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Editor-in-Chief: John Mascarin, M.A., LL.B.
AIRD & BERLIS LLP

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The Islands Trust: 30 Years of Protecting B.C.'s Gulf Islands

By Bill Buholzer

British Columbia's first New Democratic Party government is often remembered, in land use planning circles, as the initiator of the province's Agricultural Land Reserve, a provincially designated agricultural land use zone that has since 1974 survived the election of numerous provincial administrations whose property-rights orientation suggested that its abolition was a certainty. Instead, the ALR remains in place, enjoying (in the era of "smart growth") a fresh round of applause from around North America in its role as the urban containment boundary for the fast-growing Okanagan, the Fraser Valley and Vancouver Island. Meanwhile a lesser-known NDP innovation, the Islands Trust, has evolved quietly as a unique local government land use planning agency in charge of one of the province's most treasured and fragile regions.

Origins of the Trust

The islands in the Gulf of Georgia, first visited by Spanish explorers in the late 17th century (discounting a recently claimed, secret visit by Sir Francis Drake on behalf of Queen Elizabeth I some 200 years earlier), are part of an archipelago of small, for the most part thinly inhabited islands that stretch across the 49th parallel: those south of the international border are known as the San Juan Islands, and those in Canada are known locally as the Gulf Islands (Americans, of course, call them the "Canadian San Juans").¹ Though they

¹ The islands south of the border comprise San Juan County in Washington State, a local government body with which the Islands Trust is in frequent contact as the two agencies wrestle with shared land use problems.

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B.C.'s Gulf Islands

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were settled relatively early in the Crown colony's history by farmers and fishermen, the ruggedness and inaccessibility of the Gulf Islands were sufficient to ensure their survival in relatively pristine form until the 1960s, when the tentacles of real estate development began to insinuate their way into a landscape that had until then been impacted only lightly by small farms and rustic summer cottages.

Access to the islands was by ferry service only, and none were within commuting distance of the employment centres of Vancouver, Victoria or Nanaimo. In its dying years, the Social Credit government of W.A.C. Bennett instituted via the province's *Local Services Act* an effective freeze on subdivision, and in 1973 an all-party committee of the Legislature recommended a new land use planning approach for the area, which had been under the jurisdiction of several of the province's regional districts. These were a sort of upper-tier municipality with responsibility for land use planning and development matters in unincorporated rural areas. The islands had, it seems, not figured prominently in the regional districts' allocations of their planning resources, and the consequences – urban-scale subdivisions spread inappropriately across ecologically fragile landscapes – were serious enough to attract the Legislature's attention.

The *Islands Trust Act*, S.B.C. 1974, c. 43, established a trust body of three provincial appointees and two trustees elected from each of 13 designated islands – those with significant populations – performing a largely advisory role in land use planning matters. On any particular planning issue the "trust committee," having jurisdiction to give advice or, in some cases, approve a development proposal, could be comprised of the three provincial appointees acting on their own or a committee comprised of the three provincial appointees and the two locally elected trustees. The chair of the provincial appointees was given jurisdiction to determine whether any particular issue pertained to "general affairs" or to "local affairs," and all decisions on development proposals could be appealed to the Minister of Municipal Affairs.

The local trust committees were given a veto on the adoption of community plans and land use by-laws by the regional districts affecting their respective islands, and the Crown and its agencies were required to give notice to the trustees before undertaking the development or disposition of Crown land in the trust area. Local trust committees could also veto the deposit of subdivision plans affecting land on their island. Elected regional district directors representing the islands in regional district matters were *ex officio* members of the local trust committees. The operations of the Islands Trust were funded solely from the consolidated revenue fund of the province.

Fine-Tuning the Legislation

The opposition parties in the Legislature criticized the obvious paternalism that pervaded this first version of the *Islands Trust Act*, but in the spring of 1977 the new Social Credit administration introduced amendments that greatly increased the powers of the Islands Trust, without changing the governance structure at all. The amendments addressed the overlapping roles of

the regional districts and the Islands Trust in relation to land use and development matters, which had been the source of some confusion and delay, by eliminating the role of the regional districts entirely and giving the trust committees sole jurisdiction, subject to the superintending role of the Minister.

The opposition was quick to remind the government of the criticisms its ministers had levelled at the original legislation's lack of local accountability, questioning how the government could bestow significant new powers on a basically undemocratic form of local government. And in a gesture not seen very often in B.C. politics the government adjourned debate on the amendments until further consultation with the regional districts and affected islanders could occur. The amending bill was returned for debate with significant changes to the governance structure; the provincially appointed trustees were replaced with elected local trustees and the Islands became self-governing, at least in land use matters. (Other local services such as parks, waste management, and animal and nuisance control remain under the jurisdiction of the regional districts.) The funding arrangement was modified to provide for the levying of taxes on real property in the trust area to pay the expenses of the trust.

