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Environmental Development Permit Areas: In Practice and in Caselaw

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 Thanks to the District of Saanich, City of Nanaimo, City of Kelowna and Regional District of Central Okanagan for permission to reproduce their EDPA maps in the Appendices.

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Executive Summary

This report provides an analysis of the treatment of Environmental Development Permit Areas (EDPAs) in practice and in law. EDPAs are a tool available to local governments in British Columbia to protect the riparian and terrestrial natural environments. EDPAs currently function by identifying the natural environment, its ecosystems and biodiversity, and regulating development within these areas. It is at the discretion of local governments to identify the areas, define what constitutes "development", and place restrictions on such development. Reflecting on both how local governments have implemented EDPAs and legal challenges to their implementation, it becomes clear that EDPAs in general are not regularly disputed and courts accept them and development permitting as within local government jurisdiction so long as the EDPA regime follows the requirements of the *Local Government Act* and reasonably carries out its purpose of protecting the natural environment.

In summarizing caselaw regarding judicial treatment of EDPAs, the following observations are offered:

1) Courts will uphold EDPAs where they are designated on reasonable evidence and with reasonably certain boundaries. On-the-ground certainty is not required.

2) Because there is some discretion in granting permits, council must be able to demonstrate that they considered the application for a development permit in the context of the guidelines set out in the Official Community Plan (OCP). Furthermore, if council rejects a permit application, decision-makers must provide reasons for rejection in order to inform the applicant how they can meet the guidelines in the future.

3) We note that courts have not overturned any EDPA regime in the province, and courts have directed that very few decisions on EDPA permits be reconsidered.

In analyzing four local governments' implementation of EDPA regimes, the following observations are offered:

1) The precision of mapping EDPAs varies significantly between local governments. For instance, Saanich has a very precise mapping system, whereas Kelowna designates a significant portion of the City as EDPA. The detail of the designation reflects the level of onus on the applicant to identify the ESA on their property and propose development accordingly. More precise mapping mechanisms relieve the burden on the applicant of identifying the scope of ESA on their property, and allows for a more specific EDPA application for the landowner.

Recommendation: That local governments provide detailed mapping of EDPAs

2) Within the EDPA regime, development is defined as any construction on and subdivision of property, in addition to land alteration activities. Local governments are responsible for providing a list of activities that constitute "land alteration." Generally, these are exhaustive lists, but some local governments provide a non-exhaustive descriptions of "land alteration" processes. This creates uncertainty for the applicant, and wide discretion for the decision-maker responsible for granting permits with conditions. Clear descriptions of activities caught under the EDPA will increase certainty, and can lead to better compliance. *Recommendation: That local governments provide a clear list of what activities are considered "development" and what activities are exempt from regulation.*

3) There is little attention paid to the importance of connectivity of fragmented ecosystems in protecting ecosystem health. Although most local governments recognize ecosystem connectivity as an objective, the language is not pervasive throughout the guidelines and during implementation. Highlighting the importance of connectivity would reduce complaints by property owners that their property is not "ecologically sensitive" on its own. This shift in perspective from focusing on environmentally sensitive areas to overall ecosystem health more effectively aligns with the purpose of EDPAs in protecting the natural environment, ecosystems, and biodiversity.
Recommendation: Make language of connectivity more pervasive in EDPA guidelines and in implementation through development permitting.

In sum, treatment of EDPAs in both caselaw and practice utilize the high level of discretion the *Local Government Act* grants to local governments. In the judicial system, a municipal decision must be considered reasonable. Municipalities and regional districts must have reasonable evidence to support the designation and boundaries set by the EDPA in order to be upheld. In permitting, discretion is limited to considering factors expressed in the guidelines enshrined in the OCP. Local governments must provide reasonable explanations that are connected to the guidelines to support their EDPA permitting decisions. So long as this is the case, permitting decisions will be upheld. This aligns with the report's findings that a higher level of clarity and detail in EDPA designations, such as is found in Saanich, and guidelines will reduce the burden on the applicant, making the application a more reasonable process. The high amount of discretion benefits from strong and clear designation and guidelines, so that the community and judicial system can support the reasonableness of the local government's decisions.

Introduction

This report provides an overview of the Environmental Development Permit Area (EDPA) regime that is available to municipalities and regional districts in British Columbia under the *Local Government Act*. The objective of this report is to provide a clear analysis on how municipalities shape their EDPA regimes, and how the law treats EDPAs.

The report is divided into four parts. Part 1 introduces the objectives of EDPAs, and describes the statutory basis for them. Part 2 considers the treatment of EDPAs by three different municipalities and one regional district that have longstanding experience with using an EDPA regime. Part 3 reviews how the courts have treated EDPAs and the ways in which they have been challenged. Part 4 takes the common practices from existing EDPA regimes and makes recommendations for effective EDPA regimes in light of what the case law requires of local governments under this statutory authority.

It is important to note that municipalities and regional districts have the same authority to designate EDPAs and issue development permits under them. Therefore, references to municipal council also include regional district boards, and vice versa.

Part 1: EDPA Overview

Development permit areas are a site-specific land use regulation that municipalities may designate for a variety of purposes, such as to manage the form and character of commercial development, hazardous conditions, energy and water efficiency, and environmental protection. While these regulations operate similarly, this paper focuses on EDPAs and their ability to protect the natural environment, its ecosystems and biodiversity. An EDPA is a development permit designation that is overlaid upon existing municipal zoning and land use planning based on the type of development that can occur on a property or the quality of the property itself. The Green Bylaws Toolkit provides the following overview of EDPAs:

> Local governments may designate environmental development permit areas (EDPAs) to protect the natural environment, its ecosystems, and biological diversity; to regulate the form and character of development; and to influence the siting of development on a parcel. DPAs are a more fine-grained tool than standard zoning for shaping how development occurs on a site.
>
> EDPAs enable staff and council to make site-specific decisions about protecting sensitive ecosystems. They can specify conditions and

> standards that a developer must meet. Environmental protection staff agree that EDPAs are the best way to protect sensitive ecosystems. EDPAs are also the best way to prohibit site disturbance before approval of a development project. [1]

EDPAs will often include protection of areas termed "environmentally sensitive areas," "ecologically sensitive areas," and "environmentally significant areas." These are all terms that are generally defined as areas that have been identified by a sensitive ecosystem inventory as significant to the natural environment and warranting protection.

The *Local Government Act*, RSBC 2015, c 1 enables EDPAs at section 488(1)(a) ("*Local Government Act*"):[2]

> 488 (1) An official community plan may designate development permit areas for one or more of the following purposes:
>
> (a) protection of the natural environment, its ecosystems and biological diversity;[…][3]

The power of the local government to designate a development permit area for protection of the natural environment is exclusive to British Columbia. No other provincial or territorial jurisdiction enables local governments to provide this type of site-specific attention to the impact of development.[4] Although all provinces have included in their version of the *Local Government Act* the power for municipalities to require the protection of natural environment in their Official Community Plans (OCP), there is no province or territory that provides an instrument for a development permitting regime to explicitly address the natural environment, its ecosystems, and biological diversity.

Under section 488(2) of the *Local Government Act*, in order for an EDPA to be valid, the Official Community Plan must:

> (a) Describe the special conditions or objectives that justify the designation, and
>
> (b) Specify guidelines respecting the manner by which the special conditions or objectives will be addressed.

The designation of the land that is subject to the EDPA is generally depicted through a map that identifies an EDPA in an OCP or zoning bylaw. To ensure the EDPA regime is *intra vires* the jurisdiction of the local government, the designation must reflect the objectives set out in section 488 of the *Local Government Act* to protect the natural environment, its ecosystems, and biological diversity. Thus, a local government must designate an EDPA solely for these purposes; it cannot serve to promote other public

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[1] D. Curran, *Green Bylaws Toolkit for Supporting Sensitive Ecosystems and Green Infrastructure* (Wetlands Stewardship Partnership: Victoria, 2007) 73.
[2] *Local Government Act*, RSBC 2015, c 1, s 488 [Local Government Act].
[3] *Ibid.*
[4] In order to determine this, the authors canvassed all local government legislation in Canada and did not find any similar regime.

interests. The EDPA must provide a justification for the designation of these lands, and support the justification with guidelines.

Section 489 of the *Local Government Act* list the activities that require a development permit:

> 489 If an official community plan designates areas under section 488 (1), the following prohibitions apply unless an exemption under section 488 (4) applies or the owner first obtains a development permit under this Division:
>
> (a) land within the area must not be subdivided;
>
> (b) construction of, addition to or alteration of a building or other structure must not be started;
>
> (c) land within an area designated under section 488 (1) (a) or (b) *[natural environment, hazardous conditions]* must not be altered;[5]

Note that subsection (c) prescribes a development permit in cases of land alteration. This applies specifically to EDPA and hazardous conditions development permits. Thus EDPAs apply to more activities than other types of development permit areas, and captures activities beyond the development of buildings.

The *Local Government Act* goes on to recognize the specific authority granted to local governments regarding EDPAs:

> 491 (1) For land within a development permit area designated under section 488 (1) (a) *[protection of natural environment]*, 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

[5] *Local Government Act supra* note 2 at 489

(iii) control erosion or protect banks.[6]

The authorization under 491(1) is put to use in the guidelines of an EDPA regime. So long as the mentioned legal provisions are followed, in practice, the EDPA is a highly discretionary tool. There are as many ways to scope and implement an EDPA designation as there are municipalities. The next section describes how three different municipalities and one regional district implement EDPAs. We provide a detailed synopsis of each EDPA regime, and highlight what is significant or unique to the regime. We then provide charts that compare and summarize different features of EDPAs between the local governments.

Part 2: Synopsis of EDPA Regimes

This section examines consistencies and variations in the application of terrestrial EDPAs from four local governments: the District of Saanich, the City of Nanaimo, the City of Kelowna, and the Central Okanagan Regional District. In order carry out this research, we consulted the local governments' OCPs and associated materials on their EDPA regimes, and spoke to or emailed with staff of three of the local governments. We used this information to create a "profile" of each local government's regime. For each EDPA regime, we sought to answer the same set of questions, which are found as subheadings in the local government EDPA profiles below. We then developed tables to compare the treatment and implementation of different EDPA factors between the four local governments, and we provide a brief summary of our findings on how these factors are generally treated.

These local governments were chosen because they offer comprehensive EDPA regimes that address terrestrial ecosystems. This is significant because there is no provincially legislated protection for these land-based ecosystems. This can be distinguished from riparian areas where protection is provincially legislated under the Riparian Areas Regulation and *Fish Protection Act*.[7] EDPAs thus fill an important gap in ecosystem protection by including terrestrial ecosystems.

The Resort Municipality of Whistler and the City of Surrey were evaluated but not included because, although their EDPA regimes are established, their OCPs are currently under review. Surrey's EDPA regime will be available to the public in April, 2016. It is unclear when Whistler's OCP and EDPA regime will be available although staff confirmed that their EDPA designation blankets the entire rural landscape.

2.1 District of Saanich EDPA Regime

The District of Saanich implemented its EPDA Guidelines in 2012. This implementation

[6] *Ibid* at 491(1)

[7] *Fish Protection Act,* SBC 1997, ch. 21

includes an amalgamation of previous protective guidelines. Such previous guidelines include the guidelines to protect rare plants, animals, and ecosystems as well as riparian areas not already protected by the Streamside Development Permit Area. In 2012, the District created the Environmental Development Permit Area Atlas using data from the Environmentally Sensitive Areas Atlas and provided a more coherent EDPA regime for the entire district.

2.1.1 Main areas of protection: The main areas of protection are bald eagle and great blue heron nests, sensitive ecosystems, wetlands and watercourses, marine backshore, and rare and endangered plants.[8]

2.1.2 Identification markers: The District of Saanich uses 5 main markers to identify areas designated under the EDPA regime. These include:

1) The Sensitive Ecosystems Inventory;[9]
2) Red and Blue listed animals and ecosystems identified through the Conservation Data Centre;[10]
3) Wildlife trees that are habitat for certain nests, as identified through the Wildlife Tree Stewardship Program;[11]
4) The Saanich Marine Inventory (2000);
5) The Isolated Wetlands and Watercourses Inventory (2010).

These markers have been used to create an EDPA atlas, which consolidates this information onto a large area map. Thus, EDPAs are scoped and designated through mapping. The designation arises from physical coordinates, rather than descriptive conditions. Buffers were applied to the Sensitive Ecosystem Inventory, Wildlife trees, Marine Inventory, and Isolated Wetlands and Watercourses. The buffers identify areas where permits are required in order to develop sensitively.

