

The Komasa Bluffs Covenant:

An Opportunity to Become a Partner in Conservation

THE KOMASA BLUFFS

For five kilometers along Denman's northeastern edge, the Komasa Bluffs soar 100 metres above the waters of the Strait of Georgia. Rare and exceptionally well-preserved marine fossils, now 18,000-years-old, are occasionally revealed in their Quadra sands. High on the Bluff's crest, raptors perch atop giant snags and centuries old Douglas-fir, Western red cedar and Grand fir, surveying the abundant marine life in the tidal zones below. Shore-birds rest and forage in the shelter of the Bluffs during their journey along the Pacific Flyway. Off-shore, over-wintering and breeding waterfowl preen and forage as mink, river otter, and black tail deer make their way along the beach.⁽¹⁾ The Bluff's Quadra Sands contain what hydrologists speculate is the largest groundwater aquifer on Denman Island.⁽²⁾ Perennial streams flow from the toe of the Bluff and create unusual habitats. As well, the Bluff ecosystem is an important component of the diverse and highly productive inter-tidal and sub-tidal region of the Strait of Georgia in that vicinity. According to Taara Environmental who undertook the Baseline Report of the covenant area, "The ecological significance of the covenant area cannot be overstated."⁽³⁾

This significance has long been recognized by the Denman community, government agencies, conservation organizations and previous owners. With the placement of a conservation covenant on the coastal portions of most Komasa Bluffs properties on November 6, 2006, the goal of affording protection to this area in perpetuity was finally realized. Since the 1990s, conservation covenants have become a widely used tool to protect lands with important natural values, allowing individuals, not just governments, to take a leading role in conservation. Komasa Bluffs landowners and the Denman Conservancy Association (DCA) have a unique opportunity to work together to protect this special area for generations to come.

The Denman Conservancy Association (DCA) is a volunteer organization established in 1991 to preserve, protect and enhance the quality of the natural and human environment of Denman Island. DCA is a BC registered society with federal charitable tax status. Supported by approximately 300 members, DCA is dedicated to increasing public awareness of the need for a strong ethic of land stewardship through public education, research and community participation. We are working to preserve forests, wetlands and other ecologically sensitive habitats. DCA owns properties, holds covenants, and serves as manager for conservation lands. DCA organizes and supports activities such as the Landkeepers program (stewardship) and educational activities with regular newsletters, informational workshops and nature Walks and Talks.

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THE COVENANT

The Komasa Bluffs Conservation Covenant (KBCC) is complex, lengthy and can seem daunting at first glance. This Guide's Q&A is intended to describe the covenant and summarize some of its provisions. It does not purport to provide legal advice. Prospective purchasers and owners are advised to consult with their own lawyers. In addition, this Guide is general in nature. Please refer to the KBCC itself for details relevant to any restriction and/or obligation. The covenant document can be accessed at:
<http://www.denmanconservancy.org/Komas%20Bluffs%20Covenant.pdf>

Q.1 What is a conservation covenant?

It is a commitment acquired along with the land that requires landowners to permanently protect specified natural and/or cultural features of their land. The commitment is between the owner and an organization or agency (the covenant holder). The covenant and additional “charges” (Statutory Right of Way and Rent Charge – see Q.12) are registered on the property's title at the Land Title Office and bind current and future owners of the property.

Q.2 Who is the Komas Bluffs covenant holder?

Denman Conservancy Association (DCA), a non-profit organization and registered charity, holds the KBCC. DCA has been approved to hold covenants (and related statutory rights of way) on Denman Island by the BC Provincial Government, and was among the first conservancy organizations in BC to receive this designation.

Q.3 What is the Komas Bluffs covenant area?

The KBCC covenant area is 41 hectares (101.3 acres) and includes only that part of properties at the Komas Bluffs to which the provisions of the KBCC apply. It is shown on a survey (“Plan”) that is attached as Schedule A to the registered covenant document.

Q.4 How do I know where the covenant area is?

DCA has marked the boundary of the covenant area on the lot lines measuring from survey pins already in place. The DCA-established stake locations are not precise, but adequate to provide a general idea of the area. The owner may wish to have a legal survey to locate exact boundary locations.

Q.5 How did the conservation covenant get placed on the Komas Bluffs?

In the mid 1990's the owner of the Komas Bluffs was interested in securing protection of the special natural features of the Bluffs. The property was sold but the concept of protecting the Bluffs was carried forward. Eventually the terms of a conservation covenant were agreed with a subsequent owner and the covenant was registered in 2006.



