



Agricultural Land Commission Appeal Decision, ALC File 46937

Appellant: Dairylike Farms Ltd.

Appeal pursuant to section 55 of the *Agricultural Land Commission Act* of the May 12, 2017 Remediation Order issued by Kim Grout, Chief Executive Officer of the Agricultural Land Commission

Introduction

- [1] On May 12, 2017 Kim Grout, Chief Executive Officer (CEO) of the Agricultural Land Commission (ALC) issued an Order to Joyce I. Malenstyn c/o Dairylike Farms Ltd. to cease unauthorized filling and remediate filled areas located at 5285/87 104th St. Delta, BC (the “Order”). The specific terms of the Order are set out later in this decision.
- [2] On June 30, 2017 the ALC received a Notice of Appeal from Alastair Wade, legal counsel, on behalf of the Appellants of the Order pursuant to section 55 of the *Agricultural Land Commission Act* (ALCA).
- [3] On July 25, 2017, the Appeal Panel provided direction regarding procedure related to the Appeal Hearing and applicable timelines (the “July 25, 2017 Directions”). The July 25, 2017 Directions included timelines for the submission of additional information and representations.
- [4] On October 13, 2017, further to the July 25, 2017 Directions, the Appeal Panel received a representation from the Appellant (the “Appeal Submissions”) outlining the rationale for the appeal of the Order, defending the actions of the Appellant and outlining commitments that the Appellant was prepared to take to alleviate the CEO’s concerns with filling.

[5] The appeal process included an oral hearing heard by the Appeal Panel. The oral hearing occurred on October 20, 2017 at the Element Hotel located in Burnaby, BC (the “Oral Hearing”). The Appeal Panel consists of Frank Leonard (ALC Chair) and ALC Vice Chairs Richard Mumford, Gerry Zimmermann and Dave Merz.

[6] Following the Oral Hearing, the CEO was offered an opportunity to respond to the Appeal Submission and consider amending the Order. Further, the Appeal Panel provided a follow up question to the Appellant. The Appellant had the opportunity to respond to the CEO response and the Appeal Panel question, and did so.

Background

[7] The Order relates to a property located at 5285/87 104th St Delta, BC (the Property). The legal description of the Property is:

Parcel Identifier: 028-188-110

Lot 1, Section 3, Township 4, New Westminster District Plan BCP44157

[8] The Property is 31.5 ha and is located within a designated agricultural land reserve (ALR) as defined in section 1 of the ALCA.

[9] The involvement of Compliance and Enforcement (C&E) staff of the ALC with the Property began in 2009 (the following are timeline highlights).

- In August 2009, the Appellant was advised by C&E staff that a plan must be submitted to the ALC for the development of a cranberry bog on 3 – 5 ha of the Property.
- On March 4 2010 the first C&E Stop Work Order (SWO) was issued to cease filling.
- On December 10, 2010 a second ALC C&E SWO was issued to cease filling.
- In May 2011, a warning letter was issued to the Appellant to comply with the December 10, 2010 SWO and to submit truck records.

- In December 2011, the landowner provided a farm plan to Delta and the ALC for converting the Property to a cranberry farm.
- In February 2012, a letter from the ALC solicitor confirmed that the SWO remained in effect and requested that an agricultural plan be filed by April 2012.
- On April 8, 2013, the ALC received a professional agrologist report from Bruce McTavish P. Ag.
- In October 2016, the Appellant's counsel advised of the retention of a professional agrologist to develop an agricultural plan.
- An Agrology Assessment dated Feb 6, 2017 from Madrone Environmental Services Ltd. Gordon Butt M.Sc. P. Ag, P. Geo (the "Madrone Report") was received by the ALC.
- On May 12, 2017, the CEO of the ALC issued the Order.
- On June 30, 2017, the Appellant submitted a Notice of Appeal of the Order.
- October 20, 2017 the Appeal Panel conducted the Oral Hearing.

The Order

[10] Among the various materials the Appeal Panel had before it was a copy of the Order together with the documents referenced therein. These documents comprised the "ALC Documents Package" to which the Appellants were provided electronic access on July 25, 2017 as part of this Appeal.

