

STAFF REPORT

Date: November 14, 2012

File No.: 6500-20
(Riparian Areas Regulation)

To: Thetis Island Local Trust Committee
For meeting of November 21, 2012

From: Courtney Simpson, Acting Regional Planning Manager

CC: Aleksandra Brzozowski, Island Planner

Re: Riparian Areas Regulation Compliance

BACKGROUND:

To become compliant with the provincial *Riparian Areas Regulation* (RAR), the Islands Trust contracted with Mimulus Biological Consultants to map streams in the one watershed on Thetis Island identified by the Ministry of Environment as being applicable to the RAR, as their information showed it was fish-bearing or potentially fish-bearing. The March, 2011 Mimulus report concludes that the mapped streams meet the definition of a *stream* under the RAR.

The majority of the watershed applicable to RAR on Thetis Island is on the Meadow Valley Strata property. The Thetis Island Local Trust Committee (LTC) received a report at their July 16, 2011 meeting recommending that staff proceed with drafting a development permit area for the streams in the watershed in order to become compliant with the RAR. Staff planned to first meet with the Meadow Valley property owners to discuss options for incorporating the strata's future plans as exemptions to avoid the need for numerous development permits. Staff met with Meadow Valley property owners on July 22, 2011. Two options were discussed at this meeting:

1. Pursuing an exemption from the RAR by Meadow Valley Properties hiring a biologist to determine if there is a lack of current or potential fish presence or habitat and if so, applying for this exemption from the province; or
2. Not pursuing exemption but designing development permit area guidelines where all current and planned activities that a biologist deems to not be harmful to fish or fish habitat are exempt from requiring a development permit, with any additional activities requiring one – a biologist would have to provide a RAR assessment of the plan for the property to determine what activities can be exempt from requiring a development permit.

The owner-developer of Meadow Valley Properties, Mr. Ian Ralston, contracted with Aquaparian Environmental Consulting Ltd to conduct a fish presence/absence study with the aim of demonstrating that the watershed is not applicable to the RAR. The report from Aquaparian dated December, 2011 concludes that "the watercourse does not support fish and therefore is not protected under the RAR".

The Ministry of Environment has corresponded with Mr. Ralston, Aquaparian and the Islands Trust explaining how it disagrees with the conclusions in the Aquaparian report and considers the stream to still be applicable to the RAR because there is a potential for fish presence.

At their April 18, 2012 meeting the LTC passed the following resolutions:

*It was **MOVED** and **SECONDED** that, based on the Local Trust Committee review of the reports by Mimulus and Aquaparian, the Thetis Island Local Trust Committee considers the Thetis Island Trust Area Riparian Areas Regulation compliant.*

CARRIED
Chair Hancock opposed

*It was **MOVED** and **SECONDED** that the Local Trust Committee direct staff to prepare for the next meeting a draft amendment for the Thetis Island Official Community Plan, Section 8, Policy 4.1, to reflect the Local Trust Committee's decision the Thetis Island Local Trust Area is Riparian Areas Regulation compliant.*

CARRIED
Chair Hancock opposed

At the October 3, 2012 LTC meeting staff presented a report that detailed how staff interprets the definition of "stream" in the Riparian Areas Regulation, describing that this interpretation is based on advice from legal counsel and the Ministry of Environment. This advice leads staff to continue to advise the Thetis Island LTC to amend their bylaws with the belief that this watershed is applicable to the RAR. This staff report included a legal opinion regarding a similar situation on Mayne Island. Ian Ralston submitted a critique of the legal opinion and suggested that the Islands Trust legal counsel be asked to respond to it.

At the October 3, 2012 LTC meeting the LTC passed the following resolutions:

*It was **MOVED** and **SECONDED** that the Thetis Island Local Trust Committee request staff to seek legal advice on the feedback received from Ian Ralston and TRAX Development Limited with regards to the applicability of Riparian Areas Regulation.*

CARRIED

*It was **MOVED** and **SECONDED** that the Thetis Island Local Trust Committee direct staff to request funds from the Scientific Studies budget in order to retain the service of Aquaparian to provide further information pursuant to the Ministry of Environment disagreement with the conclusion in the Aquaparian report.*

CARRIED

The purpose of this report is to describe how staff has responded to these two resolutions from the October 3, 2012 meeting and recommend next steps.

