IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Capilano Suspension Bridge Holdings Ltd. v The District of Tofino,* 2026 BCSC 2014

Date: 20261020
Docket: S101373
Registry: Nanaimo

In the Matter of the *Judicial Review Procedure Act*, RSBC 1996, c 241

Between:

Capilano Suspension Bridge Holdings Ltd.

Petitioner

And

The District of Tofino and Nicholas Henderson, Building Inspector

Respondents

Before: The Honourable Justice Dion

Reasons for Judgment

Counsel for the Petitioner:	L.J. Alexander
Counsel for the Respondents:	S.S. Manhas G.W. Patterson
Place and Dates of Hearing:	Nanaimo, B.C. January 26-28 and June 19, 2026
Place and Date of Judgment:	Nanaimo, B.C. October 20, 2026

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I. INTRODUCTION

[1] In its amended petition filed on August 26, 2025, petitioner Capilano Suspension Bridge Holdings Ltd. (“CSB”) seek judicial review of the decision of the District of Tofino staff to refuse a water allotment for its proposed resort development.

[2] The respondents, the District of Tofino (the “District”) and Building Inspector Henderson (“Inspector Henderson”) submit that the refusal of the water allotment was reasonable and the amended petition ought to be dismissed with costs.

[3] After the initial hearing of the petition, CSB brought an application to reopen the evidentiary portion of its case in the trial to admit new evidence, which is opposed by the District. CSB’s application to reopen is addressed in these reasons.

II. BACKGROUND

[4] CSB is the owner of land located at 600 Hellesen Drive, Tofino, British Columbia, legally described as Lot A, District Lot 131, Clayoquot District Plan VIP32709 (the “CSB Land”). It is 4.05 hectares in size.

[5] The District is a municipality incorporated in accordance with the provisions of the *Community Charter*, SBC 2003, c 26 [*Community Charter*] and the *Local Government Act*, RSBC 2015, c 1 [*LGA*].

[6] Newcastle Engineering Ltd. (“Newcastle”) are engineering consultants working for CSB in relation to the servicing requirements for the development of the CSB Land. McElhanney Ltd. (“McElhanney”) are engineering consultants working for the District.

[7] The CSB Land is zoned for commercial tourist use and commercial tourist accommodation buildings, ancillary use buildings, and staff accommodation buildings.

[8] The District adopted certain bylaws in 2015 and 2024 for the purposes of regulating, prohibiting and imposing requirements in relation to the District’s system

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for the supply, treatment, storage, and distribution of water (the "District Water System").

[9] At all material times, the District has operated the District Water System. Aaron Rodgers is the District's Director of Infrastructure and Public Works ("Director Rodgers") and as such, he is responsible for the management of the District Water System. Specifically, he is responsible for the administration of the water system regulatory bylaws ("Water System Bylaws").

[10] At all material times, the Water System Bylaws included the following:

a) District of Tofino Water Utility Bylaw No. 1213, 2015 (the "2015 Water Utility Bylaw"), as amended, which was in force and effect from the date of its adoption on October 27, 2015, to the date of its repeal on June 25, 2024; and

b) District of Tofino Water Utility Bylaw No. 1346, 2024 (the "2024 Water Utility Bylaw"), which was in force and effect from the date of its adoption on June 25, 2024.

[11] While Tofino sits in a rainforest, that does not relieve it from having to manage its water usage. The District Water System is supplied by five creeks located on Meares Island. The District Water System does not have significant raw water storage and operates a flow-through system. This means that for the District Water System to have sufficient capacity to provide sufficient water to all users connected to the system, the inflow from the five creeks into the system must at least be equal to the demand for the water from the users connected to the system.

[12] The District experienced water shortages in 2006 severe enough that a local state of emergency was declared, leading to the closure of all tourism businesses in an effort to conserve water. As a result, the District has implemented detailed water conservation programs.

[13] The District of Tofino Water Use and Conservation Bylaw No. 1224, 2016 included four stages of water restrictions. Since its amendment in 2024, this bylaw

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now has three stages of water restrictions. The last time the District faced a severe water shortage was in 2023. However, due to various factors including eventual heavy rainfall, the imposition of the strictest water restrictions was averted.

[14] Against this backdrop, and over this time, the District commissioned studies of the District Water System, including water supply studies, flow monitoring, water modelling, conservation strategies, and infrastructure condition reviews. These studies aided the District to identify risks, plan upgrades, and set priorities for the District Water System. Ultimately, these studies culminated in the preparation of the "District of Tofino Water Master Plan", dated February 16, 2024 (the "Water Master Plan"), as an overall cohesive plan to address the capacity issues with the District Water System.

[15] While applicants for a development permit provide information relating to general servicing requirements for their proposed development as part of their development permit application, the District does not conduct a detailed review of that information as part of the consideration of issuance of the development permit. The District conducts its detailed review of general servicing requirements for a proposed development at the subdivision or building permit stage. At the development permit stage, the District limits its review to advising the applicant if there are any significant general service impediments to the ultimate approval of their development at the subdivision or building stage.

[16] The CSB Land is located within a number of development permit areas established under the District of Tofino Official Community Plan Bylaw No. 1290, 2021 ("OCP"), under which:

a) Development Permit Area #1 "Downtown Main Street" was established for the "revitalization of an area in which a commercial use is permitted";
b) Development Permit Area #6 "Riparian" was established for the "protection of the natural environment, its ecosystems and biological diversity";

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c) Development Permit Area #7 “Tourism Focus” was established for the “protection of the natural environment, its ecosystems and biological diversity”: and for the “establishment of objectives for the form and character of development in the resort region”; and

d) Development Permit Area #8 “Wildlife Habitat” was created for the “protection of the natural environment, its ecosystems and biological diversity”.

[17] In 2020, CSB applied to the District for a development permit, addressing Tourism Focus Development Permit Area (“DPA 1”) Conditions and Foreshore 1 Development Permit Area (“DPA 8”) Conditions (in accordance with a previous iteration of the development permit application form). The District issued that permit on January 4, 2021, in accordance with the application and the District zoning bylaw.

[18] In August 2022, CSB applied to the District for a second development permit addressing Riparian Development Permit Area (“DPA 6”) Conditions and Tourism Focus Development Permit Area (“DPA 7”) Conditions. The District issued that permit on May 1, 2023 (“DP 2023”), authorizing the development of 47 oceanfront suites, eight guest cabins, 70 sleeping units for employee housing, and buildings for a resort restaurant, all permitted in accordance with applicable zoning. Each of these buildings requires a water service/supply and they cannot be constructed or used without a water supply. DP 2023 included a mandatory requirement that water service be provided in accordance with a servicing report attached to the development permit. DP 2023 was renewed in December 2025, including the requirement to follow the servicing report.

[19] On December 20, 2023, through its architects, dHKarchitects Inc. (“dHKarchitects”), CSB submitted building permit applications for three categories of buildings on CSB Land comprising the Tofino Beach Lodge suites, reception, restaurant and lounge, the Tofino Beach Lodge Spa (the “Spa”), and a 10-unit employee housing building (collectively, the “Building Permits”). In mid-2025, CSB

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advised the District that it was no longer seeking to build the Spa (the "Proposed Development").

[20] Building permits are issued under the authority of the District of Tofino Building Bylaw No. 1256, 2019 (the "2019 Building Bylaw"). Section 10.1 of the 2019 Building Bylaw requires that an applicant (owner) must satisfy certain requirements or conditions for a building permit, including:

> (f) if the parcel that is the subject of the building permit application cannot be connected to the District's waterworks system, the owner must apply for and obtain approval from the District and other applicable public authorities for an alternate water supply system;
>
> …
>
> (h) if all on site and off site works and services required by a District bylaw or other enactment have not been completed in accordance with the enactments, the owner must enter into a completion agreement with the District and deliver to the District letters of credit or cash security for completion of the works and service.

[21] The applications for the Building Permits were referred to Director Rodgers for review under the Water System Bylaws to determine whether the Proposed Development could be connected to the District Water System.

[22] As part of CSB's application for DP 2023, the District received a water modelling report that addressed whether the District Water System had sufficient hydraulic capacity for the Proposed Development. The report specifically noted that a detailed review of the District's water supply capacity was not included.

[23] The District says that CSB were advised in December 2022 that analysis of the water supply was required. Brayden Hughes, principal of Newcastle, deposed in his first affidavit that at no time prior to March 21, 2024, was Newcastle told that further general water consumption or capacity assessments were required.

[24] Turning back to the applications for the Building Permits, Director Rodgers reviewed them under the Water System Bylaws to determine whether the Proposed Development could be connected to the District Water System. He reviewed the servicing information provided by CSB (as part of its application for DP 2023) within the context of the Water Master Plan. As part of that review, in accordance with

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section 4.5 of the 2015 Water Utility Bylaw, Director Rodgers considered whether approving a water connection for the Proposed Development would have an adverse effect on other users of the District Water System, and if it did, whether to deny the water connection.

[25] On March 21, 2024, Director Rodgers issued his decision. He determined, to avoid adverse effects on other users of the District Water System, that he could not approve a water connection for the Proposed Development (the "Refusal Decision").

[26] In the Refusal Decision, Director Rodgers also confirmed the District requirement that CSB provide a new, upgraded 250 mm diameter watermain on the west side of Hellesen Drive. He included this to provide CSB advance notice of the requirement in the event that the Proposed Development could proceed utilizing an alternative water supply.

[27] CSB says the Refusal Decision did not specifically identify what water demand the District thought the Proposed Development would impose, but it did address water system capacity:

> Water System Capacity
>
> The District recently completed a Water Master Plan, the plan indicates a deficiency in raw water supply during the busy dry season. The Peak Hour Demand (PHD) for the proposed development is calculated to be 205 persons x 2,500 litres per capita per day = 5.9 l/s. Adding 225 new units of commercial accommodation and their attendant water use projected to be 5.9 l/s may cause adverse effects on other users during periods of high demand and low source water flows. The proposed demand of 5.9 l/s during peak hour demand would account for 23.6% of the observed baseline creek low flow into the District's water system. The table below from the Water Master Plan highlights this issue.
>
> Section 4.5(a) of the District of Tofino Water Utility Bylaw 2015, states that the District may limit the number, size, and capacity of connections to the District Water System to prevent adverse effects on other users.
>
> … [table omitted] …
>
> Section 4.5(b) of the District of Tofino Water Utility Bylaw 2015 provides that the District may refuse water service main extension or enlargement.
>
> To avoid adverse effects to other water users of the system, the District cannot approve the proposed new connection based on the proposed demands.

