Forest Appeals Commission

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

DECISION NO. 2012-PMF-001(a)

In the matter of an appeal under section 33 of the *Private Managed Forest Land Act*, S.B.C. 2003, c. 80.

BETWEEN:	Oceanview Golf Resort & Spa Ltd.	**APPELLANT**
AND:	Private Managed Forest Land Council	**RESPONDENT**
BEFORE:	A Panel of the Forest Appeals Commission Loreen Williams, Panel Chair	
DATE:	Conducted by way of written submissions concluding on April 17, 2012	
APPEARING:	For the Appellant:	Timothy J. Huntsman, Counsel
	For the Respondent:	Daniel R. Bennett, Counsel Emily Lapper, Counsel

APPEAL

[1] This appeal is brought by Oceanview Golf Resort & Spa Ltd. from the reconsideration decision dated November 24, 2011, of Trevor Swan, the Chair of the Private Managed Forest Land Council (the "PMFLC"), made pursuant to section 32 of the *Private Managed Forest Land Act* (the "*Act*"). The reconsideration decision confirmed the earlier determination by the PMFLC that the Appellant must pay an exit fee under the *Private Managed Forest Land Regulation,* B.C. Reg. 371/2004 (the "*Regulation*") for five parcels of land (the "Subject Lands") owned by the Appellant. The Subject Lands were declassified and withdrawn from the Private Managed Forest Land Program on January 1, 2011.

[2] The Forest Appeals Commission has the authority to hear this appeal under section 33 of the *Act*, which states:

Appeal to commission

33 (1) A person who is the subject of an order, a decision or a determination of the council under section… or 32 may appeal the order, decision or determination to the commission in accordance with the regulations.

…

(15) An appeal under this section to the commission is a new hearing and at the conclusion of the hearing, the commission may

(a) by order, confirm, vary or rescind the order, decision or determination,

(b) refer the matter back to the council or authorized person for reconsideration with or without directions,

(c) order that a party or intervenor pay another party or intervenor any or all of the actual costs in respect of the appeal, or

(d) make any other order the commission considers appropriate.

[3] The Appellant asks the Commission to rescind the reconsideration decision, and exempt the Appellant from all exit fees for the withdrawal of the Subject Lands from the Private Managed Forest Land Program; or alternatively, recalculate the exit fee based on exemptions for portions of the Subject Lands that are designated for parks, public utilities and right of ways.

BACKGROUND

Overview of the statutory scheme

[4] The *Act* applies to all private land that is classed by BC Assessment as "managed forest" under the *Assessment Act*, R.S.B.C. 1996, c. 20 (the *"Assessment Act*"), except private managed forest land in a tree farm licence area, woodlot licence area or a community forest agreement area. The "managed forest" class of property was established to encourage owners to manage their land for long-term forest production. Essentially, land in the managed forest class generally has a lower assessed value than other land classes such as residential, but the landowner must make a commitment to manage the land in compliance with the requirements of the *Act* and its regulations, which are intended to encourage reforestation and the protection of key environmental values.

[5] The PMFLC is an independent provincial agency established under the *Act* to administer certain aspects of the Private Managed Forest Land Program.

[6] Owners can voluntarily enter and exit their property from the managed forest class by providing notice to the PMFLC. Owners may apply to have land included in the managed forest class by submitting an application to the PMFLC that complies with the *Act*. Requirements include a minimum property area of 25 hectares, a 15 year commitment to the Private Managed Forest Land Program, and an acceptable "management commitment" setting out, among other things, the long-term forest management objectives for the property and how they will be achieved. The application is then forwarded to BC Assessment, which determines whether the property may be classed as managed forest under the *Assessment Act*. If the application is accepted, the *Act* and its regulations apply to the land as of January 1 of the next fiscal year, at which time the property is added to the BC Assessment roll as managed forest land.

[7] When a parcel of land classified as private managed forest land is sold, the holder of the management commitment must give notice of the sale to the PMFLC within 30 days of the sale, pursuant to section 11 of the *Private Managed Forest Land Council Regulation*, B.C. Reg. 182/2007 (the "*Council Regulation*"). To maintain the land's classification as managed forest, the purchaser must submit a management commitment for approval to the PMFLC pursuant to section 17 of the *Act*. If the purchaser fails to submit such a commitment, or it is not approved by the PMFLC, the land will be declassified under section 24 of the *Assessment Act*.

[8] When lands are declassified or withdrawn from the Private Managed Forest Land Program, the new owner may be liable to pay an exit fee if the property has been managed forest land for less than 15 years. Pursuant to the *Act* and *Regulation,* the PMFLC must determine whether an exit fee is payable, and if so, it must apply the formula set out in section 2(3) of the *Regulation* to calculate the amount of the fee. Exit fees are paid to the appropriate local government.

[9] Section 3 of the *Regulation* sets out certain exemptions from exit fees. Particularly relevant in this case are the exemptions in section 3(1)(a) and (c), whereby an owner is not required to pay an exit fee in respect of a portion of land that has been declassified that "is subject to a right of way or easement" or "is gifted to the government or local government".

Classification of the Subject Lands

[10] The Subject Lands are comprised of five parcels of land located near the City of Nanaimo (the "City") described as: PID 004-674-502 ("Parcel #1"), PID 008-747-741 ("Parcel #2"), PID 008-991-529 ("Parcel #3"), PID 008-991-570 ("Parcel #4"), and PID 023-922-907 ("Parcel #5").

[11] In 2005, the Subject Lands were owned by Island Timberlands GP Ltd. ("Island Timberlands") until they were purchased by Cable Bay Lands Inc. ("Cable Bay"), a predecessor company to the Appellant. At the time of purchase, the Subject Lands were classified as private managed forest land over which Island Timberlands had a management commitment.

[12] After the sale of the Subject Lands to Cable Bay, Island Timberlands notified the PMFLC of the withdrawal of its management commitment.

[13] Cable Bay did not submit a management commitment for the Subject Lands in 2005. As a result, the lands were declassified as managed forest land by BC Assessment.

[14] On June 1, 2006, Cable Bay submitted a management commitment to the PMFLC so that the Subject Lands could be reclassified as private managed forest land. The management commitment was accepted by the PMFLC and, as of January 1, 2007, the Subject Lands were reclassified as managed forest land.

