Riparian Protection and Compensation - *Fish Protection Act*

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prepared for:
BC Ministry of Environment, Lands and Parks

January 1999

Facts and Background

A streamside protection regulation is being developed under Section 12 of the *Fish Protection Act* (FPA), which will require local governments to protect streamside areas according to management objectives such as mandatory setbacks. It is anticipated that the streamside policy directives could call for a range of approaches from requiring development free areas (where riparian areas are intact or have a high potential for restoration) to vegetation, soil and impervious surface management approaches (in areas where riparian areas have been altered by existing subdivision and development). Some members of the public have called upon the government to compensate them if the regulation results in restrictions on the use of their land.

Streamside policy directives are to be implemented by local governments which operate under the *Municipal Act* which states that:

s. 914 (1) Compensation is not payable to any person for any reduction in the value of that person's interest in land, or for any loss or damages that result from the adoption of an official community plan, a rural land use bylaw or a bylaw under this Division or the issue of a permit under Division 9 of this Part.

(2) Subsection (1) does not apply where the rural land use bylaw or bylaw under this Division restricts the use of land to a public use.

This report discusses when local governments are obligated to pay compensation for restrictions on land use to protect the environment.

Issues

1. What are the legal limits of provincial private land use regulation for environmental protection purposes?

2. What are the legal limits of municipal private land use regulation for environmental protection purposes?

3. Does land use regulation, aimed at protecting streamside areas through mechanisms such as setbacks, restrictions on impermeable surfaces, vegetation control, etc., require governments to pay compensation to landowners?

4. What are the exceptions to the rule that land use regulation will not give rise to compensation?

- when landowners are deprived of all permitted uses of their land – disguised expropriation or "sterilization";
- when private land is converted to a public purpose – e.g., zoning to convert private land to parkland.

5. What remedies are available to aggrieved landowners and are these remedies sufficient to protect their interests?

6. What would be the effect of not regulating for streamside protection?

7. How can s. 12 of the *Fish Protection Act* be implemented to maximize habitat protection and minimize compensation claims?

Discussion and Conclusions

1. What are the legal limits of provincial private land use regulations for environmental protection purposes?

There are constitutional limits on the province's ability to protect fish habitat.[2] As long as the laws it passes do not contravene the *Constitution Act 1867*,[3] the provincial government has a broad authority to pass land use laws to protect the environment. The province could legislate stream protection measures such as setbacks directly, as other provincial legislatures have.[4] Instead it has chosen the method set out in s. 12 of the FPA, which authorizes the enactment of a regulation requiring local governments to establish their own stream protection bylaws.

There are certain legislative presumptions, which may be overcome by clear statutory language. Legislation is presumed not to authorize the expropriation of land without compensation unless the statute clearly shows a contrary intent.[5] If the statute is clear that compensation will not be paid, that direct statement of intent will be the law. For example, the *Municipal Act* rebuts the presumption that legislation will not be interpreted to authorize expropriation without

compensation unless there is clear language to that effect. Section 914 of that *Act* states that changes in zoning will not give rise to a right to compensation *unless* the bylaw restricts the use of land to a public use.

Courts have said that this section of the *Municipal Act* must be narrowly interpreted. The exception should be limited to the ambit clearly expressed.[6]

Conclusion: The limits on the provincial government's power to regulate land use for environmental protection are primarily constitutional. To avoid compensation claims, the land use regulation must not restrict the use of land to a public use. There are narrow exceptions to the "no compensation for zoning changes" rule, which will be discussed in more detail below. Though phrased in different ways, the exceptions all relate to attempts by local governments to obtain some benefit to themselves at the expense of landowners. The exceptions do not come into play when a local government is acting pursuant to statutory authority to protect the environment. The *Fish Protection Act* provides ample authority for streamside measures to protect the environment.

2. What are the legal limits of municipal land use regulation for environmental protection purposes?

Municipalities and other forms of local or regional government have only the powers that are delegated to them by other levels of government. A municipality cannot act for a purpose beyond its powers. The powers of a local government to enact streamside protection measures have two fundamental sources, the *Municipal Act*, as amended by the *Local Government Statutes Amendment Act*, and the *Fish Protection Act*. It is necessary to look at the express object and intent of each *Act* to determine what actions a local government can take to protect the environment.

