



Legal Measures to Protect the Gulf Islands Coastal Douglas-fir Zone

An ELC Clinic report prepared for:
Raincoast Conservation Foundation

Law Student: Andrew Spear
Articled Student: Ruben Tillman
Supervising Lawyer: Calvin Sandborn, QC



June 2020

Copyright © 2020 The Environmental Law Centre Society. All rights reserved.

Permission is hereby granted to reproduce and distribute these materials in whole or in part for educational and public interest purposes, provided such copies are disseminated at or below cost, provided that each copy bears this notice, and provided that the Environmental Law Centre is credited as the original published source.

DISCLAIMER: This material is provided for general information as a public and educational resource. We attempt to ensure the accuracy of the material provided, however the Environmental Law Centre does not warrant the quality, accuracy or completeness of information in this document. Such information is provided "as is" without warranty or condition of any kind. The information provided in this document is not intended to be legal advice. Many factors unknown to us may affect the applicability of any statement that we make in this material to one's particular individual circumstances. This information is not intended to provide legal advice and should not be relied upon as such. Please seek the advice of a competent lawyer in your province, territory or jurisdiction; or contact the ELC for more complete information.

Photos: Holly Pattison and Raincoast Conservation Foundation

Copyediting and layout: Holly Pattison, Environmental Law Centre

Contents

Canada’s Rare Coastal Douglas-fir Zone	4
The Islands Trust Area	8
How Can the Islands Trust Protect the CDF?	10
Background.....	10
Key Tools Available to the Islands Trust.....	13
Environmental Development Permit Areas – Increase Islands Trust Authority	14
Enforcement of DPAs – The Need for Provincial Law Reform and Islands Trust Action	17
Tree Cutting Bylaws.....	19
Enhance the Ability of the Islands Trust to Implement Effective Tree Cutting Bylaws.....	20
Zoning – A Fundamentally Important Legal Tool	22
A Final Key Opportunity for Reform.....	24
Amend S.21 of <i>Private Managed Forest Land Act</i>	24
Other Conservation Tools	26
Covenants.....	26
Amenity Density Bonuses.....	28
Natural Area Protection Tax Exemptions.....	29
Conclusion	31
SUMMARY OF RECOMMENDATIONS.....	32



Canada's Rare Coastal Douglas-fir Zone

Nestled in the rain shadow of Vancouver Island and the Olympic Peninsula, straddling the Georgia Strait, stretching across the southeastern coast of Vancouver Island from Campbell River to Victoria, across the Gulf Islands, and ending in a small sliver of mainland BC, west of the coast mountains from Powell River to the American Border, lies Canada's Coastal Douglas-fir Biogeoclimatic Zone (the "CDF").

The CDF includes some of the most iconic forests in the world, featuring many of the mammoth firs and cedars for which BC has grown famous – as well as flower-festooned Garry Oak meadows and starkly beautiful arbutus groves. The CDF's rare and diverse ecosystems "provide key services that sustain human health and wellbeing, including timber and non-timber resources, clean air and water, nutrient cycling, carbon dioxide

absorption and carbon storage.”¹ It is BC’s smallest² and rarest³ biogeoclimatic zone (“zone”).⁴

The Douglas-fir ecosystems in the CDF support plant associations that are only found in the Gulf and Juan de Fuca Islands, southeast Vancouver Island, and a small part of the BC mainland.⁵ The sensitive ecosystems that make up the CDF “rely on a delicate mix of species and conditions that are easily affected by human activities.”⁶ The wide variety of plants and animals in the CDF include more species of conservation concern than in any other zone in BC.⁷ These species “contribute to genetic, species and ecosystem biodiversity, a principle very important to the survival of species and the proper functioning of ecosystems.”⁸

When ranked for sensitivity to climate change, carbon storage capability, biodiversity habitat, and the degree of human impacts, the Coastal Douglas-fir is the most important BC ecosystem

Islands Trust⁹

Unfortunately, the CDF is also the most threatened of BC’s zones,¹⁰ and indeed this zone includes one of the four most endangered ecosystems in all Canada.¹¹ A large percentage

¹ Galiano Island Local Trust Committee, Bylaw No 108, *Official Community Plan* (1995, consolidated 7 February 2019), online (pdf): <<http://www.islandstrust.bc.ca/media/348848/ocp-bylaw-108-consolidated-feb-7-19.pdf>>, (“Galiano OCP”) at 2. CDF Douglas-fir forests within the Islands Trust Area “store and sequester more carbon per hectare than the rest of British Columbia. This carbon sequestration is likely due to a higher density of maturing forests, which store and take in more carbon to support their growth” (Islands Trust, *Protecting the Coastal Douglas Fir Zone*, (October 2018), online (pdf): <<http://www.islandstrust.bc.ca/media/346674/cdf-toolkit-final-web.pdf>> (“Islands Trust”) at 11).

² For an interactive map showing all of BC’s Biogeoclimatic zones, see BC Forest Service, “Biogeoclimatic Zones,” online: <<https://www.for.gov.bc.ca/hfd/library/documents/treebook/biogeo/cwhzone1.htm>>.

³ Galiano Island Local Trust Committee, Bylaw No 108, *Official Community Plan* (1995, consolidated 7 February 2019), 2.

⁴ A biogeoclimatic zone “is an area with a relatively uniform climate and with a mix of vegetation and soils that reflect that climate” (Islands Trust, *supra* note 1 at 8).

⁵ Islands Trust Fund, *Regional Conservation Plan 2018-2027*, (30 January 2018), online (pdf):

<<http://www.islandstrustconservancy.ca/media/84722/rcp-final-web-mar-27.pdf>> (“Islands Trust Fund”) at 11.

⁶ Furthermore, “sensitive ecosystems are often rare and are home to rare species” (Islands Trust Fund, *supra* note 5 at 12).

⁷ Islands Trust Fund, *supra* note 5 at 11.

⁸ Capital Regional District (CRD), “Coastal Douglas Fir”, online: <<https://www.crd.bc.ca/education/our-environment/ecosystems/terrestrial/coastal-douglas-fir>>.

⁹ Islands Trust, *supra* note 1 at 11.

¹⁰ Islands Trust, *supra* note 1 at 8.

¹¹ See Integral Ecology Group Ltd (IEG), ALCES Landscape and Land Use Ltd (the ALCES Group) & Silvatech Consulting, *Yellow Point-Cedar watershed modelling case study – final report*, (Duncan, BC: Prepared for the Cowichan Valley Regional District, Environmental Initiatives Division, 2015), online: <<https://www.cvrld.bc.ca/DocumentCenter/View/72088/Yellowpoint-Cedar-Watershed-Model?bidId=>> at 1). See also, Ancient Forest Alliance, “Ancient Forest Alliance Commends BC NDP Government for Expanding Protection for Coastal Douglas-Fir Ecosystem,” (Media Release, 24 July 2018), online: <<https://www.ancientforestalliance.org/media-release-ancient-forest-alliance-commends-bc-ndp-government-for-expanding-protection-for-coastal-douglas-fir-ecosystem/>>, and Brennan Clarke, “Prospect of logging in Douglas fir ecosystem above Nanoose Bay worries neighbouring

of the BC population – including Greater Victoria, Nanaimo, Richmond, Delta and White Rock -- is in the CDF. The CDF has the highest density of roads, and is the most altered by human activity, of the 16¹² zones in BC. ¹³ A legacy of logging¹⁴ has left only about 1% of the CDF's original old-growth forest intact.¹⁵

Given the precarious state of the Zone and the tremendous benefits it provides to both humans and BC's diverse ecosystems, steps must be taken to protect the rich biodiversity of the CDF. Approximately 50% of its land is still forested,¹⁶ yet only 11% of the land in the CDF is protected in some way – in fact, the Islands Trust states that the CDF is the “least protected biogeoclimatic zone in BC”.¹⁷ Across the province, 94% of the land is publicly owned. In contrast, in the CDF, 80% of land is privately owned.¹⁸

municipalities,” (The Globe and Mail, 30 April 2010), online: <<https://www.theglobeandmail.com/news/british-columbia/prospect-of-logging-in-douglas-fir-ecosystem-above-nanoose-bay-worries-neighbouring-municipalities/article4352902/>>.

¹² Note that there has been some discrepancy among available sources about the total number of zones in BC. The Forest Service's map of BC's Zones, *supra* note 2 listed 14 Zones, as did a map by Simon Fraser University (<<https://www.sfu.ca/geog/geog351fall07/Group06/webmap.html>>). The Centre for Forest Conservation Genetics at the University of British Columbia stated that there were 14 Zones (<<https://cfcg.forestry.ubc.ca/resources/cataloguing-in-situ-genetic-resources/about-bec-and-bgc-units/>>). However, experts tell us that about a decade ago two more site-specific zones were identified. The Islands Trust now states that there are 16 Zones (*supra* note 1 at 8). A book published by Biodiversity BC in 2008 also states that BC has 16 Zones (MA Austin, D.A. Buffett, DJ Nicolson, GGE Scudder & V Stevens, eds, *Taking Natures Pulse: The Status of Biodiversity in British Columbia*, (Victoria, Biodiversity BC, 2008). See the executive summary, online: <<http://www.biodiversitybc.org/EN/main/downloads/tnp-introduction.html#toc>>.

¹³ Islands Trust, *supra* note 1 at 12.

¹⁴ Islands Trust Fund, *supra* note 5 at 11.