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> The refusal to permit a water service connection to the subject property precludes your clients from obtaining a building permit under s. 10.1(f), of the District of Tofino Building Bylaw 1256, 2019.

[28] In response to the Refusal Decision, Newcastle advised Director Rodgers, by letter dated April 4, 2024, that the Proposed Development had changed from that contemplated in the servicing information provided by CSB as part of its application for DP 2023 (issued May 1, 2023). CSB provided the District with updated calculations of the domestic water demands of the updated Proposed Development (the number of hotel units and employee housing numbers decreased). In its updated calculations, Newcastle reduced the peak hour demand information from 5.9 l/s to 5.35 l/s (which equates to an average daily demand ("ADD") of 1.22 l/s and maximum daily demand ("MDD") of 3.21 l/s).

[29] Between April 4, 2024, and July 24, 2024, the District and dHKarchitects held discussions relating to the servicing requirements for the Proposed Development, including regarding the reduction of its scale and the use of an alternative water source.

[30] In May 2024, after the Water Master Plan was submitted to the Tofino District Council ("District Council") in February 2024, District Council directed staff to prepare a Limits to Growth Policy ("LGP"), based on information in the Water Master Plan.

[31] On July 23, 2024, the District Council received a report/policy document from its staff entitled "Limits to Growth – water allocation priorities (the "First Water Policy"). It included a discussion of limitations to future approvals because of water scarcity within the District. The First Water Policy was not a zoning bylaw or a servicing bylaw, and it did not consider the CSB Land in its review of current development proposals.

[32] CSB says the First Water Policy confirms the availability of community water, both before and after the Refusal Decision, of 333 m^3. The First Water Policy indicates, in part:

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> The purpose of the Limits to Growth Policy is to outline a path forward for development, likely over the next 5-10 years, that indicates:
>
> - How much more water consumption, in the form of development, we are willing to allow in the community considering both development needs (housing, etc.) and community risk (economic impacts, fire flow considerations, etc).
> - How this water consumption amount will be allocated based on development priorities outlined in the OCP, AHNA, etc.
> - How we evaluate potential development applications with respect to the goals and conditions of the Policy;
> - How we track the allocation of water – rezonings, subdivisions, Development Permits, Building Permits, Occupancy Permits, etc.

[33] The First Water Policy later formed the basis for the LGP the District Council adopted on December 10, 2024, discussed more fully below.

[34] By letter dated October 4, 2024, Newcastle provided Director Rodgers with updated calculations of the domestic water demands of the Proposed Development. The updated calculations resulted in the reduction of the ADD and MDD information from 1.22 l/s to 1.11 l/s and of 3.21 l/s to 2.93 l/s, respectively. This information did not address any domestic water demand in relation to the Spa that had been contemplated.

[35] On October 10, 2024, counsel for CSB, enclosing a copy of Newcastle's October 4, 2024, letter, made its first written demand to Inspector Henderson "requiring that the Building Permits be issued or alternatively written reasons for refusal be provided in accordance with [section] 54 of the *Community Charter*".

[36] The updated ADD and MDD information in the October 4, 2024, letter from Newcastle was confirmed by the District's consultant, McElhanney, in their Technical Memo dated October 25, 2024.

[37] On November 13, 2024, counsel for CSB issued their second written demand to Inspector Henderson, to issue Building Permits or provide written reasons.

[38] By letter dated November 25, 2024, Inspector Henderson replied to counsel for CSB, advising:

> I am responding to your letters of October 10th and November 13, 2024.

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In both letters you asked me to either issue building permits to your client or provide reasons for refusing to issue those permits. To be clear, I have not refused to issue the building permits. Instead, for two reasons, both of which are based on my interpretation of what the District's Building Bylaw requires, I have paused any further processing of your client's building permit applications.

First, section 10.1(h) of the Building Bylaw requires either completion of all on-site and off-site works and services, or an agreement together with security for completion of those works and services. As you know, your clients engineering consultants have been in discussions with District representatives to determine the precise servicing requirements for the proposed development, but it is my understanding that a Works and Services Agreement has not been entered into. Therefore, in accordance with Section 10.1(h) of the Building Bylaw, and consistent with Section 509 of the *Local Government Act*, a building permit must not be issued until the WSA has been entered into and security for those works has been provided

Second, under section 10.1(f) of the Building Bylaw, if a parcel cannot be connected to the District's waterworks system, the owner must apply for and obtain approval for an alternative water supply system. Following a refusal of your client's application for a connection to the District's water system under S. 4(5) of the Water Utility Bylaw, your client has not received "approval from the District and other applicable public authorities for an alternate water supply system" as required by section 10.1(f). I understand that your client's consultant's have been exploring potential options for an alternative water supply system, but at this point no such system has been proposed. An approved connection to an adequate water supply is a requirement of the Building Code and a condition of a building permit.

I assume your client's consultants are still working on designs for works and services and an alternative water supply, and I would not typically refuse the building permits at this stage. Instead, I would pause any further processing of the application until I was satisfied that the outstanding issues have been resolved or are likely to be resolved. Further processing at this point would involve the district engaging our third-party consultants to review the buildings, which is a time-consuming task with costs that are entirely born by the applicant. This process frequently involves re-designs by the applicant's consultants and new plan submissions, which seems premature given that the buildings currently have not met the basic servicing requirements. We are following an established process that prioritizes staff time and resources and prevents an applicant from incurring expensive consultant fees.

If you disagree with my interpretation of Sections 10.1(f) or (h) of the Building Bylaw or think I may or must issue building permits despite my conclusion that these sections have not been satisfied, I am willing to hear from you or your client about any of those matters.

Finally, I must emphasize there may be other requirements arising from the Building Bylaw that must be met before I am able to issue building permits. For now, I am focusing only on sections 10.1(h) and (f), again because in my view further processing and assessment of the applications is not warranted at this time.

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[39] On October 23, 2024, counsel for CSB made a Request for Access to Records to the District ("FOI Request") seeking copies of all records of applications for building permits received from December 18, 2023, the date of CSB's application for the Building Permits. By letter dated November 27, 2024, the Manager of Legislative Services responded to counsel for CSB, advising that eight other building permits were issued by the building inspector. With respect to the refusal of applications, the Manager indicated:

> You will find that no refused applications for building permits have been included in the records release. This is because the District of Tofino has not issued any, apart from the refusal of the building permit application for 600 Hellesen Drive.

[40] CSB says the District's letter confirms that the application for the Building Permits was refused, and it was the only refusal between December 18, 2023 and November 27, 2024. The eight building permits that were issued in this period were for the following:

- single family dwelling
- two storey single family residence
- cabin
- new staff accommodation
- detached garage
- three-bedroom hotel home
- home addition
- short-term rental accessory dwelling unit

[41] In his Affidavit #1 made July 7, 2025, Director Rodgers deposed that since CSB made its application for Building Permits, he approved seven new connections to the District Water System. In aggregate, those new connections imposed an additional ADD on the District Water System of 2.85 m^3/day (as compared to the 50 m^3/day that would be imposed on the District Water System if he were to approve a water connection for CSB's Proposed Development).

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[42] On December 5, 2024, counsel for CSB issued their third written demand to Inspector Henderson requesting compliance with s 54 of the *Community Charter* that written reasons for the refusal to issue the Building Permits be given, unless by December 20, 2024, he confirmed the they would be issued. Counsel for CSB also address what they say were three errors made by Inspector Henderson in his November 25, 2024, letter.

[43] First, in respect of s 10.1(h) of the Building Bylaw, counsel for CSB said Inspector Henderson misstated the process under that section and the *LGA*:

> The applicant has to set out its proposed works and services for the building inspectors review, and these comply with your bylaws. It was now incumbent on you to state in writing what works and services you require as a condition of the issue of the building permits, in accordance with sections 506, 506.02 and 506.03 of the *Local Government Act*.

[44] Second, in respect of the position taken by Inspector Henderson in relation to s 10.1(f) of the Building Bylaw, counsel for CSB said:

> Your statement about connection to the District's waterworks system is factually incorrect and ignores the applicable statutory scheme. If this were to be the basis for a refusal to issue a permit, it would be unreasonable.
>
> Section 10.1(h) of the Building Bylaw is relevant only "if the parcel that is the subject of the building permit application ***cannot*** be connected to the District's waterworks system". Here, the property ***can*** be connected to the waterworks system. Relevant engineering analysis and drawings have been submitted to the District which demonstrate that. It is Tofino's Development Department that has suggested it will not ***authorize*** a connection. It justifies that unreasonable position by reference to section 4.5 of the Tofino Water Utility Bylaw as being sufficient authority to preclude it, despite that position being inconsistent with the statutory scheme under Section 8 of the *Community Charter* and Part 14 of the *Local Government Act*, the Water Utility Bylaw itself, and there being no guidelines or criteria within that bylaw to inform applicants how the manager may exercise his discretion under that section.
>
> [*Emphasis in original*]

[45] Third, with respect to what counsel for CSB refers to as Inspector Henderson's "Residual authority to decline permits", they indicated:

> Your refusal to consider what you call "other requirements" from the Building Bylaw is unreasonable and unacceptable in the circumstances. Section 54 of

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> the *Community Charter* provides that when requested by an applicant (as done in my October 10 and November 13, 2024 letters), a building inspector must give written reasons for the building inspector's refusal to issue a building permit that is required by a bylaw under Section 8 of the *Community Charter*. It does not say that you can give just some of the reasons.