The *Municipal Act* and the *Fish Protection Act* both authorize protection of the environment in general and protection of streamside areas in particular.[7] The combined effect of these *Acts* means a court will be very hesitant to interfere with a local government decision about streamside protection. If a local government is acting for a proper purpose, and the laws noted above explicitly include streamside protection as a proper purpose, the government's protection measures will likely not be overturned.

Two recent cases illustrate how courts have upheld efforts by local government to protect the environment. The first is the BC Court of Appeal's 1995 decision in *MacMillan Bloedel v. Galiano Island Trust Committee*,[8] a leading case on the scope of local government bylaws to protect the environment. The Court of Appeal held that since the municipality was acting for a statutorily authorized purpose, in that case "to preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust area and the Province generally,"[9] there was no reason to interfere with its decision.

The second is the *Bignell* case, which was based on a landowner's claim that a stream setback deprived him of the use of his land. This recent BC Supreme Court case confirms that setbacks imposed by a local government to protect fish habitat will not give rise to compensation claims, even if the landowner's use of his or her land is substantially restricted.[10]

Conclusion: To determine the limits of a local government's power to regulate land use for environmental protection, the statutes that authorize the regulation must be examined. The intent of the *Fish Protection Act* is to protect fish (though it has no purpose section which explicitly states this intent), and so bylaws authorized by that *Act* will similarly give local governments broad leeway. Reasonable setbacks to protect streamside areas are authorized by law.

3. Does land use regulation, aimed at protecting streamside areas through mechanisms such as setbacks, restrictions on impermeable surfaces, vegetation control, etc., require governments to pay compensation to landowners?

Both the common law and the *Municipal Act* are clear that compensation will not be payable to landowners when a local government restricts the use of their land by enacting streamside protection measures, except in very limited circumstances.

Legal texts confirm this general rule:

> "In practice, it is rare that losses resulting from the exercise of planning powers give rise to a right of compensation for the property owner."[11]
>
> "It is well settled that owners may be compelled to surrender some value or future value of their land to the local authority and no price has to be paid."[12]

Specifically, courts have generally found that reasonable setbacks imposed by laws are not prohibitory and do not give rise to compensation claims.[13]

Three recent cases illustrate that compensation claims for land use restrictions for legitimate environmental purposes will not succeed. The first two cases have already been noted.

The first example shows that Courts have allowed bylaws to impose dramatic changes in the use of land without giving rise to a right of compensation. In *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee*[14] the logging company was a large landowner of land in a forest zone, which it wanted to sell for residential uses. The local trust committee increased the minimum parcel size to 50 acres which effectively sterilized the use of the land for residential purposes. At trial the company succeeded in having the zoning bylaws quashed. The trial Judge found the bylaws were beyond the trust committee's powers, discriminatory and passed in bad faith. On appeal this judgement was reversed. The Court of Appeal held that the Trustees acted within the scope of their legislative authority especially considering the objects expressed in Section 3 of the *Island Trust Act* "to preserve and protect the trust area and its unique amenities and environment." This case is an important precedent for the *Fish Protection Act* proposed

regulation, as it shows that when a provincial statute clearly states environmental protection objectives, those objectives will be taken into account in a Court's review of bylaws which affect private property owners.

The second recent BC case held that a 30 metre setback requirement contained in a development permit for the purpose of fish protection did not amount to expropriation without compensation. In *Bignell v. Municipality of District of Campbell River*, the landowner argued that his lot had been "rendered of limited value" and was "unsuitable for almost any purpose" because most of the land could not be built on as a result of the setback requirement.[15] The property had been purchased for his used car business. The local government agreed to issue a development permit subject to drainage and setback conditions to protect fish habitat, based on DFO Guidelines. The property owner disputed the drainage condition, and it was eventually removed, but the setback distance from the creek was increased from 15 to 30 metres. The property owner sued. He argued that the municipality had expropriated the lot for public use without compensation.