¹⁵ Ancient Forest Alliance, “Ancient Forest Alliance supports BC government's proposal to expand Coastal Douglas-Fir ecosystem protection,” (News Release, 23 December 2017), online: <<https://www.ancientforestalliance.org/media-release-ancient-forest-alliance-supports-bc-governments-proposal-to-expand-coastal-douglas-fir-ecosystem-protection/>>.

¹⁶ UBC Faculty of Forestry, Centre for Forest Conservation Genetics (CFCG), “CDF zone land use statistics,” online: <<https://cfcg.forestry.ubc.ca/resources/cataloguing-in-situ-genetic-resources/cdf-zone/cdf-land-use-statistics/>>. Of the forested land, about 20% is less than 60 years old, about the same amount is between 60 and 120 years old, and about 10% is more than 120 years old (*ibid*). Moreover, “the older forests occur in small, highly fragmented patches” (CFCG, “Coastal Douglas Fir Zone,” online: <<https://cfcg.forestry.ubc.ca/resources/cataloguing-in-situ-genetic-resources/cdf-zone/>> (“CFCG”).

¹⁷ Islands Trust, *supra* note 1 at 8. Moreover, the CDF has the lowest number of large (more than 250 hectares) protected areas, and “most of the protected areas are small, isolated land parcels surrounded by development” (CFCG, *supra* note 16).

¹⁸ Coastal Douglas-fir Conservation Partnership (CDFCP), “Why Conserve the CDF?,” online: <<http://www.cdfcp.ca/index.php/about/why-convert-the-cdf>>.

A key problem is that the privately owned forested lands in the CDF are inadequately protected by law. Private forests are not subject to the sustainability rules and protection of soils, water and biodiversity that exist on Crown forest lands under the *Forest and Range Practices Act*.¹⁹ As the BC Court of Appeal has stated:

*Apart from some provincial environmental controls and federal Fisheries Act [...] considerations, all the landowner requires before enjoying the fruits of the timber harvesting of his [sic] private lands is a timber mark from the Ministry of Forests.*²⁰

Even where private lands are designated as private managed forest land (“PMFL”) under the *Private Managed Forest Land Act*²¹ the provincial rules for private managed forest land are dramatically less protective than Crown forest land rules.²² Worse, as we will see, local governments are seriously constrained from supplementing the inadequate regulation of private managed forest lands with local legislation.

Furthermore, the Islands Trust lacks the authority it needs to protect forest ecosystems with Development Permit requirements. Local Trust Committees also lack the power to implement the kind of tree cutting bylaws that municipalities can implement. In addition, like other local governments, the Local Trust Committees lack the *enforcement* powers they urgently need to make Development Permit Areas effective to protect sensitive areas.

Provincial law reform is clearly needed. The Islands Trust should petition the Province to reform the law to give it the legal tools necessary to protect its precious forests. At the same time, the Trust should diligently pursue the exercise of its existing powers.

¹⁹ See the *Forest and Range Practices Act*, SBC 2002, c 69 (“FRPA”). Also see the Forest Practices Board’s “Board Bulletin, Volume 6 – Guide to the *Forest and Range Practices Act*”, online (pdf): <<https://www.bcfpb.ca/wp-content/uploads/2016/04/006-Volume-6-Information-Bulletin.pdf>>. “FRPA sets the requirements for planning, road building, logging, reforestation, and cattle grazing. It applies only on publicly owned (provincial Crown) land outside parks and other protected areas” (*ibid* at 2).

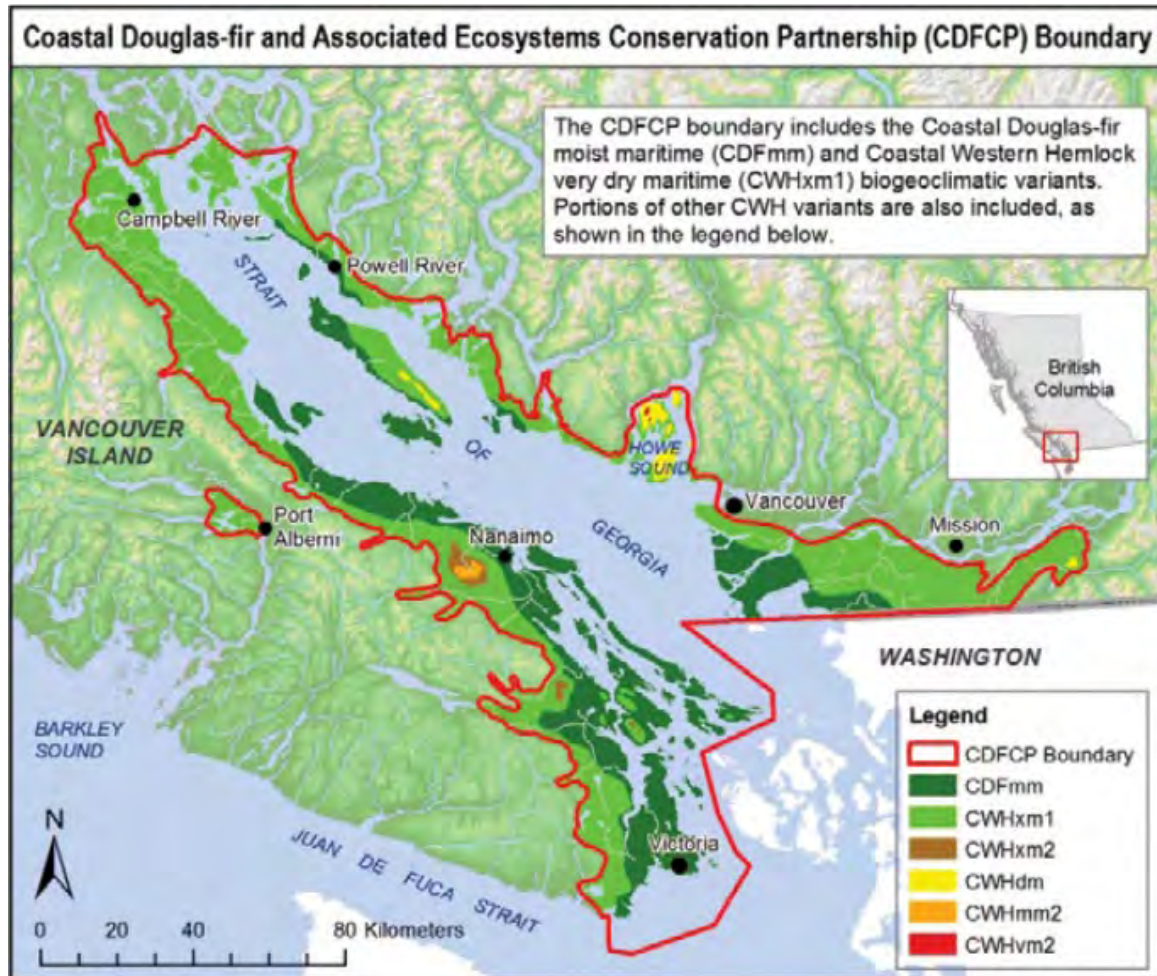
²⁰ Para 15 of *Denman Island Local Trust Committee v. 4064 Investments Ltd*, 2001 BCCA 736, 96 BCLR (3d) 253.

²¹ SBC 2003, c 80 (“PMFLA”). See the Environmental Law Centre’s report on this subject, *The Need to Reform BC’s Private Managed Forest Land Act*, (Victoria: UVic ELC, 2019), online (pdf): <<http://www.elc.uvic.ca/wordpress/wp-content/uploads/2019/08/Private-Managed-Forest-Land-Act-Reform.pdf>> (“ELC PMFLA”). “Private forest owners can designate their land as private managed forest land under the *Assessment Act* and receive a significant tax break” (*ibid* at 9).

²² See ELC PMFLA, *supra* note 21. “Private managed forest land is subject to an entirely different set of rules than crown forest land – and those private land rules are far weaker. Notably, the PMFLA has no requirement for sustainable long-term forest management” (*ibid* at 5).

The Islands Trust Area

Of the many areas within the CDF, none may be as important to conservation as that within the Island Trust area. This area, created through the *Island Trust Act*²³ ("ITA"), encompasses 13 major Gulf Islands²⁴ and one quarter of the CDF.²⁵ Within the CDF, the Islands Trusts forests are especially important. For example, carbon



²³ RSBC 1996, c 239. See the definition of "trust area" in s 1 and the description in Schedule A.

²⁴ And more than 450 smaller islands (Islands Trust, "The Islands Trust Area," online: <http://www.islandstrust.bc.ca/islands/>). This does not include Bowen Island, which is also part of the Islands Trust but, uniquely, is incorporated as an island municipality (Islands Trust, "Bowen Island Municipality," online: <http://www.islandstrust.bc.ca/islands/bowen-island-municipality/>).

²⁵ See Kate Emmings & Jennifer Eliason, "Coastal Douglas-Fir Conservation Strategy" (Briefing to Local Trust Committees, Bowen Island Municipality) (1 December 2015) at p 1, online (pdf): http://www.islandstrust.bc.ca/media/338956/cdfcp_conservation_strategy_with_attachments.pdf. The Islands Trust area is entirely within the CDF (Islands Trust, *supra* note 1 at 8).

sequestration in the Islands Trust area is an average of 82% higher per hectare than in CDF areas elsewhere.²⁶

As with the CDF as a whole, an unusually high percentage of the land in the Islands Trust area is privately owned.²⁷ More than 3.3 million people live in the areas surrounding the Islands Trust, so “the pressure to develop and change the natural landscape of the Islands Trust is high.”²⁸ Over half the landbase of the Islands Trust area “is in a natural state and managed by private individuals or corporations.”²⁹ The problem is that legal protections for forests on private lands are grossly inadequate.