[11] On May 12, 2017 the CEO issued the following Order:

For the aforementioned reasons, I hereby order:

- *No more fill material be brought onto the property without ALC approval for, or in relation to, the construction of any new berms, dikes or bogs.*

- *Fill material associated with the above-ground reservoir be removed from the property by August 30, 2017 and a conventional in-ground reservoir be installed. All of the material removed from the property will need to be appropriately disposed of at an authorized disposal site and we would encourage you to consult with WorkSafe BC to ensure public and worker safety during the removal of this material.*
- *The existing bogs and berms/dikes (surrounding the bogs) can remain until such time as you cease to operate the cranberry operation for more than 6 months, at which time you must return the site to its original pre-fill agricultural capability (Class 4 unimproved) or better within 2 years from the date you cease cranberry operations.*
- *You must deliver to my office no later than 4:00 pm on July 1, 2017, a rehabilitation plan for the property, prepared by a Professional Agrologist with expertise in soils and reclamation, detailing how pre-fill agricultural capability will be achieved, supported by a detailed soil survey and agricultural capability.*

Notice of Appeal

[12] Section 55(1) of the ALCA permits an appeal from certain specified orders, including an order made under sections 50 and 52 of the ALCA. Section 55(1) states as follows:

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.

[13] On June 30, 2017 the ALC received a Notice of Appeal of the Order from the Appellant.

Written Evidence and Written Submissions

[14] The Appeal Submissions dated October 13, 2017, and submitted by Mr. Wade, included the following submissions on the Appellant's behalf:

1. An Interwest Appraisal report dated June 6, 2011, prepared by Danny Grant, a Registered Professional Agrologist, outlined the drainage limitations of the Property and confirmed that the desired crop, “cranberries”, requires good drainage. Due to its low elevation filling, the Property to improve drainage is deemed a reasonable course of action, though costly. The conclusion of the report is that the alternative to filling is to abandon the Property for agricultural production.
2. A Worksafe BC inspection report dated July 30, 2014 is provided which confirms the constructed above ground reservoir is safe.
3. Following a September 23, 2016 ALC request that a professional independent agrologist prepare an agricultural development plan, the Appellant contracted Mr. Butt (P. Ag) to undertake an Agrology Assessment of the proposed cranberry operation and the actions taken to date to achieve the agricultural development.
4. The Butt Agrology Assessment dated February 6, 2017 (also referenced as “The Madrone Report”) confirmed the poor quality of the original soils, particularly the drainage limitation; that the agricultural plan implemented by Dairylike Farms seeks to overcome the soil drainage limitations; that the future bogs could be constructed at a lower elevation; and that the motivation and capabilities of the operator (Mr. Malenstyn) appear sufficient to successfully develop the cranberry operation.
5. The Appellant’s counsel advised that there are many above ground reservoirs in east Delta and that the requirement to replace an above ground reservoir with an in-ground reservoir is not reasonable. In addition, a 2013 recommendation of the Michigan Department of Agriculture is referenced indicating that all new cranberry growers should consider closed, recycling systems for environmental protection. The purpose of the reservoir on the property is to operate a closed irrigation/water capture system to ensure that previous problems with contaminated saline irrigation water from the City of Delta ditches does not re-occur.
6. The high elevation of the berms is cited as necessary to maximize the area devoted to growing cranberries on the remainder of the Property.
7. Further advice solicited from Mr Mauza of Ocean Spray, agreed with the Madrone Report and suggested that the capacity of the reservoir “*does not seem out of line*”.
8. The Appellant concludes that any reservoir (in-ground, or above ground) will degrade land and that the current elevated reservoir will use less land than in-ground reservoir.

9. The Appellant is prepared to limit the height of any future dykes for the bog to an elevation of 2.2 meters as suggested by the Madrone Report.
10. The Appellant indicates that fill was not placed on the cranberry bogs at its present height for area wide flood protection.
11. The Appellant provides nineteen examples of previous decisions of the ALC between 2012 and 2016, to permit filling for the improvement of agricultural capability and to facilitate agricultural development.
12. The Appellant as per its October 13, 2017 submission indicates that he is prepared to reduce the level of the reservoir berm by 2 meters, limit the bog filling to typical levels (1 – 1.2 meters) and ensure that the dykes are constructed at a maximum of 2.2 meters.

