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December 3, 2013 2013-15-IT

BC COURT OF APPEAL UPHOLDS DENMAN ISLAND'S BYLAW FOR KOMAS BLUFF

VICTORIA – In its decision released today, the BC Court of Appeal was unanimous in dismissing an appeal of a decision of the Supreme Court of BC, thereby continuing to uphold the Denman Island bylaw that regulates development on the Komas Bluff. The decision relates to construction and land alterations on the face, at the crest and on the plateau above the Komas Bluff, on land owned by Daniel and Debra Stoneman of Denman Island.

The Honourable Chief Justice Bauman, writing for the Court, also upheld the lower court's award of special costs to the Denman Island Local Trust Committee. In his Reasons for Judgment, the Chief Justice explained his decision was based on "the Stonemans' deliberate breaches of the laws they well knew to be in place before they embarked upon their construction activities."

The Stonemans' property lies within the Komas 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 numerous court decisions.

Earlier this year, the Supreme Court of BC 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 Komas Bluff Development Permit Area without the necessary permits. The judgment prohibited the Stonemans from further altering the land within the Komas Bluff Development Permit Area without valid permits or further order of the Court. Today's decision from the Court of Appeal upholds the order of the BC Supreme Court requiring the property owners to:

- remove any existing structures they are unable to obtain a permit for, 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 Komas 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 the completion of specific work recommended by their engineer in relation to their proposed construction. However, the Stonemans began construction of a residence without completing the requirements for the permit. Beginning in 2010 they constructed stairs down the face of Komas Bluff, also without permits. They claimed the bylaws were invalid and that no development permit was required.

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David Graham, a Denman Island local trustee responded today saying, “This judgment confirms the decisions of three previous court decisions and we hope it’s over. Once again, it confirms that the Stonemans must work with the Denman Island 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 Denman Island local trustee, added, “We look forward to moving past this issue. The Stonemans should have certainty now about the need to respect the community’s bylaws and to work with the Denman Island Local Trust Committee.”

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: Reasons for Judgment attached.

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Stoneman v. Denman Island Local Trust Committee,* 2013 BCCA 517

Date: 20131203
Dockets: CA040708 & CA040709

Docket: CA040708

Between:

Daniel John Stoneman and Debra Monica Stoneman

Appellants (Petitioners)

And

Denman Island Local Trust Committee

Respondent (Respondent)

- and -

Docket: CA040709

Between:

Denman Island Local Trust Committee

Respondent (Petitioner)

And

Daniel John Stoneman and Debra Monica Stoneman

Appellants (Respondents)

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Smith
The Honourable Madam Justice Bennett

On appeal from: An order of the Supreme Court of British Columbia, dated February 13, 2013 (*Stoneman v. Denman Island Local Trust Committee*, 2013 BCSC 218, Victoria Dockets S062427 & S122406).

Counsel for the Appellants:	D.W. Burnett
Counsel for the Respondent:	F.V. Marzari
Place and Date of Hearing:	Vancouver, British Columbia September 13, 2013
Place and Date of Judgment:	Vancouver, British Columbia December 3, 2013

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Madam Justice Smith

Concurred in by:
The Honourable Madam Justice Bennett

Summary:

The DILTC sought a declaration that the Stonemans unlawfully developed their land contrary to a bylaw passed under the Local Government Act and an injunction relating thereto. The Stonemans challenged the bylaw's validity on a number of grounds and sought an order of mandamus approving their development. The Stonemans were parties to an earlier proceeding that challenged the bylaw's validity.

The trial judge granted the relief sought by the DILTC and held that the doctrine of res judicata applied to the Stonemans' validity argument and that the request for mandamus was without merit. The Stonemans appeal on both issues.

Held: Appeal dismissed.

Both cause of action estoppel and issue estoppel apply in this case and bar all of the Stonemans' submissions that were raised in the previous proceeding, or should have been raised, even if all of those submissions were not ultimately dealt with by the courts. Any arguments not covered by res judicata fail on the merits. The request for mandamus is without merit and there is no application to which an order for mandamus could attach.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. Overview

[1] This appeal concerns the validity of certain local government regulations that were previously unsuccessfully challenged in proceedings in which the Stonemans took part. Accordingly, this appeal turns on the applicability of the doctrine of *res judicata* in both of its iterations, cause of action estoppel and issue estoppel, to the submissions made, and relief sought, by the Stonemans.

[2] Essentially, we are asked: may the respondent be twice vexed in this matter? Justice Curtis, in the Supreme Court, gave effect to the respondent's plea of *res judicata*; the Stonemans appeal.

[3] The Komas Bluff is located along the eastern shore of Denman Island. Denman Island is part of a unique species of local government in British Columbia called the "Islands Trust".

[4] The Islands Trust consists of all of the islands in the Strait of Georgia, Howe Sound and Haro Strait, lying within an area described by metes and bounds in Schedule "A" to the *Islands Trust Act*, R.S.B.C. 1996, c. 239 ("*ITA*"). Essentially, it includes the group of islands off the mainland of British Columbia known as the Gulf Islands.

[5] The object of the Islands Trust is stated so in s. 3 of the *ITA*:

> 3 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, in cooperation with municipalities, regional districts, improvement districts, other persons and organizations and the government of British Columbia.

[6] The Islands Trust acts in part through local trust committees like the respondent, Denman Island Local Trust Committee ("DILTC" or the "Trust"). These committees enjoy certain powers to act as local governments for each island in the Islands Trust.

[7] In particular, the DILTC historically has exercised the powers previously granted by s. 879(1)(b) of the *Municipal Act*, R.S.B.C. 1996, c. 323, now s. 919.1(1)(b) of the *Local Government Act*, R.S.B.C. 1996, c. 323. This subsection permitted the DILTC to designate lands as a development permit area ("DPA") for the purposes of protecting development from hazardous conditions.

