



News Release

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February 14, 2013

2013-06-IT

BC SUPREME COURT UPHOLDS DENMAN ISLAND'S BYLAWS FOR KOMAS BLUFF

VICTORIA – In its decision released yesterday, the Supreme Court of British Columbia upheld Denman Island bylaws that regulate development on the Komasa Bluff. The decision relates to construction and land alterations at the crest and on the plateau above the Komasa Bluff, on land owned by Daniel and Debra Stoneman of Denman Island.

The Stonemans' property lies within the Komasa Bluff Development Permit Area, which requires geotechnical studies before activities such as tree-cutting and building construction can take place. In areas of BC that are subject to natural hazards, development permits are one of the primary mechanisms that local governments use to protect structures from flooding, mudflows, erosion, land slip, rock falls, avalanche and wildfire. While development is allowed, it must be done pursuant to permit conditions to reduce the risks associated with natural hazards. This normally happens as a matter of course. Legal action is very unusual, but this one property has now been the subject of three court cases.

In his Reasons for Judgment, the Honourable Mr. Justice Curtis found that the Stonemans breached the *Local Government Act* when they cleared and excavated their land, and constructed buildings and structures, including a path, stairs, a ramp, drainage works, a residence and accessory buildings within the Komasa Bluff Development Permit Area without the necessary permits. The judgment prohibits the Stonemans from further altering the land within the Komasa Bluff Development Permit Area without valid permits or further order of the Court. It also orders the Stonemans to:

- work with the Denman Island Local Trust Committee to either obtain the required permits, or remove any unpermitted structures and rehabilitate the property at their own expense,
- allow access to the property to Islands Trust staff or contractors in order to assess and ensure compliance with the order, and
- pay the full legal costs incurred by the Denman Island Local Trust Committee in enforcing the *Local Government Act* and defending its bylaws.

The case dates from 2005, when the Honourable Mr. Justice Groberman ruled that the Komasa Bluff Development Permit Area was valid, in relation to an earlier court action involving the Stonemans and Mr. Dean Ellis, the previous owner of the property. In 2006, the Stonemans applied for and were granted a development permit for their proposed construction, subject to their submission of plans for erosion protection from a geotechnical engineer. However, the Stonemans began construction of a residence without submitting the requested reports. Beginning in 2010 they constructed stairs down the face of Komasa Bluff, also without permits. They claimed the bylaws were invalid and that no development permit was required.

In yesterday's Reasons for Judgment, the Honourable Mr. Justice Curtis said: "Any person who read Justice Groberman's decision could not fail to understand that his decision was that the Komasa Bluff Bylaw was valid and that no person should be in violation of its provisions."

The Court went on to find that: "The Stonemans bought the property intending to build a home on it and live there. When they appeared before Groberman J. they were well aware of this. They argued that Bylaw 111 [establishing the development permit area] was invalid and did not apply to their property and they lost that argument. They are now attempting to re-argue the issues having chosen to build without a permit in spite of a court order they ought to have understood very clearly indicated that they were not free to do so."

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Bowen, Denman, Hornby, Gabriola, Galiano, Gambier, Lasqueti, Mayne, N. Pender, Salt Spring, Saturna, S. Pender, Thetis

David Graham, a Denman Island local trustee responded to the judgment saying, "I'm pleased that this judgment confirms and clarifies the options available to the landowners. They must now work with the local trust committee to comply with Denman bylaws both by remediating the land and fulfilling the conditions necessary to obtain the proper permits."

Laura Busheikin, also a local trustee on Denman Island added, "We are glad the community's bylaws are once again upheld, and look forward to resolving this situation with the Stonemans."

The Islands Trust is a federation of local government bodies representing 25,000 people living within the Islands Trust Area. The Islands Trust is responsible for preserving and protecting the unique environment and amenities of the Islands Trust Area through planning and regulating land use, development management, education, cooperation with other agencies, and land conservation. The area covers the islands and waters between the British Columbia mainland and southern Vancouver Island. It includes 13 major and more than 450 smaller islands covering 5200 square kilometres.

Note: chronology, photo and Reasons for Judgment attached.