[15] On June 25, 2007, Cable Bay submitted a notice of withdrawal to the PMFLC for Parcels 3 and 4. As of January 1, 2008, Parcels 3 and 4 were declassified as private managed forest land.

[16] After the removal of Parcels 3 and 4, Cable Bay paid an exit fee to the City for their removal.

[17] On September 18, 2008, Cable Bay applied to the PMFLC for the reclassification of Parcels 3 and 4 as private managed forest land. Due to the date of the application, and by the time the PMFLC completed the review and approval of the management commitment, it was too late for the reclassification of those parcels in 2009. Parcels 3 and 4 were reclassified as private managed forest land as of January 1, 2010.

The Development Approval Process with the City

[18] Since 2005, Cable Bay, and later the Appellant, have been involved in the development approval process with the City for the Oceanview Golf Resort & Spa subdivision.

[19] This development approval process has four phases. In the first phase, the Subject Lands are designated as "Resort Centre" under the Official Community Plan Bylaw (the "OCP Bylaw"). In the second phase, the City and the Appellant negotiate a Master Plan for the future land use designations and policies for the development. In the third phase, the City and the Appellant enter into a Phased Development Agreement for the implementation of the land uses set out in the Master Plan and to determine the amenities, servicing and rezoning of the Subject Lands. In the final phase, the Appellant will apply for development permits and the City will approve subdivision plans.

[20] As part of that process, section 941(1) of the *Local Government Act,* R.S.B.C. 1996, c. 323, requires that 5% of the land proposed by a developer for subdivision by a local government be provided to the local government without compensation.

[21] By letter to the Appellant dated September 16, 2008, the City provided preliminary concerns and comments on the revised concept plan submitted by the Appellant in August of 2008. Mr. Tucker, the Director of Planning and Development for the City, indicated at paragraph 10 that a minimum of 5% of the Subject Lands "shall be dedicated as park". This policy is found in section 2.9 of the OCP Bylaw entitled: "Parks and Open space Policy 2.8.4".

[22] The OCP Bylaw sets out the City's policy as follows at page 57:

> The City will encourage subdivision applicants to dedicate more than 5% of a parcel where portions of the parcel are largely undevelopable, and the proposed dedicated area can serve some park or open space functions, protect environmentally sensitive areas and/or avoid natural hazards.

[23] In the September 16, 2008 letter, the City also required the Appellant to remove the Subject Lands from the Private Managed Forest Land Program due to the future change of use proposed under the Master Plan. That was required because section 21 of the *Act* prohibits local governments from adopting a bylaw or issuing a permit under Part 21 or 26 of the *Local Government Act* in respect of private managed forest land that would have the effect of restricting a forest management activity.

[24] As of the conclusion of submissions on this appeal, the Appellant has completed the first two phases of the development approval process. Phase one: on September 8, 2008, the City passed a new OCP Bylaw and designated the

Subject Lands as "Resort Centre". Phase two: the completion of the Master Plan, which was approved by the City by way of an amendment to the OCP Bylaw on February 18, 2010.

[25] The City and the Appellant jointly negotiated the terms of the Master Plan for the development which addressed future land use designations and policies for the development including park spaces and amenities. The Master Plan commits 95.3 acres of park land, 42 acres of rights of way, and 1.9 acres for community service and public utility from a total development area of 421.3 acres.

Withdrawal of the Subject Lands and the Exit Fee

[26] In December 2009, the Appellant notified the PMFLC of its intention to withdraw its management commitment for the Subject Lands. BC Assessment published notice of the declassification as of January 1, 2011.

[27] On April 4, 2011, the PMFLC notified the Appellant that the exit fee for the declassification of the Subject Lands was $312,957.20. In calculating that fee, the PMFLC applied the formula in section 2(3) of the *Regulation*, and took into account the number of years the specific parcels of land had been classified as managed forest land. It determined that Parcels 1, 2 and 5 had been managed forest land for four years (from 2007 to 2010, inclusive), and Parcels 3 and 4 had been managed forest land for one year (2010).

[28] On April 12, 2011, the Appellant notified the PMFLC that it wished to "appeal" the April 4, 2011 exit fee determination of the PMFLC. Under section 32 of the *Act*, the PMFLC may rescind or vary an order, decision or determination made by the PMFLC. The Chair of the PMFLC conducted a reconsideration of the matter.

[29] The Appellant asked the Chair to reconsider two issues: (1) the amount of the exit fee; and (2) the valuation of the Subject Lands by BC Assessment. On the first issue, the Appellant submitted that the PMFLC had not taken into consideration the fact that a portion of the Subject Lands had been gifted to the City, and therefore, and exemption from the exit fee may be applicable under section 3(1)(c) of the *Regulation*. On the second issue, the Appellant submitted that the valuation included the lands denoted in the Master Plan as parks, public utilities and public service, which may have overstated the valuation of the Subject Lands and resulted in an incorrect calculation of the exit fees payable.

[30] On November 24, 2011, the Chair of the PMFLC issued the reconsideration decision, which upheld the April 4, 2011 decision of the PMFLC. Regarding the amount of the exit fee, the Chair concluded that, despite his authority under section 32 of the *Act*, section 3(b) of the *Council Regulation* precluded him from reconsidering how the exit fee calculation formula was applied. Regarding the valuation of the Subject Lands, he concluded that the PMFLC was obligated to rely upon a valuation of the Subject Lands made by BC Assessment under the *Assessment Act* to reach its calculation, and therefore, any appeal of the actual valuation made by BC Assessment required an appeal under the *Assessment Act*.