Q.6 With the KBCC on a portion of my property (the covenant area), do I still own that portion?

Yes. You and your successors hold title to the entire property and may continue to use it subject to the requirement that the use of that portion of the property, which is in the covenant area, be in compliance with the restrictions and obligations of the covenant.

Q.7 What happens if I sell my property?

The KBCC is registered against the title of your property under Section 219 of the *Land Title Act*. The covenant remains in effect after the land is sold or transferred, binding future owners of the land to the terms of the covenant.

Q.8 Can the KBCC ever be changed?

The KBCC can only be modified if both the owner and the covenant holder agree to such a change.

Q.9 Why does the KBCC have so much legal language and seem so long and complicated?

The KBCC is a legal document that, if current or future owners do not uphold it, may be enforced through the courts. The various sections and specific wording of the covenant are drafted to ensure that the intent and restrictions are specific and enforceable.

Q.10 Does the KBCC allow access by the general public to the covenant area?

No right of access to the covenant area by the general public is granted by the KBCC.

Q.11 What is the “Report” that is part of the registered covenant document?

It contains baseline documentation information that describes the covenant area and its amenities (any natural scientific, environmental, wildlife, plant and cultural value relating to the covenant area). The KBCC Report was completed on January 20, 2006 and is meant to serve as a starting point for understanding the amenities that are sought to be protected and how to best protect them. A Summary of the report is attached to the covenant document as Schedule B and full versions of the Report (with maps, photos, etc.) are held by DCA and the owner at the time of registration. To obtain the full version, please download from the website link above.

Q.12 What is actually registered at the Land Title Office on properties to which the KBCC applies?

- FORM C - Land Title Act (2 pages) – standard cover form with information about the owner and covenant holder, and includes signatories to the agreement
- FORM E - Land Title Act (1 page) – standard form with information about the owners (transferors)
- Terms of Instrument – Part 2 (26 pages) –agreement text
- Schedule A (1 page) – survey delineating the covenant area
- Schedule B (14 pages) – summary of the *Baseline Report* (a detailed physical description of the land)

There are two additional obligations associated with registering the covenant against the property’s title and these are also noted as “charges” against the title:

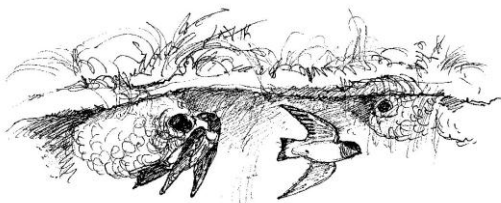
- *Statutory Right of Way* - registered under Section 218 of the *Land Title Act*, which permits the DCA to inspect the land annually or at other times if warranted in order to monitor and record the covenant area’s condition
- *Rent Charge* - to enable remedy of a violation of the terms of the covenant as a deterrent to such violations (see Q.21)

Q.13 What should I do if I have purchased a property with a portion in the Komasa Bluffs covenant area?

Section 14 of the covenant requires the owner to notify the covenant holder in writing of the change of ownership of the property and provide a copy of the state of title certificate as verification to the DCA (see address below). A copy of the covenant and baseline report can be downloaded from the DCA website (see website link above).

Q.14 Can I make alterations to the covenant area?

Yes, but only those alterations permitted by the covenant and only after a Detail Plan has been approved by DCA. [There *are* some circumstances in which specific alterations can be made without a Detail Plan (see Q.18).]



Q.15 How can I know before I purchase whether I will be able to make any of the permitted alterations to the covenant area?

DCA is unable to provide any assurance, prior to purchasing the property, that any particular alteration would be approved. Alterations to the covenant area may only be made after the owner has engaged in the required process (see Q. 16 and Q. 19 below). The intent of the covenant is to protect the covenant area and its natural amenities, but it also recognizes the need to accommodate a limited, but reasonable, level of residential use in the covenant area that enables the owner to enjoy the property. DCA will keep both of these objectives in mind when it reviews any requests for a proposed alteration, but DCA is not in a position to provide any advance review of any enquiries by a potential purchaser of a property within a covenant area.

Q.16 Does the Islands Trust have a role in approving alterations to the covenant area?

Yes, the Komasa Bluffs Covenant Area is entirely contained within the *Islands Trust Development Permit Area 1 – Komasa Bluffs*. Islands Trust Land Use Bylaw #186 requires an owner of property within the Komasa Bluffs development permit area to apply to the Denman Island Local Trust Committee for a development permit prior to undertaking any development, subdivision, or alteration to the land. Therefore, prior to any development, subdivision, or before making any land alteration within the covenant area, an owner of property within the Komasa Bluffs development permit area will have to engage in a process both with DCA and the Islands Trust. For further information, please refer to the Islands Trust.

