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October 1, 2015 2015-17-IT

COURT UPHOLDS LEGALITY OF DENMAN ISLAND BYLAWS ON KOMAS BLUFF

VICTORIA — The B.C. Supreme Court has confirmed that the Denman Island Local Trust Committee (DILTC) has conducted itself in a reasonable and lawful way, in protecting development from hazardous conditions at Komas Bluff, Denman Island.

In its latest response to Dean Ellis' complaints about the application of DILTC's bylaw to his property, the Court found Mr. Ellis had no grounds for judicial review. The court further found that the DILTC was not required to issue a development permit to Mr. Ellis, as he had not submitted a complete application. In an unusual move, the court gave Mr. Ellis detailed directions to guide any future applications. Madam Justice Young also cautioned him "not to use this Development Permit application process as a vehicle to air your complaints about past litigation or your personal opinion on the validity of the bylaw or its interpretation."

In her September 29, 2015 Reasons for Judgment, Madam Justice Young dismissed Mr. Ellis' 2004 and 2005 Development Permit applications as "moot" because they attempted to legitimize his unlawful removal of trees that had been addressed by the orders of the BC Supreme Court in 2005 and 2006. In his application for a judicial review, Mr. Ellis claimed that the DILTC had repeatedly denied a number of previous applications to remove trees, build stairs to the beach and grow hay on his land since 2004. However, the Court found "it is simply not true that they ignored him. They have gone to great length to set out what their concerns are and how he can rectify their concerns."

"As the local trust committee responsible for land use planning decisions, we have a responsibility to make decisions that protect the safety and sustainability of the community," said Laura Busheikin, Denman Island Local Trustee. "We remain committed to working with landowners who bring us complete applications as part of the Development Permit process the community established to protect people, structures and other development, where hazardous conditions exist."

On Denman Island, an area known as the Komas Bluff is prone to land slips and erosion. In 1988, the Denman Island LTC created a Development Permit Area (DPA) to protect development within the Komas Bluff area. Certain activities, such as tree removal, building construction and drainage alteration can cause slope failure and threaten the security and safety of people, buildings and roads. Therefore, these activities are only allowed by permit, based on advice from a qualified geotechnical expert.

Mr. Ellis removed hundreds of trees within the Komas Bluff DPA and caused significant destabilization of the Komas Bluff, in contravention of the regulations. After exhausting all attempts at a reasonable resolution, the DILTC got a court injunction in 2005, requiring Mr. Ellis to comply with the regulations and remediate the affected area. Since that court injunction, Mr. Ellis has made claims, counterclaims and petitions covering a gamut of issues ranging from the validity of the bylaws to the conduct of trustees and Islands Trust staff. The courts have repeatedly found that the bylaws are valid, are enforced for proper purposes under the *Local Government Act* and do not impair Right-to-Farm legislation.

In a related decision on September 25, 2015, the B.C. Court of Appeal dismissed Mr. Ellis' application for a stay of an earlier court order to sell his Denman Island property to recover approximately $90,000 in special court costs payable to the Islands Trust as a result of the 2005 judgment.

"The Supreme Court of B.C. has once again ruled in favour of the DILTC's actions, and the individual trustees and staff's conduct, in interpreting and implementing bylaws passed and enforced for proper purposes under the *Local*

Government Act," said Peter Luckham, Islands Trust Council Chair. "We sincerely hope Mr. Ellis follows the court's directions for successfully complying with the regulations that protect development from hazardous conditions."

The Islands Trust is a federation of local government bodies representing 25,000 people living within the Islands Trust Area and another 10,000 non-resident property-owners. 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 judgement attached

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ellis v. Denman Island Local Trust Committee,* 2015 BCSC 1753

Date: 20150929
Docket: S08941
Registry: Courtenay

In the Matter of the *Judicial Review Procedure Act* R.S.B.C. 1996, c.241

Between:

Francis Dean Ellis

Petitioner

And

Denman Island Local Trust Committee

Respondent

Before: The Honourable Madam Justice Young

Reasons for Judgment

Petitioner - Self-Represented	F.D. Ellis
Counsel for Respondent:	A. Bradley
Place and Date of Hearing:	Courtenay, B.C. July 21-24, 2015
Place and Date of Judgment:	Courtenay, B.C. September 29, 2015

[1] This is the hearing of a petition for judicial review of the denial of several development permit applications for land on Denman Island. It is being brought by Mr. Ellis who is the owner of the land located at 2626 Swan Road on Denman Island (the "Property"). The decision making body is the Denman Island Local Trust Committee (the "DILTC") which is authorized under the *Islands Trust Act*, RSBC 1996, c 239 which establishes a regime of land use regulation within the trust area.

LEGISLATION

[2] The *Local Government Act* RSBC 1996, c. 323 deals with planning and land use management. Among the powers under s. 876, the *Act* confers a power to adopt an Official Community Plan Bylaw.

[3] Sections 919.1 and 920 of the *Local Government Act* provide as follows:

> **Division 9 — Permits and Fees**
>
> **Designation of development permit areas**
>
> **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;**
>
> (c) protection of farming;
>
> (d) revitalization of an area in which a commercial use is permitted;
>
> (e) establishment of objectives for the form and character of intensive residential development;
>
> (f) establishment of objectives for the form and character of commercial, industrial or multi-family residential development;
>
> (g) in relation to an area in a resort region, establishment of objectives for the form and character of development in the resort region;
>
> (h) establishment of objectives to promote energy conservation;
>
> (i) establishment of objectives to promote water conservation;
>
> (j) establishment of objectives to promote the reduction of greenhouse gas emissions.
>
> (2) With respect to areas designated under subsection (1), the official community plan must
>
> (a) describe the special conditions or objectives that justify the designation, and

(b) specify guidelines respecting the manner by which the special conditions or objectives will be addressed.

(3) As an exception to subsection (2) (b), the guidelines referred to in that subsection may be specified by zoning bylaw but, in this case, the designation is not effective until the zoning bylaw has been adopted.

(4) If an official community plan designates areas under subsection (1), the plan or a zoning bylaw may, with respect to those areas, specify conditions under which a development permit under section 920 (1) would not be required.

Development permits

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;

(c) [Repealed 1999-38-53.]

(d) land within an area designated under section 919.1 (1) (a) or (b) must not be altered;

(e) land within an area designated under section 919.1 (1) (d), (h), (i) or (j), or a building or other structure on that land, must not be altered.

(2) Subject to subsections (3) to (6), a local government may, by resolution, issue a development permit that

(a) varies or supplements a bylaw under Division 7 or 11 of this Part,

(b) includes requirements and conditions or sets standards under subsections (7) to (10.2), and

(c) imposes conditions respecting the sequence and timing of construction.

(3) The authority under subsection (2) must be exercised only in accordance with the applicable guidelines specified under section 919.1 in an official community plan or zoning bylaw.

(4) A development permit must not vary the use or density of the land from that permitted in the bylaw except as authorized by subsection (5).