2.1.3 Relationship between land, ESAs, and EDPAs: Saanich's EDPA applies to approximately 2200 properties. That equates to 5 percent of private properties in the District, and 2 percent of public land parcels.[12] Overall, the EDPA covers 1026 hectares. For a map that designates the EDPA boundaries in Saanich, see Appendix A: *Saanich EDPA Map*. Saanich also provides a GIS mapping service that identifies the type of ecosystems that triggers an EDPA designation.[13]

2.1.4 Activities caught by EDPAs: EDPAs are used to restrict development on environmentally sensitive areas. An EDPA permitting process is triggered only when a landowner moves to alter or develop their land; land within an EDPA does not require

[8] District of Saanich, "Saanich Environmental Development Permit Area" online: http://www.saanich.ca/living/natural/planning/edpa.html?ref=shortURL)%3fref=shortURL - what

[9] British Columbia Ministry of Environment "Sensitive Ecosystem Inventory" online: http://www.env.gov.bc.ca/sei/ [Sensitive Ecosystem Inventory]

[10] British Columbia Ministry of Environment "BC Species and Ecosystem Inventory" online: http://a100.gov.bc.ca/pub/eswp/jsp/results_print.jsp

[11] BC Nature "Wildlife Tree Stewardship Program" online:http://www.wildlifetree.ca/atlas.html

[12] Letter from Adriane Pollard, Manager of Environmental Services Planning Department, Saanich BC. (February 11, 2016)

[13] Saanich "GIS Map Service" online: http://saanich.ca/services/gis/

remediation simply because of designation. As set out above, development caught under the definition in the *Local Government Act* includes subdivision, construction, addition to, or alteration of a building, as well as alteration of land.

Further to section 489(c) of the *Local Government Act* that prohibits land within an EDPA from being altered, Saanich lists specific activities that trigger an EDPA assessment. These include: the removal, alteration, disruption, or destruction of vegetation; removal, deposit, or disturbance of soils; creation of non-structural impervious or semi-impervious surfaces; constructions of roads, trails, docks, wharves, and bridges; and provision and maintenance of sewer and water services.[14]

2.1.5 Exemptions to the EDPA: If land is within an EDPA, an activity may be exempt from the requirement to obtain a development permit if the activity in question is to: remove hazardous trees; maintain already existing gardens and lawns; add structures such as picnic tables, benches, or small outbuildings; remove invasive plants or plant native plants; partake in environmental restoration projects or slope stabilization projects; repair and maintain existing structures, construct low-impact paths; or use the land for agriculture.[15]

2.1.6 Challenging the EDPA designation: Saanich provides an ability for landowners to seek an exemption from EDPA designation. If a landowner seeks to be exempt from the EDPA, without proposing development, there is the possibility to hire a qualified environmental professional (QEP) to declare that the land is not within an ecologically sensitive area. If a QEP declares that the land is not an ESA or a buffer zone, staff present the request to council and the EDPA designation may be lifted. This exemption application is at the owner's expense. To date, there has been one successful challenge to the EDPA designation where Council accepted that an entire property was not actually within a sensitive ecosystem. More commonly, staff or consulting biologists will refine the lines of the EDPA to apply to a smaller area of the property. Proposals that are found to be outside of the EDPA as a result can be exempted by staff.

2.1.7 Development in an EDPA: Development shall not occur on an ESA unless a registered professional biologist has identified mitigation measures to achieve the least impact to the ESA, or the development proposal supports and protects the environmental values.[16] The environmental values enumerated are: the habitat of rare and endangered plants, animals, and sensitive ecosystems; wildlife trees and their buffers; isolated wetlands and watercourses; and the marine backshore. In other words, an applicant needs to prove that the ESA will not be affected by the proposed development.

Measures to minimize the negative impacts within a buffer of ESAs are also listed. These measures include: avoiding the removal/modification of native vegetation; avoiding the introduction of non-native invasive vegetation; protecting against impacts to the protected root zones of the trees within the ESA; avoiding disturbance to wildlife and habitat; minimizing the use of fill, soil disturbance, and blasting; minimizing changes to

[14] District of Saanich "29: Environmental Development Permit Area" online: http://www.saanich.ca/living/environment/pdf/edpa/EDPA_Guidelines_Extracted_Mar2012.pdf [Saanich EDPA Guidelines]

[15] *Ibid*

[16] Saanich EDPA Guidelines *supra* note 14 at p. 118, #1.

the hydrology; and safeguarding against run-off of sediments and construction-related contaminants.

Thus, prior to issuing a development permit, the applicant has to prove, using a QEP's assessment of the property or an area of the property, that the development would not adversely affect the natural environment. If the proposal is only within the buffer area, a QEP may not be needed. The municipality may require that the assessment include: a sediment and erosion control plan; an arborist plan; a biologist report; a surveyed plan; and/or a bond.[17]

2.1.8 Compliance measures during development: Development that complies with the EDPA may require any of the listed measures: fencing to protect the ESA; environmental monitoring during construction, demarcation of wildlife corridors and trees; and restriction of development activities during sensitive times.[18]

2.1.9 What is special about Saanich: Saanich provides one of the most competent designations of EDPAs by the use of thorough mapping. Unlike other jurisdictions that establish a blanket EDPA regime over an area, Saanich has used mapping and inventories to pinpoint areas that trigger designation of the EDPA regime. Saanich has also used the EDPA designation to protect terrestrial ecosystems as well as the marine foreshore. Saanich's designation seeks to protect these terrestrial ecosystems as key parts of the green infrastructure of the municipality. This becomes clear in looking to the map, where there are pockets of designated areas away from the marine foreshore. Most of the terrestrial area covered is public parks or buffers around the parks. This is reflected in the fact that over half of the EDPA designated areas are on public land, which is mostly comprised of parks.

2.2. City of Nanaimo EDPA Regime

The City of Nanaimo EDPA scheme is embedded in its 2008 Official Community Plan at *5.2: Environmentally Sensitive Areas.*[19]

2.2.1 Main areas of protection: The main areas of protection under this scheme are: watersheds, watercourses and their associated aquatic habitats; marine foreshore and nearshore areas; mature and old growth forests; wildlife trees; rare woodlands (such as Garry oak and Arbutus groves) and herbaceous communities of southwest slopes; and special landforms such as cliffs, coastal bluffs, points and rocky islets.[20]

2.2.2 Identification markers: To scope the EDPA, the city of Nanaimo relies on the *Sensitive Ecosystem Inventory for East Vancouver Island and the Gulf Islands "(SEI").*[21]

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[17] *Ibid* at p 119 #5.

[18] *Ibid* at p. 119 #4.

[19] City of Nanaimo "Plan Nanaimo Official Community Plan" 2008 at 5.2 "Environmentally Sensitive Areas" p 84 online at: http://www.nanaimo.ca/assets/Departments/Community~Planning/Offical~Community~Plan~-~10~Year~Review/OfficialCommunityPlan2008.pdf [Nanaimo EDPA]

[20] *Ibid* at 84.

[21] Sensitive Ecosystem Inventory *supra* note 9.

The *SEI* was coordinated and overseen by a Technical Advisory Group (TAG) consisting of representatives from municipal, provincial, and federal authorities. This mapping occurred between 1993-1997.

There are seven sensitive ecosystems designated: wetland, riparian, old growth forest, woodland, terrestrial herbaceous, coastal bluff, and sparsely vegetated. The Sensitive Ecosystems Inventory has identified the remaining fragments of natural ecosystems on eastern Vancouver Island and the adjacent Gulf Islands. Responsible development regarding ESAs is suggested within the management recommendations of this *SEI.* This is significant because this study was completed in 1997, before the provincial government enacted legislation to allow municipalities to designate EDPAs. This inventory has been supplemented with local knowledge. The inventory is used to create an ESA map to designate upland EDPAs, the areas known as DPA2 sites.

2.2.3 Relationship between land, ESAs, and EDPAs: Nanaimo's EDPA mapping is specific. The EDPA mapping demarcates ESAs so that a small portion of the area is caught under the DPA2 designation. This can be contrasted with Kelowna's EDPA designation, which places blanket coverage over the majority of the municipality. For a map that designates the EDPA boundaries in Nanaimo, see Appendix B: *Nanaimo EDPA Map*. Nanaimo also provides a GIS mapping service that identifies the type of ecosystems that triggers an EDPA designation.[22]

2.2.4 Activities caught by EDPAs: EDPAs are triggered by proposed development. Nanaimo provides an exhaustive list of what constitutes development. As a foundation, development means any activity referred to in s. 489 of the *Local Government Act*. Additionally, development for EDPAs include: removal, deposit, or distribution of soils; removal, alteration, disruption, or destruction of vegetation, creation of non-structural impervious or semi-impervious surfaces; construction of roads, trails, docks, wharves, and bridges; development of utility corridors; expansion of existing landscaping; provision and maintenance of sewer and water services; and subdivision of land where there are potential impacts to the ESA.[23]

2.2.5 Exemptions to the EDPA: Nanaimo provides only five exemptions to the requirement for a permit within EDPA: construction outside of a buffer zone or ESA, development within the agricultural land reserve, hazardous tree cutting, emergency procedures to prevent or control forest fire, flooding, or erosion emergencies, and public works and services.[24]

2.2.6 Challenging the EDPA designation: Nanaimo does not include a provision that allows an applicant to challenge the EDPA designation.

2.2.7 Development on an EDPA: Nanaimo requires that a QEP clearly identifies ESAs in the parcel of land being developed. In this EDPA scheme, if an ESA covers a portion of the land, the entire parcel of land is marked as an EDPA. The QEP's job is to describe

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[23] Nanaimo EDPA *supra* note 19 at 142.

[24] *Ibid* at p 181.

the location and coverage of the ESA, and create a development plan that does not affect these areas. The QEP must also determine appropriate buffers to maintain the ESAs, and include recommendations for mitigation measures. The applicant pays for this assessment. The Director of Community Development shall determine whether, and to what extent, further development approval information will be required.[25]

If further information is needed, it may require the following assessments: a site plan; site profiles and cross sections that demonstrate conditions prior to disturbance and anticipated post-development conditions; a site inventory that comments on ecosystem classification and recommends current best practices for the ecosystem; a background analysis of the site; a description of the proposed development; an assessment of the impact of the proposed development; recommendations to manage the impacts of development; proposed mitigation measures and their anticipated effectiveness; and any recommended monitoring requirements to ensure proposed activities are properly carried out.[26]

2.2.8 Compliance measures during development: The guidelines list measures of compliance regarding ESAs and buffer zones. Any development in an EDPA designated area requires permanent fencing to protect the ESA and its buffer, and monitoring of the site by a QEP during construction. The development must not occur during sensitive life cycle times, and wildlife corridors and significant trees must be demarcated. Additionally, the City may require revegetation and restoration as a mitigative measure to development.[27]

2.2.9 What is special about Nanaimo: The City of Nanaimo clearly describes the types of assessments that may be required to properly inform the City as to the conditions of the area under development when granting a development permit. The assessment by the QEP is thorough, which allows for a proper appraisal of the area, and a proposal that reflects the complete findings of the report. Furthermore, the potential for ongoing monitoring acts as an enforcement mechanism to assure the EDPA conditions are followed throughout the development process.

2.3. City of Kelowna EDPA Regime

The City of Kelowna has embedded their EDPA scheme into the OCP under chapter 12: Natural Environment DP Guidelines. The City revised its OCP in 2012.

2.3.1 Main areas of protection: The City of Kelowna recognizes both riparian and terrestrial ecosystems in their EDPA. The terrestrial ecosystems broadly encompass areas such as old coniferous forests, coniferous woodlands, grasslands, and sparsely vegetated ecosystems.[28]

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[25] *Ibid* at p 164.

[26] *Ibid* at p. 165-166.

[27] *Ibid* at p 139, Guideline 8.

[28] City of Kelowna, Official Community Plan (2012) "Chapter 12: Natural Environment DP Guidelines" at 12.2 online: http://apps.kelowna.ca/CityPage/Docs/PDFs/Bylaws/Official Community Plan 2030 Bylaw No. 10500/Chapter 12 - Natural Environment DP Guidelines.pdf [Kelowna EDPA]

2.3.2 Identification markers: The ecosystems that are protected under the EDPA regime have been identified through mapping inventories commissioned by the City, and through partnerships with provincial and federal initiative.