Local governments cannot directly regulate forestry,³⁰ but this report will give an overview of the steps communities in the Islands Trust area can take to conserve forests based on the current legal landscape – and point to promising avenues for law reform to better conserve the precious CDF zone.

²⁶ Islands Trust, *supra* note 1 at 11.

²⁷ Islands Trust, *supra* note 1 at 9: “[p]rivate land in the Islands Trust Area represents about 68.6% of the landscape.”

²⁸ Islands Trust Fund, *supra* note 5 at 16

²⁹ Islands Trust Fund, *supra* note 5 at 21.

³⁰ See Islands Trust, *supra* note 1 at 27.

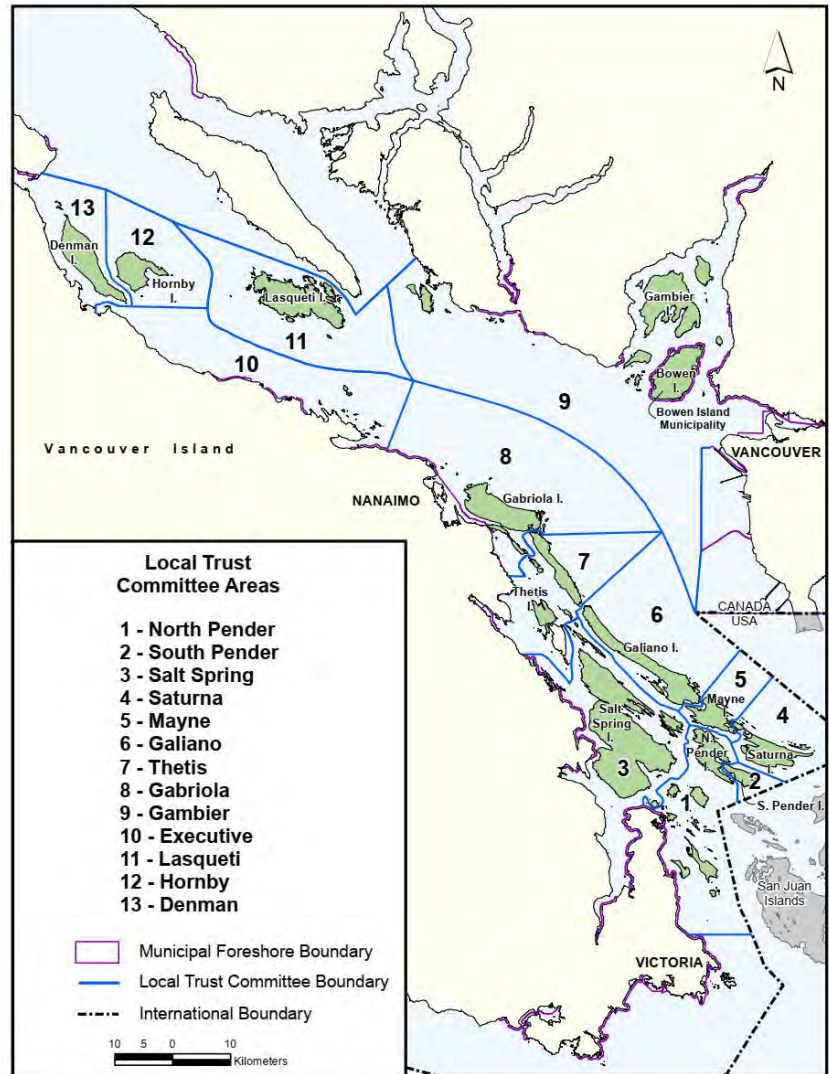
How Can the Islands Trust Protect the CDF?

The purpose of this project is to examine what tools are currently available to the Islands Trust to better protect the Coastal Douglas-fir zone – and what legal reforms could enhance the ability of local communities to protect their native forests.

Background

The legal powers of municipalities, regional districts and other local governments are not inherent. As a matter of constitutional law they derive their powers from the provinces.³¹ Therefore, a local government can only wield powers – such as to make bylaws, grant permits, or zone – if it is specifically granted power to do so through provisions of a provincial statute. Any modifications to local government powers must come from the provincial government.

It is also important to note that provincial laws on forestry and mining (e.g., the *Private Managed Forest Land Act*, the *Mineral Tenure Act*) generally trump conflicting local government rules and decisions on resource use.³²



³¹ See, e.g., the Supreme Court of Canada's comment that "[m]unicipalities are entirely the creatures of provincial statutes. Accordingly they can exercise only those powers which are explicitly conferred upon them by provincial statute" (687 of *R v Greenbaum*, 1993 CanLII 166 (SCC), [1993] 1 SCR 674). In BC, the *Local Government Act* and the *Community Charter* provide the legal framework and foundation for the establishment and continuation of local governments, including providing for the powers of local governments (see the purposes in s 1 of the *LGA*).

³² See the comments of the BC Supreme Court in *Gambier Island Preservation Society v Islands Trust* 1984 CanLII 894 (BC SC), 54 BCLR 93, at para 6: "there can be no doubt that the province has the power to modify or abrogate any by-laws which would otherwise interfere with a development approved by it" (the context of that case involved a mining company's proposal to establish an open pit mine that the court said "will largely destroy the existing environment of

In the case of the Islands Trust, its powers and mandate come from the *Islands Trust Act* (“ITA”).³³ Pursuant to the act,

*[t]he object of the trust is to preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust area and of British Columbia generally, in cooperation with municipalities, regional districts, improvement districts, other persons and organizations and the government of British Columbia.*³⁴

Several bodies make up the organization of the trust. The Trust Council sets out general policies for carrying out the object of the Trust and is responsible for the financial management of the trust;³⁵ the Executive Committee is intended to carry out the daily business of the Trust and review the activities of Local Trust Committees;³⁶ and the Islands Trust Conservancy administers the trust fund and manages its assets.³⁷ Finally, Local Trust Committees regulate the development and use of land in their respective local trust areas.³⁸

The *ITA* establishes 12 Gulf islands as “local trust areas.”³⁹ Each local trust area has its own Local Trust Committee, and these Local Trust Committees exercise powers over their respective local trust areas that would otherwise belong to regional districts in their areas.⁴⁰ (As an aside, note that the Executive Committee acts as the Local Trust Committee for the Ballenas-Winchelsea Islands.⁴¹)

This report concerns itself with the powers available to the Local Trust Committees (including the Executive Committee when it acts as a Local Trust Committee). Therefore, this report’s findings do not apply to the powers available to the municipality of Bowen Island. As a municipality, Bowen Island has more extensive powers and is directly subject to the *Local Government Act*⁴² (“LGA”) and the *Community Charter*.⁴³

Turning to the Local Trust Committees, as mentioned they undertake land use planning over their respective local trust areas. The *Islands Trust Act* empowers Local Trust Committees to regulate

Gambier Island as a recreational resource” (paras 4-5). Although the trustees of the Islands Trust “bitterly” opposed the proposal, its fate was in provincial hands alone (paras 10-12). Note that section 10 of the *Community Charter* specifically provides: “A provision of a municipal bylaw has no effect if it is inconsistent with a Provincial enactment,” --and in many respects Islands Trust jurisdiction is more restricted than municipal jurisdiction.

³³ The Islands Trust and the Islands Trust Fund are both continued (from a previous act) in s 2 of the *ITA*.

³⁴ Section 3 of the *Islands Trust Act* (*ITA*).

³⁵ Except for the financial management of the trust fund (subsection 4(2) of the *ITA*).

³⁶ Subsection 4(3) of the *ITA*.

³⁷ Subsection 4(5) of the *ITA*.

³⁸ Subsection 4(4) of the *ITA*.

³⁹ Section 1, definition of “local trust area”; see also Schedule B.

⁴⁰ Subsection 4(4) of the *ITA*.

⁴¹ Called the Ballenas-Winchelsea Islands Local Trust Area (Executive Committee) (Islands Trust, “Ballenas-Winchelsea Islands Local Trust Area (Executive Committee),” online: <<http://www.islandstrust.bc.ca/islands/local-trust-areas/ballenas-winchelsea/>>. Generally, the executive committee acts as a local Trust Committee “for that part of the trust area that is not in a local trust area or municipality” (s 4(3) of the *ITA*).

⁴² RSBC 2015, c 1.

⁴³ SBC 2003, c 26.

the development and use of land specifically for the purpose of carry out the “preserve and protect” object of the Trust,⁴⁴ making them a powerful tool for conservation on the Gulf Islands. While the *Islands Trust Act* imports some powers from the *Local Government Act* and *Community Charter* (among other enactments), Local Trust Committees and other Trust bodies may only exercise powers they are given in the *ITA*. Therefore, any modification or expansion of Islands Trust powers must be done through an amendment of the *ITA* (or by amending provisions of other acts, for example the *LGA*, that are incorporated into the *ITA*).

⁴⁴ *ITA*, s 24(2)(b): “[f]or the purpose of carrying out the object of the trust, each local trust committee may ... regulate the development and use of land in its local trust area.”



