

## Thetis Island Local Trust Committee Regular Meeting Addendum

**Date:** August 29, 2017  
**Time:** 9:30 am  
**Location:** Thetis Island Community Centre (Forbes Hall)  
 North Cove Road, Thetis Island, BC

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		<b>Pages</b>
10.	APPLICATIONS AND REFERRALS <span style="float: right;">10:10 AM - 10:45 AM</span>	
10.3	<i>TH-DVP-2015.2 (Trincomali Holdings) - Staff Report</i>	2 - 8
10.4	<i>Salt Spring Island Local Trust Area Referral Request for Response for Bylaw Nos. 500 and 501</i>	9 - 10
	---BREAK--- 10:45 - 11:00	
11.	LOCAL TRUST COMMITTEE PROJECTS - None	
11.1	<i>Ruxton Island Private Moorage Review - verbal update</i>	

File No.: TH-DVP-2015.2  
(Trincomali Holdings)

DATE OF MEETING: August 29, 2017

TO: Thetis Island Local Trust Committee

FROM: Ann Kjerulf, Regional Planning Manager  
Northern Team

COPY: Gary Richardson, Island Planner  
Marnie Eggen, Island Planner  
Miles Drew, Bylaw Enforcement Manager

SUBJECT: Development Variance Permit Application TH-DVP-2015.2  
Applicant: Dan A.J. Wickham, Director and Shareholder of Trincomali Holdings (owner)  
Location: 204 Pilkey Point Road, Thetis Island

## RECOMMENDATION

1. That the Thetis Island Local Trust Committee defer consideration of Development Variance Permit Application TH-DVP-2015.2 for a period of 90 days in order to provide sufficient time for the applicant to inform the Islands Trust of his intended actions in response to the survey completed by Brent Taylor, BCLS on August 21, 2017 which has determined that the retaining wall is located partially on Crown foreshore.
2. That the Thetis Island Local Trust Committee request that staff contact the Penelakut, Lyackson, Chemainus, Halalt, Cowichan, Lake Cowichan, Semiahmoo, Tsawout, Tseycum, Pauquachin, Tsartlip and Malahat First Nations to request that they inform the Islands Trust of how their Aboriginal Rights and Title may be affected by the retaining wall, which is the subject of Development Variance Permit Application TH-DVP-2015.2;
3. That the Thetis Island Local Trust Committee request that staff notify the BC Archaeology Branch that a survey of the subject property located at 204 Pilkey Point Road has determined that the retaining wall, which is the subject of Development Variance Permit Application TH-DVP-2015.2, is located partially on Crown foreshore; AND FURTHER

That the BC Archaeology Branch be asked to confirm their requirements with respect to retention, modification or removal of the retaining wall.

## REPORT SUMMARY

Islands Trust staff have determined by way of a recent boundary survey completed by a Registered BC Land Surveyor (BCLS) that the retaining wall (also referred to as a seawall), which is the subject of Development Variance Permit (DVP) Application TH-DVP-2015.2, is partially located on Crown foreshore. As a result of this finding, the Thetis Island Local Trust Committee (LTC) is unable to grant a variance for the portion of the wall located on the Crown foreshore, due to ownership by the Crown, lack of permissible zoning, and concerns with respect to First Nations' interests.

The LTC is asked to defer consideration of DVP Application TH-DVP-2015.2 for a 90 day period in order to:

- Provide the applicant sufficient time to review and respond to this information, and to inform the Islands Trust of his intended next steps;
- Provide time for staff to conduct a supplementary referral of application TH-DVP-2015.2 to First Nations; and
- Provide time for staff to contact the BC Archaeology Branch to confirm that the Branch continues to have no concerns with the presence of the retaining wall, which a survey has confirmed is located partially on Crown foreshore, and to confirm that a Heritage Alteration Permit would be required should there be an intent to modify or remove the wall.

## BACKGROUND

Application TH-DVP-2015.2 involves a request to vary s. 5.4(b) of the Thetis Island Land Use Bylaw No. 89, 2011 to permit a retaining wall to be located 0.0 m from the rear property line (in this case, the lot line adjacent to the sea). The application is a result of bylaw enforcement arising through an initial complaint to the BC Archaeology Branch. This is the second DVP application to be considered by the LTC for the same retaining wall.