[46] On December 10, 2024, the District Council adopted the LGP which, as noted, it had directed staff in May 2024 to prepare, and the First Water Policy was tabled to District Council in July 2024. The LGP, *inter alia*, confirmed that as of the date of its adoption and implementation, the District Water System had an existing additional unused or unallocated capacity of 120 m^3 per day to service new development. The LGP is based on estimates of ADD.

[47] Under the heading “Purpose”, the LGP provides:

> The District of Tofino Council directed staff to prepare a “Limits to Growth” policy in response to the 2024 Water Master Plan which outlined a general inability for the District's current water source to keep up with increasing demand, particularly in the late summer months.
>
> Water supply constraints identified in the 2024 Water Master Plan are expected to be an issue for at least the next decade as the District develops a new water source to address growing demand and dryer summers.
>
> This policy provides a framework for the allocation of remaining water supply until such time as a new water source can address the current capacity issues.
>
> This Limits to Growth Policy has been developed to ensure that the District’s remaining raw water supply is allocated primarily to residential developments. This document sets out the District of Tofino’s policy regarding development priorities and limits with respect to availability of raw water and related infrastructure considerations. Development within the District of Tofino that requires a water connection or increased water demand will only be approved if an allocation is awarded through this policy.
>
> This policy is intended to provide transparency and certainty of the process of capacity estimation and allocation. It clarifies for the development community and the public, how the raw water supply will be managed to ensure maximum benefit to the community.
>
> The authority to implement this policy is rooted in Section 6 of the Water Utility Bylaw for Building Permit and Subdivision applications and Council’s consideration of Zoning Amendments, and the issuance of Temporary Use Permits.
>
> The District of Tofino reserves the right to allocate raw water supply for projects deemed by Council to be in the interests of the community including, but not limited to, hospitals, public safety buildings, educational and

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> recreational facilities, critical infrastructure, and the provision of affordable community housing.

[48] Under the LGP, the District's building inspector will consider whether an applicant holds a valid Water Allocation Certificate ("WAC") in assessing the sufficiency of water supply for every building application.

[49] Under the heading "Ineligible Uses", the LGP provides:

> 1. The following are not eligible for a WAC unless an applicant can provide alternate raw water capacity or other solutions to the satisfaction of the Director of Infrastructure and Public Works.
>
> a. Commercial accommodation uses such as Resort, Resort Condominium, Hotel, Motel, Lodge, Guest-house, Short Term Rental, and Bed and Breakfasts.
>
> b. Water Intense Land Uses that consume significant volumes of water.
>
> […]

[50] Under the heading of "Eligible Uses", the LGP provides:

> 1. The following development proposals will receive a WAC as long as remaining water supply is available, that the projected ADD for the development will be subtracted from the appropriate category of remaining water supply:
>
> a. Tla-o-qui-aht First Nation projects that do not exceed 60 m^3 ADD
>
> b. Commercial Industrial, or institutional development not defined as Water Intensive Land Uses.
>
> […]
>
> f. Despite 7.1.b, Water Intensive Land Uses that do not exceed existing water demand on the subject property.

[51] CSB's original petition was filed February 13, 2025.

[52] McElhanney prepared a further Technical Memo dated May 5, 2025 ("May 2025 Technical Memo"), based on their understanding that the scope and scale of the Proposed Development had changed from the original development permit applications. It was determined that CSB's Proposed Development (having excluded the Spa), had an MDD of 101 m^3/day, or an ADD of 50 m^3/day.

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[53] According to CSB, the water demand of the Proposed Development would require less than half of the remaining ADD 120 m^3 water supply confirmed in the LGP, of 50 m^3/day.

[54] According to the District, McElhanney concluded that if the Proposed Development is connected to the District Water System, it would increase the MDD deficit by 14 percent during the extended dry periods. It was also McElhanney's view that MDD is the benchmark for a flow through system, and therefore the measure by which the District ought to base its reliance.

[55] In light of the issues that had arisen since Director Rodgers issued the Refusal Decision (i.e., his initial review being based on servicing information provided by CSB as part of its application for DP 2023 relating to the scope of development that was different from that of the Proposed Development and the consultants using outdated development servicing requirements and standards in their calculations), he reconsidered it.

[56] By letter dated July 4, 2025, Director Rodgers confirmed that in accordance with sections 4.5(a) and (b) of the 2015 Water Utility Bylaw (now sections 4(5)(a) and (b) of the 2024 Water Utility Bylaw), he considered whether approving a water connection to the Proposed Development would have an adverse effect on other users of the District Water System and if so, whether the water connection should be denied.

[57] Director Rodgers indicated he only took account of those bylaws, policies and regulations that were in effect when he issued the Refusal Decision on March 21, 2024. He also reviewed the Water Master Plan and the May 2025 Technical Memo. He did not consider the LGP because it did not exist in March 2024. He concluded that to avoid adverse effects to other users of the District Water System, he could not approve a water connection for the Proposed Development ("Reconsideration Decision").

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[58] In the Reconsideration Decision, under the heading, “Water Capacity Analysis”, Director Rodgers indicated that:

> Water Capacity Analysis
>
> In my opinion, a decision to approve a water connection for the proposed Tofino Beach Lodge development rests on the following facts:
>
> 1. The district's Water Master Plan (WMP) suggests that creek flows (water supply) should meet MDD demands.
> 2. Tofino is currently operating with a water supply deficit of 713 m^3 MDD.
> 3. The proposed Tofino Beach Lodge project is projected to add 101 m^3 of additional water demand (MDD) deficit.
>
> The proposed Tofino Beach Lodge Development would increase the MDD deficit by 101 m^3 to 814 m^3. This represents an increase in the deficit of approximately 14% and increases the risk to the water system and community of Tofino. The capacity limits of the current water system with a 713 m^3 MDD deficit were highlighted during the summer of 2023 when Stage 4 water restrictions were days away from being implemented. Those 2023 Stage 4 water restrictions would have been that:
>
> - All outdoor use of water would have been prohibited.
> - Indoor use of water would have been restricted to drinking purposes and use for sanitation purposes.
>
> Restrictions have a significant impact on the users of the District Water System and the community of Tofino. In the summer of 2023, the District considered imposing a state of local emergency based on a lack of capacity in the water system but that was narrowly averted. In 2006, the lack of capacity in the water system resulted in the District declaring a state of local emergency leading to the closure of all tourism businesses in order to conserve the dwindling water supply. At the time, water was trucked in to prevent further business closures.
>
> I’ve considered the Tofino Beach Lodge water connection application (for a building permit) in the context of the information provided in this letter. As I understand per my role as the Director of Infrastructure and Public Works it is my responsibility under the authority of section 4.5 of the District of Tofino Water Utility Bylaw 2015 (now section 4(5) of the District of Tofino Water Utility Bylaw No. 1346, 2024) to determine whether a water connection to the District Water System will invite adverse effects on other users.
>
> The Tofino Beach Lodge application for a water connection as required through the District's Building Bylaw is refused per the authority granted to me through sections 4.5(a) and (b) of the District of Tofino Water Utility Bylaw 2015 (now section 4(5) of the District of Tofino Water Utility Bylaw No. 1346, 2024) based on the information available to me and following my analysis of the updated May 5, 2025 McElhanney memo. It is evident to me that a 14% increase in the MDD deficit from 713 m^3 to 814 m^3 would have an adverse effect on other users of the District Water System.

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> […]
>
> I have considered that the District's Water Master Plan (WMP) indicates a water supply ADD surplus. However, that does not affect my view that the approval of the Tofino Beach Lodge water connection would increase the risk of significant water restrictions and a state of local emergency and would likely have an adverse effect on other users of the District Water System. The reality is that the ADD surplus existed in the summer of 2023 when Stage 4 water restrictions and a state of local emergency were narrowly averted. The proposed Tofino Beach Lodge development would reduce that ADD surplus by 50 m3 making the need for Stage 3 water restrictions and a state of local emergency more likely.
>
> The refusal to permit a water service connection to the subject property precludes your client from obtaining a building permit under section 10.1(f) of the District of Tofino Building Bylaw 1256, 2019 without providing evidence of an alternative water source of water for the proposed development.
>
> Please contact me at your convenience to discuss this letter and next steps.

[59] I turn now to the relevant legislative scheme.

III. THE RELEVANT PROVISIONS OF THE LEGISLATIVE SCHEME

[60] The relevant provisions of the *LGA* are set out in Part 14, specifically ss. 506, 506.02, 506.03, and 509, which provide as follows:

> **Works and services requirements**
>
> **506** (1) A local government may, by bylaw, regulate and require the provision of works and services in respect of the development of land, and for that purpose may, by bylaw, do one or more of the following:
>
> (a) regulate and prescribe minimum standards for the dimensions, locations, alignment and gradient of highways in connection with the development of land;
>
> (b) require that a water distribution system, a fire hydrant system, a sewage collection system, a sewage disposal system, a drainage collection system or a drainage disposal system be provided, located and constructed in accordance with the standards established in the bylaw;
>
> (c) regulate and require that the following be provided, located and constructed in accordance with the standards established by the bylaw:
>
> (i) highways, sidewalks, boulevards, boulevard crossings, street lighting, transit bays or underground wiring;
>
> (ii) amenities, including benches, bollards, bicycle parking facilities, directional signage, parklets, street lamps, street signs, transit shelters or waste disposal and recycling containers;

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(iii) transportation infrastructure that supports walking, bicycling, public transit or other alternative forms of transportation, including traffic calming measures;

(iv) sustainable design features that provide for energy and water conservation, reduction of greenhouse gas emissions and climate resilience;

(v) any other thing, or classes of things, prescribed by regulation.

(2) A bylaw under subsection (1) must not be used to prevent the development of land to the density allowed in respect of that permitted use under the applicable zoning bylaw.

(3) A bylaw under subsection (1) may be different in relation to one or more of the following:

(a) different circumstances;

(b) different areas;

(c) different land uses;

(d) different zones;

(e) different classes of highways.

(4) A local government's authority under subsection (1) (b) or (c) may be exercised only in accordance with the regulations made under subsection (5).

(5) The Lieutenant Governor in Council may make regulations

(a) prescribing the local governments, or classes of local governments, that may make bylaws described in subsection (1) (b) or (c), and

(b) prescribing the dimensions, location or number of works and services referred to in subsection (1) (b) or (c).

