



In the Works: Non-Conforming Use

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Non-conforming uses, which arise when a lawful use ceases to be permitted through a new or amended zoning bylaw, are protected by section 911 of the *Local Government Act*. The courts have extended this protection further by creating an “irrevocable commitment to use” category, designed to offer protection to an owner whose development plans are well under way but where construction has not yet started. In the recent case of *Sierra Club of Canada v. Comox Valley Regional District 2010 BCSC 74*, the court has further clarified situations where the protection may be available.

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 previous cases, activities which have assisted owners in establishing commitment to use are those which have occurred on the land itself, such as clearing and grading in advance of construction. In this case, the land was situated in a development permit area, which precluded any land-based activities in advance of a permit being obtained. The court considered this in reviewing the actions taken by the owner in contemplation of the gas station and concluded that actual use of the land is not a prerequisite to finding a commitment to use. The owner had hired professionals to prepare many studies and reports in preparation for the intended use, and therefore the project had moved beyond being merely a concept, or still in the planning stage, to the level of commitment. The court concluded that the local government could take the position that commitment to use had been established and issue the development permit.

The determination by a local government that an owner has established an “irrevocable commitment to use” will always be, by the very nature of the test, heavily fact-specific. Where sufficient evidence of the commitment exists, however, the local government may be legally able to issue permits and approvals for the completion of the development, notwithstanding that a newly amended zoning bylaw may no longer allow the intended use.