



200 - 2006 West 10th Avenue
Vancouver, BC V6J 2B3
www.wcel.org

tel: 604.684.7378
fax: 604.684.1312
toll free: 1.800.330.WCEL (in BC)
email: admin@wcel.org

24 September 2015

Town of Gibsons
474 South Fletcher Road, Box 340,
Gibsons, BC VoN 1Vo

*** BY FAX AT 604-886-9735 ***

Attn. Mayor and Council

Dear Sirs/Mesdames:

Re: Rezoning of Hyak Marine Site, Gibsons, BC

We write on behalf of the Gibsons Alliance of Business and Community Society with regard to your consideration of a proposal to rezone the Hyak Marine Site. In particular, we submit that a Site Profile should be required prior to proceeding with rezoning.

We understand that you have taken the position that a site profile is not required in respect of this site, since Gibsons has “opted-out” of s. 40(1) of the *Environmental Management Act* (EMA) under the Contaminated Sites Regulation (CSR), s. 4(4).

However, we submit that the municipality has legal obligations under s. 40(2) and (4) of the *EMA* and ss. 946.1 and 946.2 of the *Local Government Act*, which create independent obligations in relation to site profiles.

The opt-out scheme created in section 4(4) of the *CSR* does not expressly exempt the municipality from its requirements under the Act (or, for that matter, under any other Act), but rather exempts “a person ... from the duty to provide a site profile” under s. 40(1) of the *EMA*. This *CSR* exemption does not directly address the obligations of the municipality, and does not in any way purport to address Gibson’s obligations under statutory provisions other than s. 40(1). Notably, s. 4(4), does not purport to exempt Gibsons from the requirements of ss. 40(2), 40(4) or section 946.1 and 946.2 of the *Local Government Act*.

In our view, the Town of Gibsons likely continues to have legally enforceable obligations in relation to the preparation and assessment of site profiles, notwithstanding advice to the contrary received from the BC government.

A review of legal obligations related to Site Profiles

While s. 4(4) of the *CSR* purports to exempt a “person” from the requirement of preparing a site profile prior to rezoning, that exemption has nothing to say about the requirements of ss. 40(2) and 40(4) of the *EMA* and section 946.1 and 946.2 of the *Local Government Act*.

Section 40(2) of the EMA is not affected by the “opt-out” provision. It states that “an owner of real property must provide a site profile” to the Ministry of Environment (the “director”), if the owner (among other things) “owns real property that is used or has been used for activities specified in the regulations...”

Thus, under s. 40(2) of the EMA, a site profile is required if the property in question has been used for an activity listed in the regulation. The CSR does specify a list of “Industrial and Commercial Purposes and Activities” which may require a site profile in Schedule 2, several of which we understand apply to the Hyak Marine Site.

Section 2(1) of the CSR explains the relation of this list to s. 40(2) (among other subsections) in a rather awkward way:

- 2 (1) A person is exempt from the duty to provide a site profile under section 40 (1), (2), (3), (6) and (7) of the Act with respect to industrial or commercial purposes and industrial or commercial activities which are not described in Schedule 2.

It is our view that Schedule 2 prescribes a list of activities in relation to s. 40(2). Section 40(2)(a) is the only provision within s. 40(2) that speaks of a list of activities, and we submit that s. 2(1) must be read as confirming that there is a duty to provide a site profile under s. 40(2) where the activities listed in Schedule 2 have occurred.

It is our position that s. 40(2) of the EMA does require the preparation of a site profile under the *Environmental Management Act* in respect of the Hyak Marine Site, notwithstanding any exercise of the opt-out provision of the CSR.

While s. 40(2) does not explicitly require the person to provide a site profile to the municipality, section 40(4) of the EMA requires a municipal government (along with a subdivision approving officer considering a subdivision application, or the oil and gas commission considering an application under oil and gas legislation) to consider site profiles prepared under s. 40(2).

Section 40(4) of the EMA states:

- (4) A municipality, an approving officer or the [oil and gas] commission, as applicable, must
- (a) assess a site profile **received under subsection (1), (2) or (3)** in accordance with the regulations,
 - (b) if the assessment of the site profile under paragraph (a) indicates that a director should review the site profile to determine if a site investigation is required, forward a copy of the site profile to a director, and
 - (c) forward a copy of the site profile to any other person specified in the regulations.
[Emphasis added]

This section seems to explicitly contemplate municipalities assessing site profiles received under either s. 40(2).

In addition, the *EMA* is not the only statute addressing the requirement to provide site profiles. Notably, ss. 946.1 and 946.2 of the *Local Government Act* impose their own requirements on the municipality:

946.1 (2) A municipality or regional district must

(a) assess site profiles referred to in section 40 (1) [*site profiles*] of the [Environmental Management Act](#), and

(b) in accordance with section 40 (4) [*site profiles*] of the [Environmental Management Act](#), provide site profiles to a manager.

946.2 (1) This section applies to an application for one or more of the following:

(a) zoning;

(b) development permits or development variance permits;

(c) removal of soil;

(d) demolition permits respecting structures that have been used for commercial or industrial purposes.

(2) A municipality or regional district must not approve an application referred to in subsection (1) with respect to a site where a site profile is required under **section 40** [*site profiles*] of the [Environmental Management Act](#) unless at least one of the following is satisfied ... [Emphasis added]

Note that the *Local Government Act*, s. 946.1, explicitly incorporates the municipal obligations under s. 40(4). Similarly, 946.2 restricts the ability of local governments to make key decisions, such as rezoning, the issuance of development permits, etc. “with respect to a site where a site profile is required under section 40 [*site profiles*] of the *Environmental Management Act*.” Pursuant to this section, if a site profile is required under *any* part of section 40 (including either ss. 40(1) **or** (2)), then then a local government cannot make an approval enumerated in s. 946.2(1) unless it satisfies the criteria in s. 946.2(2). For example, if a site profile is required under s. 40(2) of the EMA, then a municipality cannot approve a development permit, variance or zoning application unless a s. 946.2(2) criterion is met.

This interpretation is also consistent with the combined purpose of s. 946.2 of the *Local Government Act* and the Contaminated Sites provisions of the *EMA*, which was enacted through amendments passed in 2002; the Minister introducing the amendment explained:

[A] municipality must not approve an application for a development permit if they have not received a site profile required by the [*Environmental*] *Management Act*. The intent is to prevent persons from conducting activities on land that may be contaminated. ¹

¹ <http://www.leg.bc.ca/hansard/37th3rd/h20501p.htm#3124>; ironically, the Minister also boasted that the amendments would rework the old “confusing and incomplete” statutes “so that they are clear and complete...”

Conclusion

In our view, it is far from clear that s. 4(4) of the CSR, as it currently reads, exempts a local government from all obligations related to site profiles. A reasonable interpretation of ss. 40(2) and (4) of the EMA and s. 946.1 and 946.2 of the LGA require that a site profile be prepared in respect of the Hyak Marine Site, and that the rezoning of the site not proceed until the site profile is prepared.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Gage". The signature is fluid and cursive, with the first name "Andrew" and last name "Gage" clearly distinguishable.

Andrew Gage,
Staff Counsel

cc. Client

cc. Vince Hanemayer, Ministry of Environment (by email only at
Vincent.Hanemayer@gov.bc.ca)