[31] Also in regard to the second issue, and whether an exemption under section 3(1) of the *Regulation* applied, the Chair stated:

> The Council finds that the denoted lands were transferred to a local government and that the owner received a benefit from that transfer in the form of being a condition of the approval of the development. Therefore, the Council does not consider that the transfer of the denoted lands constituted a gift. Accordingly, the type of exemption from the applicability of the exit fee as set out in section 3 (1) (c) of the PMFLR [*Regulation*] is not applicable in the circumstances.
>
> In consideration of the above, the Council affirms its decision that an exit fee is appropriate in respect of the denoted lands. As stated in paragraph 4, the Council has not reconsidered the calculation of the amount of the exit fee.
>
> [underlining added]

[32] On January 6, 2012, the Appellant appealed the reconsideration decision to the Commission. The grounds for appeal in the Appellant's Notice of Appeal have been summarized by the Panel as follows:

1. the PMFLC erred in interpreting the word "gift" when it held that the donor of a gift receives nothing;
2. section 19 of the *Act* and section 3(1) of the *Regulation* indicate that an owner should receive compensation for gifting land; and
3. the PMFLC erred in finding that the Subject Lands were transferred to the City and the owner received a benefit from the transfer in the form of a condition of approval for development.

[33] In addition, the Panel has summarized the main arguments raised in the Appellant's submissions, as follows:

1. no exit fee is payable, because the Subject Lands were private managed forest land for more than 15 consecutive years when they were purchased by the Appellant;
2. section 2(1) of the *Regulation* should be interpreted as requiring that the PMFLC refrain from levying an exit fee until the Appellant's development process has concluded, such that all parties know exactly what portions will constitute right of ways and what portions will be gifted to the City as parkland above the 5% that is "provided" to the City pursuant to the *Local Government Act*; and
3. the portions of the Subject Lands that will be gifted to the City or subject to a right of way or easement, in accordance with the Master Plan, are exempt from the exit fee under section 3(1) of the *Regulation*.

[34] The Respondent submits that the appeal should be dismissed, because:

1. when the exit fee was determined, the Subject Lands had not been classified as managed forest land for more than 15 consecutive years;
2. the statutory framework requires that BC Assessment declassify managed forest land by September 30, and the PMFLC must determine the amount of the exit fee when BC Assessment declassifies the land, rather than at a future date when the development process is complete; and

3. when the Subject Lands were declassified, none of them fell within any of the exemptions in section 3(1) of the *Regulation*; or alternatively, the portions of the Subject Lands designated in the Master Plan as parks or public utilities are not "gifts" within the meaning of section 3(1).

[35] Both parties provided affidavit evidence in support of their submissions.

RELEVANT LEGISLATION

[36] Section 17 of the *Act* addresses how land becomes private managed forest land. One of the requirements is set out in section 17(1)(b). It states that the management commitment must contain:

> (b) an acknowledgement of the requirements to
>
> (i) pay the annual administration fee under section 9
>
> (ii) pay the exit fee under section 19, if applicable, and
>
> (iii) otherwise comply with this Act and the regulations.

[37] Section 19 of the *Act* addresses exit fees and exemptions. It states:

Exit fee

19 (1) Except when exempted by regulation or in prescribed circumstances, an owner must pay an exit fee in accordance with the regulations if the assessor declassifies the land under section 24(3)(b) of the *Assessment Act.*

...

[38] Sections 2 and 3 of the *Regulation* set out the prescribed requirements for exit fees and exemptions:

Exit fees

2 (1) Subject to section 45 (2) of the Act and section 3 (1), if the assessor declassifies managed forest land under section 24 (3) (b) of the Assessment Act, the council must

> (a) determine, in accordance with subsection (2), the amount of the exit fee that the owner of the land is required to pay under section 19 (1) of the Act, and
>
> (b) notify the owner of the amount of the exit fee.

(2) For the purpose of subsection (3) the assessor may determine the total annual property tax that would have been due for the property that is

being removed from the managed forest land class, had that property not been valued and classified as managed forest land for the immediately preceding tax year roll, less the total property tax that was payable for the immediately preceding tax year on the property that is being removed from the managed forest land class.

(3) The exit fee referred to in subsection (1) is the amount determined by finding the product of the following:

Total annual property tax as determined under subsection (2)

Multiplied by

Number of consecutive years ending in the current tax year that the property has been classified as managed forest land

Multiplied by

Adjustment Factor noted in Schedule B for the number of years classified as managed forest land for assessment purposes.

(4) If the estimated total annual property taxes for the property for the immediately preceding tax year based on reclassification out of the managed forest land class is less than the total annual property taxes payable for the property in the managed forest land class for the immediately preceding tax year, no exit fee is payable.

(5) If the property has been classified managed forest land for 15 or more years, no exit fee is payable.

(6) In determining the number of years a property was classified as managed forest land for the purposes of the calculation under subsection (3), the time the property was classified as managed forest land before the coming into force of this section will be included.

Exemption from exit fees

3 (1) For the purpose of section 19 (1) of the Act, the circumstances in which an owner is not required to pay an exit fee in respect of a portion of land that has been declassified under section 24 (3) of the *Assessment Act* are that the portion of land

(a) is subject to a right of way or easement,

(b) is expropriated,

(c) is gifted to the government or local government, or

(d) is subject to a land exchange with the government or local government.

(2) Despite subsection (1), if land is declassified as a result of notification to the assessor under section 31 (1) of the Act, the owner must pay the exit fee calculated under section 2.

[39] Additional provisions that are relevant to this appeal are as follows:

Local Government Act

Provision of park land

941 (1) Subject to section 905.1 (4) (h) and (4.1), an owner of land being subdivided must, at the owner's option,

(a) provide, without compensation, park land of an amount and in a location acceptable to the local government, or

(b) pay to the municipality or regional district an amount that equals the market value of the land that may be required for park land purposes under this section determined under subsection (6).

(2) Despite subsection (1), if an official community plan contains policies and designations respecting the location and type of future parks, the local government may determine whether the owner must provide land under subsection (1) (a) or money under subsection (1) (b).

...

(4) The amount of land that may be required under subsection (1) (a) or used for establishing the amount that may be paid under subsection (1) (b) must not exceed 5% of the land being proposed for subdivision.

...

Assessment Act

24 (3) The assessor must declassify all or part of a parcel of land as managed forest land if the assessor is

(a) notified by September 30 of the year in which the assessment roll is completed,

(i) under section 31 (1) of the *Private Managed Forest Land Act* that the owner or a contractor, an employee or an agent of the owner has contravened or is contravening a provision of that Act or the regulations made under it, or

(ii) under section 31 (2) (b) of the *Private Managed Forest Land Act* that the owner has withdrawn his or her management commitment, or

(b) not satisfied, on September 30 of the year in which the assessment roll is completed, that the land meets all requirements to be classified as managed forest land.

