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TUP-04-13

REPORT TO THE JUAN DE FUCA LAND USE COMMITTEE
MEETING OF TUESDAY, MARCH 15, 2016

SUBJECT **Temporary Use Permit Renewal Application for Plan 344R, Section 97, Renfrew District and on District Water Lot 751, Block A and B**

ISSUE

The purpose of this report is to consider a request for a three year renewal of temporary use permit TUP-04-13 for the purpose of allowing construction and operation of an existing seasonal commercial marina providing moorage for private fishing and pleasure craft, as well as ancillary fuel sales, as shown in Appendix 1.

BACKGROUND

On May 8, 2013, the CRD Board passed a resolution approving the issuance of TUP-04-13 subject to conditions. The permit will expire on May 8, 2016, three years after the date of the resolution. An application for renewal, received January 25, 2016, from the applicant, requests a three year extension to the permit.

Following issuance of the original permit, the CRD received correspondence from Pacheedaht First Nation stating their objection to the marina operation and the CRD's issuance of the permit. Pacheedaht cited concerns regarding a nearby archaeological site, and potential impacts on adjacent salmon habitat and fishing rights.

In preparation for submitting a zoning amendment application to allow for a permanent marina at the site, the applicant submitted an application to the Province for an expanded licence of occupation. As part of the licence approval process, the Province is required to enter into meaningful consultation with any affected First Nations.

At the present time, the applicant, Pacheedaht and the Province continue ongoing consultation and negotiation involving a new licence of occupation application. Correspondence from Pacheedaht legal counsel to the Ministry of Forests, Lands and Natural Resource Operations (Appendix 2, p. 2, para. 3), indicates that in the event that the Province is unable to issue the amended licence in time for the applicant to construct the new marina this year, Pacheedaht have agreed to a temporary extension of the expired licence of occupation for the coming season. However, in addition to an extension of the provincial licence, the applicant is also required to obtain an extension to the CRD issued temporary use permit in order to operate the temporary marina for the coming season.

Upon final approval of the new licence of occupation by the Province, the applicant could begin the process to amend the Port Renfrew Comprehensive Community Development Plan in order to allow a permanent commercial marina.

The *Local Government Act (LGA)* allows that a temporary use permit holder may apply to have the permit renewed, but that the permit may only be renewed once. Since the Province may extend the old licence of occupation on a month-to-month basis and the time-frame for concluding the required consultation for the new licence is uncertain, Planning staff recommend that temporary use permit TUP-04-13 be renewed for a period of three years. This will also allow the applicant time to complete an amendment to the Port Renfrew Comprehensive Community Development Plan.

ALTERNATIVES

That the Land Use Committee recommends to the CRD Board:

1. That a three year renewal for Temporary Use Permit TUP-04-13, as shown in Appendix 3, for Plan 344R, Section 97, Renfrew District, and on District Water Lot 751, Block A and B, be approved.
2. That the temporary use permit be renewed for a period of one year.
3. That the temporary use permit renewal be denied.

LEGISLATIVE AND PUBLIC CONSULTATION MPLICATIONS

Section 497(2) of the *LGA* states that a temporary use permit holder may apply to have the permit renewed, but that the permit may only be renewed once.

The *LGA* does not require that notice be given of the CRD's intent to pass a resolution regarding the renewal of a temporary use permit. CRD Bylaw No. 3110 has no requirement for public notification or consultation of a temporary use permit renewal.

LAND USE IMPLICATIONS

Section 4.5 of the Comprehensive Community Development Plan states that the CRD Board may issue a temporary use permit if the following conditions have been met:

a. The impacts to any of the existing land uses are kept to a minimum.
b. It does not involve the construction or erection of a new building.
c. It does not involve numerous delivery trucks travelling to the site on a daily basis, to either pick up or drop off freight or other materials.
d. The activity serves the needs of the community or is a part of the tourism sector.
e. The activity will be carried out wholly within the principal building.
f. There must be no on street parking.

The marina operation has been active under the temporary use permit since May 8, 2013 and appears to have complied with all the specified conditions noted above. Not withstanding the letters of objection from the Pacheedaht First Nation, CRD staff have received no complaints from members of the public.

CONCLUSION

The CRD Board passed a resolution approving the temporary use permit on May 8, 2013. After the original permit was issued, the CRD received correspondence from Pacheedaht First Nation objecting to the permit's issuance and outlining their concerns regarding potential impacts of the marina development on a nearby archaeological site, adjacent salmon habitat and fishing rights. While negotiations and consultation regarding a new licence of occupation continue, Pacheedaht have agreed to support a temporary extension to the old licence of occupation in order that the applicant may operate the existing marina for the current season. While the Province may extend the licence of occupation on a month-to-month basis, the CRD issued temporary use permit may only be renewed once. Since the time-frame for concluding the required consultation for the new licence is uncertain and additional time following that process will be required to complete an amendment to the Port Renfrew Comprehensive Community Development Plan, Planning staff recommend that temporary use permit TUP-04-13 be renewed for a period of three years.

