

Aug 31, 2023

Islands Trust Releases Legal Opinion about Emergency Options for Thetis Island Property that Poses Fire Risk

In response to community concern about a fire on a Thetis Island property that has been subject to bylaw enforcement, the Islands Trust Executive Committee decided to make public a legal opinion about the scope of emergency powers available to the Province of British Columbia, the Cowichan Valley Regional District, the Thetis Island Improvement District and the Thetis Island Local Trust Committee.

Since September 5, 2019, the Thetis Island Local Trust Committee has been pursuing bylaw enforcement against the owner of 88 Pilkey Point Rd, Thetis Island, in response to the unlawful use of the property as an automobile salvage yard and for the operation of an unlawful vehicle repair and welding business outdoors. The property owner has been ordered by the BC Supreme Court to cease the unlawful uses and to remove the large amount derelict vehicles, salvage materials and auto parts from his property. He has failed to comply with a B.C. Supreme Court order and has been found in contempt of court. A sentencing hearing will be scheduled in the near future.

Despite the court order and significant efforts by Islands Trust bylaw compliance and enforcement staff to encourage the owner to seek compliance, the property remains a hazard. A fire on the property in April 2023 renewed community concerns about the potential risk the property poses to neighbouring properties, which prompted Executive Committee to request a legal opinion on emergency options.

The legal opinion received states that it is unlikely that the Province or a local government could successfully declare a state of local emergency under the *Emergency Program Act* in this case. Generally, the *Fire Services Act* authorizes the provincial fire commissioner to inspect fire hazards, and take steps to remove the hazards. However, it is unlikely that this would achieve the clearing of materials and debris from the property in this case, as it is unlikely the commissioner would view all materials on the property as hazardous. The *Local Government Act* authorizes regional districts, such as the Cowichan Valley Regional District, to declare an emergency. However, according to the legal opinion, the courts' interpretation of the word "emergency" is not applicable in this case because the fire was successfully extinguished in a few hours and does not require immediate emergency action by the regional district. The powers of improvement districts are more limited than municipalities and do not include emergency powers. Furthermore, under the Thetis Island Improvement District Fire Regulation By-Law No. 53. Section 1(a), the Fire Chief is not authorized to inspect the property or to issue orders to remove materials and debris. The legal opinion states that the civil contempt proceedings commenced by the Local Trust Committee are likely the best option for achieving the removal of the salvage materials and debris from the property.

"The Islands Trust Executive Committee decided to make public a legal opinion to help the community understand the limited options available to achieve the clearing of salvage materials and debris from the property," said Tobi Elliott, Thetis Island Local Trust Committee Chair and Vice-Chair of Islands Trust Executive Committee. "The legal opinion states that the Thetis Island Local Trust Committee has no emergency powers it can use and that there are no other legal proceedings available to expedite clean-up of the property. The opinion concludes that the current contempt proceedings are the most effective way for the Thetis Island Local Trust Committee to achieve removal of the derelict vehicles and debris from the property."

"As the Executive Committee, we felt it vital to request a legal opinion as soon as possible to address the situation and respond to community concerns," said Islands Trust Council Chair Peter Luckham. "Islands Trust bylaws are carefully crafted with community and aim to preserve and protect the unique nature of the islands in the Trust Area as well as its inhabitants."

Local trust committees create bylaws suitable to the local trust area, and like local governments, Islands Trust uses a 'complaint-based' bylaw enforcement process. This means that almost all investigations result from community complaints. Islands Trust Council and local trust committees may adopt general bylaw compliance and enforcement policies to set priorities for investigations.

Local trust committees and local trustees do not get involved in specific investigations unless the bylaw compliance and enforcement officer recommends legal action. If the local trust committee approves of the action, then the Islands Trust Executive Committee must approve of the expenditure from the Islands Trust legal budget, before legal assistance can be requested.

Contact:

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Peter Luckham, Chair, Islands Trust Council- 250.210.2553

Russ Hotsenpillner, Chief Administrative Officer, Islands Trust, via Executive Coordinator 250.405.5161

Attached:

August 1, 2023: Legal Opinion on Emergency Powers

REPLY TO: VANCOUVER OFFICE

VIA EMAIL: wdingman@islandstrust.bc.ca

August 1, 2023

Warren Dingman
Manager – Compliance & Enforcement
200 – 1627 Fort Street
Victoria, BC V8R 1H8

Dear Mr. Dingman:

Re: Emergency powers in relation to 88 Pilkey Point Road (the “Property”)

In connection with a fire that occurred on the Property in April 2023, you have asked for our opinion on the scope of emergency powers available to the Province, Cowichan Valley Regional District (the “CVRD”), Thetis Island Improvement District (the “Improvement District”) and Thetis Island Local Trust Committee (“the “LTC”), to achieve the clearing of salvage materials and debris from the Property. The owner has been using the Property for the storage of derelict vehicles in contravention of the Thetis Island Land Use Bylaw No. 89, 2011. The LTC has taken enforcement proceedings and the owner has failed to comply with a B.C. Supreme Court order to remove salvage materials from the Property.

BRIEF RESPONSE

Provincial and local governments have exercised their emergency powers in rare circumstances where temporary sudden events require immediate action. In our view, these circumstances are likely not present in relation to the Property. At this point, the civil contempt proceedings commenced by the LTC are likely the best option for achieving the removal of the salvage materials and debris from the Property.

ANALYSIS

1. Provincial powers

a. Powers under the *Emergency Program Act*, R.S.B.C. 1996, c. 111 (the “EPA”)

Under the EPA, the provincial government or a local authority may declare a state of local emergency where it is satisfied that an emergency exists or is imminent. The EPA defines “emergency” as follows:

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"emergency" means a present or imminent event or circumstance that

- (a) is caused by accident, fire, explosion, technical failure or the forces of nature, and
- (b) requires prompt coordination of action or special regulation of persons or property to protect the health, safety or welfare of a person or to limit damage to property.