Key Tools Available to the Islands Trust

Under s 29 of the *Islands Trust Act*, with some exceptions, Local Trust Committees have the land use planning powers afforded to regional districts under Part 14 of the *LGA*.⁴⁵ All bylaws enacted must be in accordance with the Trust Policy Statement,⁴⁶ and be consistent with each Local Trust

⁴⁵ Part 14 (ss 455-585.41) of the *LGA* deals with powers of both municipalities and regional districts; however, the *ITA* gives Trust Committees only “all the power and authority of a regional district board” under certain enactments, including Part 14 of the *LGA* (*ITA*, s 29(1)(b)).

⁴⁶ All Trust Committee bylaws must be submitted to the executive committee for approval (s 27 of the *ITA*), and the executive committee must not approve a bylaw if it is “contrary to or at variance with the trust policy statement” (s 15(4) of the *ITA*). The trust council is required to adopt a trust policy statement that applies to the Trust area (s 15(1)). To view the statement, see Islands Trust, “Policy Statement,” online: <<http://www.islandstrust.bc.ca/trust-council/governance/policy-statement/>>.

Committee's Official Community Plan (OCP).⁴⁷ These planning powers provide a broad suite of potential strategies.

Environmental Development Permit Areas – Increase Islands Trust Authority

One of the most effective available tools to protect lands is the power to establish Development Permit Areas ("DPAs"). Official Community Plans can designate DPAs.⁴⁸ Once a DPA is established, landowners are required to secure a permit before subdividing, constructing on, or altering land.⁴⁹ Upon application for a permit, the relevant Local Trust Committee can examine the specific environmental threats posed by development and place further site-specific conditions on the permit.⁵⁰

Although all new bylaws must be consistent with the applicable Official Community Plan, OCPs are generally considered by the courts to be policy documents.^{51 52} However, when an OCP designates a specific Development Permit Area, the local governments can specify conditions and standards that a developer **must** meet in that Area. Environmental protection staff from around BC agree that Environmental DPAs "are the best way to protect sensitive ecosystems."⁵³

The OCP must state why an environmental DPA is being established – it must describe the special conditions and objectives that justify a DPA designation.⁵⁴ In addition, the OCP (or zoning) must

⁴⁷ Through the incorporation of most of Part 14 of the *LGA* into the *ITA* (see *supra* note 45). Part 14 of the *LGA* includes Division 4, concerning OCPs. In particular, s 478(2) of the *LGA* says that "[a]ll bylaws enacted ... by a ... board ..., after the adoption of (a) an [OCP] ... must be consistent with the relevant plan".

⁴⁸ Division 7 of Part 14 of the *LGA*, incorporated into the *ITA*, concerns DPAs, and in particular s 488(1) of Div 7 says that an OCP may designate [DPAs] for a number of purposes, including "protection of the natural environment, its ecosystems and biological diversity."

⁴⁹ *Local Government Act*, s 489.

⁵⁰ Section 491 of the *Local Government Act (LGA)* describes the specific requirements that may be attached to development permits. In the case of a DPA designated specifically for the protection of development from hazardous conditions, Trust Committees may require the permit applicant to prepare a report at the applicant's expense to assist the Committee in determining the conditions or requirements it will impose with the permit (s 491(4) & (5)). See Environmental Law Centre, *Green Bylaws Toolkit for Conserving Sensitive Ecosystems and Green Infrastructure*, (Revised and Updated April 2016), online (pdf):

<https://stewardshipcentrebc.ca/PDF_docs/GreenBylaws/GreenBylawsToolkit_2016.pdf#GBT-version3-2016Apr13-FULL.indd%3AAppendix%20D%3A444.pdf> ("*Green Bylaws Toolkit*") at Part 2.9 (86-100) for a thorough discussion of DPAs. Also see Environmental Law Centre, *Environmental Development Permit Areas: In Practice and in Caselaw*, online: http://www.elc.uvic.ca/wordpress/wp-content/uploads/2016/04/2016_01_02_EDPA_FINAL_March31_2016.pdf

⁵¹ *LGA*, s 478 (see *supra* note 47 for very brief discussion).

⁵² Courts have interpreted the term "consistent" broadly, and generally speaking will not interfere with bylaws on this ground unless there is a clear conflict with the relevant OCP – See e.g., *Residents and Ratepayers of Central Saanich Society v Central Saanich (District)*, 2011 BCCA 484, 313 BCAC 159..

⁵³ *Green Bylaws Toolkit*, *supra* note 50 at 86.

⁵⁴ Assuming the DPA is designated for the purpose of protecting ecosystems. DPAs may be designated for a number of purposes, listed in s 488(1) of the *LGA*. Aside from protection of the natural environment, these purposes include protection of farming and revitalization of an area in which a commercial use is permitted. See s 488(1) for the full list.

set out guidelines on how to address the special conditions and objectives.⁵⁵ Development permits must follow the guidelines, so the guidelines must state which ecosystem elements the Trust Committee intends to protect.⁵⁶

Local Trust Committees have great flexibility in applying DPA guidelines. As discussed in the ELC's *Green Bylaws Toolkit* (2016),

*[t]his flexibility is both a benefit and a drawback. If guidelines are comprehensive, they provide staff and council with a fine-grained way to tailor development to the ecological conditions on specific sites. However, to work effectively they require considerable staff expertise and public knowledge. Development permit outcomes depend on staff members' understanding of how ecological systems function, their ability to translate that knowledge into controls on development, and the ability of development permit holders to comply with controls.*⁵⁷

DPAs can be established specifically for the purpose of “protection of the natural environment.”⁵⁸ If a Local Trust Committee designates a DPA for this purpose, it may further tailor development permits to do a number of things, including specifying areas of land that must remain free of development and requiring specific natural features to be preserved.⁵⁹

The power of DPA designation gives Local Trust Committees broad powers to control development within environmentally sensitive areas, allowing for a more directed site-specific approach than zoning. Specific activities on a site-by-site basis can be evaluated and controlled accordingly, and all relevant activities within a Development Permit Area can be brought in line with conservation goals. Because of the breadth of options they give to Local Trust Committees, DPAs are a useful tool for addressing site-specific environmental damage from development over large areas.

Galiano Island has established a Development Permit Area in an attempt to provide broad protection of trees. The Galiano OCP designates a large DPA spanning the local trust area that aims to restrict tree cutting and removal.⁶⁰ In this Development Permit Area, tree cutting (other than for exceptions such as buildings, subdivision, small quantities for things like firewood) may require the owner to obtain a special Development Permit and meet specified conditions. For example, in forest-zoned lands the owner may have to demonstrate a “sustainable forest management strategy” to get a Development Permit.⁶¹

⁵⁵ LGA, s 488(2); the guidelines can be specified by zoning bylaw instead of in an OCP, in which case the DPA designation is not effective until the zoning bylaw is adopted (s 488(3)). Note that It is also open to a Trust Committee to specify conditions under which a permit would *not* be required in a particular DPA (for instance, minor landscaping work) – LGA, s 488(4). See *Green Bylaws Toolkit*, *supra* note 50 at 87.

⁵⁶ *Green Bylaws Toolkit*, *supra* note 50 at 87.

⁵⁷ *Green Bylaws Toolkit*, *supra* note 50 at 88.

⁵⁸ LGA, s 488(1)(a).

⁵⁹ Among other things that can further the DPA's goal of protecting the natural environment. See s 491(1) of the LGA.

⁶⁰ Galiano OCP, *supra* note 1 at 63-6. The Galiano Island local trust area includes some smaller islands (*ibid*).

⁶¹ Galiano OCP, *supra* note 1 at 64-65 (3.5 Guidelines).

However, the main barrier to effectively protecting Island Trust forests with DPAs is the Court of Appeal decision in *Denman Island Trust Committee v. 4064 Investments Ltd.*⁶² In that 2001 case, the Court invalidated Denman Island bylaws that established Development Permit Areas designed to ensure sustainable forest practices⁶³, protect forest cover, limit removal of trees and require retention of a certain percentage of old growth forest.⁶⁴ The Court ruled that the Legislature had not intended to give the Islands Trust the authority to generally regulate forest practices on private land. This court decision has prevented Local Trust Committees from replicating the encompassing forest regulation that the Denman Island Trust Committee had attempted.

However, in light of the precarious ecological state of the unique Coastal Douglas-fir zone described above,⁶⁵ action must now be taken. The Province should not stand back while the Islands' Coastal Douglas-fir forests deteriorate. The Legislature has long recognized the special ecological and legal status of the Islands Trust, in the *Islands Trust Act* itself:

*"The object of the trust is to preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust area and of British Columbia generally..."*⁶⁶

This unique mandate and duty to the people of British Columbia was specifically noted by the Court of Appeal in the *MacMillan Bloedel v. Galiano Island Trust Committee* case, with the Court noting that "No comparable provision is to be found in any other [municipal] legislation."⁶⁷

Therefore, it is time that the Legislature grant the Island Trust the explicit jurisdiction to comprehensively protect the threatened privately owned forests of the Islands with forestry DPAs. Clearly, the Legislature has jurisdiction to grant such powers to the Trust.⁶⁸

Reversing the effects of the *Denman Island* decision would involve granting broad forestry DPA powers to the Islands Trust specifically. This should be accomplished by a carefully drawn amendment to s. 29 of the *Islands Trust Act*. In the *Denman Island* decision, the Court was concerned that the Islands Trust's DPA powers derived from the same part of the *Local Government Act* that gives all regional districts the power to implement DPA. The Court was concerned that if it ruled that all regional districts (and the Islands Trust) could regulate forestry, that might unduly interfere with provincial forestry regulation.

