



Environmental Law Clinic

UNIVERSITY OF VICTORIA

Our File No. 2007-02-04

April 14, 2008

John Doyle
Auditor General
Province of British Columbia
8 Bastion Square
Victoria, BC V8V 1X4

Dear Sir:

Audit of the Minister of Forests' January 2007 Decision to Delete Private Lands from TFLs 6, 19 and 25

We write to you on behalf of the Sea-to-Sea Greenbelt Society. We wish to bring to your attention troubling new developments that are relevant to your examination of the deletion of private forest lands from TFL 25 west of Sooke.

Last week Western Forest Products applied to subdivide extensive portions of the lands in question -- thereby avoiding the new zoning bylaws that the Capital Regional District recently approved in response to the Minister of Forests' decision. Those bylaws were not yet final, because they still awaited the signature of another member of Cabinet.ⁱ (See *Appendix A*)

This subdivision application graphically demonstrates how the Minister of Forests' decision and decision-making process has:

- Spoiled the orderly transition of land use regulatory regimes for the lands, as they moved from provincial TFL regulatory authority to the CRD;
- Damaged the Regional Growth Strategy and Official Community Plans of Otter Point and Shirley/Jordan Riverⁱⁱ; and
- Undermined democratic governance in the Capital Regional District and Juan de Fuca Electoral Area.

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Background

As you know, for decades prior to the Minister's decision to delete the TFL lands, the deleted lands in the Jordan River, Otter Point and Shirley areas had been designated for forestry purposes under the provincial Tree Farm License. Local governments did not anticipate that the protective TFL status would be suddenly stripped away without notice.

The Capital Regional District regards the deleted TFL lands as vital to its blue/green spaces strategy, green infrastructure network and maintenance of working forests in the region. The CRD considers proper planning and regulation of these lands vital to maintaining the natural beauty of the West Coast and preventing urban sprawl from marring the lands beyond Sooke.

Prior to the TFL 25 land deletion, the CRD's Regional Growth Strategy had called for much of the deleted land to be maintained as forestry resource lands. The rest of the lands are covered by two Official Community Plansⁱⁱⁱ that call for:

- The retention of both the rural and natural character of the area;
- The protection and enhancement of the natural environment, its ecosystems and biological diversity; and
- Support for planned community development in conjunction with residential, agricultural, forestry, commercial, tourism and recreational activities.

However, the CRD^{iv} had not yet updated its planning and zoning bylaws, to reflect the wishes of the community and the goals of the relatively recent Regional Growth Strategy that the governments of the region have agreed to.^v

The Minister of Forests' Decision Caught Local Government by Surprise

A serious problem was created because the Minister failed to consult with the public and local governments before removing the lands from provincial TFL regulation. Although Western Forest Products had been informing its shareholders of government-company negotiations for more than a year before the decision^{vi}, the Minister failed to inform local governments and the local citizens who would be affected by the upcoming decision.

As a result, the deletion decision caught local government unawares, with their planning initiatives unfinished. They had not been given adequate opportunity to revise their bylaws to deal with the dissolution of TFL regulation on the land.

They had not yet taken the necessary steps to amend their zoning bylaws to ensure that new developments were consistent with the new Regional Growth Strategy, the Official Community Plans and community opinion.

Orderly development of the western portion of the Capital Regional District was put in serious jeopardy.

Capital Regional District Response to the Minister's Decision

The Capital Regional District reacted to overwhelming public concern about the TFL deletions. After formal public hearings involving hundreds of citizens, in February CRD Directors approved third reading of OCP and zoning bylaw amendments that applied to the former TFL lands in the Juan de Fuca Electoral Area – including Jordan River, Otter Point and Shirley. These bylaws were designed to maintain the *status quo* for lands that have been designated for TFL forestry for decades. They were also designed to preserve the integrity of the CRD's Regional Growth Strategy and the integrity of the Official Community Plans.

The new zoning bylaw 3495 called for 120 ha lot minimums for future subdivisions for lands zoned forestry within Otter Point, Shirley and Jordan River. The CRD was forced to act to pass these bylaws, to provide a "breathing space" to protect the Regional Growth Strategy and OCPs from being badly damaged by the unexpected fallout from the deletion decision.

The new bylaws were designed to allow rational and orderly development of land use bylaws to cope with the massive and unexpected addition of the TFL lands to the real estate marketplace. It is important to note that flexibility to allow for appropriate denser subdivision was available, since landowners would continue to have the right to apply for rezoning -- and each application for rezoning would be considered on its merits.

Since February the bylaws passed by the CRD have been awaiting the final signature of approval from the Minister of Community Services, Ida Chong.