The judge admitted that imposing the setback, which he said was a "reasonable condition" had the practical effect of rendering the land "undevelopable." But the change in usability was caused by the shape of the lot and the location of the creek, not the setback: "Had the petitioner been willing to comply with the drainage condition, it would have been free to develop the lot… The respondent was willing to allow development of the lot, but not environmentally dubious development."[16]

In the case of *Steer Holdings Ltd. v. Manitoba*,[17] a company owned land with a creek valley running through it which the company planned to develop. The province passed a law which prohibited the issuance of a building permit for any construction spanning a water course. The company sued for compensation on the ground that its land had been confiscated. The action failed at both trial and appeal levels. The Court of Appeal reviewed the common law applicable to the case and said that to determine whether expropriation had occurred, it was necessary to find some level of benefit to the government:

> "To qualify for compensation there must be an expropriation, if not in name, then in effect. The limitation on usage must be balanced by some corresponding acquisition by the authority.
>
> Thus, zoning bylaws passed by municipalities do not give rise to claims for compensation, and this is so even where there is a "downzoning" by which the owner's use of property is more restricted…The fact that the bylaw has imposed greater limits on the use of the land is not, in itself, a ground for declaring the bylaw invalid….However, where the bylaw is merely a disguise for an attempted confiscation of the land without compensation, the bylaw will be set aside."

To analyze whether a proposed streamside protection measure amounts to expropriation, two questions should be asked:

i. Is there any element of acquisition by the local government?
ii. Are all development and land uses prohibited?

If the answer to both questions is no, there will be no expropriation and compensation will not be payable.

Conclusion: While zoning bylaws of the type that will be enacted pursuant to s. 12 of the *Fish Protection Act* may affect the value of land, for example, by limiting the possibilities of subdivision, or depriving landowners of some use of their land, the law is clear that no compensation will be payable for this loss of value, s. 914 *Municipal Act.*

4. What are the exceptions to the rule that land use regulation will not give rise to compensation?

There are two exceptions to the rule that compensation will not be payable as a result of land use regulation:

- when landowners are deprived of all permitted uses of their land – disguised expropriation or "sterilization"

The first exception is regulation that "sterilizes" all land uses. Councils have rezoned land so it was left without any uses until they could decide on a future course of action, but this practice was held to be illegal. Freezing all uses of land will amount to confiscation, or disguised expropriation. A municipality may not create a "holding zone," thereby freezing all uses of land, even if it does so in good faith.[18]

Setbacks do not sterilize land use, or deprive a landowner of all uses of his or her land, in the majority of cases. In the *Bignell* case, the judge found that even though the plaintiff could not use the land as he had planned because of the setback condition, that did not mean the land was frozen to all uses:

> "There is nothing to stop the petitioner from using the outside edges of the land for a use contemplated by the zoning 'C-3.' There may be economic impediments to such a use, but this is due to the rather unfortunate shape of the land, not the setback condition. I also note again that the DFO recommended a 30 metre set-back with the same plot of land when faced with an earlier development proposal."[19]

However, there is an older case in BC in which a bylaw which prohibited any building at all within 100 feet of a river was held to be prohibitory since it had the effect of denying all uses of a Plaintiff's land: *Duquette v. Port Alberni.*[20] If regulation results in no possible uses of the land, the local government will be liable to compensate the landowner.

The question that must be determined is whether a property owner is deprived of any reasonable use of his or her land. A streamside protection measure contained in a bylaw made under the *Fish Protection Act* will, in the majority of cases, not deprive a landowner of all uses of his land. The public benefits of planning take precedence over private property rights in these situations.

One judge has described the reasons for not equating zoning restrictions with expropriation in a case involving dedication of a shoreline right-of-way. The landowner in that case refused to dedicate a 3 metre wide right-of-way for a walkway beside the waterfront. One argument she made to oppose this requirement was based on expropriation. The judge in that case said:

> "I do not consider that the dedication of the three metre right of way to be expropriation without compensation as submitted by the appellant. It is the cost demanded by the applicable legislation in return for subdivision approval with the goal of ensuring satisfaction of the public's interest in access through certain lands and providing a healthy environment for the community as a whole."[21]

Similarly, in the *Bignell* case, the judge noted the desirability of protecting the salmonid populations and the need to provide a minimum level of protection for the ecologically sensitive waters. The purpose of the setback was to achieve these ends, not to thwart the landowner's development ambitions.