⁶² *Denman Island Trust Committee v. 4064 Investments Ltd.* 2001 BCCA 736 (CanLII)

⁶³ Bylaw 113 (described in paragraph 4 of *Denman Island Trust Committee* 2001 BCCA 736 (CanLII)).

⁶⁴ See paragraphs 20 and 21 of *Denman Island Trust Committee v. 4064 Investments Ltd.* 2001 BCCA 736 (CanLII).

⁶⁵ See the discussion in the sections "Canada's Rare Coastal Douglas Fir Zone" and "The Islands Trust Area" in the Introduction above.

⁶⁶ Section 3, *Islands Trust Act*.

⁶⁷ See *MacMillan Bloedel v. Galiano Island Trust Committee* 63 B.C.A.C. 81 (CA), paragraphs 21-22.

⁶⁸ For example, see paragraphs 77-78 of *Denman Island Trust Committee v. 4064 Investments Ltd.* 2001 BCCA 736 (CanLII).

Therefore, the power to establish DPAs to protect forest ecosystems and broadly regulate forestry should not be extended to regional districts, but to the Islands Trust alone.⁶⁹ This is justifiable because of the unique values at play in the Islands Trust area.

Once the Province has amended the *Islands Trust Act* to enable Local Trust Committees to protect forest ecosystems, the government should make funding available to enable the Islands Trust to prepare Development Permit Area designations, justifications and guidelines, which would have many common elements across the 13 local trust areas. This would be a preferable approach, rather than expecting each individual Local Trust Committee to perform this work. This would enable each Local Trust Committee to enact appropriate bylaw amendments in a timely way.

[**Note:** In order to be effective, Development Permit Areas must go hand-in-hand with other critical legal tools, such as **zoning** (discussed below), designation of corridors of connectivity, etc.]

Recommendation #1 **The Islands Trust should formally request that the Province amend s. 29 of the *Islands Trust Act* to give the Islands Trust the authority to establish Development Permit Areas to protect forest ecosystems and regulate forest practices on private lands.**

Enforcement of DPAs – The Need for Provincial Law Reform and Islands Trust Action

It is one thing to establish Development Permit Areas. It is another to enforce them. Currently, although DPAs are widely seen as a conservation tool of choice, a fundamental problem is the lack of effective enforcement mechanisms when a DPA is contravened.⁷⁰

Local governments view DPA requirements as especially difficult to enforce. Unlike the situation with ordinary bylaw contraventions, local governments may not be able to enforce contraventions against DPA requirements with their normal set of enforcement tools – such as prosecutions, tickets, and bylaw enforcement notices. Instead, local governments widely believe that the only way to enforce development permits is to go court and pursue the costly and arduous process of seeking a court injunction.⁷¹ Therefore, enforcement of such DPA contraventions is rare.

The Union of BC Municipalities (“UBCM”) has endorsed multiple resolutions calling for law reform to allow local governments to issue tickets, bylaw notices, or initiate prosecution for DPA and/or development permit violations. Noting that designation of DPAs “is the main legislative

⁶⁹ The amendment to s. 29 of the *Islands Trust Act* would have to be done carefully to avoid inadvertently narrowing the scope of the development permit power for other local governments, by implication.

⁷⁰ *Green Bylaws Toolkit*, *supra* note 50 at 90.

⁷¹ *Green Bylaws Toolkit*, *supra* note 50 at 87. As noted below, this is also the view of the Union of BC Municipalities. Note that the Ministry of Municipal Affairs and Housing seems to dispute this view, to some extent. See their response to a resolution of the Union of BC Municipalities, *infra* note 72.

mechanism for addressing protection of riparian and environmentally sensitive area[s],”⁷² the 2019 UBCM resolution concludes:

Therefore be it resolved that UBCM request the provincial government to improve the enforceability of development permit area requirements by enabling local governments to enforce violations by way of prosecution, ticket or bylaw notices.

It is problematic when local governments feel that DPAs – the best legal mechanism available for protecting environmentally sensitive areas – are not readily enforceable with the most effective enforcement tools.⁷³ Although the Province has responded that local governments could utilize such tools, if they structured their legislation differently,⁷⁴ this matter needs to be urgently addressed – to ensure that local governments are using the most effective enforcement tools possible for DPA contraventions.

Recommendation #2 **The Islands Trust should request that the Province enhance and clarify the power of local governments to enforce Development Permit Area requirements and Development Permit conditions – by explicitly enabling local governments to enforce contraventions by way of prosecution, ticketing and issuance of bylaw enforcement notices.**

Recommendation #3 **The Islands Trust should take all possible steps under the current law to ensure that DPA requirements and Development Permit conditions are enforceable by way of prosecution, ticketing and issuance of bylaw enforcement notices.**

⁷² Resolution B53 of Union of BC Municipalities (UBCM), “Resolutions to be Considered at the 2019 UBCM Convention”, (UBCM 2019 Resolutions Book), online (pdf):

<<https://www.ubcm.ca/assets/Resolutions~and~Policy/Resolutions/2019%20UBCM%20Resolutions%20Book.pdf>> at 133. The resolution further notes, “in 2003 and 2011 UBCM endorsed resolutions calling for legislative changes so local governments can issue municipal ticket information or bylaw violation notices for contraventions of the prohibition on altering land in designated development permit areas, or contrary to issued development permits, but these changes have not yet occurred” (*ibid*). The resolution was endorsed by the UBCM: UBCM, “2019 UBCM Annual Convention – Resolutions Decisions,” online (pdf):

<<https://www.ubcm.ca/assets/Resolutions~and~Policy/Resolutions/2019%20UBCM%20Resolutions%20Disposition.pdf>> at the third page of the PDF (unnumbered). Note that the Ministry of Municipal Affairs and Housing responded to this resolution, saying that the Ministry will continue to monitor the issue, but also that local governments *can* in fact enforce DPA requirements by prosecution, ticket, or bylaw notices if they structure the local legislation in a certain manner (Ministry of Municipal Affairs and Housing, *Provincial Response to the Resolutions of the 2019 Union of British Columbia Municipalities*, (February 2020), online (pdf): UBCM <<https://www.ubcm.ca/assets/Resolutions~and~Policy/Resolutions/2019%20Provincial%20Responses%20to%20UBCM%20Resolutions.pdf>> at 73.

⁷³ See *supra* note 72: the UBCM called DPA designation “the main legislative mechanism for addressing protection of riparian and environmentally sensitive area[s].” Moreover, “[e]nvironmental protection staff agree that EDPAs [Environmental DPAs] are the best way to protect sensitive ecosystems” (*Green Bylaws Toolkit*, *supra* note 50 at 86).

⁷⁴ See *supra* note 72.

Tree Cutting Bylaws

The ability to enact tree cutting bylaws gives Local Trust Committees the power to directly prohibit the cutting down of trees in specific circumstances. However, the powers afforded to Local Trust Committees in this respect are more restricted than those of municipalities, which have broad powers to regulate, prohibit and impose requirements in relation to trees.⁷⁵

In contrast, Local Trust Committees can prohibit tree cutting only where a risk of flooding, erosion, land slip or avalanche exists.⁷⁶ Local Trust Committees can generally “regulate” tree cutting in such hazard areas,⁷⁷ including requiring a permit for any cutting,⁷⁸ and requiring a report prepared at the applicant’s expense to show that the proposed cutting will not create a danger from flooding or erosion.⁷⁹

The power to require tree cutting permits is a power distinct from DPA designation. By bylaw, a Local Trust Committee may designate hazard areas as tree cutting permit areas. In contrast, DPAs may be designated for a much wider variety of purposes, and must be designated in an OCP. Moreover, Local Trust Committees have more flexibility with respect to settings conditions for a development permit in a DPA. Tree cutting permits are specifically limited to regulating tree cutting in areas at risk of flooding, erosion, land slip or avalanche. Currently, Local Trust Committees can pass tree cutting bylaws to prohibit tree removal – but only for areas at risk of flooding or the other hazards mentioned.⁸⁰

As the law currently stands, Local Trust Committees have to ensure that their tree cutting bylaws address management of hazard area. If a Trust Committee attempted to impose tree cutting permit requirements outside of areas subject to flooding, erosion, land slip or avalanche, the tree cutting bylaw could be vulnerable to court challenge. The Local Trust Committee, like all statutory decision makers, must act within the bounds of their statutory authority.⁸¹

Although Local Trust Committees do not have the fulsome powers to regulate tree cutting that municipalities have, the geography of the islands may mean that tree bylaws could still be applicable to large, environmentally important swathes of land. Galiano Island, for example, has a large quantity of hazard area land, which tree cutting bylaws could potentially apply to.⁸² While Galiano has designated DPAs over its steep slope hazard areas, the Galiano Local Trust Committee would likely be within its powers to enact a tree cutting bylaw as well.

⁷⁵ *Community Charter*, s 8(3)(c).

⁷⁶ *LGA*, s 500 (as incorporated into the *ITA*).

⁷⁷ *LGA*, s 500(2)(a)

⁷⁸ *LGA*, s 500(2)(b).

⁷⁹ *LGA*, s 500(3)-(4).

⁸⁰ See the discussion on the tree protection powers of regional districts (which are identical to the powers of Committees), in *Green Bylaws Toolkit*, *supra* note 50 at 125.

⁸¹ See the discussion on the constitutional role of local governments, above.