[8] The Komas Bluff is thought to be an area subject to landslip and, accordingly, it has been a target of the DILTC's exercise of this power. Essentially, the designation ensures that before "development" (broadly inclusive) may take place, a land owner must obtain a development permit, which, in turn, may contain requirements that are intended to address the environmental or other concerns which prompted the designation of the area.

[9] The Komas Bluff DPA was amended by the enactment of Bylaw 111 in 1999 by the DILTC. The amending bylaw addressed the designation of the land within the DPA and the guidelines that gave notice to owners of the types of conditions they

might expect any proposed development would be subjected to at the permitting stage.

[10] In 2009, the provisions of Bylaw 111 were effectively incorporated with little change into the provisions of the DILTC's new Official Community Plan Bylaw 185 ("Bylaw 185, 2009"). This bylaw was approved by the Minister of Community Services on 11 May 2009. Because of the history of the litigation in this matter, I will refer to the impugned provisions as "Bylaw 111".

[11] There were two Petitions before the Supreme Court: that of the DILTC seeking a declaration that the Stonemans unlawfully construed various buildings and structures on their lands and an injunction relating thereto; and that of the Stonemans attacking the validity of Bylaw 111.

II. Bylaw 111 Litigation

[12] The lands currently owned by the Stonemans were once part of a much larger parcel owned by 4064 Investments Ltd., which began harvesting timber from the property in the late 1990s. In response, the DILTC enacted a series of bylaws (110, 111, 112, 113, and 114) in 1999. Compendiously, these bylaws were known as the "Forest Bylaws".

[13] In particular, Bylaw 113 purported to closely regulate the harvesting of timber on private lands on Denman Island. It designated approximately one-half of the land area of the Island as the "Forest Cover DPA".

[14] The validity of the Forest Bylaws as a group was considered by the Supreme Court of British Columbia in *Denman Island Local Trust v. 4064 Investments Ltd.*, 2000 BCSC 1618 (a decision coincidentally rendered by me). There, the Court focussed on Bylaw 113 and found that it was beyond the legislative competence of the DILTC to enact to the extent that it purported to regulate logging on private lands. The Court concluded that as the Forest Bylaws were enacted as an integrated legislative package, the validity of a principal set of regulations (Bylaw 113) should lead to a declaration of the invalidity of all; severance was not deemed appropriate.

An appeal was taken to this Court and in reasons indexed as 2001 BCCA 736, the Court dismissed the appeal as it concerned Bylaw 113, but set aside the order declaring the remaining bylaws invalid (including Bylaw 111) and remitted the issue of their validity to the Supreme Court. In the result, the matter was apparently settled and Bylaw 111 was not considered again until the *Ellis* proceedings to which I will shortly turn.

[15] In 2000, the owner of the lands in question obtained a development permit to harvest trees, subject to the condition that no trees be cleared within a 50 metre buffer zone from the crest of the bluff. A subsequent owner cleared the land up to the edge of the 50 metre buffer zone. The lands were then purchased by Mr. Ellis in early 2002.

[16] In June 2002, Mr. Ellis obtained a development permit authorizing the subdivision of his lands into Lot A and Lot B. Over the next two years he apparently cleared trees and excavated drainage works within the 50 metre no disturbance buffer and without a development permit. The DILTC commenced proceedings to restrain this work. In July 2004, the Stonemans purchased Lot A from Mr. Ellis. They did so subject to the DILTC's Certificate of Pending Litigation lodged against title to both lots.

[17] In 2004, the Stonemans were added as parties to the *Ellis* proceedings. They filed an Appearance and a Statement of Defence, and conducted discoveries. They were represented by counsel for at least a time. They responded to the DILTC's application for summary judgment and filed an outline and affidavits opposing all relief sought. They appeared in person before Justice Groberman (then of the Supreme Court) at the summary trial. I will deal below in some detail with the issues pursued by the Stonemans in the *Ellis* proceedings, but for now I will relate the principal findings of Justice Groberman and this Court on appeal from his decision.

III. The Decisions in *Ellis*

[18] The DILTC sought a declaration that Mr. Ellis violated the provisions of Bylaw 111, an injunction to prevent further violations, and an order directing the remediation of the disturbed lands. The DILTC originally sought similar relief against the Stonemans, including an injunction preventing them from removing trees within the Komas Bluff DPA. However, by the time of the hearing before Justice Groberman, the DILTC only sought an order requiring the Stonemans to allow Mr. Ellis to enter their lot for the purpose of remediation.

[19] Justice Groberman essentially accepted the positions advanced by the Trust at the summary trial: 2005 BCSC 1238. He found (at para. 32) that Mr. Ellis deliberately and systematically endeavoured to clear the buffer zone of tree cover and he ignored the requirement to obtain a development permit to do so, in breach of the applicable provisions of the bylaw and the *Local Government Act.*

[20] Justice Groberman then turned to the submissions before him which impugned the validity of the establishment of the Komas Bluff DPA. As I will relate, the defendants in *Ellis*, including the Stonemans, pursued a number of theories over the course of the litigation touching on the issue of the validity of Bylaw 111. What Justice Groberman actually dealt with in his reasons were the arguments urging invalidity which were pressed before him in final submissions. That is not to say, however, that the entire panoply of submissions *contra* the bylaw are not relevant on the *res judicata* argument before this Court and I will later review their breadth. But here, I will relate Justice Groberman's treatment of the issues left before him.

[21] Justice Groberman first dealt with the issue, which he characterized as Mr. Ellis's primary argument, (at para. 35):

> …that the bylaw establishing the Komas Bluff DPA is void, because it fails to adequately define the boundaries of the area.

