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BULLETIN

COURT OF APPEAL SCALES BACK RIPARIAN AREA PROTECTION POWERS

In a decision that will likely come as a shock to many clients who have been attempting to carry out the mandate in the *Riparian Areas Protection Act* (RAPA) (formerly the *Fish Protection Act*) to protect their riparian areas from development impacts, the B.C. Court of Appeal has determined (in *Wilson v. Cowichan Valley (Regional District)* 2023 BCCA 25) that the only regulatory tool that conceivably enables them to do so, the "natural environment" development permit area, may not be up to the task.

This case concerns a policy in the CVRD's official community plan that directs the regional board to refuse to issue a development permit that would authorize development within an area identified in a riparian area assessment report as a streamside protection and enhancement area (SPEA), whether or not the QEP who prepared the report has provided an opinion that such development, if authorized, would not harm fish habitat. On its face, the policy seems clearly to lie within the range of options provided to local governments under the RAPA scheme, which include local regulatory measures providing riparian area protection that exceeds the level of protection prescribed by directive under RAPA. The CVRD policy implements the precautionary principle to the extent that it would, for example, protect the riparian area against any error that the QEP may have made in forming the opinion that development within a SPEA will not harm fish habitat, and would tend to protect it against development impacts beyond those that the QEP has actually evaluated, including any impacts related to course-of-construction changes in the scope of development projects.

The development permit application in question sought approval for the siting of a dwelling within an identified SPEA adjacent to Shawnigan Lake, on a site whose developable area outside the riparian assessment area was already largely occupied by the applicants' new garage. The applicants' QEP identified an 18-metre SPEA and opined that the construction and occupancy of the dwelling almost entirely within that area would not harm fish habitat. CVRD staff recommended against issuing the permit on the grounds that the dwelling could feasibly be sited somewhat farther from the lake, thereby encroaching less into the SPEA. The applicants sought judicial review of the board's decision, and in 2021 the B.C. Supreme Court quashed the board's decision and ordered that the permit be issued. The Court was of the view that it was unreasonable for the regional board to interpret its authority in respect of development permits to include authority to prohibit development in a SPEA. The Court of Appeal has now dismissed the Regional District's appeal of that decision.

In both courts the focus was on the wording of s. 491(1) of the *Local Government Act*, which says that a development permit may "specify areas of land that must remain free of development, except in accordance with any conditions contained in the permit". In both Courts, this was interpreted as implying that while development within a SPEA may be made subject to conditions, it may not be prohibited entirely. According to the Court of Appeal, "it is not the intention of the legislature to prohibit development in a SPEA; rather, it is the intention of the legislature to empower local governments to prohibit development in a SPEA where HADD would result". This approach seems to allow the enactment of the RAPR and its predecessor legislation, both of which presumed an exercise of regulatory powers that were already contained in the *Local Government Act*, to reduce the scope of those pre-existing powers, at least where they are being exercised in an attempt to comply with the RAPR but perhaps more broadly. In that regard there is no discussion in either of the judgments of the use of this power in DP areas that are designated to protect habitats other than those frequented by fish, or of what the Legislature's intention may have been in regard to such matters; the powers are treated as if they had been conferred only to complement RAPR.

Unfortunately, the language of s. 491(1) is the same as that in s. 491(2) – the authority to specify areas of land in a hazard lands DP area that must remain free of development, except in accordance with permit conditions. Given the increased attention that local governments are giving to the identification and management of lands that are subject to wildfire, flooding, coastal erosion and landslides, any decision that calls into question their authority to prohibit development in these areas is worrisome. It would be useful for the Legislature to clarify the wording of these provisions, especially since it has recently signaled its intention to continue to rely on local governments to manage development in hazardous areas.

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