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**Chronology: Daniel John Stoneman and Debra Monica Stoneman versus
Denman Island Local Trust Committee**

2003: A significant slump on the property received province wide attention. A geotechnical report prepared by Thurber Engineering concluded the slump was a result of “incautious human activity” tree cutting and ditching too close to the crest of the bluff without a development permit. In areas of BC that are subject to natural hazards, development permits are one of the primary mechanisms that local governments can use to require geotechnical reports or place other conditions on development to protect structures from flooding, mudflows, erosion, land slip, rock falls, avalanche and wildfire.

2005: The BC Supreme Court found that the previous owner of the property, Mr. Ellis, had contravened the *Local Government Act* by altering land in the Komasa Bluff Development Permit Area without a development permit, and issued an order that prohibited “cutting trees on, clearing, developing, excavating or otherwise altering” the Stoneman property within 50 metres of the top edge of the Komasa Bluff or on the face of the Komasa Bluff. In that action, the Court rejected the many arguments made by both Mr. Ellis and Mr. Stoneman that the Komasa Bluff Development Permit Area was invalid or inapplicable to the property, and that they did not require further development permits to alter the land. Costs were awarded against Mr. Ellis, but not against Mr. and Mrs. Stoneman at that time, on the basis that there was no indication that the Stonemans would continue the unauthorized clearing and land alterations on the property.

2006: The Stonemans applied for a development permit to build a house and outbuildings in the Komasa Bluff Development Permit Area. That development permit was approved by the Denman Island Local Trust Committee, subject to the Stonemans’ complying with the recommendations of a geotechnical engineer hired by the Stonemans, and a requirement that that engineer review and approve their plans. The Stonemans later declined to complete the requirements for issuance of the development permit, but nevertheless proceeded to construct the house and outbuildings.

2007: The BC Court of Appeal upheld the orders of the BC Supreme Court, and specifically the Komasa Bluff Development Permit Area as validly protecting development from hazardous conditions through restrictions on land alteration and tree clearing

March 2012: Islands Trust bylaw enforcement staff received a complaint about tree removal and path construction on the face of the Komasa Bluff on the property. A visit to the Stonemans’ property confirmed new construction of a path, stairs, ditching work, the removal of trees and vegetation on the slope face, as well as the installation of drainage works, all without the necessary permits.

July 2012: The Denman Island Local Trust Committee filed proceedings with the BC Supreme Court seeking a court order prohibiting Daniel John Stoneman and Debra Monica Stoneman from doing any further construction or works in the development permit area without a permit, and requiring them to remove a pathway and stairs on the face of the Komasa Bluff, and to obtain a development permit for their house and outbuildings within the Komasa Bluff Development Permit Area on their property on Denman Island. That same month, the Stonemans file an amended petition for judicial review seeking an order that the Komasa Bluff development permit area is either invalid, or inapplicable to the Stonemans property.

February 13, 2013: The Honourable Mr. Justice Curtis, Supreme Court of British Columbia, releases Reasons for Judgement.



IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Stoneman v. Denman Island Local Trust
Committee*,
2013 BCSC 218

Date: 20130213
Docket: 12-2406
Registry: Victoria

Between:

Denman Island Local Trust Committee

Petitioner

And

**Daniel John Stoneman
and Debra Monica Stoneman**

Respondents

Docket: S062427
Registry: Vancouver

Between:

**Daniel John Stoneman
and Debra Monica Stoneman**

Petitioner

And

**Denman Island Local Trust Committee,
Minister of Community Services**

Respondents

Before: The Honourable Mr. Justice Curtis

Reasons for Judgment

Counsel for Daniel and Debra Stoneman:

Daniel W. Burnett

Counsel for Denman Island Local Trust
Committee:

Francesca Marzari

Place and Date of Hearing:

Victoria, B.C.
December 10-12, 2012

Place and Date of Judgment:

Victoria, B.C.
February 13, 2013

[1] The Denman Island Local Trust Committee has applied by petition filed July 6, 2012 for a declaration that the Stonemans have altered land which they own at 2600 Swan Road, Denman Island, without a development permit contrary to s. 920(1)(b) and (d) and 928 of the *Local Government Act*, and for other orders flowing from that allegation. In response, the Stonemans, allege that the bylaw the Trust Committee seeks to enforce is invalid, as set out in their petition in action S062427, in which they claim in the alternative, an order declaring that the Development Permit Area boundaries are invalid, that no permit is necessary, or alternatively, an order that they be issued a permit validating the property development they have done.