Oral Hearing

[15] The appeal process included the Oral Hearing which was held on October 20, 2017 at the Element Hotel in Burnaby, BC.

[16] The Appellant Joyce Malenstyn and her son Don Malenstyn attended October 20, 2017 hearing. The Appellants were represented by legal counsel Alastair Wade.

[17] During the Oral Hearing, oral submissions were made by Mr. Wade pursuant to the Appeal Submissions dated October 13, 2017 (noted above).

Relief Requested on Appeal

[18] Section 55(2) of the ALCA states:

On an appeal under this section, the commission may

- (a) confirm 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.*

[19] The final requests and commitments of the Appellant are as follows, as set out under the heading “Nature of Order Sought” in the Appeal Submissions dated October 13, 2017:

- 1) *Dairylike agrees that it will not import further fill material onto the property for the construction of any new berms, dykes or bogs without prior approval of the ALC.*
- 2) *Dairylike agrees to provide a plan setting out volumes of fill required to complete the remaining bogs, as well as a monitoring plan to control the quality of the fill.*
- 3) *Dairylike proposes that a qualified registered professional, acceptable to Dairylike, oversee the implementation of the plan and provide a report to the Commission that the implementation of the plan has been completed in substantial compliance with the plan.*
- 4) *Dairylike seeks the rescission of the Chief Executive Officer’s order to remove the reservoir. Dairylike wishes to retain the above ground reservoir which is a normal part of farm practice. It will agree, if required, to reduce the height of the reservoir berms by 2 meters.*
- 5) *Dairylike will agree to construct future dykes to an elevation of 2.2 meters, even though this is below the Flood Construction Level as established by the Corporation of Delta.*

Additional Agrologist Information:

[20] The ALC commissioned an Agrologist Report prepared by Bruce McTavish P. Ag and Hubert Timmenga P. Ag, dated April 13, 2013 entitled “Observations” (the “McTavish/Timmenga Report”). The McTavish/Timmenga Report expressed concern with the quality of construction of the above ground reservoir and the generally poor quality of the fill. It noted that the height of the cranberry bogs is 2 m above sea level – higher than other nearby cranberry bogs; the poor quality of the subsoil used for topsoil; and that the regional drainage system appeared functional.

[21] A memo dated May 18, 2017 from ALC Agrologist Katarina Glavas P. Ag to CEO Kim Grout confirms that:

- The bogs are filled to a greater extent than necessary (1.8 meters) to achieve good drainage.

- The current elevation of the dikes (2.9 GSC¹) is in excess of what is required for cranberry production.
- The reservoir volume is appropriate, but the construction of an above ground reservoir is not a normal farm practice in the cranberry industry, nor in the Agrologist's perspective is it necessary.
- Recent drainage improvements by the District of Delta have alleviated area wide flooding concerns.
- Given concerns about saline irrigation water, the crop choice of cranberries is puzzling as it is not tolerant of salt, as compared with blueberries. Also, if the cranberry operation ceases the Property, now filled excessively with poor quality fill, will have limited the use of the Property for any other crop.

Further Information:

[22] Following the Oral Hearing, the Appeal Panel wrote as follows to the CEO: "*The Appeal Commissioners have requested that you:*

- *Consider the Appellant's offered options set out in the October 13, 2017 Appeal Submission to vary your May 12, 2017 Order, and provide written comment; and*
- *If you are not inclined of your own volition to vary your Order in light of the Appeal Submission, provide a written response to the Appeal Submission."*

[23] The CEO responded to the Appeal Submission information in a November 17, 2017 submission. The CEO declined to vary the Order and submitted that the Order should be confirmed. Her comments included the following:

- 1) *Dairylike has placed an excessive volume of fill to construct the bogs. The height of the berms and dikes to contain the bogs is not consistent with normal farm practices.*
- 2) *Dairylike was made aware that it required authorization to deposit fill on the Property over a number of years. Its filling was the subject of a stop work order and numerous communications with the Commission and its legal counsel.*
- 3) *The risk of flooding that resulted in 2001 crop loss has since been mitigated by regional drainage infrastructure improvements made by the Corporation of Delta in*

¹ GSC means Geodetic Survey of Canada.