The first application, TH-DVP-2010.1, was considered by the LTC on August 1, 2012:

### TH-045-2012

**It was MOVED and SECONDED** that the Thetis Island Local Trust Committee defer decision on permit TH-DVP-2010.1 at this time and advise staff to bring this application back to the Local Trust Committee after response from the Lyackson and Penelakut First Nations. **CARRIED**

Subsequently, a staff report was presented to the LTC on November 21, 2012 noting the following issues, in summary:

- Concerns regarding First Nations interests;
- Possible trespass on Crown foreshore given that the applicant had not provided a boundary survey and the requirement for a new survey *“specifically intended to survey the legal boundary and the seawall’s position relative to it as proof”*;
- Lack of policy support in the Islands Trust Policy Statement and Thetis Island Official Community Plan for hard retaining walls, which can disrupt natural shoreline processes;
- No Heritage Alteration Permit had been secured prior to construction of the retaining wall on Archaeological site Dg-Rw-149; and
- Modification of the structure would likely require various permits in addition to a remediation plan.

Following consideration of the staff report, application TH-DVP-2010.1 was denied by the LTC:

### TH-069-2012

**It was MOVED and SECONDED** not to issue a Development Variance Permit for application TH-DVP-2010.1. **CARRIED**

The minutes of the November 21, 2012 also note the following as requested by Trustee Luckham:

*“Let the Minutes show that the lack of information and science regarding the site has made this a difficult decision for the Local Trust Committee and we are hopeful that the applicant returns with more information.”*

The second (current) application was submitted to the Islands Trust in 2015, TH-DVP-2015.2. The LTC considered a staff report for this application on November 29, 2016, which was accompanied by an Impact Assessment Report prepared by JPH Consultants on behalf of the applicant. While determining that the beach was “dynamically stable”, the consultant recommended that the wall not be removed:

*“From a biophysical perspective removal of the wall would gain no habitat or shore protection advantage – it is not functionally affecting the shoreline on-site, or to the north. On the otherhand, there is very little space between the cabin and the top-of-bank – removing the wall, then experiencing a northerly 100 year storm could be catastrophic. We recommend not removing the wall.”*

The consultant further recommended *“that the toe of the wall be more extensively and intensively planted with beach rye and other salt-tolerant, sediment-anchoring native plants” and “complete removal of grass along a 2.5-3 m strip above the wall with extension of the existing native plants.”*

Staff noted that comments from the Lyackson and Penelakut First Nations had not been received and that staff was not comfortable recommending the variance be granted prior to receiving comments.

Staff further noted that a valid survey was needed to confirm the location of the retaining wall.

Following consideration of the staff report, the LTC passed the following resolution:

**TH-2016-070**

**It was MOVED and SECONDED** that the Thetis Island Local Trust Committee consider issuance of TH-DVP-2015.2 when:

- a) mitigation measures recommended in the Impact Assessment Report dated July 15, 2016 prepared by JPH Consultants are carried out to the satisfaction of the Planner;
- b) First Nations concerns are addressed to the satisfaction of the Local Trust Committee;
- c) a signed survey prepared by a Registered BC Land Surveyor is provided showing the location of the seawall structure. **CARRIED**

In response to item c), the applicant provided the Islands Trust with a signed version of the same location certificate previously submitted with the application. Following discussion between bylaw enforcement and planning staff, it was determined that this did not satisfy the terms of the resolution nor would it provide any certainty regarding the actual location of the wall or support to recommend that a variance be granted.

In May 2017, Islands Trust staff contacted the applicant to request that he provide a valid survey prepared by a Registered BC Land Surveyor showing the location of all buildings and structures relative to lot boundaries including the present natural boundary. The applicant declined to provide this information prior to the date requested, July 15, 2017.

As part of an ongoing bylaw enforcement investigation, the Islands Trust contracted with Polaris Land Surveying to undertake a field survey in order to accurately determine the legal boundaries of the subject property and the buildings and structures in relation to the rear property line (adjacent to the sea). A field survey was completed on August 17, 2017 and a certified survey plan was provided to the Islands Trust on August 21, 2017 (see Attachment 1).

The recent survey, completed by a Registered BC Land Surveyor, has determined that a portion of the retaining wall is located on Crown foreshore.