(5) If the land was designated under section 919.1 (1) (b), the conditions and requirements referred to in subsection (7.1) of this section may vary that use or density, but only as they relate to health, safety or protection of property from damage.

(6) A development permit must not vary a flood plain specification under section 910 (2).

(7) For land designated under section 919.1 (1) (a), a development permit may do one or more of the following:

(a) specify areas of land that must remain free of development, except in accordance with any conditions contained in the permit;

(b) require specified natural features or areas to be preserved, protected, restored or enhanced in accordance with the permit;

(c) require natural water courses to be dedicated;

(d) require works to be constructed to preserve, protect, restore or enhance natural water courses or other specified natural features of the environment;

(e) require protection measures, including that vegetation or trees be planted or retained in order to

(i) preserve, protect, restore or enhance fish habitat or riparian areas,

(ii) control drainage, or

(iii) control erosion or protect banks.

(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;

(b) require, in an area that the permit designates as containing unstable soil or water which is subject to degradation, that no septic tank, drainage and deposit fields or irrigation or water systems be constructed;

(c) in relation to wildfire hazard, include requirements respecting the character of the development, including landscaping, and the siting, form, exterior design and finish of buildings and other structures;

(d) in relation to wildfire hazard, establish restrictions on the type and placement of trees and other vegetation in proximity to the development.

(8) If land has been designated under section 919.1 (1)(d), (e), (f) or (g), a development permit may include requirements respecting the character of the development, including landscaping, and the siting, form, exterior design and finish of buildings and other structures.

(9) If land has been designated under section 919.1 (1) (f), a development permit may include requirements respecting the character of the development, as referred to in subsection (8) of this section, but only in relation to the general character of the development and not to particulars of the landscaping or of the exterior design and finish of buildings and other structures.

(10) A development permit for land that has been designated under section 919.1 (1) (c) may include requirements for screening, landscaping, fencing

> and siting of buildings or other structures, in order to provide for the buffering or separation of development from farming on adjoining or reasonably adjacent land.
>
> (10.1) A development permit for land designated under section 919.1 (1) (h), (i) or (j) may include requirements respecting
>
> (a) landscaping,
>
> (b) siting of buildings and other structures,
>
> (c) form and exterior design of buildings and other structures,
>
> (d) specific features in the development, and
>
> (e) machinery, equipment and systems external to buildings and other structures
>
> in order to provide for energy and water conservation and the reduction of greenhouse gas emissions.
>
> (10.2) A development permit for land designated under section 919.1 (1) (h), (i) or (j) may establish restrictions on the type and placement of trees and other vegetation in proximity to the buildings and other structures in order to provide for energy and water conservation and the reduction of greenhouse gas emissions.
>
> **(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.**
>
> **(12) If a local government delegates the power to issue a development permit under this section, the owner of land that is subject to the decision of the delegate is entitled to have the local government reconsider the matter.**

[4] I have bolded those sections which are relevant to this decision.

[5] The Denman Island Official Community Plan ("Denman Island OCP"), which is created under the *Local Government Act*, designated an area running along the northeast coast of the Denman Island as Development Permit Area No. 1 Komas Bluff (the "Komas Bluff DPA") pursuant to s. 919.1(b) of the *Local Government Act*.

[6] The Komas Bluff DPA was first designated in the Denman Island OCP pursuant to Bylaw 35 in 1988. It was designated for the purpose of protection of development from hazardous conditions under the then *Municipal Act*. The Komas Bluff DPA was incorporated into the new Denman Island OCP in 1991.

[7] According to s. 919.1(2) of the *Local Government Act,* development permit areas designated under the Official Community Plan must:

> (a) describe the special condition or objective that justify the designation and
>
> (b) specify guidelines respecting the manner by which the special conditions or objectives will be addressed.

[8] The Komas Bluff DPA was amended by Bylaw 111 in 1999. Bylaw 111 amended both the guidelines and the map designation of the area.

[9] The following guidelines are the guidelines that were approved by the Minister of Municipal affairs in Bylaw 111 on May 12 1999 (there has been a subsequent amendment which has changed the numbering but not the content of the guidelines).

> Guideline 3 (now 2)
>
> 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.
>
> ...
>
> Guideline 6 (now 5)
>
> Notwithstanding the drainage bylaw provisions or requirements, drainage facilities should be required to divert drainage away from any areas subject to sloughing or damage from sloughing.
>
> Guideline 7 (now 6)
>
> Trees or other vegetation should be retained or replanted in order to control erosion along the top or the face of the bank.

[10] Denman Island Trust Committee Development Procedure Bylaw No. 71, 1992 sets out the procedure for applying for a development permit.

[11] Section 3 of Bylaw No. 71 provides that:

3. An application by an owner of land for amendment to an official community plan or zoning bylaw for a permit, or for conversion of a building into strata lots, shall:

(1) be made by the owner of the land or a person authorized in writing by the owner;

(2) be submitted to the Islands Trust office in the appropriate form established by the Islands Trust, as may be varied from time to time.

(3) contain all information required by the applicable form.

[12] Section 3.1 of Bylaw No. 71 says:

3.1 **Development Permit Area No. I Komas Bluff**

In addition to the provisions of Section 3, an application for any development permit within Development Permit Area No. 1 Komas Bluff shall contain:

A. A statement outlining the reason for the proposed alteration of, subdivision of, or building on land within the Development Permit Area.

B. A geotechnical report from a professional engineer with experience in geotechnical engineering indicating what activities or forms of land alteration may be undertaken on the portion of the land (that is) the subject of the development permit application.

C. A scaled map of the affected parcel showing:

i the location of the proposed building and/or structures;

ii the location of the property lines;

iii the location of areas subject to sloughing or damage from sloughing;

iv the location of planting, retention, or removal of vegetation to control erosion; and

v the layout of the proposed subdivision, including roads, lot lines, building sites, and natural areas left free of development.

BACKGROUND FACTS AND HISTORY OF LEGAL PROCEEDINGS

[13] A portion of the Property is located within the Komas Bluff DPA.

[14] In 2000 a development permit was issued to a previous owner of the Property and it authorized clearing of trees up to 50 meters from the crest of the Komas Bluff DPA and prohibited the harvesting of trees or clearing or altering of land within 50 meters of the top edge of the bluff.

[15] The 50 metre setback (the buffer) was flagged by a surveyor in September 2000. The land on the island side of the buffer was logged.

[16] In 2002, after Mr. Ellis purchased the Property, he was granted a development permit to adjust the boundary between the lots by subdivision. He cut a great many trees without a development permit. The DILTC commenced an enforcement action in the Supreme Court of British Columbia against Mr. Ellis seeking a declaration that he was in breach of the provisions of Bylaw No. 60 establishing the Komas Bluff PDA and s. 920 of the *Local Government Act*. Mr. Ellis challenged the validity of Bylaw 60 (which is now Bylaw No. 111). The decision by Mr. Justice Groberman in that action is reported at *Denman Island Local Trust Committee v Ellis*, 2005 BCSC 1238, (hereinafter referred to as the Ellis Enforcement Proceeding).