RECOMMENDATION

That the Land Use Committee recommends to the CRD Board:

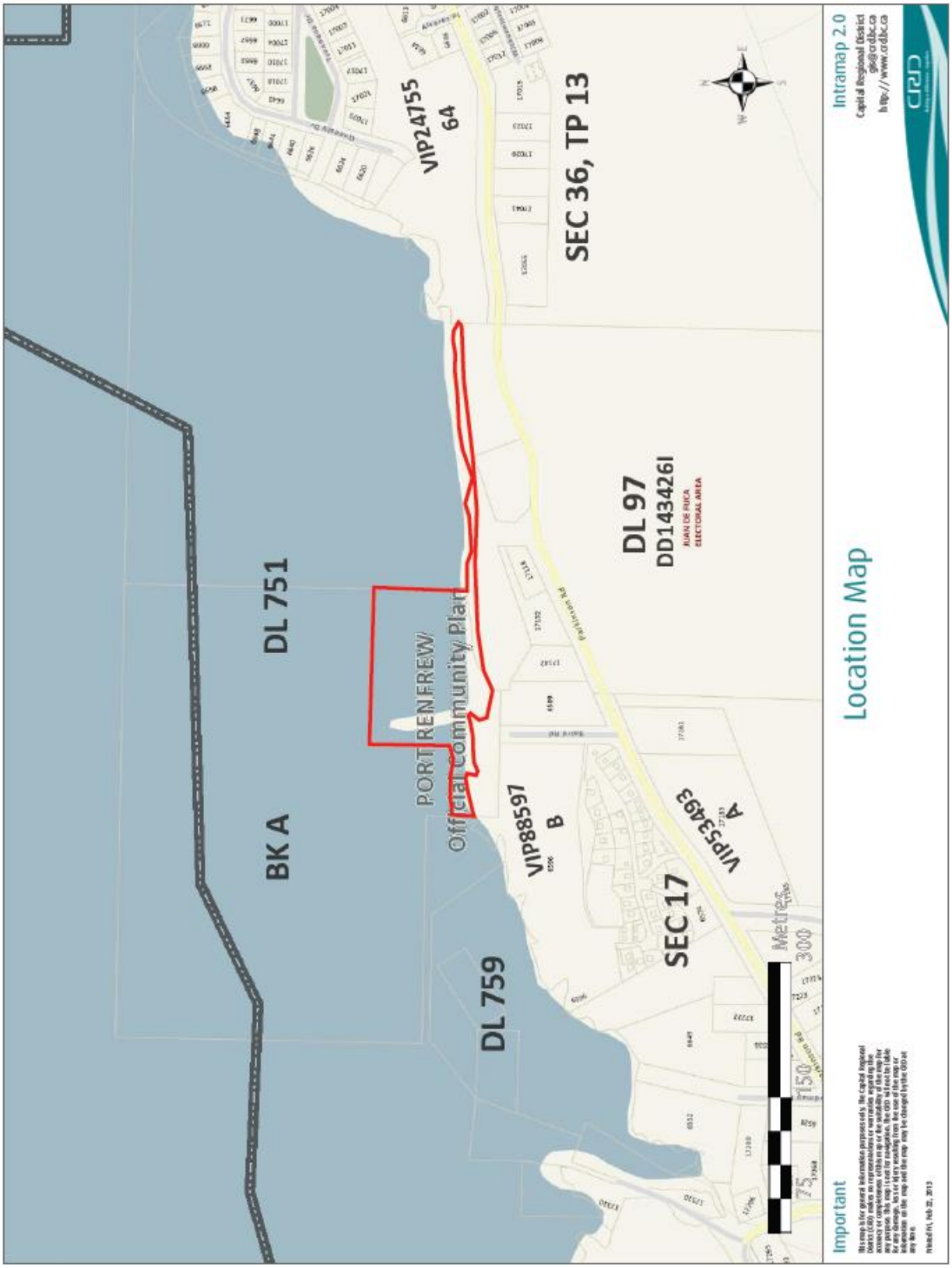
That a three year renewal for Temporary Use Permit TUP-04-13, as shown in Appendix 3, for Plan 344R, Section 97, Renfrew District, and on District Water Lot 751, Block A and B, be approved.

Submitted by:	Iain Lawrence, Supervisor, Local Area Planning
Concurrence:	Kevin Lorette, P.Eng., MBA, General Manager, Planning & Protective Services
Concurrence:	Robert Lapham, MCIP, RPP, Chief Administrative Officer

IL:wm

Appendices:
1. Location Map
2. Correspondence from JFK Law Corporation to Rudi Mayser, Manager, Ministry of Forests, Lands and Natural Resource Operations, February 15, 2016
3. Temporary Use Permit TUP-04-13

Appendix 1: Location Map



Appendix 2: Correspondence from JFK Law Corporation

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File No. 1062-012

February 15, 2016

Delivered by E-mail: Rudi.Mayser@gov.bc.ca

Rudi Mayser, Manager
Ministry of Forests, Lands, and
Natural Resource Operations ("FLNRO")
142-2080 Labieux Road
Nanaimo, BC V9T 6J9

Dear Mr. Mayser:

Re: Consultation with the Pacheedaht First Nation regarding the Pacific Gateway Marina Ltd. ("PGM") application for a Licence of Occupation ("Licence") in Port San Juan

I write in reply to your February 3, 2016 letter to Erin Thomson of my firm. In your letter, you indicated that FLNRO will soon be "moving to decision" and requested that our client, the Pacheedaht First Nation ("Pacheedaht") provide comments on PGM's final application package for PGM's Little C Marina (the "Marina"). We note that while Pacheedaht agreed to make reasonable efforts to provide a response by today's date, Pacheedaht did not receive a full referral package for the Marina until February 3, 2016. That leaves my client with less than two weeks to provide a response on a new application for a marina.