STAFF COMMENTS:

1. Authority of the Ministry of Environment related to the RAR:

The Ministry of Environment's authority related to RAR is complicated and we reported at the October 3, 2012 meeting that the Ministry of Environment does not have the authority to declare a stream applicable or not applicable to the RAR; that is the authority of the individual Qualified Environmental Professional (QEP). We have sought further legal advice on the authority of the Ministry of Environment related the RAR and based on this advice, make some clarifications:

- Recent case law has clarified that once a QEP has filed a report that complies with the compliance methods in the RAR, the Ministry of Environment has no jurisdiction to withhold the notification that lifts the prohibition on local government development approvals. This clarification that the QEP's decision cannot be "overruled" by the Ministry of Environment is limited to the specific context where a QEP files a report necessary for local government development approvals and does not extend to the situation on Thetis Island where the LTC is deciding how to become compliant with s.12 of the *Fish Protection Act*.
- S. 12 of the *Fish Protection Act* says that the LTC must either include riparian area protection provisions that are in accordance with the RAR in its zoning and bylaws, or alternatively "ensure that its bylaws and permits under Part 26 ... provide a level of protection that in the opinion of the local government, is comparable to or exceeds that established" by the RAR.
- The sanction for failing to comply with s. 12 is that the Crown would lay a charge against the LTC. If the Ministry of Environment considers that the LTC has not complied with s. 12 (which would require a conclusion on their part that there is at least one stream on Thetis Island that is within the scope of the *Fish Protection Act* and the RAR) then such charges are possible. These circumstances make it clear that it is the opinion of Ministry of Environment and not the opinion of this or any QEP that will determine whether the Crown considers the LTC to be in compliance with s. 12.

Therefore our understanding is that the Ministry of Environment can have a different interpretation than a QEP who has examined streams in the Local Trust Area, and when it comes to the LTC's compliance with s. 12 of the *Fish Protection Act*, it is the Ministry of Environment's interpretation that is most relevant. However, staff recommends a more nuanced approach in moving forward.

2. Feedback received from Ian Ralston at October 3, 2012 meeting:

As directed by the LTC, staff sought legal advice on Ian Ralston's critiques of the legal opinion for RAR on Mayne Island. It was suggested that this new legal opinion could be released to the public so that the Meadow Valley property owners could read it.

Based on recent legal advice on this situation in general, we have not insisted upon a legal response to Ian Ralston's critiques. In the staff comments above, we now understand that resolving the disagreement between Aquaparian and the Ministry of Environment may not be necessary. Further, it is becoming clear to staff that resolving

the difference in interpretation of the legislation may be impossible without significant measures such as legislative change.

3. Follow up report from Aquaparian Environmental Consulting Ltd:

As directed by the LTC, staff contacted Aquaparian Environmental Consulting Ltd with a request that they prepare a follow up report to their December, 2011 report on Ralston Creek, responding to the specific critiques from the Ministry of Environment of their methodology and conclusions that the watershed is not applicable to the RAR. Although Aquaparian was willing to do this, through conversation with them as well as our recent legal advice, it was felt that such a report would not be productive; it may not be possible to resolve the differences in interpretation.

4. Moving forward on RAR Compliance on Thetis Island:

Riparian areas have significant environmental values whether or not they provide fish habitat. If the LTC is unconvinced that there are watercourses on Thetis Island that come within the scope of the *Fish Protection Act*, it should still consider enacting protection for watercourses in general, and can do so without referring to fish habitat at all.

If the LTC takes this approach, it should ensure that the general environmental protection adopted (whether setbacks, covenants, a development permit area or some combination thereof) meet the LTC's obligation to protect these areas. The *Fish Protection Act* states that the LTC must "provide a level of protection that in the opinion of the local government, is comparable to or exceeds that established" by the RAR.

The enactment of general environmental protection for riparian areas would be a significant improvement over the status quo where there are no such requirements in place presently.

Staff suggests an ideal approach is to take this opportunity to consider environmental protection for freshwater on all of Thetis Island, re-framing the project to be one of protecting the freshwater resources in general rather than becoming compliant with the RAR. However, the LTC has to balance other projects and staff and financial resources, so may choose to continue with the focus on this one watershed.

If the focus is to remain on the one watershed only, the next step is to take an inventory of the current protection measures on the watercourse including setbacks and covenants, and compare that to requirements in legislation and recommendations from best practices. Options can then be presented for increasing the level of protection where necessary. Options may include a development permit area for protection of the natural environment, but other options can be considered such as covenants and setbacks. The approach taken in other local trust areas would be referred to and considered for applicability to Thetis Island.

RECOMMENDATIONS:

Based on the above considerations, staff recommends that the Thetis Island Local Trust Committee:

1. Proceed no further with draft bylaw No. 92;
2. Change the description of Top Priority No. 2 from “Riparian Areas Regulation Implementation” to “Protection of freshwater ecosystems”;
3. Change the Activity column of Top Priority No. 2 to: “Ensure protection of freshwater ecosystem in the Ralston Creek watershed through review of current regulation and covenants, and possible bylaw amendment”.

Prepared and Submitted by:

Courtney Simpson

November 14, 2012

Courtney Simpson, RPP
A/Regional Planning Manager

Date