- when private land is converted to a public purpose – e.g., zoning to convert privately owned land to park

The second exception is regulation that converts private land to a public purpose. A council cannot reserve private lands for a public use, but must purchase or expropriate the lands.[22] The *Municipal Act*, s. 914(2) is clear that local governments cannot use bylaws to restrict the use of private land to public uses.

A municipality may not reserve private lands for a public use by the device of a zoning bylaw. For example, a court held that the District of Burnaby could not rezone industrially zoned lands as "Parking."[23] But mere restriction of uses will not justify quashing a bylaw. The District of North Vancouver successfully changed the zoning on land owned by the federal Canada Mortgage and Housing Corporation (CMHC) agency from residential to parks, recreation and open space. The CMHC sought to quash the zoning bylaws which made these changes. The court found that the bylaws left uses available for the land, even though the uses were unsatisfactory to CMHC. As there was no evidence that the District was trying to acquire the lands or hold them pending future decisions, the bylaws were valid.

The judge in the *Bignell* case, involving the 30 metre creek setback requirement, distinguished the "public use" cases on the basis that in each of them there was a clear intention on the part of the municipalities to acquire the land being rezoned, which was missing in the case he decided.[25]

Whether any private uses remain available to the landowner is the key factor that must be examined when looking at the issue of whether the land in question has been converted to a public use. Protecting fish habitat is a public purpose but it does not give rise to compensation as long as there are still private uses available; e.g. in *Bignell* industrial uses were still permitted if the setback was maintained and in *Galiano Island* logging remained a permitted use.

Conclusion: Streamside protection measures will not usually invoke any exceptions to the "no compensation" statutory rule, unless the local government converts private land to a public use or renders the property completely unusable.

5. What remedies are available to aggrieved landowners and are these remedies sufficient to protect their interests?

It is foreseeable that a streamside protection bylaw could prima facie prohibit any private uses of land. If the landowner felt that he or she was being deprived of all uses of their land, they could apply to a board of variance.

Section 901 of the *Municipal Act* sets out the right to apply to a board of variance for variance from the requirements of a bylaw on the basis of hardship. The board has the authority to permit minor variances from the bylaw as well.

If an owner were to be substantially affected by a setback regulation under the *Fish Protection Act*, he or she would have the right to apply to a board of variance for an exemption based on hardship. The boards of variance have generally accepted property owners' claims of hardship, and allowed exemptions from bylaws.

Courts will not lightly interfere with findings of boards of variance. For example, in the case of *Metchosin v. Metchosin Board of Variance*,[26] a board of variance allowed a homeowner to ignore front and rear yard setbacks contained in the zoning bylaw to build a single-family residence on his irregularly shaped waterfront lot. The municipality appealed the decision of the board of variance. The Chambers Judge dismissed the municipality's appeal. The Court of Appeal dismissed a subsequent appeal. The Court of Appeal said both the Board and the Chambers Judge considered the homeowner would experience undue hardship if the provisions of the zoning bylaw were applied to him in the construction of a residence on his property. It had not been demonstrated that there was error in his conclusion. The rural residential zoning protected a rural character, but in its application to this subdivision, the zoning would effectively deprive the homeowner of any reasonable use of his land.

Conclusion: An appeal to a Board of Variance is available to landowners who are deprived of all uses of their land by a streamside protection regulation, and is an adequate remedy to protect landowners' rights.

6. Effect of Not Regulating Riparian Zone Protection

Currently municipalities have ample discretionary authority to protect streamside areas without giving rise to compensation claims. But there is no duty for this protection to take place, and if a council chooses to ignore the guidance on streamside protection that has been provided by senior levels of government, such as the MELP-DFO *Land Development Guidelines for the Protection*

of Aquatic Habitat, it is free to do so. Section 12 of the *Fish Protection Act* is meant to change the current state of the law, and enhance the current voluntary approach with more substantial provincial direction.

