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BULLETIN

June 24, 2010

Riparian Area Regulations Reviewed by BCSC

The reasons for judgment released this week in *Yanke v. City of Salmon Arm* examine the role of the Riparian Area Regulations in a very common development scenario. Specifically, the decision looks at how the Regulations interact with the former streamside protection and enhancement area (SPEA) regime and with other tools local governments routinely use to protect sensitive riparian areas, such as restrictive covenants.

The petitioner applied to the City for a setback variance to allow construction of a home on his lot, which is separated from the natural boundary of Shuswap Lake by a 30 metre lot and a six metre strip of park land. Upon receipt of a riparian area assessment report from a qualified environmental professional, the City granted the variance subject to approval by the provincial Ministry of Environment and the federal Ministry of Fisheries and Oceans Canada. When the latter approvals did not materialize, the property owner commenced a petition challenging the validity of the Riparian Area Regulations.

The petitioner's first argument was that the Regulations are invalid because they were intended to apply to "riparian lands" (which he suggested means only those lands immediately abutting streams) but various defined terms in the Regulations purported to include non-abutting lands such as his. The Court quickly rejected this argument, finding "The *FPA* [*Fish Protection Act*] and the RAR [Riparian Area Regulations] are not concerned with riparian rights of streamside owners, but with the protection and enhancement of streamside lands which may be close enough to the water that development upon them can exert an influence on fish habitat."

Satisfied that the Regulations could apply to the petitioner's land notwithstanding its lack of water frontage, the Court ultimately concluded that they did not apply in this instance because of the transitional provisions in section 8(2) of the Regulations:

> (2) If, before this regulation came into force, a local government had established streamside protection and enhancement areas in accordance with the former regulation, the local government is deemed to have met the requirements of this regulation in respect of those areas.

The former regulations required local governments to establish SPEAs and to take steps to protect those areas. That regulatory regime was in effect until replaced by the Riparian Area Regulations in March 2005.

The petitioner's lot was created by subdivision in February 2005, just one month before the change in regulatory regimes. As a condition of subdivision, a restrictive covenant setting certain setbacks, including a 15 metre vegetated landscape area, was registered against title to the petitioner's lot. The Court concluded that this registration of a covenant benefiting the City and Fisheries and Oceans Canada constituted the establishment of a SPEA under the former regulatory regime, thus satisfying section 8(2) of the new Regulations. The Court rejected the Province's argument that the requirement to establish a

SPEA necessitated “macro” level action by the City, such as designation of protection of zones in an OCP. It concluded that a SPEA could be established in conjunction with other exercises of statutory power (in this case, subdivision approval) and in respect of a specific property rather than on a comprehensive, jurisdiction-wide basis. Since the covenant met the requirements of the transitional provision, the Court concluded that the petitioner’s property was not subject to the current Regulations and that the City was therefore free to approve the development without provincial or federal involvement.

Mr. Justice Meiklem’s decision also confirms that section 4 of the Regulations set out two distinct processes for those developments that will result in a “harmful alteration, disruption or distraction of natural features, functions and conditions that support fish life” (HADD) and those that will not. Despite vague wording to the contrary in the Riparian Areas Regulation Implementation Guidebook published by the Province, this case confirms that non-HADD proposals do not need to be approved by the provincial and federal governments.

When processing a development application for land in riparian areas, local governments that are subject to the RAR should carefully review their files and the property’s title search to assess whether any previous measures, such as the granting of covenants, could constitute the establishment of a site-specific SPEA under the Streamwide Protection Regulation and render the property exempt from the Riparian Area Regulations. Proposals that are certified as non-HADD under subsection 4(2) do not require approval from the Ministry of Environment or the Ministry of Fisheries and Oceans Canada.

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