2005-2006, with additional improvements in 2012. The majority of filling on the Property took place after 2009, and the air photo and file history show that the Property was filled well into 2014.

- 4) *The scale of the reservoir is unprecedented in the B.C. cranberry industry. It is an above ground reservoir with berms 10 m high, containing 63,600 m³ of poor quality fill. I understand that the reservoir to have been constructed without oversight by a qualified engineer. Cranberry experts have indicated that construction of an above-ground reservoir is not a normal cranberry production farm practice in B.C.*

[24] In addition, the Appeal Panel asked the Appellant the following question:

Did the Appellant receive income from filling, and if so, how much income?

Appellant's Responses:

[25] On November 28, 2017, the Appellant responded to the CEO's submission of November 17, 2017. Paraphrasing, the Appellant's submission provides:

- 1) The Corporation of Delta staff provided Mr. Malenstyn with the required heights for filling.
- 2) He has been accepting fill on the Property since 1996.
- 3) He had consecutive annual crop losses prior to filling.
- 4) All cranberry farms in BC have above ground reservoirs and this is a normal farm practice.
- 5) The reservoir is at 4.5 m geodetic height, not 8 m as indicated and has been inspected by WCB and is safe.
- 6) No fill has been accepted on the Property since 2011.
- 7) Two professional agrologists have confirmed that the farm is appropriately filled.
- 8) High salinity in Delta irrigation water remains an on-going problem.

[26] The Appellant responded on November 30, 2017 to the Appeal Panel's question about receiving income from filling. The Appellant's admitted that from 2009 until the date of the stop work order Dairylike received payment for fill, but said that all payments went

back into farm improvements, including the considerable cost of stripping topsoil, placing the fill, and then replacing the topsoil.

Appeal Panel's Findings:

[27] The Appeal Panel made the following observations and findings as to the claims and statements of the Appellant:

- 1) The Appellant appears to have legitimate concerns that the low elevation of the Property limits agricultural productivity and the Appeal Panel confirms that filling to improve drainage is one potential response to excessive water problems on the Property.
- 2) The Appellant has not followed protocol and submitted an ALC application for filling as recommended by the December 2006 Strengthening Farming Factsheet submitted with the Appellant's November 28, 2017 response to the CEO's submission. In addition the Appellant has refused to submit an application for filling even though he has been advised to do so since 2009.
- 3) The Appellant has also provided examples of 19 previous applications for filling that were conditionally allowed by the ALC. This evidence supports the necessity of making an application for filling for agricultural improvement, rather than releasing the Appellant from the necessity of making an application. In addition the evidence of approved filling applications indicates that the ALC is supportive of filling for farming purposes, within the parameters of typical farm practices.
- 4) The Appellant has provided confirmation in two reports, authored by Professional Agrologists, that the filling and diking activities are appropriate to developing the 31.5 ha Property for cranberry production, including the development of an above ground reservoir. However, the Madrone Report mentions that other cranberry operations depend on pumping from irrigation in ditches and as a result many cranberry operators do not have reservoirs as large as the Appellant's.
- 5) The Appeal Panel finds that the Appellant's rationale for the above ground reservoir to be weak because no evidence is provided of other similar above ground reservoirs in the City of Delta. In contrast, other cranberry operations in the area do not require filling (except for dike berms) and have in-ground water reservoirs.
- 6) The Appeal Panel finds the above ground reservoir to be excessive and unnecessary for a cranberry operation.

