

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Stevens v. Capital Regional District*,
2010 BCSC 445

Date: 20100401
Docket: 09 1468
Registry: Victoria

In the matter of the *Judicial Review Procedure Act*, and
Re: the *Private Managed Forest Land Act*, and
District Lot 37, Galiano Island, Cowichan District

Between:

Frederick James Stevens, Isobel Kathleen Stevens
and Stevens Excavating Limited

Petitioners

And

Capital Regional District and
Galiano Island Local Trust Committee

Respondents

And

Residents and Owners Association of Galiano

Intervenors

Before: The Honourable Mr. Justice Crawford

Reasons for Judgment

Counsel for the Petitioners:

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Place and Date of Hearing:

Victoria, B.C.
August 25 and 26, 2009

Place and Date of Judgment:

Victoria, B.C.
April 1, 2010

Introduction

[1] Mr. Stevens seeks a court order requiring the Chief Building Inspector of the Capital Regional District (CRD) to issue a building permit to permit placement of a mobile home on his property on Galiano Island.

[2] Mr. Stevens owns land designated as private managed forest land and argues he is permitted to place a mobile home on the 160 acre lot. The respondent, CRD, on the basis of the Galiano Island Local Trust Committee land use bylaw, has declined to issue the permit on the basis the zoning bylaw does not permit a dwelling on land zoned F1 (Forest 1).

[3] The litigation is a small battle in an ongoing war over land use on Galiano Island, one of the beautiful islands on the east side of Vancouver Island. It is plain that this has been an ongoing and divisive issue. On one side there are people on Galiano Island who want to ensure no further subdivision takes place and to that end any residential development is anathema. On the other hand there are a number of the Island's population that wish to continue to manage forest activity, that believe having one's residence on the property is an appropriate adjunct to that forest management activity, and therefore the prohibition against a residence on a large property makes no sense.

[4] The issue then is which prevails: provincial legislation regarding forest management activity or local government bylaw concerning land use. My conclusion is driven by the chronology of events, both in terms of what has occurred, and the various enactments by provincial and local government.

History

[5] Mr. Stevens is a relation of the Cook family who pre-empted the land in 1915. The Cook family held the lands until 1957 when the land was acquired by the Powell River Company for logging, and then in 1980 transferred to MacMillan Bloedel Limited. Both companies harvested timber on the land. In 1993 Brotherston Ltd. acquired the land and maintained a logging camp, a bunkhouse, and kitchen until

1997. Mr. Stevens, through his company Stevens Excavating Limited, purchased the land December 23, 1997.

[6] At the time, District Lot 37 was zoned F-1 under zoning framework established under the Galiano Island Trust Committee Zoning Bylaw, Bylaw No. 82, which came into force in 1992. The zoning framework established by Bylaw No. 82 was continued in the Galiano Island Local Trust Committee Land Use Bylaw No. 127, 1999 (the “Galiano Land Use Bylaw”).

[7] In 2000 Mr. Stevens put a mobile home on the property. He said that was a necessary adjunct to his management of the forest on the land as there are four different stands of trees on the property. He says there is approximately 1,200 cubic metres of harvestable timber in several plantation areas.

[8] In 2003 Mr. Stevens applied to the Agricultural Land Commission to have the land designated managed forest under the then predecessor to the current legislation, the *Forest Land Reserve Act*, R.S.B.C. 1996 c. 158 [“FLRA”]. On September 4, 2003, the Agricultural Land Commission advised Mr. Stevens they accepted his Management Commitment and the Agricultural Land Commission would advise the B.C. Assessment Authority the land had been classified “managed forest” under the *Assessment Act*, R.S.B.C. 1996 c. 20. The effect of that classification is to reduce Mr. Stevens’ property taxes.

[9] Mr. Stevens’ forest management plan stated the 160 acres is mostly reforested plantation trees save for approximately 25 acres covered by a Hydro tower easement. As well there is a permitted gravel pit of two and one-half acres partly within the Hydro easement. The stands of trees are respectively 35, 20, and 10 years old. The plantations are mixed with alder and maple trees, and heavy undergrowth which he is thinning out.

[10] He has reclaimed and replanted several old skid roads and others are being kept clear and passable for fire protection. A pond located on the west side of the

property is accessible for firefighting purposes. The main entrance and secondary roads are gated and locked.

[11] His plan was to continue to engage in basic silviculture methods and forest management practices including planting, spacing, thinning, pruning and control of pests. It will be decades before he is able to harvest any timber from the plantation but at that time there will be selective harvesting and reforestation implemented to ensure continuous forest growth. The application attached a sketch showing an existing dwelling which I presume is the mobile home at the centre of the litigation.