[22] The thrust of this argument concerned the western boundary of the Komas Bluff DPA which does not coincide with either a surveyed or a natural boundary. It is

simply a line drawn on a map. Justice Groberman accepted that there was some resulting uncertainty in the position of the western boundary of the Komas Bluff DPA; that its position could only be determined within a tolerance of about plus/minus five metres. Still, he did not strike down the bylaw for vagueness (at para. 48):

> [48] The test of vagueness, however, is neither absolute precision nor optimal clarity. If it were, very few statutes would pass muster. Instead, the test is whether a law provides adequate notice of a zone of risk, and provides a principled basis for legal debate as to whether conduct falls within or outside the proscribed zone. I am satisfied that the bylaw in question adequately delineates the boundaries of the Komas Bluff DPA. While there may be room for debate as to whether a particular tree is within or without the boundary, the bylaw, together with general principles of legal interpretation provide an adequate basis for that debate.

[23] Justice Groberman then turned to two other grounds of attack.

[24] The first was a submission that Bylaw 111 effectively prohibited farm uses on the lands, which, because they were within the agricultural land reserve, was contrary to s. 2(2) of the *Agricultural Land Reserve Use, Subdivision and Procedure Regulation*, B.C. Reg. 171/2002. Essentially, while a local government may regulate farm use on these lands, it cannot by bylaw prohibit those uses.

[25] Justice Groberman rejected this submission (at para. 56):

> [56] I am not persuaded that the bylaw should be interpreted as prohibiting farming activities. Rather, it regulates such activities, requiring a permit to be obtained before they can be undertaken. Land owners are required to take appropriate steps to ensure that farming activities do not result in instability of the land or in degradation of groundwater. In some situations, the circumstances of the land will mean that a permit cannot, in practice, be obtained. The dominant feature of the development permit scheme, however, is regulation and not prohibition. I am satisfied that the scheme does not conflict with the *Agricultural Land Commission Act* or the *Agricultural Land Reserve Use, Subdivision And Procedure Regulation*.

[26] The second subsidiary submission dealt with by Justice Groberman was the suggestion that the *Worker's Compensation Act*, R.S.B.C. 1996, c. 492 excused compliance with Bylaw 111 in order to protect workers who must be free to remove dangerous trees in operations on the land. Justice Groberman briefly dealt with and rejected this strained submission.

[27] In the result, Justice Groberman made these orders (at paras. 90 and 91):

> [90] I am, therefore, at this time granting:
>
> a) a declaration that the defendant Ellis unlawfully contravened section 920(1)(d) of the *Local Government Act* by altering land within the Komas Bluff PDA without a development permit authorising such alteration; and
>
> b) a permanent injunction against Mr. Ellis, restraining him from cutting trees on, clearing, developing, excavating or otherwise altering those portions of the lands that are within fifty metres of the top edge of the Komas Bluff, or causing any of those activities to be carried out on those portions of the lands, without first obtaining a development permit authorizing such activities.
>
> [91] I have also determined that this is an appropriate case in which to grant a mandatory injunction against Mr. Ellis requiring him to undertake rehabilitative measures on the lands, limited to those measures necessary to fulfill the purposes of section 919.1(1)(b) of the *Local Government Act*. An ancillary order will require the Stonemans to allow him to undertake that work. I will determine the appropriate terms of the mandatory injunction after hearing further evidence and argument from the parties.

[28] An appeal from that decision was taken to this Court. The Stonemans apparently did not appear in the Court of Appeal proceedings.

[29] On the appeal, Mr. Ellis advanced "different grounds than he raised at trial" per Levine J.A. (2007 BCCA 536 at para. 23).

[30] On appeal, the primary ground advanced was the submission that Bylaw 111 was passed, not for its stated purpose under s. 919.1(1)(b) of the *Local Government Act* to protect development from hazardous conditions, but, rather, given the legislative authority relied on for the passage of the bylaw, for the improper purpose of protecting the natural environment in and about the Komas Bluff.

[31] Justice Levine, for the Court, approached the question from the perspective of considering whether the bylaw's restrictions on the removal of trees served the purpose of protecting development from hazardous conditions. She concluded that the authorizing legislation contemplated "future development" in the scheme. At para. 44, she concluded:

> [44] Given this interpretation, the restrictions on tree removal in Bylaw No. 111 clearly serve the purpose of "protection of development from hazardous conditions". The requirement that a permit be obtained before trees are removed protects future development from hazards associated with landslip and erosion. The purpose of the restriction is not to protect the bluff itself, as the appellant claims, but to protect future development on or near the bluff.

[32] Justice Levine concluded (at para. 58) that the trial judge made no error in concluding that the bylaw was valid.

[33] It will be seen that what was before the Supreme Court and the Court of Appeal in *Ellis* was the question of Bylaw 111's validity, that is: did the DILTC exceed its delegated legislative authority in enacting the bylaw?

[34] Before Justice Groberman, the final argument was reduced to the issues I have canvassed. Before the Court of Appeal, the attack changed course and the "improper purposes" argument was advanced. But what is important to note is that the general issue of the bylaw's validity was at bar.

[35] This is made even clearer when we consider several other lines of attack on the validity of the bylaw that were raised by the parties in the *Ellis* litigation in the Supreme Court.

[36] Here, I will concentrate on issues that the Stonemans raised themselves.

[37] In paragraph 12 of their Amended Statement of Defence, they specifically raised the "improper purposes" submission, arguing that the Trust purported to exercise its authority to protect development from hazardous conditions, when in reality it was endeavouring "to establish, preserve or remediate forest cover".

[38] In his affidavit in support of his response on the application for summary trial before Justice Groberman, Mr. Stoneman again advanced the "improper purposes" submission (at para. 26):

> 26. Given this pattern of application, I concluded the Plaintiff, under the guise of Bylaw 111, was preserving a 50 meter strip of land along Komas Bluff. The application of Bylaw 111 was inconsistent with the object of the

> bylaw, to protect development and pursuant to s. 884 of the *Municipal Act* had no validity.

