

Submissions regarding the determination under s. 18(5) of the *Environmental Assessment Act*, SBS 2002, c 43 as to whether the Jumbo Glacier Resort Project has been substantially started

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1. Introduction

We write on behalf of Wildsight and the Jumbo Creek Conservation Society (the “Societies”). The Societies are non-profit organizations opposed to the Jumbo Glacier Resort Project (the “Project”). The Societies make these submissions in regard to the Minister of Environment’s (the “Minister”) upcoming “substantially started” determination for the Project under s. 18(5) of the *Environmental Assessment Act*, SBC 2002, c. 43 (the “Act”).

The Project has not been substantially started. Not a single project element is complete, most have not been started, and the few that are started are *barely* started. Glacier Resorts Ltd. (the “Proponent”) has had the right to build the Project for 10 years and undertook no meaningful construction for about 9 years and 10 months – or 98% of the duration of their right to build the Project. The last-minute attempt to meet the legislative requirement for substantially starting is inadequate: Two concrete slabs and a couple of lift anchors are *barely* a start to the proposed \$450 million year-round ski resort.

Further, it appears that the construction has been done in contravention of the *Act* and conditions of the environmental assessment certificate; if true, the construction should not be taken into account in determining if the Project is substantially started.

2. Facts

On October 12, 2004, the government of British Columbia issued Environmental Assessment Certificate TD04-01 (the “Certificate”) to the Proponent. The Certificate and a subsequent time extension gave the proponent 10 years to *substantially* start the Project. At present, 10 years later, the Proponent has *barely* started the Project.

The most detailed and current Project description is found in the Master Plan¹. In total, the proposed \$450 million² Project consists of 137 significant buildings,³ 6,252 bed units,⁴ 46,500 square feet of commercial and service use space,⁵ 11,058 parking spaces,⁶ between 23 and 27 lifts to service up to 19,700 persons per hour,⁷ and associated infrastructure.

At present, total Project construction consists of floating slabs for two buildings and two anchor blocks for a single ski lift. To put this in perspective, according to an Expert hired by the Ktunaxa Nation Council, this amounts to less than 0.5% of the investment to complete Phase 1 (only the first of three project stages).⁸ The Expert Report of Calvin Meiklejohn is attached as **Appendix A**⁹ to this submission (the “Meiklejohn Report”).

¹ Jumbo Glacier Resort Master Plan 2010, Prepared by Pheidias Project Management Corp. (the “Master Plan”).

² Master Plan Table 7.10 at page 7-33.

³ Master Plan Table 4.14 at pages 4-85 to 4-89 (adding up of all building numbers).

⁴ Master Plan Table 4.17 at page 4-90.

⁵ Master Plan Table 4.5 at page 4-58.

⁶ Master Plan Table 4.11 at page 4-62.

⁷ Master Plan Table 4.12 at page 4-84.

⁸ Expert Witness Report of Calvin Meiklejohn at Section 6.

⁹ To avoid duplication, this appendix is excluded from the version of these submissions that are appended to the Ktunaxa Nation Council’s submissions.

The Master Plan divides the Project into three phases to be built over 15 to 20 years.¹⁰ After 10 years, Phase One has barely been started and Phases Two and Three have not been started. As such, the focus of these submissions is on Phase One. However, it is important to keep in mind that the substantially started determination must be made in relation to the whole Project and not just in relation to a single phase of the Project.

2.A. Phase One has *barely* been started

Phase One of the Project consists of 71 elements.¹¹ Of the 71 elements, 68 are not started and construction has barely begun on three: floating slabs have been poured for one daylodge and one maintenance facility, and two anchors have been poured for the base of one ski-lift. The following table lists the Phase One Project elements and the degree to which they are started.

Phase 1 Elements	Construction status
1 Gondola ¹²	Nothing started.
2 Chair Lifts ¹³	Two concrete anchor blocks have been poured for one lift. Bottom lift station not built, no tower bases started, top lift station not started, no lift apparatus present (motors, towers, pulleys, gondolas, cables, et cetera).

¹⁰ Master Plan at page 4-81.

¹¹ Master plan First Phase Summary List, Parking Lot Table 4.7, and Resort Construction Phasing and Bed Unit Calculations (at pages 4-74, 4-60, and 4-84 to 4-89 respectively). I used the Construction Phasing and Bed Unit Calculations to determine the number of elements where there was an inconsistency in number between it and the First Phase Summary List.

¹² Master Plan at page 4-76.

¹³ Master Plan at page 4-76.

