



**Agricultural Land Commission Appeal Decision, ALC File 142854**

In the matter of an appeal under section 55 of the *Agricultural Land Commission Act*,  
R.S.B.C. 2002, c. 36

**BETWEEN:**

**Border Feedlot Corporation**

**Appellant**

**AND:**

**Paula Blanchard, ALC Compliance and Enforcement Officer**

**Respondent**

**BEFORE:**

An Appeal Panel of the ALC

Dave Zehnder, ALC Vice Chair  
Janice Tapp, ALC Vice Chair  
Richard Mumford, ALC Vice Chair  
Gerry Zimmermann, ALC Vice Chair  
Linda Michaluk, ALC Vice Chair  
Jennifer Dyson, ALC Chair

**DATE:**

Conducted by way of Written Submissions concluding on

September 25, 2020

**SUBMISSIONS:**

**From the Appellant:** John Roberts, Legal Counsel

**From the Respondent:** Paula Blanchard, ALC Compliance and  
Enforcement Officer

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**Procedural History**

[1] On May 22, 2020, a stop work order dated May 14, 2020 (the “Order”) was delivered to the Appellant, Border Feedlot Corporation (“BFC”) and BFC Director Vernon Baird. The Order was issued pursuant to s. 50 of the *Agricultural Land Commission Act* (“ALCA”) by Paula Blanchard, Agricultural Land Commission (“ALC”) Compliance and Enforcement Officer. The Order pertained to PID 013-222-082 (40 ha) – *Part SE 1/4* ,

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*Section 7, Township 7, New Westminster Land District, Except Plan N ¼ & EXC PT on PL 15097, PT of SRW PL 78025, PT Dedicated Rd on PL BCP13058* located at 961 176 Street Surrey, BC (the “Property”), and required that BFC stop “operating a commercial soil blending business on the Property without the approval” of the ALC. The Order sets out that this activity is a non-farm use of land without authority contrary to s. 20(1) of the *ALCA*.

[2] By Notice of Appeal dated August 3, 2020 BFC appeals the Order on the grounds that the Appellant’s use of the Property conforms with s. 20(1) of the *ALCA* and the Appellant does not operate a commercial soil blending business on the Property as described in the Order. The Appellant seeks to have the Order quashed.

[3] Pursuant to rule 3, of the *ALC Rules of Practice and Procedure for Appeals under Section 55 of the ALC Act*, Ms. Blanchard is the respondent.

[4] The Appeal Panel (“Panel”) of the ALC has the authority to hear this appeal under section 55 of the *ALCA* which provides:

**55** (1) A person who is the subject of a determination, a decision, an order or a penalty under section 50, 52 or 54 (1) may appeal the determination, decision, order or penalty to the commission by serving the commission with a notice of appeal.

(2) On an appeal under this section, the commission may

(a) confirm, vary or reverse the determination, decision, order or penalty, or

(b) refer the matter, with or without directions, back to the person who made the initial determination, decision or order.

The appeal was heard in writing by the Panel.

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[5] On September 1, 2020, the Appellant delivered its written Appeal Package. The Appeal Package contained a written argument in support of the Appeal which is described in more detail below, and the Affidavit of Vernon Baird.

[6] On September 15, 2020, the Respondent delivered its written submissions, which are described in more detail below.

[7] On September 24, 2020, the Appellant delivered his reply in writing.

[8] On September 25, 2020, the Respondent delivered a sur-reply in writing.

### **Background**

[9] The Appellant has operated a cattle feedlot on a property located at 8<sup>th</sup> Avenue in Surrey, BC, (the “Feedlot”) since 1982. BFC receives horse manure and mushroom manure and blends these products with cattle manure to create a blended manure (the “Product”).

[10] Approximately 20 years ago, BFC started leasing the Property. Approximately 10-15 years ago BFC started bringing the horse and mushroom manure directly onto the Property to blend. BFC applies the Product to fields used to feed BFC’s cattle at both the Feedlot and the Property. BFC stores the Product at the Property to make it easier to spread instead of hauling it from the Feedlot. At times, BFC sells excess Product to third parties.