2.3.3 Relationship between land, ESAs, and EDPAs: In looking at the Kelowna Natural Environment DP map (Map 5.5), a great deal of land is covered by the natural environment designation. Interestingly, the majority of the EDPA designation is for the preservation of surface and groundwater. The precise ecosystem feature that justifies and triggers the EDPA on any specific property is not depicted on the map, instead it is available from the City of Kelowna when applying for a development permit. In other words, the applicant cannot decipher what environmental element triggers a designation on their land; it is the City of Kelowna that shares the nature of the designation with the applicant. To view Kelowna's Natural Environment DP map, see Appendix C: *Kelowna EPDA Map.*

2.3.4 Activities caught By EDPAs: The Kelowna OCP identifies the following properties as requiring a development permit to address the natural environment and water conservation guidelines: subdivision of land; alteration of land, including, but not limited to clearing, grading, blasting, preparation for or construction of services, and roads and trails; drilling a well; or construction of, addition to, or alteration of a building or structure.[29]

2.3.5 Exemptions to the EDPA: A Natural Environment Development Permit will not be required when: a covenant effectively protects the entire ESA; a report by a QEP demonstrates that the proposed development will have no significant negative impacts to the ESAs; the activity relates to removal of hazardous and beetle kill trees; the development activity is on Crown Land, and is conducted under the auspices of the province; the actions are necessary to prevent immediate threats to life or property; or the activity is related to agricultural farm practices.[30]

2.3.6 Challenging the EDPA designation: The landowner has an opportunity to exempt their land from the EDPA designation by hiring a QEP to prepare a report that demonstrates and concludes that the land in question is not environmentally sensitive, and the natural feature is no longer present due to previously approved development, and that it cannot be restored. This exemption is contingent upon the City of Kelowna accepting the report.[31]

2.3.7 Development on an EDPA: The guidelines for EDPAs in Kelowna are explicitly discretionary, and recognize that not all conditions will apply to all DP areas. The guidelines provide enumerated recommendations to protect different 'natural environment' concerns. For a complete list of the guidelines, see sections 12.1-12.12 of the Natural Environment DP Guidelines.

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[29] *Ibid* at 12.1.

[30] *Ibid* at 12.3.

[31] *Ibid* at 12.3 (B)

There are two management practices worth noting within these guidelines. The first management practice recognizes the importance of connectivity in relation to biodiversity.[32] This allows for a broader understanding of what areas are to be protected, in order to repair fragmented ecosystems. The second interesting management practice is the option of requiring performance bonding.[33] This provision allows for the City, at their discretion, to require the applicant to submit a cost estimate of the total cost of rehabilitating and restoring the ESA they purport to develop. The applicant must provide this financial security to the City prior to the issuance of approvals of any building or site disturbance. The bond does not act as permission to alter an ESA. Rather, it safeguards against the event that an ESA, despite following protocol, is harmed during development. The City can use the bond to restore the ESA.

2.3.8 Compliance measures during development:
Kelowna has clear and complete compliance measures set out in their EDPA Guidelines. These compliance measures are prescribed at the discretion of City staff, upon consideration of the QEP's assessment report. The guidelines speak to different areas of environmental concern and include best management practices regarding: biodiversity, habitat management, buffers, vegetation, urban development, soil disturbance, erosion control, water and drainage, groundwater, fill, ESAs, riparian areas, mitigation, ongoing maintenance, and monitoring.[34] The language of the different provisions in the guidelines reflects the wide spectrum of the level of compliance with the best management practices. This language includes action words like "protect," "require," "prohibit," and "ensure." Alongside this strong language, some provisions soften the compliance with language such as "encourage," "strongly discourage," and "minimize." This allows for decision-makers to exercise discretion to ensure that the permit conditions can support the ecological values or connectivity on the property upon which development is being proposed.

2.3.9 What is special about Kelowna: There are four interesting considerations that Kelowna's EDPA regime offers.

First, the regime and guidelines that Kelowna provides are highly discretionary. This creates a greater responsibility on both the applicant and the City to tailor the EDPA provisions to the property being considered. The discretionary nature of this is found in the preamble to the guidelines, which recognizes that not all guidelines will apply to all development permits, which allows for conditions to be applied as appropriate.

The second interesting consideration helps to justify the highly discretionary nature of the EDPA regime. The Kelowna Natural Environment DP Map illustrates the vast amount of land that is caught under this DP regime. The boundaries are not as clear as other municipal EDPA maps, and the EDPA applies to more land. The map also does not discern between the different justifications for prescribing a site as belonging to the EDPA. It reads that the designation may include any combination of the following: water courses, sensitive ecosystems, sensitive drainage areas, and vulnerable groundwater

[32] *Ibid* at 12.4 (Guidelines 1.1-1.2)
[33] *Ibid* at 12.12
[34] *Ibid* at 12.1-12.12

aquifers. The liberal designation is complemented by the discretionary guidelines. Together, these essentially require the applicants to consider the nature of their property, and to propose development that accommodates the natural value of their property.

The third consideration is the discretionary use of performance bonds as collateral to development. The guidelines allow for the requirement of financial security to safeguard against contravention of conditions laid out in a development permit. This is an effective tool in addressing non-compliance with the EDPA. Most often, these bonds are in place to ensure that damaged areas are fixed. Bonds are a tool to repair damage, generally in the form of re-landscaping. If there is non-compliance, but no damage has yet to arise out of the non-compliance, the City may issue a fine under an appropriate regulatory bylaw, and may revoke a permit until compliance can be assured.

The final consideration is the inclusion of groundwater in the Natural Environment DP scheme. Further research would need to be conducted to explore to what extent the DP conditions would apply to areas designated to protect groundwater.

2.4. Regional District of Central Okanagan EDPA Regime

The Regional District of Central Okanagan ("Central Okanagan") is divided into four different sub-regional OCPs. These are: Brent Road/Trepannier OCP ["Brent Road"], Ellison OCP, Rural Westside OCP, and South Slopes OCP. Each sub-regional OCP contains its own EDPA regime for that specific sub-region. There is much consistency between the EDPAs within these four OCPs, and the four OCPs are in the process of being harmonized. Accordingly, this report will group the four regimes together, and note when a provision in one OCP differs from the others.

2.4.1 Main areas of protection*:*

The four EDPA regimes largely prescribe certain coniferous woodland, grassland, sparsely vegetated, and matured forest ecosystems as sensitive ecosystems. The justification behind these designations is to protect the natural environment, its ecosystems, and biological diversity.[35]

[35] Regional District of Central Okanagan "Brent Road/Treppanier Official Community Plan" (2012) at *Appendix II: Sensitive Terrestrial Ecosystems DP and Guidelines* 86. online: http://www.regionaldistrict.com/media/19957/Schedule A - At First Reading.pdf [Brent Road EDPA]; Regional District of Central Okanagan "South Slopes Official Community Plan" (2012) at *Appendix II: Sensitive Terrestrial Ecosystems DP and Guidelines* 77 online: http://www.regionaldistrict.com/media/20787/South Slopes OCP Schedule A.pdf [South Slopes EDPA]; Regional District of Central Okanagan "Ellison Official Community Plan" (2014) at *Appendix A-8: Sensitive Terrestrial Ecosystem Development Permit Design Guidelines* online: http://www.regionaldistrict.com/media/20113/EL_OCP_Appendices.pdf [Ellison EDPA]; Regional District of Central Okanagan "Rural Westside Official Community Plan" (2014) at *13.3: Terrestrial Ecosystem Development Permit Areas* 75 online: http://www.regionaldistrict.com/media/48752/ConsolidatedRuralWestsideOCPBylaw1274.pdf [Rural Westside EDPA]

2.4.2 Identification markers: The four EDPA regimes depend on the Central Okanagan Sensitive Ecosystem Inventory (SEI).[36] This SEI was created in 2001, updated in 2009, and revisited in 2011 in order to fill the gaps. The inventory creates very broad maps, which are used to flag ESAs when development is being considered on certain lands.

2.4.3 Relationship between land, ESAs, and EDPAs: The four regions provide separate maps that illustrate designated areas. This section will speak to the area covered by each region.

2.4.3.1 *Brent Road:* A large portion of the Brent Road regional area is designated as EDPA. As in the Kelowna OCP, this requires the applicant to identify the type and classification of ESA on their property. To view Brent Road's Terrestrial Environment DP map, see Appendix D: *Brent Road EPDA Map.*

2.4.3.2 *South Slopes:* Of the four OCPs, the South Slopes map designates the least amount of land as an EDPA. There is a concentration of sensitive terrestrial ecosystems alongside Okanagan Lake, leading to pockets of designated protected ecosystems in areas that recede from the shorefront. To view South Slopes Terrestrial Environment DP map, see Appendix D: *South Slopes EPDA Map.*

2.4.3.3 *Ellison:* We see much of Ellison's boundary caught within the "Sensitive Terrestrial Ecosystem DP" map, which requires the developers to consider and accommodate the environment upon which they are proposing development.

2.4.3.4 *Rural Westside:* The Rural Westside map encompasses the majority of the shoreline, which is protected under this regime.

For more detail on the type of ecosystem designated in specific areas, the Regional District of Central Okanagan provide public access to a GIS mapping system that layers the SEI designation on the map.[37]

2.4.4 Activities caught By EDPAs: The different OCPs provide different triggers for development permitting. In Brent Road, permitting is required for any development or alteration to land.[38] The Ellison OCP triggers permitting with an EDPA for development that requires a building permit on designated land, as set out in the district maps. Additionally, Ellison requires a development permit for any parcel of land that is 8 hectares or larger that is being altered or subdivided. [39] Rural Westside and South Slope do not define what activities trigger a development permit within an EDPA.

2.4.5 Exemptions to the EDPA: Activities exempted from development permitting under the EDPA regime are consistent between regimes. These activities include: land in

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[36] Ministry of British Columbia "Sensitive Ecosystems Inventory: Central Okanagan SEI" online: http://www.env.gov.bc.ca/sei/okanagan/

[37] Regional District Central Okanagan Mapping System: online: http://www.rdcogis.com/GIS_App_public/index.html

[38] Brent Road EDPA *supra* note 35 at 87.

[39] Ellison EDPA *supra* note 35 at section 18-13 point 7.3.

the ALR; removal of diseased or hazardous trees; ecological enhancement and site restoration; land that is already protected under a restrictive covenant; development that does not alter the "footprint" of the building; and development that a QEP has agreed will not affect the ESA.[40]

2.4.6 Challenging the EDPA designation: All four regimes allow for challenging the EDPA designation. Under both the Ellison and Brent Road EDPA regimes, a QEP may identify the precise area of a sensitive terrestrial ecosystem, and protect that area from development through other means in order for the proposed development to be exempt from the EDPA designation.[41] Rural Westside differs slightly in that the QEP must prove that the development that previously occurred on the site has effectively extinguished any ecosystem attributes worth protecting.

2.4.7 Development on an EDPA: The EDPA Guidelines under the four OCPs are in the process of being harmonized to ensure consistency between sub-regions. This section will collectively describe the EDPA Guidelines, and flag differences among them.

The general guidelines of the regimes require a QEP to prepare an environmental assessment, to identify sensitive terrestrial ecosystems. Once these systems are identified, the QEP must delineate buffers around the systems, and ensure connectivity between ecosystems if possible, to not create fragmented ecosystems. Additionally, the QEP must consider methods of conserving trees, nesting habitats, water quality, and critical habitat. Within these general guidelines, there is also a provision that recognizes that if disturbance of critical habitat cannot be mitigated, it may be acceptable to undertake environmental improvements off the property, with the intention of no net loss of critical habitat. This off-site restoration is uncommon, as it requires the applicant to own multiple properties. What is more common is for onsite restoration or reparation to act as a condition if development infringes on an ESA or buffer zone.[42] The one exception to these general guidelines is in the Rural Westside OCP, which does not require a QEP to prepare an environmental assessment.

Once an area is identified as a sensitive terrestrial ecosystem, the ESA stratification system is applied by either a QEP or the environmental planner, to determine the environmental sensitivity rating. There are four classes of ESA valuations in this system, ESA1 being very high, and ESA4 being low. Areas in ESA1 are given high priority protection, with an expected 100 percent retention rate. Areas in ESA4 offer little to no value to overall biodiversity, and generally have experienced anthropogenic disturbances with little possibility of rehabilitation. It is on these ESA4 sites that responsible development is promoted. This ESA stratification is embedded in the OCP for Brent Road and South Slopes.[43] Although the ESA stratification is not embedded in Ellison and

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[40] Brent Road EDPA *supra* note 35 at 87; South Slopes EDPA *supra* note 35 at 78; Ellison EDPA *supra* note 35 at 7.3.1-7.3.8; Rural Westside EDPA *supra* note 35 at 76.

[41] Brent Road EDPA *supra* note 35 at 87; Ellison EDPA *supra* note 35.

[42] Brent Road EDPA *supra* note 35 at 89; South Slopes EDPA *supra* note 35 at 80; Ellison EDPA *supra* note 35 at 1; Rural Westside EDPA *supra* note 35 at Appendix 3 p 3.

[43] Brent Road EDPA *supra* note 35 at 92; South Slopes EDPA *supra* note 35 at 83.

Rural Westside's Guidelines, the same stratification system is used internally to attach conditions to the DP.

This stratification system is then supplemented with objectives and guidelines for how to specifically protect different types of ecosystems. These specific provisions include guidelines on grasslands, sparsely vegetated cliff and rock ecosystems, and coniferous woodlands and mature forests. The specific guidelines are a reflection of the SEI recommendations from which the terrestrial ecosystem EDPAs are based.