## ANALYSIS

### Issues Analysis

The encroachment of the retaining wall onto Crown Foreshore presents a distinct challenge for a number of reasons:

1. Pursuant to s. 498 of the *Local Government Act*, the LTC has the authority, on application by an owner of land, to (by resolution) issue a DVP that varies a zoning bylaw. A further restriction on this power is that a DVP must not vary the use or density of land from that specified in the bylaw. Notably, the retaining wall is considered a permitted structure in the Thetis Island LUB R1 zone, in which the subject property is located; however it is not a permitted structure within the W4 zone, which according to the Thetis Island LUB is located seaward of the rear property line. The Thetis Island LUB defines the boundary between land and water zones in s. 3.2.3 as follows:

*“The boundary between water and land-zones is the surveyed lot line as shown on the most recent plan registered in the Land Title Office and where there is no registered survey plan, the natural boundary of the sea is deemed to be the boundary.”*

For reference, the surveyed lot line is the dashed line shown on Attachment 1.

2. The location of the wall coincides with Archaeological site Dg-Rw-149, a prehistoric midden. The BC Archaeology Branch previously recommended that the DVP not be issued prior to a post-impact assessment being done but later withdrew this recommendation. Staff would need to confirm whether or not the position of the BC Archaeology Branch remains the same given that the location of the retaining wall has now been confirmed.
3. First Nations interests may be affected. The staff report provided to the LTC on November 21, 2012 indicated that emails received from both the Penelakut and Lyackson First Nation were unsupportive of the variance request and should be sufficient for the LTC to make a decision on this application:

*“[Staff] have since received an email from the Penelakut band administrator explaining that Council has met about this issue and their position is that they expect the Islands Trust and other agencies involved to enforce their regulations so that it does not set a precedent for others to develop without necessary permits and have their development legalized through a variance later. The Lyackson’s email expresses a similar viewpoint.”*

Staff notified First Nations in writing following the receipt of application TH-DVP-2015.2 in October 2016 and requested the opportunity to discuss the application and/or to meet on site. Staff received a response earlier this week from staff of the Lyackson First Nation that they are willing to discuss the application. However, this is not expected to occur prior to LTC consideration of this staff report on August 29, 2017.

Staff have also discussed application TH-DVP-2015.2 with Fiona MacRaid, the Islands Trust First Nations and Marine Advisor, who has provided the following comments for LTC consideration:

- Emerging archaeological evidence points to the Islands Trust Area as being a region which was densely populated by First Nations people with an advanced culture so that, wherever there is a low-lying beach in the island region, there is a higher likelihood of previous settlement;
- Given Thetis Island’s geographic proximity between Salt Spring Island and Vancouver Island, and the presence of a low-lying beach, we must assume a high likelihood that there would have been a First Nations settlement near the subject property and that this location will have historical value even if archaeological evidence has not yet been documented;

- Due to First Nations still recovering from over a century of tragic federal policies such as the residential schools and other racially-based disadvantages legislated through the *Indian Act*, we are still in the early years of identifying and protecting the significant archaeological values found within the Trust Area. It can be reasonably assumed that, as First Nations and archaeologists become increasingly aware of the deep history of this island region through emerging archaeological evidence, places previously thought to hold no historical value may be re-examined.
- Since the Chartrand<sup>1</sup> decision in 2015, local governments need to make a much greater effort to consult with First Nations who have unceded Aboriginal rights and title and especially to First Nations who also have pre-Confederate treaty rights such as the Douglas Treaty rights; this particular location will be primarily important, but not exclusively, to Hul'qumi'num (Cowichan, Chemainus, Penelakut, Lyackson, Halalt, Lake Cowichan). Five First Nations who have Douglas Treaty rights (Tsawout, Tseycum, Pauquachin, Tsartlip and Malahat) also have asserted interests in this site
- Case law is rapidly emerging, noting the Grace Islet scenario, and Provincial agencies, including the BC Archaeology Branch, are making decisions today that are far more conservative than in the past;
- Crown foreshore is recognized as unceded Aboriginal territory and if the Crown is involved in the decision-making of this site, they will require early and meaningful consultation with all first Nations under the Crown's fiduciary duty to consult;
- The LTC are advised to err on the side of conservative decision-making.

Discussion with the Islands Trust liaison at the Ministry of Municipal Affairs and Housing (formerly the Ministry of Community, Sport and Cultural Development) has confirmed that in addition to the Hul'qumi'num Nations, this area is of interest to the Semiahmoo First Nation.

