



Regional Board Report

TO: Regional Board

FROM: Todd Cashin
Director of Community Services

DATE: July 29, 2019

SUBJECT: Development Permit Application (DP-18-13)
Lake Okanagan Resort (2013) Ltd., Inc. No. BC0952776
New Town Architecture and Engineering Inc. (Agent)
2751 Westside Road North
Central Okanagan West Electoral Area

Voting Entitlement: *Custom Vote – Electoral Areas & West Kelowna Fringe Area – 1 Director, 1 Vote*

Purpose: To consider the issuance of a Development Permit for works associated with a proposal to construct fourteen (14) two-level, duplex chalets at Lake Okanagan Resort.

Executive Summary:

As outlined in the Rural Westside Official Community Plan, a Development Permit (DP) must be approved before land undergoes construction of, addition to or alteration of a building, structure, or clearing of land for the protection of the natural environment, its ecosystems and biological diversity and protection of development from hazardous conditions.

DP-18-13 has been submitted for works associated with a proposal to construct fourteen two-level, duplex chalets for a total of twenty-eight units on an undeveloped area of Lake Okanagan Resort under an existing LUC, south of the existing development. Site conditions have been explored by qualified professionals and a number of issues remain regarding uncontrolled fill, historical landslides, shoreline erosion, and the need for further geotechnical analysis. Therefore, Planning staff conclude that the proposed development does not conform to the Development Permit Design Guidelines of the Rural Westside OCP.

Land Use Contracts (LUC) are land-use regulatory tools, similar to site-specific zoning bylaws, enacted under legislation established in the 1970's. All LUC's in the Province of British Columbia will automatically be terminated on June 30, 2024, under the *Local Government Act*. The Regional District of Central Okanagan is moving forward with bylaws to discharge LUC's and apply the equivalent land use designation or zone to the parcels. It is recognized that under LUC's, development rights exist despite any zoning provisions which may contradict use and development provisions however, these rights must conform with various aspects of the LUC and associated site plans. Although recognized under the LUC, the subject area was not contemplated in the site plan, Schedule B-96-9 of the LUC. As such, the proposed development does not conform to the LUC.

RECOMMENDATION:

THAT Development Permit Application DP-18-13 be refused as the proposed development does not comply with the existing Land Use Contract.

AND FURTHER THAT the Regional Board direct Planning staff to work with the applicant to bring forward a bylaw to terminate the existing Land Use Contract in accordance with the Land Use Contract Discharge Priority, along with amendments to the Zoning Bylaw to provide that the lands will be appropriately zoned.

Respectfully Submitted:



Todd Cashin
Director of Community Services

Approved for Board's Consideration



Brian Reardon, CAO

Prepared by: Danika Dudzik, Environmental Planner

Implications of Recommendation:

Strategic Plan:	Refusing the Development Permit meets the 2015-2018 Strategic Priorities Plan <ul style="list-style-type: none"> • Strategic Priority #3: Nurture Responsible Growth and Development • Strategic Priority #4: Promote responsible environmental protection
Policy:	Refusing the Development Permit complies with: <ul style="list-style-type: none"> • Regional Growth Strategy Bylaw No. 1336 • Rural Westside Official Community Plan Bylaw No. 1274
Legal/Statutory Authority:	The <i>Local Government Act</i> , Part 14, Section 488 (Designation of development permit areas) provides the legislative authority for an OCP to designate development permit areas for the protection of the natural environment, its ecosystems and biological diversity and protection of development from hazardous conditions. The OCP provides the direction and guidelines to be adhered to when considering a development permit.

Background:**Land Use Contracts:**

Land Use Contracts (LUC) are land-use regulatory tools, like site-specific zoning bylaws, enacted under legislation established in the 1970's. All LUC's in the Province of British Columbia will automatically be terminated on June 30, 2024, under the *Local Government Act*. The Regional District is moving forward with bylaws to discharge LUC's and apply the equivalent land use designation or zone to the parcels. Properties located within LUC's are not governed by the Regional District's Zoning Bylaw No. 871 or Joe Rich Rural Land Use Bylaw No. 1195.

Prior to June 30, 2022, all local governments that have jurisdiction over land subject to a LUC must provide zoning. As per the October 9, 2014, staff report to the Board (Land Use Contract Discharge Priority), the intent is for the Regional District to move forward with bylaws to discharge the LUC's and apply the equivalent land use designation or zone to the parcel(s).

Of the nine LUC's that affect the RDCO, LUC No. 247 which received first reading on June 24, 2019 is the fifth to be presented to the Regional Board for discharge. The LUC for Lake Okanagan Resort is identified as the next LUC to be presented to the Regional Board for discharge.

