
Density Bonus & Other Policy Options for Energy Efficiency

Prepared For:
Capital Regional District and Islands Trust
Community Action on Energy Efficiency – Gold Program

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Report Summary

This purpose of this Community Action on Energy Efficiency Gold project is to analyze a series of energy efficiency policy options for Salt Spring Island, and to make recommendations on which policy options should be considered for implementation. The objective is to facilitate the timely adoption of environmental policies appropriate for Salt Spring Island by the Islands Trust and Capital Regional District.

The scope of this *Density Bonus and Other Policy Options for Energy Efficiency* report is to describe the density bonus provisions of the *Local Government Act* and other policy options (such as a sustainability checklist), discuss their implications for energy efficiency in light of the companion report titled *Energy and Greenhouse Gas Emissions Analysis for New Residential Buildings*, and to make recommendations for their application given the administrative capacity of the Islands Trust and rural land use context of the Salt Spring Island community. The report focuses primarily on energy efficiency in buildings, and does not include energy efficiency from reductions in transportation from concentrated land use forms.

Chapter 1 sets out the jurisdiction of the Islands Trust and the Capital Regional District as it applies to a rural landscape, and how changes in regulation affect existing uses of land and buildings. Chapter 2 describes the density bonus policy option in detail. Chapter 3 explains each of the policy options for taking action on energy efficiency available to the Islands Trust and Capital Regional District, and makes recommendations for their implementation. The policy options considered in Chapter 3 are official community plans, energy efficiency standards for buildings, development permit areas, development cost charges, reduced permit fees and fast tracking applications, parking in lieu fees, limiting impervious surfaces, and regulating tree cutting. Finally, Chapter 4 discusses the issue of local government liability for taking action on energy efficiency and the ability to require the use of sustainability checklists for land and building development.

Recommendations include:

- Explore the potential for a density bonus in the form of a floor space increase to improve the energy efficiency of new buildings without compromising the community's goals for obtaining other amenities;
- Include greenhouse gas emission reduction targets and actions in the Salt Spring Island official community plan;
- In discussion with the provincial government on further provincial action, and other local governments on their approach, work with the capital regional district to evaluate the feasibility of enacting energy efficiency standards for new buildings;
- Expand existing development permit areas for the objective of reducing greenhouse gases with particular focus on guidelines relating to tree retention trees;
- Pursue the use of development cost charges as part of a comprehensive growth management and development financing review, not solely to promote green building.
- Create a tailored building permit fee for energy efficient buildings.
- Evaluate whether there are sufficient applications for development that involve parking spaces per year or per five years that would warrant using parking-in-lieu fees for alternative transportation infrastructure.
- Consider adopting a tree cutting bylaw on hazard lands in, for example, development permit area 6 and all lands over a specified slope gradient to bolster enforcement opportunities.

1. Introduction

1.1 Project Context & Scope

Salt Spring Island is part of the Islands Trust and is an Electoral Area of the Capital Regional District (CRD). At the UBCM conference in September 2007, the Islands Trust, with 62 other local governments, signed onto the Provincial Climate Action Charter. The Charter commits signatory local governments to becoming carbon neutral by 2012 and to working towards creating more compact and energy efficient communities. At the same time, the Salt Spring Island Local Trust Committee is currently undertaking an Official Community Plan (OCP) review, scheduled for completion in 2008. The community and Local Trust Committee are proposing a suite of policies that have energy and climate change implications.

The Local Trust Committee of the Islands Trust has engaged Salt Spring Island in several projects under the Ministry of Energy, Mines and Petroleum Resources Community Action on Energy Efficiency (CAEE) Gold Program. The first project, titled *CAEE Local Government Policy Instruments Initiative*, identified policies and actions for possible future implementation on Salt Spring Island. This work was followed by an analysis of the greenhouse gas (GHG) implications of different settlement patterns on Salt Spring Island. This latter study concluded that clustering dwellings into more compact settlements (villages and hamlets) would result in significant reductions in greenhouse gas emissions, especially for those dwellings located near to a village centre, primarily due to reduced transportation emissions with some positive impact from improved energy efficiency in buildings.¹

As part of its participation in the CAEE Gold Program, the Salt Spring Island Local Trust Committee and Trust Council have committed to the following climate change targets:

- Achieve an EnerGuide for New Houses rating of 80 for 100% of new detached, single family and row houses by 2010 (subject to bylaw adoption).
- Reduce the energy consumption in 12% of existing detached, single-family and row houses by an average of 17% (subject to bylaw adoption—residential additions only).
- Implement a policy that sets an energy efficiency target of at least 25% below Model National Energy Code for Buildings (MNECB) for new local government funded, owned, managed or occupied buildings (subject to bylaw adoption).

This purpose of this third CAEE Gold project is to analyze a series of energy efficiency policy options for Salt Spring Island, and to make recommendations regarding which policy options should be considered for implementation, including a detailed process analysis for the implementation of selected policies. The objective is to facilitate the timely adoption of environmental policies appropriate for Salt Spring Island by the Islands Trust and CRD.

The scope of this *Density Bonus and Other Policy Options for Energy Efficiency* report is to describe the density bonus provisions of the *Local Government Act* and other policy options (such as a sustainability checklist), discuss their implications for energy efficiency in light of the companion report titled *Energy and Greenhouse Gas Emissions Analysis for New Residential Buildings*,² and to make recommendations for their application given the administrative capacity of the Islands Trust and

¹ Sustainability Solutions Group and Holland Barrs Planning Group, *The GHG Implications of Different Settlement Patterns on Salt Spring Island* (2007).

² Alison Bailie & Matt Horne (Pembina Institute) July 2008.

rural land use context of the Salt Spring Island community. In summary, the *Energy and Greenhouse Gas Emissions Analysis for New Residential Buildings* report finds significantly more GHG reductions for requiring air source heat pumps, with requiring increased energy efficiency and attached housing achieving some GHG reductions. Information, checklists and incentives have little effect.

The analysis considers only the jurisdiction of the Islands Trust and the CRD as it applies to a rural landscape. Its focus is primarily on energy efficiency in buildings, and does not include energy efficiency from reductions in transportation from concentrated land use forms.

1.2 Jurisdiction of the Islands Trust and the Capital Regional District

Both the Islands Trust and the CRD have jurisdiction for affecting the energy efficiency of housing or community form. The Islands Trust Council and Local Trust Committee's jurisdiction is found in the *Islands Trust Act*, which sets out the purpose of the Islands Trust governance structure:³

The object of the trust is to preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust area and of British Columbia generally, in cooperation with municipalities, regional districts, improvement districts, other persons and organizations and the government of British Columbia.

The Salt Spring Island Local Trust Committees may regulate land use and development, which includes powers that would otherwise belong to the CRD.⁴ For the purposes of this project, these powers include the Local Trust Committee authority for:⁵

- the construction and layout of trailer courts, manufactured home parks and camp grounds;
- official community plans (OCPs);
- zoning;
- density bonus;
- parking;
- runoff control, including the maximum percentage of land that can be covered by impermeable surfaces;
- screening and landscaping;
- non-conforming uses;
- development permit areas; and
- development approval information areas or circumstances.

While the *Islands Trust Act* gives authority to the Islands Trust for subdivision servicing standards,⁶ the Islands Trust does not fulfill the approving officer role for subdivision because it does not have jurisdiction to do so pursuant to the *Land Title Act*.⁷

³ *Islands Trust Act*, s.3.

⁴ *Islands Trust Act*, ss.4(4) and 24(2)(b).