⁸² Galiano OCP, *supra* note 1 at 86. For maps of each DPA on Galiano, see Schedules F – I of the OCP, at 105-108. For an unofficial compilation map of all the DPAs, see “DPA Compilation Map”, online (pdf): *Islands Trust* <<http://www.islandstrust.bc.ca/media/117554/dpa-compilation-map-august-2018.pdf>>.

Recommendation #4 The Islands Trust should consider the extent to which current Trust tree cutting bylaw jurisdiction could be implemented in all hazard lands in the Coastal Douglas Fir zone.

Enhance the Ability of the Islands Trust to Implement Effective Tree Cutting Bylaws

Local Trust Committees could do far more to regulate tree cutting if the Province were to grant the Trust the same power now possessed by municipalities to regulate, prohibit and impose requirements regarding tree cutting.⁸³

Section 8(3)(c) of the *Community Charter* gives fundamental power over trees to municipalities. They have the power to enact bylaws to regulate, prohibit and impose requirements in relation to trees. Municipalities such as Saanich have successfully used this power to protect trees.⁸⁴

In contrast, as discussed in this report, regional districts and Local Trust Committees are limited with respect to their power over trees to areas at risk of flooding, erosion, land slip or avalanche. Local Trust Committees should have the same fundamental power over trees as municipalities.

Greater power over trees could also allow Trust Committees to create uniform standards across the Trust area to regulate tree cutting and development projects. Adopting a standard, such as the ANSI A300 Pruning standard,⁸⁵ would clarify acceptable arborist practices on the Gulf Islands, and prevent negligent destruction of trees on private property.

The primary justification for the limited powers of regional districts over trees as compared to municipalities is based on a distinction between rural and urban contexts. “The rural tree-cutting issue involves a greater complexity of interests including commercial, forestry, private land, local

⁸³ In addition, note that an expert informant has suggested that the law should allow the Trust to establish “best practices” standards, as defined by a recognized sustainability standard. Confusion as to the standards, which apply to tree cutting bylaws have made it difficult to establish correct practices for tree cutting within the *ITA*. To solve this issue, LTCs must be careful to be clear and concise as to what permissible and impermissible activities surrounding tree cutting. This can also be aided by adopting a clear standard of arborist best practices within the *ITA* as a whole, for example the ANSI 3000. A clear and objective standard across the entire *ITA* for appropriate tree cutting practices, if combined with public education and diligent investigation of offences, would help ensure bylaw compliance within and across islands in the context of tree cutting.

Adopting a common standard would require either an amendment or regulation added to the *ITA* -, either establishing the standards there or requiring these same standards to be individually implemented by Local trusts for each Island within the *ITA*. Increased education and enforcement could be resource-intensive for individual Local Trusts. However a common standard across the *ITA* would streamline public education, resulting in lower combined costs relative to that of facilitating 12 individual public education programs.

⁸⁴ See District of Saanich, Bylaws No 9467 & 9548, 2014, *Tree Protection Bylaw, 2014, No 9272*, (Consolidated), online (pdf): <[https://www.saanich.ca/assets/Local~Government/Documents/Bylaws~and~Policies/tree-protection-bylaw-2014-no-9272.pdf](https://www.saanich.ca/assets/Local%20Government/Documents/Bylaws%20and%20Policies/tree-protection-bylaw-2014-no-9272.pdf)>. The purpose of the bylaw is, among other things, to prohibit “the altering, cutting, damaging or removal of protected trees without a permit” (2). Protected trees include *any* tree with a DBH (diameter at breast height) of 60 centimetres or more, and in particular Arbutus, Garry Oak, Pacific Dogwood, and Pacific Yew trees of much smaller dimensions, among other trees listed (5).

⁸⁵ American National Standards Institute, “ANSI A300 Standards” (Tree Care Industry Association, 2017). Online: <https://www.tcia.org/TCIA/Build_Your_Business/A300_Standards/Part_1.aspx>

government, environmental and aboriginal interests.”⁸⁶ Courts have therefore interpreted rural tree cutting as requiring broader policy planning than can be provided by a regional district. By contrast, urban tree cutting, which takes place solely within the bounds of a municipality, does not require this level of consideration. However, the Trust is distinguishable from this context, due to its unique mandate:

*[t]he history of the Islands Trust Act indicates a legislative intent to increase the powers of local trust committees. It also shows an intent to give increased effect to the object statement [ie the mandate of the Trust] now contained in s. 3 by setting out the object statement in a separate section of the Act. I think it a clear inference that local trust committees exercising the powers conferred under the Act ... have a legislative mandate to act in conformity with the object statement in s. 3.*⁸⁷

There is therefore a solid argument in favour of an expanded power of the Trust in order to allow Local Trust Committees to achieve their mandate. The Trust’s “preserve and protect” mandate is “not a mere piety;”⁸⁸ it has court-recognized legal effects. This distinguishes the Trust from other regional districts, and entails a unique balance of policy considerations. The preservation and protection of the unique CDF ecosystems contained within the Trust area must be given priority, and the local governments entrusted with authority to fulfill this mandate must have the tools they need to do this job effectively. There is therefore ample justification for the Islands Trust being afforded a larger breadth of tree cutting powers, akin to the municipal fundamental power over trees, without having to make a similar argument for regional districts in general.

In regard to the respondent's argument that it would be "unreasonable" to hold that the Local Trust Committees of the Islands Trust have the power to broadly regulate tree cutting on private land when that would mean that the Regional Districts must have to have the same power, I would simply observe that Regional Districts are not required to give effect to the object of the Islands Trust, as set out in s. 3 of the Islands Trust Act.

Justice Anne Rowles, BC Court of Appeal⁸⁹

Recommendation #5 The Islands Trust should ask the Province to enhance the Trust’s jurisdiction over tree cutting bylaws, to make its jurisdiction equal to that of municipalities under s. 8 of the Community Charter.

⁸⁶ *Denman Island Local Trust Committee v 4064 Investments Ltd*, 2000 BCSC 1618 (Canlii), [2000] BCJ No 2232, at para 137.

⁸⁷ *Macmillan Bloedel Ltd v Galiano Island Trust Committee*, 1995 CanLII 4585 (BC CA), [1995] BCJ No 1763 (“*Macmillan Bloedel*”) at para 177.

⁸⁸ *Macmillan Bloedel*, *supra* note 87 at para 130.

⁸⁹ *Denman Island Local Trust Committee v 4064 Investments Ltd*, 2001 BCCA 736, 208 DLR (4th) 425, para 61, Justice Anne Rowles in dissent.

Zoning – A Fundamentally Important Legal Tool

Zoning allows local governments, including Local Trust Committees,⁹⁰ to regulate the use and density of use, of land, buildings and other structures; the siting, size and dimension of structures; the location of uses on the land and within structures, and the shape, dimension and areas of parcels of land.⁹¹ Zoning allows broad land use planning, including the restriction of development in areas where development would involve tree removal or other destructive activities.⁹²

Zoning can create larger lot sizes, setbacks (buffers) from sensitive areas, and encourage the protection of sensitive ecosystems, including forests. It can also cluster development in specific areas to remove pressure on others (see the discussion below on amenity density bonuses).⁹³

The zoning power has some weaknesses in terms of its ability to contribute to conservation goals. Private land cannot be restricted to public use (parks, for instance, cannot be created through zoning alone).⁹⁴ As compared with site-specific development permits that can be tailored to the ecological conditions on a particular site, zoning is a less-fine grained tool.⁹⁵ Overall, however, in combination with diligent mapping and planning (to identify where sensitive ecosystems are and where greenways should go), zoning can be effective at maintaining contiguous forest in urban-interface areas (*i.e.* areas where wildland meets urban areas).

For example, Saturna Island has a Forest Reserve Zone, upon which most non-forestry related uses are prohibited; additionally, buildings structures, and required parking areas cannot cover more than two percent of the parcel they are on.⁹⁶ Saturna also has a Wilderness Reserve Zone, which permits only residential (with a maximum density of one residence per lot) and ecological reserve uses.⁹⁷ Denman Island has used zoning to protect environmentally sensitive areas, establishing multiple zones of ecosystem protection,⁹⁸ with the protection of the CDF as a specific land planning objective.⁹⁹

⁹⁰ Committees may enact zoning bylaws thanks to the incorporation of Division 5 – Zoning Bylaws (ss 479-483) of the LGA into the ITA by s 29(1)(b) of that act.

⁹¹ For an overview of how zoning works, see *Green Bylaws Toolkit*, *supra* note 50 at 73.

⁹² “On a municipal, regional district, or watershed level, zoning is the primary means of preventing development in locations where it can harm sensitive ecosystems and directing development towards more appropriate locations” (*Green Bylaws Toolkit*, *supra* note 50 at 73).

⁹³ See the discussion about cluster development in *Green Bylaws Toolkit*, *supra* note 50 at 75.

⁹⁴ *Green Bylaws Toolkit*, *supra* note 50 at 74.

⁹⁵ *Green Bylaws Toolkit*, *supra* note 50 at 74.

⁹⁶ Saturna Island Local Trust Committee, Bylaw No 119 (As Amended by Bylaws 125 & 126), *Land Use Bylaw No 119, 2018* (Consolidated 18 February, 2020), online (pdf): <<http://www.islandstrust.bc.ca/media/349226/sa-lub-119-consolidated-2020-02-18.pdf>> (“Saturna Land Use Bylaw”) at 31.

