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BARRISTERS AND SOLICITORS

THE STREAMSIDE PROTECTION REGULATION

By

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Certain sections of the *Fish Protection Act* (originally passed in 1997) were brought into force on January 19, 2001 as was the Streamside Protection Regulation (B.C. Reg. 10/2001) (the "Regulation").

In this paper I begin by trying to place the Regulation in its context by describing other legislation which affects or could affect streamside protection (Section 1). I then summarize the purposes of the legislation (Section 2). I finish with some editorial comments/practice points on the Regulation (Section 3).

1. PRE-EXISTING LEGISLATION

Protection of fish habitat is not a new concept. Prior to the implementation of the Regulation, persons considering developing lands in which a water course was present and which provided fish habitat had to take other legislation into account, including:

Federal Fisheries Act

This Act gives the Department of Fisheries and Oceans ("DFO") decision making authority for the conservation and protection of fish and fish habitat which supports Canadian fisheries.

Section 36(3) of the Act prohibits the deposit of a deleterious substance of any type in water frequented by fish. The term "deleterious substance" includes any substance that would degrade the water so that it is rendered deleterious to fish or fish habitat.

In addition, section 35(1) prohibits the harmful alteration, disruption or destruction of fish habitat.

Fish habitat includes the wetted perimeter of a stream, the shoreline and setbacks from a stream (i.e. portions of the dry land on either side of the stream or lake shore). It is not unknown for distances of 30 meters to be applied by DFO (i.e. 15 meters on both sides) for a stream with a wetted perimeter of approximately one meter. The case law contains numerous examples of prosecutions and enforcement actions against landowners, developers and subcontractors for cutting down trees or removing shrubs from dry land portions of fish habitat. In determining the

size of the setback, DFO will often apply variable sized setbacks depending upon the specific circumstances.

Land Development Guidelines for the Protection of Aquatic Habitat

The Land Development Guidelines for the Protection of Aquatic Habitat (the "Guidelines") were developed in 1992 by DFO together with the provincial Ministry of Environment, Lands and Parks ("MELP"). The federal government has jurisdiction over Pacific salmon populations, while steelhead, trout, char and other freshwater species are managed by the province.

The Guidelines apply whenever a planned project involves work in and around fish habitat such as a stream, lakeshore, wetlands, or marine foreshore, or when drainage water or pollutants may potentially be discharged into fish habitat.

The Guidelines set out objectives to be considered when the federal and provincial governments apply their legislative powers under the *Fisheries Act* and various provincial statutes. Where a project may have impacts on fish and fish habitat, the land developer must prepare a land development plan, which is an impact assessment document outlining the development proposal and describing how the requirements in the Guidelines will be incorporated. DFO and MELP then determine the potential impacts on fish and fish habitat based on habitat function, productivity, uniqueness and sensitivity. If a potential impact exists, alternate siting, mitigation, or compensation options are examined to determine if the project can proceed without having a negative impact on the maximum natural productive capacity of the fish habitat, in which case the project will be approved under the Act.

Sensitive Streams Designation and Licensing Regulation (*Fish Protection Act*, S.B.C. 1997 c. 21)

The *Sensitive Streams Designation and Licensing Regulation*, brought into force March 10, 2000, designates 15 streams as "sensitive" for the purposes of the *Fish Protection Act*. Any application for a license, approval, or an amendment to a license or approval with respect to these designated streams, which would include an application for a simple water crossing, triggers this regulation. The comptroller or regional water manager may then require the

applicant to provide detailed data respecting current stream conditions and proposed mitigation and restoration measures.

The regulation also provides guidelines for "in kind compensation" proposals, pursuant to which an applicant agrees to create fish habitat in place of any habitat that would suffer a significant adverse impact under the applicant's proposal. Some of the designated sensitive streams in the lower mainland include Kanaka Creek, West Creek, Whonnock Creek, Silverdale Creek and Nathan Creek. Accordingly, if a development is proposed near one of these streams, the developer may be required to provide detailed data respecting the stream, mitigative measures and restoration measures.