Unfortunately, the local media now report that Western Forest Products has been "racing to beat lot size restrictions".^{vii} WFP has apparently filed an application to create 319 subdivision lots on the lands in question, relying upon the existing 1993 zoning of the deleted TFL lands. This is outmoded zoning which had never been made consistent with the Growth Strategy and OCP – and zoning which

was enacted without contemplation of the unforeseen deletions of great expanses of TFL land.

WFP's spokesman expresses confidence that its application will be dealt with under the old zoning -- and emphasizes that under their application there will be "zero parks". The clear implication is that if the public wants parks in such treasured places as Jordan River that even higher subdivision densities will now have to be negotiated. (See *Appendix A*)

Additional Consequences of the Minister's Decision Are Becoming Clear

These new developments vividly demonstrate some of the unfortunate consequences that arise from the way that the Ministry handled the land deletion decision. For one thing, they show the gravity of the Provincial government's failure to negotiate matters like parks when government had leverage on that issue.

Furthermore, these events show that the process followed in making the Minister's decision has, perhaps irremediably, damaged:

- the Regional Growth Strategy in the Capital Regional District; and
- democratic governance over land use in the Juan de Fuca Electoral Area and Capital Regional District.

It is becoming quite clear that the failure of the Ministry of Forests to follow proper process in implementing the deletion order has placed the integrity of the CRD Regional Growth Strategy at risk. The landscape that future CRD residents will inhabit could now differ significantly from the one that the governments and citizens of the region agreed upon in the Regional Growth Strategy and OCPs. Hundreds of subdivided lots may mar a landscape that should have remained largely undeveloped. In addition, taxpayers may be unnecessarily saddled with the economic costs of urban sprawl.^{viii}

Just as important, the secrecy and lack of consultation by the Ministry has created a situation where bylaws that have been formally approved by CRD directors are not governing the future of the lands in question. A series of events has been set in play that, in effect, disenfranchises CRD residents and CRD Directors from control over local land use.

After extensive public hearings, the democratically elected directors of the CRD have voted for new bylaw provisions to protect the natural beauty and character

of the region – yet those bylaws are not being applied because WFP has rushed in to rely upon the old bylaws.

This could have been avoided if the Minister had given as much notice of the upcoming deletions to the public and the CRD as Western gave to its shareholders. Beginning in November 2005 WFP announced in each of its quarterly shareholder reports that it was asking government to delete these lands. In contrast, government apparently gave no notice to local governments until after the January 2007 deletion was complete.^{ix}

If the Minister had shared his information with the CRD early on, that could have provided the CRD with enough time to go through the local hearing processes and obtain final ministerial approval for the new bylaws. By now the new bylaws would be final – and this subdivision application would clearly be governed by the new bylaws.

As it is, the clearly expressed public will (as represented by the vote of CRD directors) is that 120 hectare minimums should apply to these lands. Yet that law may not apply, because there was not quite enough time to get a ministerial signature on bylaws that have been approved by the CRD.

This result is ironic since Minister Coleman told the Legislature that the deletion decision was not of concern, since local planning processes would now be relied upon to deal with these lands. He stated:

They have to go through local zoning, and at that time there are public hearings and input from the public on the use of those lands. That's fine.

-- [Hansard, October 29, 2007, p. 8894]

This theme was reinforced by Government MLA Ron Cantelon's statement to the Legislature that local government would be fully empowered to mitigate the TFL decision:

It is now no longer part of the tree farm licences. This does not mean, however, that the land is now suddenly open for development. Au contraire...

In fact it's under the jurisdiction, as well it should be, of the people in the local communities... In my community – and I'm sure your community [CRD] will be as responsive – the regional district placed a 50-hectare minimum parcel size on land that is zoned for

silviculture. What this means in the regional district of Nanaimo is that you can't chop these parcels up into parcels smaller than 50 hectares... That, of course, is the prerogative of the local regional district in the southern area as well... Rightly, they should have the opportunity to say that, and they will, as they did in the Nanaimo regional district, where clearly the hand was held up to the forest companies and said, "No smaller than 50 hectares. Don't come here with your subdivision plans."

So I'm sure the people in this community will also respond quite well to any proposed changes in official community plans, to any proposed changes in zoning. They will have their say.

-- [Hansard, October 22, 2007, p. 8672]

The tragedy is that the people of the Capital Regional District are not 'having their say'. To paraphrase Mr. Cantelon, 'Their hand was held up to the forest companies and they said No smaller than 120 hectares. Don't come here with your subdivision plans." However, because of the Ministry of Forests' failure to properly communicate its intentions to local communities about the upcoming TFL deletions, the people of the CRD are not having their full and proper say.

Conclusion

It is important that your office examine these recent and grave consequences of the TFL decision. In that regard, further discussion with the Capital Regional District about these problems may be helpful.

