitled "FSD LIST OF PRE-1940 PROPERTIES". In that detailed listing are references to results of the "exhaustive research process" that is referred to in the introduction. There is no mention in the references or notes for each individual property of any specific attendance at the individual properties or the results of any assessment of those properties.

[257] I have some difficulty accepting the petitioners' argument that, upon reviewing the May 2015 Report and the Luxton Report, any homeowner would have been

under the impression that an individual assessment was made of each property. There is no mention of any such assessment and the detailed research in Appendix C itself confirms the variety of sources that were used to confirm the basis for inclusion on that list (which was clearly indicated as the forerunner of what would become Appendix A4). If any such individual assessment had been made, then one would have expected the results of that assessment to be set out in Appendix C, which was intended to "review and update" the Heritage Inventory.

[258] In addition, the fact that both the Heritage Inventory and the Luxton Report referred to some properties as having been "significantly" or "unsympathetically" renovated or altered would suggest, in itself, that there may be issues with continuing conservation of those properties even though the age of the building itself presumptively suggested that it was worth preserving. If there had been an actual assessment of these properties by Luxton or someone else, any reasonable member of the public would have expected it to be included in the disclosed materials.

[259] The lack of mention that any such specific assessment had been done could not reasonably be understood by the public as confirming that it had been done. This seems to be accepted by the petitioners who state in their argument:

> It is not evident on the face of the Luxton Report or the May Report that appended it that no assessment of the heritage merit of the Scheduled Properties had been performed.

In that event, it seems incongruous to me that someone would understand that something had been done simply because there was no mention that it had *not* been done. Needless to say, none of the petitioners give evidence to that effect.

[260] Further, each individual homeowner would have been acutely aware that no such assessment had been done of his or her own property. There is no reasonable basis upon which any homeowners in that circumstance would think that everyone else's home in First Shaughnessy had been assessed, save for theirs. In fact, Ms. Cummings and the petitioners, Hilary Benson and Neil Rogic, confirm that, as

far as they are aware, no one has ever done an assessment of the heritage value or character of their homes.

[261] I also disagree that without any such mention (of a negative), there was potential for the public to be misled as to the rationale for the City's decision to list the properties on Appendix A4. As I have mentioned, the genesis of Appendix C of the Luxton Report was the Heritage Inventory, which was clearly represented to be a listing of all pre-1940 homes in First Shaughnessy. The later May 2015 Report and the Luxton Report also makes clear that it was that listing and with that criteria in mind that Appendix C and later, Appendix A4, was developed. In other words, the primary criterion for inclusion was simply that the buildings were constructed prior to 1940, which was confirmed through Luxton's research exercise described in Appendix C.

[262] Further, there is no evidence that anyone was misled on this issue or was unable to formulate and make informed, rational, and thoughtful comments at the public hearing. The public hearing commenced on July 21, 2015 and continued on July 28 and September 15, 2015.

[263] I have already mentioned the July 2015 Bulletin which was released prior to the public hearings. That document answered the question "what properties are to become "protected heritage property"?" The answer was:

> All sites in the First Shaughnessy area … that contain buildings constructed prior to 1940 are recommended to be scheduled as "protected heritage property".

[264] At the public hearing on July 21, 2015, the composition of the protected heritage property schedule was discussed and the fact that it included a "blanket" or "global" designation of all pre-1940 buildings. Comments included:

> I'm not against heritage issues but I'm strongly against blanketing all pre 1940 houses as some kind of heritage area. [Mr. Loy Leland]
>
> I've heard people say it already and I'm in agreement with them that the pre 1940 blanket moratorium on demolition by any stretch is not a balanced approach. [Mr. Richard Lee]

> I'd like to talk about two things; one is a sort of favourite topic tonight which is the global designation of all 1940 heritage and the other is loss of value. [Mr. Michael Nobel]
>
> [Emphasis added]

[265] Between July 21, 2015 and the resumption of the public hearing on July 28, 2015, the City received correspondence which similarly raised the issue of the scheduling of all pre-1940 property:

> The designations of all pre 1940 houses as heritage is inappropriate and ill considered…[Mr. Richard Sirola]
>
> Each of the 600 houses in First Shaughnessy deserve to be assessed in this fair and just way. But they were not. Why not? I would assume because of budget, time and staff constraints. Therefore the shortcut, easy and unfair blanket way was to designate all pre-1940 houses as heritage, regardless of merit. [Mr. Edward Lum]
>
> I do not agree with conserving all pre-1940 homes in the First Shaughnessy area as heritage properties [Ms. Thuy Nguyen]
>
> Houses should be analyzed individually and not to include all pre-1940 houses as Heritage houses. [Ms. Caroline Lum]
>
> However, not all buildings in this area, which constructed before 1940s, should be protected by the bylaw. Herein,cookie cut at 1940 is not acceptable. [Mr. John Sun/Chris]
>
> I understand that the Plan is set to protect pre-1940 buildings, but I think the blanket proposal is not only unfair, unreasonable, impractical and uneconomical to the house owners, but also harmful for the whole neighbourhood! [Ms. Catherine Yang]
>
> I don't think a blanket ban for all pre-1040 houses is a correct way to go. [Ms. Mina Zhang]
>
> [Emphasis added]

[266] Based on these comments, it is more than evident that these members of the public (and anyone who was also in attendance when the statements at the public hearing were made), were not in any way misled to believe that an individual assessment of each of the scheduled properties had taken place.