ISSUES

[40] The Panel has considered the following issues:

1. Whether an exit fee is not payable on the basis that the Subject Lands were private managed forest land for more than 15 consecutive years, and therefore, are exempt under section 2(5) of the *Regulation*.
2. Whether section 2(1) of the *Regulation* should be interpreted to require that exit fee determinations only be made upon the completion of a development process.
3. Whether portions of the Subject Lands are subject to an exemption from the exit fee because, under the Master Plan, they:
   (a) will be transferred to the City in addition to the 5% required by the *Local Government Act* and constitute land that "is gifted" under section 3(1)(c) of the *Regulation*; or
   (b) will be "subject to a right of way or easement" under section 3(1)(a) of the *Regulation*.

DISCUSSION AND ANALYSIS

1. Whether an exit fee is not payable on the basis that the Subject Lands were private managed forest land for more than 15 consecutive years, and therefore, are exempt under section 2(5) of the *Regulation*.

The Appellant's submissions

[41] The Appellant's original position was that under section 2(5) of the *Regulation*, it was exempt from paying an exit fee for any of the Subject Lands because that land had been private managed forest land for more than 15 consecutive years when it was acquired by the Appellant.

[42] In its rebuttal, the Appellant concedes that this argument applies only to Parcels 1, 2 and 5, since the Appellant previously paid the exit fee when it withdrew Parcels 3 and 4 from the Private Managed Forest Land Program in October 2007.

[43] The Appellant says that when it purchased the Subject Lands, they had been in the Private Managed Forest Land Program in excess of 15 years, and that its intention was for the lands to remain in the program. For this reason, it should be exempt from paying the exit fees for Parcels 1, 2 and 5.

[44] The Appellant concedes that after the purchase of Parcels 1, 2 and 5, the lands were declassified for a period of time because the Appellant did not receive notice of its requirement to file a management commitment over those lands after it purchased them. As soon as it was aware of its obligation as landowner, the Appellant says that it applied for reclassification. Had there not been a declassification, the lands would have been classified as private managed forest land for more than 15 years and section 2(5) of the *Regulation* would apply.

[45] In his affidavit, Glenn Brower, the Team Leader and Manager for the Appellant's development, states that the declassification of the Subject Lands after their acquisition from Island Timberlands was done without notice to the Appellant.

[46] Mr. Brower also states that it was the Appellant's intention to have the Subject Lands remain in the managed forest. Upon discovery of the declassification, he assumed that there had been a clerical error and took steps to have the lands reclassified as managed forest land by filing a new management commitment in 2006.

The Respondent's submissions

[47] The Respondent submits that the amount of time a parcel has been classified as private managed forest land is not cumulative. The *Act* specifies that to avoid the exit fee, the land must have been held consecutively as private managed forest land by the time of declassification; the purpose being to encourage landowners to keep their land classified in return for which they pay a lower rate of tax. If landowners were permitted to move land in and out of the scheme, it could be subject to abuse as it could be used as a temporary tax shelter.

[48] The Respondent submits that, under section 2(1) of the *Regulation*, the relevant time for determining the number of years a parcel of land has been continuously classified as private managed forest land is at the time of declassification. This is the time at which the exit fee is to be determined.

[49] In this case, none of the Appellant's land had been classified for more than 15 years at the time it applied for its withdrawal from the program. Consequently, the PMFLC had no choice but to consider the lands ineligible for the exemption under section 2(5) of the *Regulation*.

[50] Finally, the Respondent submits that the Appellant's position is inconsistent with its past conduct. In 2008, the Appellant withdrew Parcels 3 and 4 from the private managed forest land program and paid an exit fee. It did not claim that it was entitled to an exemption at that time due to its previous classification in excess of 15 years under section 2(5) of the *Regulation.*

[51] In his affidavit, Stuart Macpherson, Executive Director of the PMFLC, refers to section 11 of the *Council Regulation* which requires the holder of a management commitment over private managed forest land to give notice of the sale of that land to the PMFLC within 30 days.

[52] Mr. McPherson states that the purchaser of the private managed forest land, as owner of that land, is required by section 17 of the *Act* to file a new management commitment if the lands are to remain as private managed forest lands. Section 9(1) of the *Council Regulation* sets out the specific requirements of the management commitment.

[53] Mr. McPherson further states that if a new management commitment is not received by the PMFLC, the land is automatically declassified under section 24 of the *Assessment Act.*

The Panel's Findings

[54] As stated above, the Appellant concedes that its arguments on this issue only relate to Parcels 1, 2 and 5. The Panel agrees that the exemption in section 2(5) of the *Regulation* does not apply to Parcels 3 and 4. The Panel's further findings on this issue relate to Parcels 1, 2 and 5 only.

[55] For the reasons set out below, the Panel finds that the Appellant cannot rely on section 2(5) of the *Regulation* for an exemption from payment of the exit fee for Parcels 1, 2 and 5.

[56] The Panel finds that the *Act* and its regulations encourage the owners of private managed forest land to retain land in that form, rather than declassifying it. The general purpose of the *Act* was referred to by Gerow, J. in *TimberWest Forest Corp. v. Campbell River (City)*, 2009 BCSC 1804 ["*TimberWest*"], at paragraphs 89 and 90:

> In *Winmark Capital Inc. v. Galiano Island Local Trust Committee* [2004] B.C.J. No. 2781 (S.C.) at para. 16, the scheme under the *Private Managed Forest Land Act* was described as follows:
>
> > The petitioner had the land included in the Forest Land Reserve and it is now governed by the *Private Managed Forest Land Act*, SBC 2003, c. 80. In return for property tax breaks, that statute imposes management standards on forest land in order to minimize the environmental effects of forestry and to allow for sustained harvesting.
>
> An earlier case, *Denman Island Local Trust Committee v. 4064 Investments Ltd.*, 2000 BCSC 1618; varied (not on this point) [2001] B.C.J. No. 2688 (C.A.) had recognized the same purpose in relation to the predecessor act to the *Private Managed Forest Land Act*, and the *Assessment Act*:
>
> > 27 Section 24 then introduces the concept of "managed forest land", that is, "forest land" managed in accordance with a forest management plan under s. 24 of the *Assessment Act*.
> >
> > 28 The forest management plan must be prepared in accordance with regulations under the Assessment Act and it must be approved by the assessor.
> >
> > 29 Pursuant to B.C. Regulation 349/87, the forest management plan must include various undertakings by the applicant, including commitments to reforest the land, maintain and harvest the tree crop in accordance with established principles and to protect the soil and forest crop from decease [sic], insects and fire.
> >
> > 30 The incentive for a private landowner to include his or her forest lands within a forest management plan is a much more favourable property tax treatment than would be the case in respect of unmanaged forest lands.