Q.17 What kinds of alterations can I make to the covenant area with a Detail Plan approved by DCA?

The owner can create or improve sight lines to the horizon that conform to very specific criteria as detailed in the covenant document; and construct a gate, driveway or pathway, or other alterations. Encroachment of buildings in the covenant area, subject to compensation, is also contemplated in the covenant. However there are other constraints such as the “Safe Building Line” ⁽⁴⁾ that may exclude such encroachment.

Q.18 Can I make alterations to the covenant area without an approved Detail Plan?

The only exception, to the requirement to obtain the prior approval of any proposed alteration, is in the case of an emergency situation, where such alteration is necessary to prevent injury to a person or damage to any building or personal property. There is also a limited right to keep pathways clear and to remove organic debris and standing dead trees that may impact buildings on the property. Please refer to the covenant for specific details and obligations of the owner to notify DCA.

Q.19 How do I make a request to the DCA to undertake alterations to the covenant area?

Specific steps are required:

1. Obtain a Site-specific Ecological Inventory: In consultation with DCA, owners will need to obtain and register (on title), at the owner's expense, an ecological inventory specific to their property that will serve as an amendment to the Report (see Q. 11). The 2006 Report covers the entire length of the 3.5 kilometre covenant area. In order to make informed decisions about any proposed alterations on a particular property within the covenant area, it is necessary for more site-specific information about the area of the Komasa Bluffs to be available. In addition, having detailed descriptions of amenities specific to that property, prior to any proposed alteration, will be of benefit to the owner and the covenant holder.

2. Submit a written request & Detail Plan to DCA: A Detail Plan is a report, which may include illustrations, photos and other documentation of the proposed alterations and the impact that the proposed alterations may have on the covenant area and its amenities. It also identifies all remedial actions that the owner will take to lessen or eliminate the impacts identified. [Refer to the covenant for information on Detail Plans and approval procedures.]

Q.20 What if the DCA and owner have a disagreement?

The DCA and the owner will attempt to resolve a disagreement themselves, acting reasonably and in good faith. However, if they are unable to do so, the covenant does provide for a clear step-by-step dispute resolution process in various circumstances, including in the event that DCA refuses to approve a Detail Plan.

Q.21 What happens if I use or permit the use of the covenant area in contravention of the covenant?

The covenant has specific clauses to address this possibility. The covenant includes the "Rent Charge" which is a type of enforcement mechanism. It is not a periodic rental payment. It secures payment of \$25,000 by the owner to the DCA for each breach by the owner of the terms of the covenant. The amount is indexed for inflation since the covenant is intended to last indefinitely.

The Rent Charge is suspended (that is, no funds are actually paid "up front"), but is enforceable if the owner is in breach of the covenant and either has not cured the breach or is not taking steps to do so. "Generally, the covenant holder may enforce the rent charge in several ways, including by a court action against the landowner for the rent charge amount...The covenant holder could apply to the court to have the landowner's interest in the land sold to provide funds to pay the rent charge. The covenant holder need prove only that the landowner has violated the terms of the covenant in order to collect the basic rent charge amount. It is not necessary to prove that any particular harm resulted from the violation. The covenant holder can also recover the reasonable costs of enforcing the rent charge. This would include legal fees."⁽⁵⁾

Q.22 Can DCA come on my property at any time to inspect the covenant area?

DCA is entitled to enter your property once a year for an annual inspection of the covenant area. The owner and DCA will agree on an inspection date before August 31 each year. However, at all reasonable times with a written notice of 7 days to the owner, DCA may enter the property to access the covenant area. If in the opinion of DCA there is an emergency or other circumstance, which does not make giving notice practicable, the DCA may exercise its statutory right of way to enter the property to access the covenant area.

References: (1) *An Island Legacy*, Denman Conservancy Association, March 1999; (2 &3) *Baseline Inventory of the Komasa Bluff, Denman Island, BC*, Taara Environmental, January 20, 2006; (4) *Geotechnical Report 44211-N on the Komasa Bluffs*, Robert Potter, December 1, 2006; (5) *Greening Your Title: A Guide to Best Practices for Conservation Covenants* (2nd ed.), Ann Hillyer & Judy Atkins, West Coast Environmental Law, 2005