[267] The City memorandum of August 18, 2015 contains the following statement:

> The City's heritage consultant Donald Luxton conducted an extensive review of all First Shaughnessy properties to confirm the list of those built pre-1940…

[268] In my view, this could only have led a member of the public back to Appendix C of the Luxton Report, and the detailed description of what that review entailed.

[269] The petitioners place some reliance on what they say was "clarification" that they received only one day before the final public hearing on September 15, 2015. They say that this "clarification" confirms that the public could have been misled. The Assistant Director of Legal Services indicated that it had received a September 9, 2015 letter from counsel who was acting for a group of homeowners in First Shaughnessy. In that letter, counsel had objected to the approach that "all pre-1940 homes in the First Shaughnessy area are worthy of protection".

[270] The Assistant Director's letter to the Mayor and Council dated September 14, 2015 (which was later disclosed to the public) responded:

> Staff would like to clarify that the pre-1940 date was established by City Council, not Luxton, when Council adopted the First Shaughnessy Official Development Plan and Design Guidelines in 1982. The 1940 date is based on the fact that the majority of development in the area occurred from 1907 when the area was established by the CPR up until the start of World War II. Buildings built prior to 1940 reflect the high social and economic status of property owners in First Shaughnessy at the time. After the start of World War II, the quality and style of buildings being constructed in the area changed dramatically, as they did throughout the city.
>
> In 1994, Council adopted the First Shaughnessy Heritage Inventory as part of the First Shaughnessy Design Guidelines. This inventory lists all of the properties currently recommended to council as protected heritage property, along with others that have since been demolished. The 353 sites listed in the 1994 inventory are identified as having historical significance to the City of Vancouver. In our recent study, Luxton was asked to confirm the list of pre-1940 buildings. Luxton was not asked to review the current architectural merit or historic integrity of each of the 353 sites.
>
> As stated at the Public Hearing on July 21, 2015, and re-iterated in the August 18, 2015 Yellow Memo to Council, Mr. Luxton estimates that less than 5% of the 315 properties recommended as "protected heritage property" are non-meritorious, based on visual assessment. For any buildings on the list of protected heritage property that do not warrant conservation, the proposed Heritage Procedures By-law includes a process through which such properties can be reconsidered by Council. This process would involve an evaluation of Heritage Character and Heritage Value, as described in Section 3.4 of the first Shaughnessy Design Guidelines, which Guidelines are in support of the Heritage Conservation Area Official Development Plan. Should a home on the list of protected heritage property be determined to have no Heritage Character and/or Heritage Value, it could be removed from the list by City Council after a Public Hearing.

[Emphasis added]

[271] In my view, the substance of these homeowners' counsel's enquiry itself reveals that these homeowners well understood that all pre-1940 homes were on the proposed Appendix A4 and that this was the criterion which dictated whether homes would be on the list or not. What the petitioners (not I) describe as a "clarification" only confirmed what was more than evident from the previous materials circulated to the public.

[272] In conclusion, in my view, the contents of the disclosed materials made clear to the public the basis upon which the City formulated Appendix A4. When the disclosure is considered in its entirety, the public was very well informed throughout the process as to how the City determined which properties would be included on Appendix A4 and the importance of pre-1940 homes in terms of supporting the overall conservation efforts that were to be achieved by the HCA Bylaws.

[273] There was no non-disclosure or misrepresentation by the City by failing to point out something that had not occurred. There was no reasonable basis upon which any member of the public could have been misled to believe that the development of Appendix A4 was based on an actual assessment of each property on that schedule.

[274] Indeed, while not determinative, the evidence is that many members of the public were not confused or misled as to the nature of the work that had been done to compile Appendix A4. In my view, the public clearly understood or should have understood from the disclosed materials that Appendix A4 was simply a list of all properties in First Shaughnessy which contained an existing pre-1940 building, arising principally from the Heritage Inventory.

[275] It follows from my conclusion above that the public had ample opportunity to formulate their position on the proposed HCA Bylaws so as to meaningfully participate in the public hearing process.

CONCLUSION

[276] The petition is dismissed with costs in favour of the City. In that event, the City seeks an opportunity to speak to the matter of costs, particularly given the petitioners' allegations of bad faith and misrepresentation. Leave to do so is granted, provided that materials are filed by the City within 30 days of this decision.

"Fitzpatrick J."