

Staff Report

To: Joe Fernandez, Chief Administrative Officer

From: James van Hemert, Consulting Planner

Date: October 21, 2021

Re: Applications for

- 1) *Undue Hardship Variances* under the provincial Riparian Area Protection Regulations,
- 2) *Development Variance Permits* under the Zoning Bylaw, and
- 3) *Development Permits* within the Watercourse and Streamside Protection Development Permit Area (DPA 1) of the Official Community Plan for 8 and 12 Prospect Avenue, legally described as Lots 1 and 2, District Lot 12, Cowichan Lake District, Plan EPP106330.



Application Request

The Town has received two separate and adjoining applications to:

- 1) vary the Zoning Bylaw to allow development within the 30-metre floodplain setback to the Cowichan River as established in Article 4.13.1 a. of the Zoning Bylaw, as an *undue hardship variance* in accordance with the Riparian Area Protection Regulations (RAPR) and the Local Government Act to reduce the setback between the stream boundary and future development, inclusive of staircases and decks:
 - a) for 8 Prospect Avenue to between 5.8 metres (most southwesterly point) and 16.8 metres (most northeasterly point) and;
 - b) for 12 Prospect Avenue to between 12.2 metres (most southwesterly point) and 17 metres (most northeasterly point); and
- 2) request a Development Permit under the provisions of the Watercourse and Streamside Protection Development Permit Area (DPA 1) of the Official Community Plan.

The two components of the applications may be considered concurrently.

Staff are recommending a modest adjustment to the variance requests: the addition of a front lot line setback variance of 1.5 metres, which would result in a reduced setback from 7.5 to 6.0 metres. This will permit a larger SPEA than originally proposed in the application. Please note that the maps incorporated in this staff report do not reflect this variance adjustment. The applicants have acquiesced to this adjustment.

Provided in the following two figures are mapped details of the following:

- 1) extent of the variances required to accommodate a reduced SPEA, (Stream Protection and Enhancement Area),
- 2) revised natural stream boundary,
- 3) existing 30-metre Riparian Area Assessment line,
- 4) planning area extent for purposes of calculations,
- 5) 30% developable area option,
- 6) 40% developable area option,
- 7) riparian restoration planting plan, and
- 8) development footprint for residential dwelling.