[39] Mr. Stoneman took issue (at para. 27) with the appropriateness of the south and west boundaries of the Komas Bluff DPA. He attacked the use of an "ecosystem based plan" created for the DILTC by Silva Ecosystem Consultants Ltd. to create the boundaries of the Komas Bluff DPA. He suggested that this was a "wrong choice" by the Trust (at para. 30):

> 30. Within Silva eco-map boundaries, the Denman Island Local Trust used former Forest Cover Bylaw 113 to ensure preservation of trees. On Komas Bluff this was a wrong choice. Preservation of tall forest cover in pre-existing areas of unstable bluff - in known areas of endemic windthrow - constituted a continuing hazard to the riparian and marine area, the very area Silva was trying to protect. Without requirements to mitigate the effect of farming outside the zone, it was like plugging a sink and leaving the tap on. Eventually the sink overflowed - taking the bluff with it.

[40] Effectively, Mr. Stoneman was questioning the scientific wisdom of the Trust's purpose for designating, and the definition of, the Komas Bluff DPA. This is essentially an argument based on the bylaw's alleged unreasonableness. Again, at para. 31, he alluded to "improper purposes":

> …In my opinion the Plaintiff's development permit boundaries on Komas Bluff had little to do with development but were used to define boundaries for preservation.

[41] Mr. Stoneman also advanced a discrimination argument (at para. 25) based on the allegation that the Trust had previously issued development permits without the requirement for supporting geotechnical reports and contrasted that conduct with the requirements imposed upon Mr. Ellis.

[42] It is noted that all the evidence taken on various examinations for discovery in *Ellis* was before Justice Groberman as evidence on the summary trial. In Mr. Stoneman's examination of a representative of the DILTC, the discrimination point was again pressed - that is, the evidence of development permits being issued without the requirement of a geotechnical report under Bylaw 111's Guidelines.

[43] Further, counsel on that examination dealt at length with the boundary lines for the Komas Bluff DPA and how they were determined.

[44] With that review of what Justice Groberman and the Court of Appeal decided in *Ellis*, and, importantly, what further arguments were developed in the course of those proceedings, it is now necessary to juxtapose the arguments and issues that the Stonemans pursued in these proceedings.

IV. The Stonemans' Case in These Proceedings

[45] The Stonemans filed an Amended Petition in these proceedings on 9 July 2012. They sought varied relief, but here I highlight their application 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 in respect of the Petitioners' Property as defined herein;

[46] The grounds advanced in the Petition for declaring Bylaw 111 invalid are contained in Parts 2 and 3 of the Petition. The first ground begins at paragraph 51 under the heading:

> The DILTC passed Bylaw 111 with objectives outside the scope of its authority, and is thus invalid.

[47] This is the "improper purposes" submission which was before Justice Groberman and specifically addressed by the Court of Appeal.

[48] The thrust of the familiar submission is simply to the effect that the bylaw is aimed at protecting the bluff from being harmed by development, not protecting development from hazardous conditions.

[49] At paragraph 59, the Stonemans refer to Guideline 3 set out in Bylaw 111, which is the guideline requiring the provision of a geotechnical report, and they then assert (at para. 60):

> 60. This guideline also is *ultra vires* s. 879(1)(b) of the *Local Government Act* as it is aimed at protecting the entire Komas Bluff DPA from any potential

> erosion, or water degradation, among other things, caused by the proposed development. This guideline does not protect development from the hazardous bluffs. It wrongfully requires a geotechnical report indicating that the proposed development will not cause erosion to the bluff, or water degradation to the entire DPA.

[50] It will be recalled that this specific guideline was expressly raised by Mr. Stoneman in his affidavit in the *Ellis* proceedings and formed the basis for his discrimination argument.

[51] The Stonemans then create this heading:

> In the alternative, if the objectives and the guideline are within the statutory authority of the DILTC, then the boundaries of Komas Bluff DPA are based on grounds outside its statutory authority, such that the boundaries are invalid.

[52] And they state (at paras. 64-66):

> 64. In determining the boundaries of a development permit area pursuant to s.s. 879(1)(b), the DILTC must act based on reasonable grounds on what areas are considered hazardous to development.
>
> 65. In other words, there must be some reasonable justification for determining the hazardous areas, and the boundaries of a development permit area. If the boundaries greatly exceed the hazardous area, they are then acting in excess of their statutory authority.
>
> 66. The DILTC has not drawn the boundaries of the Komas Bluff DPA based on any analysis of hazardous conditions to development. Instead, the boundaries have been determined to protect the bluff's ecology from harmful development, an unlawful purpose.

[53] Again, this is an aspect of the "improper purposes" submission.

[54] Still on the DPA boundaries issue, the Stonemans then advance an argument to the effect that the DPA boundaries extend 100 to 125 metres inland from the crest of the Bluff and that this excessive inclusion of lands was, in fact, a simple "mistake". At paragraph 77, they assert as fact:

> 77. This mistake has been recognized by DILTC staff, and yet it has failed to amend the boundaries:
>
> c) After Bylaw 111 was passed, another previous owner of the Property applied for a development permit to clear cut land up to 50 metres

> from the bluff crest. The area proposed to be cleared was within another development permit area, the Forest Cover DP areas. The owner, relying on Hopwood's description that the Komas Bluff DPA boundary is 50 metres from the bluff crest, stated the Komas Bluff DPA did not apply to this application, and thus no geotechnical report was required.
>
> d) This led to internal staff correspondence recognizing that there appeared to be a mistake as the DILTC's official map appears to show the Komas Bluff DPA boundaries to encompass more land than the 50 meter setback described above by Hopwood.
>
> e) The development permit was granted without need for a geotechnical report. However, the DILTC has failed to correct the mistake in the Komas Bluff DPA map, and has failed to either issue a development permit on the Property as sought in the second DP Application or confirm that no such application is required.