4. The LTC is under no legal obligation to grant a variance to authorize the retaining wall to remain in its location (within the boundaries of the applicant's property).
5. The applicant has a common law right to make a submission to the LTC in response to information presented. Given the timing of this report, staff are of the opinion that the LTC should not render a decision without giving the applicant sufficient time to respond to the issues noted.

### Options for Resolution

Options to approach resolution of the issues include:

#### ***Modification or removal of the retaining wall from the W4 zone, and remediation of the shoreline:***

Given the concerns of JPH consultants with the removal of the wall, this may further necessitate relocating the existing, non-conforming cottage which is located very close to the retaining wall, an option which is commonly referred to as "managed retreat", an approach where development is relocated further away from the shoreline as a preferred method of protection over shoreline modification; it is also likely that permits would need to be obtained from the BC Archaeology Branch (Heritage Alteration) and Cowichan Valley Regional District (demolition).

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<sup>1</sup> Chartrand v. British Columbia, 2015 BCAA 345 (CanLII).  
<https://www.canlii.org/en/bc/bcca/doc/2015/2015bcc345/2015bcc345.html?autocompleteStr=2015%20BCCA%20345&autocompletePos=1>

### ***Rezoning lands within the W4 zone to permit the retaining wall:***

This option would require the applicant to make an application to the LTC to rezone lands in the W4 zone to R1 or another zone, and also for the applicant to make an application for a Crown tenure to authorize the encroachment onto Crown foreshore; the applicant would need to provide a valid land survey in both cases.

### ***Deposition of a new survey plan:***

The applicant could make an application to the Surveyor General in order to “legitimize accreted land into an upland title”.<sup>2</sup> If successful, a new indefeasible title would be registered with the land title office, based on the extent of the land defined in the new plan.

Notably, all three of the noted options trigger the Provincial Duty to Consult with First Nations.

### **Rationale for Recommendation**

The staff recommendation is noted on page 1 of the report. Staff are of the opinion that the applicant should have sufficient time to respond to the information contained within this report and to derive a plan for addressing the issues noted. Staff would also like to make a further effort to engage with all First Nations with recorded interests in proximity to the subject property and also to confirm the position and requirements of the BC Archaeology Branch should the applicant wish to retain, modify or remove the retaining wall.

## **ALTERNATIVES**

### **1. Deny the Application/Refer Matter to Bylaw Enforcement**

The LTC may deny the application and request that staff initiate bylaw enforcement procedures to have the retaining wall removed.

*That the Thetis Island Local Trust Committee deny application TH-DVP-2015.2 [for the following reasons- insert reasons] AND FURTHER*

*That the Thetis Island Local Trust Committee request that staff initiate bylaw enforcement procedures to have the retaining wall removed.*

## **NEXT STEPS**

Should the LTC concur with the noted recommendation on page 1, staff would formally request that the applicant consider the information and inform the Islands Trust of his intended approach to addressing the foregoing issues. Staff would also follow-up with the BC Archaeology Branch and with a referral to First Nations.

Submitted By:	Ann Kjerulf, MCIP RPP Regional Planning Manager	August 24, 2017
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## **ATTACHMENTS**

1. Polaris Survey

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<sup>2</sup> BC Land Title & Survey. <https://ltsa.ca/practice-information/accretion>

SITE PLAN OF PART OF LOT 27, DISTRICT LOT 30,  
THETIS ISLAND, COWICHAN DISTRICT, PLAN 12796.  
BCGS MAP SHEET 92G.002



All distances are in metres and decimals thereof, unless otherwise noted.

The intended plot size of this plan is 559mm in width by 432mm in height (C-Size) when plotted at a scale of 1:250.