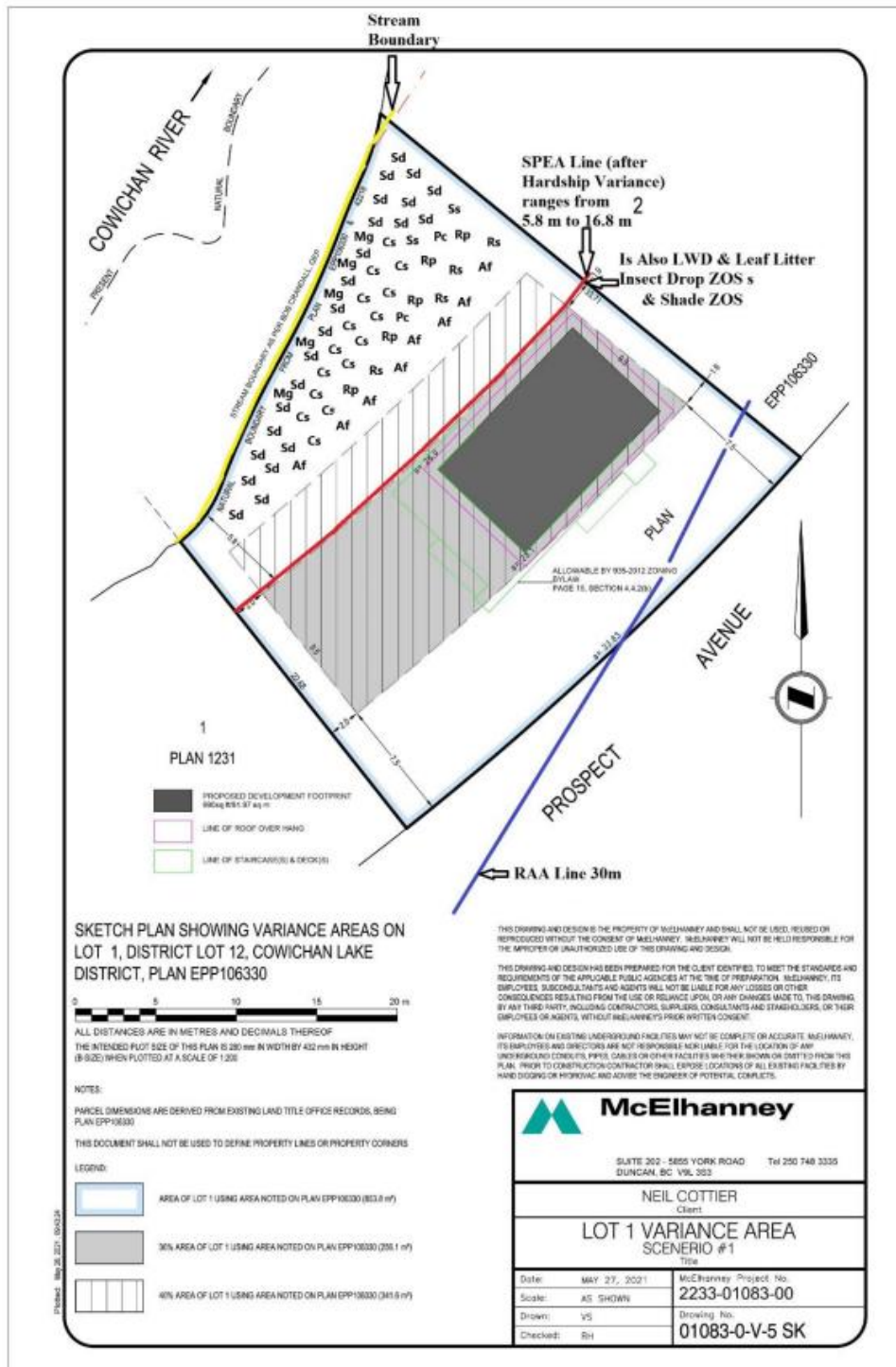


Figure 1 Plan of proposed variance and riparian restoration planting plan for 8 Prospect Avenue

Background

The subject properties were created by subdivision in 2020 when an existing single lot was divided into two.

8 Prospect Avenue (Lot 1)

Since the time of subdivision, a new boardwalk access has been constructed through the riparian assessment area and a floating dock installed on the Cowichan River. The property is actively used for recreation purposes. A small shelter is the only permanent building on the site. There is no principal residential dwelling. Except for the approximately 5-metre-wide strip of vegetated land adjacent to the river, the entire property has been domesticated with a lawn, fruit trees, rock retaining walls and gravel surfaces.

12 Prospect Avenue (Lot 2)

The site is currently occupied in an informal manner for recreation. A floating dock has been expanded on the river and a sauna constructed on the dock. The property is largely domesticated with lawn, fruit trees, and gravel parking areas. There is no principal residential building. Only a small portion of the site remains in a natural vegetative state.

Regulatory Overview

Setbacks to the Cowichan River

Zoning

Article 4.13.1 a. of the Zoning Bylaw provides for a 30-metre floodplain setback from the natural boundary of the Cowichan River. In effect, this leaves no buildable area on either lot.

Official Community Plan

The 30-metre setback is consistent with the Official Community Plan's (OCP) Riparian Assessment Area of 30 metres. Specifically, the OCP's Development Permit Area for Watercourse and Streamside Protection's objectives are:

6.2.3 Objectives

- 1) To protect watercourses and their riparian areas, and the adjacent upland areas that exerts an influence on watercourses, from development.
- 2) To restore and enhance watercourses and their riparian habitat for wildlife movement and the natural features, functions and conditions that support fish and wildlife processes.

Provincial Riparian Areas Protection Regulations (RAPR)

The OCP and Zoning regulations are consistent with the provincial regulations for riparian area protection.

Land Use

The subject lots are Zoned R-1 Urban Residential. The zone district permits a Principal residential dwelling with a maximum building coverage area of 40%. The properties are currently developed with various small structures for recreation purposes without an established principal use.

The adjacent Cowichan River is zoned W-1 Water Recreation. The intent of this zone is to ensure the protection and preservation of the natural state and environment of Cowichan Lake and Cowichan River and the riparian areas adjacent to them.

Clause 3.17.1.5 states that 'No residential use of floats, piers or vessels or the storage of vessels of any kind is permitted in this zone.'

For the lot at 8 Prospect the existing and expanded floating dock and wood sauna structure are in violation of the bylaw.

For the lot at 12 Prospect The newly constructed floating dock is in violation of the bylaw.

Provincial Riparian Areas Protection Regulation (RAPR)

The purpose of the RAPR is to protect the many and varied features, functions and conditions that are vital for maintaining stream health and productivity, including:

- Sources of large organic debris, such as fallen trees and tree roots;
- Areas for stream channel migration;
- Vegetative cover to help moderate water temperature;
- Provision of food, nutrients, and organic matter to the stream;
- Stream bank stabilization; and
- Buffers for streams from excessive silt and surface run-off pollution.