(6) A local government must not impose a requirement under subsection (1) (b) or (c) in respect of a subdivision under the *Strata Property Act.*

[...]

Requirements in respect of certain systems

506.02 (1) If a local government, an improvement district or greater board operates

(a) a community water or sewer system, or

(b) a drainage collection or disposal system,

the local government may, by bylaw, require that a system referred to in section 506 (1) (b) *[works and services requirements]* be connected to the local government, improvement district or greater board system, in accordance with standards established in the bylaw.

(2) If there is no community water system, the local government may, by bylaw, require each parcel created by the subdivision to have a source of potable water with a flow capacity at a rate established in the bylaw.

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Conditions for subdivision and building permits

506.03 (1) As a condition of the approval of a subdivision, a local government may require the owner of the land to provide works and services, in accordance with the standards established in a bylaw under section 506 *[works and services requirements]* or 506.02, on that portion of a highway immediately adjacent to the site being subdivided, up to the centre line of the highway.

(2) As a condition of the issue of a building permit, a local government may require the owner of the land to provide the following:

(a) works and services, in accordance with the standards established in a bylaw under section 506 or 506.02, on the site being developed;

(b) works and services, in accordance with the standards established in a bylaw under section 506 or 506.02, on that portion of a highway immediately adjacent to the site being developed, up to the centre line of the highway.

(3) Requirements under subsections (1) and (2)

(a) may be made only to the extent that they are directly attributable to the development of land, and

(b) must not include specific services that are included in the calculations used to determine the amount of a development cost charge, unless the owner agrees to provide the services.

(4) If the owner agrees to provide the services referred to in subsection (3) (b), the calculation of the development cost charge is subject to section 565 (2) to (5) *[deductions from development cost charges]*.

[…]

Completion of required works and services

509 (1) Subject to subsection (2), all works and services required to be constructed and installed at the expense of the owner of the land being subdivided or developed must be constructed and installed to the standards established in the bylaw under section 506 or 506.02 [works and services requirements] before the approving officer approves of the subdivision or the building inspector issues the building permit.

(2) Approval may be given or the permit issued if the owner of the land

(a) deposits, with the municipality or regional district, security

(i) in the form and amount established in the bylaw under section 506 or 506.02, or

(ii) if no amount and form is established in the bylaw, in a form and amount satisfactory to the approving officer or building inspector having regard to the cost of installing and paying for all works and services required under the bylaw, and

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> (b) enters into an agreement with the municipality or regional district to construct and install the required works and services by a specified date or forfeit to the municipality or regional district the amount secured under paragraph (a).
>
> [...]

[61] Relevant provisions of the *Community Charter*, are found within sections 8 and 54. Section 8 addresses fundamental powers of a municipality, and in part provides:

> **Fundamental powers**
>
> 8 (1) A municipality has the capacity, rights, powers and privileges of a natural person of full capacity.
>
> […]
>
> (3) A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:
>
> (a) municipal services;
>
> […]
>
> (j) protection of the natural environment;
>
> […]
>
> (l) buildings and other structures;
>
> […]

[62] The requirement of a building inspector to provide written reasons is set out in section 54 of the *Community Charter*, which provides:

> **Building permits and occupancy permits**
>
> 54 (1) If requested by an applicant, a building inspector must give written reasons for the building inspector's refusal to issue a building permit that is required by a bylaw under section 8 (3) (l) *[spheres of authority – buildings and other structures]*
>
> […]

IV. STANDARD OF REVIEW

[63] The parties agree that the applicable standard of review in these proceedings is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

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[64] What is reasonable in one situation depends on the constraints imposed by the legal and factual context of the specific decision under review: *Vavilov* at para 90.

[65] As Justice Blake explained in *Omni Wyndansea Holdings Ltd. v Ucluelet (District)*, 2022 BCSC 1869 (appeal to BCCA dismissed 2023 BCCA 342; leave to appeal to SCC refused 2024 CanLII 37796, 2024 CarswellBC 1209):

> [33] In *Vavilov*, the majority emphasized that reasonableness review is meant to ensure that courts intervene where necessary to safeguard "the legality, rationality and fairness of the administrative process': at para. 13. A reasonableness review is not a "rubber-stamping" process or means of sheltering administrative decision makers from accountability but remains a robust form of review: *Vavilov* at para. 13.
>
> [34] However, to the extent that *Vavilov* promotes a more robust form of judicial review, it also reinforces deference to administrative decision makers […] and judicial respect for the legislature's choice to delegate the authority for elected municipal councils to make decisions with respect to land use and planning: at paras. 31-32…
>
> [35] Where a decision maker gives reasons for its decision, those reasons are the focus of attention on an application for judicial review. They "are the primary mechanism by which administrative decision makers show that their decisions are reasonable – both to the affected parties and to the reviewing courts": *Vavilov* at para. 81.
>
> [36] …Reasonableness review is "not a line-by-line treasure hunt for error": *Vavilov* at paras. 101-105. Rather, the reviewing court must be satisfied that there is a line of analysis in the decisions that could reasonably lead the [decision maker] from the evidence before it to their determination; any alleged flaws must be sufficiently significant to the reasoning process as to render its decision unreasonable: *Vavilov* at paras. 99-104.
>
> [37] Where the standard of review is reasonableness, the reviewing court must consider "only whether the decision made by the administrative decision maker – including both the rationale for the decision and the outcome to which it led – was reasonable": *Vavilov* at paras. 83, 87. Even where the outcome is not necessarily unreasonable, the decision may still be set aside where it was arrived at on the basis of an unreasonable chain of analysis: *Vavilov* at paras. 96-97.
>
> [38] In *Party A v. The Law Society of British Columbia*, 2021 BCCA 130 [*Party A*], the Court of Appeal for British Columbia confirmed that under the reasonableness test set out in *Vavilov*, decision makers must meaningfully grapple with the issue and central arguments raised by the parties, and the reasons must be adequate to justify the decision reached: at paras. 56-58, 66.
>
> [39] The following non-exhaustive, interacting "elements" set out in *Vavilov* at para. 106 are relevant in evaluating whether a decision is reasonable:
>
> a) the governing statutory scheme;
>
> b) other relevant statutory law or common law;

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c) the principles of statutory interpretation;

d) the evidence before the decision maker and facts of which the decision maker may take notice;

e) the submissions of the parties;

f) the past practices and decisions of the administrative body; and

g) the potential impact of the decision on the individual to whom it applies.

[40] The Court of Appeal for British Columbia in *English v. Richmond (City)*, 2021 BCCA 442 [*English*] held that reasonableness remains an inherently deferential standard of review, but, after *Vavilov*, it has a recalibrated focus on "justification in administrative decision making": at para. 74. The court must look to the record as a whole when considering the justification for the decision.

[41] In reviewing the record as a whole, this Court is not limited to reviewing the material that was before the [decision maker] on the day of the decision. It may consider information that was available to the [decision maker] including submissions of the parties, publicly available policies or guidelines that informed the decision, and past decisions: *Vavilov* at para. 94. It may also consider extrinsic materials pertinent to the interpretation of the statute: *English* at paras. 81–87.

[66] In *Xatsull First Nation v Minister of Mining and Critical Minerals*, 2025 BCSC 1798, Justice Tammen set out what were described as "key takeaways" when reviewing an administrative decision:

[80] At paragraphs 65 and 66 of their written submissions, Xatśūll has helpfully and succinctly distilled the other key takeaways from *Vavilov*, which must guide the analysis. I accept that I must adopt the approach set out there.

65. The Court held that "[a]n approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with the modern approach to statutory interpretation". [*Vavilov* at para 118.] A decision-maker does not have to "engage in a formalistic statutory interpretation exercise in every case" [*Vavilov* at para 119.] as a court would, but "whatever form the interpretive exercise takes, the [...] interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision". [*Vavilov* at para 120.] "Where the meaning of a statutory provision is disputed in an administrative proceeding, the decision maker must demonstrate in its reasons that it was alive to these essential elements". [*Vavilov* at para 120.]

66. The Court directed further: "[t]he administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to

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> be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to 'reverse-engineer' a desired outcome." [*Vavilov* at para 121.] "Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker". [*Vavilov* at para 122.] "[E]ven though the task of a court conducting a reasonableness review is not to perform a *de novo* analysis or to determine the 'correct' interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision […] that is at issue". [*Vavilov* at para 124.]
>
> [Footnotes included.]

[81] Some of the more important considerations that must guide my review are these:

1) I must review the record and reasons as a whole to determine if the decision-maker came to grips with the fundamental issue about which statutory interpretation was in dispute.
2) I must guard against upholding an inferior, albeit implausible, interpretation by the decision-maker made on the grounds of expediency.
3) I must not conduct a *de novo* interpretation, but rather must consider if the interpretation of the decision-maker was reasonable (i.e., a valid interpretation of the statutory scheme and/or instrument).

[67] Finally, it is important to reinforce the comment of the Court in *Catalyst Paper Corp. v North Cowichan (District),* 2012 SCC 2 at para 19, that our courts' review of municipal bylaws "must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation", adding:

> [19] … Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal 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. In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.

[68] With these principles in mind, I turn to the decisions at issue.

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V. THE DECISIONS

[69] As set out in the amended petition, *inter alia*, CSB seeks an order in the nature of *certiorari* setting aside or quashing the purported Refusal Decision and the Reconsideration Decision because they are not based on a coherent and rational chain of analysis in light of the facts and the law that constrained the decision maker: *Vavilov* at paras 90, 105. CSB bears the burden of demonstrating that the decisions were unreasonable: *Vavilov* at para 100.

[70] There is no dispute that the Refusal Decision was based on an incorrect factual (water demand calculations) basis. The District says because the Refusal Decision was invalid, Director Rodgers reconsidered it and issued the Reconsideration Decision, which is the only decision that ought to be considered in this review. Ultimately, the District argues that Director Rodgers' refusal of a water connection for CSB's Proposed Development in the Reconsideration Decision was reasonable and is otherwise valid.