While comments are provided below on Pacheedaht's behalf, we do not agree that FLNRO is in a position to make its decision on PGM's Marina, as more fully explained below, for two main reasons: first, the application package is not yet complete (the Archeological Impact Assessment has yet to be done) and second, despite requests now for several years, there has been no study or funding to assess the potential adverse impacts of the Marina (or PGM's previous marina proposal) on the section 35 rights and title of Pacheedaht. For the reasons contained in the remainder of this letter, it is our client's view that FLNRO has yet to properly discharge is duty to consult with Pacheedaht.

Consultation Requirements

PGM's application for the Marina is a new design and a new proposal – it is not a continuation of the Marina for which it applied for a Licence in 2012. FLNRO has asked Pacheedaht to review 305 pages of technical information and comment on the Marina's potential to adversely affect their aboriginal rights, title and culture within an extremely short window of time. This request is not appropriate and it prejudices Pacheedaht's ability to identify the Marina's full potential impacts, particularly since the technical information does not include or consider Pacheedaht's aboriginal perspective. As noted above, the studies done to date are not designed to assess in an holistic or meaningful way the potential adverse impacts of the Marina on my clients' section 35 rights and on their culture. This is not a new complaint; Pacheedaht has raised this concern for several years in respect of the previous PGM application for a Marina.

Courts do not allow the Crown to set strict timelines on the consultation process in consideration of external timing pressures when the Aboriginal group is actively engaged, there are outstanding issues to be discussed, and there is value to further discussions.[1] In respect of the Marina, the only external pressure is PGM's desire to construct and operate a marina this spring. With respect, this is not an adequate reason to rush through the application for the Marina or to cut off consultation before it has even begun. FLNRO needs to provide adequate time for Pacheedaht to raise their concerns, and for FLNRO to understand and seek to address those concerns. We again note that Pacheedaht has tried to be cooperative in terms of meeting today's deadline despite the fact that the full referral package (which, as noted below, is still incomplete regarding the AIA Study) was only sent to them less then two weeks ago.

To be clear: Pacheedaht's concerns have not been addressed and there are outstanding issues requiring consultation. FLNRO must therefore not conclude consultation and make a decision to facilitate PGM's development timelines; Pacheedaht's rights and culture must be respected. Moreover, in the event that FLNRO makes its decision at such a time that it is too late for PGM to construct its new marina this year, PGM will still be able to operate its temporary seasonal marina for the upcoming season. Pacheedaht has already agreed to a temporary extension of PGM's expired licence of occupation in a good faith gesture to encourage cooperative discussions with PGM.

With respect to Pacheedaht's engagement with FLNRO, as we have said before, the Supreme Court of Canada in *Haida* clearly set out guidelines for meaningful consultation. The Court stated:

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and

1 *Squamish Nation v. British Columbia (Community, Sport and Cultural Development),* 2014 BCSC 991, at para 214, *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, at para. 116; *Blaney et al v. British Columbia (The Minister of Agriculture Food and Fisheries)* et al, 2005 BCSC 283, at para. 108

> providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed . . . .

The Court then listed some of the components of a genuine consultation process including:

- gathering information to test policy proposals;
- putting forward proposals that are not yet finalized;
- seeking the First Nation's opinion on those proposals;
- informing the First Nation of all relevant information upon which those proposals are based;
- not promoting but listening with an open mind to what the First Nation has to say;
- being prepared to alter the original proposal; and
- providing feedback both during the consultation process and after the decision-process.[2]

Since June 2015, Pacheedaht has demonstrated its willingness to seek alternatives and compromises that would allow PGM to develop a marina in Port Renfrew while also protecting Pacheedaht's Aboriginal rights and title. FLNRO has largely observed this engagement from the sidelines. FLNRO is not entitled to rely on Pacheedaht's good faith engagement with PGM to satisfy the Crown's duty to consult. PGM does not share the Crown's constitutional obligations to the Pacheedaht. Discussions between a First Nation and project proponent, aimed primarily at mitigation and accommodation (of a marina that Pacheedaht does not want or support) is not the same information the Crown requires for assessing and addressing potential impacts to Aboriginal rights, title and culture. The Crown must obtain the latter information.

While the Crown may delegate procedural aspects of consultation to a proponent, it alone is responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests and the ultimate legal responsibility for consultation and accommodation rests with the Crown.[3] Courts have more recently confirmed that it is inappropriate for the Crown to take adopt an "oversight" role in consultation.[4]

Based on Pacheedaht's review of PGM's application package, we are concerned that FLNRO does not have the information it requires to properly assess and address the Marina's potential to adversely affect Pacheedaht's Aboriginal rights, title and culture and conclude consultation. PGM's application package only addresses bare regulatory requirements – it does not include a principled assessment of impacts to Pacheedaht's rights and culture. Indeed, it appears that the studies generally assess the bio-physical impacts of PGM's originally proposed marina and it is therefore questionable whether FLNRO has the necessary regulatory information.