Riparian Restoration Planting Plans

Restoration planting plans are provided for both lots as shown on the two diagrams provided in this report. Plants are identified with symbols representing their Latin names, and include the following (common names):

- Sweet gale
- Hardhack
- Lady fern

- Sitka sedge
- Sitka willow
- Pacific Ninebark
- Salmon berry
- Thimble berry

Lot 1 (8 Prospect Ave.) will receive a minimum of 58 plants and Lot 2 (12 Prospect Ave.) will receive a minimum of 39 plants. Full details of the planting plans are provided as accompanying documents to this report. *Note that it is expected that as a condition of approval this planting plan will be expanded by a 1.5-metre-wide strip extending for the full width of the lot to reflect a reduced 1.5-metre front setback.*

Review process for variance under Provincial Riparian Area Protection Regulations (RAPR)

The RAPR provides that a site is subject to undue hardship if

- (a) the site was created by subdivision in accordance with the laws in force in British Columbia at the time the site was created,
- (b) the developer has sought and received a decision on every variance that would reduce the legally restricted area of the site, and
- (c) the developable area of the site is less than the allowable footprint for the site.

--Part III Riparian Protection, Division 2, Section II (Undue Hardship), Subsection (2) RAPR

Commentary: the conditions of these two lots satisfy these criteria.

A site subject to undue hardship may have differing allowable footprints based on the extent of human disturbance on the site.

- 3) (a) if the area of human disturbance on the site is less than or equal to 70% of the area of the site, the allowable footprint is 30% of the area of the site;
- (b) if the area of human disturbance on the site is greater than 70% of the area of the site, the allowable footprint is 40%.

--Part III Riparian Protection, Division 2, Section II (Undue Hardship), Subsection (3), RAPR

Commentary: The applicant has provided calculations for both levels of disturbance and has chosen the smaller allowable footprint of 30%. The province is withholding its approval subject to local municipal bylaw variance approval.

Referral

A courtesy referral for comment was provided to the Cowichan Lake and River Stewardship Society (CLRSS). A response on behalf of the Society was provided by Ken Traynor in an e-mail on August 29. The Society does not support the granting of variances for the following reasons (direct quotes, slightly edited for brevity):

First, these properties did not have existing buildings on site and were vacant lots when they were recently purchased in December of 2020 according to the BC Assessment website file for these properties. **At the time of purchase,** it was clear that the lots were wholly within the existing Cowichan River floodplain and would be subject to Section 4.15 under GENERAL REGULATIONS, REQUIREMENTS AND PROVISIONS of the current Town of Lake Cowichan Zoning Bylaw. Section 4.15 clearly states on page 20 under "Floodplain Provisions Notwithstanding any other provisions of this bylaw, no building or any part thereof shall be constructed, reconstructed, moved or extended nor shall any mobile home or unit, modular home or structure be located: 1 Within 30 metres of the natural boundary of the Cowichan River.

Secondly, some observations about the properties:

- the lots in question have served an important ecosystem function for years as wildlife corridors in this area of the river;
- the foreshore riparian is in good shape except in two places where boardwalks have been pushed through it to docks in the river;
- mature trees have been removed from the properties in the past year;
- rock and fill have been brought onto the properties in the past year in order to create a flat area on the edge of the property nearest the road;
- all this recent work done on-site is within the riparian zone and without any approvals that we are aware of and is in contravention of existing Town of Lake Cowichan bylaws as posted on the Town website; and
- the Registered Environmentalists report, updated in 2021, which was shared with us by you, does not mention any of this work/disturbance.

Thirdly, observations about impacts of possible construction if the "hardship variance" is allowed:

- the road bordering the property has been flooded many times;
- looking at the property from the water it is apparent that the clay layer is just below soil surface level;
- the clay will very definitely be disturbed by foundation construction and will also be disturbed in the area around the foundation by the construction process; and
- if the construction happens during winter, it will very likely create a bloom of clay particles being flushed into the river.

Fourthly, observations on the construction mitigation procedures outlined in the REP report:

- they are likely to be ineffective during wet weather events;
- they are not likely to be enforced by anyone; and
- there is a high probability of a clay particle bloom entering the river.

Discussion

Within the past year the Town has granted a subdivision approval and provided servicing to the lots with the expectation of appropriate Provincial riparian area protection approval, satisfactory riparian area restoration and adherence to all Town bylaws.

Staff recommend a variance to the front lot line setback of 1.5 metres, thereby reducing the front setback from 7.5 metres to 6.0 metres, which is sufficient to provide room for driveway parking, is consistent with setbacks of existing residences, and will provide additional area for the SPEA adjacent to the river. The SPEA related setbacks requested will all be increased by 1.5 metres. The building area for both lots will remain the same. Additional riparian planting is expected commensurate with the reduced front lot line setback.