[11] On January 22, 2020 the Respondent sent a letter to K.S.C. Holdings Ltd. and BFC pertaining to the Property. The letter stated that BFC “may be operating a commercial business” and noted that “selling of soil amendments from the Property is not a permitted farm use and would require a non-farm use application.” Based on this information, the Respondent said the Property was in contravention of the *ALCA* and Regulation and required that the Appellant cease the aforementioned non-farm use

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activity. The Respondent also set out information about the ALC Application process and asked to be informed if the recipients chose to submit an application.

[12] On February 28, 2020, the Appellant's counsel replied indicating:

BFC carries on a "farm business" and a "farm operation" at two locations: 17256 8<sup>th</sup> Avenue, Surrey, BC ("Property A") and 961 176<sup>th</sup> Street, Surrey, BC ("Property B"). On both properties, and specifically Property B, BFC has blended cattle, horse and mushroom manure for the purpose of applying the resulting product (the "Amendment") to the fields BFC uses to grow hay and silage for feed. At times BFC has excess Amendment for its own use and sells such excess to primary users (non-retail) in the agricultural, horticultural and forestry industries as a natural fertilizer. (Emphasis Added)

[13] The Appellant's counsel stated that the use of the Product on the fields and the sale of the Product was a permitted use under sections 7(2), 7(3), 11(2) and 11(3) of the Regulations and that it was not necessary for BFC to apply for a non-farm use application.

[14] A March 12, 2020 letter to K.S.C. Holdings Ltd from a City of Surrey bylaw enforcement officer (Chris Holt) indicated that a recent inspection confirmed the operation of a soil blending business on the Property and that the City of Surrey zoning bylaw did not permit this activity in the A1-General Agricultural Zone. The landowner was required to cease the illegal use by March 26, 2020. A follow up letter from the same author on April 16, 2020, required that the soil blending use cease by April 30, 2020.

[15] On April 14, 2020 the Respondent replied to the Appellant's February 28, 2020 letter. The Respondent set out her understanding that "the operation is a soil blending operation where farm by-products (i.e. horse manure and mushroom manure) are imported and mixed before a minor percentage of the soil amendments are applied to the Property with the majority sold off-site." The Respondent stated that while storing and applying the Product to the Property was a permitted use under s. 7(2) of the Regulation, off-site sales were not permitted. The Respondent stated that section 11 of the Regulation did not apply because it does not include agricultural by-products such as manure. She

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noted that the storage, production and use of agricultural and other organic by-products are clearly defined in the Code of Practice for Agricultural Environmental Management and the Organic Matter Recycling Regulation under the *Environmental Management Act* and advised the Appellant to review this legislation. The Respondent reiterated that the activity taking place on the Property was in contravention of the ALCA and Regulations and that the BFC must cease the aforementioned non-farm use activity immediately. The Respondent reiterated that BFC could apply for a non-farm use permit.

[16] On May 8, 2020, the Appellant replied to the above letter advising that the Respondent erred in stating that a minor percentage of the Product was applied to the Property and asserted that the vast majority of the Product was so applied. The letter did not deny that off-site sales were taking place. Further, the letter advised that the ALC has a duty of confidentiality to not distribute information about BFC to another government agency or third party.

[17] On May 12, 2020, the Respondent replied to the May 8, 2020 correspondence. The Respondent confirmed that the ALC had a June 18, 2019 letter from the Ministry of Environment and Climate Change Strategy (“MOE”) addressed to BFC which described statements made by Mr. Vernon Baird, Director of BFC. The letter indicated that “[s]ince all the manure and used mushroom substrate blended is not used on-site, it is a commercial non-farm use operation and requires ALC approval per section 20(1) of the *ALCA*”. As regards the privacy issues raised by the Appellant, the Respondent advised that sections 49-52 and 54 of the *ALCA* provide officials of the ALC with certain compliance and enforcement powers. The Respondent stated the ALC owed no common law duty to maintain information gathered or findings made pursuant to those powers in confidence. The Respondent stated that the ALC is a public body subject to the *Freedom of Information and Protection of Privacy Act* (“*FOIPPA*”) and that from time to time the ALC may share information gathered in the course of its compliance and enforcement investigations with other Canadian public bodies. Disclosure of information about BFC to

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the MOE, the Ministry of Agriculture, Metro Vancouver or the City of Surrey, would be permitted by *FOIPPA*.

[18] On May 14, 2020 the Respondent issued the Order.