> 31 The price then of the more favourable tax treatment of such lands is the subjection of the owner to the "regulations" on timber harvesting found in the forest management plan.

[57] If owners maintain land as private managed forest land under this statutory scheme for less than 15 consecutive years, they obtain the benefit of lower taxes while the land is classified, but must pay an exit fee upon its declassification. If they retain the land for more than 15 consecutive years, they obtain lower taxes over that time and do not have to pay an exit fee upon declassification. The exit fee is a specific disincentive tool to preserve land as private managed forest land.

[58] The Panel finds that even if Cable Bay's intention was to keep the land in the Private Managed Forest Land Program, that did not occur. The Panel acknowledges that this area of the law is somewhat complicated due to the number of applicable statutes. However, the Panel finds that a purchaser of private managed forest land, such as Cable Bay, is expected to be aware of the applicable statutes for such a purchase. This is particularly so when the land being purchased is known to be private managed forest land that is subject to government regulation.

[59] If Cable Bay was not aware of its obligations when it purchased the Subject Lands, the Panel finds that it should have been. Regardless of its intention to maintain the Subject Lands in the Private Managed Forest Land Program when it purchased them, it was Cable Bay's failure to file the management commitment for the Subject Lands, as required by statute, that led to them being declassified. The Panel finds that the fact that Cable Bay did not receive notice of its obligation after it had purchased the land does not absolve it of its statutory obligations as a landowner, when those obligations were set out in the applicable legislation.

[60] The Panel finds that the Appellant, as Cable Bay's successor, cannot seek exemption from the exit fees by claiming that the land would have been in the Private Managed Forest Land Program for more than 15 consecutive years had it not been removed, allegedly in error, by the PMFLC. The Panel finds that there is no evidence of any error by the PMFLC in that regard.

[61] In summary, the Panel finds that the Appellant cannot seek an exemption under section 2(5) of the *Regulation* from payment of the exit fee for Parcels 1, 2 and 5, for the above reasons.

2. Whether section 2(1) of the *Regulation* should be interpreted to require that exit fee determinations only be made upon the completion of a development process.

The Appellant's submissions

[62] The Appellant submits that it is premature to require it to pay an exit fee when the manner in which the Subject Lands will be designated in the final version of the development is not yet known. It says that section 2(1) of the *Regulation* requires the PMFLC to refrain from levying an exit fee until the development process is complete, since only then will the parties be able to define:

a) what lands will be gifted to the City, and

b) what lands will form rights of way.

[63] Alternatively, the Appellant submits that if the PMFLC will not await the outcome of the development process, it should calculate the exit fee based upon the land use designations as currently set out in the Master Plan.

[64] With some frustration, the Appellant submits that it is caught in the development process, over which it has little or no control, and is being penalized by the operation of the process and the applicable statutes.

[65] The Appellant says that, in order to start the development process with the City, the City required it to withdraw the Subject Lands from the Private Managed Forest Land Program. Section 21 of the *Act* precludes a local government from passing any bylaw under the *Local Government Act* (such as the OCP Bylaw for the Appellant's development) with respect to private managed forest land that would restrict a forest management activity. This requirement for withdrawal of the Subject Lands triggered the calculation of the exit fee by the PMFLC, and was based on the status of the Subject Lands as of the time of withdrawal, despite the fact that the development is nowhere near completion.

[66] The Appellant agrees that there is nothing in the Master Plan that obliges it to complete the proposed development. However, given the negotiations with the City that have taken place to date, the Appellant describes itself as "locked into the land use designations as set out in the Master Plan" since the land use designations can only be changed by amending the OCP Bylaw, which is solely in the power of the City. The Appellant asserts that the PMFLC should have relied upon the percentages of land that are designated to be developed as park land, easements, rights of way and other public benefit uses in the Master Plan. The PMFLC should have applied exemptions from the exit fees based on those designations to calculate the appropriate exit fee.

The Respondent's submissions

[67] The Respondent submits that to require the PMFLC to refrain from the calculation and levying of exit fees for the Subject Lands until the development process is complete would be inconsistent with the statutory scheme for the management of private forest land, and unworkable for the PMFLC. Further, the Appellant's submission that the PMFLC should rely upon the Master Plan as a basis for the calculation of exit fees could lead to mischief on the part of developers.

[68] The Respondent submits that the Appellant's interpretation of section 2(1) of the *Regulation* is not supported by the clear wording of the statute and the operation of the statutory scheme. The Appellant submits that the modern approach to statutory interpretation, as discussed further under issue 3, requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."

[69] Using this approach to interpretation, the Respondent says that the key statutory provisions consist of section 24(3) of the *Assessment Act* and section 2(1) of the *Regulation.* Under section 24(3), BC Assessment is required to declassify private managed forest land by September 30 of the year in which the assessment roll is completed, if certain conditions are met. Once the land is declassified, section 2(1) of the *Regulation* requires the PMFLC to determine the amount of the

exit fee. The Respondent argues that neither statute provides for any discretion; upon declassification of the land, the process for the calculation of the exit fee is triggered.

[70] The Respondent submits that the calculation of the exit fee at the time of declassification of land is in keeping with the remedial purpose of the statutory scheme; namely, the encouragement of long-term forest management practices on private land in exchange for property tax breaks. Landowners who participate in the program for more than 15 years do not pay an exit fee when land is declassified. Landowners who remove land from the program after fewer than 15 years pay an exit fee, subject to the exceptions in section 3(1) of the *Regulation*.

