

Developers Beware Grave Tampering: \$1 million Fine

Business Examiner South
Aug 07 2006

Photo caption: DIGGING FOR DOLLARS but penalties await the negligent

Let the excavator beware-and let the buyer beware even more, because not only the oil, the gas and the gold under Vancouver Island's surface belongs to the provincial government, but so do any heritage artifacts-such as First Nations burial and village sites.

And the developer who knowingly disturbs such things faces up to a \$1-million fine or up to two years in jail.

Poet's Cove Resort on Galiano Island is being prosecuted on just such a charge: the trial date will be set in a Victoria court room in the third week of this month.

If the trial proceeds, it will be the first such case to do so, a cause of considerable unhappiness among First Nations, especially the Hul'qumin'num Treaty Group (HTG) of bands living between Nanaimo and Duncan, whose ancestors' remains were allegedly used for road fill by Poet's Cove builders.

There's nobody particularly happy with the Heritage Conservation Act-not those concerned with preservation and protection of artifacts and remains and not developers of resorts like Poet's Cove or Bear Mountain.

But Poet's Cove was charged because it was, allegedly, built on a site well known to the government and First Nations-and to the developer. On the other hand, the Bear Mountain development, frozen by a stop order issued by the city of Langford, is on no known site: not so much as a single arrowhead or bone fragment has ever being found or even rumoured.

The initial stop order was for 30 days and it was intended to give Bear Mountain time to do an archeological assessment. It has since been extended with the agreement of both parties another 60 days for this process and for consultation with First Nations-again. That's a minimum delay: if a village, burial or spiritual site turns up, the wait to resume work, to replan buildings or roads will add to the wait and cost.

What is especially frustrating to developer Les Bjola is that five years ago the company checked with the Archeology Branch and "They told us the land was of no interest." The government also provided Bear Mountain a list of five First Nations bands who might have an interest in the land. All were notified of the project, says Bjola, but none responded.

Silence did not, as it turns out, mean assent. Now that one of the five, the Songhees, raised the possibility of artifacts or a heritage site, Langford mayor Stew Young has suddenly become heritage conscious and not only required Bear Mountain to do an archeological survey but is making noises about all developable land in the city being surveyed archeologically-at the developers' expense.

If so, it would be just fine with the provincial government's Archeology Branch, which would like to see all municipalities make developers commission an "archeological overview" as part of the application for a project.

Justine Batten, director of the branch, says the projects that are accompanied by such surveys now represent "the tip of the iceberg." The great majority of developments proceed without even the overview.

The overview by an archeological consultant consists of a search of historical and legal records for evidence of human activity and a consideration of the site's geology and topography.

There is an even less onerous step that could be taken-without cost-but few taken even this step: a data request to the Archeology Branch, which will respond based on its own evaluation of the project's geography and its records of 23,000 known heritage sites in the province.

The branch will rate the development's location as having high, low or no value.

While this does not remove developers' obligation to leave undisturbed any heritage sites, it does show due diligence on their part, so that if the power shovel's teeth do damage a midden before its contents are discovered, the government will be less inclined to prosecute.

Robert Morales, chief treaty negotiator for the HTG, says the act, though already the strongest in North America "on paper," needs to be strengthened so that developers are required to at least do the initial check. "It would make it far less tempting to just ignore a discovery made further down the process."

As Morales sees it, it is far too tempting for the developer to ignore the issue until artifacts or human remains are uncovered, and when they are, to ignore it and proceed as if it never happened. "By that time so much time, money and planning has gone into it that developers may find it difficult to report."

Michael Klassen, president of the BC Association of Professional Archeologists, agrees. Provincial ministries and agencies such as Forests, Mines, and BC Hydro, require projectors to conduct archeological assessments as a condition of approval.

Not so municipalities, as Bear Mountain has discovered. Klassen says it would be good if there were a protocol between the Archeology Branch and all municipalities agreeing that at least an online map check be done by an archeologist in order to obtain a development permit.

If the preliminary overview indicates little archeological potential the development may proceed. But if potential is found a field reconnaissance by the consultant is in order. By walking the ground and by minor excavations with augers and shovels, the consultant may well rule out further work. Or he may find evidence of human activity.

In this case an archeological impact assessment must be done, in which the archeologist advises the Archeology Branch of the site's contents and values and recommends whether the project can proceed as planned without doing any damage, or whether it must be altered, or whether it cannot be adjusted. Ultimately, the artifacts may be removed, or the Archeology Branch may rule that a site may simply be recorded and then destroyed.

But once a site is discovered, no work can proceed without a permit from the Archeology Branch. Any firm that proceeds knowingly without one faces that million-dollar fine if damage is done.

Comments a disgruntled Les Bjola on the current laissez faire approach: "You follow all their regulations and directions and you assume you get to do your project." But no, "the municipality has ordered us to do another report. And according to our master development agreement the development will at all times be done under the direction of the city of Langford. We are absolutely not satisfied with the government and we've expressed our dissatisfaction to the ministry."

And the fact that the five First Nations did not respond five years ago has no force today. "You want to get them to sign off in writing," advises Ken Weaver, a real estate consultant.

Weaver also advises doing archeological assessment up front in many cases. "There are probably hundreds of archeological sites under the city of Victoria and we know about only a few of them." But the risk can be mitigated. "Anyone developing waterfront between here and Sooke should get an archeological assessment done. For a small property it's not going to cost more than \$500."

In any case, if you uncover something, down tools. "You don't want to just go in and dig if you hit a midden. If you consult carefully you will generally be able to continue with the project."

But better yet, consult before any work proceeds at all—even before buying the property. Weaver advises writing into the purchase agreement a "subject to" involving the result of an overall archeological assessment.

Are developers ignoring archeological finds? Yes, says Morales. "We get a half dozen reports a year of recorded or unrecorded sites being disturbed. Poet's Cove is the first prosecution in the province we are aware of." Morales says the HTG is not opposed to development. "But it is very important to our people that their ancestors' burial sites are treated with respect."