The law now permits municipal councils to ignore the MELP-DFO *Guidelines for the Protection of Aquatic Habitat*, as the case of *Wild Salmon Coalition v. City of North Vancouver*[27] demonstrates. In that case, council sold a parcel of land bordering Mosquito Creek, a fish-bearing creek, on the purchaser's condition that the land be rezoned for industrial use. DFO objected to the rezoning as the entire area of the proposed martial arts facility would be located within the 30 metre zone that the *Guidelines* say should be free from development. The Wild Salmon Coalition also objected to the rezoning and applied to BC Supreme Court to set aside the rezoning bylaw on the grounds of procedural deficiencies. The judge refused to set aside the bylaw, as he found that the council had followed the correct procedure. He noted that the "real issue" at the public hearing was whether any construction should be allowed. DFO's objections to the development were immaterial. The *Guidelines* could not be enforced.

Conclusion: The inadequacy of the current state of the law is one reason why urban streams and fish populations dependent on those streams are in decline. The FPA will not reverse these alarming trends unless strong riparian standards are enacted. The piecemeal approach is not working.

General Conclusions

In conclusion, streamside protection measures under the *Fish Protection Act* will not, in the majority of cases, give rise to claims for compensation since:

1. The bylaws would be specifically authorized by the intent of the *Act* and would be interpreted by a Court in accordance with the objectives of the *Act*, namely to protect fish habitat.
2. The *Municipal Act* specifically provides that compensation is not payable when a bylaw reduces the value of land: s.914.
3. A setback requirement will not usually be considered prohibitory and will not usually prevent all reasonable uses of a property owner's land.
4. In the event of complete sterilization of the use of land, relief is available through application to a board of variance for exemption from the bylaw provisions on the ground of hardship. Boards of variance have been sympathetic to landowners in such cases.
5. Any property owners that currently have buildings closer to a stream than a bylaw passed under the *Fish Protection Act* would allow are protected because their buildings would be considered non-conforming uses.

Recommendations on implementation of s. 12 of the FPA to maximize habitat protection and avoid compensation claims

1. The FPA contains no dispute resolution mechanism. It is foreseeable that disputes will arise when s.12 is enacted. These could be disputes between municipalities (i.e. one local government has set strict standards to protect a stream that crosses municipal boundaries, and the neighbouring governments have enacted only minimal standards); between landowners and local governments over compensation; between different sectoral groups such as farmers or streamkeepers and local governments over the content of a streamside protection bylaw. The controversies that have arisen to date show the potential for future conflicts. For this reason, it is desirable to include a dispute resolution procedure similar to the procedure under development in the growth strategies area of planning (for inter-governmental disputes), and in addition could include appeals to the Environmental Appeal Board (for individuals or community groups). As the purpose of the FPA is to protect fish and their environment, it makes sense to use a tribunal specialized in environmental dispute resolution.

2. Improved riparian habitat protection requires more provincial oversight of municipal streamside protection measures. This oversight could include:

    - uniform riparian setbacks included in the s.12 regulation;
    - penalties for municipalities that did not achieve the uniform standards;
    - onus on the municipalities to show why the uniform standards should be varied for their area;
    - a requirement for certification of each s.12 bylaw by a Registered Professional Biologist to ensure the bylaw has been scientifically considered to protect fish habitat; and,
    - provincial approval of each s.12 bylaw.

Endnotes

2. A discussion of the constitutionality of the *Fish Protection Act* is beyond the scope of this paper.

3. (U.K.) 30 & 31 Vict. c.3.

4. New Brunswick *Clean Air Act*, Ch. C-6.1 A.N.B., 1989, Watercourse Alteration Regulation.

5. *Her Majesty the Queen in Right of the Province of British Columbia v. Tener*, [1985] 1 S.C.R. 533 at 559.

6. *Pacific National Investments Ltd. v. Victoria (City)* (Dec.11, 1996) Van. Registry 93/3412. This case concerned a breach of contract by the local government and s. 914 of the Act was found by the Court not to absolve the City from damages for the breach.

7. The *Local Government Statutes Amendment Act, 1997*, amended the *Municipal Act* and increased the ability of local governments to protect fish habitat, specifically in sections related to runoff control, landscaping to protect the environment and development permit controls:

s. 907 (1) A local government may, by bylaw, require that an owner of land who carries out construction of a paved area or roof area, manage and provide for the ongoing disposal of surface runoff and storm water in accordance with the requirements of the bylaw.