[71] The Respondent also submits that a clear interpretation of section 3(1) of the *Regulation* leads to the conclusion that the PMFLC is to determine the status of the land at the time it is declassified. The PMFLC is not required to determine what may happen to the land at a later date or to interpret a future development plan.

[72] The Respondent further submits that requiring the PMFLC to delay the calculation of exit fees and to await the ultimate designations of declassified land would be unmanageable and could lead to uncertainty in the timing of exit fees. Due to the protracted nature of the land development process, as set out below in the evidence of Bruce Anderson, the calculation and payment of exit fees could be delayed for years and would require an ongoing monitoring process on the part of the PMFLC. This process is not contemplated in the *Regulation* or the *Act*.

[73] Additionally, the Respondent submits that delaying the calculation beyond the date of declassification could lead to developers taking advantage of the process, because there is no obligation for them to complete the development process.

[74] In paragraph 12 of his affidavit of April 5, 2012, Bruce Anderson, the Manager of Community Planning for the City, states that the Master Plan:

> … provides direction for future land uses, the intent of which will be implemented through subsequent rezoning, and then finally, through the subdivision and development of those lands, or through the dedication of lands designated as park, open spaces, roads and right of ways, to the government.

[75] In paragraph 13 and 15, he also states:

> A Phased Development Agreement will be prepared at the rezoning stage and will contain specific dedication of lands for public purposes… The Phased Development Agreement is also the subject of extensive negotiations between the City and Oceanview and as part of that negotiation, the amount of community amenities to be provided by the developer as part of the development, such as open space, will be determined.
>
> …
>
> The actual dedication of park, open spaces, roads and right of ways has not been completed for the Oceanview development approval process. This would occur at the subdivision stage of the process.

[76] Mr. Anderson further states that nothing in the Master Plan requires a developer to complete a development.

The Panel's Findings

[77] The Panel finds that section 2(1) of the *Regulation* should not be interpreted to require that exit fee determinations only be made upon the completion of a development process.

[78] The Panel finds that the clear interpretation of section 2(1) of the *Regulation* is that if managed forest land is declassified by BC Assessment under section 24(3)(b) of the *Assessment Act*, the PMFLC must determine the amount of the exit fee under section 19(1) of the *Act* and notify the owner of the amount. The use of the word "must" in section 2(1), after the phrase "if the assessor declassified managed forest land", clearly indicates an intention that declassification by BC Assessment triggers the PMFLC's obligation to calculate an exit fee. As a result, the PMFLC has no discretion about when to determine the exit fee. There is no authority in the relevant statutes for the PMFLC to delay the determination of the exit fee.

[79] The Panel further finds that, if the PMFLC were able to delay the determination of the exit fee as suggested by the Appellant, it would be an unmanageable process requiring the PMFLC to monitor the status of all parcels of land withdrawn from the Private Managed Forest Land Program. The PMFLC would have to monitor proposed developments for years, in some cases, to determine when a development is complete. This interpretation is inconsistent with the object of the *Act* and *Regulations* and the statutory scheme designed to encourage land to stay in the program, and to tax land that is removed.

[80] For these reasons, this ground of the appeal fails.

3. Whether portions of the Subject Lands are subject to an exemption from the exit fee because, under the Master Plan, they:

(a) will be transferred to the City in addition to the 5% required by the *Local Government Act* and constitute land that "is gifted" under section 3(1)(c) of the *Regulation*; or

(b) will be "subject to a right of way or easement" under section 3 (1)(a) of the *Regulation*.

The Appellant's submissions

[81] According to the Appellant, the Master Plan for the development commits a total of 33.04% of the development area of 421.3 acres as gifts to the City for parkland, rights of way and community service and community utility. The number breaks down as follows: 95.3 acres of park, 42 acres for rights of way, 1.9 acres for community service and public utility and 5% for parkland required under the *Local Government Act*. The Appellant says that the portions of the Subject Lands that are designated as park land (in excess of 5%) or easements or rights of way in the Master Plan should be exempt from the exit fee.

[82] The Appellant's evidence is that none of the Subject Lands have yet been transferred to the City. The Appellant says that the manner in which lands will be

designated for development is set out in the Master Plan. Mr. Brower states in paragraph 9 of his affidavit, as follows:

> On February 18, 2010 the City of Nanaimo adopted the Appellant's Master Plan by way of Official Community Plan ByLaw Amendment ByLaw …. Upon review of the letter that forms part of this Exhibit it is clear that the Appellant was required to enter negotiations with the City of Nanaimo for the purpose of concluding a phased development agreement, rezoning application and development permit application all of which are governed by the Master Plan Bylaw and must conform to the uses set out in the land use plan. This will ultimately result in a subdivision, at which time the parklands will be transferred to the City of Nanaimo, and the right of ways for the roads will be given to the City of Nanaimo. I can confirm that these negotiations are ongoing. The Appellant is ready, willing, able and bound (by the bylaw) to transfer the parklands and to give rights of way over the roads. It is the ordinary processes of land development that have precluded this from happening to date.
>
> [underlining added]

[83] There is no dispute that, between the time of their withdrawal from the Private Managed Forest Lands Program and the swearing of Mr. Brower's affidavit, no transfer of the Subject Lands to the City had yet occurred.

[84] The Appellant says that the negotiations which led to the Master Plan resulted in a significant amount of the Subject Lands being gifted to the City, which will ultimately form a public benefit. The Appellant says that, as a result, it should not be penalized by being denied the exemption.

[85] The Appellant also says that, while it was party to the negotiations which led to the Master Plan, it was not obliged to agree to provide park land in excess of the 5% required by the *Local Government* Act. The Appellant asserts that the only reason that lands were allocated to the City in excess of 5% is because the Appellant gave them to the City with no expectation of benefit. The Appellant says that the lands were clearly a gift.

[86] The Appellant refers to the definition of "gift" set out in The Sixth Edition of *Black's Law Dictionary*, Westlaw 1990, as follows:

> A voluntary transfer of property to another made gratuitously and without consideration.
>
> …
>
> In tax law, a payment is a gift if it is made without conditions, from detached and disinterested generosity, out of affection, respect, charity or the impulses, not from the constraining forces of any moral or legal duty or from the incentive of anticipated benefits of an economic nature.

