Riparian Area Protection Powers Rolled Back by the Court of Appeal

Twenty-five years ago, the provincial government enacted legislation intended to protect fish habitat in and adjacent to freshwater bodies frequented by migratory fish species. The chosen approach was to mandate local governments to use existing land use management tools in what is now Part 14 of the Local Government Act to protect these habitats from damage that could result from most types of development, to a standard that meets or exceeds a protection standard prescribed by the government. The Fish Protection Act (now the Riparian Areas Protection Act) established the mandate, and a protection standard involving the use of third-party, qualified environmental professionals (QEPs) is prescribed in the Riparian Areas Protection Regulation.

None of this legislation materially changed the scope of development permit powers dating back to 1977, which many local governments had already been using to protect environmentally sensitive land, including riparian land, from the impacts of development. The scope of the relevant development permit area designation power was tweaked slightly in 1997 to expressly include the protection of ecosystems and biological diversity. The power to impose development permit conditions was amended to expressly include requiring "protection measures, including that vegetation or trees be planted or retained in order to preserve, protect, restore or enhance fish habitat or riparian areas". Authority to "specify areas of land that must remain free of development, except in accordance with any conditions contained in the permit" was not changed. Neither was the enforcement of the development permit regime addressed; local governments were not given authority to directly enforce the key Local Government Act prohibitions that support the development permit system (s. 489), or to enforce development permit conditions by measures other than costly and time-consuming injunction proceedings in the BC Supreme Court. These enforcement gaps continue to frustrate the achievement of this important local government mandate.

The BC Court of Appeal has now had two opportunities to consider the detail of the government's rather complicated riparian area protection regime. The first case, Yanke v. Salmon Arm (City) 2011 BCCA 309 addressed attempts that the provincial government had been making at the administrative level to deal with some significant gaps in the legislation: the fact that many sensitive riparian habitats had already been damaged by development, and the fact that many vacant parcels of land don't afford practical building envelopes lying outside the sensitive riparian area. In Yanke, the development permit applicant had insufficient site area to construct a dwelling

outside the SPEA that their QEP had identified, but the QEP had also certified that development would not harm fish habitat if located outside a significantly smaller SPEA. The City was willing to issue a development permit premised on the SPEA boundaries being "flexed", a procedure endorsed in administrative directives that the Province had issued provided that Fisheries and Oceans Canada approved; DFO was withholding its approval. Finding that the applicant was nonetheless entitled to receive a development permit, the Court noted first of all that the government's administrative directives dealing with "flexing" had no legal force. In a key passage, Justice Groberman wrote "I do not read s. 4 of the regulation as prohibiting development within a streamside protection and enhancement area where an assessment report states that there will be no HADD resulting from the development".

The more recent case is Wilson v. Cowichan Valley (Regional District) 2023 BCCA 25. Here, the local government had adopted a very strict OCP policy that discouraged development within any streamside protection and enhancement area (SPEA) that had been identified by a QEP, even if the QEP's opinion was that development in that area wouldn't harm fish habitat. The DP applicants, working with a developed site adjacent to Cowichan Lake, had already constructed a new garage in the portion of their lot lying outside the identified SPEA. They then proposed to construct their new dwelling largely inside the SPEA – a project that their QEP advised wouldn't harm fish habitat. (This appears to have been the same R. P. Bio whose assessment report had been the focus of the Yanke decision 12 years earlier.) The regional board applied its policy and denied the application, the applicants sought judicial review of the decision, and in 2021 the BC Supreme Court quashed the decision as unreasonable and ordered the issuance of the development permit. The Regional District appealed.

In dismissing that appeal, the Court of Appeal focused, as had the BC Supreme Court, on the scope of the authority in s. 491(1)(a) to "specify areas of land that must remain free of development, except in accordance with any conditions contained in the permit", and whether that authority could reasonably be interpreted to enable the local government to prohibit development entirely in those areas of land, in circumstances where a QEP has indicated that development in that area wouldn't harm fish habitat. The negative answer that both Courts gave to that question has been a surprise to many local governments and their legal counsel. (The Court of Appeal did allow the Regional District's appeal in relation to the issuance of the development permit, on the basis that the QEP had not provided an assessment report that complied with the RAPR.)

On the face of things, it would seem viable to prohibit development in these areas entirely despite a "no HADD" conclusion from a QEP, because local governments are mandated to either meet or exceed the level of protection afforded by the RAPR, and reliance on the opinion of a QEP is part of the RAPR regime. However, the Court of Appeal found that regardless of the "meet or beat" option in the RAPA, the Regional District was still limited in dealing with the permit application to the authorities contained in s. 491, including the authority to specify development-free areas under s. 491(1)(a). What is surprising about the Court of Appeal's decision is that it then goes on to interpret s. 491(1)(a) as if it had been enacted only to confer authority in relation to riparian area protection directives made from time to time by way of the RAPR.

In reviewing the reasonableness of the regional board's interpretation of the scope of the section in its context, the regulatory scheme and the object of the enactment in which the section appears, as the relevant judicial review case law requires, the Court of Appeal makes

reference exclusively to RAPA and the RAPR, rather than to the Local Government Act itself (which contains an identically-worded power in respect of hazard lands). To the same effect, the Court refers to the Yanke decision as binding authority for a general proposition that the Legislature intended to empower local governments to prohibit development in a SPEA only where HADD would result. The Court expressly rejected the proposition that a local government may "operationalize a philosophical approach to the protection of fish habitat that is at odds with the harm-based approach that lies at the core of the provincial scheme", without appearing to take into consideration whether, prior to 1997, such a precautionary approach to the protection of the natural environment would have been available to a local government exercising the development permit power, and if so why the riparian area protection legislation should now be interpreted as limiting that power. By this course of reasoning the Court of Appeal has effectively "read down" the scope of this longstanding local government environmental protection power, as a result of the Legislature enacting the riparian area protection legislation in 1997.

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What are the consequences? Wilson may be a case that can be (as lawyers say) "limited to its facts" – if the scope of the authority in s. 491(1)(a) excludes the designation of any area that must remain simply "free of development", that must be only in cases where the power is being exercised to protect fish habitat in a watershed that is subject to the RAPR. This is because the Court of Appeal's reasons for so limiting the power derive entirely from the provincial riparian area protection legislation and the Yanke case. If that is so, then it may still be possible to prohibit development in an environmentally sensitive area that has been designated to protect the habitat of some species (animal or plant) other than fish – which suggests that single-purpose fish habitat protection DP area designations and guidelines should be avoided. By the same reasoning, it may be possible to specify hazard lands that must remain entirely "free of development" under s. 491(2). (Concerns about the effect of any such prohibitions on development entitlements are specifically addressed in ss. 490(3) and 491(3) – permits may not vary permitted use or density except on hazard lands.)

Be that as it may, it would seem worthwhile for the government to amend both ss. 491(1) and (2) to make it clear that there are indeed two options: specifying areas of land in which development must not occur at all, and specifying areas in which development may occur subject to conditions specified in the permit. Many local governments would appreciate a package of amendments that also addresses the enforcement gaps mentioned earlier.

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