VI. ISSUES

[71] The issues to be determined are:

1) Is the Refusal Decision valid for the purposes of the review?

2) If the Refusal Decision is valid for the purposes of the review, are it and the Reconsideration Decision reasonable?

3) Would OCP amendments and the repeal of the LGP change my findings on reasonableness such that I ought to reopen the case as requested by CSB?

[72] Turning now to the issues.

Issue 1: Is the Refusal Decision valid for the purposes of the review?

[73] CSB's position is that both the Refusal Decision and the Reconsideration Decision fail to provide a rational chain of analysis. They say neither show that

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Director Rodgers grappled with the existence of water and the allocation of capacity or allowance of connections to others.

[74] Director Rodgers based his decision to refuse water for the Proposed Development in the Refusal Decision on the Water Master Plan. CSB says the Water Master Plan showed that in 2023, there was 333 m^3 of available water, based on ADD. CSB says, to the extent that the Reconsideration Decision is being reviewed, it is also factually unreasonable, because it denies water to them in the face of other developments being allocated water connections, based on ADD.

[75] Given the narrow question to be addressed in this section, it is not necessary to list every argument raised by CSB with respect to the Refusal Decision, other than to say, included therein is what CSB says is the inexplicit reference to MDD, without any explanation for use of that parameter, particularly when ADD is used otherwise by the District.

[76] As noted, the District says the Refusal Decision was rendered invalid when Director Rodgers replaced it with the Reconsideration Decision after the servicing specifications/water demand calculations were updated by McElhanney. Therefore, the Reconsideration Decision is the appropriate decision for review.

[77] Notwithstanding the Reconsideration Decision's updated water demand calculations, in my view, to the extent that the Reconsideration Decision rests on the same factual constraints as the Refusal Decision, both decisions ought to be considered in the reasonableness analysis.

Issue 2: If the Refusal Decision is valid for the purposes of the review, are it and the Reconsideration Decision reasonable?

[78] I will first set out the relevant factual constraints, followed by the legal constraints in this case, both of which form the basis of the reasonableness analysis for the Refusal Decision and the Reconsideration Decision.

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A. Factual constraints

1. Did Director Rodgers come to grips with the availability of water?

[79] CSB applied for the Building Permits in December 2023. The Water Master Plan was completed in February 2024. In March 2024, Director Rodgers issued the Refusal Decision. While I accept he did not explicitly address the issue of available raw water supply, he did explain there was a deficiency during the busy dry season. He explained his concern that adding the peak hour demand required by the Proposed Development may cause adverse effects on other users during periods of high demand and low source water flows. While Director Rodgers did not mention the existence of water in 2023 in the Refusal Decision, in my view, he did give clear reasons for refusing the water connection in March 2024. Director Rodgers ended this correspondence by inviting CSB to contact him about "next steps".

[80] CSB refers to what they say is a contradiction in the Refusal Decision. On one hand, it requires CSB to provide a new, upgraded watermain to the west side of Hellesen Drive, but then on the other hand, it refuses a water connection. As noted above, Director Rodgers included the watermain requirement in the event CSB was able to proceed with the Proposed Development once an alternative water supply was found. I see no contradiction in Director Rodgers' position.

[81] In the Reconsideration Decision, Director Rodgers acknowledged that while there was an ADD surplus in the summer of 2023, he explained that the District narrowly averted the highest level of water restrictions at that time. If the Proposed Development water connection was granted, Director Rodgers was concerned that its requirement of 50 m^3 of water, would render the highest water restrictions more likely.

[82] In my view, both the Refusal Decision and the Reconsideration Decision grappled with the issue of available water for the Proposed Development and did so in the context of adverse impacts on other users and the overall concern of the potential for water restrictions if water allotment was granted for the CSB Land.

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2. Did Director Rodgers come to grips with water connections to other users?

[83] CSB also says that Director Rodgers did not come to grips with the fact that allocations or connections were made for other water users. In this regard, there are two groups being referred to. Those who were granted water connections between December 2023 and November 2024, and those who were granted or would be granted water under the LGP, including the Campbell Street development and Tla-o-qui-aht First Nation, which I address below.

[84] Director Rodgers gave evidence in discovery with respect to the water connections he granted between December 2023 and November 2024, including that he granted a connection to an “ice-house”. It is unclear to me whether the ice-house is captured within the listing of the eight new connections referred to above. Even if it was not, I have no evidence that the amount of water it would use would add significantly to the new water connections granted in the relevant period.

[85] It is important to put the eight new water connections approved by Director Rodgers within their factual context. Director Rodgers’ evidence was that these water connections, in aggregate, imposed an additional ADD on the District Water System of 2.85 m^3/day (as compared to the 50 m^3/day that would be imposed on the District Water System if he were to approve a water connection for the Proposed Development). These new connections were relatively modest. Given this, I am of the view that Director Rodgers was not obliged to bring these water connections into his analysis in the Refusal Decision.

[86] I note here that I do not agree with CSB’s submission that the reference to “refusal” by the Manager of Legislative Services in his letter of November 27, 2024, of the Building Permits, is determinative of a refusal as it would be from Director Rodgers or Inspector Henderson. The correspondence from Director Rodgers and Inspector Henderson to CSB was ongoing and in-depth regarding various issues to be resolved for a significantly sizable, proposed project.

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[87] In their oral submissions, counsel for CSB adopted the view that the November 25, 2024, letter from Inspector Henderson was not a refusal letter. While CSB may not wish to characterize the letter as a refusal of the type issued by Director Rodgers, CSB engaged directly with Inspector Henderson, making three separate written demands of him requesting reasons be issued. Given this, Inspector Henderson's letter necessarily forms part of the record under review, as do counsel's letters. Inspector Henderson did not refuse the water connection, but only paused processing of the Building Permits until the issues he identified were addressed by CSB.

[88] The Reconsideration Decision did not address the eight new connections granted between December 2023 and November 2024. Those connections were not only of nominal water usage, but they were not the focus of either of Director Rodgers' decisions. Rather, their focus was to bring to CSB's attention outstanding issues related to the Proposed Development, including the need for CSB to identify an alternative water source.

3. What is the "record" to be considered in this review?

[89] CSB also argues that the portion of the Refusal Decision dealing with water capacity issues comprises only four paragraphs, which they say is not within its context. The Water Master Plan comprises almost 200 pages, and it confirms 333 m^3 of ADD.

[90] In the Refusal Decision, Director Rodgers relied on the executive summary of the Water Master Plan, a comprehensive water plan intended to guide District decisions with respect to current and future water use in a manner that protects that resource for all users. I see no issue with Director Rodgers relying on the summary as he did.

[91] Beyond the Water Master Plan indicating 333 m^3 of ADD, CSB argues that Director Rodgers failed to transparently demonstrate how he came to his conclusion in the Refusal Decision that he could not approve the Proposed Development water connection, when:

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- the First Water Policy confirms to District Council and District Council accepts there is 333 m³ of ADD;
- the LGP confirms a permitted allocation of 120 m³ ADD; and
- District webpages confirm that over 60 m³ of ADD remains.

[92] The District Council received the First Water Policy from staff on July 23, 2024, months after the Refusal Decision.

[93] From it, the District Council adopted a water policy resolution – the "Limits to Growth Policy" - on December 10, 2024.

[94] In the Reconsideration Decision, Director Rodgers confirmed that in March 2024, he only considered those District bylaws, policies and regulations that were in effect at that time. Neither the First Water Policy nor the LGP were in effect in March 2024. He specifically stated he did not consider the LGP in either his March 2024 Refusal Decision or his July 2025 Reconsideration Decision.

[95] Therefore, to the extent that CSB relies on the First Water Policy and the LGP in respect of their submissions in the reasonableness analysis of the Refusal Decision, I decline to consider them. Similarly, I do not consider CSB's reference to the current water level listed on the District's website (presumably CSB is referencing 2026) to assist in this part of the analysis. Moreover, Director Rodgers does not say that he relied on that information.

4. To what extent does source and supply inform the analysis?

[96] Given the District's view that the Reconsideration Decision replaced the Refusal Decision, their submissions with respect to the Water Master Plan pertain also to the Refusal Decision. CSB describes the Water Master Plan as showing a "source deficit", but not a "supply deficit"; because there is storage in the system between the source creeks and supply to residents.

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[97] I have already noted above that in both the Reconsideration Decision and the Refusal Decision, Director Rodgers relied on the executive summary of the Water Master Plan. I find no issue with him doing so.

[98] The parties differ on whether the Court ought to consider these submissions by CSB. CSB says the Court need not discern or critically review source and supply deficits because the District's "own record" - which includes the First Water Policy and the LGP – addresses it. I have already determined those documents cannot form part of the record subject to review with respect to the Refusal Decision.

[99] I agree with the District that the Water Master Plan was part of the record before Director Rodgers when he made the Reconsideration Decision, and I find it was also clearly before him when he made the Refusal Decision.

[100] Based on the May 2025 Technical Memo, CSB says that Director Rodgers purported to reassess the Refusal Decision, "effectively doubling down" on his refusal to permit a water connection to the CSB Land because this "one connection" would have an adverse effect on other users of the District Water System. CSB submits that the May 2025 Technical Memo indicated the Proposed Development had an ADD of 50 m^3 per day and would therefore require less than half of the remaining water supply that was confirmed in the LGP of 120 m^3 of ADD.

[101] CSB argues that the Reconsideration Decision, made after the First Water Policy (adopted by District Council on July 23, 2024), again uses MDD and ignores ADD. The District refutes that assertion, as do I. Director Rodgers specifically acknowledges that the Water Master Plan indicated a water supply ADD surplus. Moreover, he also indicates that McElhanney recommended reducing the Newcastle water demand projections to align with applicable guidelines. Contained within McElhanney's May 2025 Technical Memo were calculations using MDD, which calculations Newcastle confirmed.

[102] I cannot accede to CSB's argument that the Reconsideration Decision provides no explanation, coherence or rational chain of analysis, and no reference to

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the factual matrix that in June 2025, sufficient water existed. Director Rodgers clearly explained his concern that connecting the Proposed Development would result in a 14 percent increase in the MDD deficit and would have an adverse effect on other users and increase the risk of significant water restrictions and a state of local emergency.