[17] After reviewing the evidence, Justice Groberman found that the removal of trees along the buffer zone had significantly destabilized the bluff.

[18] He was satisfied that there had been a deliberate and systematic effort on the part of Mr. Ellis to clear the buffer zone of tree cover and that he knowingly ignored the requirement to obtain a development permit before clearing the land.

[19] Justice Groberman found that Bylaw No.60 was valid and concluded:

> [60] I am satisfied, then, that Mr. Ellis has violated the provisions of Bylaw No. 60 establishing the Komas Bluff PDA, and that the bylaw is valid and enforceable. He has therefore violated s. 920 of the *Local Government Act*.

[20] Mr. Justice Groberman issued a mandatory injunction requiring Mr. Ellis to restore the Property to its condition prior to the violation.

[21] He also granted a declaration that Mr. Ellis unlawfully contravened s. 920(1)(d) of the *Local Government Act* by altering land within the Komas Bluff PDA without a development permit authorising such alteration.

[22] In addition, he granted a permanent injunction against Mr. Ellis, restraining him from cutting trees on, clearing, developing, excavating or otherwise altering

those portions of the Property that are within 50 metres of the top edge of the Komas Bluff PDA, or causing any of those activities to be carried out on those portions of the Property, without first obtaining a development permit authorizing such activities.

[23] A consent order was entered into setting out what remedial work had to be completed by Mr. Ellis.

[24] The Groberman decision in the Ellis Enforcement Proceeding was appealed. That appeal is reported at *Denman Island Local Trust Committee v. Ellis,* 2007 BCCA 536 (the "Ellis Appeal").

[25] In the Ellis Appeal, Mr. Ellis again challenged the validity of the Komas Bluff PDA development permit designation under s 919.1 (b) of the *Local Government Act* and its application to the Property on the basis that the development permit was not properly enacted to protect developments from hazardous conditions. The Court of Appeal unanimously rejected that ground of appeal.

[26] In further related court proceedings in 2013, the Denman Island Local Trust Committee applied for a declaration that the Stonemans, who purchased the adjacent lot to the Property from Mr. Ellis, altered their land at 2600 Swan Road without a development permit. The Stonemans petitioned for judicial review challenging the validity and boundaries of the Komas Bluff DPA. That decision is reported at *Stoneman v. Denman Island Local Trust Committee*, 2013 BCSC 218 (the "Stoneman Enforcement Proceedings").

[27] In the Stoneman Enforcement Proceedings, the Stonemans raised the argument that Bylaw 60 and the amending Bylaw 111 were invalid and that the boundaries were invalid and that no permit was needed for development. Mr. Justice Curtis found these arguments to be *res judicata* as they had already been argued in the Ellis Enforcement case where the Stonemans had been added as parties and did file a statement of defence.

[28] As an alternative argument, the Stonemans claimed an order of *mandamus* requiring the DILTC to issue a development permit validating the development they

had constructed contrary to the bylaw. The Stonemans' request for *mandamus* was found to be without merit because there was no application for which *mandamus* could attach.

[29] The Stonemans appealed that decision and the BC Court of Appeal dismissed the appeal confirming that the Stonemans' arguments were *res judicata* as the arguments could have been made, should have been made, and most were in fact made, in the Ellis Enforcement Proceeding (*Stoneman v Denman Island Local Trust Committee*, 2013 BCCA 517 at pps. 72 and 960).

RES JUDICATA APPLICATION

[30] In this amended petition, Mr. Ellis continued to challenge the validity and justification for the Komas Bluff DPA Bylaw.

[31] The amended petition for judicial review filed by Mr. Ellis in this proceeding sought the following orders:

> 1. The petitioners ("Ellis") apply for an order:
>
> a) In the nature of mandamus, compelling the DILTC to issue development permits and siting [sic] and use permit for Ellis to farm and use his land as applied for in 2004, 2005, 2013 permit applications and 2003 Consent Order on the lands cleared prior to the Groberman decision and remediated subject to the Groberman decision.
>
> b) A declaration the Silva Report does not meet the criteria to be the "Justification" as laid out in the OCP or LGA.
>
> c) The DILTC produce the report used to Justify the Komas Bluff Development Permit Area and specific map locations with GIS points so the land owners can legally understand the restrictions and guidelines
>
> d) Remove DE–DP–03–99(first development permit) (2000 permit) ("Buffer") from title
>
> 2. Require the DILTC to pay the Ellis' costs of this proceeding.

[32] Prior to hearing this judicial review application, a preliminary application was made by the DILTC to strike paragraphs 1.b), c), and d) of the amended petition on the grounds that those applications were *res judicata*.

[33] I rendered an oral decision delivered on July 22, 2015 that the relief sought at paragraphs 1.b),c) and d) of the amended petition related to the validity of the Komas Bluff DPA including its boundaries and justification and these issues had already been determined by the courts in the Ellis Enforcement Proceeding. As a result, I struck those paragraphs of the amended petition as they were *res judicata*.

JUDICIAL REVIEW

[34] This decision under the *Judicial Review Procedure Act* is therefore limited to the application at 1.a) and 2 of the amended petition and only with respect to the 2004, 2005 and 2013 applications by Mr. Ellis for development permits for the Property. I am not considering the proposed 2003 "consent order" which Mr. Ellis refers to in his petition. It was a proposal. A consent was never reached. The remediation of the Property was subsequently dealt with in a court order after the Ellis Enforcement Proceedings decision. As such, I find any reference to a 2003 proposed consent order to also be *res judicata*.

[35] Before we proceeded with submissions I became aware that the Attorney General had not been served with the petition. We stood down and, with the assistance of counsel for the respondent, Mr. Ellis did serve the Attorney General by fax on the morning of July 22, 2015 and I reviewed a faxed letter on that same morning from Erin A. Faulkner, solicitor for the Ministry of Justice Legal Services Branch advising the court that the amended petition to the court had been served and that the province would not be intervening or taking a position.

The Facts

[36] On or about March 2004, after commencement but before the hearing of the Ellis Enforcement Proceeding, Mr. Ellis submitted a development permit application to permit the clearing of trees from most of the Property and Lot A within the Komas Bluff DPA. The clearing had already taken place and he was trying to obtain a permit after the fact and prior to a determination by the court.

[37] On or about March 19, 2004, Mr. Ellis submitted to the DILTC, a revised development permit application which did not deal with Lot A.

[38] Mr. Ellis submitted that he has tried on numerous occasions to get a development permit so that he could grow hay on the Property and every time his application was rejected and he was not told why. Mr. Ellis has been growing hay on the Property for many years and continues to do so.

[39] The DILTC says that Mr. Ellis has yet to file a complete development permit application. They have attempted to work with him to explain what he needs to present in order to complete the application which could then be forwarded to the Local Committee but he has consistently refused to comply with their requests.

[40] On two occasions Mr. Ellis demanded that his application be forwarded to the Local Committee anyway and on each occasion the application was rejected because the applications were incomplete.