[12] Mr. Stevens brought the matter to a head by seeking a building permit on November 19, 2008 to “construct a mobile home”. He initially did so under the auspices of the *Private Managed Forest Land Act*, S.B.C. 2003, c. 80 [“PMFLA”]. Schedule A, s. 1(2)(s) of the *Private Managed Forest Land Regulation*, B.C. Reg. 371/2004 defines as one of the aspects of forest management activities, one dwelling per registered parcel and additional dwellings that are permitted under local applicable bylaws.

[13] The building permit application was made to the CRD. The building inspector sent the request to the Galiano Island Local Trust Committee (“Island Trust”) who in turn rejected the proposal on the basis that the zoning of Forest 1 (F-1) did not permit a residential use. Mr. Stevens persisted and asked the building inspector for the CRD to request a building permit on the basis that this was a permitted forest management use. The answer was the same. The building permit was rejected on the basis of the Island Trust F-1 zoning pursuant to the Galiano Land Use Bylaw.

Legislative history

[14] The *Island Trust Act*, R.S.B.C. 1996 c. 239, was enacted in 1989. That legislation allowed the local governments to create bylaws *inter alia* for land use.

[15] The prohibition on the construction of dwellings on forestry properties held by MacMillan Bloedel came into effect in 1992 with the passage of Bylaw No. 82. That bylaw was the subject of litigation. At trial the bylaw was struck down, but later

upheld by the Court of Appeal: see *MacMillan Bloedel v. Galiano Island Trust Committee* (1995), 126 D.L.R. (4th) 449 (B.C.C.A.).

[16] The *FLRA* was enacted in 1994.

[17] The *FLRA* established the Forest Land Commission, the object of which was set out in s. 4, which read:

Object of the commission

4 The object of the commission is to minimize the impact of urban development and rural area settlement on forest reserve land and to work to this end with local governments, first nations and other communities of interests.

[18] The announced intent was to protect forests, both on Crown land and on private land, and to do so in consultation with local government, first nations, and other community organizations that could be affected. The commission was to receive a landowner's application to make land managed forest reserve and consult with those interested parties.

[19] Section 13 read:

Permitted uses of forest reserve land

13 (1) Forest reserve land that is Crown land or Crown license land must not be used except as permitted by or under the *Forest Act*.

(2) Forest reserve land, other than Crown land or Crown license land, must be used in a way that is consistent with one or more of the following:

...

(f) a use or purpose permitted by the regulations, subject to any applicable conditions established by the commission.

[Emphasis added]

[20] And Section 2 of the *Forest Land Reserve Use Regulation*, B.C. Reg. 22/96, issued in August 1997 stated:

Land use

2. (1) The following uses are permitted under section 13(2)(f) of the Act:

(a) the construction and use of one single family dwelling for each lot, block or other area in which the land is held or into which the land is subdivided;

....

(2) Except as provided in the Act, nothing in this section relieves a person from compliance with any other enactment or a decision or requirement of any applicable authority, commission or agency having jurisdiction.

[Emphasis added]

[21] As can be seen the legislation permitted the construction of a single family dwelling on the forest reserve land.

[22] Section 17(1) of the *FLRA* provided that a local government must not adopt a bylaw under any enactment which would have the effect of restricting, directly or indirectly, a forest management activity relating to timber production on land that is managed forest land. That provision is drafted in prospective language.

[23] The Galiano Island Land Use Bylaw was adopted March 1, 2000 and continued the prohibition of residential structures on forest zoned property from Bylaw No. 82.

[24] Section 7 is entitled Forest Zones. Section 7.1 reads:

7.1 Forest 1 Zone - F1

Permitted Uses

7.1.1 In the Forest 1 zone the following uses are permitted, subject to the regulations set out in this section and the general regulations set out in Parts 2 and 3, and all other uses including residential uses are prohibited.

Buildings and Structures for Forestry Uses

7.1.2 A single non-residential unenclosed building or structure with a floor area not exceeding 93 square metres is permitted in each lot and every such building or structure must be screened by a landscape screen not less than 9 metres in height and complying with the requirements of subsection 15.1.1 of this bylaw.

[Emphasis added]

[25] While s. 7.2 reads:

7.2 Forest 2 Zone - F2

Permitted Uses

7.2.1 In the Forest 2 zone the following uses are permitted, subject to the regulations set out in this section and the general regulations set out in Parts 2 and 3, and all other uses including cottages are prohibited.

...

7.2.1.2 dwellings accessory to timber production and harvesting uses, and home occupations

...

Permitted Residential Density

7.2.2 One dwelling accessory to timber production and harvesting uses is permitted on each lot as well as accessory buildings and structures in accordance with Section 2.7 of this Bylaw.

[Emphasis added]

[26] Thus the bylaw creates two forest zonings, one of which permits a dwelling and one that does not.

[27] In 2002 the *FLRA* was amended by the *Agricultural Land Commission Act*, S.B.C. 2002, c. 36 [“*ALCA*”] which came into force November 1, 2002. Sections 65 and 69 read:

Consequential Amendments and Repeals

....

Forest Land Reserve Act

...