[2] The property in issue is approximately 22.8 acres in size. It is located on the east coast of Denman Island and bisected by Swan Road. The coastline of the property is a bluff approximately 25 meters high and 23-31 meters wide, set back from the ocean by a beach of about 15 meters. The land is included in the Agricultural Land Reserve. The Stonemans currently live in a house they have constructed on the property. Other construction includes outbuildings and a stairway running down the bluff to the beach.

[3] Demand Island is an island in the “local trust” area as defined by the *Islands Trust Act*. It is constituted as a corporation under the *Islands Trust Act* with authority to adopt an Official Community Plan for Denman Island including the designation of development permit areas.

[4] The *Local Government Act* provisions relevant to these proceedings state:

919.1 (1) An official community plan may designate development permit areas for one or more of the following purposes:

- (a) protection of the natural environment, its ecosystems and biological diversity;
- (b) protection of development from hazardous conditions;

...

920 (1) If an official community plan designates areas under section 919.1 (1), the following prohibitions apply unless an exemption under section 919.1 (4) applies or the owner first obtains a development permit under this section:

- (a) land within the area must not be subdivided;
- (b) construction of, addition to or alteration of a building or other structure must not be started;
- ...
- (d) land within an area designated under section 919.1 (1) (a) or (b) must not be altered;
- ...
- (2) ... a local government may, by resolution, issue a development permit that
 - ...
 - (b) includes requirements and conditions or sets standards under subsections (7) to (10.2), and
- (7.1) For land designated under section 919.1 (1) (b), a development permit may do one or more of the following:
 - (a) specify areas of land that may be subject to flooding, mud flows, torrents of debris, erosion, land slip, rock falls, subsidence, tsunami, avalanche or wildfire, or to another hazard if this other hazard is specified under section 919.1 (1) (b), as areas that must remain free of development, except in accordance with any conditions contained in the permit;
 - ...
- (11) Before issuing a development permit under this section, a local government may require the applicant to provide, at the applicant's expense, a report, certified by a professional engineer with experience relevant to the applicable matter, to assist the local government in determining what conditions or requirements under subsection (7.1) it will impose in the permit.
- ...
- 928 ...
- (2) Land must be developed strictly in accordance with the permit or permits issued.

[5] Denman Island Local Trust Committee Bylaw No. 4 created an Official Community Plan for Denman Island in 1978. In April of 1984, that Official Community Plan was amended by Bylaw No. 19 which included the following wording:

By adding a new Policy No. 3 to the policies in the Special Area Policies Section, Coastal Area, is as follows:

- 3. Komas Bluff is being eroded by the action of waves and tides as well as landslides activated by groundwater, geological or slope stability conditions. This is a natural process which is hastened by the stripping of vegetation from the bluffs, by introducing water into the soil, modifying slope geometry, and by the placement of fill.

Erosion is usually a slow and uneventful process when the area is left in a natural state. If the area is developed in a way that drastically changes vegetative cover, the groundwater, or the bluff slope, then landslide erosion could increase rapidly.

In the absence of a detailed geological examination of the Komasa Bluffs area, development of land should be minimized.

[6] In September of 1991, the Denman Island Local Trust Committee adopted Bylaw 60 which included the Komasa Bluff area of the Island in a development permit area under "Category "b" (Protection of development from hazardous conditions) which required that, among other stipulations "no permanent structures shall be permitted in the area subject to sloughing or damage from sloughing".

[7] Denman Island Local Trust Committee Bylaw No. 111 adopted May 1999 amended the Komasa Bluff Development Permit area provision to read as follows:

1. Denman Island Official Community Plan No. 60, cited as "Denman Island Official Community Plan No. 60, 1991", is amended as follows:

- A) Schedule "A" is amended by deleting the Komasa Bluff Development Permit Area in Section IV(l)(1)(d)(1) in its entirety and replacing it with the following:

"Development Permit Area No. 1: Komasa Bluff

Category:

The area indicated on Schedule "E" as Development Permit Area No 1: Komasa Bluff is designated a development permit area according to Section 879(1)(b) of the *Municipal Act* for the protection of development from hazardous conditions.