3 glacier lifts ¹⁴	Nothing started.
Mountain top restaurant/refuge ¹⁵	Nothing started.
Glacier Dome mid-station ¹⁶	Nothing started.
Glacier Dome base Daylodge ¹⁷	Nothing started.
Main resort Daylodge ¹⁸	<p>At most, approximately 10% complete.¹⁹ A concrete pad has been poured, but not in the location approved under the Certificate.²⁰ The concrete pad poured for the daylodge is not load bearing, does not constitute a foundation and may have to be removed in order to construct the specified micropile foundations.²¹ Building services usually found under slab (e.g., plumbing and drainage) were not observed by the professional architect who visited site.²² Other services such as electrical connections are not present.²³</p>

¹⁴ Master Plan at page 4-76.

¹⁵ Master Plan at page 4-76.

¹⁶ Master Plan at page 4-76.

¹⁷ Master Plan at page 4-76.

¹⁸ Master Plan at page 4-76.

¹⁹ Meiklejohn Report at Section 6.

²⁰ Meiklejohn Report at Section 7.

²¹ Meiklejohn Report at Section 8.

²² Meiklejohn Report at Section 8.

²³ Meiklejohn Report at Section 8.

Tertiary sewage treatment ²⁴	Nothing started.
Emergency Power Generation ²⁵	Nothing started.
Water Wells ²⁶	Preconstruction studies only.
Piped Propane system ²⁷	Nothing started.
BC Hydro connection ²⁸	Nothing started.
Service Buildings ²⁹	At most, approximately 10% complete. ³⁰ The concrete pad poured for the service building is not load bearing, does not constitute a foundation and may have to be removed in order to construct the specified micropile foundations. ³¹ Building services usually found under slab (e.g., plumbing and drainage) were not observed by the professional architect who visited site. ³² Other services such as electrical connections are not present.) ³³

²⁴ Master Plan at page 4-76.

²⁵ Master Plan at page 4-76.

²⁶ Master Plan at page 4-76.

²⁷ Master Plan at page 4-76.

²⁸ Master Plan at page 4-76.

²⁹ Master Plan Table 4.14 at pages 4-85 to 4-86.

³⁰ Meiklejohn Report at Section 6.

³¹ Meiklejohn Report at Section 8.

³² Meiklejohn Report at Section 8.

³³ Meiklejohn Report at Section 8.

3 Bed and Breakfasts ³⁴	Nothing started.
34 Townhomes ³⁵	Nothing started.
8 Single family chalets ³⁶	Nothing started.
2 Day Skier Parking Lots ³⁷	Nothing started.
1 Heli-ski lodge ³⁸	Nothing started.
4 Condos ³⁹	Nothing started.
1 Condotel ⁴⁰	Nothing started.
2 Commercial units ⁴¹	Nothing started.

2.B. Phases Two and Three have not been started

Phases Two and Three of the Project consist of an additional 99-103 elements excluding infrastructure.⁴² None of these elements have been started. Phases Two and Three should add the following elements to the Project: 2 Parking lots with 714 stalls; 16 condo elements with 798 units; 11 employee housing elements with 750 suites; 1 First Nation Interpretive Centre; 1 service facility; 41 townhome elements with 126 units; 7 single family chalet elements with 93 units; 2 hotels with 300 units; 1 condo / retail element with 53 units; and 17-21 additional lifts.⁴³

³⁴ Master Plan Table 4.14 at pages 4-85 to 4-86.

³⁵ Master Plan Table 4.14 at pages 4-85 to 4-86.

³⁶ Master Plan Table 4.14 at pages 4-85 to 4-86.

³⁷ Master Plan Table 4.7 at page 4-60.

³⁸ Master Plan Table 4.14 at pages 4-85 to 4-86.

³⁹ Master Plan Table 4.14 at pages 4-85 to 4-86.

⁴⁰ Master Plan Table 4.14 at pages 4-85 to 4-86.

⁴¹ Master Plan Table 4.14 at pages 4-85 to 4-86.

⁴² The total number of elements depends on the number of optional lifts built.

⁴³ Master Plan Tables 4.9 and 4.11 at pages 4-61 to 4-62 (Parking); Tables 4.15 and 4.16 at pages 4-87 to 4-89 (Buildings); and Table 4.12 at pages 4-82 to 4-83 (lifts).

2.C. Other Project elements have not been built

The project has other elements that are not clearly set out in the Master Plan Tables. The following table lists some of the other major project elements and indicates their status.

Project Element	Construction Status
Electric transmission line	Not started.
On-site road network	No permanent roads built.
Off-site parking facilities	Not started.
Telephone communications	Not started.