### **Appellant's Submission**

[19] On September 1, 2020, the Appellant provided a written submission which included argument and an affidavit from Vernon Baird. The main points provided in the September 1, 2020 submission were:

- No evidence is provided in the Respondent's Earlier Record that BFC committed the contravention.
- The City of Surrey Bylaw Enforcement staff letter to BFC alleging a contravention is unreliable hearsay.
- The Warning Letter from the MOE is double hearsay.
- BFC never operated a soil blending business because:
  - Manure is not included in the definition of "soil" in the *ALCA*;
  - The Product is a "soil amendment" not "soil";
  - There is no evidence that BFC ever sold the Product from the Property;
  - There is no evidence that BFC sold Product from the Property on May 8, 2020 (the date of the Order).
- The blending of manure, its application as a soil amendment to the Property, and its storage on the Property is a permitted farm use under section 7(2) of the Regulations.

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## Respondent's Submission

[20] The Respondent submits that at all relevant times the *ALCA* prohibited non-farm uses including the commercial sale of the Product, blended but not produced, on the Property.

[21] The Respondent argues that the Appellant has admitted to commercial sales of the Product in a variety of places in the Earlier Record and in other materials before the Panel:

- First, in e-mail correspondence dated January 24, 2019 from the Appellant to the MOE the Appellant stated that BFC blends manure and sells a portion to a company that bags the material for home gardeners.
- Second, in June 18, 2019, an inspection report and order from the aforementioned MOE staff described communications with Mr. Baird in which Mr. Baird informed the MOE that “approximately half of the material brought onto the site is used on the fields as a nutrient source and the remaining portion is sold to landscape yards or to a company that bags it to be sold at garden centres.”
- Third, in correspondence from the Appellant’s counsel dated February 28, 2019;
- And finally in Mr. Baird’s affidavit dated August 31, 2020.

[22] On the matter of admissibility of the evidence, the Respondent replied that no objection is raised in respect of the January 24, 2019 e-mail nor the February 28, 2019 correspondence, nor the Affidavit of Mr. Baird each of which contain admissions.

[23] Second, the Respondent argues that section 40(1) *Administrative Tribunals Act (ATA)* is applicable to the ALC on appeals by virtue of s. 55.01(a) of the *ALCA*. Section 40(1) of the *ATA* provides the Panel with the discretion to accept a wide variety of evidence whether or not the information would be admissible in a court of law. The Respondent argues it would not be reasonable or practical to require only evidence under oath or otherwise admissible under the *Evidence Act*.

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[24] In any event, the Respondent says correspondence from the City of Surrey is relied on for background, not to establish a breach of the *ALCA*.

[25] Finally, the Respondent argues the June 18, 2019 letter from the MOE should be admitted as an out of court assertion made by a party to the proceeding which is either not hearsay, or an established exception to the rule against hearsay, or a statement that otherwise meets the principled approach to hearsay.

[26] As regards the timing of sale of the Product, the Respondent argues there is no requirement that the breach occur on the date of the Order. The *ALCA* (s 50) provides that if an official considers that a person is contravening or is about to contravene a provision of this Act or the regulations, the official, in accordance with the regulations, may order that the contravention cease.

### **Appellant's reply argument**

[27] The Appellant argues in reply that the Order is a criminal or quasi criminal sanction and therefore must expressly state the contravention alleged by the Respondent and be clear and understandable.

[28] The Order states that the Appellant must "*immediately cease a commercial soil blending operation*". The Respondent argues that if the Respondent's only complaint is that the Appellant was selling manure from the Property, then the Stop Work Order should simply have stated: immediately cease the sale of soil amendment from the Property.

[29] The Appellant argues that reading the Order in light of prior correspondence between the parties renders the Order unclear and not understandable and violates the principle of administrative fairness.



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[30]The Appellant argues that the hearsay evidence has been shown to be unreliable because the MOE correspondence fails to delineate between the Feedlot and the Property and is contradicted by Mr. Baird's affidavit.

### **Respondent's September 25<sup>th</sup> 2020 sur-reply**

[31]The Respondent addressed a point not raised in previous submissions and argued that the Order is not a criminal or quasi-criminal sanction or proceeding, nor is there any allegation that the Appellants have breached the Order or otherwise contravened s. 57 of the *ALCA*

### **Appeal Panel Discussion and Findings:**

#### ***BFC Was Selling the Product Off-Site***

[32]The Panel has considered all of the information before it, whether or not specifically reiterated here.