Area:

Development Permit Area No. 1: Komasa Bluff shown on Schedule "E"

Justification:

In 1980 the Resource Analysis Branch of the Ministry of Environment conducted a reconnaissance study and identified bank instability in the area referred to as the Komasa Bluff. Sloughing was confirmed by detailed site inspection. The majority of the area was classified as active or inactive, with relatively little classified as stable. Past logging and road construction have already demonstrated that this area is prone

to landslides and other forms of erosion. The area has subdivision potential.

Objectives:

The objectives of this development permit area are as follows:

1. To protect areas of unstable terrain from increased risk of slope failure and/or erosion due to cutting or removal of trees and other development
2. To protect ground water and surface water from degradation due to development

[8] Bylaw No. 111 was enacted by the Local Trust Committee as part of a package of Bylaws numbers 110-114 inclusive amending the Official Community Plan.

[9] In June of 1997, a company named 4064 Investments Ltd. bought 4,256 acres of land on Denman Island for \$18 million and began to harvest timber at a considerable higher cut rate than had previously been the case. The May 1999 amendments to the Denman Island Bylaws included Bylaw 113 entitled “Forest Cover Development Permit Area” as a result of which parts of 4064 Investments Ltd land became subject to new development permit requirements, particularly forest cover and a limitation on removal of trees. The Denman Island Local Trust Committee began an action against 4064 Investments Ltd. and in June 1999 sought an injunction to restrain the removal of trees without a permit in four development permit areas. In a judgment dated November 7, 2000 (2000 BCSC 1618), Bauman J. as he then was, declared the entire package of Bylaws to be illegal. He held that the amending Bylaws, particularly Bylaw 113 amounted to a detailed regulatory scheme which purported to fill “the forest practices regulatory gap by extending regulations to private forest lands not otherwise touched by the provincial scheme” and was not within the legislative competence of the Islands Trust under the *Local Government Act*.

[10] In his Reasons, Bauman J. stated:

[127] I will not refer to the other bylaws in any detail.

[128] There is no doubt that they take a more focused approach to the regulation of logging in specific areas like streams and wetlands (Bylaw 112) and steep slopes (Bylaw 111).

[129] And there is no doubt that aspects of these more focused bylaws are within the letter and spirit of the powers granted under s. 879 of the Act and, in particular, under s-ss.(1)(a) and (b).

[130] However, it is clear that the Amending Bylaws are an integrated package and their primary thrust, their pith and substance, is the regulation of forest practices on private lands. ...

[11] The matter was taken to the Court of Appeal where Saunders J.A. in delivering the Reasons of the majority in the B.C. Court of Appeal stated at paras. 86-89:

[86] The Local Trust Committee contends that even in the event this Court finds that bylaw 113 is beyond the scope of its powers, the other bylaws in the package should not be declared invalid. I agree.

[87] Bylaws 110 to 114 were each passed separately, and in the manner of their enactment the Local Trust Committee has shown an intention to deal separately with the subject matter. This separation of subject matter is, in my respectful view, confirmed on a reading of the bylaws. Bylaws 110 and 114 deal with definitions and procedures respectively, and to the extent that any provisions are interrelated to and dependent upon bylaw 113 for substance, they can be severed. Bylaws 111 and 112 have substance, but independent of bylaw 113.

[88] Further, bylaws 111 and 112, as observed by the chambers judge, are more narrow in focus than bylaw 113. Bylaw 111 purports to protect land from erosion in a fashion that may bring the bylaw within s. 923 of the *Local Government Act*. Bylaw 112 purports to protect riparian and wetland areas in a fashion that may fit within the ambit of s. 920(7) as I have described it. Given the fashion in which the issues developed in the Supreme Court, these questions were not explored in the reasons of the chambers judge. Nor were they addressed fully, or at all, on appeal. In any case, as noted by Madam Justice Rowles, the issues of vagueness and the application of the bylaws to existing tree cutting operations, have not been dealt with by the chambers judge. Those issues on bylaws 110, 111, 112 and 114 should be remitted to the trial court for determination.