2.4.8 Compliance measures during development: All four of the regimes may require measures such as fencing around environmentally sensitive areas, protection of trees and root systems, and compliance with sound management plans during development. There is no mention in any of the EDPAs about ongoing monitoring by a QEP during development.

2.4.9 What is special about Central Okanagan: There are three interesting management practices that arise out of these regimes.

The first is the provision within all four regimes that allows offsite restoration if onsite mitigation is not an option. This supports a no-net loss regime. However, in practice this is uncommon, as it requires the applicant to own multiple properties that are of the same ESA stratification.

The second noteworthy practice is the stratification of ESAs found in Brent Road and South Slopes Guidelines. This stratification is useful in discerning the level of protection the EDPA will offer to the land, as there is a generous amount of land covered by the EDPA mapping, and how discretion within the EDPA regime should be exercised.

The final interesting management practice within these regimes is the inclusion of specific guidelines to address specific ecosystem types. The enumerated types of ecosystems reflect the shared SEI ecosystem classification that the EDPA regimes use as the identification marker. This is helpful in both tailoring the EDPA to the specific terrestrial ecosystem, and allowing for consistent practices pertaining to different areas but the same ecosystem types across the Central Okanagan.

2.5 Comparative Analysis of EDPA Features

The following section compares specific features of the EDPA regimes and their implementation across the local governments. The comparison are displayed in a table format, followed by a summary description of the findings.

2.5.1 Activities caught by EDPAs

	Subdivision	Construction of, addition to, or alteration of a building	Removal, alteration, disruption, or destruction of vegetation	Creation of non-structural impervious or semi-impervious surfaces	Removal, deposit, or disturbance of soils	Construction of roads, trails, docks, wharves, or bridges	Provision and maintenance of sewer and water services	Development of utility corridors	Drilling a well	Clearing, grading, blasting, preparation for or construction of services
Saanich	✔	✔	✔	✔	✔	✔	✔			
Nanaimo	✔	✔	✔	✔	✔	✔	✔	✔		
Kelowna	✔	✔				✔			✔	✔
Central Okanagan	✔	✔								✔

Both Kelowna and Central Okanagan Regional District do not provide exhaustive lists of what accounts for "alteration of land." This non-exhaustive list can be challenging for the applicant, as the applicant is left uncertain as to whether their proposed activity triggers the need for a development permit under the EDPA. All of the local governments are taking section 489(c), which prohibits alteration to land, very seriously. All the local governments protect the soil and vegetation, and respond to challenges to this protection through exemptions. For example, an EDPA is triggered by the alteration or disruption of vegetation, yet most municipalities exempt the maintenance of existing landscaping from the regime. Thus, alteration to land is read very rigidly, and the rigidity is addressed through exemptions to acceptable alterations.

2.5.2Exemptions

	Removal of hazardous trees	Maintaining existing landscaping and structures	Removal of invasive plants/ planting native plants	Restoration	Slope Stabilization/ Erosion Control	Alteration within established footprint	Agricultural land reserves	Emergency Procedures	Covenant	Public Works
Saanich	✔	✔	✔	✔	✔	✔	✔		✔	✔
Nanaimo	✔	✔		✔			✔	✔		✔
Kelowna	✔						✔	✔	✔	✔
Central Okanagan	✔	✔		✔	✔	✔	✔		✔	

Summary on Exemptions: By charting out the exemptions from the different guidelines, we see that there is general consistency across the local governments. The chart identifies key activities that generally support the objectives of the EDPA designation. Essentially, proposed development will not require a development permit so long as an ESA or buffer area is not being encroached upon, or there is no net loss to habitat. Proposed development to mitigate concerns of erosion, invasive species, and slope stabilization will also be exempt, alongside actions taken to align with emergency procedures. Two activities are exempt that may actually impact the health of the ecosystem: land in the agricultural land reserve and activities carried out through public works. However, both of these exemptions are justified as a necessary activity to promote other public interests, and the guidelines encourage mitigation of adverse effects to ecosystems within these activities

2.5.3 Challenging the EDPA designation

Saanich	✔
Nanaimo	
Kelowna	✔
Central Okanagan	✔

Alongside the provisions to challenge the EDPA designation, the local government typically allow development in an EDPA, so long as a QEP assures that the proposed development will not affect or encroach upon the EDPA values. Some allow development within the EDPA buffer but not within the ESA itself unless it is an exempt activity or shown to protect the environment. Some also 'trade' previously unmapped areas for mapped areas in hardship situations.

Summary on Challenging the EDPA Designation: By containing a provision that allows the applicant to challenge the EDPA designation, local governments are acknowledging that mapping may contain errors. This is especially true because of the scale at which the SEI mapping is carried out. Just as all the local governments recognize the possibility to add individually identified ESAs into the EDPA, so too should there exist the option to exclude areas from the EDPA regime.

2.5.3 Language of Connectivity and Fragmented Ecosystems

Saanich	
Nanaimo	
Kelowna	✔
Central Okanagan	✔

Summary on Connectivity and Fragmented Ecosystems: Kelowna and Central Okanagan are the only local governments that make clear the importance of avoiding fragmented ecosystems through protecting connectivity corridors. It will be interesting for Surrey to publish their EDPA, as within Surrey's Ecosystem Management Study (EMS), there is a focus on Green Infrastructure Networks (GIN).[44] The GIN promotes stratification of ecosystems based on their usefulness to overall ecosystem health. The GIN uses the language of hubs (large contiguous areas of complex ecological process); sites (smaller areas of natural vegetation); corridors (pathways that offer species and ecological process connection between hubs); and matrixes (the rest of the land base with varying ecological value.) The GIN is an important model for ecosystem assessment as it places of principle importance the notion of connectivity and greater ecosystem health. It will be worth looking into the role of the GIN on Surrey's EDPA regime, once published.

[44] City of Surrey "Ecosystem Management Study" (2011) online: http://www.surrey.ca/city-services/1332.aspx

2.5.4 EDPA Compliance Measures

The chart flags compliance measures and tools within different EDPAs. These measures may not be required or appropriate for each development within an EDPA. Depending on the QEP report, decision-makers will apply the measures on a discretionary basis to ensure that the specific needs of the land and ecosystem are being addressed.

	QEP report	Demarcation of Wildlife Corridors/Trees	Fencing around ESAs	Ongoing Monitoring	No Development during Sensitive Life Cycles	Tiered System of ESAs	Bond	Offsite Restoration	Specific Guidelines for Types of Ecosystems
Saanich	✔	✔	✔	✔	✔		✔		
Nanaimo	✔	✔	✔	✔	✔				
Kelowna	✔		✔				✔	✔	✔
Central Okanagan	✔	✔	✔			✔		✔	✔

Summary of EDPA Compliance Measures: This chart illustrates general consistency in available compliance measures between local governments. The compliance measures can be parsed into two groups: assurance and enforcement. Assurance measures are conditions that ensure the ESA is protected during approved development. This assurance begins with identifying the ESA in the QEP report, and continue to protect the ESA through fencing, demarcation of corridors and trees, and restricting development during sensitive life cycles, particularly for nesting sites. The assurance measures are fairly consistent between municipalities, as they are all conditions that support the objective of ecosystem health on a practical level. Enforcement measures are used as a safeguard against non-compliance. These include ongoing monitoring and security bonds. It seems as if these enforcement measures are not often used. In speaking to staff with the City of Kelowna about security bonds, the environmental planner explained that the security bond is used to ensure offsite restoration. Thus, it acts as an enforcement tool to ensure compliance with offsite promises, rather than compliance with onsite mitigation efforts. The ongoing monitoring is also rarely used, because of the cost to the applicant.

The final consideration where municipalities diverge is in the use of ESA stratification systems. The stratification system is helpful in setting a consistent foundation for the extent of discretion that municipalities can exercise concerning applications. If an area warrants higher protection, the discretion in development permitting will be more restricted than an area that is not ecologically significant. Although the stratification system is only published in the guidelines of two of Central Okanagan's OCP, both the Cities of Kelowna and Nanaimo use a similar stratification system when internally assessing the EDPA. Such a stratification system may additionally need to consider and reflect the importance of connectivity corridors between highly significant ecosystems. This means that although an area may score low on a stratification system, it warrants a high level of protection because it serves the purpose of connecting fragmented ecosystems.

2.6 Concluding Remarks

Comparison of the four local governments reveals a general consistency between the objectives, exemptions, and compliance measures. Yet there are two divergences worth making note of.

First, the local governments diverge on the amount of land captured under the EDPA designation, and the discretion in assigning conditions when issuing development permits. Regimes like Kelowna are designated much more broadly, and consequently the level of discretion is much higher, compared to the EDPA regimes of Nanaimo and Victoria.

Related to this, it is clear that in terms of application, all of the other regimes rely much more heavily than Saanich on landowner verification of ESA extent and values. This is to say that in looking at development application and compliance measures, the applicant is expected to do more legwork in Kelowna, Central Okanagan, and Nanaimo, than is expected in Saanich. This is largely because Saanich has completed significant mapping and categorization of ESAs in their district, this burden does not fall on the applicant.

What is lacking from all the regimes is the language of connectivity. Connectivity is inherent in the justification of EDPA designations, and is critical in effectively protecting ESAs, however existing EDPA regimes lack language and guidelines around connecting fragmented ecosystems. It will be instructive to see how the language of corridors, hubs, and sites play into the Surrey EDPA regime for promoting the goal of connectivity.

Part 3: EDPAs in Caselaw

3.1 Introduction

This part details the law of EDPAs as developed via judicial consideration by the courts. It reviews legal challenges to EDPAs as well as other development permit area (DPA) regimes, where relevant, and development permits in general. The provisions in the *Local Government Act* that grant authority to local governments to create DPA regimes changed in number as of January 1, 2016. For this reason, the case law in this report is all in relation to the former numbering of the *Act*. However, the changes in section numbering have not changed the law.

The first section reviews challenges to DPA regimes as a whole, including challenges to the justification of DPA regimes. The second section examines challenges to DPA guidelines. The third section evaluates challenges to DPA permits, and the fourth section explains remedies.

Before canvassing the case law on EDPAs it is important to note the modern approach to the interpretation of municipal statutes, as summarized by the Supreme Court of Canada in *United Taxi Drivers Fellowship v Alberta*:

> The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes.[45] [citations omitted]

This broad interpretation approach is reflected in the *Community Charter* at section 4(1):

> The powers conferred on municipalities and their councils under this Act or the *Local Government Act* must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.

[45] 2004 SCC 19 at para 6.

3.2 Validity of the DPA

In order for an EDPA to be valid, the regime must provide a justification that aligns with the purposes set out in s 488(1) of the *Local Government Act*. In other words, if a local government enacts an EDPA regime, it must justify the enactment as protecting the natural environment, biodiversity, and ecosystems. This section will consider how the courts have treated challenges to the justification and grounds for designation of DPA designations.