[33]The Panel finds there is sufficient evidence to support that BFC has sold the Product off-site from the Property.

[34]Most significantly, there is direct evidence from the Appellant's own affidavit in which he deposes that "in the past very little of the Blended Manure on the Subject Property was sold offsite." This is a direct admission that some of the Product was sold from the Property in the past.

[35]As well, there are the representations of his counsel in correspondence dated February 28, 2020 and sent on his behalf to the ALC that: "At times BFC has excess Amendment for its own use and sells such excess to primary users (non-retail) in the agricultural, horticultural and forestry industries as a natural fertilizer."

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[36] There is also evidence in the Earlier Record. There is a January 24, 2019 e-mail from the Appellant to the MOE in which the Appellant admits to selling the Product. No hearsay objection has been raised to this prior statement of the Appellant.

[37] The Panel did not concur with the Appellant's arguments that the Respondent could not rely upon hearsay evidence to support the issuance of the Order. Section 55.01(a) of the *ALCA* sets out that section 40 of the *ATA* applies to the Appeal Panel:

Information admissible in tribunal proceedings

**40** (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

(2) Despite subsection (1), the tribunal may exclude anything unduly repetitious.

(3) Nothing is admissible before the tribunal that is inadmissible in a court because of a privilege under the law of evidence.

(4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.

[38] In considering whether to accept the hearsay evidence the Panel considered that it was collected by and formed part of the record of investigations undertaken by officials of another public agency, the MOE. The recorded information was provided by the Appellant. The Appellant did not deny providing that information and he had an opportunity to respond to and clarify that information. Both the MOE report and the Appellant's explanations in his affidavit are admissible.

[39] The Respondent has made clear she does not rely upon the City of Surrey letter for a hearsay purpose and the Panel does not rely upon it as such.

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***Selling the Product Offsite Contravened the ALCA***

[40] Section 20 of the ALCA provides:

Non-farm use of land within agricultural land reserve

**20** (1) A person must not use agricultural land for a non-farm use unless permitted under section 25 or 45 or the regulations.

[41] The ALCA defines “farm use” and “non-farm use” as follows:

**Farm use** means (a) an occupation or use of agricultural lands for ...

(ii) a farm operation as defined in the Farm Practices Protection (Right to Farm) Act...

(iii) a purpose designated as a farm use by regulation...

**Non-farm use** means a use of agricultural land other than a farm use

[42] The *Farm Practices Protection (Right to Farm) Act* defines “farm operation” as:

**“farm operation”** means any of the following activities involved in carrying on a farm business:

(a) growing, producing, raising or keeping animals or plants, including mushrooms, or the primary products of those plants or animals; (Emphasis Added)

[43] The ALCA Use Regulation defines “farm product” and “soil amendment” as

**“farm product”** means a commodity that is produced from a farm use but does not include water;

**“soil amendment”** means compost, fertilizer, manure, mulch and soil conditioners

[44] Manure and mushroom substrate are not the “primary products” of animals or mushrooms. They are secondary by-products produced as a result of the production of primary products.

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[45] The Environmental Management Act Code of Practice for Agricultural Environmental Management define “agricultural product” and “agricultural by-product as:

"agricultural product" means

(a) livestock, poultry and insects,

(b) plants, including trees, and fungi, whether grown in a field or an enclosed space, and

(c) the primary products of a thing referred to in paragraph (a) or (b);

"agricultural by-product"

(a) includes...

(i) materials that are produced for the purposes of an agricultural operation but are incidental or secondary to the primary product of the agricultural operation,

(ii) manure, ...

(vi) the product of an agricultural composting process,

(vii) used mushroom-growing substrate, and

(viii) soilless media...

[46] According to the legislation then, a “farm operation” includes the growing and keeping of animals and mushrooms, or their primary products. “Farm product” is defined as a **product** produced from farm use; “agricultural product” includes livestock and fungi, while “agricultural by-product” includes horse manure and mushroom manure (used mushroom-growing substrate).

[47] The Product is made of blended manure / spent mushroom substrate. It is not a “farm product” nor is it an “agricultural product”.