We are also concerned about your statement in our meeting held on February 1, 2016 that there is a "low" potential for adverse impacts on Pacheedaht's section 35 rights. It is unclear to us what

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2 *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, ["*Haida Nation*"] at para. 46.
3 *Haida Nation* at para 53.
4 *Wabauskang First Nation v. Minister of Northern Development and Mines et al.*, 2014 ONSC 4424, ["*Wabauskang First Nation"*] at para 227.

the basis was for that statement, particularly since FLNRO did not and still does not have a complete application. While the change in design of the marina may assist in alleviating some of the worst possible impacts on Pacheedaht's rights and culture, there is still no analysis of what the new Marina design will do in terms of adverse impacts to Pacheedaht's rights and culture. A change in design, alone, without addressing the information gaps and concerns that Pacheedaht has been raising for months, if not years, is not sufficient to conclude consultation.

In the chart set out on the next page, Pacheedaht has identified the following information gaps that must be addressed before FLNRO may properly assess the Marina's potential adverse effects and satisfy FLNRO's duty to consult:

Outstanding Information Gaps

Right or Interest	Information Gaps	Comments
Aboriginal Fishing right	No rights-based studies about the: a. Marina's effects on the coho fishery in particular, including boat launch and possible dry-dock system; b. impacts from noise of increased boating, fishing helipad and foreshore vehicle traffic; c. impacts of an interception fishery on Pacheedaht's ability to harvest fish; d. impacts from pollution, sewage, spills and offal on fish Pacheedaht rely on for their aboriginal fishing rights e. impacts of effluent released into water from proposed fish processing plant	PGM submitted studies focused solely on the bio-physical effects of the marina on fish and fish habitat in the area. These studies alone do not make conclusions about impacts to rights. Indeed, PGM's own biological assessment and gap analysis states that "further collection of biological data or biological assessment will not alleviate [Pacheedaht's concerns]. **These particular comments indicate, perhaps, that further consultation is required.**" (emphasis added)
Aboriginal title	No studies or principled assessment of the Marina's potential to affect Pacheedaht's ability to benefit from its Aboriginal title lands now or pursuant to a Treaty	Given its remote location, Pacheedaht has limited economic development opportunities on the lands over which it claims Aboriginal title. Economic development opportunities such as eco-tourism, the campground and Pacheedaht's fish processing plant at Snuggery Cove are some of the key ways Pacheedaht can benefit from its Aboriginal title lands and from its future treaty settlement lands. Pacheedaht has repeatedly raised concerns about the Marina's potential to adversely affect its ability to benefit from its Aboriginal title lands. However neither PGM nor FLNRO have worked with Pacheedaht to study these impacts or provided a rationale for its view of these potential impacts.
Archaeological, spiritual and cultural features	The archaeological impact assessment is not complete and, in our view, makes the application incomplete	

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With respect to the potential adverse effects on Pacheedaht fisheries, the federal Department of Fisheries and Oceans ("DFO") has also not assessed the Marina's potential adverse impacts on Pacheedaht's Aboriginal fishing rights. To Pacheedaht's knowledge, DFO only reviewed PGM's original proposed design and studies related thereto to make a narrow determination as to whether that design would result in "serious harm" to fish within the meaning of the *Fisheries Act*. On September 18, 2014, DFO stated it believed that marina would result in serious harm to fish, only to later spontaneously reverse its opinion on February 10, 2015, without ever consulting Pacheedaht directly about the marina's potential to affect Pacheedaht's constitutionally-protected rights. DFO also reversed its decision notwithstanding PGM's serious concerns about the methodology that PGM's consultants adopted for their studies. Since then, DFO has not substantively engaged Pacheedaht on any of PGM's proposals, and certainly not with respect to the Little C Marina. As such – no Crown decision maker has assessed the Marina's potential effects on Pacheedaht's fishing rights. To be clear, a determination under legislation is insufficient for either DFO or FLNRO to conclude that there will be little or no adverse impact on section 35 fishing rights and aboriginal title. As a constitutional obligation, the Crown's duty to consult lies "upstream" of statutes and policy mandates.[5]

Pacheedaht Concerns about this Marina's Potential Adverse Impacts

Pacheedaht's detailed comments (as far as they can be made in less than two weeks from the application package being referred) on PGM's February 3, 2016 application are attached to this letter as Appendix "A". What follows are Pacheedaht's outstanding concerns about the Marina's potential to adversely affect their Aboriginal rights and title:

- The Archaeological Impact Assessment ("AIA") of Pacheedaht's sacred burial cave and other features along the shore in the vicinity of the Marina and its access areas are not yet complete. Even if mitigations are proposed to address and reduce potential structural impacts to the cave, there is no way to accommodate Pacheedaht for the long-term, fundamental change the Marina will cause to the quality of members' spiritual and cultural experience of the cave. For example, spiritual or cultural visits to the cave may be disturbed by passersby or the general activity of the Marina.

- As the Marina entrance is immediately adjacent to Pacheedaht's sacred cave, there will be significant increase in traffic around the burial cave, which increases the risk of vandalism and other disturbance.

- Pacheedaht remains unclear as to PGM's specific plans for a dry dock storage area for more than 40 vessels. This storage infrastructure, which was discussed during the February 1, 2016 meeting, remains reflected on sketches on the PGM website and in its

5 *West Moberly First Nations v British Columbia (Chief Inspector of Mines),* 2011 BCCA 247 at 106 and 107.

environmental monitoring plan submitted on February 3, 2016. If this is a reasonably foreseeable feature of PGM's Marina site, it must form part of the consultation for the Licence. In particular, Pacheedaht needs to understand what type of construction work, infrastructure or changes to the landscape may be required for the dry dock. Pacheedaht remains concerned about its potential to adversely affect archaeological or cultural sites in this area.