Water Act (B.C.)

The *Water Act* prohibits diverting, extracting, using or storing any water from a stream. It also prohibits making changes in and about a stream except in accordance with an approval or license.

The word "stream" is defined broadly in the *Water Act* as including a natural watercourse or source of water supply (whether usually containing water or not), ground water, lake, river, creek, spring, ravine, swamp or gulch. In other words, the *Water Act* prohibits a person from making any kind of change in and about both large and small water channels without approval. The change can be as simple as the installation of a culvert in order to construct a stream crossing.

Amendments to the *Water Act* were made as a result of the passing of the *Fish Protection Act* to prohibit the harmful deposit of rock and other debris into streams, allowing remediation if such deposit occurs, and to provide additional enforcement authority, including allowing creative sentencing and establishing higher penalties for offences related to fish and fish habitat.

Local Government Act (B.C.)

Many existing provisions of the *Local Government Act* allow municipalities to protect riparian areas. These include:

Official Community Plans ("OCP's")

Since amendments made to the Municipal Act in 1997, Official Community Plans ("OCP's") may include local government policies "relating to the preservation, protection, restoration and enhancement of the natural environment, its ecosystems and biological diversity" (section 878(1)(d)). The 1997 amendments also gave each local government the authority, through its OCP, to specify circumstances, and areas, in which "development approval information" may be required in relation to the "anticipated impact of the proposed activity or development on the community", including the "natural environment of the area affected" (sections 879.1 and 920.1).

Zoning Powers

A local government may by bylaw, zone land within the local government's area in order to regulate permitted land uses and the density of development. The section also authorizes zoning provisions that regulate the siting, size and dimensions of buildings and structures and the location of uses on a parcel (section 903). All of these components of the zoning power offer local governments flexibility in designing zoning provisions suited to environmental protection needs, while balancing development interests.

Development Permits

In addition to being a high level land use planning document, an OCP can function as the basis and framework for a system of development permits. Development permits are site-specific permits, the issuance of which can be made a condition precedent to alteration or development of a parcel for which a development permit is required by the relevant OCP.

The power to impose requirements or conditions, or to set standards, in a development permit is broad. A development permit may, under section 920 (7), in relation to environmentally sensitive areas:

- Specify natural features or areas to be preserved, protected, restored or enhanced as provided in the permit.

- Require works to be constructed to preserve, protect, restore or enhance natural water courses or other specified natural features of the environment.

- Require protection measures, including the planting or retention of vegetation or trees, to preserve, protect, restore or enhance fish habitat or riparian areas, to control drainage, or to control erosion or protection banks.

Where a local government has opted not to enact a comprehensive environmental protection bylaw, or series of bylaws, to regulate setbacks, site coverage, tree-cutting, erosion control, drainage control and other matters, a development permit can deal with essentially all of these matters.

Run-off Control Requirements

In 1997 local governments were given the power (under section 907) to pass bylaws requiring land owners who carry out "construction of a paved area or roof area" to "manage and provide for the ongoing disposal of surface runoff and storm water" in accordance with the bylaw's requirements. Among other things, the bylaw can establish the maximum area of land, expressed as a percentage, that can be covered "by impermeable material". These bylaws can differ according to different zones, different uses, different sizes of paved or roof areas, and different terrain and surface water or groundwater conditions.

Screening and Landscaping Requirements

The power, in section 909, to set standards by bylaw to require provisions for screening or landscaping was extended in 1997 to include screening or landscaping in order to preserve, protect, restore and enhance the natural environment. This power can be used, for example, to create leave areas where site development is not permitted, to enhance separation of development from adjacent sensitive areas, including riparian areas and fish habitat.

Subdivision Bylaw Provisions

At the practical level of development design and construction, the local government power under section 938 to regulate design and construction of works and services "in respect of the subdivision of land" is extremely important. Under that section, a local government has the

authority to adopt a bylaw that requires the servicing of subdivisions in accordance with the standards established in the bylaw. This power extends to regulation of highways, sidewalks, boulevards, water distribution systems, sewage collection and disposal systems and – perhaps most important in the context of this paper – drainage collection and disposal systems.