[89] In conclusion, I would dismiss the appeal as it concerns bylaw 113. I would set aside the order appealed declaring bylaws 110, 111, 112 and 114 invalid and remit the issue of their validity to the Supreme Court of British Columbia for fresh determination.

[12] Following the appeal decision, the Denman Island Local Trust Committee and 4064 Investments entered into a consent order dismissing the challenge to Bylaws 110, 111, 112 and 114.

[13] In early 2000, the then owner of the land in question obtained a development permit to harvest trees and clear part for a Christmas tree farm. The permit included the following conditions:

No Harvesting of trees and/or clearing or alteration of land is permitted within 50 metres of the top edge of the bluff situated on the eastern side of the subject property.

Harvesting of trees and/or clearing or alteration of land lying 50 metres or more from the top edge of the bluff ... is permitted only if the 50-metre setback line mentioned above has first been located and clearly identified on site by the applicant, to the satisfaction of the Denman Island Local Trust Committee.

[14] The next owner had a surveyor flag the 50-meter buffer zone and cleared to the inland side leaving the 50-meter zone extending to the bluff under forest cover.

[15] The land was purchased by Mr. Dean Ellis in February 2002. In June 2002, Mr. Ellis was granted a Development Permit to adjust lot boundary lines by way of subdivision. The geotechnical report which accompanied the application recommended the maintenance of the buffer zone, but suggested it might be possible to improve the view on the lots by removing some trees. Mr. Ellis made inquiries to the Island Trust and was advised he needed a permit before any trees were cut. By the fall of 2002, the Trust was receiving complaints that trees were being cut in the buffer zone. It became clear that Mr. Ellis was cutting trees and clearing land without a permit in the 50-meter zone set aside to protect the bluff.

[16] The Denman Island Local Trust Committee commenced court action against Mr. Ellis seeking a declaration he had violated the Bylaw, an injunction to prevent further violations and an order compelling Mr. Ellis to remediate the damage he had caused. On the 8th of July 2004, the Stonemans purchased their portion of the property from Mr. Ellis while the litigation was ongoing. The Stonemans were added as parties to the Trust's action against Mr. Ellis and Daniel Stoneman filed a defence on behalf of himself and his wife. The case proceed to trial before Groberman J, as he then was, January 24-28, and February 1, 2005, at which time Mr. Ellis was represented by counsel and Mr. Stoneman represented himself and Debra Stoneman. In a decision dated August 31, 2005, Groberman J. made a declaration

that Mr. Ellis “unlawfully contravened section 920(1)(d) of the *Local Government Act* by altering land within the Komasa Bluff PDA without a development permit”, granted an injunction against further breach, and ordered there to be a mandatory injunction for remediation of the land upon terms to be set at a subsequent hearing.

[17] At para. 32 of his Reasons, Groberman J. concluded:

I am satisfied that the only reasonable conclusion that can be drawn from the facts is that there has been a deliberate and systematic effort on the part of Mr. Ellis to clear the buffer zone of tree cover. He has knowingly ignored the requirement to obtain a Development Permit before clearing the land ...

[18] In reaching his decision, Groberman J. rejected the submissions that the Bylaw was void for vagueness because it failed to adequately define the boundaries, that the *Agricultural Land Commission Act* rendered the Bylaw unenforceable, that the Trust had a history of rejecting applications for development permits, and that the Bylaw was unenforceable because it conflicted with the provisions of the *Workers Compensation Act*.

[19] At para. 65 of his Reasons, Groberman J. states:

I am not prepared to extend the injunction to persons other than Mr. Ellis. The evidence does not indicate that any other person has persistently violated the Komasa Bluff DPA provisions, nor is there any reason to suspect that such violations will occur in the absence of an injunction.

Any person who read Justice Groberman’s decision could not fail to understand that his decision was that the Komasa Bluff Bylaw was valid and that no person should be in violation of its provisions.