⁵ *Islands Trust Act*, s.29(1).

⁶ At s.29(1)(a), referring to the authority provided under s.938 of the *Local Government Act*, the Islands Trust may, by bylaw, set subdivision standards for roads, sidewalks, water distribution, sewage collection and disposal, and drainage. These standards may be established for different circumstances, areas, land uses, zones and roads. The Minister of Transportation must approve bylaws establishing road standards. The Ministry of Transportation and Highways establishes road standards under s.13.1 of the *Highway Act*, R.S.B.C. 1996, c.188.

⁷ The *Land Title Act*, s.77.1(1)(b) enables the Lieutenant Governor in Council (cabinet), by order, to authorize the trust council to appoint a person as an approving officer. No order has been made.

The Local Trust Committee’s jurisdiction does not include authority for development cost charges (DCCs).⁸ DCCs remain within the CRD’s authority. Zoning applies to all of Salt Spring Island but the Local Trust Committee does not use siting and use permits because the CRD requires building permits for all construction.⁹

For the purposes of this project, the CRD’s jurisdiction largely flows from the *Local Government Act*. It has chosen to provide the service of regulating buildings and must apply the provincial Building Code and other provincial regulations respecting buildings.¹⁰ Subject to several pieces of legislation, the CRD may enact bylaws regulating buildings, such as for construction, repair, heating, and appliances.¹¹ However, it cannot create more stringent or different standards than those found in the B.C. Building Code unless it receives the approval of the Minister of Community Services, or does so under a regulation or pursuant to an agreement.¹²

Finally, the CRD has no authority on Salt Spring Island to exercise powers granted to the Trust Council or a Local Trust Committee.¹³ The regional district director who represents the Gulf Islands electoral area must not vote on resolutions or bylaws authorized by Part 26 (land use planning) of the *Local Government Act* for which the power has been given to a local trust committee by the *Islands Trust Act*,¹⁴ and the regional district board must not adopt a regional growth strategy that applies to Salt Spring Island.¹⁵ The *Islands Trust Act* specifically forbids the regional board from adopting bylaws, issuing permits or undertaking works that are contrary to bylaws of the Local Trust Committee or a service coordination agreement.¹⁶

1.3 Legal Status of Buildings & Land Uses When Regulations Change

The general rule of statutory interpretation about changes in enactments (Acts of the Legislature or regulations, including bylaws) is that when a local or senior government changes an enactment, actions taken under the former law are deemed to be valid if undertaken in accordance with the former law.¹⁷ Permissions acquired under the former law are valid. New action must conform to the new law.

In the context of buildings and changes in building regulation, this means that existing buildings are validly constructed if in accordance with a building permit obtained under the regulations in place at the time the building was constructed. If, for example, the CRD enacts an energy efficiency bylaw that is approved by the province, owners will not be required to upgrade existing buildings to the

⁸ *Islands Trust Act*, s.29(1)(a).

⁹ *Islands Trust Act*, ss.31 & 32.

¹⁰ *Local Government Act*, ss.797.1(1)(a) & 692(2); British Columbia Building Code Regulation B.C. Reg. 216/2006.

¹¹ *Local Government Act* s.694(1).

¹² *Local Government Act*, s.693.1(2), making applicable s.9 of the *Community Charter*, S.B.C. 2002 c.26.

¹³ *Islands Trust Act*, s.36(1).

¹⁴ *Islands Trust Act*, s.36(2)(a).

¹⁵ *Islands Trust Act*, s.36(3).

¹⁶ *Islands Trust Act* s.35.

¹⁷ Section 1 of the *Interpretation Act*, R.S.B.C. 1996 c.238 defines “enactment” to include an Act or regulation or a portion thereof. A “regulation” includes a bylaw or other instrument enacted in the execution of a power conferred under an Act. Section 35(1) states that the repeal of an enactment does not affect the previous operation of the enactment or anything done under it, or affect a right acquired under the repealed enactment. See also Pierre-Andre Cote, *The Interpretation of Legislation in Canada (2nd Ed.)* (Montreal: Les Editions Yvon Blais, 1991).

new standards.¹⁸ Any renovations and new construction needing a building permit or other approval would be required to meet the new bylaw standards.

In the context of land use, this rule of the application of new regulations is modified by specific rules about non-conforming uses and the ability to grant variances from new rules.¹⁹ A lawful use of land, a building or a structure may be continued as a legal non-conforming use when zoning and other land use regulations change, as long as the use is not discontinued for a continuous period of six months. The use becomes subject to the new regulations if it is discontinued for that amount of time. For the purposes of this project, this legal non-conforming use rule applies to changes in zoning, density bonus, parking, and screening and landscaping.

A building or other structure that is lawfully under construction when a bylaw changes is deemed to be a building that existed at the time of the bylaw change and to be in use for its intended purpose as stated in the building permit.²⁰ A structural alteration or addition to a building is not permitted while the non-conforming use continued unless required by an enactment (bylaw or law) or permitted by a board of variance.²¹ If the use and density of buildings conform to a new bylaw but the siting, size or dimension of buildings or offstreet parking spaces (including the number of spaces) does not conform, the buildings or spaces may be maintained or altered to an extent that would not result in further contravention of the new bylaw.²²

Variances are the other way by which new regulations may be modified when applied to specific construction projects. Development permits issued pursuant to development permit guidelines may vary or supplement zoning, parking, screening and landscaping, and subdivision regulations.²³ However, a development permit may not vary use or density. A landowner may also apply to the Board of Variance or for a development variance permit for a modification of land use regulations.

The provincial government and local governments are constantly changing land use and building regulations. How the land market and private sector insurers will react to those changes is unknown. Generally, the small proportion of new building regulation that has had an impact on property values and insurance rates relates to human health factors such as soil contamination from underground oil storage tanks and building products such as asbestos insulation.

In summary, buildings constructed under a permit do not need to be upgraded when new regulations are enacted. New construction must conform to the new rules. Where changes in land use regulations such as zoning make existing uses unlawful, as long as the existing use is not discontinued for a period of six months it will be allowed to continue as a legal non-conforming use. Applicants for development permits may also seek variances from new land use regulations, primarily for the siting, size, dimensions of structures and other features.

¹⁸ The exception to this rule is if a building is unsafe and warrants local government enforcement of health and safety regulations.

¹⁹ *Local Government Act*, s.911(1). Lawful non-conforming use rules apply to Division 7 of Part 25 of the Act.

²⁰ *Local Government Act*, s.911(3).

²¹ *Local Government Act*, s.911(5).

²² *Local Government Act*, s.911(9-10).

²³ *Local Government Act*, s.920(2)

2. Density Bonus

The density bonus provisions under s.904 of the *Local Government Act* are one of the few tools available to local governments to obtain amenities when new development occurs. Ideally it assists communities to fulfill land use planning goals by enabling them to allow developers to opt for increased densities in exchange for some community benefit such as environmental restoration, the dedication of parkland, or affordable housing. For the purposes of this project, any increase in density relates to size of housing, not additional units.

2.1 Density Bonus Defined

Section 904 of the *Local Government Act* allows local governments to establish a density bonus scheme that allows landowners to voluntarily provide amenities in exchange for greater density:²⁴

904(1) A zoning bylaw may

- (a) establish different density regulations for a zone, one generally applicable for the zone and the other or others to apply if the applicable conditions under paragraph (b) are met, and
- (b) establish conditions in accordance with subsection (2) that will entitle an owner to a higher density under paragraph (a).