- 7) The Appeal Panel finds that the above ground reservoir to not be engineered and therefore may be unknowingly at risk of failure. Should the reservoir fail, both public safety and agricultural potential (on the subject property and adjoining properties) could be negatively affected.
- 8) The Appeal Panel considers that the motivation for the above ground reservoir may have been the income that could be received from fees for fill and not, as stated by the Appellant, to limit the impacts of the reservoir on the Property, or to gravity feed water to the cranberry bogs for irrigation, frost control, and harvesting. The Appeal Panel says this as it finds the Appellant's answer to its question about receiving money for filling to be vague and incomplete. The Appellant has not provided the information requested in the Appeal Panel's November 28, 2017 letter: *Did the Appellant receive income from filling, and if so, how much income?* Though income from filling is confirmed, the second half of the question is not answered. No information is provided as to the amount of money received for the fill (either in total, or per cubic meter). Nor is any information provided as to what were the costs to the Appellant to strip topsoil and place the fill, and replace the topsoil. The Appellant claims that all of the unspecified fill income was returned to the farm. The Appeal Panel is unsatisfied with the Appellant's response to its question. The response does not alleviate the Appeal Panel's concerns that income received for filling was the motivation to deposit excessive amounts of fill for the bog elevations, dykes and above ground reservoir exceeding cranberry industry standards.
- 9) The Appeal Panel finds that the filling that has occurred on the Property has substantial negative impacts on the potential to use the land for other types of crops and farming operations. The Appeal Panel does not concur with the Appellant's assessment that cranberries are the only form of agriculture that can occur on the Property. The loss of productive land to the dykes and reservoir has reduced the arable area of the Property. General filling to raise the elevation of the Property without dyking and the reservoir could have improved the land for soil based agricultural production. In the circumstances the Appeal Panel concurs with the CEO's Order and consider that the Property should be remediated to remove the above ground reservoir at the earliest opportunity. The Appeal Panel also considers that an application to the ALC is required for any filling to further develop the Property for a cranberry operation.
- 10) The Appeal Panel believes that the Appellant has an option to request, through the ALC application process, the redistribution of the reservoir fill onto the remainder of the Property to increase the elevation of the unfilled area to similar level as the currently

filled area. The Appeal Panel cannot speak to the result of such an application, which would likely be considered and determined by the South Coast Panel.

- 11) The Appeal Panel finds the commitments of the Appellant's to reduce the reservoir berm by 2 m and limit filling to recommended levels for the bogs (1.2 m) and dikes (2.2 m) to be insufficient to address their concerns with the potential long term negative impacts of filling on the agricultural potential of the Property.

Conclusion

[28] Having received and considered the information submitted as part of the appeal, the Appeal Panel is satisfied that the May 12, 2017 Order (see below in italics) is appropriate.

- *No more fill material be brought onto the property without ALC approval for, or in relation to, the construction of any new berms, dikes or bogs.*
- *Fill material associated with the above-ground reservoir be removed from the property by August 30, 2017 and a conventional in-ground reservoir be installed. All of the material removed from the property will need to be appropriately disposed of at an authorized disposal site and we would encourage you to consult with WorkSafe BC to ensure public and worker safety during the removal of this material.*
- *The existing bogs and berms/dikes (surrounding the bogs) can remain until such time as you cease to operate the cranberry operation for more than 6 months, at which time you must return the site to its original pre-fill agricultural capability (Class 4 unimproved) or better within 2 years from the date you cease cranberry operations.*
- *You must deliver to ALC CEO, no later than 4:00 pm on July 1, 2017, a rehabilitation plan for the property, prepared by a Professional Agrologist with expertise in soils and reclamation, detailing how pre-fill agricultural capability will be achieved, supported by a detailed soil survey and agricultural capability.*

[29] The Appeal Panel confirms the Order under s. 55(2)(a) of the ALCA except for the fact that, as a practical matter, the dates in the Order have passed. In Mr. Wade's June 30, 2017 letter, an argument was made to stay the Order pending the decision on



appeal. Given all the circumstances in this particular case, the Appeal Panel is satisfied that the Appellant should be given time to comply at this point. It therefore refers the Order back to the CEO with the direction that she consider and set new deadlines for the steps set out in the second and fourth bullet points of the Order, with a view to what would be a reasonable time for compliance in the present circumstances and taking into account of the possibility that the Appellant may wish to file a non-farm use application.

Appeal Panel:

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Frank Leonard, Chair

Handwritten signature of Richard Mumford in black ink.

Richard Mumford

Handwritten signature of Gerry Zimmermann in black ink.

Gerry Zimmermann

Handwritten signature of Dave Merz in black ink.

Dave Merz

Appeal Decision Date: January 22, 2018