It is the Societies' understanding that the one 'permanent' bridge that has been installed is a municipal bridge paid for by the Municipality⁴⁴ through a federal gas tax grant. The word "permanent" is set in quotation marks to indicate that it is the Societies' understanding that this bridge was originally meant as a temporary bridge and was paid for by the Municipality. As such, the bridge should not be considered part of the Project and should be treated as a temporary municipal structure.

⁴⁴ Jumbo Glacier Mountain Resort Municipality (the "Municipality")

2.D. The Proponent has not complied with Certificate conditions

Condition 1 of the Certificate requires that the Project be built in accordance with the Proponent's Commitments.⁴⁵ Pursuant to Commitment #57, the proponent is prohibited from beginning any site development, construction activity, or well drilling program until the Proponent has conducted and submitted to the relevant Ministry specific water quality baseline analyses.⁴⁶ By email dated October 9, 2014, the Environmental Assessment Office indicated that the Proponent was in non-compliance with three key pre-construction conditions, including condition #57.⁴⁷ To the best of the Societies' knowledge, the Proponent has not entered into a s. 36 written compliance agreement with the Minister, wherein the Proponent has undertaken to comply with the environmental assessment certificate within the time and on the terms specified in such an agreement. To the best of the Societies' knowledge, the Proponent is still in non-compliance with condition #57.

⁴⁵ The Proponent's commitments are listed at paragraph 45 of Schedule A of the Certificate and are thus binding on the Proponent.

⁴⁶ Commitment 57 of the Compendium of Proponent Commitments.

⁴⁷ Environmental Assessment Office administrative inspection email dated October 9, 2014 and attached Table. Condition 57 requires the Proponent to conduct and submit to the Ministry of Water, Land and Air Protection Regional Manager (Environmental Protection) additional baseline analyses before any site development/construction activity/well drilling program is undertaken.

3. Submissions

The Societies' submissions address two main points: First, whether the construction to date is a substantial start to the Project; and second, whether the construction to date is unlawful and thus should be excluded when deciding whether the Project has been substantially started.

3.A. The Project is not substantially started

To determine whether the Project is substantially started, the Minister must focus on the physical facilities that have been built as part of the Project and compare those to the overall Project as approved. Guidance on what may be considered as part of the Project is available in the *Act*, the Environmental Assessment Office's User Guide, and in the *Taku* decision. Guidance on what "substantially started" means can be found in the *Taku* decision and in secondary sources.

The Project components that should be considered are the permanent physical aspects of the project

"Project" is a key term in s. 18(5) of the *Act* and its definition governs what the Minister may consider in deciding whether a project is substantially started.⁴⁸ The definition of "project" must be interpreted in keeping with the ordinary meaning in the context of the *Act*.⁴⁹ The object of the *Act* is the protection of the environment.⁵⁰

⁴⁸ *Taku* at para 33.

⁴⁹ *Taku* at para 34.

⁵⁰ *Taku* at para 34.

Section 1 of the *Act* defines “project” as any

- (a) activity that has or may have adverse effects, or
- (b) construction, operation, modification, dismantling or abandonment of a physical work.

This language indicates that, “in deciding whether a project has been substantially started, the decision maker should focus less on the permits which have been granted, and money expended, as two examples, and more on what has taken place physically at the site...”⁵¹ Further, temporary structures and activities should be given less weight than structures which will be in place for the life of a project.⁵²

It is important to note that the *Act* and the definition of “reviewable project” is intended to regulate physical elements and activities that could have an adverse effect on the environment. Thus “project” excludes non-physical activities that do not have adverse effects, and excludes works that do not involve construction or operation or other physical development.

The Societies submit that the following non-exhaustive list identifies some of the activities that do not, and cannot, have adverse effects. As such, these activities fall outside the definition of project and cannot be considered in determining whether the Project is substantially started:

- the environmental assessment process and all related efforts such as the preparation of the Project Report, the Project Report Supplement, and the 2003 Jumbo Glacier Resort Master Plan Concept (Volumes 1 to 5);
- the preparation of the Master Plan; and

⁵¹ *Taku* at para 34.

⁵² *Taku* at para 35.

- the completion of the preconstruction studies necessary for construction of the Project such as completion of the Environmental Management Plans and obtaining a Master Development Agreement.

The Societies further submit that the work done to fulfill construction preconditions cannot be considered in determining whether the Project has been substantially started. By necessary inference, anything that must be accomplished before construction on the Project begins, cannot be part of the Project. This would include such things as groundwater testing (an activity that may have adverse effects but is not part of the Project).