LEGEND

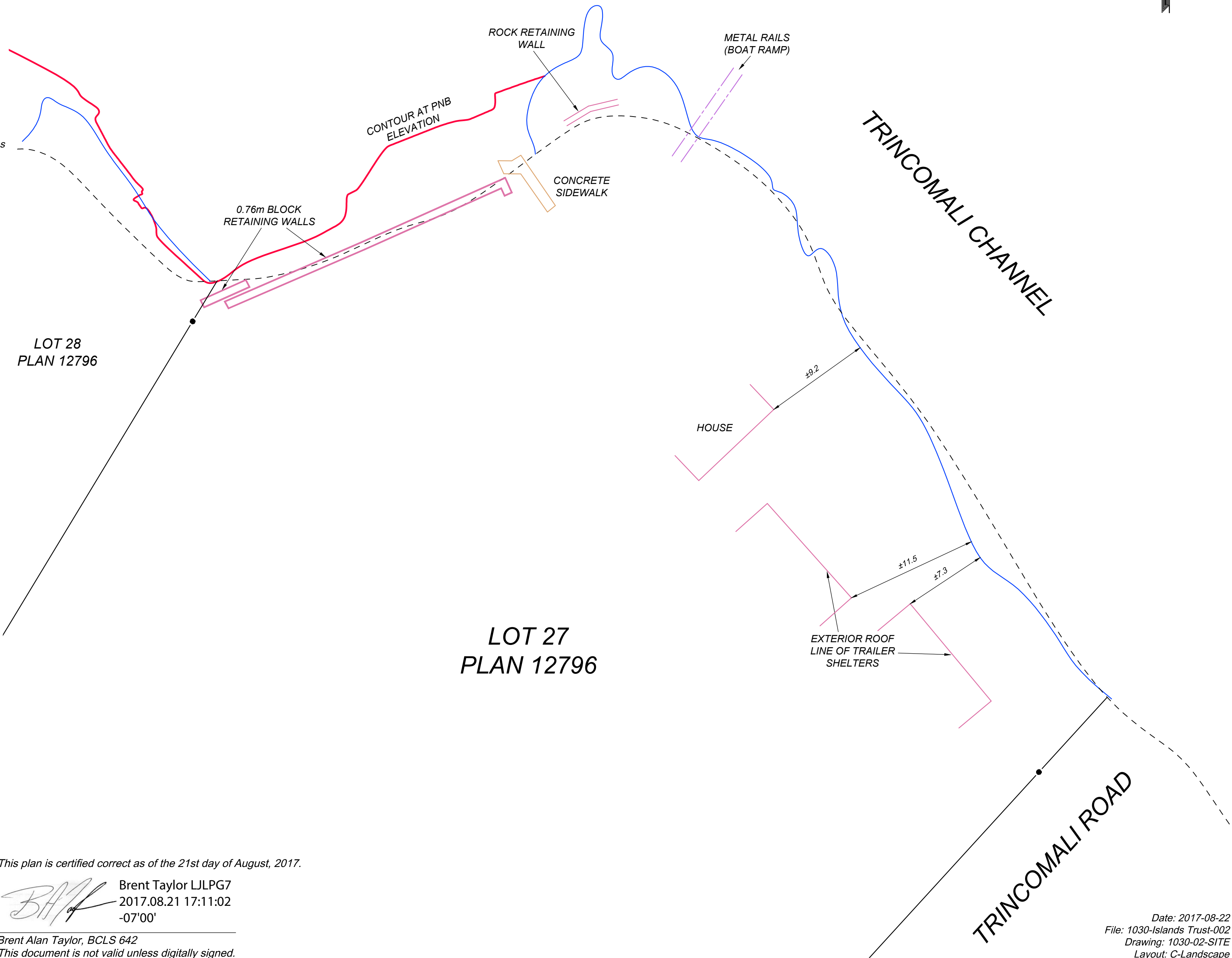
- denotes Natural Boundary as per Plan 12796
- denotes Present Natural Boundary
- denotes Standard Iron Post found

Parcel boundaries shown hereon are derived from Plan 12796, and field survey completed on August 17, 2017.

This plan was prepared for inspection purposes and is for the exclusive use of the Islands Trust.

This document shows the relative location of the surveyed structures and features with respect to the boundaries of the parcel described hereon. This document shall not be used to define property lines.

Note: Not all buildings or structures on Lot 27 have been surveyed. Not all improvements are shown on this plan.



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This plan is certified correct as of the 21st day of August, 2017.

 Brent Taylor LJLPG7  
2017.08.21 17:11:02  
-07'00'

Brent Alan Taylor, BCLS 642  
This document is not valid unless digitally signed.