The Mootness Argument

[41] The first two development permit applications preceded the publishing of the decision in the Ellis Enforcement Proceeding wherein Mr. Justice Groberman ordered remediation for the damage done to the bluff as a result of Mr. Ellis's unlawful tree clearing.

[42] The DILTC says that the 2004 and the 2005 applications are therefore moot. They were applications for development permits to legitimize the very activity that was the subject of the Ellis Enforcement Proceeding. The trees were already removed and Mr. Ellis was trying to legitimize the activity which was subsequently found by Justice Groberman to be unlawful.

[43] Counsel for the DILTC referred me to a summary of the doctrine of mootness contained in *Borowski v Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[44] In that decision the Supreme Court of Canada said that the court may decline to hear a case that has raises a hypothetical or abstract question. If the Court's

decision will not resolve a live controversy which affects the rights of parties, the court may decline to hear the matter. The approach cases have taken is a two-step process:

1. Determine if the tangible and concrete dispute has disappeared and the issue has become academic;
2. If the response to question one is yes, should the court exercise its discretion to hear the case?

[45] The 2004 and 2005 development permits applications were made after the offending tree removal had occurred. Mr. Ellis was subsequently found to be in breach of the legislation. The subject matter has been dealt with by Mr. Justice Groberman and neither this court nor the DILTC can now come up with a different conclusion.

[46] The dispute has now disappeared.

[47] There is no justification for exercising my discretion to hear a judicial review related to the 2004 or 2005 development permit applications.

[48] I therefore find that the application at paragraph 1.a) of the amended petition has to be further narrowed.

[49] The only remaining issue to be dealt with in this judicial review is the application for an order of *mandamus* compelling the DILTC to issue development permits for Ellis to farm the Property as applied for in 2013 and the issue of costs.

Review Ellis Evidence

[50] Mr. Ellis' position is that all he now wants to do is plant and cut hay on the Property. Almost all of the trees are already gone although he says that there is the odd tree left that falls over that he is trying to remove because they are a hazard. He says that everyone else on Denman Island is allowed to build steps down to the beach but he has to apply for a permit because of the location of the Property (which he still does not accept legitimately lies within the Komas Bluff DPA).

[51] He says he has complied with the Bylaw guidelines and provided a number of geotechnical reports but they are never good enough for the Islands Trust Committee. His geotechnical engineers say that the Property is good for growing hay.

[52] He says he has complied with the remediation order which was for the purpose of restoring the Komas Bluff DPA to a level of stability that will protect future development and that the only future development he has in mind is hay farming.

[53] He says that his remediation work has been monitored by Polster Environmental Services Ltd. ("Polster") and that they have submitted reports to the DILTC. He attached two reports from Polster. The first is dated April 3 2006 and it recommended planting for restoration of landslides and erosion on the Property. The second report dated March 2009 confirmed that the restoration of the notch area on the Property has resulted in establishment of healthy vegetation. The report concluded that additional remedial work on this slope is not needed although some thinning of the dense alder stand at the top of the slope would expedite the natural processes of vegetation establishment.

[54] Although I have determined that his 2004 and 2005 development permit applications are moot, Mr. Ellis has submitted some of the same reports in support of his 2013 development permit application so I will review his evidence.

[55] His first application in 2004 was accompanied by a geotechnical report from Madrone Environmental Services ("Madrone Report") but was rejected because it was not prepared by a geotechnical engineer. Mr. Ellis says it was supervised by a geotechnical engineer (but on closer scrutiny it was supervised by a geologist).

[56] His 2005 development permit application was accompanied by a different Madrone report, but it was rejected because it did not address the violation of the removal of trees and a proposal for how to return the Property to the condition it was in prior to the violation. He says that this was an improper consideration.

[57] He referred the Court to several news releases where he says that the Islands Trust has declared that they will never issue development permits in this area and he submitted that this is evidence that the Islands Trust has prejudged his application and will not give him a fair hearing.

[58] Throughout the hearing, Mr. Ellis was insistent that the Property is not properly in the Komas Bluff DPA because the Property is comprised of dense till, bowser type top soil clay loam as set out in the latest Madrone report. These submissions fall within the subjects which I found to be *res judicata*. This argument was made before Justice Grobeman.

[59] Mr. Ellis further complained that the Local Trust Committee is non-responsive. He said that he had sent them 12 letters and he said almost all were not responded to.

[60] He was invited to resubmit the 2005 development permit application after he remediated the property but he chose not to.

[61] In April 2013 he submitted an application for a development permit to “farming to 15 m of bluff” and “tree management” and “two sets of stairs down bluff”. The application was on the proper form and attached about 100 pages but no fee. He identified the current use of the land as “hay farming”.

[62] The application form notifies the applicant that they are to “Provide one full-scale, and three (3) reduced (11 x 17) copies of a detailed site plan and other drawings...” No plan was attached to this application.

[63] The form notifies the applicant that they must include information itemized on the form and encourages the applicant to contact planning staff if there any questions.

[64] Under the heading “If you are applying for a Form and Character development permit, include the following on your site plan”, Mr. Ellis did not check off any items.

[65] Under the heading “If you are applying for a “Protection Area” development permit, provide the following on your site plan: (includes development development (sic) permit established for the protection of the natural environment and protection of development from hazardous conditions)”, Mr. Ellis checked off one item: “existing and proposed uses on parcel”.

[66] The other items are listed as follows and were not checked off:

- height of existing and proposed building or building additions
- setbacks for all existing and proposed buildings to property lines, natural boundary of sea, watercourses and cliffs
- setbacks of all existing and proposed septic tanks and field and wells on the property, from natural boundaries of the sea, wetlands and watercourses and any well that are on or within 50 meters the property
- locations and dimensions of all legal easements, covenant areas, and utility corridors on the property

[67] Under s. 7 of the form Mr. Ellis wrote the following:

> Re fees:
>
> In a 2005 memorandum from David Marlor it said application incomplete + the fee was to be refunded – this was not done so please apply to this application

[68] No fee accompanied the application form.