History:

Lake Okanagan Resort is currently developed with various seasonal residential accommodation units and recreational facilities (e.g. clubhouse, swimming pools, tennis courts, marina, boat launch, and golf course). The existing structures were sited in accordance with LUC No. 225 and subsequent amendments (Bylaw No. LUCA-81-3 and Bylaw No. LUCA-95-44). A maximum of 500 residential units are permitted under the LUC.

The original LUC (Bylaw No. 225) for Lake Okanagan Resort was approved by the Regional Board in September 1978 and registered in the Land Title Office in December 1978. The LUC was modified in May 1980 as a result of a Supreme Court order. The LUC was amended again in November 1997 by Bylaw NO. LUCA-95-44 – Regional District of Central Okanagan Land Use Contract Amendment Bylaw.

The 1997 amendment made significant changes to the LUC, including the replacement of the existing site plan with a revised site plan: Revised Schedule B-96-9. Section 10 – Uses – of the 1997 amended version of the LUC provided that the Landowner would not change the development of additional units in any way or alter the development concept of the Resort “except as outlined in this amendment of [the LUC]”. Significantly, section 12 – Siting – of the amended LUC provides that no building, facility or structure shall be constructed “except in compliance with the specifications, plan and site plan set out in Revised Schedule “B-96-9” hereto.”

The version of section 12 prior to the 1997 amendment had the additional words: “or as approved by the Regional District” following the reference to the Schedule B site plan, which arguably would have permitted the Regional District to approve variations to the site plan without having to go through the formality of amendment by bylaw. The removal of those additional words by the 1997 amendment removes the ability of the Board to draw on the power under s. 546 (2)(c) to amend a LUC “in the manner specified in the land use contract.”

Legal/Statutory Provisions:

Although the Municipal Act provisions authorizing local governments to enter into LUC's were repealed in 1978, owners of land may still develop their land in accordance with a LUC despite any zoning provisions which may contradict the use and development provisions of the LUC. The Legislature provided authority for the amendment and discharge of LUC's through a bylaw with the agreement of both the landowner and local government or in the manner specified in the LUC. More recently, the Province amended the *Local Government Act* to provide that all LUC's will terminate on June 30, 2024. As part of the same legislative amendments, local governments were given additional authority to unilaterally terminate LUC's. However, s. 548 (3)(b)(i) provides that any bylaw terminating a LUC may not take effect until one year after adoption, essentially giving affected landowners a further one-year window to bring forward any development that conforms to the LUC.

Development Proposal:

A DP is required when the property to be developed is situated within a Development Permit Area designated in an Official Community Plan. When these provisions exist, a DP must be obtained before building permit approval. DPs do not reconsider the land uses that are allowed on a site. Rather DPs ensure that how a development is constructed responds to a set of guidelines to meet specific objectives. In this case, a development permit is required for

- The protection of the natural environment,
- Hillside development, and
- The protection of construction from wildfire as per the Rural Westside Official Community Plan.

The applicant is proposing the development of fourteen (14) two-level, duplex chalets for a total of 28 units and associated works including clearing and grubbing of forested areas and cut and fill earthworks with various retaining walls, underground utilities and associated services, footpath, golf cart path, and paved access road. The original submission on November 20, 2018 had contemplated twenty (20) two-level, duplex chalets. Due to concerns identified through the referral process, the applicant has since reduced the number of units proposed.

Site characteristics for the +/- 2.6 ha (6.4 acres) subject area include steep slopes, natural riparian fringe along Okanagan Lake, coarse shoreline substrates providing moderate to high suitability for shoreline spawning habitats of Kokanee, various ecosystem communities and wildlife.

An existing decommissioned building occupies the site currently. The site also contains the presence of uncontrolled fill, two identified landslides, an active force main, sand filters, and leaching field for disposal of treated sanitary water from Lake Okanagan Resort.

Environmental Considerations

An Environmental Assessment was prepared by Ecoscape Environmental Consultants Ltd. (Ecoscape). Overall findings of the assessment concluded that the proposed disturbance footprint:

- Avoids encroachment within required 20 m riparian setback from Okanagan Lake;
- Occurs within moderate value habitat areas (ESA 2). However, 8% of high value habitat areas (ESA 1) will be impacted;
- Anticipate loss of provincially red-listed terrestrial ecological communities;
- Require Provincial BMPs and mitigation measures be incorporated into planning and

construction specific to erosion and sediment control, stormwater management, and conservation and connectivity; and

- Requires environmental mitigation and restoration would be required as well as monitoring.