Date: 2017-08-22  
File: 1030-Islands Trust-002  
Drawing: 1030-02-SITE  
Layout: C-Landscape



Islands Trust

# BYLAW REFERRAL FORM

1-500 Lower Ganges Road  
Salt Spring Island, BC BC V8K 2N8  
Ph: (250) 537-9144  
Fax: (250) 537-9116  
ssiinfo@islandstrust.bc.ca  
www.islandstrust.bc.ca

**Island:** Salt Spring Island Trust Area **Bylaw No.:** 500 and 501 **Date:** August 24, 2017

You are requested to comment on the attached Bylaw for potential effect on your agency's interests. We would appreciate your response within 40 days. If no response is received within that time, it will be assumed that your agency's interests are unaffected.

**APPLICANTS NAME / ADDRESS:**

Mr. Ian Laing, Gulf Islands Brewing Ltd., 565 David Street, Victoria, BC V8T 2C7

**PURPOSE OF BYLAW:**

This application proposes to amend the Official Community Plan and Land Use Bylaw to rezone a rural-zoned property to permit an existing brewery that previously operated as a home-based business. The rezoning also proposes four additional dwelling units with a maximum floor area of 50 square meters each, in addition to a principal single-family dwelling.

**GENERAL LOCATION:**

270 Furness Road, Salt Spring Island

**LEGAL DESCRIPTION:**

Lot 8, Section 5, Range 1, South Salt Spring Island, Cowichan District, Plan 25293 (PID 002-903-091)

**SIZE OF PROPERTY AFFECTED:**

6.37 hectares/15.7 acres

**ALR STATUS:**

N/A

**OFFICIAL COMMUNITY PLAN DESIGNATION:**

Forestry (F)

**OTHER INFORMATION:**

The proposed development is contained within a 0.6 hectare (1.5 acre) area adjacent to the road frontage. To review staff reports and the proposed bylaws, please see our webpage under application SS-RZ-2016.4 – 270 Furness Road  
<http://www.islandstrust.bc.ca/islands/local-trust-areas/salt-spring/current-applications/current-application-documents/>

Please fill out the Response Summary on the back of this form. If your agency's interests are "Unaffected", no further information is necessary. In all other cases, we would appreciate receiving additional information to substantiate your position and, if necessary, outline any conditions related to your position. Please note any legislation or official government policy which would affect our consideration of this Bylaw.

Name: Seth Wright

Title: Planner

**This referral has been sent to the following agencies:**

**First Nations**

Cowichan Tribes  
Halalt First Nation  
Lake Cowichan First Nation  
Lyackson First Nation  
Penelakut Tribe  
Stz'uminus First Nation

Malahat First Nation  
Pauquachin First Nation  
Tsartlip First Nation  
Tsawout First Nation  
Tseycum First Nation

Semiahmoo First Nation  
Tsawwassen First Nation

Hul'qumi'num Treaty Group (for information only)  
Te'Mexw Treaty Association (for information only)

**Adjacent Local Trust Committees and Municipalities**

Galiano Island Local Trust Committee  
Mayne Island Local Trust Committee  
North Pender Island Local Trust Committee  
Thetis Island Local Trust Committee

**Regional Agencies**

CRD – All Referrals & K. Campbell  
CRD – SSI Economic Development Commission  
CRD – SSI Senior Manager  
CRD – SSI Building Inspection  
CRD – SSI Director  
CRD – SSI Transportation Commission  
CRD – Environmental Eng. Division  
Vancouver Island Health Authority  
Cowichan Valley Regional District

**Non-Agency Referrals**

BC Ambulance Service  
RCMP  
SSI Chamber of Commerce  
SSI Fire-Rescue

**Provincial Agencies**

Agricultural Land Commission  
Ministry of Agriculture  
BC Assessment Authority  
Ministry of Municipal Affairs and Housing  
Ministry of Transportation & Infrastructure  
Ministry of Environment and Climate Change Strategy  
Ministry of Forest Lands & Natural Resource Operations – Front Counter BC  
Ministry of Jobs, Tourism & Skills

# BYLAW REFERRAL FORM RESPONSE SUMMARY

☐

Approval Recommended for Reasons Outlined Below

☐

Approval Recommended Subject to Conditions Outlined Below

☐

Interests Unaffected by Bylaw

☐

Approval Not Recommended Due to Reason Outlined Below

\_\_\_\_\_  
Salt Spring Island Trust Area  
(Island)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
500 and 501  
(Bylaw Number)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Agency)