[69] Under s. 8 application completion checklist Mr. Ellis checked off the following:

- I have completed all sections of this application form
- I have included recent State of Title Certificate (not more than 30 days old)
- I have included copies of all covenants registered against the title
- All owners listed on title have signed the application
- I have included the correct fee (Contact Islands Trust for current fees)

[70] Under s. 8 Mr. Ellis did not check off the following:

- I have included detailed site plans and elevation drawings as required in Section 4 of this application form

[71] In an affidavit sworn on March 2 2015, Robert Milne, Island planner for the DILTC deposes that on May 3 2013, Courtney Simpson, the Regional Planning Manager, for the Islands Trust wrote to Mr. Ellis and advised him that he was required to submit a fee and the following additional information before staff to proceed with processing his development permit application:

- Site plan clearly showing the location and dimensions of existing and proposed buildings and structures and their measured setbacks from lot lines, crest of the bluff, and 2003 surveyed natural boundary. The annotated air photo and survey you provided are insufficient, and stating that all buildings are set back more than 50 m is also insufficient; the exact setback measurements must be shown on a site plan.
- A Site plan clearly showing the location of all existing (since 2006) or proposed land alterations, such as driveways, drainage works, excavations, paths, and trees or vegetation removed or intended to be removed within the Komas Bluff development permit area;
- Survey under the seal of BC Land Surveyor showing the location of the stairs to the beach and existing drainage works in relation to the present natural boundary (as determined prior to the placement of fill and seeding at the base of the stairs). The copy of an undated and unsigned survey with the location of the stairs indicated by hand that you provided is insufficient to demonstrate that the stairs are entirely landward of the natural boundary, and therefore on your property.
- We also strongly recommend that the site plans required above be prepared by a BC Land Surveyor to ensure measurements are correct. Because the buildings and structures already exist, it is important that the site plan attached to the development permit, should it be issued, accurately shows the exact location of the structures. As development permits are binding on the current and all future land owners, a site plan attached to a development permit that is not accurate may have significant consequences.
- From your cover letter dated April 9, 2013 we understand that you have considered the guidelines that apply to the Komas Bluff development permit area, previous staff reports, and the previous resolutions of the Local Trust Committee in relation to your earlier development permit application, and have chosen not to provide any further reports with respect to your current development permit application. I therefore confirm that we will rely on reports in relation to the property on file that you have provided with your application to process the application.

[72] Unfortunately that letter was addressed to Dan Stoneman at 2600 Swan Road, Denman Island B.C. and I have no evidence that Mr. Ellis ever received or saw this letter. His subsequent correspondence suggests that he may not have.

[73] I have reviewed the affidavit of Francis Dean Ellis sworn February 6, 2015 and it is not clear to me what Mr. Ellis sent to the Islands Trust attached to his development permit application signed March 13, 2013. I do not appear to have the covering letter that accompanied the development permit application and the affidavit of Robert Milne only attached the page 2 and 3 of application form and did not include the attachments that accompanied that form.

[74] At tab Z of Mr. Ellis's affidavit #1 sworn February 6, 2015, he attached a copy of what he calls "the fourth development permit application". In his oral submissions he said that he also attached a disc containing 30 reports but there is no indication that this material was sent to the Islands Trust. The disc of 30 reports which Mr. Ellis refers to is not in evidence before me. My guess from hearing submissions is that exhibit Z is the application which was resubmitted in July 2013.

[75] Mr. Ellis did not respond to the letter from Courtney Simpson which suggests to me that he did not receive it. He did send an email on May 8, 2013 to Becky McErlean and DILTC asking for the status of his reapplication for a development permit to farm and build two sets of steps. He pointed out that it had been a month since he had submitted it in early April 2013.

[76] On May 31, 2013 Rob Milne, Island Planner, wrote to Mr. Ellis notifying him that the fee was required for the application received by the DILTC office on April 3, 2013 which was the application signed on March 13 2013.

[77] Rather than submit a fee and address the deficiencies in the March 13, 2013 application, Mr. Ellis resubmitted an application in July 2013. The attachments contained in Mr. Ellis' application are 145 pages in length. The attachments contained in Mr. Ellis' July 2013 development permit application are 102 pages in length. Apparently a fee was paid.

FARMING TO 15 METRES OF BLUFF

[78] Under the application for a development permit for farming, Mr. Ellis does not specify what type of farming he intends to undertake. In his oral submissions he said he is only interested in hay farming. This description should be on the development permit application. In support of agricultural use, Mr. Ellis made reference to the following reports:

- EBA Engineering Consultants Ltd. ("EBA") recommendations November 2004, January 17, 2005, March 18, 2009 and the farm plan.
- Memorandum dated September 20, 2005 quoting Mr. Marlor as advising Island Trust Committee that once remediation was complete, Mr. Ellis's 2005 application requirements to farm within 15 m was met. Mr. Ellis then made the assertion that remediation was completed in 2009 although he provides no proof of that in his application.
- Also, in support of his proposal for agricultural use, Mr. Ellis cited Agricultural (A) in the Denman Land Use Bylaw 148 entitled *Uses Permitted by the Land Reserve Commission in the Agricultural Land Reserve*. He said in his application that this Bylaw says that agriculture should be permitted by zoning and asserts that all farm uses defined by the *ALC Act* for land in the ALR shall be permitted. Further, he submits that Local Government can regulate but not prohibit farming.
- In addition, he submitted that he has satisfied the requirement in Guideline 2 by providing the 2004, 2005, and 2009 EBA reports "to farm up to 15 m of the bluff".
- At page 4, Mr. Ellis provided excerpts from the Ellis Enforcement Proceedings decision.
- At page 5, Mr. Ellis's submitted that the consent order to remediate the Property based on a 2004 Island Trust geotechnical report by Thurber Engineering required him to plant 250 ferns and let the alders regenerate. He asserted that he has done this and that the stability of the bluff has been restored. This is confirmed in the 2009 Polster report.
- He submitted that in the Stoneman Enforcement Proceedings, both the Thurber reports identified water from the highway ditches as the cause of erosion on Ellis property. Mr. Ellis routed the two southern ditches down Swan Road which stopped the flow of water onto this development permit area subject to flooding.
- Mr. Ellis obtained a report from EBA dated March 18 2009 entitled *Geotechnical Reassessment of Intended Usage as Farmland*. EBA was asked to provide comments regarding any impact on the geotechnical recommendations due to remedial measures as

recommended by Polster in 2007 which have been undertaken as well as due to current site conditions.

- EBA noted that Mr. Ellis has farmed this land throughout these proceedings so growing hay is not a new use for the lands. He is currently not and has no plans to irrigate the property.
- EBA described the site and noted that the vegetation that was recommended to reduce erosion seems to have taken. Alders are growing in the upper portion and grasses are evident on the lower colluvial slopes of the notch. Salmonberries and ferns are growing on the slope below.
- EBA concluded that their recommendation contained in their January 17, 2005 letter remains valid. That recommendation was attached to David Marlor's affidavit # 1 at exhibit AA. The recommendations made by EBA at that time were as follows:
    - They noticed that the bluffs have been regressing for many years prior to the present. The removal of trees in 2000 would likely have accelerated this degradation as more water would have been available to the slope. As well, at any location where a concentrated flow is discharged over the slope significant erosion and sloughing is evident.
    - The proposed usage of the property for hay production is acceptable from a geotechnical perspective providing the following are carried out:
        - Irrigation is not used or if it is, soil moisture sensors and controlled applications are employed such that excess watering does not occur. If an irrigation system is put in place, regular inspections and maintenance are required to prevent leakage.
        - The planting suggested by Madrone is carried out and maintained and there is no farming activity with 15 m of the bluff.
        - The ponds, which have been formed, do not have a proper outlet. During wet weather these ponds may overtop resulting in uncontrolled release of water. An armoured outlet discharging to a drainage channel should be installed.
- The report concludes by saying that the conclusions/recommendations made herein will not prevent regression of these bluffs, however the intent is to put in place measures such that the degradation is not accelerated.