(2) The following are conditions that may be included under subsection (1)(b):

- (a) conditions relating to the conservation or provision of amenities, including the number, kind and extent of amenities;

The bonus or approval allowed in exchange for the amenity must be density. For example, a local government cannot permit an otherwise prohibited use in return for an amenity.²⁵ An example of this is where a use that would not be feasible under the base density of a zone, e.g. a hotel, cannot be enabled by a density bonus.

Although the wording of section 904 contemplates pre-zoning density bonus into existing zoning by setting out a base density and a bonus in return for specified amenities, most local governments in B.C. prefer to enable density bonus on an ad hoc basis in response to specific development proposals. Local governments prefer ad hoc because to pre zone density bonus removes their discretion to negotiate or turn down an application as a landowner is entitled to the higher density if the prescribed amenities are provided.²⁶ If density bonus is enabled through the OCP but remains ad hoc in that a tailored zoning or land use bylaw amendment will apply to the specific project, there is more discretion on the part of staff and elected officials to negotiate for an acceptable density, design, and amenity package. Local governments in B.C. have almost exclusively used the ad hoc or spot zoning approach to density bonus by accepting amenity contributions as part of zoning amendments that contain site-specific density bonus provisions.²⁷

²⁴ There is very little case law explaining the legal bounds of density bonus, and a search found no case law defining the term “amenity.” Of particular note, the court in *Lambert v. Whistler, ibid*, declined to rule on whether the conditions supplied in that case fell within the meaning of amenity.

²⁵ *Lambert v. Whistler (Resort Municipality)* 2004 BCSC 342, 46 M.P.L.R. (3d) 203, 28 B.C.L.R. (4th) 125.

²⁶ *First National Properties Ltd. v. Highlands (District)* (1996) 32 M.P.L.R. (2d) 26. See also William Buholzer, *British Columbia Planning Law and Practice* (Markham: LexisNexis Canada Inc. 2001).

²⁷ B. Buholzer, *Financing Urban Growth: Amenities and Density Bonuses* (Vancouver: Continuing Legal Education Society of BC, 2008).

2.2 Rezoning and Comprehensive Development Zoning versus Density Bonus

While section 903 of the *Local Government Act* gives local governments considerable discretion in crafting zoning regulations, it does not allow them to require amenities as part of regular rezoning. Local governments cannot “sell” zoning, and there must be specific legislative authority, such as for density bonus, to allow bargaining to go on between a developer and local government.²⁸ They can accept promises or gifts of, for example, high performance building from a developer to include as part of a rezoning, but a local government cannot require these amenities unless it is part of a density bonus scheme under section 904. Whether the amenities are a promise from the developer or an exaction or mandatory requirement from the local government depends on one’s perspective. The test is whether the local government made the amenity or cash-in-lieu a condition of a successful rezoning.

It is common practice to negotiate energy efficiency standards for rezoning, particularly for larger developments that involve comprehensive development zones. However, where a local government is seeking amenities such as higher energy efficiency standards for buildings using zoning, the appropriate legal route is to use a density bonus. As discussed below, the Islands Trust may enable developers to construct to a higher energy efficiency standard as an amenity through zoning for density bonus.

2.3 Density and Amenity Defined

Section 872 of the *Local Government Act* defines density as the density of building and lands. This definition is not helpful in shedding light on what land development activities relate to density, so it is important to turn to planning principles that related to density calculations – the number of units per area of land (units per hectare), and the size of buildings in relations to the size of the land (floor area ratio for buildings on the lot, expressed as a ratio of total allowed floor area to size of the lot, e.g. 1:1).

The size of a unit or housing in relation to the lot is a component of density. Limiting the size of units or uses is allowed under the general zoning authority in the *Local Government Act*, section 903. A local government may regulate the density of the use of land and buildings, and the size of buildings and uses.²⁹ These regulations may be different for different zones or uses within a zone.³⁰ A local government may limit the size of the buildings or uses in a zone outright (for example to 300 square metres), or may limit the size of buildings or uses in relation to the size of the land (for example a floor area ratio of 0.5:1).

There are several different approaches to crafting density increases in exchange for amenities, specifically energy efficiency. A base density of, for example, 100 square metres (1076 square feet) per unit can be established with a permitted increase in density to 200 square metres (2153 square feet) if the developer provides the amenity of achieving a particular energy efficiency standard. This type of density bonus may also be expressed in relation to the size of the property, for example as a ratio between building and land size e.g. a density increase of 0.5:1 to 0.6:1.

²⁸ *Pacific National Investments v. Victoria (City)* [2000] 2 S.C.R. 919 (S.C.C.); *Lambert v. Whistler (Resort Municipality)* 2004 BCSC 342, 46 M.P.L.R. (3d) 203, 28 B.C.L.R. (4th) 125.

²⁹ *Local Government Act*, s.903(1)(c)(ii-iii).

³⁰ *Local Government Act*, s.903(3).

The term “amenity” is not defined in the *Local Government Act*, but s.904 links density bonus to “conditions relating to the conservation or provision of amenities, including the number, kind and extent of amenities.” Section 4 of the *Local Government Act* and recent case law dictate that a broad interpretation of both local government powers and the meaning of terms is required.³¹ Likewise, courts prefer to allow local governments to determine the public interest and what is needed as an amenity in a particular community. Given this direction, the term amenity can be defined very broadly as a feature that a local government views as in the best interest of its constituents.

Local governments have obtained the following amenities under s.904:³²

- price-controlled, limited equity market units (for residents and employees);
- units controlled, managed or owned by non-profit housing groups providing affordable housing;
- guaranteed or time limited rental units with rent control mechanism;
- housing for people with special needs;
- provision of accessible or adaptive units;
- preservation of heritage structures;
- child care facilities;
- youth recreation equipment at a community centre;
- high efficiency ("green") building designs;
- public art;
- underground parking;
- transit amenities such as a turning loop for buses;
- waterfront walkways;
- open spaces and plazas;
- public trails;
- fishing piers;
- landscaping;
- tree preservation and maintenance of street trees;
- ecological restoration;
- enhancement of riparian habitat;
- dedication of wetlands to the local government;
- stream preservation;
- preservation of a site's unique environmental attributes; and
- preservation of environmentally sensitive areas.

These amenities have been provided both on-site and off-site. There is no indication in the legislation that an amenity is limited to an on-site location.

There are several local governments that accept high performance buildings as part of an amenity package for density bonus in specified areas, which include the Cities of North Vancouver, Port Coquitlam and Victoria.³³ The City of Burnaby provides for a green building “bonus” in the UniverCity neighbourhood where enhanced energy efficiency of 23 percent better than the

³¹ See, for example, *Nanaimo (City) v. Rascal Trucking Ltd.* [2001] 1 S.C.R. 342; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)* 2004 SCC 19, [2004] A.W.L.D. 170, 46 M.P.L.R. (3d) 1, 236 D.L.R. (4th) 385, 318 N.R. 170, 18 R.P.R. (4th) 1, 26 Alta. L.R. (4th) 1, 12 Admin. L.R. (4th) 1, [2004] 7 W.W.R. 603, 346 A.R. 4, 320 W.A.C. 4, [2004] 1 S.C.R. 485.

³² This list is derived from a review of case law dealing with s.904, the B.C. Office of Housing and Construction Standards, *Density Bonus Provisions of the Municipal Act: A Guide and Model Bylaw* (1997), and the Smart Bylaws Guide website, section on Compact Complete Communities: Density Bonus <http://www.wcel.org/issues/urban/sbg/Part3/compact/densitybonus/>.