⁹⁷ Saturna Land Use Bylaw, *supra* note 96 at 34. Similar to the requirements of the Forest Reserve Zone, buildings and structures can cover no more than 1% of the land on a Wilderness Reserve Zone lot (*ibid*).

⁹⁸ Specifically, Denman Island has a Conservation Zone, a Marine Conservation Zone, and a Marine Protection Zone (Denman Island Local Trust Committee, Bylaw No 186, 2008, *Land Use Bylaw*, (Consolidated July 2018), online (pdf): <<http://www.islandstrust.bc.ca/media/346122/debl-186-lub-consolidated-july-16-2018.pdf>> at 19.

⁹⁹ Denman Island Local Trust Committee, Bylaw No 185, 2008, *Official Community Plan*, (Consolidated February 2017), online (pdf): <<http://www.islandstrust.bc.ca/media/342174/debl-185-ocp-consolidated-feb-1-2017.pdf>> at 60. For a map of Denman Island’s land use designations, see Schedule C to the OCP at “Denman Island Planning Bylaws,” online: *Islands Trust* <<http://www.islandstrust.bc.ca/islands/local-trust-areas/denman/bylaws/>>.

Denman Island has used “downzoning” or “conservation zoning” to “correct zoning enacted in the 1970s and 1980s that was not sensitive to ecological value.”¹⁰⁰ Conservation zoning involves rezoning to decrease the density or intensity of uses in the interests of environmental protection.¹⁰¹ Local governments, including Local Trust Committees, do *not* generally have to compensative landowners for loss of value resulting from conservation zoning.¹⁰²

Recommendation #6 The Islands Trust should strategically zone to better protect valuable forests, for example by using Conservation Zoning to decrease the density or intensity of uses in environmentally sensitive areas.

¹⁰⁰ *Green Bylaws Toolkit*, *supra* note 50 at 60.

¹⁰¹ *Green Bylaws Toolkit*, *supra* note 50 at 60.

¹⁰² See s 458 of the *LGA* (as incorporated into the *ITA*).

A Final Key Opportunity for Reform

Amend S.21 of *Private Managed Forest Land Act*

Currently, the *Private Managed Forest Land Act* (“PMFLA”) prohibits a local government from adopting any bylaw or issuing any permit which might indirectly or directly interfere with forestry activities on private managed forest land. Furthermore, the environmental protections with respect to private managed forest land is weak in British Columbia, requiring a fraction of the protections afforded on Crown land governed by the *Forest and Range Practices Act*. As the ELC has previously recommended in its report on the need to reform the PMFLA^{103 104}:

“[l]ocal governments should be enabled to enact bylaws that affect private managed forest land operations.”¹⁰⁵

Under S. 21 of the *PMFLA*, local governments cannot adopt bylaws or issue permits that “would have the effect of restricting, directly or indirectly, a forest management activity” on private managed forest land. This issue represents one of the single largest barriers to sustainable forestry on the Gulf Islands. Section 21 should be amended to allow an exemption for the Islands Trust – to allow Local Trust Committees to adopt bylaws and issue permits to regulate forest management activities on private managed forest lands.

Again, because of the unique importance and vulnerability of the CDF,



¹⁰³ ELC PMFLA, *supra* note 21.

¹⁰⁴ See Part 3: Recommendations for Reform starting at 23 of ELC PMFLA, *supra* note 21.

¹⁰⁵ ELC PMFLA, *supra* note 21 at 27.

there is a strong argument that the Trust area deserves special protections, over and above those offered to other areas. As discussed at the beginning of this paper, the CDF is the smallest, rarest, and most threatened zone in BC, and one of the four most endangered ecosystems in all Canada. The Garry oak ecosystem in particular, historically found throughout the CDF zone on southeastern Vancouver Island and the southern Gulf Islands (and in two isolated sites in Vancouver), now occupies less than 10% of its historical range -- and less than 5% of the original ecosystem remains in near-natural condition.¹⁰⁶ Clearly, the CDF occupies a unique position of vulnerability in BC and Canada.

Furthermore, there is the strong argument that the “preserve and protect” mandate of the Islands Trust requires broader latitude in order to achieve its object than would be necessary in other areas.

Recommendation #7 The Islands Trust should seek amendment of the *Private Managed Forest Land Act*, to allow for the Islands Trust to legislate forestry protection measures on Private Managed Forest Lands.

¹⁰⁶ MA Austin et al (eds) *Taking Nature's Pulse*, (Victoria: Biodiversity BC, 2007) online: <<http://www.biodiversitybc.org/EN/main/downloads/tnp-2.html>> at s 2, text box 6. These data are more than a decade out of date, so it's entirely possible that the state of the Garry oak ecosystems in the CDF have declined since then.



Other Conservation Tools

Covenants

A landowner may enter into a voluntary agreement with a local government (or an approved non-governmental organization) to restrict activities such as tree cutting and development on their land – and register the agreement on the title of the property. These agreements are called conservation *covenants*.¹⁰⁷ The covenant holder (*i.e.*, the local government or non-governmental organization) has the right to ensure that the landowner complies with the covenant, by means of

¹⁰⁷ Pursuant to s 219 of the *Land Title Act*, RSBC, c 250, a covenant may be registered “in favour of the Crown, a Crown corporation or agency, a municipality, a regional district, the South Coast British Columbia Transportation Authority, or a **local trust committee under the *Islands Trust Act***” (s 219(1), emphasis added). Additionally, for covenants that include specific conservation provisions, the relevant minister may designate “any person ... on terms [the minister] thinks proper” to be the covenant holder (“covenantee”) (s 219(3)(c)).

monitoring and enforcement.¹⁰⁸ Covenants “run with the land,” meaning that a covenant created by one owner persists even if the owner transfers title (so whoever owns the land must adhere to the terms of the covenant).¹⁰⁹

The *Land Title Act* specifies what provisions can go in a covenant, including:¹¹⁰

- provisions about the use of land or the use of a building on the land;
- provisions that restrict or prohibit building on the land to varying degrees;
- provisions that restrict or prohibit subdivisions;
- provisions preventing the separate sale or transfer of multiple parcels of land that are collectively covered by the covenant; and
- provisions that land or “a specified amenity”¹¹¹ be protected.¹¹²

The ELC’s *Green Bylaws Toolkit* explains, “[t]ypical covenant provisions include prohibitions on altering ecologically valuable features such as riparian habitat, specifying how to manage and steward different types of ecosystems, and creating greenways or trails that span several adjoining parcels of land.”¹¹³

Unfortunately, as is the case with all tools discussed in this report, Local Trust Committees may well find enforcement and monitoring of covenants to be challenging. They can be expensive to implement, often involving site surveys to get a clear description of the area to be protected, and legal resources to draft the terms of the covenant.¹¹⁴ Nonetheless, covenants can be a “primary legal tool for protection of [environmentally sensitive areas].”¹¹⁵

Local governments that have used covenants extensively “find that keeping landowners informed of covenants and monitoring their compliance is essential to ensure respect for the covenant’s conditions.”¹¹⁶

While it is possible for covenants to be created through the earnest goodwill of landowners, Committees can incentivize the creation of covenants (for example, as discussed immediately below, through amenity density bonuses, and through tax relief).

¹⁰⁸ See *Green Bylaws Toolkit supra* note 50 at 117-119 for an excellent discussion on covenants. See s 219 of the *Land Title Act* for the statutory authority of covenant holders to enforce the covenant.

¹⁰⁹ *Land Title Act*, s 219(1) a covenant “is enforceable against the covenantor and the successors in title of the covenantor” and s 219(3) (with respect to covenants with specific conservation provisions) contains identical wording, subject to certain conditions in 219(11)-(12) (having to do with what happens with the covenant holder dies or dissolves).

¹¹⁰ Section 219(2) & (4).

¹¹¹ *LTA*, s 219(5): “amenity” includes any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land that is subject to the covenant.”

¹¹² If a covenant contains this last type of provision (in s 219(4)), then there are special conditions that apply on the death or dissolution of the covenant holder – see ss 219(11)-(12).

¹¹³ *Supra* note 50 at 118.

¹¹⁴ *Supra* note 50 at 119.

¹¹⁵ *Supra* note 50 at 119.

¹¹⁶ *Supra* note 50 at 119. That page cites a study of covenants in Surrey that concluded, “covenants require ongoing landowner education, monitoring, and enforcement” (*ibid*).

Recommendation #8 The Islands Trust and Islands Trust Conservancy should consider ways to strategically increase and incentivize forest protection through conservation covenants.

Amenity Density Bonuses

Amenity Density Bonuses (“ADBs”) are useful tool for incentivizing private landowners to preserve contiguous expanses of forest on their property (as a conservation “amenity”).¹¹⁷ ADBs are special allowances of zoning density over and above those specified in the applicable zoning bylaws – in return for preserving natural amenities on properties.¹¹⁸ Local Trust Committees can tailor site-specific density bonuses, which can incentivize private landowners to develop their properties in a way that minimizes impacts on surrounding ecosystems.¹¹⁹ For example, density bonuses can be allowed in one area, offset by protection of environmentally sensitive areas or dedication of park land elsewhere.¹²⁰

The Salt Spring Island OCP contemplates amenity zoning and set out a list of eligible amenities.¹²¹ These amenities include, among other things:

- the dedication of environmentally sensitive areas to a conservation body (or protection through a conservation covenant);
- the dedication of a public park and recreation lands or funds for this purpose; and
- suitable, productive forest land donated to a community organization for the operation of a community owned and managed woodlot.¹²²

The *Green Bylaws Toolkit* has a more extensive discussion on the practicalities of ADBs.¹²³ To summarize, ADBs work best either in high-density urban or large-lot rural settings. In the former case, slightly higher density (e.g. a few more floors on a high-rise) will likely go unnoticed. In the latter case, ADBs may be attractive to both landowners and local governments, since they can “reduce servicing costs, protect green infrastructure, and limit the footprint of subdivision.”¹²⁴

In contrast, ADBs will likely be less effective in medium-sized and/or near-urban communities, where residents may oppose extra floors on a small building, and where economic conditions are

¹¹⁷ See the discussion starting at 78 of *Green Bylaws Toolkit*, *supra* note 50.