[55] The allegation of mistake in the drafting of the DPA boundaries is based on the exchange of internal emails between two persons working for the DILTC. On 29 September 1999, one Fred Pickard, sent this email to David Marlor, the Regional Planning Coordinator for the Island Trust:

> It is apparent that, instead of the western boundary of the DP area being 50 m. from the bluff, it is from 100 to 150 m. from it, and that is the problem - it seems that the talk was 50 m. but in reality, it is much greater and it sounds like it was a mistake.

[56] At the hearing of this appeal, counsel for the Trust advised us that this email was part of the document disclosure made in the *Ellis* proceedings. Further, I note again, that since 1999, the DILTC has essentially re-enacted Bylaw 111 by incorporating its terms into Bylaw 185, 2009.

[57] The Stonemans' Petition then proceeds under this heading:

> The Komas Bluff DPA is invalid as its approval by provincial government agencies was based on promises the DILTC has not fulfilled.

[58] There are two arguments advanced here. The first is the assertion that Bylaw 111 and its successor, Bylaw 185, 2009, require approval from the Minister of Agriculture pursuant to s. 903(5) of the *Local Government Act*.

[59] The Petition then refers to the referral of Bylaw 185, 2009 to the Agricultural Land Commission and the Ministry of Agriculture. The Petition continues (at paras. 84-88):

> 84. One of the concerns expressed by the ALC was that the Komas Bluff and the Steep Slope DPA boundaries may be unjustifiably large, and included more farm land than necessary. The DILTC entered into an agreement dated Mar 4, 2009 with the ALC and the Ministry of Agriculture. Pursuant to this agreement, the ALC and the Ministry of Agriculture agreed to approve OCP Bylaw #185 based on the DILTC's commitment to conduct hazard mapping along the Komas Bluffs, among other things, which it said it had started and expected to be completed by late 2009.
>
> 85. OCP Bylaw #185 was enacted in 2009.
>
> 86. However, the DILTC failed to perform the hazardous mapping and has confirmed, despite its commitment to the ALC and the Ministry of Agriculture, it has no plans to do so.
>
> 87. The Petitioners have requested the Ministry of Community and Rural Development and the Ministry of Agriculture revoke their approval and declare the Komas Bluff Bylaw invalid as the DILTC has not fulfilled the commitment upon which the ALC approval had been premised.
>
> 88. As a result, the Komas Bluff Bylaw is invalid as the DILTC did not fulfil its commitment upon which approval was based. It has not followed the mandatory legislative requirements to enact this bylaw. There is no discretion for the court to defer to the DILTC if it has not followed the required legislative process (see for example, *Baynes Sound Area Society for Sustainability v. Comox Strathcona (Regional District)* 2009 BCSC 565.)

[60] The Petition proceeds to Part 3 - the "Legal Basis" on which the Petition was based (although as I have shown, much of Part 2 of the Petition serves this purpose as well). Here, the Stonemans reiterate the grounds of attack noted above but then add an argument under a heading:

> Komas Bluff DPA Boundaries are invalid due to unreasonableness.

[61] But, here, the Stonemans cite in support of the unreasonableness submission, the "excessive boundaries" argument, the "improper purposes" argument and the Guideline 3 complaint, all of which have been discussed above.

V. Decision under Appeal

[62] This brings us to the decision of Justice Curtis under appeal. Here, I will focus on the judge's treatment of the *res judicata* argument. There is a further aspect to these proceedings, the Stonemans' application for relief in the nature of *mandamus* as it pertains to their application for a development permit, but I will deal with that submission separately below.

[63] Justice Curtis noted the Stonemans' position before him to the effect that there was no binding requirement on them to obtain a development permit for their proposed farm use of the lands and for the construction of their home. In any event, the Stonemans took the position that, even if Bylaw 111 was valid, it was only so within the 50 metre buffer strip from the Bluff. Justice Curtis also related the Trust's position that the validity of Bylaw 111 had already been decided in proceedings to which the Stonemans had been a party.

[64] Justice Curtis then proceeded (at paras. 30 and 31):

> [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.

[65] The Stonemans, on this appeal, conflate the two branches of *res judicata*, cause of action estoppel and issue estoppel, into one doctrine of *res judicata*. They take an exceedingly narrow view of what was before Justice Groberman in *Ellis*.

[66] At para. 35 of their Factum, they submit:

> 35. The Stoneman Statement of Defence in *Ellis* is at A.B. vol. 4 p. 1088. It does raise a conflict with the right to farm protected by statute and the *4064 Investments* rulings as to an invalid Forestry purpose of the bylaw. However at the Ellis trial, the entire issue was about tree cutting by Ellis within 50 meters of the bluff. The Stonemans were not required to and did not raise any of the issues raised in the present case, nor could they be reasonably expected to do so considering:
>
> a) Nothing in *Ellis* engaged the question of whether the bylaw boundary in excess of 50 meters was valid;
>
> b) The Stonemans had no construction on their property and had applied for no permit for any construction at the time of the *Ellis* trial;
>
> c) When the Stonemans did subsequently apply for a permit, it was for construction of a house outside the 50 meter buffer, engaging an issue that had nothing to do with the *Ellis* case, and based on a fact (namely the permit application) arising after the Ellis trial;
>
> d) The DILTC response to the permit application also arose after the Ellis trial and judgment; indeed the issue of the DILTC attempting by requiring the very remediation they had been denied in the Ellis trial judgment by definition is an entirely new issue that only arose and only could have arisen after the *Ellis* judgment;
>
> e) The issues in *Ellis* as set forth in both the trial and appeal judgments, namely (a) void for vagueness, (b) conflict with Workers Compensation legislation and (c) conflict with right to farm legislation are not the issues raised in the present case.

[67] They further submit (Factum, para. 36) that *res judicata* only applies against a party or privy who was "a party or privy in a meaningful and substantial way and not merely in name". No authority is cited for this particular qualification.