[87] In his affidavit, Mr. Brower states at paragraph 13:

> The Appellant received no benefit whatsoever in committing to a gift to the City of Nanaimo of lands over and above the 5% maximum that could be

> demanded by the City of Nanaimo to be provided to the City of Nanaimo as a result of the *Local Government Act.*

[88] The Appellant asserts that the PMFLC erred in the reconsideration decision when it found that a benefit accrued to the Appellant for the lands it gifted to the City under the Master Plan. It says that there is no evidence, from either the affidavits of Mr. Anderson or Mr. Macpherson, that the City would not have approved the Master Plan unless the amounts of parkland set out in the Plan were agreed upon by the Appellant. Further, there is no evidence that portions of the Subject Lands were given to the City by the Appellant as consideration for the approval of the Master Plan.

[89] The Appellant says that the City has acted unfairly as beneficiary of the exit fee under the *Act*, by insisting that the Subject Lands be withdrawn from the Private Managed Forest Land Program before the Appellant was able to complete any transfers to the City. It argues that the City should be stopped from benefitting from its actions.

[90] The Appellant submits that the appropriate approach for the interpretation of the applicable statutes in this case was set out by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42; and *Montreal (City) v 2952-1366 Quebec Inc.*, 2005 SCC 62, in which the Court cited E. A Driedger, *Construction of Statutes*, (2nd ed, 1983), at page 87, and held at paragraphs 26 and 114:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[91] To be harmonious with the intentions of Legislature, the Appellant submits that statutes should provide incentives, rather than penalties, for those who give land to local governments when there is no legal reason for them to do so.

[92] The Appellant further submits that section 8(1) of the *Interpretation Act* requires a remedial, large and liberal construction and interpretation of legislation. On that basis, the Appellant submits that section 3(1) of the *Regulation* should not be interpreted in a way that precludes a developer from exemptions from the exit fee when land is declassified. Rather, those sections should be interpreted to take into account the types of situations where a developer's generosity exceeds the amounts set out in the *Local Government Act*.

The Respondent's submissions

[93] The Respondent submits that the PMFLC is required under section 3(1)(a) of the *Regulation* to determine at the time of declassification, if any of the land "is subject to a right of way or easement". The Respondent says that, on the plain reading of that section, when the Subject Lands were declassified in January 2011, none of them could be described as subject to right of way or easement.

[94] Similarly, the Respondent says that, as of the date of declassification, none of the Subject Lands fell under the exemption in section 3(1)(c) as being "gifted to the government or local government" since none of the Subject Land had been

transferred to the City. The Respondent says that the Appellant's designation of lands as parks or amenities in the Master Plan does not constitute a "gift" under section 3(1)(c) of the *Regulation*.

[95] The Respondent refers to a number of cases where the word "gift" has been judicially considered. It says that those decisions are consistent with the definition from *Black's Law Dictionary* relied upon by the Appellant. According to the Respondent, courts have considered a variety of transfers which have resulted in the following definitions for "gift":

> … to constitute a "gift", it must appear that the property was transferred voluntarily and not as the result of a contractual obligation to transfer it and that no advantage of a material character was received by way of return…
>
> (*Jabs Construction Ltd. v. The Queen,* 99 DTC 729)
>
> The essence of a gift is the absence of consideration. The donor, or giver, receives nothing for the transfer, either from the receiver or any other person.
>
> (*Fehr v Fehr,* 2003 MBCA 68)

[96] On the facts, the Respondent submits that the Appellant cannot assert that the portion of land above the 5% required by the *Local Government Act* was a gift to the City for which there was no consideration. The Appellant's designation of land as park or right of way was part of an overall strategy for the approval of its land development project. The different designations of land in the Master Plan resulted from negotiations with the City and were part of the ongoing development process. The Respondent asserts that the Appellant would necessarily receive a benefit, since the process would result in the ultimate benefit of the approval of the Master Plan and the completion of the development, none of which could occur without the City's approval.

[97] The Respondent submits that this interpretation of section 3(1) of the *Regulation* is consistent with the purpose of the *Act* as set out in section 5 of the *Act*; namely, the encouragement of forest management practices on private managed forest land which take into account the social, environmental and economic benefits of those practices. The exit fee is designed to discourage the early withdrawal of land from the program and to prohibit its use as a temporary tax shelter.

[98] The Respondent says it would be inconsistent with the statutory objectives and scheme to allow a developer to withdraw private managed forest land from the program in order to obtain a development permit, which would necessarily change the use of the land, and then to be exempt from all or part of the exit fee for the removal of that land.

The Panel's Findings

[99] The Panel finds that the Subject Lands are ineligible for an exemption from the exit fee under section 3(1) of the *Regulation*.

[100] Under section 33(15)(a) of the *Act*, the Panel has the authority to confirm, vary or rescind the order, decision or determination of the PMFLC. For different

reasons, the Panel has reached the same conclusion as did the PMFLC in its reconsideration decision about whether the Appellant is eligible for an exemption from the exit fee under section 3(1).

[101] The Panel finds that the PMFLC erred in its reconsideration decision on this issue when it found as follows, at paragraph 6:

> The denoted lands (Subject Lands) are within the municipality of Nanaimo and were transferred from Oceanview to the City of Nanaimo. Therefore, the denoted lands are potentially subject to the exemption from exit fees provided for in section 3 (1) (c) of the PMFLR.
>
> [underlining added]

[102] The evidence before the Panel from both the Appellant and the Respondent is that none of the Subject Lands have yet been transferred to the City by the Appellant. All transfers will take place in the future as part of the development process. Thus, the PMFLC's findings in the reconsideration that "the denoted lands… were transferred from Oceanview to the City" and that "the denoted lands are potentially subject to the exemption from exit fees…" were in error.

[103] The Appellant's position is that it "cannot stray from the designations set out in the Master Plan" and that it is legally "locked-in" to the gifts to the City of park land and land for rights of way, easements and public use. It submits that the only way to change the designations is by an amending bylaw which can only be done by the City. As a result, the future plans for the Subject Lands should form the basis for the exemptions from the exit fees.