[103] I also cannot accept CSB's argument that Director Rodgers gave no explanation for denying the connection when he was aware that the Water Master Plan confirmed over 333 m^3 of ADD existed in 2023. Director Rodgers commented specifically on this point and gave reasons for it.

[104] I accept that Director Rodgers did not mention that the First Water Policy confirmed that available water to the District Council, nor did he mention the LGP, which permitted allocations of 120 m^3 ADD, because, as he explained, those were not part of the record he considered in March 2024. CSB has not established that Director Rodgers considered the First Water Policy or the LGP in either the Refusal Decision or the Reconsideration Decision.

5. Do other allocations of water to non-commercial resort developments form part of the review?

[105] CSB also submits that on August 13, 2025, the day after cross-examination of Director Rodgers and Inspector Henderson, without any doubt known by them, the District Council adopted a bylaw rezoning development and resolving:

> **Resolution No. 265/25**
>
> That 33.12 m^3/day of water is allocated to 825 Campbell Street per the District of Tofino Zoning Amendment Bylaw No. 1315, 2022 [as adopted in the same council meeting].

[106] Yet, CSB says, neither Director Rodgers nor Inspector Henderson mentioned this in their discovery evidence. The Campbell Street development involves 24 single family lots and a 55-unit apartment building, requiring 26 connections and allocation of approximately the same amount of water Director Rodgers had determined that CSB required and sought in December 2023, 20 months previously. However, the record shows that both Director Rodgers and Inspector Henderson

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continued to work with CSB to address District concerns related to the Proposed Development, including the requirement of an alternative water source.

[107] I have already noted above that included in the LGP under the heading "Eligible Uses" is the reference to "Tla-o-qui-aht First Nation projects that do not exceed 60 m³ ADD". The LGP is a response to the District Council's concern over raw water supply and how best to allocate it, including residential development, considering, *inter alia*, the prospect of water shortages.

B. Legal constraints

1. Do the Water System Bylaws give Director Rodgers the authority to refuse the water connection?

[108] Director Rodgers relied on his authority under section 4.5(a) and (b) of the 2015 Water Utility Bylaw to make his decision that the District "cannot approve the proposed new connection based on the projected demands". Section 4.5 read as follows:

> **4. Conditions of Service**
>
> […]
>
> 4.5 The Manager may for the purposes of protecting the District Water System and preventing adverse effects on other users:
>
> a) limit the number, size, and capacity of connections to the District Water System;
>
> b) refuse water Service main extension or Service enlargement;
>
> c) refuse to provide Service at any location where the District Water System is not effectively protected from any actual or potential Cross Connection;
>
> […]

[109] As noted above, the 2015 Water Utility Bylaw was repealed and replaced with the 2024 Water Utility Bylaw on June 25, 2024, pursuant to which the Reconsideration Decision was made. The relevant provisions of it are as follows:

> **4. Conditions of Service**
>
> […]

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> (5) The Manager may for the purposes of protecting the District Water System and preventing adverse effects on other users;
>
> a) limit the number, size, and capacity of Service Connections to the District Water System;
>
> b) determine water meter location;
>
> c) refuse water Service Connection extension or Service enlargement;
>
> d) refuse to provide Service at any location where the District Water System is not effectively protected from any actual or potential Cross Connection;
>
> […]

[110] CSB argues that Director Rodgers cannot rely on s 4.5(a) as a justification to deny them water. They say that while there are subtle differences between the two bylaws, neither of them actually allow for refusal of service for any reason other than lack of protection from cross connections. The reference to "refuse" relates to refusal of an extension or enlargement, which is not what Director Rodgers refused.

[111] On this point, the District says bearing in mind that the Court must be mindful that the purpose of the Water System Bylaws are to provide for the protection of the District Water System, the legislative scheme applicable to Director Rodgers' decision - the delegated authority to him under section 4.5(a) and section 4(5)(a) - does not prescribe factors to be taken into account by him in exercising his discretion under those provisions. I note here that in their third demand letter dated December 5, 2024, counsel for CSB acknowledged that under the Water System Bylaws there are no guidelines or criteria to inform applicants how the manager may exercise his discretion.

[112] The Court's role is to determine whether it was reasonable for Director Rodgers to reach the conclusion he did in the Reconsideration Decision amidst the constellation of law and facts. Here, the District points to Director Rodgers' reliance on the Master Water Plan, including the executive summary, and in particular his reliance on statements under the heading "6.3 Water Supply Deficiency", where he explained his concerns, noted above.

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[113] Director Rodgers also relied on and referred to the statement under the heading “5.1 Source Water Design Criteria”:

> The District’s water supply operates as a flow through system with minimal raw water storage (approximately nine days of raw water storage assuming an average MDD of 2865 m³/day). In flow through systems, the inflow for the water source should have the ability to meet the MDD, otherwise there is a risk of drawing down potable water reservoirs. Therefore, the creek flows that supply the Districts raw water supply should have the ability to meet the MDD. Note that systems with ample raw water storage capacity, not considered to be flow through systems, only need to be able to meet the ADD plus an additional safety factor.

[114] Also, before Director Rodgers was the May 2025 Technical Memo, which confirmed the Proposed Development (without the Spa), had an MDD of 101 m³/day, or an ADD of 50 m³/day

[115] Ultimately, in the Reconsideration Decision, Director Rodgers was of the opinion that the Water Master Plan indicated a water supply ADD surplus, but it did not affect his view that the approval of the proposed connection would increase the risk of significant water restrictions and a state of local emergency and would likely have an adverse effect on other users of the District Water System. While ADD surplus existed in the summer of 2023 when Stage 4 water restrictions and the state of local emergency were narrowly averted, in his view, the Proposed Development would reduce the ADD surplus by 50 m³ making the need for Stage 3 water restrictions and a state of local emergency more likely.

[116] It was on this basis that he refused to permit a water service connection to the CSB Land and thereby precluded CSB from obtaining Building Permits under s. 10.1(f) of the 2019 Building Bylaw without providing evidence of an alternate source of water for the Proposed Development. Director Rodgers asked CSB to contact him to discuss his letter and next steps.

[117] The District submits that from the Reconsideration Decision, Director Rodgers was aware that:

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a. The Water Master Plan contained information relating to both an MDD deficit and an ADD surplus:

b. From a design perspective, a flow through system with minimal storage (such as the District Water System) should have a supply capable of meeting MDD;

c. The District Water System had approximately nine days of raw water storage based on current MDD;

d. An increase in MDD would reduce the approximately nine days of raw water storage by 14% (to approximately 7.75 days);

e. Based on current MDD and ADD, in 2023, the District imposed significant water restrictions and considered declaring a state of local emergency, but that was narrowly averted; and

f. An addition of MDD or ADD would increase the risk of significant water restrictions and a state of local emergency.

[118] In these circumstances, I agree with the District that the Reconsideration Decision was reasonable, both in relation to Director Rodgers' reliance on creating a greater MDD deficit in the District Water System and in relation to his assessment of the impact of reducing the current ADD surplus. In both circumstances, I find it was reasonable for him to determine that the approval of a water service connection for the Proposed Development would have an adverse impact on existing users of the District Water System.

[119] With respect to the language of sections 4.5 and 4(5) of the 2015 and 2024 Water Utility Bylaws, respectively, I am satisfied that those sections make clear that Director Rodgers had the authority to limit the size and capacity of the water service connection sought by CSB. In refusing a water service connection to the CSB Land to supply 101 m^3 MDD water for the Proposed Development, Director Rogers was limiting the connection available to the CSB Land. He did not consider a connection

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of the size and capacity sought by CSB to be appropriate given his concern that it would have an adverse impact on the other users of the District Water System. Director Rodgers' denial of the connection does not preclude the approval of a connection having a lesser size and capacity, nor does it preclude CSB finding an alternative water source.

[120] In short, pursuant to the Water System Bylaws, Director Rodgers had the authority to limit the number, size, and capacity of connections to the District Water System for the purposes of protecting the District Water System and preventing adverse effects on other users.

2. Other non-commercial users

[121] CSB says the District has allocated no water to the CSB Land, despite it being far more advanced in the development process than the property at 825 Campbell Street. As well, when the District considered the effect on "in-stream" applications in developing policies, it left the CSB application out of its consideration.

[122] While CSB has submitted that their request for a water connection is the only water connection the District has ever refused, I have already addressed the relatively nominal amount of water used by the connections approved between December 2023 and November 2024.

[123] As to the Campbell Street development, I agree with CSB that Inspector Henderson and Director Rodgers would have likely been aware that the decision to grant a water connection was about to be made, and they did not disclose that information during their examinations. However, there is no obligation on the District, particularly while engaged in litigation, to disclose the prospect, irrespective of its imminence, of other users being connected to the District Water System. This is particularly the case when CSB had not yet met the requirements applicable to the Proposed Development, including identifying an alternative water source, which they were advised of as early as March 2024.

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[124] I agree with the District's submission denying CSB's assertion that Director Rodgers simply refused their application for the Building Permits on the basis that the Proposed Development is for commercial accommodation use (i.e., a resort hotel) as suggested by the First Water Policy or the LGP. Rather, he based his decision on the anticipated MDD and ADD associated with the Proposed Development and the adverse impact on existing users of the District Water System by adding that demand on the capacity of it.

[125] There is no evidence before the Court that Director Rodgers blindly followed the policies in refusing the water service connection, nor making his decisions in light of prospective water connections for residential development.

[126] CSB also argued that at no time has the most restrictive stage of water usage/conservation been declared pursuant to the District of Tofino Water Use and Conservation Bylaw No. 1224, 2016, or the amended bylaw in 2024. I agree with the District that this has no bearing on the applications for the Building Permits, or the District's refusal to allow the water connection to CSB. It is clearly the role of the District Council and their staff to plan for and implement steps to ensure the most restrictive water conservation stages are avoided.