[79] The DILTC says that the EBA report dated March 18 2009 entitled *Geotechnical Reassessment of Intended Usage as Farmland* does not address the

development permit area guidelines or all of the proposed developments in the application.

[80] The guideline the DILTC refers to is Guideline 3 (now 2)

> 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.

[81] The DILTC were previously concerned about the January 17, 2005 EBA report because it was prepared prior to remediation of the bluffs. Mr. Ellis did discuss what his remediation plans were and EBA included the replanting recommended by Madrone as one of its recommendations back in 2005 and reconfirmed in 2009 after they observed the replanting. Mr. Ellis was advised that the DILTC required proof that the Madrone planting was carried out. The 2009 EBA report does confirm the replanting has been done and the plants have taken root.

[82] The January 17, 2005 report and the March 18, 2009 EBA reports do only address farming but EBA provided separate reports for the other activities.

[83] On May 14, 2005, Mr. Ellis did write to Mr. Marlor and said that he was of the belief that the January 17, 2005 EBA report did address the guidelines. He was referred to previous rejection letters dated May 4, 2005 and the staff report dated February 16, 2005. The report was to address the trees and vegetation removal and other land alterations undertaken in violation of the existing in-force development permit and the engineer was to provide recommendations for returning the geotechnical slope stability to a state equal to or greater than it was before the violation. This last requirement is likely impossible to meet.

[84] Mr. Milne stated in his affidavit #1 that the March 18, 2009 EBA report is unacceptable because it does not address the development permit area guidelines.

On my reading of the March 18, 2009 and January 17, 2005 EBA reports together, they do address the vegetation removal and the concerns raised in the development permit guidelines without expressly referring to them. The report concludes that the proposed activity will not accelerate the erosion of the bluff. If further details are required they were not specified by the DILTC.

[85] The March 18, 2009 EBA report addresses the previous concern that the January 17, 2005 EBA report was prepared before remediation. It was prepared after the remediation was complete and it comments on the replanting and on the drainage ponds.

[86] Unless the DILTC can particularize the deficiencies, which they have not done, I believe the application for a development permit for hay farming is almost complete. What is missing is a more detailed description of the activity.

TWO SETS OF STAIRS DOWN BLUFF

[87] Under the proposal to build steps/stairs down the bluff in two places called notches in recent reports by Thurber, Mr. Ellis asserted that the construction was similar to that of neighbours on the adjacent Komas Bluff DPA to the north (pictures enclosed at page 67). In support of the construction, he cited the March 3, 2009 EBA report and the fact that the DILTC took no action on the adjacent land alterations.

[88] At page 9 of Mr. Ellis' application he made reference to a March 3, 2009 EBA report regarding the proposed stairways. That report is not attached to the application but is attached to Mr. Milne's affidavit #1 at exhibit H. It is a very brief report made, based on conversations during a site visit to the Property. Mr. Ellis proposed the construction of access to the beach adjacent to the notch (which was defined in an earlier report). The report recommended that a route be selected to minimize any cuts/fills required and disturbance to vegetation. An aerial photograph of the Property with hand drawn lines was apparently included in the first application. There is no proposed site plan which is a significant flaw to the report.

[89] The March 3, 2009 EBA report also recommends that the construction be carried out so as not to channel water. Where the slope is steeper than 25 degrees it recommended that the walkway/stairs should be supported above grade by posts and where the slope is flatter than 25 degrees, the walkway can be a grade with proper support of steps. Had Mr. Ellis provided a building plan to EBA, this report might have been useful but without one, it is not. It also does not address the development permit guidelines.

TREE MANAGEMENT

[90] Again this description of the requested activity is vague.

[91] Mr. Ellis said in his oral submissions that what he wished to do was to remove identified hazardous trees that overhung on the bluff or are dead. He cited the EBA report dated April 24, 2009 entitled *Removal of Hazardous Trees*. Mr. Milne did attach a signed copy of the same report to his affidavit#1 as exhibit "G". This EBA report was signed by R.A. Patrick, P. Eng, Principal Engineer - Geotechnical Practice and Jerry Schmidt, P. Eng. Senior Geotechnical Engineer.

[92] The April 24, 2009 EBA report said that EBA was requested by Mr. Ellis to provide comment from a geotechnical perspective, regarding the removal of 85 trees from the top of the bluff of the buffer zone. The report observed that the trees were either over hanging the bank, leaning, dead or had fallen. I cannot tell whether this observation was made by them or provided to them. Mr. Ellis had deemed certain trees to be hazard trees. EBA was not asked to comment on whether the trees were hazard trees or not.

[93] In the April 24, 2009 report, EBA recommended that trees that had fallen away from the bluff could be removed provided the disturbed area was re-vegetated at least to a similar level of benefit as the original vegetation.

[94] EBA recommended that trees which had fallen over the bluff should be left as they are, due to difficulty removing them. Dead and dying trees that were back from the edge of the bluff (by five meters or more) could be cut off close to the ground.

The wood could be removed from the site but the roots should be left in place. Any disturbance to the ground surface should be remediated with new vegetation to provide a similar level of benefit as the original vegetation.

[95] EBA said that trees within five meters of the slope crest will be problematic to remove. The dead trees do not provide slope stability but if cut, should not be allowed to fall over the bluff as they would have to be lifted up with an excavator. The disturbance must be remediated with vegetation.

[96] EBA commented that the overhanging trees are too costly to remove. The report recognized that there could be an adverse effect on the slope should the trees be removed so they must be removed with care and re-vegetation of the area would be required.

[97] The report does not identify the specific trees that are deemed by Mr. Ellis to be hazardous. The DILTC required that this assessment be made by a forester.

[98] The DILTC submits that the April 24, 2009 EBA report also does not address the development permit area guidelines or the proposed development in relation to the current state of the property. I am of the view that it does address slope stability and how to remove trees from the buffer without causing further instability.

ISSUES OF VALIDITY OF THE BYLAW AND OTHER ARGUMENTS

[99] In his 2013 development permit application, Mr. Ellis then enters into a discussion about Bylaw 919.1(1)(b) and his belief that this Bylaw is being misinterpreted. He continued to argue that the Komas Bluff DPA was not appropriate for the Property and critiques the reports that were relied on by the Islands Trust. This issue is *res judicata*.

[100] He reviewed the history of past applications and denial of development permit applications. At page 17 of his application, he says “Had Judge Groberman seen this report, [EBA Engineering Consultant Ltd, November 9, 2004 draft geotechnical assessment of the Property and March 9, 2006 geotechnical assessment of the

Property also by EBA] he may have said at least all the requirements for an application were fulfilled." These comments are not useful. The DILTC is not in a position to evaluate what Justice Groberman would have done with new evidence.

[101] He uses the Polster report (*Assessment of Restoration of Damaged Notch Site Komas Bluffs Denman Island*, dated March 2009) to argue that the accusation that he had done millions of dollars damage to the Property must be incorrect because Polster found that the damage was rectified by a few ferns.