Tree Preservation Bylaws

Section 708 of the *Local Government Act* authorizes adoption of a bylaw, applicable to all or part of a municipality, to prohibit or regulate the cutting and removal of trees, prohibit the damaging of trees, to regulate activities that may damage trees, and to require the replacement of trees that have been cut or removed in contravention of the bylaw. In the context of sensitive riparian zones, this power can be used to identify areas of the municipality in which tree removal is either prohibited or regulated. In the context of development, such a bylaw can authorize removal of trees, but require that they be replaced by trees of a size and species required by the municipality.

2. ANALYSIS OF THE REGULATION

Purpose Of The Regulation

Section 2 of the Regulation states that its purpose is "to protect streamside protection and enhancement areas from residential, commercial and industrial development so that the areas can provide natural features, functions and conditions that support fish life processes including, but not limited to…" There follows a list of these natural features, functions and conditions.

What Is A "Stream"?

Five definitions in the Regulation have to be considered.

"Stream" is defined as "a watercourse or source of water supply, whether usually containing water or not, a pond, lake, river, creek, brook, ditch and a spring or wetland that is integral to a stream and provides fish habitat".

Not all streams are created equal. There are four sub categories: fish bearing streams, non-fish bearing streams, permanent streams and non-permanent streams.

A "fish bearing stream" is "a stream in which fish are present or potentially present if introduced barriers or obstructions are either removed or made passable for fish".

A "non fish bearing stream" is "a stream that:

(a) is not inhabited by fish, and

(b) provides water, food and nutrients to a downstream fish bearing stream or other water body".

A "non-permanent stream" is a "stream that typically contains surface waters or flows for periods less than 6 months in duration".

A "permanent stream" is a "stream that typically contains continuous surface waters or flows for a period more than 6 months in duration".

What Is To Be Protected?

As stated, the purpose of the Regulation is to protect streamside protection and enhancement areas ("SPEAS") from residential, commercial and industrial development.

A SPEA is defined as a "an area adjacent to a stream that links aquatic to terrestrial ecosystems and includes both the riparian area vegetation and the adjacent upland vegetation that exerts an influence on the stream, the width of which is determined according to section 6".

Width Of Streamside Protection And Enhancement Areas

The area of a particular SPEA depends on the area of the existing or potential vegetation conditions at a stream (section 6(1)).

"Potential vegetation" is "considered to exist if there is a reasonable ability for regeneration either with assistance through enhancement or naturally, and is considered to not exist on that part of an area covered by a permanent structure" (section 1).

The starting point for the measurement of such vegetation conditions is the "top of the bank" (a defined term) or the "top of the ravine bank" (also a defined term) on either side of a stream.

The area of the SPEA will then depend on two general criteria:

- the width of the existing or potential vegetation areas; and
- the type of stream.

Section 6(1) describes how the width of vegetation areas is to be determined. There are seven different categories. Vegetation (whether existing or potential) that is:

1. intact and continuous and 50 metres wide or more; or
2. limited but continuous and 30 metres wide; or
3. discontinuous, but occasionally wider than 30 metres, between 30 and 50 metres wide; or
4. narrow but continuous and 15 metres wide; or
5. discontinuous, but occasionally wider than 15 metres, between 15 and 30 metres wide; or
6. very narrow but continuous up to 5 metres wide; or
7. discontinuous, but occasionally wider than 5 metres, between 5 and 15 metres wide interspersed with permanent structures.

Having first determined the width of the existing or potential vegetation at a stream, the applicable width of the SPEA can be calculated based on the type of stream involved.

If the vegetation falls within categories 1, 2 or 3 above and the stream is either fish bearing or permanent (even though non fish bearing), the SPEA must be at least 30 meters wide, measured from the top of the bank.