VII. CONCLUSION ON REASONABLENESS

[127] In sum, I am satisfied, given the record as a whole, that Director Rodgers exercised his discretion under the authority granted to him, justifiably. He refused the water connection to CSB with transparent reasons that show he meaningfully grappled with the issues, while providing a rational chain of analysis in doing so. I find that the Refusal Decision and the Reconsideration Decision are reasonable.

Issue 3: Would OCP amendments and the LGP repeal change the outcome of the case such that I ought to grant CSB's application to reopen the case?

[128] The short answer is no.

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1. Background

[129] The parties originally appeared before me for hearing of the petition on January 26, 27, and 28, 2026 (the "January Hearing"). I reserved my decision. Subsequently, CSB sought to reopen its case due to amendments of the District's OCP, which formal process, unbeknownst to CSB, had commenced the month prior to the January Hearing. CSB says that the OCP amendments are directly relevant to water availability and allocation that is the core issue of the main proceeding.

[130] The District says that while the repeal of the LGP may render some of the relief sought moot, they do not agree that it, nor the amendments to the OCP, are relevant.

[131] After becoming aware of the amendments on March 12, 2026, CSB filed an application to reopen its case; a hearing date was scheduled for April 9, 2026. However, due to the unavailability of counsel for the District, the hearing date was rescheduled to June 19, 2026.

[132] CSB relies on Rule 8-1(14) of the *Supreme Court Civil Rules,* BC Reg 168/2009, and the inherent jurisdiction of this Court to:

a) permit Affidavit #3 of Janet Ferris ("Ferris Affidavit #3") to be filed and admitted into evidence;
b) order a continuance or reopen the January Hearing of the petition prior to judgment; and
c) permit CSB to make further oral submissions with respect to the new evidence attached to Ferris Affidavit #3.

[133] The District opposes CSB's application but if granted, they seek to have affidavit #3 of Aaron Rodgers ("Rodgers Affidavit #3") admitted into evidence as well. CSB opposes admission of the Rodgers Affidavit #3 on the basis that it breaches settlement privilege.

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2. Applicable legal principles

[134] At paragraph 8 of *Begg v Provincial Rental Housing Corporation*, 2025 BCSC 2639, this Court referred to the applicable legal principles on an application to reopen:

> [8] The legal principles that apply on an application to reopen are set out in *Cox v. Swartz Estate*, 2022 BCSC 1494 at paras. 50-51 as follows:
>
> > [50] The court has a broad discretion to permit a party to reopen its case and tender evidence to prevent fundamental miscarriages of justice. The power is to be used sparingly and with care to prevent frauds and abuses of the courts process that might result: See *Clayton v. British American Securities Ltd.* (1934), 1934 CanLII 229 (BC CA), [1934] 3 W.W.R. 257, [1935] 1 D.L.R. 432, at 440 (BCCA) [*Clayton*]; *Graham v. Galaxie Signs Ltd.*, 2013 BCCA 266, at para. 33 (leave to appeal ref'd: 2014 CanLII 5831 (SCC)) [*Galaxie Signs*].
> >
> > [51] The test for reopening of a trial to bring new evidence into the case is whether the applicant has shown on a balance of probabilities that (1) a miscarriage of justice would probably occur without reopening the trial, and (2) the new evidence would probably have changed the result of the trial: *Grewal v. Grewal*, 2016 BCCA 237, [*Grewal*] at para. 71; *Galaxie Signs* at para. 33. As noted in *Cowichan Valley (Regional District) v. Jeffries* (1983), 46 B.C.L.R. 303, 1983 CanLII 484 (BCSC), [*Cowichan Valley*] at para. 13, for the purposes of the test, the evidence must indeed be fresh evidence: It must have come to the applicant's attention after trial, without being reasonably discoverable beforehand.

[135] The scope of the discretion to reopen is generally narrower where judgment has been issued, and the test becomes even more rigorous depending on whether the order has been entered or not. I have not yet issued judgment nor entered an order.

[136] At paragraph 18 of *Chura v Batten Industries*, 2021 BCSC 2737 [*Chura*], Justice Lyster referred to the comments of Justice Dardi in *A.B. v C.D.*, 2014 BCSC 1676 [*A.B.*] that "[t]he authorities do not mandate any rigid test. In order to invoke the court's inherent powers to control its own process and to remedy what might otherwise be a substantial injustice, the applicant need not establish the omission of a material fact."

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[137] Also, at paragraph 18 in *Chura*, Justice Lyster further referred to the comments of Justice Dardi in *A.B.* that:

> [31] […] The factors for consideration in an application to re-open include the relevance of the proposed evidence, the effect, if any, of re-opening on the orderly and expeditious conduct of the trial, and whether the other party would be prejudiced if the re-opening is permitted: *Vander Ende* at para. 84.
>
> [32] The jurisprudence establishes that the fundamental consideration on an application to re-open is whether to do so is in the interests of justice and whether a miscarriage of justice would occur if the proposed evidence is not received: *Bell v. Bell*, 2001 BCCA 148 at para. 23; *Moradkhan v. Mofidi*, 2013 BCCA 132 at para. 24; *Stevens v. Plachta*, 2006 BCCA 479 at para. 15.

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3. CSB position on reopening

[138] CSB submits that the evidence sought to be introduced – a staff report dated February 24, 2026 (the "2026 Staff Report"), a Council resolution dated February 24, 2026, repealing the LGP (the "LGP Repeal"), and the OCP amendments ("OCP Amendment") – is new, not fresh evidence (together the "Proposed New Evidence"), that came to their attention after the trial.

[139] Apart from a first reading of the OCP Amendment on December 9, 2025, in respect of which there was no public notice, the Proposed New Evidence did not exist at the time of the January Hearing. This, CSB says, militates in favour of reopening.

[140] CSB says at the January Hearing, both parties referred to the OCP in support of their respective positions concerning the way in which this bylaw dealt with land use designations, future growth policies, and policies with respect to the District Water System.

[141] CSB says it was not known to them, nor did the District disclose to them, that the District Council had commenced the process of amending the OCP, having given the amending bylaw first reading on December 9, 2025.

[142] On February 24, 2026, after the close of the January Hearing, the District Council repealed the LGP. CSB says that both the OCP Amendment and the repeal

of a “key policy” that they argued was in contravention of the entire *LGA* regulatory scheme were unknown to the Court at the January Hearing.

[143] In its amended petition filed August 26, 2025, CSB sought a declaration that the LGP adopted on December 10, 2024, was unlawful and of no force and effect as it related to regulation of land use. The declaration respecting the legality of the LGP is now no longer necessary. CSB says the District has, in effect, conceded the point by repeal of it, which the District denies.

[144] CSB submits that the arguments with respect to the requirements for properly enacted land use regulations, intentional or otherwise, appear to be accepted after the completion of the January Hearing. This, CSB argues, highlights the danger of the substantial injustice if the CSB Land subject of the main proceeding is the only property caught in the “unique timing” that is now evident. CSB says that no other applications for water were historically rejected. Future projects and/or applications may not proceed in the face of what they submit are now presumptively legal bylaws and bylaw policies. However, none of these existed at the material time; that being, during the process of CSB’s applications, which they commenced in 2020.

4. District position on reopening

[145] The District says that CSB is impermissibly trying to put its case in twice. Allowing CSB to reopen its case to add the Proposed New Evidence would not address any injustice, much less a substantial injustice. None of the arguments the petitioner might make on the Proposed New Evidence are new. As such, they are simply trying to recast their case.

[146] In its amended petition, CSB seeks to, *inter alia*, quash the LGP and overturn Director Rodgers’ refusal to approve a water connection. It challenges the LGP as an attempt to regulate land use under the guise of service regulation; it says Director Rodgers’ refusal was unreasonable because both the Water Master Plan and the LGP purported to allocate a raw water surplus to other users.

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[147] The District says that the post-hearing LGP Repeal means any relief sought is moot and no further arguments about it are necessary. Relatedly, they say that the LGP Repeal also has no bearing on the reasonableness of Director Rodgers' decision to refuse CSB's water connection because the LGP did not exist when Director Rodgers first refused the water connection and therefore, he did not take the LGP into account in the Reconsideration Decision of CSB's application and again refused the water connection.

[148] The District also says with respect to CSB's argument that the LGP Repeal is an admission by the District that the LGP is or was invalid and is also evidence the District resiled from positions taken at the hearing, are not inferences open to this Court. The District relies on s 37 of the *Interpretation Act,* RSBC 1996, c 238, and submits that the repeal of all, or a part, of an enactment, or a substitution of it, is not to be construed as a declaration as to the previous state of the law. CSB says they are not relying on s 37, rather, they rely on the case authorities such as *Josef v Ontario Minister of Health*, 2013 ONSC 6091, that when those changes happen, there are cost implications.

[149] Even if these were proper inferences open to the Court, the District says it is unnecessary for the Court to consider implications of the LGP Repeal because any relief sought in relation to the policy is moot; the LGP was not considered when the petitioner's water connection was denied in both decisions.

[150] With respect to CSB's request to have this Court consider the OCP Amendment, the District submits that this too is simply an attempt to argue what they already argued at the January Hearing, consistent with the challenge to Director Rodgers' approach to managing the municipal water system as an invalid attempt to regulate and prohibit CSB's otherwise lawful resort development proposal.

[151] Before turning to the factors that I must consider on the issue of reopening the case, I will first deal with whether the Rodgers Affidavit #3 is inadmissible on the basis of settlement privilege.

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5. Is the Rodgers Affidavit #3 inadmissible due to settlement privilege?