[102] Under the heading *Water and Ditches,* Mr. Ellis posed the question; why did the Islands Trust approve highway drainage of up to three million gallons per day onto the Ellis lands and then sue Ellis for the resulting damage? He then questioned whether the DILTC knowingly flooded his land knowing that it would cause slumps so they could sue him to validate its bylaws.

[103] Mr. Ellis's application contains a section about agricultural land to support the proposition that the Islands Trust cannot prohibit farming and that its bylaws must be consistent with the *Agricultural Land Commission Act*. I do not think that these propositions are in dispute.

[104] There is a large section in Mr. Ellis' July 2013 development permit application material on the location of the Komas Bluff accompanied by several pages of maps and charts trying to prove that the Property lies to the south of the Komas Bluff and should not be included in the DPA. I have found that this issue is *res judicata*.

[105] Mr. Ellis referred to reports that have identified the soil on the Property as compacted glacial till and not Quadra sands. The point of this submission is to prove that the Property should not be in the Komas Bluff DPA. I have found that this issue is *res judicata*.

[106] There is a section in Mr. Ellis's submissions on discrimination but he provided no evidence to support this argument so was prevented from making these submissions.

[107] Mr. Ellis argued that the term “buffer” has been misused by the DILTC because the purpose of the bylaw is to protect future development from harm and not to protect the environment. He submitted that the DILTC misuses the word “buffer” to imply some infringement on sacred area defined only by their planners and Louise Bell. I believe that the term “buffer” was first used prior to the logging of the lands to create no-logging zone as a means of stabilizing the bluff from erosion. Erosion of the bluff presumably would cause harm to future developments.

[108] Mr. Ellis challenged the Komas Bluff guidelines again and submitted that the guidelines were written for the wrong purpose. He submitted that the guidelines were submitted for the purpose of protection of the environment and not protection of future development. This argument was made unsuccessfully in the Ellis Enforcement Proceeding.

[109] He discusses some without prejudice settlement negotiations which did not result in a settlement in 2004 and I did not allow him to proceed with this argument at the judicial review.

[110] Mr. Ellis then challenged the report prepared by R.N. Green entitled *Expert Advice on Windthrow of Forested Buffer Re DILTC v Ellis* which was relied on by Mr. Justice Groberman in the Ellis Enforcement Proceeding. Mr. Ellis listed all the factors that, in his opinion, Mr. Green ignored in his report. He speculated what the result might have been had Mr. Green considered all these factors. This argument is irrelevant to the present development permit application. It is of no help to second guess what the decision might have been if additional arguments had been raised.

[111] Mr. Ellis referred to the September 2012 EBA report on soil composition of the Property. It says that the previous report misnamed the deposit of Quadra sand instead of Quadra sediment or Cowichan head formation. The report does not recant previous findings that the property is unstable and subject to landslip and erosion. This report is not prepared for the purpose of a development permit application. It appears to be for the purpose of again challenging the validity of including the Property in the Komas Bluff DPA. It does not meet the requirement of

the development permit area guidelines and is specifically limited to the sole use of Mr. Ellis and the Stonemans.

[112] Mr. Ellis referred to *Stoneman v Denman Island Local Trust Committee,* 2013 BCCA 517 at pp. 100-105 where the Stonemans relied on the 2006 Thurber report which recommended remediation to the bluff area. The Stonemans argued that the report established that their property was stable and that nothing further was needed to prevent erosion and as a result a development permit should be issued without further requirements. The British Columbia Court of Appeal disagreed and found that there was nothing improper in the conditions attached by the DILTC requiring proof that the Madrone planting had been done and that a drainage plan was in place and that the reports be accompanied by a site plan.

[113] Mr. Ellis then submitted that Bylaw DE-DP-03-99 was registered against the Property under the authority of the Forest Cover development permit application and was not removed after Bylaw 114 was struck down by Mr. Justice Bauman. He made submissions about why geotechnical reports were not required for the DP 99 forest cover bylaw. I do not see how this argument is relevant to the application.

[114] He asserted “All vestiges of DP 99 and 50 m. are required to be removed from the OCP”. Again I am uncertain how this relates to the present application.

[115] At page three of his submission, Mr. Ellis submitted that the existence of DE-DP-2002.1 satisfies the requirement for a site specific geotechnical report set out in Guideline 2 of the Komas Bluff DPA because the Islands Trust had two other geotechnical reports which it used as guidelines for this subdivision permit. Those reports did not, however, address the current requested use of the lands.

DISCUSSION

[116] I recognize that Mr. Ellis has committed a great deal of work and expense to prepare this detailed development permit application. What concerns me is that the application has too many objectives. The first objective is to obtain a development permit to engage in agricultural use, build stairways to the beach and to manage

trees which are valid purposes. The second objective appears to be to reintroduce evidence to set the record straight in the Ellis Enforcement Proceeding. This objective has detracted from the main objective of obtaining a development permit and of course is *res judicata*. The third objective undertaken by Mr. Ellis is to attempt again to prove that the Komas Bluff DPA is not justified. Again the issue is *res judicata* and including pages of submissions on this point detracted from his main objective.

[117] It has been an arduous task to read through over 100 pages of submissions and sort out the relevant from the irrelevant. It is more than an applicant should expect from the DILTC staff.

[118] The DILTC needs to receive a complete application form with current relevant reports attached and not cut and pasted excerpts from nine reports of various ages. Each report has to identify the applicable guidelines of the Komas Bluff DPA and has to specifically consider all the proposed developments in relation to the current condition of the land and address the guidelines.

[119] I find the reports from EPA regarding farming and hazard tree removal do address the guidelines without specifically saying that they have reviewed the guidelines. The most current report is from 2009 so it should be updated to confirm that the recommendations are still valid and that the guidelines were reviewed and taken into consideration. If there are more deficiencies in these reports I am not aware of what they are.

[120] The March 3, 2009 EBA report related to the proposed stairway falls short of addressing the guidelines.

[121] The DILTC also required a site plan and drawing of the stairway that Mr. Ellis intended to construct. I questioned him on the plans for the stairway several times and what I heard was that it was impossible to draw, a waste of time and ludicrous and unfair because no one else had to do it and because the Property is not highly erosive so he should not have to bother complying with the Komas Bluff DPA

guidelines. I am not satisfied from those answers that he has a building plan for the beach access at all. Without one, he will not succeed in obtaining a permit.

[122] The DILTC requested a written outline from Mr. Ellis which describes the nature of the three activities proposed in more detail. This could be easily accomplished.

[123] The DILTC required that the determination of which trees are hazard trees be made by a qualified arborist.

[124] I find that the DILTC have been responsive to Mr. Ellis's various permit applications and that it is simply not true that they have ignored him. They have gone to great length to set out what their concerns are and how he can rectify their concerns although they do fall short of explaining why the 2009 EBA report related to farming is deficient. Their responses to past development permit applications are set out in Mr. Marlor's affidavit #1. Their responses to the 2013 development permit application are set out in Mr. Milne's affidavit #1.