If the vegetation falls within categories 1, 2, 3, 4 or 5 and the stream is non fish bearing or non-permanent, the SPEA must be at least 15 metres wide.

If the vegetation falls within categories 4 or 5 above and the stream is permanent but non fish bearing, the SPEA must also be at least 15 metres wide.

If the vegetation falls within categories 4, 5, 6 or 7 above and the stream is fish bearing (whether permanent or not), the SPEA must be the greater of the widths determined in accordance with those categories and 15 metres. As I understand it, this means that if, for instance, there is discontinuous vegetation beside a fish bearing stream – whether that vegetation exists or is potential - and that vegetation occasionally is (or could be) wider than 15 metres, the width of the SPEA will be at least 15 metres and could be as much as 30 metres.

Finally, if the vegetation falls within categories 6 or 7 and the stream is non-fish bearing, the SPEA must be at least 5 metres wide and can be up to 15 metres wide.

Application Of The Regulation

A copy of section 12 of the *Fish Protection Act* is attached to this paper as Schedule A. This section was brought into force by B.C. Reg. 10/2001 at the same time as the Regulation was brought into force.

Section 12(1) provides that the Lieutenant Governor in Council may by Regulation establish "policy directives" relating to the protection and enhancement of riparian areas that may be subject to residential, commercial or industrial development. The Regulation is presumably what constitutes those policy directives.

Section 12(2) required that consultation should take place before such policy directives were brought into force between the MELP and representatives of the Union of British Columbia Municipalities. This consultation took place in the period following the passing of the *Fish Protection Act* and the UBCM endorsed a draft of the Regulation at its annual meeting in October, 2000, subject to financial and technical assistance being made available by MELP to local governments (as is contemplated by section 3(1) of the Regulation – see below).

Section 12(3) states that policy directives may be different for different parts of British Columbia. B.C. Regulation 10/2001 provides that the Regulation only applies to those local governments (all in rapid growth areas) listed in Schedule B.

Section 12(4) states a local government to which the Regulation applies must:

- include riparian area protection provisions in its zoning and rural land use bylaws in accordance with the Regulation; or
- ensure that its bylaws and permits under Part 26 of the *Local Government Act* (or the equivalent provisions of the Vancouver Charter) provide a level of protection which, in the opinion of the local government, is at least comparable to that set out in the Regulation.

Section 12(5) states that a policy directive may establish a time period during which a local government must review and if necessary, amend its bylaws to meet the requirements of section 12(4). Section 5 of the Regulation states that affected local governments must establish SPEAs within 5 years of the enactment of the Regulation.

Intergovernmental Cooperation Agreements

Section 3(1) of the Regulation requires that it is to be "supported" by "intergovernmental cooperation agreements". These are defined in subsection 3(2) of the Regulation as agreements between MELP and the authorized representative of the appropriate local government "which may include agreement with Fisheries and Oceans Canada".

These agreements can incorporate any of the topics set out in the Regulation including:

- financial and technical support for the implementation of the Regulation;
- the staged establishment of SPEAs;
- advice by qualified professionals with reference to the operation of the Regulation;
- dispute resolution;

- a compliance strategy, including education, training, monitoring, reporting, enforcement and auditing.

Types Of Property Affected

Section 7 of the Regulation states that the local governments to which the Regulation applies must protect SPEAs when exercising their powers with respect to "residential, commercial or industrial development". This phrase is defined in section 1 of the Regulation as meaning those activities listed in the definition which are associated with or result from the regulation or approval, under Part 26 of the *Local Government Act,* of residential, commercial, industrial or ancillary activities. These include:

- removal alteration, disruption or destruction of vegetation;
- disturbance of soils;
- construction or erection of buildings and structures;
- creation of nonstructural impervious or semi-impervious surfaces;
- provision and maintenance of sewer and water services;
- development of drainage systems;
- development of utility corridors;
- subdivision as defined in section 872 of the *Local Government Act*.

