YOUNG ANDERSON
BARRISTERS & SOLICITORS

REPLY TO: VANCOUVER OFFICE

PRIVILEGED AND CONFIDENTIAL

VIA EMAIL: jmobbs@islandstrust.bc.ca

TC-IC-2024-007
It was MOVED by Trustee Bernardo, and SECONDED by Trustee Yates,
that Trust Council request staff to release the November 13, 2024 Young Anderson legal opinion relating to the interpretation of Section 3 provided to Trust Council to the public.

CARRIED

November 13, 2024

Julia Mobbs
Interim Chief Administrative Officer
200 – 1627 Fort Street
Victoria, BC V8R 1H8

Dear Ms. Mobbs:

Re: Islands Trust Object Clause
Our File No. 00002-0020

You have requested that we review and update opinions that we have previously provided to the Islands Trust on the interpretation of s. 3 of the *Islands Trust Act*, the "object" clause. Those opinions consist of the following:

- A July 12, 2007 opinion addressing a legal opinion that was prepared by another law firm on whether the object clause restricts the policy options of trust bodies to environmental conservation.
- A September 1, 2020 opinion dealing with whether the policy statement may contain policies regarding housing and sustainable communities. (The Trust Council shared the advice contained in this opinion with the general public later in 2020.)
- Another September 1, 2020 opinion addressing whether the object clause permits the Islands Trust policy statement to contain policies regarding reconciliation with Indigenous people.

For reference, s. 3 of the *Islands Trust Act* is as follows:

> 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, First Nations, other persons and organizations and the government of British Columbia.

To summarize:

- Our 2007 opinion concluded that the policy options of trust bodies aren't restricted to environmental conservation. Rather, the scope of the object clause is broader, and includes consideration of island communities as part of the trust area that is to be preserved and protected.
- Our September 2020 opinion concluded that it would be a reasonable interpretation of the object clause, unlikely to be disturbed on judicial review, to include in the policy statement policies regarding housing and sustainable communities. That opinion included consideration of the Supreme Court of Canada's important 2019 administrative law decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, which determined that judicial review of interpretations of their enabling legislation by delegated decision-makers (such as the Islands Trust Council) must apply a reasonableness standard that affords deference to the judgment of the decision-maker. This would quintessentially include Trust Council interpretations of the object clause.

  We consider our conclusion on the topic of housing and sustainable communities to have been recently confirmed by the fact that the local trust committees, like municipalities and regional districts, are required (under the new s. 473.1 of the *Local Government Act*) to provide in their official community plans housing policies respecting each class of housing needs addressed in their housing needs reports. (Other parts of Bill 44 including the requirement to permit small-scale multi-family housing in restricted zones don't apply to the local trust committees, which indicates that the application of s. 473.1 to local trust committees cannot be a legislative oversight.) Since provincial statutes are meant to be interpreted consistently with one another, the implication must be that the policy statement prepared under the *Islands Trust Act* may properly reflect the fact that local trust committees are required to plan for increases in housing supply.

- Our other September 2020 opinion concluded that policies in the policy statement aimed at reconciliation with Indigenous people would be within scope to the extent they were ancillary to substantive policies dealing with preservation and protection of the trust area (as contrasted with free-standing policies dealing with reconciliation for its own sake). We identified a significant risk that stand-alone reconciliation policies were outside the Trust Council's authority.

Having reviewed those opinions in the preparation of this letter, we would advise that we remain comfortable with our previous conclusions. The development of the local case law on the reasonableness test in judicial review since 2019 has confirmed that a court would defer to the judgment of the Trust Council on the interpretation of the object clause as long as its interpretation met the reasonableness test. In regard to the topic of reconciliation, one significant change in the

legislative landscape is the enactment of the *Declaration of the Rights of Indigenous Peoples Act* (DRIPA), which includes the following:

> 2 The purposes of this *Act* are as follows:
>
> (a) to affirm the application of the Declaration to the laws of British Columbia;
> (b) to contribute to the implementation of the Declaration;
> (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.

While the Declaration contains many Articles that might be considered to be potentially relevant to the work of the Trust Council and the local trust committees, perhaps the most obviously relevant is Article 32(2):

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

It is important to note that DRIPA didn't itself change any of the laws of British Columbia except to the extent that it requires the government to prepare an action plan to achieve the objects of the U.N. Declaration in the province, and authorizes the government to enter into decision-making agreements with Indigenous governing bodies in regard to a broad range of administrative-level decisions. That this is so was confirmed by the B.C. Supreme Court in *Gitxaala v. British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680, which dealt with the on-line staking procedure for mineral claims. At paragraph 470 of its decision, the Court briefly concluded that "In sum, s. 2(a) of DRIPA does not implement UNDRIP into the domestic law of British Columbia." The government would presumably, should it choose to do so, implement the U.N. Declaration in the trust area by (for example) entering into a decision-making agreement with representatives of one or more First Nations that requires the consent of the First Nations before the Minister of Municipal Affairs may approve the Islands Trust Policy Statement or an official community plan of a local trust committee, or their consent to the approval by a provincial approving officer of a subdivision in the trust area. We don't consider that the enactment of DRIPA has had any effect on the interpretation of the object clause in the *Islands Trust Act*. Thus, for example, the Islands Trust policy statement cannot establish a "free and informed consent" entitlement for local First Nations in respect of matters that are within the jurisdiction of a trust body, or be premised on an assumption that such a right exists, merely because DRIPA has been enacted.

The Legislature has also amended the *Interpretation Act* to include the following, which applies to the construal (interpretation) of s. 3 of the *Islands Trust Act* in the event of any ambiguity in the wording of the section:

> 8.1 (3) Every Act and regulation must be construed as being consistent with the [United Nations Declaration on the Rights of Indigenous Peoples].

We don't consider that the enactment of s. 8.1 changes the opinions we have previously expressed on the interpretation of the object clause in relation to the question of reconciliation, because we haven't identified any particular ambiguity in the clause in relation to that subject. Rules of interpretation like s. 8.1 cannot be used to import new content into statutory language like that used in s. 3 of the *Islands Trust Act*; they can only be used as a tool in interpreting content that is already there. In 2020 we expressed the view that s. 3 probably authorizes inclusion in the policy statement of policies on such matters as engagement with First Nations on the preparation of local trust committee bylaws if Trust Council considers that such engagement would tend to support reconciliation objectives; this is based on such LTC bylaws themselves being squarely within the scope of the object clause.

We trust that this opinion will be helpful to the members of Trust Council and look forward to meeting with them on December 4 and dealing with any outstanding questions.

Yours truly,

YOUNG ANDERSON

Bill Buholzer
buholzer@younganderson.ca

BB/jms