ASHRAE 90.1 and meeting or exceeding EnerGuide 80 and/or R-2000 standards are eligible for a five percent floor area ratio bonus.³⁴ The use of an alternative energy system qualified a building for a bonus of ten percent.

A cash contribution could be considered an amenity because section 904 contemplates “conditions relating to” the provision of amenities. Cash contributions should be managed in a separate fund reserved for the purchase of the specific amenity for which they were collected and specified in the zoning bylaw, e.g. energy efficiency upgrades for a community centre or other facilities.

2.4 Timing of Providing Amenities

Applicants are entitled to density bonuses when an approving officer approves a subdivision plan, or staff approve a building permit, at the bonus density.³⁵ The challenge arises with some amenities that do not exist until after the density bonus has been obtained by the applicant landowner. The concern is that there is limited ability to enforce the amenity commitment where the density bonus has already been granted if the applicant does not fulfill his or her part of the deal. The bonus density cannot be taken back. Some local governments require registration of a restrictive covenant before an occupancy permit will be granted. A local government may have to sue for specific performance to enforce the covenant or contravention of the zoning bylaw.

Energy efficiency standards highlight this problem because some standards, such as LEED, are assessed once the building has been in operation for a period of time. One suggested alternative is for the zoning bylaw enabling the density bonus to provide for an alternative amenity if the project does not obtain a certain level of LEED performance by a specific date.

2.5 Recommendations for Density Bonus for Energy Efficiency

At minimum, density bonus policies must include:

1. The maximum increase in density over base density that is permissible in any development. The maximum additional density, e.g., 25 percent, will depend on the community’s willingness and neighbourhood’s ability to accept additional density. The decision on this percentage or total amount should be the result of a community discussion so that citizens understand the tradeoffs in and benefits of increased density.
2. A list of amenities (in order of importance) that the community needs, generated in consultation with the public and lodged in the OCP.
3. A transparent amenity density bonus formula that will help all parties understand the extent of the benefit that accrues to the developer and the benefit that returns to the community.
4. Regular monitoring and adjustment, for example as part of OCP reviews, to reflect changing land values, the cost of construction, and the amenity priorities of the community. A balance must be maintained between the cost of the amenity and the value of the density in order to make the density bonus attractive to landowners.

³³ Kim Fowler, Director of Planning, City of Port Coquitlam. Personal communication May 15, 2008; Susan Rutherford, Green Buildings Guide (Vancouver: West Coast Environmental Law Association, 2006).

³⁴ Fraser Basin Council and Community Energy Association (2007). *Energy Efficiency & Buildings: A Resource for BC’s Local Governments* at 43.

³⁵ William Buholzer, *Financing Urban Growth: Amenities and Density Bonuses* (Vancouver: Continuing Legal Education Society, 2008)

When assessing amenities it is important to evaluate whether the desired amenities benefit the new residents of the development, or whether they are community amenities. Arguably, allowing green buildings or energy efficiency standards in new buildings through density bonus is a benefit that directly accrues to the residents of the buildings and to the planet as a whole, but only indirectly to the community. Providing energy efficiency as an amenity also benefits the developer and increases the project's marketability. A court may seek a more direct connection between the amenity and the community.³⁶

If energy efficiency can be procured by other means, such as through the use of regulatory bylaws, obtaining it through section 904 density bonus powers may be an inefficient use of a local government's land use authority. Many developers are supplying energy efficiency in response to market pressures and demand, so it may be unnecessary to "use up" the amenities provided by density bonus to obtain high performance buildings. However, carefully tailoring an increase in the size of homes as a density bonus where the only possible amenity is high performance building design, recognizing that such a small increase in density would achieve this amenity, may not detract from achieving other amenities that need unit number increases to make their provision affordable.

Given the list of desired amenities in the existing Salt Spring Island OCP, energy efficiency standards is only one amenity in a list of many amenities that have a more direct impact on the community. An evaluation of priority amenities should take place during a comprehensive plan review (as is presently occurring) so that prioritization of the amenities can occur in consultation with the community.

Recommendation:

There are many important amenities for which density bonus can be used, with some amenities not available through any other means. Therefore, the use of density bonus for energy efficiency will need to be weighed against these other needs and the potential for additional amendments to the Building Code and the ability of the CRD to enact regulatory bylaws for energy efficiency in buildings (see section 3.2). However, using density bonus is a simple way to secure increased energy efficiency of new homes and the use of air source heat pumps.

Explore the potential for a density bonus in the form of a floor space increase to improve the energy efficiency of new buildings without compromising the community's other goals for obtaining other amenities.

³⁶ William Buholzer, *ibid.*

3. Other Policy and Bylaw Options

There are a number of existing policy and bylaw opportunities to affect GHG emissions, including OCP policies, energy efficiency standards for buildings, development permit areas, development cost charges, reduced permit fees, and tree cutting standards. The provincial government has also passed new legislation in the spring 2008 legislative session that addresses the ability of local governments to address climate change and energy efficiency measures. The provincial government enacted Bill 10, the *Housing Statutes Amendment Act, 2008*, on March 31st, which enables local governments to enact regulatory bylaws for the purpose of addressing energy and water efficiency, and for reducing greenhouse gas emissions. The provincial government enacted Bill 27, the *Local Government (Green Communities) Statutes Amendment Act, 2008* on May 29th. It enables several additional land use powers under the local government act that have implications for energy efficiency and sustainable communities. Four of those powers are relevant for the Salt Spring Island CAEE Gold initiative, as detailed below.

Bill 27 also amends the *Local Government Act* to include a definition of the term “greenhouse gas” to mean any or all of carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulphur hexafluoride and any other substance prescribed by regulation.³⁷

3.1 Official Community Plan Policies

Official community plans (OCPs) provide direction and guidance on a community’s objectives for land use, development and local government operations. An OCP describes the community’s vision, and may deal specifically with policies for the preservation, protection, restoration and enhancement of the natural environment, its ecosystems and biological diversity, as well as the location and density of housing to meet anticipated needs over the next five years.³⁸

Strong statements about clustering development in rural areas on a certain percentage of the landscape and energy efficient design can assist decision-makers such as subdivision approving officers and Local Trust Committee members to evaluate or suggest changes to applications in the public interest. OCP policies also provide information for landowners as to what may be expected from development applications.

It is important to note that all subsequent bylaws must be consistent with OCP policies.³⁹ However, policies do not enable specific action and are not enforceable against a local government unless a court finds that local government action is in direct conflict with the policies.⁴⁰

New provisions under Bill 27 require local governments to include targets for the reduction of greenhouse gas emissions and policies and actions of the local government to achieve those targets.⁴¹ As noted above, all subsequent bylaws must be consistent with these targets, however they are not

³⁷ At section 11.

³⁸ *Local Government Act*, ss.877-878.

³⁹ *Local Government Act* s.884 (2).

⁴⁰ *Local Government Act* s.884(1); *Rogers v. Saanich* (1983), 22 M.P.L.R. 1 (B.C.S.C.) and *Brooks v. Courtenay (City)* (1991), 78 D.L.R. (4th) 662 (B.C.C.A.).