The facts section sets out the scope of the Project in detail. As noted above, permanent physical construction of Project facilities must be given the most weight in the substantially started determination. The only permanent physical work on the Project amounts to two concrete slabs and two lift anchors that were poured, possibly unlawfully, in a last minute attempt to meet the requirement for a substantial start by October 12, 2014.

Substantially started requires more than being *barely* started

The term “substantially started” is not defined in the *Act*. In the *Taku* decision, Justice Macintosh referred to an online definition of “substantial” before noting that to be substantially started, a “project needed to have been started in its essentials, in a real and tangible way”. Further guidance is provided in the Environmental Assessment Office’s User Guide, where it points out that ancillary, secondary, or temporary activities are less important than significant and important steps “to develop the **overall** project” [Emphasis added].

According to municipal development guidance, in the context of s. 926 of the *Local Government Act*, RSBC 1996, c 323, “substantially started” requires that at least 50% of the approved Development Permit project’s footing and foundation

is poured.⁵³ The Societies would concede that it would be reasonable to conclude the Project was substantially started if 50% of the foundations for the total approved Project had been poured – foundations for at least 68 of the 137 significant buildings.

As detailed above, the Project is a proposed \$450 million year-round ski resort with 137 significant buildings, between 23 and 27 lifts, and all associated infrastructure including domestic water, roadways, sewage treatment, piped propane, and electricity. The Societies would concede that that it would be reasonable to conclude that the Project was substantially started if Phase One was complete and operational, even though Phase One appears to constitute less than one third of the Project. Calvin Meiklejohn, an architect hired by the Ktunaxa Nation Council, found that only 0.5% of the total value of Phase 1 (of the Project’s 3 phases) has been completed.⁵⁴

At present, total construction on the facilities consists of floating slabs for two buildings and two anchors for one ski lift. There are no roads, there is no electricity, there is no sewage treatment, and there is no domestic water. No reasonable analysis could lead to the conclusion that the Project has been substantially started. It would be hard to even argue that the daylodge, ski lift, and maintenance facility are “substantially started” in themselves. When examined in the context of the Project as approved, these concrete works are *barely* a start to the Project.

3.B. The Construction was not done in compliance with the Certificate’s conditions

The Societies submit that any construction undertaken prior to the fulfillment of the Certificate’s pre-construction conditions is *prima facie* unlawful. Section 41

⁵³ City of Kelowna Land Use Management Bulletin Number 10-02, created November 19, 2010.

⁵⁴ Meiklejohn Report at Section 6.

of the *Act* states that a person commits an offence if they contravene s. 8(1) or (2) of the *Act* or fail to comply with an environmental assessment certificate. As noted by the Environmental Assessment Office, as of October 9, 2014 the Proponent was in non-compliance with pre-construction conditions 57, 72, and 146. As such, any construction undertaken prior to fulfillment of these conditions is in apparent violation of the Certificate and thus, likely in violation of s. 41 of the *Act*. To the best of the Societies' knowledge, the Proponent has not yet complied with all pre-construction conditions. As such all construction to date on the Project appears to be unlawful.

Proponents should not be allowed to rely on unlawful construction to meet statutory requirements for substantially starting projects. Allowing the Proponent to rely on activities conducted in violation of a certificate would set an iniquitous precedent. It would act as an encouragement to proponents to violate certificates and the *Act* if helpful in obtaining the permanent right to pursue a project. It would also send a troubling message to groups like the Societies who are committed to opposing objectionable project proposals through the established legal process. Refusing to consider any construction that was performed in non-compliance with the Certificate will set a proper precedent on how unlawful construction should be handled in substantially started determinations.

3.C. [Rushed construction done in September and October 2014 was not done at the location stated in the Master Plan and may constitute a violation of the certificate](#)

According to the Meiklejohn Report, the slab poured for the daylodge is likely outside the *Land Act* tenure for the Project and the change in location will likely have ramifications for the overall master plan.⁵⁵

⁵⁵ Meiklejohn Report at Section 7 and associated Appendices.

Condition 1 of the Certificate states:

The Proponent must cause the Project to be **designed, located, constructed,** and operated in accordance with both the Conditions of this Certificate and the documents and correspondence listed in Schedule A...” (Emphasis added)

Condition 4 of the Certificate states:

“...if prior to the Project being constructed and operations commencing, the Proponent proposes a material change to the design, location, construction or operation of the Project as described in the documents listed in Schedule A and in the opinion of the Executive Director, the change may have the potential for significant adverse effects, the Proponent must then provide to the Executive Director:

- a) an application in writing to amend the Certificate, pursuant to section 19(1) of the Act; and
- b) plans, analysis, records and other information necessary for an effective assessment by the Executive Director of the proposed change.