- The Marina may affect the San Juan Chinook Salmon holding and migration area between the government dock and the existing breakwater. It is Pacheedaht Indigenous knowledge that this area is important for the salmon as they return to the San Juan River. This has not been addressed in PGM's studies and it is impossible to predict what effect the Marina infrastructure and the increased vessel traffic will have on the fish in this area. This concerned has not been addressed in consultations with FLRNO thus far or by DFO.

- The increased charter and sport fishery may affect Pacheedaht's fishing resources at Swiftsure Bank and along migration corridors at East Point and west of Woods Nose. These are all important Pacheedaht traditional harvesting sites and have become popular charter fishing spots.

- Pollution from boats, Marina infrastructure like fuel stations, and PGM's proposed processing plant may adversely affect fish, other marine life, and their habitats.

- Increased lights and noise from boat traffic associated with the marina affect fish behaviour and force Pacheedaht fishers to change their preferred traditional practices and locations in response. Similarly, helicopters may affect fish behaviour, particularly if overflight height restrictions are not adhered to.

- With respect to construction, Pacheedaht is aware that the juvenile fish development in the San Juan River is running a month ahead of schedule and outbound migration may be earlier than anticipated. This migration may be affected by any in-water construction.

- Pacheedaht remains concerned about the Marina's long term adverse effects on their ability to benefit economically from their Aboriginal title, including, as set out above, changes to the wilderness experience of their campground and other eco-tourism projects.

Fish Processing Plant

In addition to the marina infrastructure, the potential upland dry-dock infrastructure and parking, and the future plans for a fishing lodge, PGM is proposing to construct and operate a fish processing plant. Pacheedaht is concerned that, due to its location and the plan to release waste water into the ocean, this plant will exacerbate pollution and bacterial counts in a

sensitive area of the bay. This in turn has the potential to adversely affect marine life and habitat, as well as human health to the extent locally caught fish may be affected. We note that a sanitary closure is already in effect in Port San Juan and these sources, particularly any effluents from the proposed fish processing plant will exacerbate this closure. This will frustrate Pacheedaht's stewardship efforts to rehabilitate the area to enable future bi-valve harvesting in the area. When PGM's seasonal marina was operating, Pacheedaht has observed offal and other pollution washing up on the foreshore at Beach Camp and at the Pacheedaht campground. Further comments about the potential PGM fish processing plant are contained later in this letter.

Consultation and Accommodation

FLNRO has not consulted meaningfully with Pacheedaht about the Marina. In spite of Pacheedaht's repeated requests for a clear consultation process, based on reliable and appropriate information and equal resources, FLNRO repeatedly declined Pacheedaht's requests for a consultation protocol and capacity funding. FLNRO has not directly engaged in information gathering and instead relied on PGM or other decision makers, such as DFO, to gather information critical to FLNRO's duty to consult Pacheedaht. This is not consistent with the direction courts have given on consultation. In our letter of March 13, 2015, we set out the consultation guidelines the Supreme Court of Canada established in *Haida Nation*. The Ontario Supreme Court in *Wabauskang First Nation* more recently identified the following as hallmarks of model consultation:

(a) establishing a protocol for consultation and accommodation;

(b) agreeing on what subject matters will be discussed with whom;

(c) agreeing on what matters are to be kept confidential as between which parties and what written communications are shared with non-recipients;

(d) defining roles as between the Crown, the Proponent, and the First Nation; and

(e) providing the First Nation funding for administrative assistance (at paras. 230-231)

FLNRO has not taken these steps. For example, attending a meeting where Pacheedaht and PGM sought to find compromise and alternatives is not consultation. FLNRO has requested Pacheedaht's comments on PGM's Marina application within a span of two weeks and, again, citing a lack of mandate, refused Pacheedaht's request for capacity funding to off-set the over $125,000 Pacheedaht has incurred on consultation for this Project over the last four years (most of those years were focused on PGM's initial application for a Marina). As we noted above, the Crown's consultation obligations lie upstream of statutory mandates. It is inappropriate to reject Pacheedaht's request on this basis, particularly since this process has placed an unfair burden on a small First Nation with limited resources.

If FLNRO is now "moving to decision" on PGM's application, it is important that FLNRO consider the whole project and not focus narrowly on the specific elements of the Marina that fall within FLNRO's mandate, such as potential effects of the breakwater and moorage infrastructure. We understand, based on publicly available information on FLNRO's website, that licences of occupation for marinas address not only the moorage infrastructure like breakwaters and docks, but also the ancillary uses, such as fuel stations, restaurants and bait shops.[6] As such, it is important that FLNRO consider the adverse effects any ancillary uses may have on Pacheedaht's Aboriginal rights, title and culture and accommodate Pacheedaht for any such impacts.

In the event FLNRO decides to approve the Marina, it may flexibly accommodate at least some of Pacheedaht's concerns in respect of the Marina's full adverse impacts to Pacheedaht's rights. Section 39 of the *Land Act* enables the Minister to issue a licence of occupation *subject to the terms and reservations the Minister considers advisable.* While Pacheedaht is not in support of the Marina, should FLNRO be inclined to approve the application, Pacheedaht recommends the following be incorporated as licence conditions:

1. **No Fish Processing Plant:**

   In light of the potential environmental impacts of the proposed fish processing plant and adverse impacts to Pacheedaht's section 35 rights and title, excluding the fish processing plant as a permitted use under this Licence is one effective way to minimize the adverse effects and impacts of this Project. It would also address some of Pacheedaht's concerns about the proposed fish processing plant's adverse effects on Pacheedaht's title-based rights and future treaty-based interests.

