



Islands Trust

ISLANDS TRUST LEGAL OPINION: MAYNE ISLAND RIPARIAN AREAS REGULATION IMPLEMENTATION

Due to uncertainty concerning the applicability of the provincial Riparian Areas Regulation to several watercourses on Mayne Island, the Islands Trust has obtained an opinion from Young, Anderson, its legal counsel. The Executive Committee of Islands Trust has authorized the release of this legal opinion. The following points provide a summary of Islands Trust's understanding of the applicability of the RAR based on this legal advice:

- The presence or absence of fish alone is not relevant to whether or not a local government must amend its bylaws to protect riparian areas.
- The RAR requires local governments to implement measures on streams where fish may not be present: the legislation has as its object both the protection of streams where fish are present and the restoration of riparian habitat that potentially supports fish life.
- The question of fish-presence is relevant to the determination of the width of the Streamside Protection and Enhancement Area (SPEA) (i.e. the "setback"), not to whether a stream is subject to the RAR.
- The first report obtained by the LTC (the 'Reimer' report) provided the necessary information for the LTC to proceed with amending its bylaws to implement the RAR. The second report (the 'Swell' report) concurred with this conclusion.
- The *Fish Protection Act* and the RAR do not provide Ministry staff with administrative discretion to determine whether or not a watercourse is a "stream" as defined in the RAR.
- Concerns of landowners regarding the application of the RAR to streams without fish present are an issue with the provincial legislation and regulation.
- The *Fish Protection Act* requires that the LTC amend its bylaws to implement Riparian Area protection measures on the streams.

REPLY TO: VANCOUVER OFFICE

VIA EMAIL: rkojima@islandstrust.bc.ca

January 30, 2012

Robert Kojima
Regional Planning Manager
Islands Trust
200 - 1627 Fort Street
Victoria, BC V8R 1H8

Dear Mr. Kojima:

**Re: Mayne Island RAR Implementation
Our File No. 0002 -0172**

You have requested that we review various reports and correspondence that the Islands Trust has received regarding the presence of fish-bearing or potentially fish-bearing streams on Mayne Island, as part of the local trust committee's consideration of bylaw amendments required to comply with s. 12 of the *Fish Protection Act*.

In summary, the Islands Trust has received two separate reports by qualified environmental professionals (QEPs) as defined in the Riparian Areas Regulation, to the effect that there are three streams on Mayne Island that fall within the scope of s. 12 of the *Fish Protection Act* and the Riparian Areas Regulation. It has also received reports prepared by QEPs on behalf of the Mayne Island Landowners Coalition to the effect that there is no evidence of fish presence in any of the three streams. Finally, it has received a June 3, 2011 letter from the Ministry of Environment purporting to determine that Campbell Creek, one of the three streams, is not subject to s. 12 or the RAR, and a copy of a November 18, 2011 e-mail from the Minister of Environment to Murray Coell, MLA for Saanich North and the Islands, commenting on and confirming the conclusions set out in the MOE letter.

1. Relevance of the Presence of Fish

In our view, the presence of fish in these streams is not relevant to the question of whether the local trust committee has an obligation to enact riparian area protection measures under s. 12 of the *Fish Protection Act* in relation to them. It is clear from the Riparian Areas Regulation that "streams" that require local government measures under s. 12 include streams in which fish are

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not present. For example, s. 6(2) of the RAR in describing the width of streamside protection and enhancement areas includes a methodology for determining SPEA width in relation to non-fish-bearing streams as well as for fish-bearing streams. (This is likely the reason that the Assessment Methods published by MOE for the use of QEPs contains a methodology for determining the presence of fish.) Section 6(1) of the RAR directs that the identification of SPEAs take into account both existing and potential vegetation, and companion amendments to the *Local Government Act* in 1997 enabled local governments to impose development permit conditions for riparian areas that deal with the restoration and enhancement of degraded riparian habitat, as distinct from the protection of intact riparian habitat. Thus it seems clear that the *Fish Protection Act* and the RAR have as their object both the protection of riparian habitat that presently supports fish life, and the restoration and enhancement of riparian habitat that potentially supports fish life, and it is in that context that we conclude that the local trust committee's duties under s. 12 don't depend on the initial presence of fish in a stream.

Because of the conclusion we have reached on this point, we will not comment on whether the reports prepared for the Landowners Coalition correctly applied the MOE's suggested methods for determining the presence of fish.

