

DEVELOPMENT BY WATER: A SHORT AND DENSE PRIMER ON BC RIPARIAN AREA PROTECTION

There can be any number of issues arising in development from the physical features of a site and the complex web of regulation relating to those features. Just one aspect for developers to keep in mind is how a site's proximity to a watercourse, waterbody or wetland may impact their plans.¹

British Columbia's *Riparian Areas Protection Act*² authorizes the Lieutenant Governor in Council to, by regulation, establish directives regarding the protection and enhancement of riparian areas considered to be subject to residential, commercial or industrial development.³ The purpose for these directives is to protect fish and fish habitat, which might be negatively affected by development. Where a directive applies, a local government must include riparian area protection provisions consistent with the directive in its zoning and land use bylaws.⁴ Alternatively, a local government must ensure that its bylaws and permits made under Part 14 of the *Local Government Act*⁵ provide, in the local government's opinion, at least comparable protection to that established by the directive.⁶

Under the *Riparian Areas Protection Regulation*,⁷ a local government must establish either a rules-based or approval-based scheme, which prohibits development within a "riparian assessment area" adjacent to a fish-bearing watercourse or waterbody unless the development proceeds in accordance with an assessment report prepared by a primary qualified environmental professional ("PQEP") or is approved by the local government.⁸ In either case, the assessment report must first be submitted to the Ministry of Forests, Lands, Natural Resource Operations and Rural Development, who will then provide it to the local government, if it is compliant with the *Regulation's* methodology and content requirements.⁹

For most watercourses and waterbodies (collectively defined as "streams" in the *Regulation*), the riparian assessment area is all land with 30 metres of the high water mark or adjacent active floodplain.¹⁰ Part of the purpose of an assessment report is to determine the "stream protection and enhancement area" ("SPEA") within a riparian

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assessment area that is sufficient to prevent “harmful alteration, disruption or destruction” (“HADD”) of the streamside land capable of supporting riparian vegetation and supporting the life processes of fish.¹¹ The assessment report must set out the PQEP’s opinion as to whether the site is subject to “undue hardship” and whether the development will meet the “riparian protection standard” if it proceeds in accordance with the report.¹²

Normally, development will be permitted – because it meets the riparian protection standard set by the *Regulation* – within a riparian assessment area only where it will not occur within the SPEA and will not cause HADD to the features of the SPEA that support fish life processes.¹³ In cases of undue hardship, where the circumstances of a parcel or strata lot mean that the area available for development¹⁴ is smaller than the otherwise permitted footprint of a structure, development will be permitted where the development:

- (a) will not occur in the SPEA, other than where there is already human disturbance, such as an existing building;
- (b) will be situated and designed to minimize encroachment into the SPEA; and
- (c) will not cause HADD to the features of the SPEA that support fish life processes.¹⁵

It should be noted that the riparian area protection regulatory regime is not intended

to prevent development entirely. Local governments will act beyond their authority if they prohibit development outright where riparian protection is engaged. This was illustrated in the case of *Cowichan Valley (Regional District) v. Wilson*.¹⁶

There, the owners of a waterfront parcel located on Cowichan Lake submitted an application for a development permit with variance that would allow them to remove an existing cabin, relocate its septic system, and construct a new home. The parcel, because of its panhandle shape, had limited area available for development outside of the 28-metre SPEA identified in the assessment report provided to the CVRD; both the existing cabin and septic system were within the SPEA. As such, the owners’ PQEP opined that the site was subject to undue hardship and recommended that the CRVD permit the new home’s further encroachment into the SPEA, as HADD would not result.

The CVRD included in its Official Community Plan bylaw (“OCP”) a riparian protection development permit area subject to a policy that stated:

Where the [P]QEP report describes an area designated as Streamside Protection and Enhancement Area (SPEA) the development permit will not allow any development activities to take place therein, and the owner will be required to implement a plan for protecting the SPEA over the long term through measures to be implemented as a condition of the development permit...¹⁷

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On the basis of this policy, the CVRD denied the development permit and variance, asserting its authority to refuse to issue a development permit where there would be any encroachment into a SPEA, even if a PQEP opined that development could occur without causing HADD.

The Court made an important distinction between what the riparian protection regime is and is not meant to accomplish: "... it is not the intention of the legislature to prohibit development in a SPEA; rather, it is the intention of the legislature to empower local governments to prohibit development in a SPEA where HADD would result".¹⁸ Accordingly, the Court determined that the CVRD had gone too far and quashed the offending policy. Even so, the Court refused to order issuance of the development permit sought by the owners, due to significant problems with the PQEP's report.¹⁹

The above is a mere taste of how development may be affected by riparian area protection regulations, but we hope it conveys to readers the significance and complexity of regulation in this area. Those seeking to develop land adjacent to a watercourse, waterbody or wetland should seek legal advice specific to their circumstances.

April, 2026

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- 1 This is a complex matter, the full interrogation of which is beyond the scope of this introductory article. For brevity, this article simplifies some of the relevant legislative provisions.
- 2 S.B.C. 1997, c. 21.
- 3 *Ibid.*, s. 12(1). Note that "development" is a broad term and includes subdivision, per s. 1(1) of the *Riparian Areas Protection Regulation*, B.C. Reg. 178/2019. Here, we are primarily concerned with the construction of buildings or structures.
- 4 *Ibid.*, s. 12(4)(a). The areas of the province in which the directives apply are listed in s. 2(1) of the *Riparian Areas Protection Regulation*, *supra* note 3.
- 5 R.S.B.C. 2015, c. 1.
- 6 *Riparian Areas Protection Act*, *supra* note 2, s. 12(4)(b).
- 7 *Supra* note 3.
- 8 *Ibid.*, s. 4(2).
- 9 *Ibid.*, s. 6.
- 10 *Ibid.*, s. 8.
- 11 *Ibid.*, s. 9.
- 12 *Ibid.*, s. 17.
- 13 *Ibid.*, s. 10(1).
- 14 That is, the area of the site other than the SPEA and any other naturally and legally restricted areas of the site, per s. 1(2) of the *Riparian Areas Protection Regulation*.
- 15 *Ibid.*, 10(2).
- 16 2023 BCCA 25, *aff'ing* in part 2021 BCSC 1735. Note that this case dealt with the previous *Riparian Areas Regulation*, B.C. Reg. 376/2004.
- 17 *Ibid.*, at para. 35.
- 18 *Ibid.*, at para. 75.
- 19 *Ibid.*, at para. 95.



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Aidan is an associate lawyer with the firm and maintains a general municipal law practice, with particular interest in land use planning, judicial review, and freedom of information and privacy matters. Aidan has provided advice to local governments about zoning compliance, use of park land, and the scope of easements. As well, he has drafted leases and section 219 covenants, advised on conflict of interest and code of conduct issues, and assisted with submissions to the Office of the Information and Privacy Commissioner for British Columbia. Aidan has assisted with the preparation of pleadings in bylaw enforcement matters and written submissions to the Court of Appeal for British Columbia. Aidan obtained his Juris Doctor from the University of Victoria and was called to the Bar of British Columbia in 2024, after articling with a municipal law boutique in Vancouver.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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