

VIA EMAIL: cfrater@islandstrust.bc.ca

October 27, 2020

Clare Frater
Director, Trust Area Services
Islands Trust
200 - 1627 Fort Street
Victoria, BC V8R 1H8

Dear Ms. Frater:

Re: Policy Statement Amendment Project
Our File No. 00002-0020

You have requested our opinion on the several questions pertaining to the amendment of the Trust Policy Statement, which we will address in order:

1. *Is s. 3 of the Islands Trust Act to be interpreted in such a way as to restrict the scope of the Policy Statement to environmental conservation and cultural heritage matters, or can the Policy Statement include policies in respect of matters like sustainable communities and affordable housing that appear to relate more directly to the exercise of bylaw-making powers by local trust committees under Part 14 of the Local Government Act?*

The general scheme of the *Islands Trust Act* includes the creation of governance bodies that exercise jurisdiction pursuant to both the *Act* and pre-existing local government legislation, principally what's now Part 14 of the *Local Government Act*. In enacting this legislation, the Province withdrew certain regulatory powers from regional district boards and conferred them on elected local trust committees. The result is that local governance of the trust area is shared between the regional districts and the Islands Trust. In conferring governmental powers on the Islands Trust entities the Legislature identified the statutory object that is in s. 3 of the *Islands Trust Act*. For the purpose of carrying out that object, the Trust Council established under the *Act* must adopt a policy statement, the scope of which is not prescribed; the *Act* merely states that the policy statement must be a general statement of the policies of the Trust Council to carry out the object of the trust. The Trust Council may, according to the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65, interpret s. 3 of the *Islands Trust Act* "applying its particular insight", and a reviewing court will defer to that interpretation unless it can be shown to be unreasonable; the interpretation need not be legally "correct".

The *Vavilov* decision indicates that the scope of the policy statement should be determined according to its “text, context and purpose”. The context and purpose of s. 3 include providing the standard or benchmark for the bylaw approval function performed by the executive committee under s. 15 of the *Act* in respect of local trust committee and island municipality bylaws, and the broader but less binding purpose described in s. 39.1 of the *Act* which requires the council of an island municipality to have regard to the policy statement when enacting bylaws and issuing permits and licences. According to s. 15(4), the executive committee may not approve a bylaw if it is contrary to or at variance with the policy statement. The efficacy of the policy statement in preserving and protecting the trust area lies principally in the direction it gives to the enactment of Part 14 bylaws by the local trust committees and island municipalities. These are the core tools that the Legislature provided to the local trust committees to achieve the object of the trust.

The Trust Council has several options in respect of Part 14 bylaws. It may legitimately determine in respect of particular Part 14 bylaw-making powers that local trust committees and island municipalities can be left to exercise their Part 14 powers as they see fit, in which case the policy statement may be silent on that topic. In other cases, the Trust Council may see fit to state a policy favouring the enactment of a particular type of Part 14 bylaw without indicating in any detail what such a bylaw should achieve. In still other cases the Trust Council may wish to go further, by indicating substantive content for such a bylaw that is considered to be appropriate or necessary for achieving the trust object. Each of these could in our view be a legitimate policy choice for the Trust Council to make in relation to any particular Part 14 topic, and a reasonable interpretation of s. 3 of the *Act* and the provisions of the *Act* dealing with the policy statement. It is implicit in the foregoing opinion that we don’t consider that the policy statement must be restricted in its scope to environmental conservation and cultural heritage, since Part 14 powers extend well beyond those matters.

As to the meaning of the term “unique amenities” in the trust object, according to the Supreme Court’s reasoning in *Vavilov*, the B.C. Legislature is presumed to have intended local and municipal trustees sitting in Trust Council to determine what constitutes a “unique amenity” that falls within the scope of the “preserve and protect” object, subject only to judicial review on a standard of reasonableness. In leaving the term undefined in the statute, the Legislature can be taken to have intended that the Trust Council would determine what features of the trust area warrant preservation and protection as “unique amenities”, by addressing the matter in the policy statement. As regards the text of the statute as referenced in the foregoing citation from the *Vavilov* decision, dictionaries merely define “amenity” as “pleasant feature”. The interpretation of these words in s. 3 seems to us to be an exercise that a reviewing court would see as quintessentially engaging the principle in *Vavilov* that the Legislature’s delegate (Trust Council) may employ its “particular insight”, based on local knowledge, in determining what features of the trust area it will seek to preserve and protect. We don’t interpret the adjective “unique” as meaningfully limiting the scope of the term “amenities”; rather, we think that the term “unique” simply acknowledges the juxtaposition of the trust area’s landforms, plant and

animal communities and so forth with the geographic position of the islands on which they are found, which is by definition unique.