⁴¹ At section 20, amending *Local Government Act* s.877.

enforceable against a local government unless a court finds that local government action is in direct conflict with the targets.⁴²

Examples of targets and actions flowing from the draft policies in the Draft Salt Spring Island OCP section on Climate Change, Emissions and Energy Efficiency (at D.1.5, draft dated March 27, 2008) could include:

- Target: 100 percent of new Islands Trust and CRD buildings will conform with an energy efficiency standard of 25 percent below Model National Energy Code for Buildings. Action: Implement a green facilities policy.
- Target: The Islands Trust will decrease GHG emissions from operations by 30 percent by 2010. Action: Implement a green operations policy for evaluating and decreasing the GHG impacts of capital works projects; decrease staff and board travel by 20 percent through the use of teleconferencing and videoconferencing, etc.
- Target: 60 percent of new development will occur within the Ganges urban containment boundary. Action: Revise zoning, revise OCP policies about servicing to support the urban containment boundary, etc.
- Target: Increase tree cover on Salt Spring Island by 10 percent by 2012. Action: Enact landscaping standards as part of development permit areas, etc.

Recommendation:

Include greenhouse gas emission reduction targets and actions in the Salt Spring Island OCP.

3.2 Energy Efficiency Standards for Buildings

The CRD provides the service of building inspection and therefore has authority⁴³ to regulate the construction, alteration, repair or demolition of buildings and other structures, as well as the heating, air conditioning, electrical wiring and equipment of buildings,⁴⁴ for the purpose of health, safety or the protection of persons or property.⁴⁵ The Salt Spring Island Local Trust Committee may exercise this jurisdiction by bylaw to regulate the construction and layout of trailer courts, manufactured home parks and camping grounds.⁴⁶

Bill 10, the *Housing Statutes Amendment Act, 2008*, augments jurisdiction for buildings by allowing regional districts to enact bylaws regulating buildings for the purposes of:⁴⁷

- The provision of access to a building or other structure, or to part of a building or other structure, for a person with disabilities;
- The conservation of energy or water; and
- The reduction of greenhouse gas emissions.

It is important to note that this authority is subject to the Community Charter's concurrent jurisdiction section.⁴⁸ Concurrent jurisdiction requires that any bylaw dealing with building regulation must be approved by the Minister, enacted under a regulation, or enabled by agreement

⁴² *Local Government Act*, s.884; *Rogers v. Saanich* (1983), 22 M.P.L.R. 1 (B.C.S.C.) and *Brooks v. Courtenay (City)* (1991), 78 D.L.R. (4th) 662 (B.C.C.A.).

⁴³ *Local Government Act*, s.693.1(1).

⁴⁴ *Local Government Act*, s.694(1)(a-b). This authority is subject to the *Health Act*, *Drinking Water Protection Act*, and the *Fire Services Act*.

⁴⁵ *Local Government Act* s.694(1.1).

⁴⁶ *Islands Trust Act* s.29(1)(a).

⁴⁷ At section 6, amending *Local Government Act* s.694.

between a local government and a provincial Ministry. Regional Districts and the Local Trust Committee have no independent jurisdiction in relation to buildings – all bylaws must either be approved or enacted in keeping with further authority spelled out by a regulation or an agreement.

Under concurrent jurisdiction, the Buildings and Other Structures Bylaws Regulation provides authority for local governments to regulate buildings.⁴⁹ It allows local governments to regulate buildings by bylaws that establish standards for the construction, alteration, repair or demolition of buildings or structures that:

- Are listed in sentence 1.1.1.1 (2) of Division A of the Code [structures to which the Code does not apply such as public infrastructure located in a street, utility towers, hydro electric dams and accessory buildings less than 10 square metres], or
- Are not “buildings” as defined in the Code.

For buildings or structures not referred to above, a council may adopt a bylaw that establishes standards for construction, alteration, repair or demolition of a building or structure subject to the restrictions that the bylaw must not (emphasis added):

- Establish standards *that are additional to or different from* the standards established by the Code,
- Extend or change the application of scope of the code as specified in articles 1.3.2.1 [the application of the Parts 1, 2, and 3 of Division A of the Code to all buildings covered by the Code], 1.3.3.1 [the application of Parts 1, 7, and 8 of Division B of the Code to all buildings covered by the Code], 1.3.3.2 or 1.3.3.3 [the application of specific part of the Codes to different types of buildings] of Division A or subsection 2.2.7 [professional design and review] of Division C of the Code, or
- Change the form of a letter that is set out in a schedule to subsection 2.2.7 [professional design and review] of Division C of the Code.

Therefore, for most buildings any local government bylaw purporting to regulate buildings cannot establish standards that are additional to or different from the standards established by the Code. This is important where a local government wants to require a particular energy efficiency standard that can be met without supplementing the Code. Under the Buildings and Other Structures Bylaws Regulation, a building bylaw cannot set standards that are different from the Code.

While the amendments under Bill 10 could be a powerful tool allowing local governments to enact specific green building bylaws, many local governments will avoid enacting bylaws that require approval from the Minister because of the ultimate uncertainty of and the delay in waiting for provincial approval. There is ongoing discussion at the provincial level about enacting a regulation allowing local governments to adopt energy efficiency and other green buildings standards, and that the recent amendments to the Building Code were a first step in requiring more energy efficient buildings.⁵⁰

The CRD already provides the service of building inspection, thus from an administrative perspective it would be relatively simple to regulate buildings for increased energy efficiency. It requires enacting a bylaw that contains enhanced energy efficiency standards and seeking approval

⁴⁸ *Local Government Act* s.693.1(2). Concurrent jurisdiction or authority is found in s.9 of the *Community Charter*, S.B.C. 2003, c.26.

⁴⁹ BC Reg 86/2004.

⁵⁰ Staff from the Ministry of Community Services, Ministry of Energy, Mines and Petroleum Resources, and the Climate Action Secretariat all expressed this view at the B.C. Green Community Committee Working Groups Retreat on May 15, 2008.

of the Minister. At the same time, the author is not aware of any bylaws relating to buildings enacted by a local government under concurrent authority, and there is a strong desire to maintain consistency across the province in Building Code matters given the Code's focus on health and safety.

Recommendation:

In discussion with the provincial government on further provincial action, and other local governments on their approach, evaluate the feasibility of enacting energy efficiency standards for new buildings.

3.3 Development Permit Areas

The Islands Trust may designate development permit areas (DPAs) to protect the natural environment, its ecosystems, and biological diversity, and to regulate the form and character of intensive residential, commercial, industrial or multi-family development.⁵¹ The DPAs must be established in the OCP with a justification of the conditions or objectives that the DPA seeks to address.⁵² Guidelines setting out how those conditions or objectives will be met must be contained in the OCP or zoning/land use bylaw.⁵³ Subject to exemptions in the OCP or zoning bylaw, a landowner must obtain a development permit for land in a DPA before subdividing it or constructing, adding onto, or altering a building or other structure.⁵⁴ For environmental DPAs designated for protection of the natural environment, a development permit is also required before land may be altered.

Development permits issued pursuant to DPAs are flexible and can vary or supplement zoning and subdivision regulations and impose conditions on the sequence and timing of construction, but may not vary land use or density.⁵⁵ It is important to note that development permit conditions cannot include conditions for buildings that are dealt with through the building permit process. Development permit areas address land use, not building construction standards.

Development permits granted for a DPA for protection of the natural environment can:⁵⁶

- specify areas of land that must remain free of development, except in accordance with any conditions contained in the permit;
- specify natural features or areas to be preserved, protected, restored, or enhanced;
- require dedication of natural watercourses;
- require construction of works to preserve, protect, restore, or enhance natural watercourses or other specified natural features of the environment; and
- specify protection measures, including planting or retaining vegetation or trees in order to conserve, protect, restore or enhance fish habitat or riparian areas, control drainage, control erosion, or protect banks.