Courts have restricted circumstances that constitute an "emergency" under the EPA to unexpected events of a temporary nature that urgently demand immediate action.¹ Local governments have successfully exercised their authority under the EPA to order immediate community evacuations in response to floods², oil spills³, and sinkholes⁴, all of which posed imminent danger to life and safety. Given that the fire on the Property was fully extinguished after a few hours, it is unlikely that a court would find that the fire caused a circumstance that demands immediate action under the EPA. Further, the salvage materials have remained on the Property for several years, which a court might characterize as an enduring state of affairs rather than a temporary, exceptional event that requires an urgent response.

b. Powers under the *Fire Services Act*, R.S.B.C. 1996, c. 144 (the "FSA")

The FSA authorizes the provincial fire commissioner to inspect fire hazards, issue orders to remedy hazardous conditions, and take steps to remove fire hazards in certain emergency situations. Section 21 of the FSA permits the fire commissioner to enter upon and inspect any property in the province to determine, among other things, whether a fire hazard exists on the property. After such an inspection, the fire commissioner may, pursuant to section 22 of the FSA, issue orders requiring the property owner to remedy the hazardous conditions. The powers under sections 21 and 22 of the FSA may also be exercised by local assistants appointed by the provincial fire commissioner. We are not aware of whether any appointments have been made by the fire commissioner in the CVRD or the Improvement District. Further, section 25 of the FSA provides that, if an emergency arising from a fire hazard causes the fire commissioner to be apprehensive of imminent and serious danger to life or property, or of a panic, the fire commissioner may remove the hazard or risk.

The LTC may consider approaching the provincial fire commissioner with a view to having the commissioner exercise its powers under the FSA in relation to the Property. However, in our opinion, this approach is unlikely to achieve the clearing of all materials and debris from the Property, as it is unlikely that the commissioner would be of the view that all materials on the

¹ *Rosewall v. Sechelt (District)*, 2022 BCSC 20 ["Sechelt"], at paras 39-40, 78-79, 83.

² *1033040 B.C. Ltd. v Lumby (Village)*, 2023 BCSC 402.

³ *Kirk v. Executive Flight Centre Fuel Services*, 2017 BCSC 726.

⁴ *Sechelt*, supra note 1, 2022 BCSC 20.

Property constitute a fire hazard or could endanger life or property as contemplated by section 21 of the FSA. Additionally, it is unlikely that the state of the Property would cause the commissioner to be apprehensive of imminent and serious danger to life or property as contemplated by section 25 of the FSA.

2. Powers of Regional Districts

Section 295 of the *Local Government Act*, R.S.B.C. 2015, c. 1 (the “LGA”) authorizes regional districts to, by bylaw, declare that an emergency exists and to deal with the emergency. Section 295 of the LGA provides:

Emergency powers

295 If the powers conferred on a board are inadequate to deal with an emergency that is not an emergency within the meaning of the *Emergency Program Act*, the board may, by bylaw adopted by at least 2/3 of the votes cast, declare that an emergency exists and exercise powers necessary to deal effectively with the emergency.

Based on how courts have interpreted the word “emergency” in this context,⁵ it appears that two elements are required for an event to constitute an emergency: (1) a sudden or unexpected event; and (2) the necessity of immediate action by the regional district. As it relates to the state of the Property, our view is that a court may find that while the first element is present, the second element is not: the April 2023 fire on the Property was a sudden event, but the fire was successfully extinguished in a few hours. Therefore, there isn’t any urgency to immediately clear the Property. As such, if a bylaw is passed under section 295 of the LGA in relation to the Property, there is a considerable risk that the validity of the bylaw could be challenged.

3. Powers of Improvement Districts

The powers of improvement districts, as set out in section 697 of the LGA, are more limited than those of municipalities and regional districts. Improvement districts do not have any emergency powers under the LGA. However, given that a fire occurred on the Property, we have reviewed the powers of the Improvement District Fire Chief under the Thetis Island Improvement District Fire Regulation By-Law No. 53. Section 1(a) of the Bylaw authorizes the Fire Chief to enter upon and inspect any land, except for privately-owned and occupied single family dwellings, within the Improvement District. Therefore, the Fire Chief is not authorized by the Bylaw to inspect the Property or to issue orders that could achieve the removal of materials and debris from the Property.

⁵ See: *Kuypers v. Langley (Township)*, 1992 CanLII 693 (BCSC); and *Kent v. Storgoff*, (1962) 38 D.L.R. (2d) 362 (BCSC).

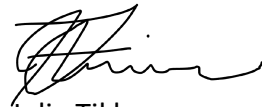
4. Powers of the LTC

The LTC does not have any emergency powers under the *Emergency Program Act* or the *Islands Trust Act*.⁶ However, we have undertaken contempt proceedings on behalf of the LTC in relation to the Property owner's breach of a court order that required the removal of the derelict vehicles from the Property within 90 days of the date of the order (February 24, 2023). As you are aware, the owner has been found to be in contempt of court, and the LTC is seeking penalties against the owner in addition to obtaining compliance with the original removal order. In our view, there are no other legal proceedings that the LTC may commence to expedite this matter; the current contempt proceedings are the most effective way for the LTC to achieve removal of the derelict vehicles and debris from the Property.

We would be pleased to discuss our opinion with you at your convenience.

Yours truly,

YOUNG, ANDERSON



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JXT/jt

⁶ R.S.B.C. 1996, c. 239