   We also note that there are two existing fish processing plants in the Port Renfrew area; one located at Snuggery Cove, which Pacheedaht is acquiring and the other located at Trailhead Resort. It is difficult to understand why a third fish processing plant is needed, particularly when it has the potential to add to adverse environmental impacts generally and to Pacheedaht's section 35 rights and title and when PGM has already been using the fish processing plant at Snuggery Cove.

   The fish processing plant Pacheedaht is acquiring at Snuggery Cove is a suitable distance from their traditional fishery resources. By operating the plant, Pacheedaht will be able to directly observe the fish catch, size, quality and species and be able to track the status of the fishery in their traditional territory.

   Pacheedaht will develop economic opportunities for its members in its fish processing plant. It will provide 5 seasonal jobs and enable Pacheedaht to bring its commercial licences home, which will allow more members locally to be involved with the fishery to

6 Land Use, Marinas and Yacht Clubs, website accessed February 12, 2016

support their livelihoods. This will further facilitate knowledge transfer between elders and youth, and foster a sense of spiritual self and cultural wellbeing. This is a value that cannot be monetized or compensated.

Excluding the fish processing plant from the Licence's permitted use is rationally linked to and offsets the Marina's adverse effects on Pacheedaht's Aboriginal fishing rights and title. To the extent that PGM is of the view that a fish processing plant is needed as part of the "marine experience" for the Marina, there are existing alternatives that do not require the construction and operation of a third fish processing plant in Port Renfrew. Indeed, for the past two years, PGM has referred its clients to the fish processing plant Pacheedaht now operates for their processing needs, which confirms that it would be feasible for PGM to continue this practice.

2. Monitoring Conditions – Archaeological, Spiritual and Cultural Values:

FLNRO should require PGM to hire a Pacheedaht member as a cultural monitor for the duration of the Marina construction to observe construction and report on any concerns about adverse effects to archaeological, spiritual or cultural values, including the sacred cave already protected under the *Heritage Conservation Act*. We understand that there is already a day rate in place for such a monitor, which PGM is aware of.

Where the cultural monitor raises concerns about PGM's activities, PGM must take all reasonable steps to address the monitor's concern and implement the monitor's recommendations into the Marina construction activities. This aspect must be an express condition of any approval and cannot be left to the discretion of PGM.

Until the Archaeological Impact Assessment Report is completed, PGM should be required to refrain from any construction work within 70 m of the sacred cave.

PGM must refrain from all heavy construction work, including blasting, for the duration of the Archaeological Impact Assessment and must not resume heavy construction work, including blasting, until the archaeologist provides notice that it is safe to do so.

PGM must be required to carry out whatever steps, and provide whatever supplies or labour the archaeologist's requests to enable the completion of the Archaeological Impact Assessment.

PGM must implement whatever recommendations the archaeologist includes in his Archaeological Impact Assessment report in order to ensure the ongoing safety and integrity of the Sacred Cave, and any additional archaeological sites identified in the report. This, too, must be an express condition of any approval.

3. **Monitoring Conditions – Marine Life and Habitat:**

   FLNRO should also require PGM to hire a Pacheedaht member as a marine habitat monitor for the duration of the Marina construction to observe all Marina construction occurring in or adjacent to water and report any concerns regarding the construction's potential to adversely affect marine habitat as identified in the Marine Habitat Report. The day rate for the habitat monitor should be the same as for the monitor mentioned above, which PGM is already aware of.

   Where the habitat monitor raises concerns about PGM's activities, PGM must take all reasonable steps to address the monitor's concern and implement the monitor's recommendations into the Marina construction activities. As noted above, this must be an express condition of any approval,

   The Habitat Monitor's responsibilities should include assessing and monitoring construction work marine habitat for adverse effects on Pacheedaht's aboriginal rights and culture (including but not limited to fishing and marine harvesting). If Pacheedaht requests, PGM should provide the Habitat Monitor training on how to observe the Marina construction occurring in or adjacent to water and to report any concerns regarding the construction's to adversely affects fish, fish habitat and other marine life and their habitat in accordance with the Marina Marine Water Construction Environmental Plan;

4. **Staging dock access:**

   PGM must allow Pacheedaht access to the staging dock adjacent to the breakwater in the East Lot for its traditional fisheries at no charge for the duration of the Licence, should the application be approved by FLNRO.

In addition to the Licence conditions, please confirm as soon as possible FLNRO's proposal for ensuring that the Licence of Occupation for the water lot to the east of the breakwater is not developed. Pacheedaht has proposed that FLNRO transfer the Licence of Occupation for this lot to Pacheedaht at no charge and with no yearly charges, fees or taxes, If FLNRO has alternative ways of protecting Pacheedaht's rights and interests in this area, such as a withdrawal under the *Land* Act, Pacheedaht would be happy to work with FLNRO to explore alternatives.