Development permits granted for a DPA for form and character of intensive residential, commercial, industrial and multi-family residential development can set requirements respecting the character of the development, including landscaping, and the siting, form, exterior design and finish

⁵¹ *Local Government Act*, s.919.1(1).

⁵² *Local Government Act*, s.919.1(2)(a).

⁵³ *Local Government Act*, s.919.1(2)(b) and s.919.1(3).

⁵⁴ *Local Government Act*, s.920(1).

⁵⁵ *Local Government Act* ss.920(3) and 920(4).

⁵⁶ *Local Government Act*, s.920(7).

of buildings and other structures.⁵⁷ However, for commercial, industrial and multi-family residential development, the requirements must relate only to the general character of the development and not to the particulars of landscaping or the exterior design or finish of buildings and other structures.⁵⁸ It is important to note that form and character DPAs do not apply to single detached housing unless it is considered “intensive,” such as small lot or infill development. In the context of a rural island, clustering housing or allowing any non-rural densities may be considered “intensive” residential development.

Existing legislation for DPAs enable staff and the Local Trust Committee to address forest retention for the protection of the natural environment, its ecosystems and biological diversity by requiring the maintenance of existing trees and planting of additional trees as a condition of the development permit. However, courts have limited DPAs for protection of the natural environment to specific ecological features, such as riparian corridors or a stand of mature trees, rather than forest cover of an entire island.⁵⁹ DPAs for protection of the natural environment may also be used to specify areas that must remain free of development, effectively clustering buildings into a more energy efficient layout. Subject to the discussion below about Bill 27, designating DPAs for the protection of the natural environment and creating guidelines for the retention of tree cover and clustering could have a secondary effect of decreasing GHGs, however DPAs could not be designated primarily for the purpose of decreasing GHGs.

Likewise, DPAs for form and character give local governments better control over the siting and design of new development by including conditions and standards in a development permit relating to how new buildings look or fit into the character of the neighbourhood. For residential development, local governments have typically used these DPAs to impose conditions on the aesthetic quality of small lot and multi-family development, and not for addressing energy efficiency, such as solar orientation and materials for building exteriors.

New legislation addresses these shortcomings in the ability to designate DPAs for GHG reduction purposes. Bill 27 enables the designation of development permit areas for the:⁶⁰

- Establishment of objectives to promote energy conservation;
- Establishment of objectives to promote water conservation;
- Establishment of objectives to promote the reduction of greenhouse gas emissions.

If an OCP designates land for these purposes, that land must not be subdivided, construction or alteration of a building must not be started, or the land or a structure on it must not be altered without first obtaining a development permit or qualifying for an exemption from a development permit.⁶¹

In order to provide for energy and water conservation and the reduction of greenhouse gas emissions, a development permit designated for these purposes may include requirements respecting:⁶²

- Landscaping, including restrictions on the type and placement of trees and other vegetation in proximity to the buildings and other structures;

⁵⁷ *Local Government Act*, s.920(8).

⁵⁸ *Local Government Act*, s.920(9).

⁵⁹ *Denman Island Local Trust Committee v. 4064 Investments Ltd.*, 2001 BCCA 736 (B.C.C.A.).

⁶⁰ At section 23, amending *Local Government Act* s.919.1(1).

⁶¹ At section 24, amending *Local Government Act* s.920.

⁶² At section 24, amending *Local Government Act* s.920.

- Siting of buildings and other structures;
- Form and exterior design of buildings and other structures;
- Specific features in the development; and
- Machinery, equipment and systems external to buildings and other structures

The new legislation specifically enables local governments to designate DPAs for the purpose of reducing GHGs and impose conditions for siting, exterior design and form. Any additional authority for forest retention must be derived from the ability to include requirements for “landscaping,” a definition of which could include tree retention and planting. The siting of buildings can include clustering development.

Some local governments already include guidelines that address GHG reduction in DPAs. For example, the City of Richmond’s guidelines include requirements for sunlight access, south-facing orientation of windows to maximize solar gain, and operable windows.⁶³

Local governments have considerable flexibility in applying DPA guidelines. This flexibility is both a benefit and a drawback. If guidelines are comprehensive, they provide staff and the Local Trust Committee with a fine-grained way to tailor development to specific sites before construction or site disturbance. On the other hand, to work effectively they require staff expertise to craft development permit conditions that reflect the site qualities and building plan. Many local governments apply boilerplate development permit conditions for the different types of objectives involved, for example requiring a landscape plan to show which trees will be retained and where new trees will be planted, or requiring compliance with a certain form and character. Finally, the only way to enforce development permits is through injunction proceedings in the Supreme Court.

Recommendation:

The Islands Trust is familiar with the use of DPAs and has an existing application and approval process in place. However, the energy efficiency and GHG reduction benefits of the siting of buildings and exterior form and character is minimal. The largest GHG reduction benefits from DPAs may flow from retaining trees.

Expand existing DPAs for the objective of reducing GHGs with particular focus on guidelines relating to tree retention trees.

3.4 Development Cost Charges

Subject to exemptions in the legislation, the CRD has jurisdiction to impose development cost charges (DCCs) on subdivisions or a building permit for new construction to help fund the cost of sewer, water, storm drainage, road and parkland upgrades needed as a result of new growth.⁶⁴ DCC rates can be set for different geographic areas in a community and can vary by land use and density.⁶⁵ This recognizes that different types of uses and locations have varying infrastructure servicing costs, with significant reductions in infrastructure costs for development in compact, complete communities, especially where development is in the form of infill and densification in established areas with existing unused servicing capacity.⁶⁶ High performance building features that reduce water requirements, sewage flows and storm run-off result in minor savings in local servicing

⁶³ Fraser Basin Council and Community Energy Association (2007). *Energy Efficiency & Buildings: A Resource for BC’s Local Governments* at 38.

⁶⁴ *Local Government Act*, s.933.

⁶⁵ *Local Government Act*, s.934(3).

networks. There are also potentially major savings in local government-wide servicing costs due to reduced need for new water supply and storage, water treatment capacity and municipal storm water systems brought about by high performance building design.

In the context of reducing GHG emissions, using DCCs to support high performance buildings will result in GHG reductions from a system-wide basis (water supply and treatment). DCCs do not apply directly to energy efficiency, but reductions in energy use and thus GHG emissions will result from lowering the demand for supplying and treating water, and the maintenance associated with those systems.

Local governments typically set DCCs for single detached, multifamily, and commercial/industrial uses, but rarely vary the rates depending on the location of the new development in the jurisdiction even though location is one of the most significant factors that influences the infrastructure cost associated with accommodating growth.⁶⁷ Kelowna and Nanaimo are notable exceptions because their DCCs for the city centre apartments are \$5000 less than residential units in suburban areas.⁶⁸

Bill 27 explicitly offers further jurisdiction to take into account development that reduced GHGs. It exempts small unit housing from development cost charges (DCCs) and requires local governments to consider the impact of developments with low environmental impact on DCCs. A DCC is not payable on self-contained dwelling units if, subject to certain bylaws and regulations, each unit is no larger than 29 square metres (312 square feet) and each unit is used solely for residential purposes.⁶⁹

Bill 27 creates a number of categories of development for which a local government may waive or reduce DCCs, subject to certain bylaws and regulations.⁷⁰ These categories are:

- not-for-profit rental housing, including supportive living housing;
- for-profit affordable rental housing;
- a subdivision of small lots that is designed to result in low greenhouse gas emissions;
- a development that is designed to result in low environmental impact.