3.2.1 Grounds for designation

The Official Community Plan (OCP) should always clearly state the basis under s 488(1) on which the DPA is designated.[46] Land can be included in more than one DPA, but in order for a DPA to apply to land it must be in the area designated.[47] If it is not in the DPA, conditions cannot be imposed by development permit.[48]

Land may be designated by several methods. It is generally designated by a map provided in the plan.[49] Issues can arise as to whether a particular development is inside the permit area when either the designations do not follow legal boundaries or the scale of the maps is such that the width of the line describing the boundary represents a considerable distance on the ground.[50] This uncertainty or vagueness will be addressed in the next subsection. If mapping is based on another more detailed mapping source, the interpretive provisions should identify the source, so that it can be consulted to resolve disputes.[51] Some OCPs designate areas by reference to the local government's zoning map. As Buholzer notes, this approach is risky because it:

> invites a challenge to the validity of the DPA designations effected by amendment of the zoning bylaw… on the grounds that the local government has by this device avoided procedural requirements for OCP amendments. Therefore, it is preferable that the question of whether a development permit is required be capable of resolution by examining the plan and such incorporated material, without reliance on the exercise of discretion by a local official administering the plan.[52]

[46] William Buholzer in association with the Planning Institute of British Columbia, *British Columbia Planning Law and Practice*, (Markham, ON: LexisNexis c2001)(loose-leaf) issue 31, 3/14 . at §11.33. ["Buholzer"]
[47] *Ibid*.
[48] *Cowichan Valley (Regional District) v Schon Timber Ltd*, [1994] BCJ No 3083, 25 MPLR (2d) 249 (SC).
[49] Buholzer *supra* note 46 at §11.37.
[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*

3.2.2 Vagueness of the designation boundaries

Uncertain boundaries for the DPA were at issue in *Denman Island Local Trust Committee v Ellis [Ellis]*, where the landowner attacked the bylaw designating the DPA as too vague.[53] This decision provides a test for vagueness and applied it, upholding the designation boundaries. In this case, a portion of the boundary did not follow a surveyed or natural boundary, and if scaled as indicated on the OCP map, the width of the boundary was about 10 metres on the ground. The unauthorized land alteration in question had been occurring on a portion of the property that was not proximate to the boundary, however the defendant in that case argued that the lack of precision in translating the map to the ground rendered the DPA bylaw vague, and therefore unenforceable. The court first reviewed the leading caselaw on how precise a law must be in order to escape being unenforceable by reason of vagueness.[54] It held that laws must provide adequate notice of a zone of risk and provide a principled basis for legal debate as to whether conduct falls within or outside the prescribed zone. The court held that the standard for precision is not particularly exacting nor of optimal clarity. It also held that while the DPA could have designated the boundaries with much greater precision than 10 metres, such as using metes and bounds descriptions or legal surveys, the bylaw establishing the boundaries of the DPA met the test for vagueness and was therefore not void.[55]

3.2.3 Authority for EDPA designation

The *Local Government Act* allows for the designation of EDPAs for the protection of the natural environment, its ecosystems and biodiversity. On a plain reading of that language, the scope for designating EDPAs is broad. One older case has interpreted this wording narrowly to relate to "specified natural features or areas",[56] relating to "geographical or topographical features such as bluffs, gullies and rock outcroppings, and discreet areas such as beaches, streams, glades and bogs," but not to forest cover of significant tracts of land.[57] However, this interpretation is called into question. Buholzer comments that "this approach seems to confuse the power to impose permit conditions, which may clearly only be exercised in relation to such features or areas, with the power to designate the areas within which such a particular feature might be identified and singled out for protection through the DPA application process."[58] Indeed, the dissent in the same case interpreted the words "natural environment, its ecosystems

[53] *Denman Island Local Trust Committee v Ellis*, (2005) BCSC 1238 [Ellis]
[54] *Ibid* at paras 45-48.
[55] *Ibid* para 48-49. Buholzer's reading of this case at §11.37 it at odds with the author's. Buholzer reads the decision as saying that the court only decided the DPA boundary was not impermissibly vague because the unauthorized alteration was not proximate to the boundary. He opines that had the alteration been occurring near the uncertain boundary, the local government's enforcement action would likely have failed.
[56] *Denman Island Local Trust Committee v 4064 Investments Ltd*, 2001 BCCA 736, 208 DLR (4th) 425.
[57] *Ibid* para 81.
[58] Buholzer *supra* note 46 at §11.24.

and biodiversity" in sections 920(1)(d) and 7(b) broadly. It held that the words included trees and treed areas such as forests were clearly within the plain meaning of the words and as such the committee had the authority to regulate trees on private lands.

3.2.4 Justification for designation

Some of the purposes for DPA designation as set out in s 488(1) are described in objective terms, and a decision to designate areas for those purposes are not likely to be open to questioning whether it was an appropriate use of the designation power. Some have a more subjective basis, and as such have the potential to be questioned. [59] The OCP must describe the special conditions that justify the designation. This usually consists of a simple statement. For example, a DPA to protect development from hazardous conditions can state that the area is in the flood plain of a named river, and so the objective of the flood plain designation is to limit the potential property damage and personal injury that could result from a flood.[60]

In *Valentine Lands Corp v Gibsons (Town),*[61] the plaintiff unsuccessfully challenged the justification for the DPA that was designated as both an EDPA and for the protection of development from hazardous conditions. The test for designation and justification looked at the evidence before the council: there must have been evidence before council that would convince a reasonable council person that the areas designated were indeed subject to one or more of the enumerated perils (ie. lands that required protection of the natural environment, or protection of development from hazardous conditions) before council made that determination. In this case, there was evidence that the OCP designations and the companion tree cutting permit area were enacted on the basis of "local empirical knowledge" of the nature of the land in the area. Therefore, there was some evidence that would have justified a reasonable council person to have come to the conclusion that those areas may have been areas that were subject to development hazards.

3.2.5 Conflict with the Agricultural Land Commission

In *Denman Island Local Trust Committee v Ellis* ("*Ellis*"),[62] the DPA included land that was also designated under the agricultural land reserve. The landowner argued that the DPA had effectively prohibited farm uses of the subject lands, which is contrary to s 2(2) of the *Agricultural Land Reserve Use, Subdivision and Procedure Regulation*. The court held that DPA regimes that require a permit to be obtained prior to activities being undertaken and that may impose conditions are regulatory, not prohibitory, in nature and are therefore permitted by s 2(2). The DPA therefore did not conflict with the Agricultural Land Commission or

[59] Buholzer *supra* note 46 at §11.34.
[60] Buholzer *supra* note 46 §11.38.
[61] *Valentine Lands Corp v Gibsons (Town),* [1992] BCJ No. 272, 9 MPLR (2d) 69 (SC).
[62] Ellis *supra* note 53 note

reserve.[63]

3.3 Guidelines

The *Local Government Act* s 488(2) requires a local government to establish guidelines indicating the manner by which the special conditions or objectives, in this case environmental, will be addressed. They guide the establishment of development permit conditions and serve as the public's and property owner's primary source of information as to what conditions local government staff and council may impose when a development permit application is made.

The court in *48 Fr Hwy Land Ltd v Langley (Township*")[64] ("*Langley*") summarized a guideline as a "directing principle" to land owners who seek to develop their properties. In *Washi Beam Holdings Corp v West Vancouver (District)* ("*Washi Beam*"), the court held that there must be guidelines "respecting the manner by which the special conditions or objectives will be addressed."[65]

The court in *Rocky Point Metalcraft Ltd v Cowichan Valley (Regional District)*[66] ("*Rocky Point*") said the following about what constitutes a guideline:

> It is important to note that a "special condition" or an "objective" is not a guideline. A guideline directs how special conditions or objectives are met [citations omitted]. Guidelines tell landowners what they have to do to develop their property. This does not mean that guidelines must give precise direction; they can be broadly defined in order to give local governments flexibility to exercise their discretion on a case-by-case basis.[67]

Therefore, a guideline is to be differentiated from either a description of a special condition or an objective justifying the designation of a permit area.[68] The most essential thing is that the words used provide a guideline for land owners who seek to develop their property.[69]

3.3.1 Scope and Particularity of the Guidelines

The scope of guidelines will determine the extent of the local government's power to issue development permits: Their power to vary or supplement bylaws, impose requirements or conditions, or set standards may be exercised "only in accordance with the applicable

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[63] *Ibid* para 56.
[64] *48 Fr Hwy Land Ltd v Langley (Township*") [1999] BCJ No 1861, 4 MPLR (3d) 53 (SC) at para 40. [*Langley*]
[65] *Washi Beam Holdings Corp v West Vancouver (District)*[65] [1999] BCJ No 617, 2 MPLR (3d) 118 (SC). [*Washi Beam*]
[66] *Rocky Point Metalcraft Ltd v Cowichan Valley (Regional District*) BCSC 756, [2012] BCJ No 1043. [*Rocky Point*]
[67] *Ibid* at para 31.
[68] *Washi Beam supra* note 65 at para 40.
[69] See also *Doman Industries Ltd v North Cowichan (District)*, [1980] BCJ No 96, 116 DLR (3d) 358 (SC).[Doman Industries]

guidelines specified," per s 490(2) of the *Local Government Act*. The generality or specificity of EDPA guidelines in particular may depend on knowledge of site-specific natural sciences and the resources allocated to engage specialists to do this work.[70]

The level of particularity required in development permit guidelines was considered for the first time in *511784 BC Ltd v Salmon Arm (District)*.[71] The plaintiffs alleged that the District's guidelines were too general, vague, and uncertain. The plaintiffs further alleged the guidelines were discriminatory. However, the court found that the objectives and guidelines in the OCP must be sufficiently broad and lacking in precision in order to give Council the necessary flexibility to exercise its discretion on a case-by-case basis. The court held that the authority to issue development permits is a discretionary power, not a regulatory power, and the requirement for certainty and precision attaches only to regulatory powers. However, once a council has exercised its discretion to issue a development permit, the need for certainty is met in the requirements and conditions contained within the development permit itself. This preserves the discretionary nature of the development permit power, while the requirement that the Council give reasons for refusing an application ensures that the applicant is given clear direction as to how the Council considered the guidelines could be met. Also, the court rejected the allegation of discrimination on the basis that all discretionary powers are exercised in a discriminatory way; the exercise of discretionary power is only unlawful if the discretion is exercised in an improper discriminatory manner, that is for some improper purpose or on some irrelevant basis. There was no evidence in the case that the Council had discriminated for an improper purpose.[72]

Municipal governments must also be careful using mandatory language that a development permit must comply with the guidelines. This can perhaps be an unrealistic requirement since the application of development permit guidelines usually requires a certain amount of balancing of objectives, and trading off compliance with one guideline against compliance with another.[73]

The court in *Westfair Foods Ltd v Saanich (District)*[74] ("*Westfair Foods*") held that in respect to development permit applications, council is not exercising a policy or legislative function, but rather one of a quasi-judicial nature. To be acting judicially, council can only issue a development permit in accordance with the applicable guidelines specified in the OCP.[75] Therefore, in the case of mandatory language, a municipal council has the obligation to either: 1) establish clearly and in a manner open to public scrutiny that all the guidelines had been met; or 2) assuming the council has the jurisdiction to authorize a development permit even if

[70] Buholzer *supra* note 46 at §11.41.
[71] *511784 BC Ltd v Salmon Arm (District)* (2001) BCSC 245, 19 MPLR (3d) 232.
[72] *Ibid* at paras 44-45.
[73] Buholzer *supra* note 46 at §11.46.
[74] *Westfair Foods Ltd v Saanich (District)* (1997)BCJ No 331, 30 BCLR (3d) 305 (SC), affirmed, [1997] BCJ No 2852, 49 BCLR (3d) 229 (CA).
[75] See *Washi Beam*, *supra* note 65, at para 34; *Westfair Foods*, *supra* note 74 at para 17.

every guideline was not met, to address the issues of whether the guidelines were met and why directly and in a manner open to public scrutiny.

If the council fails to do either but approves the development permit, it has acted without jurisdiction.[76] These obligations are seen in *Loewen v Coquitlam (City)*,[77] where the guidelines required in mandatory language that development permits comply with all of the guidelines but the planner's report implied that the permit did not comply with some of the guidelines. The council approved the permit anyways. As the court summarised, "If as the advice logically suggests a number of the guidelines were not met, the application could not be consistent with the OCP requirement that the application be consistent with the guidelines."[78] The court therefore quashed the development permit because there was no evidence that the council had turned its mind to whether non-compliance with any guideline was acceptable. It therefore did not act in conformity with its obligation to act judicially before authorizing the development permit and therefore acted without jurisdiction.[79]

3.3.2 Guideline adequacy

Guidelines that simply reiterate the types of conditions that may be imposed by a development permit are not sufficient. The guidelines at issue in *Doman Industries Ltd v North Cowichan (District)* were essentially a restatement of the provisions of the *Municipal Act* (the relevant statute at the time) that authorized the council to provide for the issuance of development permits.[80] The court held that this was too vague and too indefinite and did not inform the applicant of the criteria that must be met in order to obtain a development permit. For this reason, along with others not related to guidelines, the court held that the bylaw was too uncertain so as to be unenforceable.[81]

The quality of the guidelines were also challenged in *Washi Beam*. They were found to be adequate, but only barely. The OCP designated the area as a DPA for several purposes, including to protect the character of the municipality, but no permit guidelines were stated as such. The guidelines were not included in the "Development objectives" section, as is often the case. The court noted that this section of the OCP was poorly drafted, confusing, and contained few guidelines.[82] However, it also found that the lack of a guideline section or a "Guidelines" heading was not necessary. It held that a guideline may exist without being referenced by usage of that term, within reasonable limits.[83] The most important feature is that the words

[76] *Loewen v Coquitlam (City),* [1999] BCJ No 2167, 5 MPLR (3d) 135 (SC) at paras 57-58.
[77] *Ibid*.
[78] *Ibid* para 51.
[79] *Ibid* para 56-58.
[80] Doman Industries *supra* note 69.
[81] *Ibid* at para 39.
[82] Washi Beam *supra* note 65 at para 46.
[83] *Ibid* para 39.

used provide a guideline for land owners who seek to develop their property.[84] In this case, the court found that there was an appropriate guideline in the OCP. The language "to foster compatibility of development by considering the impact of new construction on the views from adjacent properties," contained both an objective ("to foster compatibility") and a guideline ("by considering the impact ..."). Therefore, there was one appropriate guideline in the OCP, which was also referenced in the planner's report. On this basis, the council had evidence before it on which they might properly choose to exercise their discretion against issuance of the permit.[85]

As Buholzer notes, however, local governments should take a cautious approach and not take the leniency of the court in *Washi Beam* for granted. Courts may not want to sift through the contents of local bylaws searching for terms that they usually consider must be present. Guidelines should be clearly stated and identified as such in the plan. The precise wording of the guidelines should be approached cautiously.[86]

Guidelines may referentially incorporate standards set out in other sources such as technical or "best practices" documents. However, these other sources must provide clear direction to the landowner as to how the OCP objectives are to be met. In *Rocky Point*, the District's OCP had referentially incorporated the Environmental Guidelines of senior government agencies. The guideline in question provided that "[t]he latest best management practices for land development of the Ministry of Water, Land and Air Protection, and Fisheries and Oceans Canada should be respected." These management practices, contained in the Environmental Guidelines published in March 2006, span almost 200 pages (plus appendices) and contained extensive provisions related to community planning, site development and management, and development near environmentally valuable resources.[87] The court looked unfavorably upon the practice of incorporating an entire document of the magnitude of the Environmental Guidelines into the OCP, as it did not provide clear direction to a landowner as to how the OCP objectives are to be met. Nevertheless, the court examined the contents of the Environmental Guidelines and found that they provided the necessary authority for the local government to consider other groundwater users and whether there is a sufficient water supply when approving developments. This was held to be so despite the fact that the local government did not consider this guideline to be applicable at the time of the permit rejection.[88]

[84] *Ibid* para 40.
[85] *Ibid* para 47.
[86] Buholzer *supra* note 46 at §§11.45-11.46.
[87] Rocky Point *supra* note 66 at para 35.
[88] *Ibid* at paras 37-39.