[20] The following order was entered. “Approval as to form”: by the signature of the parties including Mr. Stoneman:

BEFORE THE HONOURABLE WEDNESDAY,
MR. JUSTICE GROBERMAN THE 31st DAY OF AUGUST 2005

THE APPLICATION of the Plaintiff, Denman Island Local Trust Committee coming on for hearing at Vancouver, British Columbia, on October 20, 2005 and on hearing Francesca Marzari, counsel for the

Plaintiff, Brent Lokash, counsel for the Defendant, and Daniel John Stoneman, representing himself and Debra Monica Stoneman:

THIS COURT DECLARES THAT:

1. The Defendant Ellis unlawfully contravened section 920(l)(d) of the *Local Government Act* by altering lands legally described as Lot A Section 23 Denman Island Nanaimo District Plan VIP74719 ("Lot A") and Lot B Section 23 Denman Island Nanaimo District Plan VIP74719 ("Lot B") (together the "Lands") within Development Permit Area No. 1: Komas Bluff without a development permit authorizing such alteration; and

THIS COURT ORDERS:

2. A permanent injunction restraining the Defendant Ellis from cutting trees on, clearing, developing, excavating or otherwise altering those portions of the Land that are within fifty metres of the top edge of the Komas Bluff or on the face of the Komas Bluff (the "Buffer"), or causing any of those activities to be carried out, on, or in the Buffer, without first obtaining a development permit authorizing such activities, or in accordance with a further order of this Court;
3. A mandatory injunction requiring the Defendant Ellis to undertake rehabilitative measures on the Lands to restore the Komas Bluffs on the Lands to a level of stability sufficient to protect existing and future development on and around the Lands from accelerated slope failure, erosion or other hazardous conditions related to the Defendant Ellis' breach of s 920(1)(d) of the *Local Government Act*, such measures to be specified by further order of this Court, either upon application of the Parties, or as consented to by the Parties;
4. The Defendants Daniel and Debra Stoneman shall allow the Defendant Ellis access to Lot A in order to investigate and undertake rehabilitative measures on Lot A, pursuant to paragraph 3; and
5. The Parties may make further application to the court with respect to the terms of the mandatory injunction and the issue of costs.

[21] By order dated October 20, 2005, special costs were awarded against Mr. Ellis with respect to the Bylaw violation.

[22] The B.C. Court of Appeal dismissed an appeal from the order in Reasons dated November 6, 2007 (2007 BCCA 536). The Stonemans did not participate in the appeal.

[23] On the 25th of August 2006, the Stonemans submitted an application for a development permit and siting and use permit to build a house and other buildings on the property. A revised site plan and further information from the Stonemans was submitted September 12, 2006.

[24] At their meeting on October 17, 2006, the Trust Committee passed a resolution authorizing issuance of a development permit to the Stonemans upon receipt of specified information which resulted in a letter of October 24, 2005 which stated:

**Re: Lot A, Section 23, Denman Island, Nanaimo District, Plan
VIP74719**

At their October 17, 2006 regular business meeting, the Denman Island Local Trust Committee passed the following resolution with respect to the referenced application:

It was MOVED and SECONDED that the Denman Island Local Trust Committee instructs Staff to issue DE-DP-2006.2 contingent on receipt of:

- *written proof that the Court Order incorporating the recommendations of the April 4, 2006 Thurber Engineering report have been entered by the Court;*
- *a letter signed by Madrone Environmental Services Ltd stating that the planting recommended for the Property in the October 2003 Madrone Report has been completed;*
- *a drainage plan affixed with the Seal of the EBA Engineering Consultants Ltd. showing all hard surfaces including walkways, driveways and patios; and*
- *a site plan affixed with the Seal of EBA Engineering Consultants Ltd. showing all developed areas including walkways, driveways, patios and septic tank and clearly states that the agricultural building is "farm use – no principal residential or accessory residential uses".*

On receipt of the above information, Staff will issue the Permit as per the Denman Island Local Trust Committee instructions. The Siting and Use Permit application will be issued simultaneously.

The drainage plan and the site plan may be combined onto a single plan, provided the siting and drainage information is clearly presented.