[152] At paras 85-90 of *Acciona Wastewater Solutions LP v Greater Vancouver Sewerage and Drainage District,* 2025 BCSC 2040 (leave to appeal to BCCA refused 2026 BCCA 62 per Justice Winteringham in Chambers), Justice Elwood set out a succinct summary of the legal principles of settlement privilege:

> [85] Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a litigious dispute. Sometimes called the "without prejudice rule", it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation: *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at para. 31.
>
> [86] Settlement privilege is a "class" or "blanket" privilege. It protects the class of communications exchanged in the course of settlement negotiations, as well as documents created for the purpose of that endeavour: *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 37 paras. 12, 16.
>
> [87] The use of the words "without prejudice" is not essential. What matters is the intent of the parties to settle the dispute: *Sable Offshore Energy* at para. 14.
>
> [88] Justice Veenstra confirmed the test for settlement privilege in *Stancor Enterprises Ltd. v. Fiorvento*, 2022 BCSC 1842 at para. 92, citing *Abdul-Ahad v. Challa*, 2021 BCSC 795 at para. 35:
>
> > a) A litigious dispute must be in existence or within contemplation;
> >
> > b) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
> >
> > c) The purpose of the communication must be to attempt to effect a settlement.
>
> [89] The party asserting settlement privilege must establish that a "litigious dispute" was either in existence or within contemplation, and the communications in question were made for the purpose of attempting to effect a settlement of that dispute. This means that litigation must be more than a mere possibility for the privilege to apply: *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership*, 2007 BCSC 143 [*Blue Line Hockey*] at para. 103.
>
> [90] Litigation can be said to be within contemplation when a reasonable person, with the same knowledge of the situation as one or both of the parties, would find it unlikely that the dispute will be resolved without it: *Hamalainen v. Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.).

[153] CSB says the Rodgers Affidavit #3 is inadmissible due to settlement privilege because it refers to and attaches as Exhibit "A" an email dated March 4, 2026, from

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Glenn Hill, principal of dHKarchitects, on behalf of CSB to Director Rodgers, wherein Mr. Hill states:

> Without prejudice to the legal proceeding currently underway I am reaching out to request a meeting with the District of Tofino Staff to discuss the potential for exploring alternative sources of water to service the project as currently submitted through the two current Building Permits.
>
> …
>
> Generally speaking, we would like to explore options / feasibility for providing storage on site to offset peak draw, sourcing an onsite well to potentially service the Employee Housing building to reduce demand on city water supply and any other options available to us that may generate support for water allocation for the project.

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[154] CSB submits that if the District wished not to have discussions on a without prejudice basis, they should have said so. They did not do so, rather, Director Rodgers met with them.

6. Discussion on settlement privilege

[155] As noted, applications for building permits are made to the District under the 2019 Building Bylaw. Section 10 of the 2019 Building Bylaw requires that, among other things, an applicant for a building permit must apply for and obtain a development permit if the building or structure is in an area designated by the District's OCP as a development permit area. If the parcel that is the subject of the building permit application cannot be connected to the District Water System, the applicant must apply for and obtain approval from the District for an alternative water source.

[156] The District focused its submissions on the third prong of the test outlined in para 92(c) of *Stancor Enterprises Ltd. v Fiorvento*, 2022 BCSC 1842 [*Stancor*], referred to above. At the January Hearing, evidence was led about the District's position that CSB – like all prospective applicants for water allocation – were advised, and therefore had an opportunity, to seek an alternative water source as part of their development application. Prior to the January Hearing, CSB did not seek an alternative water source. After the January Hearing, the District says CSB wished

to continue to discuss what had always been the District's position that applicants are to seek an alternative water source where required.

[157] The District also submits that there is no offer to settle the litigation in Mr. Hill's email. Rather, despite the litigation, Mr. Hill and CSB wished to discuss the potential for exploring alternative water sources. Mr. Hill's email was not an attempt to effect settlement within the meaning and spirit of the third prong of the test in *Stancor* at para 92(c).

[158] CSB says that the District's position ignores paras 125 to 126 of *Stancor,* where Justice Veenstra cautioned that the Court must be careful in concluding that the fact of a broader business negotiation means that the purpose of a settlement communication is not "to attempt to effect settlement". Justice Veenstra was of the view that settlement privilege should not be "strictly constrained to discussions that fall squarely within the pleadings of any existing legal action." Legal authorities recognize the important public interest in encouraging settlement: *Stancor* at paras 125-126.

[159] I agree with the District that the purpose of Mr. Hill's communication was not to effect settlement; it was a continuation of discussions between CSB and the District regarding the Proposed Development.

[160] In *Abdul-Ahad v Challa,* 2021 BCSC 795, the Court noted at para 38 that the use of the phrase "without prejudice" is not, on its own, sufficient to protect a document from disclosure. The focus is on whether the content of the document contains a settlement offer or refers to settlement indirectly by inviting compromise or some other approach to resolution.

[161] Given this, I agree with the District that just because the email from Mr. Hill is marked "without prejudice" does not make it so. It is the intent of the communication that matters. Here, the intent of the communication was to continue discussions on the unchanged position of the District that CSB need seek an alternative water

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source. The intent of Mr. Hill's email was not an attempt to resolve the legal proceeding, nor was it inviting compromise or some other resolution of it.

[162] I agree with the District that if I permit the Proposed New Evidence, then on my finding that the Rodgers Affidavit #3 is admissible, which I do, it too ought to be admitted.

[163] I turn now to the factors on reopening CSB's case.

a) Relevance of the Proposed New Evidence

[164] CSB says the Proposed New Evidence is relevant because the OCP Amendment adds policy about management of land use and development rights respecting water limitations with updated zoning bylaws. In addition to the OCP setting out an "order" in which applications will be dealt with, which leaves out CSB's application for Building Permits, the OCP now also has a distinct policy of non-support for additional commercial accommodation development except for on Tla-o-qui-aht land, which is specifically designated in the OCP Amendment for both development and water allocation.

[165] CSB also argued at the January Hearing that the LGP has no basis in municipal law, and that it sought to indirectly accomplish restriction of one type of land use (resort development) and purported to discriminate amongst land uses through means other than lawful land use designation.

[166] The District says the LGP Repeal was not considered by Director Rodgers in either of his two decisions to refuse a water connection to the CSB Land, and therefore is of no relevance. Also, since CSB sought various orders in relation to the LGP in their amended petition and the LGP has been repealed, its validity is now moot.

b) The effect, if any, of reopening on the orderly and expeditious conduct of the trial

[167] There is no *viva voce* evidence in this trial. It is all on affidavit evidence. While reopening the evidence would occasion some delay in reaching final determination,

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there would be no significant effect of reopening on the orderly and expeditious conduct of the trial. The January Hearing has concluded and judgment has been reserved. No orders have been made.

c) Would the other party be prejudiced if reopening is permitted?

[168] The District's argument is that the LGP Repeal and OCP Amendment are not relevant and that CSB is trying to recast their case. In my view, the District would not be prejudiced if I granted CSB's application because the arguments they would make with the Proposed New Evidence would be the same arguments made on CSB's original petition: the LGP is not relevant.

d) Is it in the interests of justice to allow the reopening of the CSB's case?

[169] At the January Hearing, CSB made submissions on the law relating to provision of utility services, and how the LGP (and its purported regulation of land use) was contrary to established common law. CSB says that following the close of the January Hearing, the District had the benefit of hearing their arguments, and the 2026 Staff Report was prepared for the February 24, 2026, District Council meeting. On that date, the LGP was repealed by unanimous vote. No record of any discussion is in the meeting minutes though the 2026 Staff Report is public and is part of the Proposed New Evidence.

[170] CSB says, whether as a result of this proceeding or otherwise, the District has repealed the LGP, one of the major focusses of the main proceeding. The 2026 Staff Report acknowledged that water allocation policies now go into "regular operational practise" and related land use policies in the OCP, just where the petitioners submitted they ought to properly be housed.

[171] Further, to control land use to which CSB was entitled to put their property, CSB says it must have been done in the land use legislation framework set out in the *LGA*, with all its procedural protections. Discrimination as amongst uses is

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permitted but it must be grounded in the designations and policies in the OCP, then implemented by consistent zoning bylaws.

[172] The OCP Amendment permits the District to down-zone the CSB land. This shift, CSB says, is an admission at law that at the time of CSB's: (i) applications for Building Permits in 2023, (ii) formal demand(s) for their issuance in 2024, and (iii) petition hearing, this was not the case.

[173] I am satisfied that the Proposed New Evidence is fresh evidence that only came to the attention of CSB after the close of the January Hearing and it was not reasonably discoverable before March 12, 2026.

[174] I have already determined that the Refusal Decision and the Reconsideration Decision were reasonable and that neither relied on the LGP.

[175] Based on the record before me, the adoption of the LGP in July 2024 occurred after DP 2023 was approved; its creation was necessitated by the February 2024 Master Water Plan. The petition was filed on February 13, 2025. The first step the District took to amend the OCP was on December 9, 2025, the month prior to the January Hearing. The LGP was repealed on February 24, 2026, the same day as the OCP Amendment was made shifting authority for land use from the LGP to the OCP.

[176] While there was no direct notice to CSB about the steps taken by the District from December 9, 2025, to March 2026 when CSB became aware of those steps, I have not been provided any authority to support the proposition that the District was obligated to advise CSB of the steps they planned to take regarding overall planning issues. This is particularly the case where the decision maker is under threat of, and becomes engaged in, litigation by the applicant.

[177] The actions of (i) Inspector Henderson and Director Rodgers not disclosing at their respective discoveries in August 2025 that a residential development (Campbell Street) would be approved for a water connection the next day; (ii) the District Council adopting and eventually repealing the LGP; and (iii) the creation and

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implementation of the OCP Amendment, which *inter alia*, established a distinct policy of non-support for additional commercial accommodation development except for Tla-o-qui-aht land, may be disingenuous in light of CSB's contemporaneous efforts to obtain the Building Permits. However, any disingenuity is tempered by what I find to be: (i) the considerable deference owed to municipal governments and administrative decision makers in planning within their jurisdiction, and (ii) the efforts taken by the District to work with CSB to advance the Proposed Development, including advising as early as March 2024 of the requirement for CSB to identify an alternative water source. That still has not been done by CSB.

[178] In my view, while I acknowledge that the "unique timing" referred to by CSB is deeply unfortunate, I am unable to find that a miscarriage of justice would likely occur without reopening the trial, nor is the Proposed Evidence such that it would have probably changed the outcome of the trial. It is not in the interests of justice to reopen the case.

VIII. DISPOSITION

[179] The amended petition and application are dismissed. The District shall have its costs at Scale B for both the petition and the application.

"Dion J."

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