Concluding Comments

FLNRO must be careful to avoid drawing conclusions about the Marina's potential adverse effects and impacts and the status of consultation with Pacheedaht based on information about PGM's previous proposals for a Marina in Port Renfrew. Neither PGM nor FLNRO have answered Pacheedaht's outstanding questions or addressed their concerns. Simply re-designing

a marina does not, in and of itself, meet the duty to consult if there are outstanding questions, information gaps and concerns.

Pacheedaht requests that FLNRO suspend its decision on the Licence for the Marina pending the resolution of consultation with Pacheedaht. Pacheedaht again requests that FLNRO work with Pacheedaht to determine a plan for obtaining the outstanding information necessary to assess the Marina's impacts on Pacheedaht's rights, outline a clear consultation process and provide capacity funding to off-set the significant consultation costs Pacheedaht has incurred over the past three years. We look forward to your prompt reply.

Yours truly,

JFK Law Corporation

Per:

for Robert Freedman
RCF/ETT
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cc:
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Appendix 3: TUP-04-13

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CAPITAL REGIONAL DISTRICT

TEMPORARY USE PERMIT NO. TUP-04-13 (renewal)

1. This Temporary Use Permit is issued subject to compliance with all of the bylaws of the Regional District applicable thereto, except as specifically varied or supplemented by this Permit.

2. This Temporary Use Permit applies to and only to those lands within the Regional District described below (legal description), and any and all buildings, structures, and other development thereon:

   PID: 009-592-342

   Legal Description: Plan 344R, Section 97, Renfrew District, and on District Water Lot 751, Block A and B

3. Pursuant to Section 492, 493, 495, 496, 497 of the *Local Government Act*, and Section 4.5 of the Capital Regional District's **Port Renfrew Comprehensive Community Development Plan, 2003, Bylaw No. 3109,** this Temporary Use Permit is renewed subject to the following conditions:

   a. For the purposes of this permit "Temporary Use" shall mean: "a seasonal commercial marina as shown on the attached Location Map (Attachment 1) and Site Map (Attachment 2), providing moorage for private fishing and pleasure craft as well as ancillary fuel sales".

   b. Access to the marina is to be from Parkinson Road via a private strata road through the adjacent parcel Lot 1, Section 97, Renfrew District, Plan EPP24972.

   c. Access to the marina through Lot 64, Section 1, Renfrew District, Plan 24755 except Plan VIP57563, VIP68427 and Section 36, Township 13, is to be used by emergency vehicles only.

   d. That a covenant be registered pursuant to Section 219 of the *Land Title Act* to permit the temporary use for the period of the permit. The covenant shall also include an agreement by the owner to indemnify and save harmless the CRD against all costs and expenses incurred by the CRD, in default by the owner, in the conversion, demolition or removal of the temporary use, and/or legal costs incurred in pursuing such legal remedies as the CRD sees fit. The covenant shall be registered within 30 days of the date of approval of the permit.

   e. That an Irrevocable Letter of Credit in the amount $10,000, be held for the period of the permit to ensure compliance with the permit conditions.

   f. In default of compliance with any of the provisions of this permit, the permit shall lapse.

   g. Nothing shall be done which is or will become an annoyance or nuisance to the surrounding areas by reason of unsightliness, the emission of odours, liquid effluence, dust, fumes, smoke, vibration, noise or glare; nor shall anything be done which creates or causes a health, fire, or explosion hazard, electrical or navigation interference.

4. The land described herein shall be developed strictly in accordance with the terms, conditions and provisions of this Permit, and any plans and specifications attached to this Permit which shall form a part hereof.

5. Notice of this Permit shall be filed in the Land Title Office at Victoria under Section 503 of *the Local Government Act*, and the terms of this Permit (TUP-04-13) or any amendment hereto shall be binding upon all persons who acquire an interest in the land affected by this Permit.

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TUP-04-13

6. The following plans and specifications are attached to and form part of this Permit:
    a. Location Map
    b. Site Map

7. This Permit is NOT a Building Permit

8. This permit renewal shall expire 3 years after the date of issuance of the permit, and, in accordance with Section 497(2) of the *Local Government Act*, may not be further renewed.

RESOLUTION PASSED BY THE BOARD, THE 13th day of April, 2016.