A copy of the DRAFT permit is attached for your information. This permit is not official until signed by the Deputy Secretary and is included here for your information only.

[25] The Stonemans however did not comply with the requests but rather started construction without a permit in October of 2006. Legal counsel for the Trust Committee wrote on November 6, 2006 to advise the Stonemans they were in breach of the Bylaw. In March 2007, the Stonemans submitted a further engineering report prepared by EBA. On June 7, 2007, legal counsel for the Trust wrote to advise the Stonemans that staff would recommend issuance of a development permit for the residence and related structures upon provision of the information and reports recommended in the March 2007 EBA report they had submitted. No permit was obtained and construction of the house and buildings proceeded without a permit.

[26] In addition to construction of a house and outbuildings without the permit required by the Bylaw, in 2010 the Stonemans began construction of stairs down the face of the bluff itself leading from their house to the beach.

[27] Mr. Stoneman in his affidavit sworn August 24, 2012 deposes:

7. It is my belief that since our property lies outside the boundaries of the hazard area Holden identified, is stable and not of quadra sands composition, there can be no requirement binding on us to obtain a development permit for its farm use or the issuance of Siting and Use permit.

9. Even if Bylaw 111 boundaries were valid on our property, we say they are only valid to 50 meters. Since our home and buildings lie outside the 50 meters, it is our belief we never required a development permit for the issuance of a Siting and Use permit.

[28] The position of the Denman Island Local Trust Committee is that the validity of Bylaw 111 establishing the Komias Bluff Permit Area and of its boundaries has already been decided by Justice Groberman in the Ellis case to which the Stonemans were a party. In legal terms, the Trust argues those issues are *res judicata* and cannot be raised again by the Stonemans. The Stonemans' position is that no remedy was claimed against them in the Ellis case and that therefore it

would be unfair to treat them as if they had put forward their whole case when there was no need to do so. The Stonemans did however file a defence in the Ellis case. In that defence, it was alleged that Bylaw 111 was invalid and did not apply to their property because the land was subject to the *Agricultural Land Commission Act*, the Trust did not have the authority to regulate farming, that Bylaw 111 was invalid because it was directed to protection of land rather than development, and that the boundaries of Bylaw 111 were invalid because they were established for a forestry purpose found invalid in the 4064 Investments case.

[29] Justice Groberman's decision specifically dismissed submissions that:

- (i) the Komasa Bluff DPA as amended by Bylaw 111 was not introduced for a purpose authorized by s. 919.1(b) of the *Local Government Act*;
- (ii) the designated boundaries of the Komasa Bluff DPA as amended by Bylaw 111 were invalid;
- (iii) the Komasa Bluff DPA as amended by Bylaw 111 did not comply with the agricultural land use regime in B.C.; and
- (iv) no additional development permits were required to clear trees or to alter land on the property within the Komasa Bluff DPA or 50 meters Buffer.

[30] The Stonemans bought the property intending to build a home on it and live there. When they appeared before Groberman J. they were well aware of this. They argued that Bylaw 111 was invalid and did not apply to their property and they lost that argument. They are now attempting to re-argue the issues having chosen to build without a permit in spite of a court order they ought to have understood very clearly indicated that they were not free to do so.

[31] In the case of *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367 at para. 81, the B.C. Court of Appeal states:

Cause of action estoppel is focused primarily on fairness to litigants. The idea behind it is that a party should not be "twice vexed" with litigation, and should be entitled to deal with the entirety of the opposite party's case within a single piece of litigation. Issue estoppel, on the other hand, as discussed in *Toronto v. C.U.P.E.*, is primarily concerned with the integrity of the judicial

system – the efficiency of the trial process and the authority and credibility of judicial findings.

[32] Analyzing this case from either perspective, the Stonemans ought not to be heard to re-litigate the decided issues. They were present, they argued the issues and they lost. They knew then that the ruling would apply to them and their property. Having had their day in court on those issues, they cannot re-argue the matter now. Furthermore, their conduct challenges the integrity and credibility of the judicial findings in the Ellis case; having lost their argument and being fully apprised of the court's decision and reasons, they close to proceed in direct violation of the Bylaw and any reasonable interpretation of the court's decision, attempting to justify that in the manner set forth in Mr. Stoneman's affidavit referred to earlier.