Accordingly, approval of the development variance permit and development permit requests may reasonably be considered along with the staff recommended variance to the front lot line setback.

Recommendation

I. Development Variance Permits

- A. For the property legally described as Lot 1, District Lot 12, Cowichan Lake District, Plan EPP106330, and with a street address of 8 Prospect Avenue, vary the 30-metre floodplain minimum setback to the Cowichan River as established in Article 4.13.1 a. of the Zoning Bylaw by between 22.7 metres and 11.7 metres, resulting in a setback of between 7.3 metres (most southwesterly point) and 18.3 metres (most northeasterly point), subject to the following conditions:
 - 1. that all the conditions of the Development Permit are satisfied; and
 - 2. if the conditions of the Development Permit are not satisfied within two years of the date of approval, the Development Permit Variance shall lapse.
- B. For the property legally described as Lot 1, District Lot 12, Cowichan Lake District, Plan EPP106330, and with a street address of 8 Prospect Avenue, vary the 7.5-metre front lot line setback of the Zoning Bylaw Section 5.1.6 by 1.5 metres resulting in a front lot line setback of 6.0 metres.
- C. For the property legally described as Lot 2, District Lot 12, Cowichan Lake District, Plan EPP106330 and with a street address of 12 Prospect Avenue, vary the 30-metre floodplain minimum setback to the Cowichan River as established in Article 4.13.1 a. of the Zoning Bylaw by between 16.3 metres and 11.5 metres resulting in a setback of between 13.7 metres (most southwesterly point) and 18.5 metres (most northeasterly point); subject to the following conditions:
 - 1. that all the conditions of the Development Permit are satisfied; and
 - 2. if the conditions of the Development Permit are not satisfied within two years of the date of approval, the Development Permit Variance shall lapse.
- D. For the property legally described as Lot 2, District Lot 12, Cowichan Lake District, Plan EPP106330, and with a street address of 12 Prospect Avenue, vary the 7.5-metre front lot line setback of the Zoning Bylaw Section 5.1.6 by 1.5 metres resulting in a front lot line setback of 6.0 metres.

II. Development Permits

- A. Approval of a Watercourse and Streamside Protection Development Permit Area (DPA 1) for the property legally described as Lot 1, District Lot 12, Cowichan Lake District, Plan EPP06330 and with a street address of 8 Prospect Avenue, subject to the following conditions:
1. Provincial approval of the Riparian Area Protection Regulations (RAPR) Assessment Report;
 2. removal of illegal piers and floats on the Cowichan River and illegal trailers and structures prior to issuance of a building permit;
 3. preparation of a satisfactory sediment and erosion control plan satisfactory to the Town, prior to issuance of a building permit; and
 4. completion of the riparian restoration planting plan, prepared by Christine Brophy on September 11, 2021, and as expanded by 1.5 metres in width across the entire lot width per staff recommendation, prior to building occupancy, with financial surety held for 2 years; and
 5. placement of a restrictive covenant with respect to SPEA protection and maintenance and limits to the principal dwelling within the building envelope established as shown on the map (figure 1 in the staff report) prepared by McElhanney, dated May 27, 2021, and shifted in its entirety by 1.5 metres southerly toward Prospect Avenue, attached to, and forming part of the Development Permit.
- B. Approval of a Watercourse and Streamside Protection Development Permit Area (DPA 1) for the property legally described as Lot 2, District Lot 12, Cowichan Lake District, Plan EPP06330, and with a street address of 12 Prospect Avenue, subject to the following conditions:
1. Provincial approval of the Riparian Area Protection Regulations (RAPR) Assessment Report;
 2. removal of illegal piers and floats on the Cowichan River and illegal trailers and structures prior to issuance of a building permit;
 3. preparation of a sediment and erosion control plan satisfactory to the Town, prior to issuance of a building permit; and
 4. completion of the riparian restoration planting plan, prepared by Christine Brophy on September 11, 2021, and expanded by 1.5 metres in width across the entire lot width per staff recommendation, prior to building occupancy, with financial surety held for 2 years; and

5. placement of a restrictive covenant with respect to SPEA protection and maintenance and limits to the principal dwelling within the building envelope established as shown on the map (figure 2 in the staff report) prepared by McElhanney, dated May 27, 2021, and shifted in its entirety by 1.5 metres southerly toward Prospect Avenue, attached to, and forming part of the Development Permit.



James van Hemert, MCIP, RPP, Consulting Planner