[104] The Panel finds that using the future designations for the Subject Lands, as set out in the Master Plan, would lead to significant inaccuracies, and is inconsistent with the statutory scheme.

[105] In acknowledging that an amendment to the OCP Bylaw may take place, the Appellant acknowledges that such an amendment is possible. Indeed, the Panel finds that the designations set out in the Master Plan cannot be taken as certainties upon which determinations of exemptions from the exit fees may rest.

[106] While both parties are most likely hopeful that the Master Plan will become a reality, the fact that changes may occur is echoed in the affidavit of Mr. Anderson, who states as follows:

> 12. …The Master Plan provides direction for future land uses, the intent of which will be implemented through subsequent rezoning, and then finally, through the subdivision and development of those lands, or though the dedication of lands designated as park, open spaces, roads and right of ways, to the government."
>
> 15. The actual dedication of park, open spaces, roads and right of ways has not yet been completed for the Oceanview development approval process. This would occur at the subdivision stage of the process.
>
> [underlining added]

[107] Any number of unforeseen events or circumstances could ensue between the time of declassification of the land and the ultimate development of the Subject

Lands. For example, the economic viability of the subdivision could change and it may never be developed; the approach to development of the City Council could change and unanticipated changes to the Master Plan could ensue. Those are only two possibilities that could result in significant discrepancies or changes between the Master Plan and the ultimate development of the Subject Lands, including any gifts to the City above the required 5% or any lands that are ultimately subject to a right of way or easement.

[108] Based on the approach to statutory interpretation adopted by the Supreme Court of Canada, the Panel finds that the word "is" contained in section 3(1)(a) and (c) of the *Regulation* means the state of the Subject Lands at the time of their withdrawal and declassification. For convenience, the relevant portions of section 3(1) of the *Regulation* are set out below:

> **3** (1) For the purpose of section 19 (1) of the Act, the circumstances in which an owner is not required to pay an exit fee in respect of a portion of land that has been declassified under section 24 (3) of the *Assessment Act* are that the portion of land
>
> (a) is subject to a right of way or easement,
>
> ..
>
> (c) is gifted to the government or local government, or
>
> ...
>
> [underlining added]

[109] The New Shorter Oxford English Dictionary, v. 1 defines "is" as "that which exists, that which is; the fact or quality or existence". This interpretation means that the PMFLC must assess the land being declassified as it exists at the time of declassification. It cannot consider the land being declassified in terms of how it may be developed in the future. The Panel finds that this is so regardless of how comprehensive a development plan may exist for the lands in question.

[110] The Panel finds that, until a transfer has actually occurred, the Subject Lands remain in the possession of the Appellant and all future uses are, at best, possible uses. As no transfer of portions of the Subject Lands from the Appellant to the City for parks, rights of way or easements has taken place, the Appellant is not exempt from paying exit fees under section 3(1)(a) or (c).

[111] The Appellant submits that section 3(1) of the *Regulation* must be read to allow an exemption for commercial activity or development on declassified private managed forest land which benefits a local community. The Appellant says that if the Legislature had intended to exclude developers from availing themselves of the exemption, then subsection 3(1)(c) would have read "is gifted to the government or local government (except as part of a commercial land development)". The Appellant argues that the exemption clause should operate as an incentive for persons who choose to gift land to local governments where no obligation exists.

[112] The Panel finds that, in making this submission, the Appellant fails to appreciate the underlying purpose of the *Act* and its regulations. They are specifically drafted to encourage the continued participation of the land and

landowner in the Private Managed Forest Land Program. They are not designed to encourage or reward the withdrawal of any land from the program, regardless of how beneficial to the public the subsequent use of the land may be.

[113] Section 19(1) of the *Act* and sections 2 and 3(1) of the *Regulation* form part of a statutory scheme, and must be read from the perspective of the objectives which underlie the scheme. Section 5 of the *Act* sets out the object of the PMFLC as follows:

> The object of the council is to encourage forest management practices on private managed forest land, taking into account the social, environmental and economic benefits of those practices.

[114] The Panel has already noted, under issue 1, that the BC Supreme Court's decision in *TimberWest* indicates that the statutory scheme provides tax incentives for landowners to practice sustainable long-term forestry.

[115] The exit fee upon removal from the program is designed to act as a disincentive to land owners and to encourage ongoing participation in the program. The exemptions in section 3(1) are in keeping with the overall statutory scheme. They remove the disincentive when lands are removed involuntarily, such as in an expropriation (section 3(1)(b)) or where a portion of the lands is subject to rights of way or easements for existing roads etc. (section 3(1)(a)).

[116] The Appellant's frustration with the statutory scheme which allows the City, as direct beneficiary, to compel declassification of land in the Private Managed Forest Land Program as part of the development process is understandable. The statutory framework which allows for a developer's participation in the development process also invests the City, as local government, with the final authority over the development.

[117] The Appellant states that it would have been fairer for the City to have waited for the Appellant to transfer to the City those portions of the Subject Lands which would later form park land, rights of ways and easements, etc., under the Master Plan. That way, the Appellant says, it would have been entitled to exemptions under the *Regulation*.

[118] The Panel finds, however, that this interpretation ignores the operation of section 21 of the *Act*, which prohibits a local government from adopting a bylaw that would restrict a forest management activity on private managed forest land. The Panel finds, therefore, that the City did not act prematurely when it required the withdrawal of the Subject Lands. It was a necessary first step in the development process which allowed the City to pass the OCP Bylaw. Unfortunately, it meant that the Appellant could not avail itself of the exemptions under the *Regulation*.

[119] For all of these reasons, the Panel finds that the Appellant is not entitled to an exemption from the exit fee under sections 3(1)(a) or (c) of the *Regulation*.

DECISION

[120] In making this decision, the Panel has considered all of the evidence and arguments, whether or not specifically reiterated here.

[121] For the reasons stated above, the Panel finds that the Appellant is not entitled to any exit fee exemptions under the *Act* or the *Regulation* in relation to the Subject Lands, and the Appellant must pay the exit fee as calculated by the PMFLC.

[122] Accordingly, the appeal is dismissed.

"Loreen Williams"

Loreen Williams, Panel Chair
Forest Appeals Commission

June 22, 2012