

Proposed Bylaw 195 - More Litigation at Your Expense?

In Bylaw 195, Island Trust is amending the Streams, Lakes and Wetlands development permit area (DPA).

Denman Islanders should be aware that this DPA is likely invalid. Bylaw 112 was the original bylaw which established DPA No. 4: Streams, Lakes and Wetlands. In 2000, when 4064 challenged its validity, the British Columbia Supreme Court struck down Bylaw 112 as invalid. In 2001 the British Columbia Court of Appeal set aside the bylaw conditional on fresh validation by the Supreme Court. The Bylaw was never validated.

Litigation Summary

1. In 1998/99 the DILTC passes 5 forest bylaws (110,111,112,113 & 114) to regulate logging and farming.
2. In 2000 the DILTC sued 4064. 4064 challenged the bylaws: the Supreme Court declared them all invalid.
3. In 2001 the DILTC appealed resulting in;
 - the Appeal Court dismissing the appeal on Bylaw 113,
 - the Court asking exactly which lands are designated within Schedules maps to the bylaws,
 - DILTC and 4064 legal counsel agreeing to address the designation issue if revalidation is ordered,
 - the Court conditionally setting aside the decision on 110,111,112 and 114, referring them back to the Supreme Court for a fresh determination of validity.
4. Subsequently the DILTC paid 4064 an undisclosed sum in a confidential mutual release agreement, a sum rumoured to be \$160,000. Clauses in the agreement wrongly represent the Appeal Court overturned the bylaws. The agreement prevents 4064 from validating the bylaws. The DILTC and 4064 were advised the agreement may be wrong in law and they assumed a risk.
5. The DILTC ignores the Order, represents the bylaws were upheld and continues them as valid.

The specifics are evidenced in the Oral Reasons for Judgement in DILTC v. 4064 Investments Ltd, 2001 BCCA 736, CA027920, and are as follows;

“[89] In conclusion. . . I would **set aside** the order appealed declaring bylaws 110, 111, 112 and 114 invalid and remit the issue of their validity to the Supreme Court of British Columbia for fresh determination.”

Emphasis added.

Please recognize the words “set side”. Set aside typically means you intend to get back to something. The bylaws were set aside so the Supreme Court could consider additional issues the courts had not dealt with previously.

“[88] . . . Bylaw 112 purports to protect riparian and wetland areas in a fashion that may fit within the ambit of s. 920(7) as I have described it. Given the fashion in which the issues developed in the Supreme Court, these questions were not explored in the reasons of the chambers judge. Nor were they addressed fully, or at all, on appeal have not been dealt with by the chambers judge. Those issues on bylaws 110, 111, 112 and 114 should be remitted to the trial court for determination.”

The Appeal Court Order was based on a conditional agreement.

“[62] During argument, counsel were in agreement that **if the appeal were allowed**, those issues would have to be remitted to the trial court for determination and I would so order.” **Emphasis added**

When the conditions of an agreement are not met, the status quo remains the same as before the agreement was made. If you buy a house on the condition of financing, the status quo remains the same until the condition is satisfied. Until you get the financing the house isn't yours. Until the Supreme Court validates the bylaws, the bylaws remain invalid. How then did this community ever come to believe that the development permit areas including “Streams, Lakes and Wetlands” were valid? Simple answer. Islands Trust said they were.

(over)

"The Denman Island "Streams, Lakes and Wetlands", 'Komas Bluff' and "Steep Slopes" development permit areas were upheld by the Court of Appeal decision, and these development permit areas are once again in effect."

ISLANDS TRUST NEWS RELEASE January 7, 2002

Putting your trust in the "Trust", you believed them. Islands Trust lied. The bylaws were not upheld but set aside for validation. They remain invalid until validated. Obviously, the DILTC has knowingly regulated private property within these DPAs on a false basis for over 12 years causing hardship to some land owners and all taxpayers.

Why didn't the DILTC comply with the Court Order? Madame Justice Rowles identified the problem. The law requires that land within DPAs must be properly justified and designated under the *Local Government Act*. She asked,

"whether the Amending Bylaws are uncertain from the perspective of determining exactly which lands on Denman Island are actually designated in the schedules to the bylaws."

Trustees and Planners can't just draw lines on maps anywhere they like, then call it a DPA. It is clear that within the boundaries of the Komas Bluff DPA, Islands Trust staff did add substantial land without justification or designation.

"The DP area includes the actual steep part of the bluffs plus a strip of land extending 50 meters back from the crest of the bluff. The extent of the steep terrain is based on the map by Silva Ecosystems (1998), derived by interpretation of recent air photos. The 50 meter strip was added by Islands Trust staff using the Trust's GIS (Geographic Information System)"

Hopwood Report Nov. 11, 1999.

"It is apparent that, instead of the western boundary being 50 m. from the bluff, it is from 100 to 150 m from it, and that is the problem – It seems the talk was 50 meters. But in reality, it is much greater and it sounds like it was a mistake."

Ed Pickard to David Marlor, Islands Trust Planners, Sept. 29, 1999

Did Islands Trust planners do the same thing in DPA No. 4: Streams, Lakes and Wetlands? Add land that was not properly justified as wetlands? Exactly which lands in Streams, Lakes and Wetlands are justified to meet provincial standards for designation as a development permit area?

We are told the purpose of Bylaw 195 is to provide an exemption for farming? The *Right to Farm Act*, as well as provincial farming regulations, already exempt farming. Agricultural Land Commission Chair, Eric Karlsen, has said;

"However in the light of its experience with the DPAs since commenting on the existing OCP in 1998, in particular DPA 1 (Komas Bluff) and DPA 4 (Streams, Lakes and Wetlands), the Commission's position has changed . . . In this light the Commission is no longer able to condone the DPA provisions and considers that they may be contrary in whole or in part to the spirit of the Commission's legislation and, if inconsistent, of no force and effect."

It's apparent the DILTC believe themselves beyond court and provincial authority, an attitude continued in proposed Bylaw 195, one guaranteeing increased legal risk. On Komas Bluff alone, likely half a million dollars has been spent on litigation - so far. Three cases continue, in large part because the DILTC never validated exactly which lands were properly designated in that DPA. Will Bylaw 195 now trigger a similar wave of litigation over land in Streams, Lakes and Wetlands - all at your taxpayer expense?

Respectfully Provided For Your Information

A Denman Neighbour Dan Stoneman