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CLIENT BULLETIN

SHORELINE WORKS AND THE ZONING POWER

Local governments with shoreline zoning need to be aware of the B.C. Supreme Court's October 1, 2018 decision in *Fonseca v. Gabriola Island Trust Committee*, in which the Trust Committee was unable to enforce its zoning bylaw in respect of a retaining wall that owners of land on Mudge Island had constructed to protect their shoreline property from erosion. The Trust Committee successfully enforced a 30-metre ocean setback regulation in respect of various accessory structures that the owners had constructed in the setback area, including a deck/walkway structure, stairs and fences. However, the Court accepted the owners' argument that the zoning regulations could not be read to prevent them from keeping the stone and concrete walls they had constructed near the shoreline of False Narrows if their purpose was to protect their land from erosion. The materials filed in the owners' application for a declaration that the zoning bylaw interfered with their exercise of riparian rights satisfied the Court that the action of the sea had actually caused erosion at this location. The Court's decision in favour of the owner rests on ancient English and Roman law pertaining to riparian rights, and the owners' argument that preventing them from building erosion control structures would constitute "a complete abrogation" of their common law riparian right to protect their property. That would require, under ordinary principles of statutory interpretation, either express provisions in the *Local Government Act* or the *Islands Trust Act*, or a necessary implication from express provisions. There is, of course, no mention of riparian rights in either statute; nor could the Court find language that necessarily implied the abrogation of any riparian right. It did leave open the possibility that local bylaws could regulate how walls adjacent to the shoreline are constructed. This is a case on the scope of the zoning power, though the Court's reasoning could possibly extend to soil deposit bylaws and other types of bylaws that deal with shoreline alteration.

Until now, the zoning power has been routinely exercised and enforced in respect of foreshore areas (both freshwater and marine) even though zoning regulations obviously affect (and are sometimes specifically enacted to affect) the protection of property from erosion – though it is likely that siting variances have been approved from time to time via either board of variance order or development variance permit where a significant erosion problem is being addressed. Local prohibitions on shoreline armouring probably assist both the federal and provincial governments with environmental protection objectives, in addition to achieving aesthetic objectives that are highly important to many residents and visitors to shoreline areas. Thus, this decision will be of interest to planning and bylaw enforcement staff throughout the province. As counsel to the Islands Trust in this matter, we will update this bulletin if we receive instructions to appeal the decision to the B.C. Court of Appeal.

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