The subject area is also adjacent to the Kokanee “Red Zone” as identified by the Ministry of Forests, Lands, Natural Resource Operations and Rural Development, recognized as providing important habitat for the long-term maintenance of Kokanee population productivity.

In the Environment Assessment, Ecoscape indicates that the unnamed water course identified on the mapping to the north of the subject area, does not meet Riparian Areas Regulation (RAR) or Forest Practices Code of British Columbia definition of a stream and that there is no evidence of a water course.

Restoration and environmental monitoring was proposed. Bonding is required as set out in Bylaw No. 944 (Procedures Bylaw) for a Development Permit. The bond amount is based on the estimate provided by the Qualified Environmental Professional in the amount of 125% of the estimated cost prior to issuance of a Development Permit. The suggested performance bond was \$20,000 and the suggested maintenance bond was \$5000.00.

Geotechnical Analysis

Site conditions were explored by Tetra Tech Canada Inc. in the Geotechnical Assessment Report. A summary of the Geotechnical Assessment report identifies:

- The southern part of the site is generally suitable for the intended proposal however slope stability concerns and an information gap in the central and northern parts of the site means that further geotechnical work is recommended for development to proceed in these areas and a no-build zone has been identified pending additional assessment.
- The report includes recommendations and conditions for site preparation, structural fill and material reuse, foundation design, slope considerations, drainage, and underground utility installation.
- Although the report includes geotechnical recommendations, it indicates that these should be re-assessed once detailed design information is made available.

Site Plan

Since submission of the Development Permit application, the more fundamental issue has emerged as to whether Lake Okanagan Resort has a right to proceed with the proposed development under the terms of the LUC.

It is recognized that Lake Okanagan Resort has development rights under the LUC, but those development rights contemplate development in conformance with the site plan. As such, the proposed development does not conform to the LUC. In addition, the LUC does not provide for the transfer of development rights or density from one part of the property to another if the overall development unit count is not exceeded.

Further, in addition to section 12 that requires that any building must be constructed in compliance with the site plan, the Revised Schedule A, which outlines the numbers of various units of accommodation that may be developed, also provides that the units shall be constructed “in substantial compliance with the attached site plan”, Schedule B-96-9. Proposing several units in an area where no development at all is shown is not in substantial compliance with the site plan.

In order to proceed with the proposed development the LUC must be amended by bylaw under s. 546 (2)(a) with the agreement of both parties (RDCO and the owner of the subject property). Planning staff are not in support of any development within the respective area due to technical comments received to date regarding the protection of the natural environment, its ecosystems and biological diversity and protection of development from hazardous conditions as it relates to risk and liability. There are many other areas throughout the Lake Okanagan Resort properties that are suitable for further development and in accordance with the site plan.

Regional Board Strategic Priorities (2019-2022)

- **Transportation and Mobility** - We will promote transportation and land use approaches that enhance movement throughout the region and reduce our collective reliance on vehicles.
- **Sustainable Communities** - We will initiate and support efforts to create a healthy built environment in which all people throughout the region enjoy a high quality of life with access to safe neighbourhoods including a diverse range of housing options.
- **Economic Development** - We will support economic development through the efforts of the Central Okanagan Economic Development Commission, municipalities, silyx/Okanagan people and others aimed at building the regional economy.
- **Environment** - We will initiate and support efforts to reduce our environmental footprint, adapt to climate change and connect with nature.

Regional Growth Strategy Bylaw No. 1336

- Policy No. 3.2.1.1 “Support logical and sequential growth patterns that minimize urban encroachment into rural areas”.
- Policy No. 3.2.3.1 “Consider water resources in land use planning decisions”.
- Policy No. 3.2.7.8 “Encourage land use and transportation infrastructure that improves the ability to withstand climate change impacts and natural hazard risks”.
- Policy No. 3.2.8.3 “Manage growth to minimize disturbance to habitat, watershed and natural drainage areas and systems”.
- Policy No. 3.2.8.6 “Encourage and support coordinated efforts to protect and enhance the Region’s forests, environmentally sensitive and significant areas”.

Rural Westside Official Community Plan Bylaw No. 1274:

Chapter 3 Natural Environment

- Policy No. 3.2.1.1 “The Regional District will continue to protect Environmentally Sensitive Areas on private land”.
- Policy No. 3.2.1.2 “Provide and protect vegetated leave areas to water courses, control soil erosion and sediment in run-off water, control the rates of run-off to minimize impacts on the lake, prevent the discharge of deleterious substances into the lake”.
- Policy No. 3.2.1.3 “Protect Kokanee spawning grounds located in the OCP area”.
- Policy No. 3.2.2.3 “Consider the rarity and uniqueness of the particular habitat as it relates to the remaining habitat in the OCP area. Development should avoid sensitive areas and be designed to retain important ecosystem features and functions. Responsiveness to this information will be a very important consideration in the approval of an application”.