[48] The Product is an “agricultural by-product” and a “soil amendment”.

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[49] As noted above, the Respondent has argued that the Product does not meet the definition of “soil” and as such the Stop Work Order – which refers to a “soil blending” operation is not sufficiently clear and precise.

[50] Section 1 of the *ALCA* defines “soil” as follows:

“soil” includes the entire mantle of unconsolidated material above bedrock other than minerals as defined in the *Mineral Tenure Act*;

[51] “Soil blending” is not defined. It is possible to interpret that native soil is a necessary ingredient in a “soil blending” operation. The Appeal Panel does not need to resolve this issue because, as the Appeal Panel explains below, it is also not a permitted farm use to sell a soil amendment from the Property. There is no dispute that the Product is a soil amendment. The Appeal Panel has therefore determined that it will vary the Order despite that it does not consider the reference to “soil blending” in the Stop Work Order to be incorrect in this circumstance.

[52] There is no question that storing and applying soil amendments to the Property is a permitted farm use under s. 7(2) of the Regulations that provides:

7(2)The use of agricultural land for storing and applying biosolids and soil amendments, other than compost, may not be prohibited as described in [section 4](#). (Emphasis Added)

[53] Section 7 does not speak to the sale of soil amendments.

[54] Sales from agricultural land are addressed in section 11 of the *ALCA Use Regulation*. However, while section 11 was raised by the Appellant in earlier correspondence with the ALC, it was not raised in his written submissions.

[55] The uncontested evidence before the panel is that horse manure and spent mushroom substrate are imported onto the Property and blended to create the Product. The Appellant argues these materials are “farm products”.

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[56]As set out above, the Panel respectfully disagrees. It is clear from the legislation cited above that the importation (as opposed to the production on-site) of manure (a by-product as opposed to a product) onto the Property is not a “farm operation”. Further, as the Product is composed of by-products (manure and mushroom substrate), it is itself a by-product. Therefore, the Panel finds that the production of the Product is not a “farm operation”, and that the Product is an “agricultural by-product”. The Panel confirms that sale of the Product is not a permitted farm use under section 7 of the ALCA Use Regulation. The Panel further confirms that section 11 has no application here. Section 11 refers to primary farm products that are produced on the farm and does not include agricultural by-products, let alone agricultural by-products produced off-farm like the Product.

[57]As noted above, the Appellant as operator of BFC confirms that he sold the Product from the Property to third parties. As such the Appeal Commissioners confirm that BFC contravened section 20 of the ALCA by undertaking a non-farm use (the sale of the Product) without permission of the ALC.

***The Order is Varied***

[58]As noted earlier in this decision, it is clear to the Panel that the operation being conducted on the Property is a manure and spent mushroom substrate blending operation supported by the importation of horse manure and spent mushroom substrate onto the Property. There is no native soil involved in the blending operation.

[59]The Panel has found that the sale of the Product off of the Property to third parties was not a permitted use under the ALCA and Regulation. In making the Order, the Panel noted that the Respondent accurately concluded that the Appellant had contravened section 20 of the ALCA. At the date of the Order section 20 of the ALCA provided “A person must not use agricultural land for a non-farm use unless permitted under this Act.”

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[60] Further the Appeal Panel noted that for many months preceding the issuance of the Order beginning in January 22, 2020 correspondence to the Appellant, the ALC C & E Department correctly and accurately identified that blending manure and spent mushroom substrate was a permitted use provided all of the blended manure was applied as a soil amendment to the Appellant's parcels, but that selling the soil amendment to a third party as a commercial transaction was a non-farm use and that it should cease; or, if the Appellant wished to undertake the sale of excess Product, then permission be sought from the ALC through a non-farm use application process.

### Decision

[61] Pursuant to section 55(2)(a) of the *ALCA* the Panel varies the Order so that it requires the Appellant to “*cease the sale of the soil amendment from the property*” (Please see attached revised Order).

Appeal Panel:



Linda Michaluk



Richard Mumford



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Gerry Zimmermann

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Dave Zehnder

A handwritten signature in black ink, appearing to read 'Janice Tapp', in a cursive script.

Janice Tapp

A handwritten signature in blue ink, appearing to read 'Jennifer Dyson', with a complex, scribbled circular pattern.

Jennifer Dyson

Appeal Decision Date: October 27, 2020