[68] Citing *Grant McLeod Contracting Ltd. v. Forestech Industries Ltd.*, 2008 BCSC 756, they assert that the doctrine is equitable and "[a]s such there is a residual discretion to refuse to apply the doctrine in special circumstances to ensure justice, even if it technically applies". *Grant McLeod Contracting* was a case potentially involving cause of action estoppel. Justice Josephson recognized the distinction between cause of action estoppel and issue estoppel. Citing *Grandview v. Doering*, [1976] 2 S.C.R. 621, the learned judge accepted the statement of the four criteria found in cause of action estoppel:

1. There must be a final decision of a court of competent jurisdiction in the prior action;
2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action (mutuality);
3. The cause of action in the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[69] The Stonemans also argue that the fourth requirement should not be applied strictly and cite the decision of Justice Cromwell (then of the Nova Scotia Court of Appeal) for the Court in *Hoque v. Montreal Trust Co.* (1997), 162 N.S.R. (2d) 321 (C.A.), [1997] N.S.J. No. 430 at para. 37:

> Although many of these authorities cite with approval the broad language of Henderson v. Henderson, supra, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process. [Emphasis added].

[70] After citing *Hoque*, the Stonemans then submit (Factum, para. 39):

> 39. Can it be said that the Stonemans, added to the *Ellis* case for technical reasons and not the subject of any relief sought "should" have advanced all conceivable arguments, including those arising from the possibility that they may in future apply to build a house? The issues were irrelevant to the relief sought in *Ellis* and it is difficult to imagine the trial judge even permitting the wasting of time of such arguments, let alone an in person litigant thinking they would never again be permitted to raise them.

[71] But even applying this more flexible rule of cause of action estoppel still leaves the Stonemans in difficulty. A "cause of action" for the purposes of cause of action estoppel is a factual situation that entitles one person to obtain a remedy against another person (*Mohl v. The University of British Columbia*, 2006 BCCA 70

at para. 24, citing *Letang v. Cooper*, [1965] 1 Q.B. 232 at 242-243 (C.A.)). As I have demonstrated, the *Ellis* case was about much more than simply cutting trees in the 50 metre buffer. The factual situation in this case, so far as the validity of the bylaw is concerned, is not materially altered merely because the Stonemans now seek to build a house.

[72] The parties in *Ellis*, and the Stonemans were most assuredly an active party, attacked Bylaw 111 on various grounds, urging invalidity because of "improper purposes", conflicts with provincial legislative schemes, vagueness, the breadth of the boundaries of the DPA, discriminatory enforcement of the Guidelines, in particular Guideline 3, and unreasonableness. All of these submissions could have been made, should have been made, and most were, in fact, made before Justice Groberman and this Court on appeal. The factual situation giving rise to all of them has not materially changed since *Ellis*.

[73] Prior to *Hoque*, the defendant had obtained foreclosure judgments against the plaintiff in a prior action. The judgments were obtained in default because the plaintiff did not defend them. In *Hoque*, the plaintiff alleged breach of fiduciary duty, breach of contract and other claims against the defendant. Justice Cromwell, applying the more flexible rule, still found that almost all the claims were barred under cause of action estoppel even though they were not argued at the foreclosure proceeding. Here, in the words of Justice Curtis concerning *Ellis*, the Stonemans "were present, they argued the issues, and they lost" (at para. 32). *Hoque* is of no assistance to them. The issues they raise are derived from the same factual matrix, and the DILTC should not be vexed by them again.

[74] However, the Stonemans also advance several arguments that did not arise in *Ellis*, and it is necessary to decide whether they could have and should have been raised at that time. These arguments are:

(i) the breadth of the DPA beyond the 50 metre buffer back from the crest of the Bluff was really a "mistake";

(ii) the alleged failure to comply with s. 903(5) of the *Local Government Act* by obtaining the approval required thereunder; and

(iii) the failure to conduct further "hazard mapping" allegedly promised by the DILTC as a condition of obtaining ALC and Ministry of Agriculture approval of Bylaw 185, 2009.

[75] As for the matter of the alleged mistake, that issue was within the knowledge of the parties in the *Ellis* proceedings and could have been raised by them at that time. It is within even a sympathetic application of cause of action estoppel. But even if I advanced to the merits of the point, it is bound to fail. First, there is no evidence to the effect that the DILTC itself, acting corporately through its elected committee, concluded that there was a mistake in setting down the boundaries of the Komas Bluff DPA. This is the speculation of one or two individuals. Mr. Pickard at most said that inclusion of the area beyond the 50 metre buffer "sounds like it was a mistake".

[76] Second, no authority was cited to us on the issue of whether a proven mistake of this sort vitiates a bylaw otherwise valid on its face and I know of no such authority.

[77] Third, and finally, the "mistake" speculation was voiced in 1999. The DILTC effectively re-enacted Bylaw 111 in Bylaw 185, 2009 and did not choose to alter the boundaries of the Komas Bluff DPA at that time. The re-enactment in 2009, in the face of the "mistake" allegation, suggests that there was no mistake in the legislative mind of the DILTC. If there was a mistake in casting the boundaries of the Komas Bluff DPA, its correction is for the elected members of the Trust, not this Court.

[78] Points (ii) and (iii) above are arguably new grounds of attack which have arisen since the *Ellis* proceedings as they appear to center on required approvals for Bylaw 185, 2009. As the validity of Bylaw 185, 2009 could not have been contested in *Ellis*, these submissions are not barred by cause of action estoppel. If successful, they would appear to offer the Stonemans a pyrrhic victory as giving effect to these

points and invalidating Bylaw 185, 2009 would revive Bylaw 111, their real *bête noire*. But I will nevertheless address the merits of these points.

[79] In their Factum, beginning at paragraph 57, the thrust of the Stonemans' argument is that the DILTC required ministerial approval under s. 903(5) of the *Local Government Act* and that the failure to carry out promised hazard mapping vitiated any such approval.