65 Section 2.1 is repealed and the following substituted:

Object of the commission

2.1 The object of the commission under this Act is to work with owners, local governments, first nations and other communities of interest to encourage responsible forest management practices on identified land.

....

69 Sections 13 to 16 are repealed.

[28] Thus with a stroke of the proverbial legislative pen, the permitted uses under s. 13 were repealed.

[29] As noted Mr. Stevens made his application to the Agricultural Land Commission in 2003 and that was accepted on September 4, 2003.

[30] The *PMFLA* came into force on February 2, 2004. No specific provision dealt with permitted ancillary uses to forest land management, as was found in the repealed s. 13.

[31] Section 17 of the *FLRA* was continued in s. 21 of the *PMFLA*, and restricts local government legislating uses of private managed forest land. It reads:

Restriction on local government authority regarding uses of private managed forest land

21 (1) A local government must not

(a) adopt a bylaw under any enactment, or

(b) issue a permit under Part 21 or 26 of the *Local Government Act*

in respect of land that is private managed forest land that would have the effect of restricting, directly or indirectly, a forest management activity.

[Emphasis added]

[32] That legislation is plainly prospective, as was its predecessor.

[33] In Regulations promulgated August 3, 2004, s. 1(2) stated:

(2) For the purpose of section 21 (1) of the Act, forest management activity means an activity, process or use, including structures and facilities that support the activity, process or use, that is described in Schedule A ...

[Emphasis added]

[34] Schedule A provided in part:

Forest Management Activities

[Section 1 (2)]

1 Forest management activities include the following:

...

(s) one dwelling per registered parcel unless additional dwellings are permitted under applicable local bylaws

[Emphasis added]

Thus the ancillary uses are only listed in relation to prospective legislation of the local government, and there is no provincial legislation directly permitting the owner of a forest managed property to place a dwelling on his property.

Discussion

[35] The issue joined is in part a question of statutory interpretation. It is plain the Galiano Island Land Use Bylaw pre-dated the 2004 provincial legislation.

[36] The petitioner argues that the provincial legislation is in large part simply the re-enactment of previous legislation and is to the same effect: namely, it permits a residential dwelling on a forest management property. The respondents' reply was equally simple, namely that the relevant zoning bylaw designated Mr. Stevens' property be Forest-1 and residential use was not permitted. Given that the *PMFLA* came into force in August 2004, and only spoke of prohibiting future action by a local government effecting directly or indirectly a forest management activity, the prior bylaw was not affected, and was therefore a proper basis for the Island Trust objecting to the issuance of the building permit.

[37] It was not contested that the legislation was other than prospective.

[38] In the larger context it shows a conflict between provincial legislation, plainly aimed at managing forest land reserves and encouraging reforestation on smaller tracts of land, as against the strong conservation and ecosystem preservation stance of those on Galiano Island, who wished to preserve the forest without any residential activity.

[39] These arguments are shown in the briefs of the respective interveners. A residents association argues that the effect of allowing the building permit would result in the 75 new houses on the 58 managed forest land properties.

[40] But other evidence was put before the Court indicating over 60% of the managed forest lands already have a dwelling on them. Thus the effect of allowing the permit to issue would possibly allow some 24 owners of other managed forest lands to build one dwelling on their property.

[41] The provincial legislation evidences a clear intention to permit small foresters to live on acreage in the forest, and as an inducement for the husbandry of the forest, be assessed lower property taxes. There was also the right to have one dwelling on the property as long as an ongoing forest management program is being carried out: s. 13 *FLRA* and regulation s. 2.1. This provincial legislation would be paramount over the local government bylaw.

[42] But in 2002 the legislature, by repealing ss.13-16 of the *FLRA* through the enactment of the *ALCA*, changed the managed forest legislation from plainly permitting ancillary uses, including the placement of one dwelling, to just listing ancillary uses to managed forest land as matters local governments could not legislate about. Thus the local government bylaw zoning prevails.

[43] Mr. Stevens has been caught in a legislative gap. Had he made his application and been accepted before ss. 13-16 of the *FLRA* had been repealed, he would have been permitted under s.13 to build a residence because the provincial legislation would have overridden the local government bylaw under the doctrine of paramountcy.

[44] But since November 1, 2002 the provincial legislation only states that local government cannot legislate about ancillary uses. The Island Trust zoning bylaw is an existing one and therefore prevails, and in an F-1 Zone, no dwellings are allowed. There is no specific provincial law that gives Mr. Stevens the right to place a dwelling on the managed forest lot as did s.13 of the *FLRA*. Mr. Stevens may wish to change the land zoning to F-2 which permits a dwelling on the forest managed land, but that course may have its difficulties. Or he might ask the provincial government to reconsider what they have done in changing the legislation in 2002, repealing the permitted ancillary uses.

[45] It follows that the application to order the Chief Building Inspector of the CRD to issue Mr. Stevens' building permit is dismissed.

“The Honourable Mr. Justice Crawford”