[125] On August 1, 2013 Mr. Milne wrote to Mr. Ellis and told him that there were a number of outstanding deficiencies in his 2013 development permit application. He requested the following which I paraphrase below:

> (a) A written outline which clearly describes the nature of each of the three proposed activities identified in the application a "farm up to 15m of bluff; 2 sets of stairs and hazard tree conditioning".
>
> (b) A detailed site plan showing the location of existing and proposed developments including proposed stairways.
>
> (c) A hazard tree assessment performed by a qualified arborist that identifies any hazard trees on the Property and measures necessary to address any hazards; and
>
> (d) A geotechnical report that specifically considers all of the proposed developments in relation to the current condition of the land and addresses the applicable guidelines for the Komas Bluff DPA. The report must state that your proposed activity will not cause erosion or sloughing of the property, or, if that is not possible, provide an assessment of the risk of erosion or sloughing that may be caused by your activities and make specific recommendations as to how to mitigate that erosion or sloughing actives.

[126] Mr. Ellis responded with further questions. He did provide a clearer description of the activity and location for the stairway but did not agree to provide a site plan. I believe that the site plan is a mandatory requirement and his development permit application will not proceed without one.

[127] He did not agree to hire an arborist to identify hazard trees and in fact offered to drop the tree removal from the application. If he wishes to proceed with the application for a permit to remove hazard trees this report from a qualified arborist is required.

[128] He asked for a clearer explanation of why his geotechnical reports were not adequate. I do not find Mr. Milne's email of August 7, 2013 very helpful or responsive as it relates to the geotechnical reports. The only comment he made is that they were old.

[129] The DILTC's position is that Mr. Ellis has never received a development permit because he has never submitted a complete application for one so his application did not progress past the staff level. The DILTC did not consider his 2013 application. They submit that there is nothing for *mandamus* to attach to because there is no complete application.

[130] I agree with this submission. *Mandamus* is only available when decision makers have exercised their discretion. This application is incomplete and therefore has not been put before the decision makers. Until it is complete, staff have no obligation to refer it to the DILTC.

[131] I dismiss the application for *mandamus*, but I will provide some directions because I believe that the application is close to complete.

[132] I give the following direction to Mr. Ellis. If he wishes to proceed with his application for a development permit for the three purposes he must:

1. Re-submit an application on the appropriate form completed.

2. Attach a State of Title Certificate and copies of all covenants registered against title

3. Provide with a written outline which clearly describes the nature of each of the three proposed activities (see 3.1 A. of the Denman Island Development Procedure Bylaw No. 71);

4. Prove proof of the remediation to the slope (attaching the signed March 2009 Polster report and the March 18, 2009 EBA report);

5. Provide a detailed site plan prepared by a B.C. land surveyor showing the location and dimension of existing and proposed buildings and structures including the proposed stairways and their measured or proposed setback from lot lines, crest of the bluff and surveyed natural boundary. The plan should also show the location of any proposed land alterations such as excavations, paths, drainage works and trees or vegetation removed or intended to be removed. Demonstrate that the proposed stairways are landward of the natural boundary and on the Property. (see August 1 2013 letter from Rob Milne to Dean Ellis exhibit “K” to his affidavit #1);

6. Provide a hazard tree assessment performed by a qualified arborist that identifies any hazard trees on the Property and the measures necessary to address any hazards. (see s. 11-16 of the Impact Assessment Bylaw and s. 4.1 of Land Use Bylaw Guideline 6);

7. Provide an updated geotechnical report from EBA regarding the agriculture and tree removal indicating that they are aware of the guidelines of the Komas Bluff DPA and have addressed them in the report and indicating whether their opinion from 2009 has changed.

8. Provide a full report on the impact of the stair construction. It should be commissioned after the plan has been created so the construction plan can be assessed by EBA. EBA should specifically consider the stairway alteration in relation to the current condition of the Property and should address the

applicable guidelines of the Komas Bluff DPA. (see s. 920(11) of the *Local Government Act*, s. 3.2 of the Development Procedure Bylaw and s. 4.1 of Land Use Bylaw Guideline 2); and

9. Do not address any other issues in your application which might detract from the application for a development permit. Do not use this development permit application process as a vehicle to air your complaints about past litigation or your personal opinion on the validity of the bylaw or its interpretation.

[133] Once Mr. Ellis has done all of this then the application should be put before the DILTC so that it can exercise its discretion. The granting of a development permit is not automatic. It is a discretionary decision. Of course the DILTC will have to exercise its discretion fairly and only consider relevant factors.

COSTS

[134] The DILTC has applied for special costs against Mr. Ellis for the four day hearing on the issues of *res judicata* and the judicial review. I find that the DILTC is entitled to its costs throughout on a party and party basis at a bare minimum. In order to attract special costs the DILTC would have to show that Mr. Ellis' conduct was reprehensible.

[135] In *Gichuru v. Smith*, 2014 BCCA 414, the B.C. Court of Appeal reviewed the law of special costs and cited the following test:

> [78] The test for special costs was set out in *Garcia v. Crestbrook Forest Industries Ltd. No. 2* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17, where Lambert J.A., speaking for the Court, after an extensive review of the authorities, concluded:
>
> > ... it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[136] I do not find that Mr. Ellis's conduct in these proceedings has been scandalous or reprehensible, nor has it been outrageous. It has however increased the work of the respondent because he has rehashed issues that have already been resolved repeatedly in court. He also has a poor grasp of relevance and has used the scattergun approach to his submissions making them difficult and very labour intensive to sift through. Having done so, I have found nuggets of relevance in the mountain of gravel. I keep in mind, in exercising my discretion, that Mr. Ellis is a self-represented litigant and should not be penalized for his inability to sort the legally relevant from the irrelevant. He has come to court every day well prepared with material and legal research and has respectfully made his submissions which have frequently touched on *res judicata* issues, but, in fairness to him, I recognize that his material was prepared before that ruling was made.

[137] From the perspective of the respondent, the preparation they have undertaken for both the *res judicata* argument and to defend the *mandamus* application has fallen in the greater than ordinary difficulty category.

[138] I find that an award of party and party costs at Scale C which recognizes the greater than ordinary difficulty the respondent was put to in order to prepare materials and argue the *res judicata* application is appropriate. I therefore award Scale C costs for the preparation for both hearings and for the first two days of the hearing when the *res judicata* argument was being made. For the final two days during which the judicial review application was being heard, I find that hearing was of ordinary difficulty. I have recognized that the preparation was of greater than ordinary difficulty but I reduce the final two days of hearing time to Scale B ordinary difficulty.

[139] I am aware that special costs are sometimes awarded even when there has been a milder form of misconduct deserving of rebuke. In exercising my discretion to award costs, I am mindful of the expense that is required to assess special costs. That is a factor I have considered in awarding Scale C as opposed to special costs.

[140] The costs as ordered are to be assessed by a registrar.

"Young, J"