[80] This argument was abruptly met by the DILTC pointing out that the Trust was not required to obtain ministerial approval under s. 903(5) of the *Local Government Act* by virtue of s. 918 of that *Act*.

[81] Section 918 provides:

> 918(1) Sections 903 (5) and 917 do not apply unless a regulation under this section declares that they apply.
>
> (2) The Lieutenant Governor in Council may declare by regulation that, generally or for some or all of the geographic area specified in the regulation, on and after the date specified in the regulation, section 903 (5) or 917 applies to
>
> (a) the board of a regional district specified in the regulation,
>
> (b) the council of a municipality specified in the regulation, or
>
> (c) the local trust committee under the *Islands Trust Act* of a local trust area specified in the regulation.

[82] No declaratory regulation has been adopted for the DILTC.

[83] After argument concluded before us, counsel for the Stonemans wrote to the Court advising that his references to s. 903(5) in his Factum, the foundation for the submission I have just outlined, were incorrect; that indeed the enactments relied upon by the Stonemans for their arguments at paragraphs 56 to 60 of their Factum "regarding a 2009 commitment with the Ministry of Agriculture", that is the alleged agreement to perform further hazard mapping, were s. 46(2) of the *Agriculture Land Commission Act*, S.B.C. 2002, c. 36, and s. 9 of the *ITA*. These sections provide:

> 46 (2) A local government in respect of its bylaws and a first nation government in respect of its laws must ensure consistency with this Act, the regulations and the orders of the commission.
>
> 9 (1) For the purpose of carrying out the object of the trust, the trust council may enter into, on its own behalf or on behalf of one or more local trust committees, agreements with one or more of the following respecting the coordination of activities in the trust area:
>
> (a) the government of British Columbia;
>
> (b) the government of Canada;
>
> (c) an agent of the government of British Columbia or Canada;
>
> (d) a municipality, regional district, board of school trustees or francophone education authority;
>
> (e) a first nation.
>
> (2) An agreement under subsection (1) is subject to the approval of the minister.
>
> (3) If there is a conflict between an agreement under subsection (1) and a bylaw or agreement of a local trust committee, the agreement under subsection (1) prevails.

[84] Counsel for the DILTC objects to this purported correction under Rule 30 of the *Court of Appeal Rules*. Counsel submits that the argument proceeded before this Court on the basis of s. 903(5) and that the Stonemans ought not be permitted to advance what is fundamentally a new argument at this time. I agree and I would deny leave to do so. In any event, the argument is without merit.

[85] At paragraph 59 of the Stonemans' Factum, the so-called "agreement" is discussed:

> 59. One of the concerns expressed by the ALC was that the Komas Bluff and the Steep Slope DPA boundaries may be unjustifiably large, and included more farm land than necessary. The DILTC entered into an agreement dated Mar 4, 2009 with the ALC and the Ministry of Agriculture. Pursuant to this agreement, the ALC and the Ministry of Agriculture agreed to approve OCP Bylaw #185 based on the DILTC's commitment to conduct hazard mapping along the Komas Bluffs, among other things, which it said it had started and expected to be completed by late 2009.

[86] The letter of 4 March 2009 to the ALC and the Ministry of Agriculture is signed by the Acting Regional Planning Manager of the Islands Trust. It is by no means an agreement authorized by any resolution of the Islands Trust council; it is not even

signed by their authorized officers. It contains commitments on behalf of the DILTC, that its staff will bring the ALC's and Ministry of Agriculture's concerns to the attention of the DILTC, and that its staff will recommend to the DILTC a review of the guidelines for the DPAs created by Bylaw 185, 2009. The letter further contains this commitment:

> Staff also commits, at the Staff Level, to improve communication between the Islands Trust Staff and Staff at the Ministry of Agriculture and Lands and the Agricultural Land Commission with regard to bylaw development affecting these agencies. To this end, we suggest that the Ministry of Agriculture and Lands staff, Agricultural Land Commission Staff and Islands Trust planning staff establish a regular meeting schedule (by phone or in person) for at least the duration of the review of DPAs on Denman Island. The purpose of the meeting is to keep each agency up to date on issues, to allow respective staff to report back to their elected officials and executive, to allow Islands Trust staff to utilize ministry expert advice on agricultural issues and to ensure the interests of all parties are represented during the DPA review. If you are agreeable to this, we will arrange a preliminary meeting schedule.

[87] Nothing in the letter of 4 March 2009 is in respect of "the co-ordination of activities in the Trust area" with the government of British Columbia or an agent thereof or of Canada as contemplated by s. 9 of the *ITA*; there is no evidence whatever proving ministerial approval of any such agreement under s. 9(2) of the *ITA*.

[88] I would not therefore, in any event, give effect to this submission.

[89] In my view, cause of action estoppel applies to all of the Stonemans' submissions on Bylaw 111 and the fresh arguments on Bylaw 185, 2009 fail on their merits.

[90] And the Stonemans' submissions on Bylaw 111 are equally vulnerable when one considers them in light of issue estoppel.

[91] The Supreme Court of Canada discussed the doctrine of issue estoppel in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.

[92] At para. 25, Justice Binnie referred to *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 and noted the pre-conditions to the operation of issue estoppel:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[93] The issue which the Stonemans put before Justice Curtis was the same issue they and Mr. Ellis put before Justice Groberman and the Court of Appeal in *Ellis*: the issue of the validity of Bylaw 111. That issue was finally determined in *Ellis*, expressly so by the Court of Appeal (at para. 58):

> [58] The trial judge made no error in proceeding under Rule 18A, concluding that the bylaw was valid…

[94] The Stonemans were parties in the *Ellis* litigation and they are parties here. The pre-conditions to the operation of issue estoppel are satisfied.

