



Deeply Committed?

Sierra Club of Canada v. Comox Valley Regional District, 2010 BCCA 343

Pamela Jefcoat

Valkyrie Law Group LLP

604.263.4804 / pjefcoat@valkyrielaw.com

In January of this year we reported on the BCSC's decision in *Sierra Club of Canada v. Comox Valley Regional District, 2010 BCSC 74*, where the court dismissed the Sierra Club's challenge to the Regional District's decision to issue a development permit authorizing a gas station development.

In that case, an owner commenced plans to develop lands for a gas station, when that use was permitted under the zoning bylaw. Subsequent to the owner's application for a development permit, new zoning was proposed which would eliminate that use. The development permit was issued and that decision was challenged. In dismissing the Sierra Club's petition, the court held that the permit had been validly issued and alternatively, that the owner was entitled to proceed on the basis that it had established a lawful non-conforming use.

The court's finding that the owner had established lawful non-conforming use protection was notable because the owner had not done any physical work on the site. In previous cases, activities which have assisted owners in establishing commitment to use have been those which have occurred on the land itself, such as clearing and grading in advance of construction. However, in the circumstances, the owner could not undertake physical site preparation because the development permit had not yet been issued. The owner had, however, hired professionals to prepare studies and reports in preparation of the intended use. The court considered these factors and concluded that actual use of the land was not a prerequisite to a finding of an "irrevocable commitment to use" and that the project had moved beyond merely a concept to the level of commitment necessary for non-conforming use protection.

On July 2, 2010, in *Sierra Club of Canada v. Comox Valley Regional District, 2010 BCCA 343*, the British Columbia Court of Appeal upheld the trial court's decision that the development permit had been validly issued, but declined to make a finding on the issue of whether the owner had also established a lawful non-conforming use. Instead, in obiter, the court noted that the trial court's decision raised issues with respect to the scope of the application of the commitment to use doctrine and whether, in the absence of a permit, or other lawful legislative authority to undertake a development, a non-conforming use could even be established.

In the absence of a definitive ruling on these issues, it remains that an owner who has done physical work on the site in preparation for a use stands the best chance of a finding of an "irrevocable commitment to use" and therefore non-conforming use protection. However, in our view, this does not preclude a court finding a lawful non-conforming use in the absence of such physical site work.

If physical work on the land is a mandatory requirement to establish an irrevocable commitment to use, then any lands subject to a development permit requirement could never achieve lawful non-conforming use protection prior to the development permit being issued. While this issue has yet to be judicially considered, we are doubtful that a court would interpret the law in this manner.