The appointment of a select standing committee of the Legislature in 1987, which held public meetings and observed strong public support for the Islands Trust and the protection of the islands, was followed by further amendments to the legislation in 1989. The federation of elected island trustees was now required, acting as a "trust council," to formulate and adopt a policy statement to provide a context for individual island official plans, which would henceforth have to be approved by the trust council as well as the Minister of Municipal Affairs.

The legislation was also amended to contemplate the incorporation of municipalities within the trust area; the official plans of such municipalities, which in other areas of the province must fit within the policy framework of adopted regional district "growth strategies," must instead fit within the Islands Trust policy statement. Finally, provisions pertaining to the Islands Trust Fund, the entity established in rudimentary form in 1975 with powers to acquire land in the trust area, were elaborated on, and the preparation of a trust fund five-year plan was required.

The province did not in 1974, and has not since, delegated to the Islands Trust any special regulatory or other powers to enable it to deal with the unique land use challenges of the islands. Rather, it has been equipped with the same array of regulatory powers as the province's municipalities and regional districts for dealing with land use issues — a situation that has significantly frustrated the purposes of the legislation.

Object of the Islands Trust . . .

A unique feature of the enabling legislation for the Islands Trust, in the British Columbia context, is the inclusion of a provision setting out the "object" of the trust, which in 1974 was stated as follows:

It is the object of the trust to preserve and protect, in co-operation with municipalities and the Government of the Province, the trust area and its unique amenities and environment for the benefit of the residents of the trust area and of the Province generally.

In 1974, with the province reacting to excessive development of sensitive areas under the jurisdiction of the several regional districts, each exercising its own land use planning powers without regard to provincial priorities,² the object clause could be seen as a message about how the powers that the province was delegating to the trust were to be used. No other local government entity incorporated before or since has been given such a message by the Legislature.

. . . and its Fate in the Courts

The object clause in the *Islands Trust Act* has, however, played a relatively minor role in litigation concerning the islands over the ensuing 30 years. In a 1984 case concerning a proposed open-pit mine, tailings pond and wharf facilities on Gambier Island, which lies in Howe Sound along the main highway route from Vancouver to Whistler, the court concluded that the development would fundamentally transgress the official community plan and destroy the environment of Gambier Island as a recreational resource, including the permanent disfigurement of its topography. The court held, however, that the province's mining legislation and not the Islands Trust's local by-laws governed the operation; if the province wanted to choose conservation over mining, it would have to make that choice at the provincial level (*Gambier Island Preservation Society v. Islands Trust* (1984), 54 B.C.L.R. 93, 1984 CarswellBC 151 (S.C.)). This judgment was an early acknowledgement that, while the Islands Trust had a special statutorily expressed purpose, the powers it could wield to achieve that purpose were no different from those that lay in the hands of any other local government in the province.

The most high-profile land use dispute that has been adjudicated under the Act is the struggle over the forest lands on Galiano Island, a lightly populated, elongated ridge lying to the north of Active Pass on the Mainland-Vancouver Island ferry route. In 1951, MacMillan Bloedel, at the time one of B.C.'s largest forest products firms, acquired for logging purposes 7,800 acres of land on Galiano in 66 parcels ranging up to 220 acres in area. The underlying zoning permitted subdivision into 20-acre parcels and one dwelling per parcel of land, but the part of the island in which the company's holdings were concentrated lacked services for residential development, including highways, and such development was not anticipated.

However, in the face of local opposition to its logging operations, the company released the land into a real estate market that was eager to absorb Gulf Islands building sites. The local trust committee, foreseeing a pattern of rural sprawl that the island's community plan did not favour, amended the zoning regulations to prohibit residential uses of the forest lands and require subdivided parcels to be at least 50 acres in area.

The by-laws earned the required approval of the Minister of Municipal Affairs after considerable delay. Eighteen months later, on MacMillan Bloedel's application in an action considered by many to be the province's first strategic lawsuit against

2 The land use planning system in British Columbia did not require regional plans or official community plans to comply with provincial policy statements; *ad hoc* provincial approval of official plans was required and could have been used to force the regional districts to protect the islands, but was not.

public participation (SLAPP), the by-laws were declared by the B.C. Supreme Court to be *ultra vires*, discriminatory, and passed in bad faith (*MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1993), 16 M.P.L.R. (2d) 229, 103 D.L.R. (4th) 651, 1993 CarswellBC 717 [summarized 2 D.M.P.L. 257]).

The trust committee filed a timely appeal. Over the next two years while the decision in the appeal was pending, purchasers of some of the lands made subdivision applications and some of them installed costly roadway works in order to obtain subdivision approval. The British Columbia Court of Appeal allowed the appeal ([1995] B.C.J. No. 1763, 28 M.P.L.R. (2d) 157, 10 B.C.L.R. (3d) 121, 126 D.L.R. (4th) 449, 63 B.C.A.C. 81, 104 W.A.C. 81, 20 B.C.L.R. (3d) xxxv, 78 B.C.A.C. 240, 128 W.A.C. 240, 203 N.R. 390, 1995 CarswellBC 436 [summarized 3 D.M.P.L. 258]) with the result that some owners who had purchased newly subdivided building lots were unable to obtain building permits, some developers who had installed services were unable to get subdivision approvals, and some who had purchased large forest parcels with a view to subdividing them could not do so.