[95] Still, as *Danyluk* holds, the Court enjoys a discretion in its application of the doctrine in the case at bar (at para. 33 of *Danyluk)*:

> 33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

[96] Justice Curtis applied the doctrine. I see no error in his exercise of discretion. Nothing in the equities here would prompt me to exercise the discretion not to apply issue estoppel or cause of action estoppel. And in this I am largely moved by the fact that the attack on Bylaw 111 in *Ellis* was broad and multi-faceted, even if the arguments actually disposed of by the Courts reduced in number as the case progressed. The parties there pursued many arguments and had the knowledge of

facts to ground others. Equity is well served by applying the doctrine here to promote and protect the orderly administration of justice.

VI. The Stonemans' *Mandamus* Application

[97] In their Petition, the Stonemans sought relief in the nature of *mandamus*:

> …compelling the DILTC without further requirements to issue a development permit validating the present development of the property to replace development permits DE-DP-03-09 and DEN-DP-2002 currently registered on title.

[98] The facts behind this prayer for relief are stated by the Stonemans in paragraphs 34-43 of the Petition:

> 34. In the meantime, the Petitioners wished to build a home, garage, chicken coop and pump house. Those proposed developments were further than 50 metres from the edge of the bluff, but within the Komas Bluff DPA.
>
> 35. On August 2, 2005, the Petitioners submitted an application to the DILTC for a Siting and Use Permit to build the house and related structures.
>
> 36. The DILTC responded by saying that as the proposed development was within the Komas Bluff DPA, the Petitioners would have to apply for a development permit.
>
> 37. A dispute over whether a development permit was required led to the filing of this judicial review proceeding.
>
> 38. The Petitioners, representing themselves, commenced this proceeding seeking various forms of relief and setting out their reasons why Bylaw 111 is invalid and that the DILTC had been exercising its authority outside its jurisdiction.
>
> 39. In or about August of 2006, the DILTC recommended to the Petitioners that instead of proceeding with the judicial review application, to apply for the development permit and a siting and use permit for the house and ancillary buildings.
>
> 40. The Petitioners then filed on August 25, 2006, under protest, an application for a development permit and a siting and use permit for the house and related structures (the "Second DP Application").
>
> 41. The Second DP Application proposed to build a house, with a setback 81 metres from the bluff, and 66 metres from an area of the bluff that had collapsed, ancillary buildings, and to farm within 50 metres of the bluff, with a 15 metre setback.

> 42. The Second DP Application satisfied all lawfully applicable criteria, and the DILTC should have issued a siting and use and development permit.
>
> 43. The DILTC then attempted unlawfully to impose further requirements on the Petitioners before agreeing to issue the development permits.

[99] As I understand the Stonemans' case, the gravamen of their complaint is that the DILTC was endeavouring to obtain as a condition of the requested development permit, remediation works on the lands which were not required by Justice Groberman after he reviewed the expert reports prepared following his indication that he would issue a mandatory injunction covering some form of such works on the Ellis and Stoneman lands.

[100] I reproduce the DILTC's actual resolution approving the Stonemans requested development permit:

> 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 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, and patios and septic tank …

[101] The DILTC deals with this issue at paragraphs 104 to 106 of its Factum:

> 104. Only the first requirement related to the remediation ordered in *Ellis* and it was nothing more than the entering of the consent order in that respect. This condition was fully consistent with the orders in *Ellis*, and addressed the increased instability of the bluff caused by Mr. Ellis as recommended by the 2006 Thurber report.
>
> 105. The remaining three requirements did not relate to any remediation requirements related to Mr. Ellis' unlawful clearing of the Stonemans' property. They were entirely based on the Stonemans' own geotechnical report as to what was required to ensure the safety and longevity of the

> proposed new development (the house, garage, drainage works, land clearing and cultivation) in relation to the identified ongoing instability of the bluff. That report specifically included a recommendation that planting be completed in accordance with the 2003 Madrone report, as well as drainage and siting requirements.
>
> 106. The development permit conditions incorporating the recommendations of the 2006 EBA report for the new development were specifically authorized by s. 920(7.1) and (11) of the *Local Government Act,* and Guideline 3 of the Komas Bluff DPA.
>
> > 920 (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.

[102] Guideline 3 of the Komas Bluff DPA provides:

> 3. In order to assist the Denman Island Local Trust Committee in determining conditions to be included in a development permit, the applicant will be required to provide, at their own expense, a geotechnical report certified by a professional engineer with experience in geotechnical engineering who is acceptable to the Trust Committee. The report must indicate that the proposed tree cutting, buildings, structures, land alteration, roads, driveways, or other proposed developments would not cause any potential erosion of soil or contribute to any land slip, rock fall, mud flow, sloughing, or water degradation.

[103] It will be recalled that Guideline 3 was an issue pursued by the Stonemans on the examination for discovery of the Trust representative in *Ellis*.

[104] Justice Curtis dealt with this issue at paragraph 36 of his reasons:

> [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.

[105] I agree with this conclusion. I cannot discern anything improper in the conditions attached to the issuance of the development permit.

[106] I also note the point made by the DILTC that the current development on the property differs in a number of significant respects from that proposed in the Stonemans' noted application. Accordingly, there is no application covering the existing development before the DILTC or this Court. And there is certainly no application covering the excavated path works and drainage works at the crest of the Bluff and the stairs constructed by the Stonemans down the face of the Bluff. These works were undertaken by the Stonemans in complete defiance of the terms of Bylaw 111 and the decision in *Ellis*.

[107] Absent an application complete in all respects covering all of these works, I agree with the DILTC's preliminary point that there is nothing to which an application for an order in the nature of *mandamus* might attach.

VII. Special Costs

[108] The submissions on this issue were not extensive. I find no error in principle in the exercise of the discretion below to award special costs in light of the Stonemans' deliberate breaches of the laws they well knew to be in place before they embarked upon their construction activities.

[109] I would dismiss this appeal.

"The Honourable Chief Justice Bauman"

I agree:
"The Honourable Madam Justice Smith"

I agree:
"The Honourable Madam Justice Bennett"