A local government must also take into consideration how development designed to result in low environmental impact may affect the capital cost of infrastructure when setting DCCs in a bylaw.⁷¹ It must also consider whether DCC rates will discourage development designed to result in low environmental impact.

In the context of a rural island community, DCCs are inapplicable for the majority of lots under the existing zoning because new development will have on site servicing. Using tailored DCCs to level the playing field for servicing costs to core and suburban areas is irrelevant because DCCs that relate to GHG emissions can only be used in the core area. Using DCCs in Ganges Village will increase the per unit cost in the core, which may create a further incentive to develop rural sites. However, DCCs can be tailored to result in very little or no increase in cost to development, including those only requiring a building permit, that incorporates high performance design standards. This can act

⁶⁶ Coriolis Consulting Corp., *Do Development Cost Charges Encourage Smart Growth and High Performance Building Design?: An Evaluation of Development Cost Charge Practices in British Columbia* (Vancouver: West Coast Environmental Law, 2003).

⁶⁷ Coriolis Consulting Corp., *ibid.*

⁶⁸ Coriolis Consulting Corp., *ibid.* See the chart on page 16.

⁶⁹ At section 25, amending *Local Government Act* s.933.

⁷⁰ At section 27, adding *Local Government Act* s.933.1.

⁷¹ At section 28, replacing *Local Government Act* s.934(4).

as an incentive for all development in the core to meet energy efficient/low environmental impact standards. Development cost charges are, however, complex to establish and are a change in CRD service provision in Salt Spring Island.

Recommendation:

Pursue the use of DCCs as part of a comprehensive growth management and development financing review, not solely to promote green building.

3.5 Reduced Permit Fees & Fast Tracking Approvals for Energy Efficient Projects

A local government may not impose fees, charges or taxes that are not authorized by the *Local Government Act*, another Act, or a bylaw made pursuant to this statutory authority.⁷² The Islands Trust may impose application fees, and fees for inspecting works and services that are in addition to application costs, for OCP amendments, zoning, and development permits.⁷³ These fees must not exceed the estimated average costs of processing, inspection, advertising and administration that are usually related to the type of application or other matter to which the fee relates.⁷⁴ Reductions in application fees must relate to the reduced cost of processing, inspecting or administering approvals for energy efficient projects.

The CRD may, by bylaw, impose a fee or charge payable for all or part of a service, such as building permit approval and building inspection, of the regional district.⁷⁵ A bylaw may base the fee or charge on any factor specified in the bylaw, including establishing:⁷⁶

- different rates or levels of fees in relation to different factors;
- different classes of persons, property, businesses and activities and different fees or charges for different classes; and
- terms and conditions for payment, including discounts, interests and penalties.

This section allows the CRD to charge fees for services, such as building permitting and inspection. It enables different fees for different classes of property, activities or factors. If energy efficiency can be viewed as a different factor relating to the building permit process, it may allow for different fees for high performance buildings. Dictionary definitions of the word “factor” include anything that contributes to a result, a component, an independent variable.⁷⁷ Viewed in its plain meaning, the energy efficiency of a building would appear to be a factor in providing the service of building permit approval.

It is important to note that the CRD has separate authority to reduce, waive or refund permit fees.⁷⁸ However, that authority relates to an applicant not needing the service or having already paid for it. Lower fees for energy efficient buildings should stand as their own fee, rather than as a fee reduction, or should be termed a “discount”.⁷⁹

⁷² *Local Government Act*, s.931(6).

⁷³ *Local Government Act*, s.931(1)(a-b, e). These fees are subject to regulation (s.931(3), however the provincial government has not enacted regulations establishing or limiting fees.

⁷⁴ *Local Government Act*, s.931(2).

⁷⁵ *Local Government Act*, s.363(1).

⁷⁶ *Local Government Act*, s.363(2)(b-d).

⁷⁷ The author did not find any case law considering the meaning of the word “factor.”

⁷⁸ *Local Government Act*, s.363(2)(e).

⁷⁹ Discounts are specifically enabled under s.363(2)(d).

Several municipalities are “fast tracking” green developments. For example, Saanich gives priority service to applications for building permits where they meet or exceed the Built Green, R-2000, Energuide 80, or 25 percent better than Model National Energy Code for Buildings.⁸⁰ When a local government has adopted an OCP or zoning bylaw it must define procedures by which a landowner may apply to amend the OCP or bylaw, or obtain a development permit.⁸¹ Local governments must consider all applications.⁸² The legislation and case law do not give additional direction on the authority to establish procedures, and local governments have wide latitude to consider, accept and deny applications.⁸³ In general, where the legislation gives local governments discretionary power, such as to establish its own procedures, the board has the ability to adopt whatever legal means suits its purpose.⁸⁴

From an administrative perspective, the CRD and Islands Trust already have procedures for development applications so modifying the process to accommodate energy efficient development should not be difficult. However, given staffs existing workload and need for professional development on evaluating proposals incorporating energy efficiency, setting expectations of an expedited process may be unrealistic.

Recommendation:

Create a tailored building permit fee for energy efficient buildings.

3.6 Parking In-Lieu Fees for Alternative Transportation and Transit

Bill 27 allows parking-in-lieu fees to be used for alternative transportation infrastructure.⁸⁵ If a local government, by bylaw, requires owners or occupiers to provide off-street parking or pay a parking-in-lieu fee, the local government must establish a reserve fund to either provide parking spaces or transportation infrastructure that supports walking, bicycling, public transit or other alternative forms of transportation. If a local government enacts a bylaw under this section, it does not apply to land, buildings or other structures existing at the time the bylaw came into force as long as the land or buildings continue to be put to a use that does not require more off-street parking than was required for the use existing at the time the bylaw came into force.⁸⁶

While the number of parking stalls created on Salt Spring Island in the Ganges area, or in-lieu fees paid, is small, an alternative transportation fund could be a symbolic and important part of supporting the new public transit minibus route on the Island, or for partially funding greenway/transportation corridor planning and construction.⁸⁷

Recommendation:

Evaluate whether there are sufficient applications for development that involve parking spaces per year or per five years that would warrant using parking-in-lieu fees for alternative transportation infrastructure.

⁸⁰ Russ Fuoco, Director of Planning District of Saanich. Powerpoint presentation.

⁸¹ *Local Government Act*, s.895(1). The permit refers to a permit under Part 26 of the *Act*.

⁸² *Local Government Act*, s.895(2).

⁸³ William Buholzer (2007). *British Columbia Planning Law and Practice* (Toronto: Butterworths) at 16-1 to 16-2.

⁸⁴ Ian M. Rogers (2008). *The Law of Municipal Corporations* (Toronto: Thomson Carswell) at 406.12.

⁸⁵ At section 22, amending s.906 of the *Local Government Act*.

⁸⁶ Section 906(5).

⁸⁷ See Capital Regional District bylaws *Salt Spring Island Community Transit and Transportation Services Establishment Bylaw No. 3438* and *Salt Spring Island Community Transit and Transportation Commission No. 3450*.