Much litigation ensued, and bitterness lingers on the island. The Court of Appeal weighed the effect of the object clause in the *Islands Trust Act* in reinstating the restrictive by-laws, Southin J.A. concluding "I see nothing in any provision of the *Islands Trust Act* or the *Municipal Act* which prevents this down-zoning" implemented as it was pursuant to the general zoning power in the latter Act and the object clause of the *Islands Trust Act*, which she observed is "not a mere piety."

The other justices of the Court of Appeal held that the by-law purposes that the Supreme Court had deemed to be improper (prevention or delay of residential development and the control of logging) were both within the scope of the object clause, and therefore proper purposes for the local trust committee. (Several years later, however, a different panel of the Court of Appeal was faced with a very similar downzoning undertaken by a municipality with no such statutory object, *Canada Mortgage & Housing Corp. v. North Vancouver (District)*, [2000] B.C.J. No. 391, 10 M.P.L.R. (3d) 1, 77 B.C.L.R. (3d) 14, [2000] 7 W.W.R. 300, 20 Admin. L.R. (3d) 37, 134 B.C.A.C. 294, 219 W.A.C. 294, 70 L.C.R. 161 [summarized 5 D.M.P.L. 362], and held that the ordinary zoning power was itself sufficient to support such by-laws; in other words, piety or not, the object clause added nothing of substance to the powers that the local trust committee had exercised on Galiano Island.)

The inability of the object clause to breathe substance into the Trust's regulatory powers was highlighted in a more recent case involving the logging of Denman Island (*Denman Island Local Trust Committee v. 4064 Investments Ltd.* (2001), 24 M.P.L.R. (3d) 189, 96 B.C.L.R. (3d) 253, 208 D.L.R. (4th) 425, 161 B.C.A.C. 215, 263 W.A.C. 215, 2001 CarswellBC 2826 (C.A.) [summarized 6 D.M.P.L. 298]). The local trust committee, using *Local Government Act* powers common to all B.C. local governments, had designated much of the island's forested area as a special area for the protection of the natural environment, and adopted guidelines that permitted it to prescribe forest management practices in considerable detail when issuing development permits.

After concluding that this action was clearly within the object of the Trust, the court focused exclusively on the *Local Government Act* to determine whether the by-laws in question were valid, and concluded that they were not. Ironically in the context of an ecosystem of which trees form a principal element if not the core, the court held that the power to designate environmental protection areas could be used to designate "beaches, streams, glades and bogs" but could not be used to designate a forest that covered half the island. (A glade is a space in a forest where trees don't grow.)

The court based its decision on its conclusion that the Legislature had not intended that the province's regional districts, which wield the same powers in the rest of the forested areas of B.C., would be able to regulate forestry practices in this manner. As a result, the Islands Trust may preserve and protect the spaces in the trust area's forests where trees do not grow, but not the forests themselves.

The Next 30 Years

The Islands Trust is currently preparing proposals for the consideration of the provincial government, to equip it to deal with contemporary land use issues in a manner that more fully achieves the object of the Trust. In the early years following the establishment of the Trust, the most significant problems (aside from the development pressures resulting from ill-considered regional district zoning) were proposals to use the islands as utility corridors and footings for a bridge connecting Vancouver Island to the B.C. mainland. Today, the Trust is dealing with private land logging, aquaculture, First Nations archaeological sites and aboriginal title claims, groundwater supply shortages, timeshares, excessive provincial highway development standards, and trophy homes on private islands. (There are, in addition to the 13 principal islands in the group, around 450 smaller islands and islets, many of which are in private ownership. Sotheby's International Realty has recently franchised a brokerage in Vancouver specializing in "high-end" properties including private islands, reflecting the awakening international interest in these exclusive properties.)

The new Gulf Islands National Park Reserve will heighten pressures for resort and vacation rental uses. The centrepiece of the current provincial government's local government legislative agenda, the *Community Charter*, made no significant changes to the Islands Trust's enabling legislation, and it is not clear whether the Trust's proposals for fuller powers will find a sympathetic ear in Victoria during the government's widely expected second term.

(Visit the Islands Trust website at islandstrust.bc.ca.)

Bill Buholzer is a partner in the B.C. law firm Lidstone, Young, Anderson and a member of the Canadian Institute of Planners. His previous article, Renovating Local Government Enabling Legislation: British Columbia's Community Charter, appeared in the November 2003 issue, 1 D.M.P.L. (2d) 11. He is the author of British Columbia Planning Law and Practice (Butterworths, 2002).