3.4 Permits

Land owners must obtain a development permit before undertaking development. Section 489 of the *Local Government Act* lists the specific activities that cannot be undertaken without a permit. Development permits are binding on the local government as well as on the holder of the permit.[89] As Buholzer notes, consequences of the binding nature of development permits on local governments has not yet been explored in litigation. Development permits are clearly binding on the owner, as emphasized by s 501(2) that land must be development "strictly in accordance" with the development permit.

3.4.1 Permit application and scope

The local government issues a permit after authorization by resolution of the council or board and it sets out the conditions that are attached to the permit, including the amount of any security to secure the performance of the permit conditions.[90] The local government cannot lawfully issue the permit if the authorizing resolution is not adopted.[91]

Municipalities can delegate this to their members, committees or officials under s 154 of the *Community Charter*, either generally or in relation to particular classes of DPA applications, and subject to conditions. If delegated, the local government must provide an opportunity for the permit application to have the delegate's decision reconsidered by the council or regional board under s 490 [formerly s 920]. A procedure where the council passed a resolution specifying conditions that must be met "prior to" the issuance of a permit and authorizing a local government official to issue the permit was challenged in *Sierra Club of Canada v Comox Valley (Regional District)*.[92] The court held that this was not a delegation to the official of the council's power in relation to the permit because it is a purely administrative act to issue a permit once the conditions specified by the legislative body have been met.[93]

A development permit does not authorize future intended activities beyond those specifically permitted by the permit. The court in *Jones v Chemainus Properties Ltd* found that, contrary to the petitioner's claim, the intended future commercial use of a driveway was not relevant to the issuance of the development permit. If and when such circumstances arise, it is then open to the municipality to consider pursuing enforcement proceedings for breaches of the zoning

[89] Buholzer *supra* note 46 at §11.50.
[90] *Ibid* at §11.53.
[91] *Newson v Esquimalt (Township)* [1989] BCJ No 525 (SC).
[92] *Sierra Club of Canada v Comox Valley (Regional District*) BCSC 74, [2010] BCJ No. 93.
[93] *Ibid* at paras 39-40.

bylaws.[94]

3.4.2 The discretion of council and standard of review

The case of *0742848 BC Ltd v Squamish (District)*[95] ("*Squamish*") provides an excellent overview of the now established standards of review that pertain to the judicial review of permitting decisions. The discretion of municipal councils is limited when it comes to the decision to approve or reject a permit. *Squamish* reads: "In deciding whether to grant or refuse issuance of a development permit, the municipality must apply the Guidelines. It cannot act on the basis of extraneous concerns, outside the guidelines that it has set out in its own OCP."[96] The court in *Yearsley v White Rock (City)*[97]("*Yearsley*") summarizes several cases and concludes: "Because a landowner is entitled to know what the requirements to obtain a development permit are, these requirements cannot be based upon the likes or dislikes of individual council members who are elected from time to time."[98]

Where council has acted on considerations outside of the OCP guidelines, it has improperly assumed for itself an "undefined, uncontrolled an unpredictable discretion."[99] Therefore, the question of whether the Council's decision is based on extraneous concerns not coming within the municipality's guidelines goes to its jurisdiction. The standard of review is correctness and "no question of deference arises."[100] In *Yearsley* at para 27, the court applies the parametres defined in *Dunsmuir v New Brunswick*:

> A "jurisdiction" question includes whether the municipal council correctly applied objective guidelines under its OCP or whether it acted upon impermissible, extraneous, or irrelevant criteria. When applying the correctness standard, a reviewing court must not show deference to the reasoning process of the original decision maker. The court undertakes its own analysis to decide whether the determination was correct. If it disagrees with the decision, the court will substitute its own view and provide the correct answer.

By contrast, where "the council applies the Guidelines, courts have characterized the decision as being made within council's jurisdiction, to which deference is due; the standard is therefore reasonableness."[101] Council must apply the guidelines in an objective manner consistent with

[94] *579340 BC Ltd v Sunshine Coast (Regional District*), (2005) BCSC 1203, 45 BCLR (4th) 386.
[95] *0742848 BC Ltd v Squamish (District)* (2011) BCSC 747, 84 MPLR (4th) 1. [*Squamish*]
[96] *Ibid* at para 15.
[97] *Yearsley v White Rock (City)* BCSC 719, [2009] BCJ No 1102. [*Yearsley*]
[98] *Ibid* at para 28.
[99] *Ibid* at paras 25-28.
[100] Squamish, *supra* note 95 at para 17.
[101] Squamish, *supra* note 95 at para 18.

the zoning bylaws.[102] This is also stated in sections 478(2)(b) and s 490(3) the *Local Government Act.* The court will quash a resolution if it approves a development permit for a use that is not within the intentions of the zoning by-law. This was the case in *Douglas Developments Ltd v Surrey (City)*,[103] where the court quashed a resolution passed by a municipal council to approve a development permit not consistent with the zoning bylaw. On the other hand, where the council considers uncertain potential uses that are in fact permitted under the zoning bylaw, this constitutes an irrelevant consideration outside of the council's jurisdiction.[104]

3.4.3 Public concern and other issues outside of the council's jurisdiction

Reliance on public opinion is not a relevant consideration if it is not linked to legitimate factors within the zoning bylaw or the OCP guidelines.[105] Council is not bound by the views of neighbours or members of the public, especially if those views are not consistent with applicable zoning bylaws and the OCP guidelines.[106]

The exception to allowing public concern to stand as a relevant factor is found in *Rocky Point.* In this case the public concern was related to groundwater, which was the subject of one of the guidelines. Since the guideline provided for the consideration of the impact on the groundwater supply for other users, the public concern of other users was actually relevant. Overall, the court found that the council had directed its mind to water supply issues that were grounded in the guidelines, but also to irrelevant considerations related to the uncertainty of uses as permitted under the existing zoning. However, because these two matters were inextricably intertwined and the council did have jurisdiction to consider the groundwater issues, the rejection of the application for a development permit was within the councils' jurisdiction, and the court decided to review the decision under the standard of reasonableness.

Subjective or vaguely related considerations are also outside of the council's jurisdiction. In *Yearsley*, council rejected a permit application that met all of the zoning requirements because it was out of the "character of the neighbourhood" or the "vision for the neighbourhood." These were subjective considerations that may have only vaguely referenced specific OCP guidelines. The court held they so lacked specificity as to be unreasonable.[107] The council had acted outside of its jurisdiction and the court quashed the decision.[108]

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[102] Yearsley, *supra* note 97 at para 60.
[103] *Douglas Developments Ltd v Surrey (City) (*2003) BCSC 130, 34 MPLR (3d) 314.
[104] Rocky Point, *supra* note 66 at para 48.
[105] *Yearsley*, supra note 97 at para 39.
[106] *Ibid* at para 28.
[107] *Ibid* para 39.
[108] *Ibid* para 41.

3.4.4 Consultation with First Nations under the Constitution Act, 1982

In *Neskonlith Indian Band v Salmon Arm (City),*[109] the Neskonlith Indian Band petitioned to quash an environmentally hazardous area development permit on the basis that the City had failed to meet their constitutional and legal duty to consult with the Band prior to the issuance of any development permit. The court held that the permit remained valid because the municipality had no duty to consult beyond that required in s 475 [formerly s 879] of the *Local Government Act* (which mandates a duty to consider whether to consult with persons, authorities, and organizations during the development, repeal, or amendment to an OCP). First, the honour of the Crown cannot be delegated from the provincial government to local governments. It rests at all times with the province. Second, procedural aspects of the duty to consult can be delegated to third parties, but for this to be done, the authority must be expressly or impliedly conferred by statute. Third, a municipality has no independent constitutional duty to consult. It is possible that, in fulfilling its duty to consult, the province can delegate aspects of consultation to municipalities. However, there was no express or implied duty in the *Local Government Act* to consult beyond that required s 879.[110] On appeal, the court upheld this decision and also reviewed the policy rationale behind this decision, concluding that it would be completely impractical to require consultation on all of the mundane municipal decisions, and that it was not in the interests of First Nations, the Crown or the ultimate goal of reconciliation for the duty to consult to be ground down into such small particles.[111]

3.4.5 Permit requirements and rejecting permits

When reviewing the reasonableness of decision-maker rejecting an application for a development permit, the court will look to what evidence was before the decision-maker, which will almost always include staff reports. As discussed above, the council must provide reasons for the rejection of a development permit. The development permit application process is not a negotiation exercise. There is no residual discretion in the local government to simply refuse an application where the guidelines have been objectively met. In *Westfair Foods*, the District refused a development permit application that complied with the applicable OCP guidelines on the grounds that council anticipated that the applicant would use the proposed building in a manner not permitted by the zoning bylaw. In doing so, it therefore ignored the guidelines in its OCP and exceeded its statutory jurisdiction.[112]

There must be evidence that council considered relevant and proper matters, and had valid reasons for refusing to issue the development permit. If council follows the recommendations

[109] *Neskonlith Indian Band v Salmon Arm (City)(* 2012) BCSC 499, 96 MPLR (4th) 75, affirmed, 2012 BCCA 379, 354 DLR (4th) 696.
[110] *Ibid* at paras 54-55.
[111] *Neskonlith Indian Band v Salmon Arm (City)(*2012) BCCA 379, 354 DLR (4th) 696 at para 72.
[112] Westfair Foods *supra* note 74 at para 26.

in a staff report, the court can infer that it has considered the guidelines in accordance with the report.[113]

If council does not follow a staff report, it cannot be inferred that council considered the guidelines in accordance with the report. In such case, the evidence must disclose that council has considered relevant and proper matters in reaching its decision.[114] When considering the reasons given by councilors for rejecting the application, the court must discern whether councilors directed their minds to the legal requirements applicable to the case, rather than minutely dissecting their reasons in a search for error.[115] Reasons of council must be sufficient and reference the guidelines so that the applicant knows what must be done to make development plans acceptable.[116] The court in *Langley* clarified that although it is not obligated to provide formal reasons, an applicant is entitled to know what they must do to change their plans to make them acceptable.[117] For example, in *Rocky Point*, the reason for rejection was "an absence of information about the availability of groundwater on the site and the potential impact to neighbouring wells." The court held that this so lacked specificity as to be unreasonable.[118]

3.4.6 Permits may require specific preservation, protection, restoration or enhancement

Under s 491(1)(b) [formerly s 920(7)(b)], development permits may require specified natural features to be preserved, protected, restored, or enhanced in accordance with the permit. They may also require natural watercourses to be dedicated, works to be constructed, or other protection measures. There has been no case law challenging these specific requirements.