2. Reimer Report

It is our view that the 2007 Reimer report provided a sufficient basis for the local trust committee to proceed with the implementation of riparian area protection measures. Neither of the Landowners Coalition reports detracts from that basis, because the presence of fish is not necessary to qualify a watercourse for protection under the *Fish Protection Act*. If the Islands Trust had received one or more reports indicating that none of the topographical features on Mayne Island constituted a "stream" as defined in the RAR, there would have been an issue as to whether s. 12 of the *Fish Protection Act* had any application on Mayne Island, but the Landowners Coalition reports do not address that issue. The authors of the Swell Environmental Consulting Ltd. report dated February 16, 2010, which essentially confirms the conclusions in the Reimer report of 2007, concluded the report by suggesting that the Mayne Island landowners commission another QEP report on the topic of fish absence, perhaps implying that the results of such a study could be relevant to the question of whether any of the watercourses on Mayne Island are streams requiring protection under the RAR. We don't believe such a suggestion to be correct; under the RAR, the presence or absence of fish is only relevant to the width of streamside protection and enhancement areas for watercourses that are subject to the Regulation.

3. MOE Correspondence

As for the June 3, 2011 correspondence from Marlene Caskey, indicating a consensus among Ms. Caskey, Dave Clough (one of the QEPs who had been retained by the Landowners Coalition) and other government fisheries biologists that Campbell Creek be "identified" as "non-fish-

bearing” due to the presence of a natural barrier near its mouth, and therefore not an “RAR stream”, the letter is in our view misconceived to the extent that it was intended to suggest that riparian area protection measures are not required on Campbell Creek. There is no room in the application of s. 12 of the *Fish Protection Act* for the exercise of discretion by Ministry of Environment officials as to whether a particular watercourse is a “stream” as defined in the RAR. At most, this letter could be taken as some kind of representation by the Province that it will not assert in future that the Mayne Island Local Trust Committee is in contravention of s. 12 of the *Fish Protection Act* by virtue of not having undertaken riparian area protection measures in respect of this watercourse. The wording of s. 12 and the “policy directive” that the Province has issued (in the form of the Riparian Areas Regulation) determine, of their own force, what streams in the Mayne Island local trust area require protection by the local trust committee, leaving no room for administrative-level interpretations by MOE staff. In this regard, it seems to us that the June 3, 2011 letter represents another aspect of the problem with the administration of the RAR that the Court of Appeal identified in *Yanke v. Salmon Arm (District)*, 2011 BCCA 309, which dealt with the MOE/DFO “letter of advice” routine in relation to construction of buildings within identified SPEAS. The Court of Appeal referred to “dissonance between the statutory provisions and the regulatory framework that is actually applied”, in finding the Ministry’s “letter of advice” procedure to be without any basis in law. In the present circumstances, while they may certainly provide information in a resource capacity, we don’t think that MOE staff members have any statutorily mandated role to play in determining whether or not any particular watercourse requires protection under the *Fish Protection Act* and the RAR.

For completeness, we will also note that the Minister of Environment’s November 18, 2011 e-mail message adds nothing to the legal validity or significance of Ms. Caskey’s purported determination that there is no need for the local trust committee to implement riparian area protection measures in respect of Campbell Creek. The message merely adds another layer of defence that the Islands Trust and the local trust committee may raise in the event that they are alleged to be out of compliance with s. 12 of the *Fish Protection Act* by having failed to implement such measures for Campbell Creek. As far as we can tell from the information provided in all four of the reports we have reviewed, Campbell Creek is a “stream” in respect of which a “riparian assessment area” can be identified. According to s. 4 of the RAR the local trust committee cannot lawfully approve or allow development to proceed in respect of the riparian assessment area of Campbell Creek unless the development is authorized by permit under s. 35 of the *Fisheries Act* (Canada) or the requisite QEP report has been provided to the MOE and DFO and the local trust committee has been so notified.

4. Conclusion

It may be that local landowners do not consider it worthwhile to enact riparian protection or restoration requirements, in relation to watercourses that do not currently provide fish habitat. That is a value-based position that may quite legitimately be taken in a policy discussion as to

whether s. 12 of the *Fish Protection Act* should apply to the Mayne Island local trust area, or whether riparian assessment areas *should* be so broadly defined in the RAR as to include areas adjacent to non-fish-bearing streams. Since neither of those policy matters is within the local trust committee's jurisdiction, the local trust committee may wish to suggest to the Landowners Coalition that it direct its advocacy efforts to legislators at the provincial level. In the meantime, s. 12 requires the local trust committee to implement riparian area protection measures, in our view in respect of all three watercourses identified in the Reimer report of 2007.

Sincerely,

YOUNG ANDERSON



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