[33] There is of course another aspect to this case and that is that as the evidence attacking the Bylaw is in essence the same as before, the result would very likely have to be the same even if the case were to be re-argued.

[34] In the written submission submitted by the counsel at the hearing, the Stonemans' position in their petition for judicial review is stated as follows:

1. The petitioners (the "Stonemans") apply for an order:
 - a) Declaring that Denman Island Official Community Plan Bylaw no. 60, 1991, Amendment Bylaw No. 2, 1998 ("**Bylaw 111**"), and subsequent amendments, are invalid and of no force and effect, or alternatively, the said Bylaw is invalid and of no force and effect;
 - b) Declaring that no development permit is needed for the development proposals set out in the Stonemans' development permit applications, DE-DP-2005.2, and DE-DP-2006.2.
 - c) In the alternative, if Bylaw 111 is valid, an order:
 - i) declaring that the boundaries of the Development Permit Area set out in Schedule "E", Development Permit Area #1 Komias Bluff, and subsequent amendments, (the "**DPA Boundaries**") are invalid and are of no force and effect;
 - ii) in the nature of mandamus, compelling the Denman Island Local Trust Committee (the "**DILTC**") to amend the DBA Boundaries based on the authorized objective conferred on it by s. 919.1(b) of the *Local Government Act*;

- iii) Declaring that no development permit is needed for the development proposals set out in the Stonemans' development permit applications, DE-DP-2005.2, and DE-DP-2006.2;
 - iv) in the alternative, in the nature of mandamus, compelling the DILTC to issue development permits pursuant to application DE-DP-2005.2 and DE-DP-2006.2.
- d) Requiring the DILTC to pay the Stonemans' costs of this proceeding.
 - e) Any other order that this honourable court may deem appropriate.

[35] The claims that Bylaw 111 is invalid, that the bylaws boundaries are invalid, and that no permit is needed for development are all matters that have been heard and decided. I find them to be *res judicata*, and that they cannot now be argued further by the Stonemans.

[36] The petitioner claims in the alternative, an order of *mandamus* compelling the Denman Island Local Trust Committee to issue a development permit validating the present development on the property without further requirements. In support of their position it is argued that in dealing with the permit, the Trust Committee based its decisions on improper considerations. Having reviewed the evidence, I find no merit in that submission.

[37] I dismiss the petition for judicial review and order as follows:

1. It is declared that Daniel John Stoneman and Debra Monica Stoneman have altered land through clearing and excavation, and have constructed buildings and structures, including a path, stairs, ramp, drainage works, residence and accessory buildings on property located at 2600 Swan Road, Denman Island with a legal description of Lot A, Section 23, Denman Island, Nanaimo District, Plan VIP74719 in the Development Permit Area No. 1: Komas Bluff, without a development permit contrary to s. 920(1)(b) and (d), of the *Local Government Act*;
2. Daniel John Stoneman and Debra Monica Stoneman shall not make, or permit further alternation to the land within the Komas Bluff Development Permit Area, without a valid development permit for each work as is undertaken, except as may be specifically ordered by the Court.

3. Daniel John Stoneman and Debra Monica Stoneman, at their own expense, shall undertake such rehabilitation measures on the property, including the removal of such structures for which they are unable to obtain a permit, as are ordered by a Judge of the Supreme Court of British Columbia upon further application, or as agreed to by the parties by filing a consent order with this Court.
4. Daniel John Stoneman and Debra Monica Stoneman shall provide such access to their property as is required to the Denman Island Local Trust Committees' employees, agents, or experts in order to properly assess the state of the property and enable and ensure compliance with this order.

[38] This order does not determine what requirements or conditions are appropriate in the permit process, nor does it decide what specific remediation or rehabilitation is required. These are matters to be worked out between the parties upon such expert advice as is obtained or determined by further order of a Judge of this Court if necessary.

[39] The Denman Island Local Trust Committee shall have costs to and including the entry of this judgment on both proceedings as special costs in the circumstances as earlier described.

“V.R. Curtis J.”