3.7 Limiting Impervious Surfaces and Tree Cutting

There is some data that suggests retaining trees is an important GHG reduction strategy because existing trees hold captured carbon that will be released if burned. The Islands Trust may, by bylaw, establish the maximum percentage of the area of land that can be covered by impermeable material.⁸⁸ The Islands Trust has considerable discretion in the applicability of such a bylaw as it may set different standards for different zones, uses, areas, terrain, surface or groundwater conditions, and sizes of paved or roof areas.⁸⁹ Impermeable material includes, at least, paved areas and areas where a building is situated, as inferred from the wording of the section in the *Local Government Act*.⁹⁰ The relevance of this section for this project is in its applicability to maintaining forested cover. While development permit areas are a more effective way to control the forest cover for climate change purposes, regulating runoff control by limiting the total imperviousness of rural properties could have the effect of maintaining a percentage of existing forest. However, an impervious surface bylaw cannot prohibit the cutting of trees.

The Islands Trust may designate tree-cutting permit areas only on lands that it considers to be subject to flooding, erosion, land slip or avalanche (“hazard” lands).⁹¹ Within these areas, the Islands Trust may, by bylaw, regulate or prohibit the cutting down of trees and may require owners to obtain a permit before cutting a tree. This significantly limited scope restricts the Islands Trust’s jurisdiction to hazard lands and forest retention for GHG reduction purposes would be a secondary effect of regulating tree cutting on these lands.

Creating these new bylaw processes will require administrative resources, particularly for enforcement. Although impermeable surface requirements can be contained in existing bylaws, such as zoning, measurement of impermeable surfaces on rural properties is challenging. Likewise, enforcement of tree cutting bylaws in rural areas is also difficult. However, regulatory bylaws can providing a more simple way of enforcing infractions of development permits. If contravening a development permit is also a regulatory offence, ticketing can be used.

Recommendation:

Consider adopting a tree cutting bylaw on hazard lands in, for example, development permit area 6 and all lands over a specified slope gradient to bolster enforcement opportunities.⁹²

⁸⁸ *Local Government Act*, s.907(2).

⁸⁹ *Local Government Act*, s.907(3).

⁹⁰ A search did not reveal any case law considering s.907.

⁹¹ *Local Government Act*, s.923.

⁹² It is unclear in Map 23 of the Official Community Plan whether the ratings on these lands is based on slope or soil composition.

4. Legal and Administrative Implications

4.1 Legal Exposure of Local Trust Committee

In B.C. local governments are subject to oversight from the courts for the following limited grounds:⁹³

- evaluating whether the local government followed the statutory procedures required for making a bylaw or regulation;
- determining whether the local government acted within its jurisdiction as set out by its enabling legislation, or whether the bylaw or regulation is ultra vires its jurisdiction;
- determining whether the local government improperly delegated its powers;
- considering whether the regulation or bylaw is invalid on other grounds; and
- interpreting the application of the bylaw or regulation.

Local government authority to use or not to use its discretionary legislative authority to enact bylaws is largely unfettered. A court will not overrule the public interest basis or appropriateness of a particular land use policy or regulation unless it is unreasonable or there was some non-public interest reason for enacting it, such as bias or discrimination.⁹⁴ Challenges to bylaws usually relate to whether the local government had jurisdiction under its enabling legislation to enact a regulation, or enacted the regulation through the proper process (including a public hearing for zoning and OCP amendments) and for a proper public purpose without bias or improper discrimination. However, bylaws and regulations, even when properly enacted, may be subject to challenge by parties who believe their interests have been affected.

The Islands Trust is not liable to compensate any person for a reduction in property value, or any other loss or damages, which result from adopting an OCP or other land use bylaw, or from issuing a development permit.⁹⁵ For the purposes of this project, changes to land use bylaws to which this rule applies include zoning, density bonus, parking, and screening and landscaping. Land use regulations do not expose a local government to much potential liability.

More generally, liability in the sense of being required to pay damages for errors made by local government staff may result when a local government does not follow its operations policies, as set out in bylaws, schedules to bylaws, or other policies, and harm occurs.⁹⁶ This potential liability in negligence does not generally apply to local government legislative decisions, such as issuing a development permit. Local governments are not liable in negligence for policies, such as whether to inspect or not inspect buildings, but are responsible for damage that occurs when they do not fulfill their operations in a non-negligent manner, such as failing to adequately inspect a building or not inspecting according to a policy. This type of liability already exists for the CRD and for many local governments with their building permit and inspection function. Including energy efficiency standards should not increase this liability but will require staff to become familiar with new procedures, for example ensuring a registered professional's report will be relied upon, or with

⁹³ William Buholzer (2007). *British Columbia Planning Law and Practice* (Toronto: Butterworths) at 2-1.

⁹⁴ See, for example, *Kamloops (City) v. Nielsen* (1984) 26 M.P.L.R. 81 S.C.C. where the court distinguished between policy decisions and liability for negligence in operations.

⁹⁵ *Local Government Act*, s.914.

⁹⁶ See, for example,

energy efficiency standards. A more nuanced discussion of liability requires the specific assessment of a particular bylaw or regulatory approach.

Finally, as discussed in section 1.3 above, buildings constructed under a permit do not need to be upgraded when new regulations are enacted. New construction must conform to the new rules. Where changes in land use regulations such as zoning make existing uses unlawful, as long as the existing use is not discontinued for a period of six months it will be allowed to continue as a legal non-conforming use. Applicants for development permits may also seek variances from new land use regulations, primarily for the siting, size, dimensions of structures and other features in building regulation

4.2 Ability to Require Use of the Sustainability Checklist

Local governments are increasingly using sustainability checklists to evaluate development proposals. They are a short hand way to compare a project's design to specific OCP and bylaw requirements. Local governments usually view the purpose of sustainability checklists as both educative for staff, decision-makers and the applicant, as well as a benchmark to reject proposals that do not meet a specific standard or rating.

A local government with an OCP or zoning bylaw must define, by bylaw, its procedures under which an owner of land may apply for an amendment to the OCP, zoning bylaw or for the issue of a development permit.⁹⁷ This procedure includes the ability to require specific information to evaluate an application, but not for subdivision because it is the approving officer who has the authority to establish the procedures to be followed for subdivision applications.⁹⁸

The ability to require information as part of an application is bolstered by a local government's authority to designate in OCPs areas or circumstances for which development approval information on the potential impacts of development may be required. The Islands Trust may expect this information for applications for zoning bylaw amendments, development permits, or temporary commercial or industrial use permits.⁹⁹ The impacts for which information may be requested is unrestricted in the legislation.

The difference between these two separate powers should be noted – the first enables the Islands Trust to require information about a proposed project as part of the development approval application. The second allows the Islands Trust to request information about the impact of a proposed project. Using a checklist to evaluate the GHG implications of a proposed permit or project may involve both of these powers, and, used concurrently, it is likely that the content requested in a checklist would be authorized under these sections. However, the specifics of a particular checklist should be evaluated in light of this jurisdiction. Both involve enacting bylaws on the procedures to be used.

If a sustainability checklist will be used as a benchmark to accept or reject applications, the criteria in the checklist should relate directly to development standards established in regulatory bylaws, development permit guidelines, or the official community plan. In any case, the Islands Trust must

⁹⁷ *Local Government Act*, s.895(1). The author did not find any case law considering the scope of s.895.

⁹⁸ *Land Title Act*, R.S.B.C. 1996 c.250, s.86. This is in contrast to s.931 that allows a local government to charge a subdivision application fee.

⁹⁹ *Local Government Act*, s.920.01.

be careful to tie each standard in the checklist to a policy, such as an OCP policy, or standard enshrined in a bylaw.

4.3 Implications for Other Local Governments

The analysis in this report applies equally to other Local Trust Committees of the Islands Trust, however the services provided by the regional district in which other islands are located may be different than those described here.