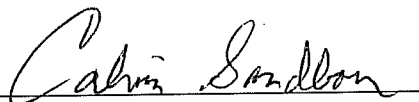
Note that in response to the WFP subdivision application, Erik Lund, Juan de Fuca Electoral Area Director has stated that it is galling that the province told the CRD not to worry about the release of TFL land because its use could be controlled through bylaws, but then held up the process. He also has stated:

If the ministry had got its act together and the bylaws had been enacted, Western Forest Products wouldn't have been able to do this without going through a process of application.

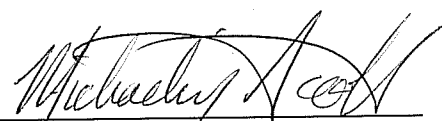
(See Appendix A)

We respectfully request that you consider these new events in your examination of this matter.

Yours truly,



Calvin Sandborn
Barrister and Solicitor



Michaelin Scott
Law Student

ⁱ The Minister of Community Services, Ida Chong.

ⁱⁱ Within the Capital Regional District.

ⁱⁱⁱ Otter Point & Shirley/Jordan River Official Community Plans.

^{iv} And the Juan de Fuca Electoral Area.

^v Those which remain incomplete or scheduled for review include the CRD's Regional Growth Strategy and Master Parks Plan and the Juan de Fuca Electoral Area's Official Community Plans, Zoning, Rural Resource Lands and Local Parks Plans.

^{vi} WFP had been informing its shareholders in quarterly reports since November 2005 about the negotiations to delete the lands.

^{vii} See Appendix A. The lands in question are around Jordan River, Muir Creek, Otter Point and Shirley.

^{viii} Those increased costs were described in footnote 67 of our October 19, 2007 letter.

^{ix} Apparently government made no public announcements until after the transaction had been completed. Apparently, the Minister did not consult with local elected officials, communities or the interest groups that have worked to protect natural values in the affected areas before making the announcement.

Forest firm racing to beat lot size restrictions

Current CRD minimum is four hectares; new bylaws will boost size to 120

JUDITH LAVOIE
Times Colonist

Sensitive lands on the southwest coast of Vancouver Island could be subdivided before the Capital Regional District is able to enact bylaws to restrict lot sizes.

Western Forest Products, which is selling more than 2,500 hectares of high-profile land stretching from Sooke Potholes to Port Renfrew, has applied to the province to subdivide some of its parcels into 319 acreages ranging from two to five hectares.

The current minimum lot size is four hectares, but WFP maintains some lots need to be smaller due to topographic restrictions and the average lot size meets current bylaws.

The application, which is for forestry land around Muir Creek, Otter Point, Jordan River and Shirley, is being made under current bylaws as the new bylaws are still awaiting approval in the office of Community Services Minister Ida Chong.

In a controversial decision in February, the CRD voted to limit lot size of forestry and

resource land in the Juan de Fuca electoral area to 120 hectares after WFP made a provisional deal to sell the land, which includes the Jordan River townsite and high profile beach and recreational areas, to developer Ender Ilkay.

Opponents are claiming WFP is trying to make an end run around the CRD, but WFP chief operating officer Duncan Kerr says he is simply following the process.

"We are within our rights to put in an application to be considered within the current zoning," he said.

The Transportation Ministry approving officer can give the go-ahead although he does have to ask for input from interested parties, including the CRD.

Even if the downzoning bylaws are enacted shortly, the applications are now grandfathered, provided the work is carried out within one year.

The large rural lots are the best that can be done under the circumstances, but there will be "zero parks," Kerr said.

"Parks only come through conversation and we haven't been able to engage in that conversation," he said.

Kerr and Ilkay have complained about the CRD going ahead with the rezoning before the community could see development plans, which were to include large parks, trails and "planned communities."

However, once the new zoning is in place, landowners can apply for rezoning.

Much of the anger during the debate was directed at the province for allowing WFP to remove 28,000 hectares of privately owned land from Vancouver Island tree farm licences.

Now, the province is again coming in for criticism.

"If the ministry had got its act together and the bylaws had been enacted, Western Forest Products wouldn't have been able to do this without going through a process of application," said Erik Lund, Juan de Fuca electoral area director.

It is galling that the province told the CRD not to worry about the release of TFL land because its use can be controlled through bylaws, but then holds up the process, Lund said.

Chong said the bylaws have

not yet reached her desk as staff are ensuring proper consultations have taken place and provincial interests are met.

"I have received some letters in opposition and other letters saying please get on with it, so there are obviously two views," Chong said.

"I really can't give a date."

Ilkay said he does not see the result of the subdivision application as the main factor in whether he proceeds with his offer to buy all 2,500 hectares.

"This is not the development vision I would have. It's nice, but my vision would certainly look different," said Ilkay, who is still hoping to build a community with green spaces and different styles of housing.

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