2. *If not, given that local trust committees and island municipalities are required by Section 473 (2) of the Local Government Act to include housing policies in their OCP respecting affordable housing, rental housing and special needs housing, should this topic be addressed in the Policy Statement?*

We indicated above that it's up to the Trust Council to determine whether any matter that is within the scope of Part 14 of the *Local Government Act* ought to be addressed in the policy statement, whether or not the matter is particularly described in s. 3. Addressing or not addressing a particular topic in the trust policy statement has important implications for the operation of the rule in s. 15 that a bylaw must not be approved by the executive committee if it's contrary to or at variance with the policy statement, and the rule in s. 39.1 that the council of an island municipality must have regard to the policy statement when enacting bylaws and issuing permits and licences. It may be that some Part 14 matters are considered so critical to the achievement of the trust object (the use of development permit area designations for the protection of the natural environment might be an example) that trust council considers that the policy statement must address them, while others are more peripheral and can be left to local trustees and municipal councils without policy guidance. It's not our view that the policy statement would be legally vulnerable if it were to omit any reference to housing. Part of the trust council's role is to determine whether such matters related to housing warrant treatment in the policy statement, in view of the fact that the *Local Government Act* requires local trust committees and island municipalities to include housing policies in their OCPs and that if the policy statement is silent on those matters, there may be less leverage to pursue the trust object as interpreted by the Trust Council by refusing to approve an OCP that's contrary to or at variance with the policy statement.

3. *Can the Islands Trust Object, set out in s.3 of the Islands Trust Act, be interpreted to include a mandate to preserve and protect affordable housing?*

As regards housing affordability in particular, it seems to us that the Trust Council might reasonably consider that socially diverse local populations are part of the unique amenities of the trust area. We note that s. 3 refers to the trust area being preserved and protected "for the benefit of the residents of the trust area and of British Columbia generally". Policies that are directed at the maintenance of an adequate supply of housing that is affordable by persons in the income brackets who have historically populated the trust area would seem clearly to be "for the benefit of the residents of the trust area". Further, one of the consequences of preservation and protection of the trust area "for the residents of British Columbia generally" could be that they may visit the trust area, such non-resident enjoyment of the trust area being more feasible given the availability of local services such as visitor accommodation, restaurants, travel services and so forth that rely on an adequate supply of

affordable housing for operators and employees. Overall, we consider that a Trust Council interpretation of the term “unique amenities” in s. 3 as including a supply of affordable housing would likely pass the reasonableness test.

4. *Given that local trust committees and island municipalities are entrusted with local government duties under Part 14 of the Local Government Act, are their roles as members of local Trust Committees and Island Municipalities different from their roles as members of the regional Trust Council which is governed solely by the Islands Trust Act?*

We must distinguish between members of the Trust Council who are members of the council of an island municipality (municipal trustees) and those who are not (local trustees), in responding to this question.

In our view it is incorrect to consider local trustees to be “wearing different hats” when they are sitting in Trust Council and when they are sitting in a local trust committee exercising Part 14 powers. According to s. 9 of the *Islands Trust Act*, the Trust Council must adopt a trust policy statement “for the purpose of carrying out the object of the trust”. Section 24 of the *Islands Trust Act* provides that “for the purpose of carrying out the object of the trust”, each local trust committee may regulate the development and use of land in its local trust area in accordance with sections 29 and 31 of the *Act*, and must submit its bylaws to the executive committee for approval. Section 29 is the source of the local trust committees’ Part 14 powers. Thus, local trustees wear the same hat whether they are sitting in Trust Council dealing with the trust policy statement or sitting in local trust committee dealing with Part 14 matters, and are meant to be pursuing the same purpose in each case: the purpose described in s. 3 of the *Islands Trust Act*.

The situation of municipal trustees is somewhat different. They acquire Part 14 powers directly via the *Local Government Act* and are not mandated to exercise those powers “for the purpose of carrying out the object of the trust”; rather, the object of the trust is secured via special provisions in Part 5 of the *Islands Trust Act*. Section 39.1 requires the councils of municipalities in the trust area to “have regard to the object of the trust” in adopting a bylaw or issuing a permit or licence, and to submit for executive committee approval only their official community plans and zoning bylaws, which approval must (as is also the case with local trust committee bylaws) be withheld if the bylaw is contrary to or at variance with the trust policy statement. It may be that municipal trustees can reasonably be described as “wearing different hats” when they are sitting in Trust Council and when they are sitting in a municipal council exercising Part 14 powers; such a conclusion might be reinforced by the fact that each of them must make separate oaths of office in respect of their municipal council and trust council roles. However, it seems clear to us that local trustees have but a single role and mandate in all their activities: to secure the object of the trust set out in s. 3 of the *Islands Trust Act*.

We trust that these opinions will be helpful to the Trust Council as it considers amendment of the Islands Trust Policy Statement.

Sincerely,

YOUNG ANDERSON



Bill Buholzer

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BB/smj

copy to: Mr. Robert Barlow, Islands Trust