ISSUED this _____ day of _____, 2016

_____
Corporate Officer

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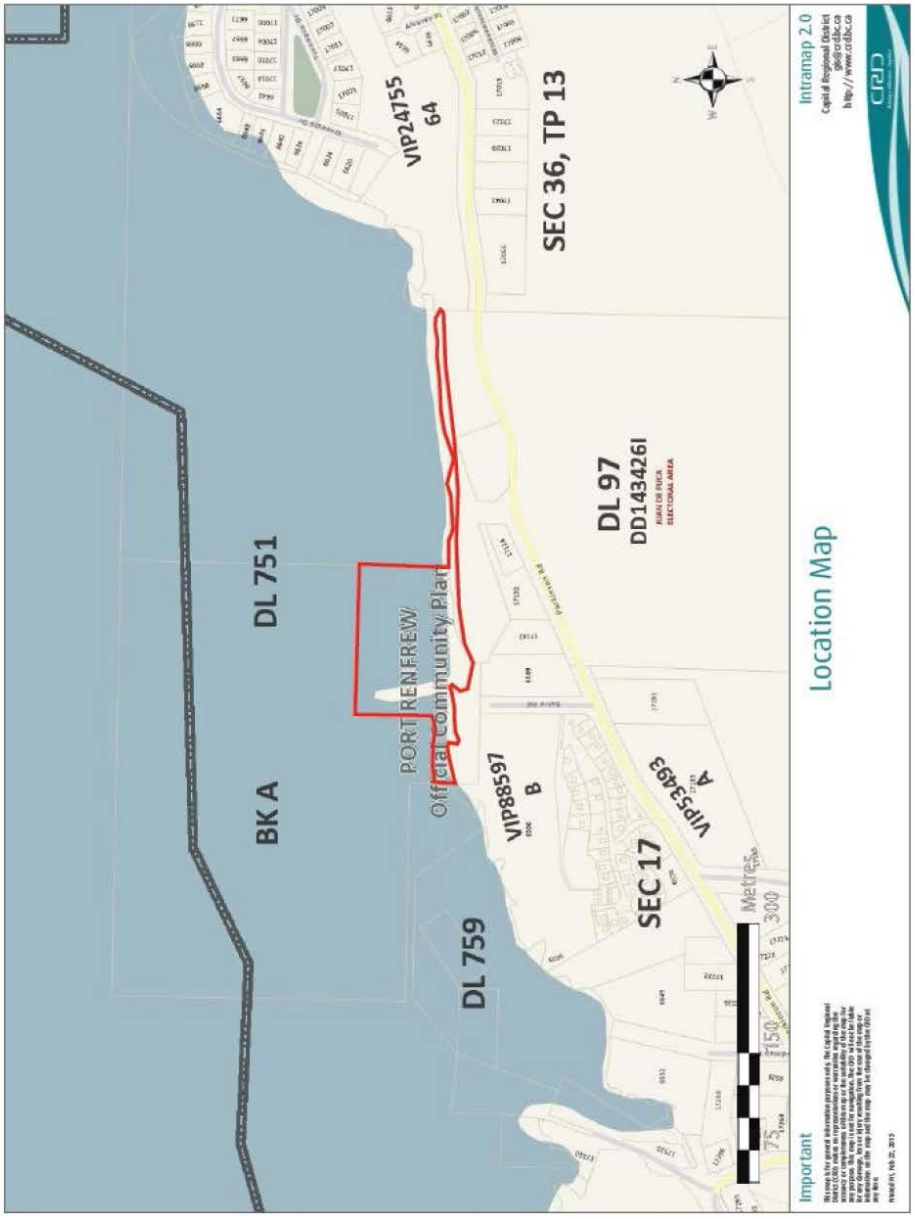
TUP-04-13

Attachment 1: Location Map



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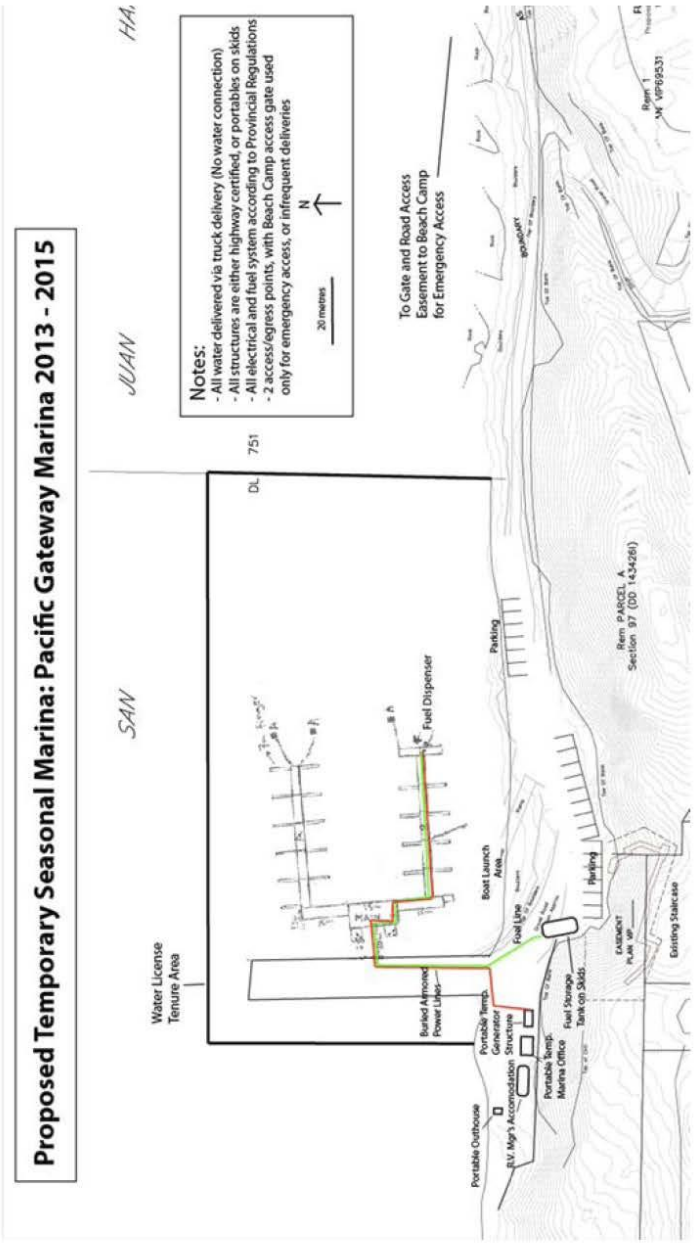
TUP-04-13

Attachment 2: Site Plan