Chapter 4 – Natural Hazards

- Policy No. 4.2.2 “The susceptibility of an area to mud flows, debris flows, debris torrents, erosion, land slip, rock falls, subsidence or avalanche may be assessed at the time of development application”.

Chapter 13 – Development Permit Areas

- Policy No. 13.1.1 “Development within designated Development Permit Areas will be reviewed by the Regional District in consideration of the objectives and guidelines identified in this Section. Conditions or restrictions may be imposed on the development accordingly”.
- Policy No. 13.1.2 “In accordance with the Local Government Act of the Province of BC, the Regional District will require funding to ensure the completion of landscaping, environmental rehabilitation, or other conditions for which security may be held”.
- Policy No. 13.1.3 “Development Permit Areas are designated and Development Permits are required in accordance with sub-sections 13.2 through 13.9”.

Site Context:

Lake Okanagan Resort is located between Caesar’s Landing and Wilson’s Landing within the Central Okanagan West Electoral Area. The subject property is +/- 20.33 ha (50.26 acres) in size; of this total, an undeveloped area south of the existing development approximately +/- 2.6 ha (6.4 acres) inform the subject area.

The subject property is affected by the Rural Westside Official Community Plan Aquatic Ecosystems, Terrestrial Ecosystems, Wildfire, and Hillside Development Permit Areas. The provincial Riparian Area Regulations are also applicable.

Owner:	Lake Okanagan Resort (2013) Ltd., Inc. No. BC0952776
Agent:	New Town Architecture and Engineering Inc.
Address:	2751 Westside Road
Legal Description:	Lot 1, Plan 30301 Except Plans 32216, KAP61751 and KAP89299, District Lot 3547, ODYD
Lot Size:	+/- 20.33 ha (50.26 acres)
Area of Land Affected:	+/- 2.6 ha (6.4 acres)
Zone:	Land Use Contract N74468
OCP Designation:	Commercial Resort
Existing Use:	Vacant
ALR:	Outside of the ALR
Fire Protection:	Wilson's Landing Fire Protection Area
Water Purveyor:	Private System
Sewage Disposal:	Onsite
Surrounding Uses:	North: Developed portion of Lake Okanagan Resort South: Rural Residential East: Okanagan Lake West: Westside Road / Resort Study Area

RDCO TECHNICAL COMMENTS:

Fire Services staff has concerns regarding the proposal due to the fact that compliance of the BC Fire Code and Fire Prevention bylaw for the existing development within the Lake Okanagan Resort complex has been a challenge and remains unresolved.

Fire Services recommends that a fire preplan and fire safety plan be produced for the proposed structures collectively with the Lake Okanagan Resort Complex before further development.

Engineering Services staff advises that the subject property is required to be serviced in accordance with the existing Land Use Contract.

Regional Parks advises that:

- In 1996, during deliberations on the amendment of Land Use Contract #225, it was noted there were seven major trails running through the subject property, District Lot 3547, which provided linkages into adjacent Crown lands. One of the trails noted and identified was the historic Fur Brigade Trail (also referred to as the Okanagan Brigade Trail). The Regional District had expressed interests in having these trails retained and maintained for trail linkages to the Crown lands beyond.
- Parks Services continues to have interests in the existing trails and the historic Fur Brigade Trail located on and near the Lake Okanagan resort property and the connectivity to the adjacent Crown lands for public recreation. The Fur Brigade Trail and other trails on the property should be retained and maintained for public recreation.

Environmental Advisory Commission (EAC) recommends that the application not be supported as presented at this time.

Anecdotal Comments:

- The Commission acknowledges the changes made to the conceptual design with the removal of a row of development.
- Discrepancy remains between information in the geotechnical report and environmental assessment.
- Details of historical sanitary approval from Ministry of Environment has not been provided, and it is unclear how this relates to a new connection to accommodate the proposed development.
- Lack of detailed geotechnical investigations in an area with existing landslides directly into Okanagan Lake. The Commission understands that detailed Sanitary Sewer and Storm Sewer designs cannot be completed until these investigations are done.
- Until the geotechnical investigations are complete, and there is confidence in the environmental soundness of the development above the landslide area, and sanitary and storm sewer infrastructure proposal within or above the landslide area, the Commission feels reconsidering this proposal would be premature.

Advisory Planning Commission (APC) recommends that the application be supported on the condition that the applicant address and satisfy outstanding items regarding potential hazardous areas, steep slopes, drainage, and geotechnical analysis.