However, section 4(2) of the Regulation states that it does not apply to a building described in section 911(8) of the *Local Government Act* (ie. one that is non-conforming, and which is damaged or destroyed to the extent of 75% of more than its value), if a local government issues a development permit or a development variance permit only for the purpose of enabling reconstruction or repair of that building on its existing foundation.

The Regulation gives applicable local governments who have entered into Intergovernmental Cooperation Agreements some flexibility in the determination of specific SEPAs. Section 6(5)

provides that local governments can take into account the existence of obstacles which impair the ability to designate SPEAs including, but not limited to:

- biophysical conditions;
- existing parcel sizes;
- existing roads, works or services;
- proposed roads, works and services needed to provide access or services to otherwise developable land;
- the existence of artificial controls on the high water mark or water level of a stream.

3. COMMENTS ON SOME SPECIFIC PROVISIONS OF THE REGULATION

Application to Development

The Regulation deals with the protection of riparian areas which may be subject to residential, commercial or industrial development. The Regulation does not, therefore, restrict agricultural uses, nor, it would seem public and private institutional and non-commercial uses within SPEAs. If a local government should wish to establish a uniform stream side protection setback policy for all developments, it could, of course, rely on its general zoning power.

The Regulation is further limited in that it only applies to activities which are subject to regulation and approvals under Part 26 of the *Local Government Act*. Thus to the extent that any regulation or approval to disturb vegetation or soil, for example, pursuant to a soil removal bylaw, or a requirement that trees be removed under section 711 of the *Local Government Act* are not Part 26 powers, they are not subject to the Regulation.

Timing

As noted, local governments have 5 years within which to establish SPEAs. Until a local government actually establishes its own SPEAs, development and subdivision of all kinds can proceed under existing bylaws.

Implementation

As noted, a local government must establish SPEAs either through its zoning bylaws or pursuant to its bylaws and permitting processes under Part 26 of the *Local Government Act*.

To the extent that any setbacks or other siting controls based on the Regulation are enacted in a zoning bylaw they will presumably still be subject to the hardship jurisdiction of the Board of Variance. A local government will have no control over such jurisdiction and there is no statutory requirement for Boards of Variance to protect SPEAs.

Intergovernmental Cooperation Agreements

Section 3 of the Regulation provides that it will be supported by intergovernmental cooperation agreements. Set out below are the comments of Ray Young of Lidstone, Young, Anderson on this section of the Regulation (in a Client Bulletin dated January 29, 2001) which he has kindly allowed me to share with you.

"There is no express power in the *Fish Protection Act* to suggest that any local government can be legally compelled to enter into any agreement whatever the terms. There is some doubt whether section 12 of the *Fish Protection Act* authorizes the Regulation insofar as the Regulation provides for mandatory agreements.

Some of what is intended to be the content of such agreements is clearly suspect. Since OCPs, DPs and zoning bylaws will be the main vehicles for implementing streamside protection, the question arises whether Council can contract away its legislative or discretionary (quasi-judicial) authority. If so, public hearings and citizen participation become meaningless exercises in respect of streamside protection areas.

If the Legislature had intended such a legally odd result one would expect it to have been much clearer in its delegation to the Cabinet in respect of purported "compulsory agreements". Instead there is no mention at all in the *Fish Protection Act* of such agreements or of the Cabinet authority to require them. Indeed, the whole idea of calling something "an agreement" and then making it mandatory is clearly opposite to the consensual nature inherent in the concept of an agreement.

The following agreement provisions are prime suspects for potential fettering of legislative and quasi-judicial discretion.

- A transition strategy with respect to streamside protection
- Prioritizing the staged establishment of streamside protection
- Amending streamside protection areas
- Dispute resolution with respect to applicable statutory authorities
- A compliance strategy [for] …enforcement

All of these have the potential to engage legislative and/or policy discretion that local governments cannot fetter by contract. To the extent that this type of content does find its way into agreements it will have to be worded in a manner that does not bind the local government to any particular course of action. In that latter respect it is hard to see how something that is not binding could be an agreement in any legal sense."