(2) A local government may, by bylaw, establish the maximum percentage of the area of land that can be covered by impermeable material….

s. 909 (1) A local government may, by bylaw, require, set standards for and regulate the provision of screening or landscaping for one or more of the following purposes:

(a) masking or separating uses;

(b) preserving, protecting, restoring and enhancing the natural environment;

a. preventing hazardous conditions…

s. 920 (7) For land designated under section 879 (1) (a), a development permit may do one or more of the following:

(a) specify areas of land that must remain free of development, except in accordance with any conditions contained in the permit;

(b) require specified natural features or areas to be preserved, protected, restored or enhanced in accordance with the permit;

(c) require natural water courses to be dedicated;

(d) require works to be constructed to preserve, protect, restore or enhance natural water courses or other specified natural features of the environment;

(e) require protection measures, including that vegetation or trees be planted or retained in order to

(i) preserve, protect, restore or enhance fish habitat or riparian areas,

(ii) control drainage, or

(iii) control erosion or protect banks.

(7.1) For land designated under section 879 (1) (b), a development permit may do one or more of the following:

(a) specify areas of land that may be subject to flooding, mud flows, torrents of debris, erosion, land slip, rock falls, subsidence, tsunami, avalanche or wildfire, or to another hazard if this other hazard is specified under section 879 (1) (b), as areas that must remain free of development, except in accordance with any conditions contained in the permit;

(b) require, in an area that the permit designates as containing unstable soil or water which is subject to degradation, that no septic tank, drainage and deposit fields or irrigation or water systems be constructed;…

The *Fish Protection Act*, s.12 states that the Lieutenant Governor in Council may, by regulation, establish policy directives regarding the protection and enhancement of riparian areas that the Lieutenant Governor in Council considers may be subject to residential, commercial or industrial development.

8. *MacMillan Bloedel v. Galiano Island Trust Committee* (1995), 10 B.C.L.R. (3d) 121 (B.C.C.A.).

9. S.3 *Island Trust Act*.

10. *Bignell v. Municipality of District of Campbell River* (1996) 34 M.P.L.R. (2d) 193 (B.C.S.C.).

11. Hoehn, *Municipalities and Canadian Law - Defining the Authority of Local Governments*, (Purich Publishing: Saskatoon, 1992) at 167.

12. Rogers, Planning and Zoning Law, 1997, s. 5.14, p.125.

13. See Rogers, *Law of Planning and Zoning*, section 138.3 and the cases quoted there: *Uxbridge v. Timbers Bros. Sand and Gravel Ltd.* [1973] 3 0.R. 107.

14. *MacMillan Bloedel v. Galiano Island Trust Committee* (1995), 10 B.C.L.R. (3d) 121 (B.C.C.A.).

15. (1996) 34 M.P.L.R. (2d) 193 (B.C.S.C.).

16. *Bignell v. Municipality of District of Campbell River* (1996) 34 M.P.L.R. (2d) 193 (B.C.S.C.)

17. [1992] 2 W.W.R. 558 (Man. C.A.).

18. *Karamolinis v. The City of Port Coquitlam* (1978), 8 B.C.L.R. 282 (C.A.); Re Corporation of District of North Vancouver Zoning Bylaw 4277, [1973] 2 W.W.R. 260 (B.C.S.C.).

19. *Bignell*, op cit. at footnote 16.

20. [1977] 3 M.P.L.R. 177 (B.C.S.C.).

21. Date: 19971022 Docket: A972311 Registry: Vancouver In the Supreme Court of British Columbia Between: Alicia Burns, Appellant and Helen Dale, Approving Officer for the Town of Comox and Tim Hall, Deputy Approving Officer for the Town of Comox Respondents.

22. Rogers, s. 5.22.

23. *Re Columbia Estates Co. Ltd. and District of Burnaby* (1975), 49 D.L.R. (3d) 123 (B.C.S.C.).

24. *CMHC v. Corporation of District of North Vancouver*, [1998] B.C.D. Civ. 660.90.80 – 10-01.

25. *Bignell*, op cit. at footnote 16.

26. (1993) 81 B.C.L.R. (2d) 156.

27. (1996) 34 M.P.L.R. (2d) 122.