3.4.7 Development Permit Conditions

In *Squamish*,[119] the landowner alleged that a permit condition requiring a residential building to be constructed on the landward side of a dike dividing the owner's parcel essentially constituted an impermissible variance of permitted uses or density, effectively sterilizing the portion of the parcel lying outside the dike. The court disagreed, noting that in the case of a

[113] Langley *supra* note 64 at para 34.
[114] *Ibid*.
[115] *LP Management Corp v Abbotsford (City)*, 2006 BCSC 1426 at para 66; *Yearsley,* supra note 97 at para 31.
[116] Yearsley *supra* note 97 at para 31*;* Langley *supra* note 64 at para 37.
[117] Langley *supra* note 64 at para 34.
[118] Rocky Point *supra* note 66 at para 48.
[119] Squamish *supra* note 95.

zone that permitted one dwelling per parcel, a condition dealing with the siting of the dwelling did not vary the permitted uses or density of use of the parcel.[120]

In *Bignell Enterprises Ltd v Campbell River (District)*[121] ("*Bignell*"), the landowner raised several challenges. First, the landowner relied on the fact that the relevant guideline said that the set-back from a waterway should be "at least 15 metres" to challenge the imposed condition of a 30 metre set-back. The court held that where a guideline says a set-back should be "at least" a certain amount of metres away, it is open to a municipality to impose a larger set-back when it serves the conservation purpose of the EDPA.[122] The landowner also challenged the condition on the fact that it rendered the property "undevelopable." The court found that it is acceptable that land may become "undevelopable" by permitting conditions due to the shape of the lot and the location of the creek, not the development permit conditions.[123] The court did not rule on whether it would be acceptable that land become "undevelopable" by reason of the development permit conditions. Thirdly, the landowner claimed that because the land had become "undevelopable" by the permitting condition, it had essentially become rezoned, such that a public hearing and a bylaw were necessary. The court held that any impact on use was again due to the shape of the lot and the location of the creek, not the development permit conditions.[124]

3.4.8 Bad faith and expropriation

The landowner in *Bignell* also challenged the permit condition on the basis that the council was acting with an ulterior motive. The court held that a municipality cannot be held as acting in bad faith when it is acting with a conservation purpose expressly within their delegated powers unless there is uncontradictable evidence of ulterior motive.[125]

Finally, the landowner argued that the condition had been imposed as expropriation—so as to force the petitioner to sell the lot to the municipality. The court held that there is no expropriation of land without compensation where a permit condition is reasonably made in line with the purpose of the EDPA and not to deliberately acquire land through rezoning or thwart development. This is the case even where an offer to purchase was made, among other solutions.[126] Where a clear intention to expropriate on the part of the municipality is lacking

[120] *Ibid* at para 72.
[121] *Bignell Enterprises Ltd v Campbell River (District)* [1996] BCJ No 1735, 34 MPLR (2d) 193 (SC). [*Bignell*]
[122] *Ibid* at paras 44-45. The court noted that in this case, the landowner knew that such a set-back was likely to occur, and the Department of Fisheries and Oceans had recommended a 30 metre set-back when faced with an earlier development proposal.
[123] *Ibid* at para 47.
[124] *Ibid* at para 46.
[125] *Ibid* at para 49.
[126] *Ibid* at paras 59-63.

and where there are other reasonable explanations for the condition, such as ecological conservation, the court will uphold permit conditions.[127]

3.4.9 Amending Permits

The question is still open as to how courts will treat amendments to development permits. The principle remains that since a permit is binding on both the local government and the permit holder, the permit cannot be amended or cancelled unilaterally.[128] However, the case of *Bignell* shows that courts could be willing to extend flexibility to municipalities to amend development permits.

There are only indirect references in the *Local Government Act* to the amendment and cancellation of development permits in the provisions dealing with the filing of Land Title Office notices. The court in *Bignell* reviewed this issue at paras 68-71 with the following observations. The provisions requiring local governments to establish development approval procedures, s 486(1) [formerly s. 895] deal only with the "issue" of a permit. The only reference to amending such permits was be found in s. 980(9) [s 503(3) is a now similar but not equivalent provision], under the heading "Permit Procedures," which reads:

> Where a permit is amended or cancelled, the local government shall file a notice of the amendment or cancellation in the manner prescribed...

At para 69, the court says that the "inescapable conclusion is that municipalities like the respondent are able to both amend and cancel development permits once issued. Otherwise, there would be no need for such a section. Further, there is no section which limits the respondent's ability to amend or cancel."

In the end, the court in *Bignell* found that municipalities have the flexibility to amend development permits once issued, especially where conditions are linked to meeting the purposes of the EDPA, and as long as they are in good faith.[129] In that case, the landowner also challenged the aforementioned set-back condition on the basis that it had been an after-the-fact amendment to the permit. The court upheld the municipality's unilateral amendment of the permit because it was reasonable in the context. The court noted that the applicant had requested the deletion of a condition requiring drainage works with knowledge that the municipality would substitute an onerous setback condition; in fact, the request seems to have been taken as a form of consent to the amendment of the permit. Importantly, the conditions

[127] *Ibid* at para 61. Expropriation cases include where a municipality had clearly rezoned in an attempt to thwart the developer's intentions, so that it was of minimal commercial value, or in attempt to acquire the land for a public purpose, such as building a Park and Ride (see paras 54-61).
[128] Buholzer *supra* note 46 at §11.85.
[129] *Ibid* at paras 68-71.

that were amended were ecologically linked as part of a complex solution to a planning concern.

3.5 Permit Remedies

The court can order a landowner to obtain a development permit. If land is altered without the owner having obtained a development permit in contravention of s 489, and the local government obtains a court order requiring the restoration of the land, the court may order the owner to obtain a development permit before undertaking the restoration work and comply with all applicable application requirements and fees.[130] For example, the court ordered a landowner to make an application within 90 days and to commence the restoration work within 90 days of the issuance of the permit.[131]

3.5.1 Injunction to enforce permit and remediate

A court will generally grant an injunction to a public authority seeking to restrain continued breach of a statute where the court finds that there was a clear breach of a statute. Courts will refuse an injunction to restrain the continued breach only in exceptional circumstances.[132] In addition to the injunction to restrain the breach, the court in *Ellis* granted an injunction to remediate. It found that the word "enforce" in s 274 of the *Community Charter* should be interpreted broadly, providing municipalities with the authority to seek mandatory injunctions that require remedial measures to be taken. It held that when exercising its jurisdiction to order that remedial measures be taken, the measures should be aimed at the enforcement of the statute according to its purposes, rather than for penal purposes. The court of appeal upheld the remedies ordered, noting that a purposive interpretation requires the jurisdiction to order remedial measures; otherwise, the purpose of all DPA conditions would be frustrated for lack of enforceability.[133]

3.5.2 Mandamus

A court should only grant mandamus or require a local government to issue a development permit where the local government has no choice but to issue the permit. If this is not the case or the local government has discretion as to how to issue the development permit, the court should not usurp the municipality's role.[134] In *Westfair Foods*, the court granted mandamus, finding that council had denied the permit because of the subjective concerns of councillors and that there had been substantial compliance with the bylaws such that council would have

[130] *Ibid* at §11.52.1
[131] *North Cowichan (District) v Fokkema Enterprises Ltd,* [2014] BCJ No 978, 24 MPLR (5th) 91 (SC).
[132] Ellis *supra* note 53 at para 64 citing *Vancouver (City) v Maurice*, BCCA 37, [2005] BCJ No 96 at paragraph 34.
[133] *Denman Island Local Trust Committee v Ellis* (2007) BCCA 536, 42 MPLR (4th) 1 at para 54.
[134] Rocky Point, *supra* note 66 para 58.

no choice but to issue the permit.[135] Similarly, in *Yearsley*, the court granted mandamus. The staff report indicated that the proposed development complied with all of the bylaws and OCP guidelines and there were no other issues of non-compliance. The court considered that the municipality had plenty of opportunity to provide argument that the permit should not be granted or that there was a further or continuing legitimate problem that could require further consideration from council.

3.5.3 Declaration of unlawful contravention

Declaratory relief is discretionary, and courts generally will not grant it where the declaration will serve little purpose, or will resolve merely hypothetical issues.[136] The court in *Ellis* issued a declaration of unlawful contravention because the validity of the DPA bylaw was a genuine practical dispute at issue.[137]

Conclusion

Courts will uphold EDPAs where they are designated on reasonable evidence and with reasonable certainty in boundaries. The courts recognize that in order for DPAs to be effective, the guidelines have to both be specific to the objective, yet flexible to allow for discretionary application to a particular property and development circumstances. Because there is discretion in granting permits, council must be able to demonstrate that they considered the application in relation to the guidelines set out in the OCP. Furthermore, in granting permits, council cannot consider irrelevant factors outside of the guidelines. Reasons for rejection must clearly inform applicants how they can meet the guidelines. Generally, courts will uphold permit conditions so long as they align with the purpose of the DPA. Permits are binding on both landowners and local governments, although courts seem to be taking a flexible approach to unilateral amendments to permit conditions. There must be clear evidence of bad faith or intention to expropriate for either argument to succeed. Remedies include an order that a development permit be obtained, that breaches be discontinued, or that restoration or remedial action be taken, as well as a declaration of unlawful contravention or mandamus for council to issue a development permit.

[135] Westfair Foods, *supra* note 74 at para 43; Langley, supra note 64 at para 36.
[136] *Cheslatta Carrier Nation v British Columbia*, 2000 BCCA 539, 193 DLR (4th) 344, leave to appeal denied, [2000] SCCA No 625 at para 62.
[137] Ellis *supra* note 53.

Part 4: Observations and Recommendations

To conclude, this report makes clear the discretionary nature of EDPAs. This discretion is evidenced in the differences between the EDPA regimes of the four local governments examined in Part 2. We find that all four governments used their discretion to craft reasonable EDPA regimes tailored to their regions.

The courts recognize the level of discretion granted to local governments to implement EDPAs, and provide significant deference to local governments to act according to the regime established. Courts have yet to invalidate an EDPA regime, and have only overturned permitting decisions if they are found to be unreasonable or if the decision makers, such as council, based their decisions on considerations outside of the guidelines. The courts insist only that the EDPA is reasonably connected to the purpose of protecting the natural environment, that there is reasonable certainty to the boundaries, and that the boundaries reasonably serve the purpose of the EDPA. Upon legal challenge, courts are deferring to the decisions of the local government regarding EDPAs so long as the local government can demonstrate that their decisions reasonably align with the purpose of EDPA implementation.

From this observation, we provide the following recommendations to local governments to ensure that their EDPA regime reasonably and effectively supports the purpose of protecting the natural environment, its ecosystems, and biodiversity.

1) In identifying and designating EDPA areas, local governments would benefit from providing a clear and detailed map of EDPAs. This map can be based on a local Sensitive Ecosystem Inventory (SEI) to provide direction as to what areas warrant protection. The map should include reasonable boundaries of the EDPA, and depict the type of ecosystem that is being protected through the designation. This designation would provide more clarity to landowners in regards to the nature and scope of the designation on their property. It would save time and alert both the applicant and the local government to site-specific factors as they embark upon the development permit process to effectively protect the designated areas. The District of Saanich provides a good example of a detailed mapping designation, through a GIS mapping service.

2) In establishing both activities caught by and exemptions from the EDPA regime, local government should provide a clear list of what activities are considered ”development” and what development is exempt from the designation. Providing an almost exhaustive list of activities and exemptions reduces the uncertainty for the applicant in scoping their proposal and for the local government in enforcement. This also increases assurance for compliance in seeking a development permit as there is information

available for the applicant on the restrictions to development. This does not compromise the discretionary nature of the EDPA regime, it simply requires a shift in discretion being used in creating the guidelines, rather than the discretion resting in the decision of whether or not the activities are caught by the regime or exemptions apply.