In addition to these matters, Intergovernmental Cooperation Agreements can deal with financial and technical support for implementation of the Regulation. This will be of major interest to the affected local governments. They will undoubtedly want to be provided not only with adequate start-up funding, but also with realistic ongoing contributions to administration, inspection and enforcement, including court costs.

Nature of a Stream

Note that a stream can be a ditch or a spring or a wetland and does not even have to usually contain water. Note also that a "permanent stream" does not mean that water is always present. Water only has to be present for more than 6 months in duration. Does this mean every year or once a decade?

Width of SPEAs

Remember that the streamside and enhancement areas will affect **both** sides of a stream.

The widths specified in the Regulation will be **minimum** widths in most cases although, as noted above, section 6(5) gives some flexibility to local governments.

Vegetation

Vegetation does not have to exist. It can merely be potential.

Does the vegetation (whether existing or potential) have to be of the sort that is described in the definition of "streamside protection and enhancement area" ie. does not for instance have to "exert an influence on the stream" or will it be possible to argue that notwithstanding that riparian vegetation of the sort described in section 6 of the Regulation exists, it did not exert influence on the stream and therefore can be discounted?

The width of a SPEA will depend, among other things, on whether the vegetation is continuous or discontinuous. These terms are not defined.

Judicial Review of Local Government Actions and Compensation

The basic principles of judicial review of local government land use legislation were set out in the judgment of Humphries J. in *Canada Mortgage and Housing Corp. v. North Vancouver (District)* (1998), 45 M.P.L.R. (2d) 214 (B.C.S.C.) as follows:

(a) A municipality cannot act for a purpose beyond its powers. *MacMillan Bloedel v. Galiano Island Trust Committee* (1995), 10 B.C.L.R. (3d) 121 (B.C.C.A.).

(b) Municipal bylaws are subject to judicial scrutiny, and courts may look behind the face of a bylaw to discover its true purpose. *Columbia Estate Co.* v. *Burnaby (District)*, [1974] 5 W.W.R. 735 (B.C.S.C.). *Hauff* v. C*ity of Vancouver* (1981), 28 B.C.L.R. 276 (B.C.C.A).

(c) Bylaws may be examined for bad faith, which includes an examination of improper or ulterior motives and lack of jurisdiction, but ulterior motives alone, if within the scope of the legislative grant to the municipality, will not invalidate a bylaw. (*MacMillan Bloedel, supra*).

(d) The onus of proving that the municipality acted for an improper purpose or otherwise beyond its jurisdiction rests on the petitioner. As well, the onus of establishing that the bylaws are bad for any of the other reasons set out in the petition rests on the petitioner. *MacMillan Bloedel, supra*.

(e) The courts should give deference to elected municipal bodies acting under legislative authority and should be slow to find bad faith, unless there is no other rational conclusion. *MacMillan Bloedel, supra*.

(f) A private land holder is entitled to use its land as it sees fit, subject to the rights of others and municipal bylaws. A zoning bylaw directly and immediately limits the use to which land may be put. *Ottawa (City) v. Boyd Builders Ltd.* (1965), 50 D.L.R. (2d) 704 (S.C.C.).

(g) Legislation is presumed not to authorize the expropriation of land without compensation. *British Columbia v. Tener,* [1985] 1 S.C.r. 533 (S.C.C.) at 559.

(h) Zoning bylaws affect the value of land, but a decrease in value as a result of a rezoning does not give rise to a right to compensation, unless the bylaw restricts the use of land to a public use. (Section 914 of the *Local Government Act*. As well, a decrease in the value of land will not of itself justify a finding of bad faith *Hall v. Maple Ridge (District)* (1993), 15 M.P.L.R. (2d) 165 (B.C.S.C.).

(i) An OCP designation is an indication of the municipality's long-term plans for the lands. Zoning designations must be consistent with OCP designations. (Section 884(2) of the *Local Government Act*).