To the best of the Societies’ knowledge, the Proponent never proposed the changed location of the daylodge to the EAO’s Executive Director, nor consulted with the Ktunaxa Nation Council regarding such a change. Thus, there is a significant question whether the relocation of the daylodge violates the Proponent’s obligations and whether the Executive Director has the information necessary to determine whether the proposed change could cause significant adverse effects.

As noted in the Meiklejohn Report, there is a serious question whether the slab for the daylodge is now located outside of the Proponent's *Land Act* tenure.⁵⁶ If true, this raises the question of whether the Proponent is now trespassing on Crown Land, in violation of ss. 59 – 60 of the *Land Act*.

The change in location of one of the Project's public structures is a significant change in the Project. As the Meiklejohn Report notes, this could require further changes to the overall resort master plan.⁵⁷ Additional changes would likely include road layout, sewage lines, hydro lines, water lines, parking, and perhaps even lift locations. If the slab is located outside the tenure, then the additional changes to infrastructure such as roadways and parking lots may also be outside the current tenure. The change of location is significant and has cascading ramifications on multiple parts of the proposed Resort, on crown land use, and even on the avalanche hazards around the project (as set out below).

As noted above, Proponents should not be allowed to rely on unlawful construction – nor construction undertaken in violation of the Certificate – to meet statutory requirements for substantially starting projects.

3.D. The construction of the daylodge in the new location may create an unacceptable avalanche hazard and violate the a commitment of the proponent

As noted above, Condition 1 of the Certificate requires that the Project be built in accordance with the Proponent's Commitments. Pursuant to Commitment #36, the Proponent has committed that:

...the proposed residential and commercial structures will be located **completely** outside the avalanche hazard area [Emphasis added]

⁵⁶ Meiklejohn Report at Section 7.

⁵⁷ Meiklejohn Report at Section 7.

The Societies have reviewed the October 30, 2014 letter of Graham Holt of RK Heliski sent to Autumn Cousins, the Manager of Policy and Compliance of the EAO. RK Heliski has over 44 years of observing, assessing, and controlling avalanche conditions at this site. Mr. Holt expresses the opinion that the relocated daylodge is now in an area subject to a “class 4” avalanche risk.

While we are aware from media reports that the Ministry of Environment may assess the avalanche risk differently, we have not seen the basis of the Ministry’s assessment. We would respectfully question the Ministry’s assessment given the hasty relocation of the daylodge, lack of detail regarding any site visits by qualified Ministry personnel, and the experience that RK Heliski brings to its assessment.

Again, given the previously stated concerns about re-locating the daylodge, and the possibility that was done in violation of Proponent commitment 36, the Minister must examine this issue carefully. For the reasons stated above, if the work done to pour a concrete slab for the daylodge violates the Certificate conditions, then it cannot be counted as work that constitutes a substantial start to the Project.

4. Conclusion

For the reasons set out above, the Societies submit that the activities undertaken by the Proponent cannot reasonably be considered to have substantially started the Project. Further, the Proponents should not be allowed to rely on the minor construction activities undertaken to date as those activities appear to have occurred in violation of Certificate terms. Further, the work itself, in the opinion of the Societies, is not a good faith start of construction but is instead a last-ditch, cynical attempt to create the impression that a substantial start to the Project is underway.

When examined, work on physical elements of the Project has been *barely* started. The Proponent has only done work in relation to 3 of the 71 project components of Phase 1, and that work is very minimal. Neither Phase Two nor Phase Three has even been started.

A Note on the Right to Make the Submissions

Regarding this Project, the Societies have been fully and regularly involved with the process over the years and expect that their submissions on the substantially started determination will be provided to the decision maker and given serious consideration. The Societies are prepared to provide any information the decision maker needs if the Societies' right to make these submissions is in doubt. If this is the case, please let us know immediately so that we can make submissions in this regard.

The Jumbo Creek Conservation Society (the "JCCS") is a non-profit society formed in 1995 specifically to oppose the development of the Project. The JCCS has participated in the process for the past 19 years and represents over 1,500 members and a significant portion of local opposition to the Project.

Wildsight is an environmental charity and has been opposed to the Project since 1991 – beginning with the CORE process and continuing from there. As with the JCCS, Wildsight has always participated in the process and represents a significant portion of local opposition to the Project.

Wildsight and Jumbo Creek Conservation Society helped with the hiring, instruction and payment of the expert for the Meiklejohn Report.