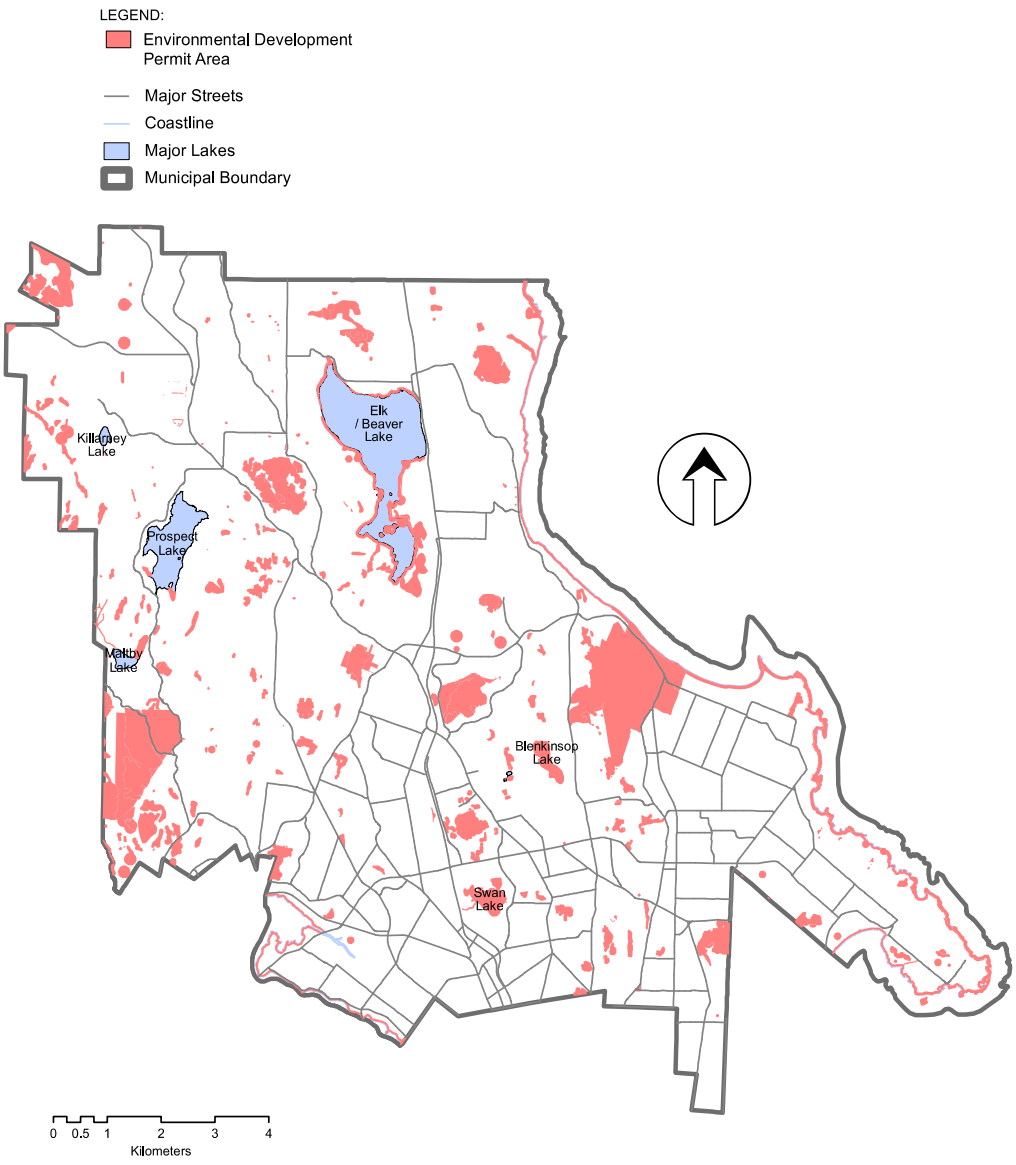
3) We do not recommend more uniformity in terms of permit conditions. The decision maker requires discretion to shape permit conditions that respond to the ecological conditions of a particular property and the proposed development in light of the purpose of the EDPA regime.

4) There is little recognition and practice regarding the importance of connectivity of fragmented ecosystems in protecting ecosystem health. Although most local governments recognize ecosystem connectivity as an objective, the language of connectivity ought to be more pervasive throughout the guidelines and during implementation. In highlighting the importance of connectivity, property owners are alerted to the ecological corridor or connectivity value that it plays and will not see it only as as a discrete parcel of land that is not "ecologically sensitive" on its own. It is anticipated that the district of Surrey will focus on connectivity by using a Green Infrastructure Networks (GIN) system, and protect ecosystems based on their usefulness to overall ecosystem health. This shift in perspective from focusing on environmentally sensitive areas to overall ecosystem health would more effectively align with the purpose of EDPAs in protecting the natural environment, its ecosystems, and biodiversity.

These recommendations seek to address the need for discretion to support clear and complete EDPA regimes. Discretion ought to be a tool properly exercised in issuing development permit conditions for specific properties within robust guidelines and process. An effective EDPA regime clearly identifies areas, activities, and exemptions to the EDPA. This benefits the functioning of the regime itself and will aid in the defence of a regime upon judicial challenge.

Appendix A: Saanich EDPA Map[138]

MAP 29 **Environmental Development Permit Area**

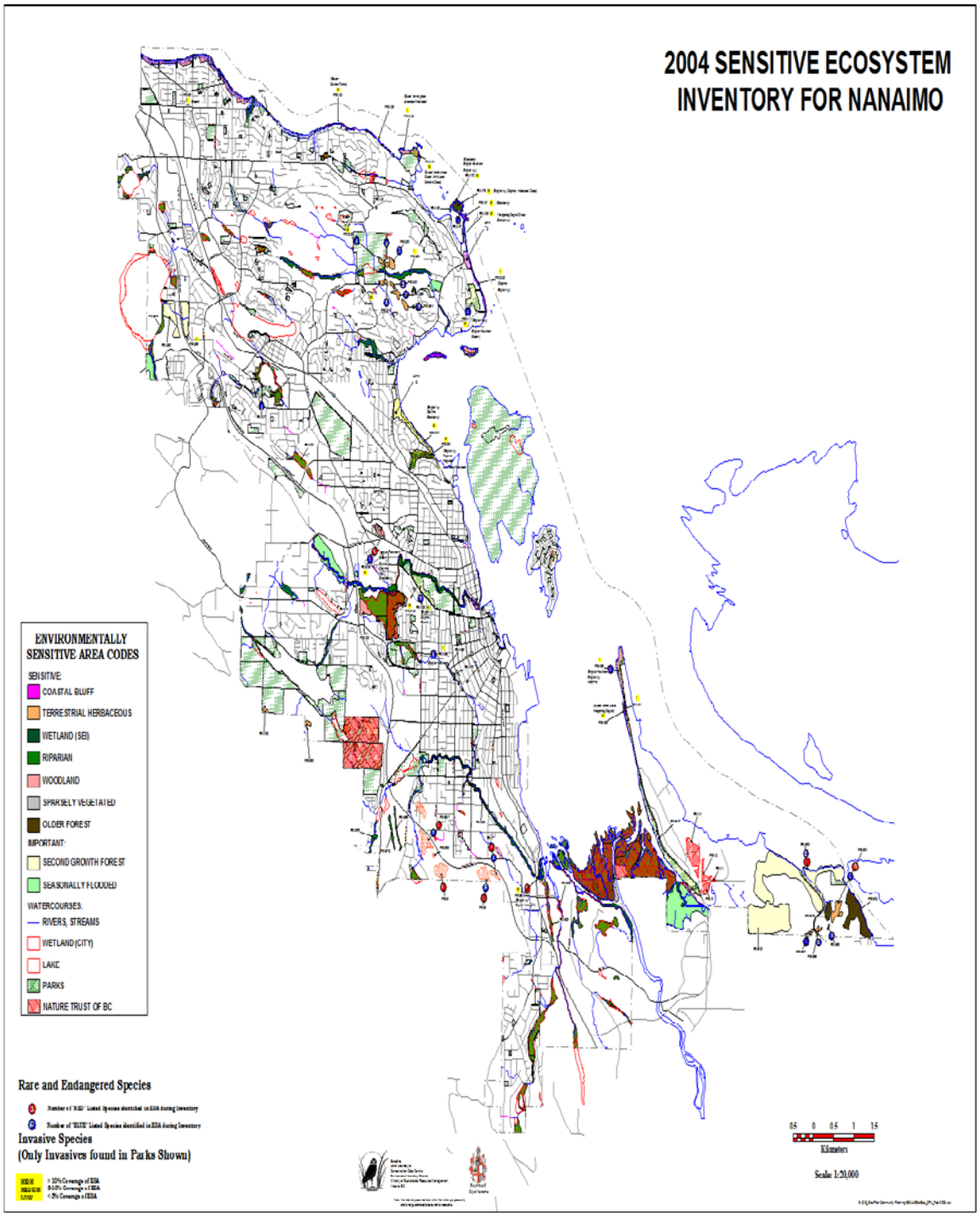


For details refer to Schedule 3 to Appendix N
to the Official Community Plan Bylaw, 2008 No. 8940.

G:\\Protect_Adm\Local Area Plans\Dev_Per_Guidelines\maps\Current Maps\DPA Map 29 Feb 2012.ai

[138] Page 122 of Schedule A "Environmental Development Permit Area" http://www.saanich.ca/living/environment/pdf/edpa/EDPA_Guidelines_Extracted_Mar2012.pdf

Appendix B: Nanaimo EDPA Map[139]

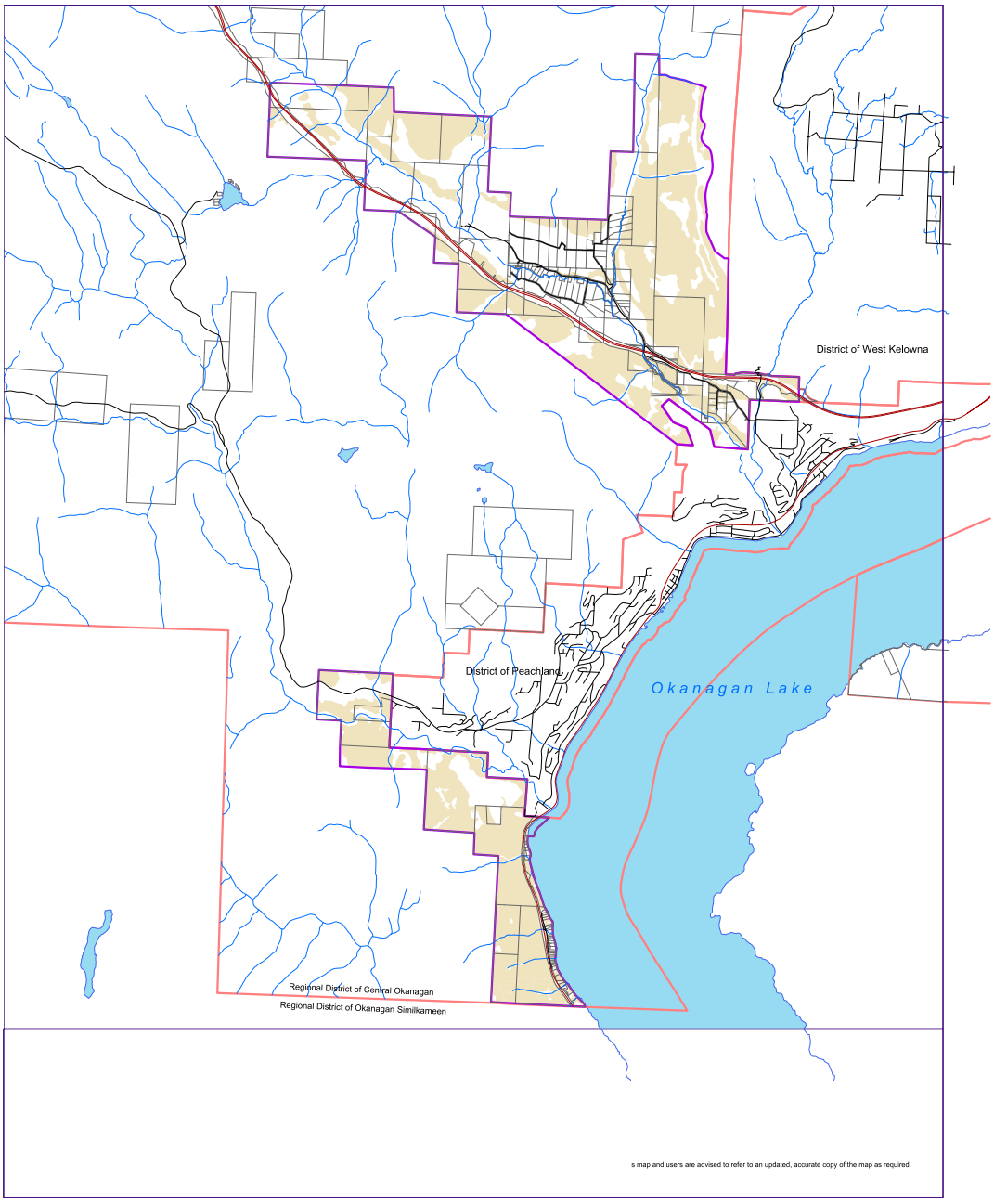


[139] Map 3: Development Permit and Heritage Conservation Area in Official Community Plan http://www.nanaimo.ca/assets/Departments/Community~Planning/Offical~Community~Plan~-~10~Year~Review/Map%203%20DPA.pdf

Appendix C: Kelowna EDPA Map[140]

[140] Map 5.5 Natural Environment
Map http://apps.kelowna.ca/CityPage/Docs/PDFs/Bylaws/Official%20Community%20Plan%202030%20Bylaw%20No.%2010500/Map%205.5%20Natural%20Environment%20DP%20Area.pdf

Appendix D: Regional District Central Okanagan EDPA Maps[141]



[141] Brent Road: Schedule F: Brent Road and Trepanier Terrestrial Ecosystem D.P. Area http://www.regionaldistrict.com/media/19994/Schedule_F_Brent_Trepanier_Terrestrial_DPA.pdf
South Slopes Schedule F: South Slopes Sensitive Terrestrial Ecosystem Development Permit Area http://www.regionaldistrict.com/media/20663/RuralWestsideOCP_SenstiveEcoDPMaps.pdf

he map as required.