(j) If a municipality designates privately owned lands under its Official Community Plan for future public use, they must make genuine plans in their capital expenditure programs to acquire the lands. *Hall v. Maple Ridge (District), Supra*. A municipality may not reserve private lands for public use by the devise of a zoning bylaw. *Columbia Estate Co. v. Burnaby (District)*, [1974] 5 W.W.R. 735 (B.C.S.C.).

(k) A municipality may not create a "holding zone", thereby freezing all uses of land, even if it does so in good faith. *Coquitlam By-Laws 918, 1298, 1336, 1410, 1438, 1498, 1516 & 1517, Re* (178), 8 B.C.L.R. 282 (B.C.C.A.); *North Vancouver Zoning By-law 4277, Re,* [1973] 2 W.W.R. 260 (B.C.S.C.).

A court will also interfere with a local government's actions if the legislation or decision is "unreasonable" see *Canadian National Railway v. Fraser-Fort George Regional District* (1994), 24 M.P.L.R. (2d) 252 (B.C.S.C.) and the judgment of Prowse J.A. in *Westcoast Energy Inc. et al v. Peace River Regional District*, [1998] B.C.J. No. 2387.

Tensions between local government legislative obligations under the Regulation, and the exercise of legislative authority under Part 26 of the *Municipal Act*, are likely to occur in cases where habitat protection measures reduce the economic value of affected land dramatically. As stated, section 12(4) of the Regulation states that an applicable local government must include riparian area protection provisions in its zoning bylaws in accordance with the Regulation or ensure that its bylaws and permits under Part 26 of the *Local Government* Act provide a level of protection which **in the opinion of the local government** is at least comparable to that set out in the Regulation. One avenue of attack in such a case could well be that the local government's "opinion" with respect to the habitat protection measures required of an owner to comply with the Regulation was clearly "unreasonable", although it is clear from the cases that the courts will not lightly interfere on the basis of unreasonableness.

It has already been noted that a court will quash any bylaw that exceeds a local government's legislative authority, including by creating a holding zone that freezes all uses of land. So if a zoning bylaw provides, in respect of a specific parcel, that it can only be used for ecological preserve purposes and no other purpose, the bylaw will be susceptible to successful challenge.

Note however that section 914 of the *Local Government Act* holds local governments harmless against such claims in many cases. That section reads as follows:

"914(1) Compensation is not payable to any person for any reduction in the value of that person's interest in land, or for any loss or damages that result from the adoption of an official community plan, a rural land use bylaw or a bylaw under this Division or the issue of a permit under Division 9 of this Part.

(2) Subsection (1) does not apply where the rural land use bylaw or bylaw under this Division restricts the use of land to a public use."

As Humphries J. observed in *Canada Mortgage and Housing Corp.*, at p. 224, a reduction in the value of land attributable to the enactment of a zoning bylaw or OCP does not render the local government liable to compensate the affected land owner. By contrast, where a zoning bylaw or rural land use bylaw "restricts the use of land to a public use", the insulating effect of section 914(1) disappears.

Note that compensation for restriction of land use to a public use will **not** be available where the public use restriction is found in an OCP, development permit or development variance permit. This is because section 914(2) excludes the insulating effect of section 914(1) **only** where the restriction is effected by a zoning bylaw, or other bylaw, adopted under Division 7 of Part 26. Official community plan bylaws are authorized under Division 2 of Part 26. It is therefore clear from section 914(2) that where the effect of an OCP policy, development permit area designation or issuance of a development permit is to restrict the use of land to a public use, the protection afforded to local governments by section 914(1) still applies.

I acknowledge with thanks the debt which I owe in the preparation of certain portions of this paper (specifically those dealing with the existing powers of local governments and those dealing with judicial review and compensation) to a paper entitled "Local Government and Habitat Protection" presented by David Loukidelis, then of Lidstone, Young, Anderson, at a Continuing Legal Education Seminar in February 1999 entitled "Environmental Issues 1999".