Unaffected RDCO Departments include Inspections Services.

AGENCY REFERRALS:

Interior Health – Healthy Community Development has concerns supporting the development proposal as they encourage growth within an area where infrastructure

(community water, community sewer, drainage, waste reduction) is planned, operated, and financially sustainable. Interior Health does not wish to encourage the proliferation of small water system and private community sewer systems in the region, which are difficult to govern and may not be economical to operate on a long term basis.

Surface and Ground Water quality can be affected through developmental practices which can increase the movement of nutrients, sediments, bacteria, herbicides and pesticides into the water regime. There will continue to be a demand for both adequate housing and tourist-related accommodation. By directing housing growth to area that can provide sustainable sewerage systems and drinking water systems will benefit the livability of the region and reduce potential negative impacts.

The existing water system is required to meet the treatment objectives for surface water supplies.

Ministry of Forests, Lands, Natural Resource Operations and Rural Development Resource Branch advises that the development proposal has been assessed to be a known and potential risk to wildlife, fish or their habitats based on the information available. Subsequent to the review and comments on the original referral dated February 11, 2019, as information has not been submitted regarding the items listed below, updated comments cannot be provided:

- Report outlining findings of appropriately-timed field inventories for plants and animals at-risk on the subject property including, but not limited to: the presence of at-risk herpetofauna (mainly snakes and amphibians). Gopher snakes have been recorded 2.5 km to the south and recent research shows they can travel this distance. Additionally, they frequently den in underground burrows, so the absence of obvious rock dens may not mean absence of hibernacula. Presence of other listed species, including small mammals such as harvest mouse. Rare plants associated with rock outcrops.
- Field-check of the mapped watercourse during spring melt to confirm lack of flow.
- A riparian and foreshore management plan which includes details of how to minimize disturbance in the riparian and foreshore areas. We recommend addressing what kind of pathway is proposed for water access, plans for mooring structures and other foreshore/riparian management considerations.
- Development should be designed to avoid clearing as many trees as possible, especially the high value older and decadent trees that provide significant wildlife habitat.
- It is the proponent's responsibility to ensure his/her activities are in compliance with all relevant legislation, including the *Water Sustainability Act* and the *Wildlife Act*.

Staff indicate that the development plan has been identified to include what appears to be an unauthorized groyne on the foreshore. A Land Survey conducted by a qualified professional would be required if the intent is to develop this in order to establish whether it is private or Crown Land.

Ministry of Transportation and Infrastructure staff advise that the Ministry has no legislative approval authority on the Development Permit, however, the applicant will need to submit a Provincial Public Highway Permit Application for the proposed access to Westside Road.

Ministry of Forests, Lands, Natural Resource Operations and Rural Development Archaeology Branch Provincial records indicate that there are 5 archaeological sites located in or near to the property, but that there are no known sites in the southern portion of the property identified as the area of interest in the referral. In the absence of a confirmed archaeological

site, the Archaeology Branch cannot require the proponent to conduct an archaeological study or obtain a permit prior to development. In this instance it is a risk management decision for the proponent.

Archaeological sites (both recorded and unrecorded, disturbed and intact) are protected under the *Heritage Conservation Act* and must not be altered or damaged without a permit from the Archaeology Branch.

Prior to any land alterations (e.g., addition to home, property redevelopment, extensive landscaping, service installation), an eligible consulting archaeologist should be contacted to review the proposed activities and, where warranted, conduct a walk over and/or detailed study of the property to determine whether the work may impact protected archaeological materials.

If any land-altering development is planned and proponents choose not to contact an archaeologist prior to development, owners and operators should be notified that if an archaeological site is encountered during development, activities must be halted and the Archaeology Branch contacted at 250-953-3334 for direction. If an archaeological site is encountered during development and the appropriate permits are not in place, proponents will be in contravention of the *Heritage Conservation Act* and likely experience development delays while the appropriate permits are obtained.

BC Hydro has no objection to the development permit application in principle, however a statutory right of way will be required for any existing BC Hydro works on the subject property, and if the intent is to have BC Hydro service this new development, a blanket right of way will be required to do so. Currently, the existing phases of development on the subject property are serviced via a private system.

Unaffected Agencies include Telus, Fortis BC, and Shaw Cable.

Alternative Recommendation:

Should the Board choose not to support the staff position, the following alternate recommendation is provided:

THAT Development Permit Application DP-18-13 be deferred at this time.

AND FURTHER THAT the Regional Board direct Planning staff to work with the applicant to bring forward an amendment to the Land Use Contract under s. 546 (2)(a) with the agreement of both parties (RDCO and the owner of the subject property).