¹¹⁸ Trust Committees may pursue ADBs by zoning bylaw, pursuant to s 482 of the *LGA* (as incorporated into the *ITA*).

¹¹⁹ *LGA*, s 482: “[a] zoning bylaw may ... establish different density rules for a zone, one generally applicable for the zone and the other ... to apply if the applicable conditions ... are met” (s 482(1)(a)). Conditions include those “relating to the conservation or provision of amenities, including the number, kind and extent of amenities” (s 482(2)(a)).

¹²⁰ Pursuant to s 510 of the *LGA*, an owner of land being subdivided must either provide park land (not exceeding 5% of the land to be subdivided) to the local government or pay the local government the market value of the land that would otherwise be park land (s 510(1) & (5)).

¹²¹ See Appendix 3 to Salt Spring Island Local Trust Committee, Bylaw No 434, 2008, *Official Community Plan*, (Consolidated June 2019), Volume 2, online (pdf): <http://www.islandstrust.bc.ca/media/329646/ss-bl-434_ocp_vol-2_2019.pdf> (“Salt Spring OCP”).

¹²² See Appendix 3 to Salt Spring OCP, *supra* note 121.

¹²³ *Green Bylaws Toolkit*, *supra* note 50 starting at 78.

¹²⁴ *Green Bylaws Toolkit*, *supra* note 50 at 79.

such that subdivision of small lots is attractive to landowners. In these situations, landowners and developers may be more reluctant to agree to cluster higher-density development.¹²⁵

The breadth of potential options makes ADBs a dynamic tool for creatively protecting forests. When used correctly and coupled with the proper incentives, they can incentivize direct conservation measures by private landowners.

Recommendation #9 The Islands Trust should carefully consider how Amenity Density Bonuses and companion conservation covenants can be strategically employed to reduce fragmentation of Coastal Douglas Fir forests.

Natural Area Protection Tax Exemptions

The Island Trust's Natural Area Protection Tax Exemption Program ("NAPTEP") can also incentivize landowners to voluntarily conserve environmentally sensitive areas. The Trust Council can designate a NAPTEP area, allowing landowners who place a conservation covenant on land within a specified area to receive a property tax exemption as long as they continue to uphold the terms of the covenant¹²⁶ (see the above discussion on covenants).

The current program offers a 65% property tax exemption for the assessed value of the portion of land protected by covenant.¹²⁷ Landowners who wish to join the program must have some kind of defined natural value or amenity on their land to protect, including: (a) a relatively undisturbed sensitive ecosystem; (b) habitat for native plant species or communities; (c) critical animal habitat; (d) special geological features; (e) historical features (e.g. culturally modified trees); or social or recreational features (e.g. distinctive natural landscapes).¹²⁸

The NAPTEP Program has successfully protected more than 50 hectares of sensitive ecosystems.¹²⁹ NAPTEP tax exemptions can be a useful long-term protection tool, because a landowner who has been enjoying their tax exemption may have to pay back-taxes if the protective covenant is cancelled.¹³⁰

¹²⁵ *Green Bylaws Toolkit*, *supra* note 50 at 79-80.

¹²⁶ *ITA*, Part 7.1 (ss 49.1-49.8).

¹²⁷ Islands Trust, "Ways to Protect Your Land: Register a NAPTEP Covenant", (Last Updated 27 May 2020), online: <<http://www.islandstrustconservancy.ca/initiatives/privateconservation/naptep.aspx>>. See also *Islands Trust Natural Area Protection Tax Exemption Regulation*, BC Reg 41/2002, s 3.

¹²⁸ *Islands Trust Natural Area Protection Tax Exemption Regulation*, BC Reg 41/2002, OC 192/2002, s 2.

¹²⁹ *Green Bylaws Toolkit*, *supra* note 50 at 105.

¹³⁰ *ITA*, s 49.7. Indeed, the landowner "must" pay back-taxes according to the formula in s 49.7(2), unless the NAPTEP exemption is cancelled because the NAPTEP designated area no longer exists (s 49.7(1)); or if the Trust council waives this obligation by bylaw (s 49.7(3)). See also *Islands Trust Natural Area Protection Tax Exemption Regulation*, BC Reg 41/2002, OC 192/2002.

Note that on North and South Pender Island, the *Morrison Waxler Biodiversity Protection Legacy Fund* offers grants to offset the cost of registration of covenants, helping to facilitate such conservation measures.¹³¹

Recommendation #10 **The Islands Trust should redouble the efforts of the Trust and Islands Trust Conservancy to incentivize protection of ecologically important forests through the Natural Area Protection Tax Exemption Program.**

¹³¹ Islands Trust, “Ways to Protect Your Land: Register a NAPTEP Covenant,” (Late Updated 27 May 2020), online: <http://www.islandstrustconservancy.ca/initiatives/privateconservation/naptep.aspx>.



Conclusion

The Coastal Douglas-fir zone found in the Islands Trust area is a rare and precious area of provincial and national significance. That is why the Islands Trust has been given a special legislated mandate to “preserve and protect” this unique place.

But if the Trust is to protect the CDF, it needs the legal tools to do so – and the political will to use such tools. Local Trust Committees already have some important powers: they can designate environmental Development Permit Areas; they can enact tree cutting bylaws in hazard areas; they can enact zoning bylaws to regulate land use; and they can use Amenity Density Bonuses and Natural Area Protection Tax Exemptions to encourage landowners to register conservation covenants.

But more needs to be done to meet the challenge of protecting the rare and vanishing Coastal Douglas-fir zone. The Trust needs to act strategically to implement Development Permit Areas to protect key portions of the CDF zone. The Trust needs specific authority from the Province to establish Development Permit Areas to protect forest ecosystems and regulate forest practices on private land. The Trust also needs enhanced enforcement mechanisms to ensure compliance with such Development Permit conditions.

The Trust needs to strategically exercise its powers to zone for conservation purposes in order to protect valuable forests. The Trust needs to vigorously apply its current power to legislate tree cutting bylaw powers in hazard areas. It also needs to petition the Province to grant the Trust the same power to regulate trees that municipalities already have.

It is also vital that the Trust gain the jurisdiction to regulate private managed forest land in the Islands Trust Area. The provincial government needs to amend the *Private Managed Forest Land Act*, which currently prohibits local governments from affecting forest activities on private managed forest land. Local Trust Committees must have the ability to adopt bylaws and issue permits to protect ecologically significant private managed forest lands. It is unacceptable that forestry in this precious ecosystem is subject to rules far weaker than the Crown land rules that apply across the province.

Finally, the Islands Trust needs to act strategically to incentivize and encourage forest protection through conservation covenants – utilizing tax incentives, Amenity Density Bonuses and other measures.

The Islands Trust has a responsibility to pass on the ecological jewel that it has inherited to future British Columbians. To meet that responsibility, substantial changes are needed, at both the provincial and local government levels.



SUMMARY OF RECOMMENDATIONS

Recommendation #1 The Islands Trust should formally request that the Province amend s. 29 of the *Islands Trust Act* to give the Islands Trust the authority to establish Development Permit Areas to protect forest ecosystems and regulate forest practices on private lands.

Recommendation #2 The Islands Trust should request that the Province enhance and clarify the power of local governments to enforce Development Permit Area requirements and Development Permit conditions – by explicitly enabling local governments to enforce contraventions by way of prosecution, ticketing and issuance of bylaw enforcement notices.

Recommendation #3 The Islands Trust should take all possible steps under the current law to ensure that DPA requirements and Development Permit conditions

are enforceable by way of prosecution, ticketing and issuance of bylaw enforcement notices.

Recommendation #4 The Islands Trust should consider the extent to which current Trust tree cutting bylaw jurisdiction could be implemented in all hazard lands in the Coastal Douglas-fir zone.

Recommendation #5 The Islands Trust should ask the Province to enhance the Trust's jurisdiction over tree cutting bylaws, to make its jurisdiction equal to that of municipalities under s. 8 of the Community Charter.

Recommendation #6 The Islands Trust should strategically zone to better protect valuable forests, for example by using Conservation Zoning to decrease the density or intensity of uses in environmentally sensitive areas

Recommendation #7 The Islands Trust should seek amendment of the *Private Managed Forest Land Act*, to allow for the Islands Trust to legislate forestry protection measures on Private Managed Forest Lands.

Recommendation #8 The Islands Trust and Islands Trust Conservancy should consider ways to strategically increase and incentivize forest protection through conservation covenants.

Recommendation #9 The Islands Trust should carefully consider how Amenity Density Bonuses and companion conservation covenants can be strategically employed to reduce fragmentation of Coastal Douglas-fir forests.

Recommendation #10 The Islands Trust should redouble the efforts of the Trust and Islands Trust Conservancy to incentivize protection of ecologically important forests through the Natural Area Protection Tax Exemption program.