Agricultural Land Commission Appeal Decision, ALC File 49995

Appeal pursuant to section 55 of the *Agricultural Land Commission Act*

Appellants: Gene and Gloria Martini

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
Ione Smith, ALC Vice Chair

DATE: August 20, 2020

PLACE: ALC Offices at #201, 4940 Canada Way, Burnaby, BC

APPEARING: For the Appellants: Kathleen Birney, Gene Martini, Gloria Martini

For the Respondent: Avtar Sundher

Appeal

[1] On or around March 9, 2017, a Remediation Order dated February 17, 2017 ("Remediation Order") from the Respondent, Kim Grout, ALC Chief Executive Officer ("CEO" or the "Respondent") was served on Gene and Gloria Martini (the "Appellants") pertaining to PID 003-757-366 – *Lot 1, District Lot 139, Nanoose District; Except Plan 18583* (the "Property") located at 1155 Leffler Road Errington, B.C. The Remediation Order required that the Appellants remove three of the four residential dwelling houses (the "Dwellings"), along with waste materials associated with this removal, from the Property.

[2] The Remediation Order required that the removal of the Dwellings was to be completed on, or before September 30, 2017 unless the CEO agreed in writing to vary

the Remediation Order. The Remediation Order also advised that if the landowners wished to appeal the Remediation Order they had 60 days to do so.

[3] On May 4, 2017 the ALC received a Notice of Appeal of the Remediation Order pursuant to section 55 of the *Agricultural Land Commission Act* ("ALCA") from the landowner's counsel. The Notice of Appeal sought orders to preserve the Martinis' right to appeal pending the outcome of their current application to have the Property excluded from the Agricultural Land Reserve ("ALR") and to have the Remediation Order set aside, but provided no grounds for the request to set aside the Remediation Order.

[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 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.*

[5] By letter dated June 14, 2017, the ALC acknowledged the Appellants' Notice of Appeal and requested that upon the issuance of the ALC's decision on the Appellants' exclusion application, the Appellants confirm their intent regarding the Appeal.

[6] On September 26, 2017, the ALC refused the Appellants' exclusion application (Resolution #2952017).

[7] On October 3, 2017, the Appellants' counsel confirmed in correspondence the Appellants' desire to proceed with the appeal of the Remediation Order.

[8] In response, the ALC confirmed, in an Oct 6, 2017 letter that it was prepared to preserve the Appellants' appeal options in light of reconsideration request timelines for the Appellants' ALC exclusion application.

[9] The ALC provided 60 days commencing December 15, 2017 to file an appeal of the Remediation Order.

[10] On February 13, 2018, the ALC received an appeal request in writing. An appeal hearing date was set for July 26, 2018.

[11] In a July 11, 2018 letter, the Appellants' counsel requested that the appeal hearing be delayed until a reconsideration request of the refused exclusion application was considered by the ALC. In an August 24, 2018 letter, the ALC confirmed that it was prepared to delay the hearing, potentially until November 2018. However, no hearing was scheduled because a soil deposit application submitted by the Appellants was under review by the ALC.

[12] A June 24, 2019 ALC letter, provided as a follow up to the ALC's August 24, 2018 correspondence to the Appellants, confirmed that a soil deposit application for 30,000 cubic meters of fill was refused by the ALC on April 1, 2019 - Resolution #100/2019 – and that the appeal of the Remediation Order should proceed if the Appellants wished to proceed. Appeal Rule amendments adopted by the ALC in January 2019 pertaining to the appeal process were outlined to the Appellants' counsel. These amendments provided for the appeal to proceed in writing (rather than require an oral appeal hearing), and gave an opportunity for the Respondent to reply, in writing, to the Appellants' written appeal submission.

[13] In a letter dated March 5, 2020, the Appellants' counsel requested to proceed with the appeal hearing and to appeal ALC Application Resolutions #295/2017 and #493/2019 and provided a summary of reasons for the appeal.

[14] In a letter dated March 9, 2020, the ALC indicated that the above referenced Application Resolutions could not be appealed pursuant to section 55 of the ALCA but had their own reconsideration process under Section 33 of the ALC Act. The ALC indicated that an appeal would proceed in writing unless an oral hearing was requested.

[15] In a letter dated April 3, 2020, the Appellants' counsel requested an oral appeal hearing and acknowledged that the Appellants have exhausted all statutory administrative review procedures in respect of Application Resolutions #295/2017 and #493/2019.

[16] On April 23, 2020, pre-Remediation Order ALC file information was provided to the Appellants (the "Earlier Record").

[17] In a May 1, 2020 letter, the ALC confirmed that an oral hearing would be held by the Panel pursuant to Rule 27 and that the oral hearing of the appeal was set for June 23, 2020. The ALC set out timelines for the sharing of information, and written submissions and responses.

[18] On May 29, 2020, the Appellants submitted written arguments to the Panel requesting that the Remediation Order be set aside and also provided appendices consisting of enactments, authorities, and excerpts from the ALC Compliance and Enforcement file.

[19] On June 12, 2020, the Respondent replied in writing and provided additional ALC file information that was relied upon in making the Remediation Order (the "Additional Materials"). The Respondent submitted that the Additional Materials had been provided

to the Appellants in years past but had been erroneously omitted from the Earlier Record.

[20] On June 22, the Appellant replied in writing to the Respondent's June 12, 2020 submission.

[21] An appeal hearing was held by telephone conference call on June 23, 2020. The appeal hearing was attended by the Appellants' counsel Kathleen Birney; the Appellants Gene and Gloria Martini; the Respondent's Representative Avtar Sundher (ALC Director of Operations), Martin Collins ALC Director of Policy and Planning; and the Panel noted above.

Background

[22] As noted, the Remediation Order requires the removal of three of the four Dwellings on the 2.7 ha Property. The legal description of the Property is:

PID 003-757-366 – *Lot 1, District Lot 139, Nanoose District; Except Plan 18583*

[23] The Property is located within a designated ALR as defined in section 1 of the ALCA in the Regional District of Nanaimo ("RDN") – 1155 Leffler Road, Errington.

[24] The Appellants' written submission indicates that the Appellants purchased the Property in July 1974. The Property at that time was occupied by an existing Dwelling constructed in or around 1955.

[25] The second Dwelling on the Property was completed in 2003 for the Appellants' son.

[26] In 2009, the Appellants submitted an application (38893) to the ALC for a two-lot subdivision of the Property so that each Dwelling could occupy its own parcel. The ALC

refused the application by resolution # 235/2009. Extending into 2010, requests for the same or slightly varied subdivision configurations were reconsidered three times by the Commission and refused on each occasion.

[27] In 2010 construction on Dwellings 3 and 4 began. The construction plans indicated that the two Dwellings would be connected by a breezeway, effectively making them a single dwelling in the Appellants' eyes.

[28] In February 2012 the Appellants requested a site meeting with the ALC to request a fourth reconsideration of Application 38893. The site meeting was granted. On May 14, 2012 the fourth application for reconsideration was again refused. The decision refusing the fourth application for reconsideration concluded that the second Dwelling was not constructed for farm purposes and required approval of the ALC as a non-farm use.

[29] On April 24, 2013 an ALC Order to Provide Information was delivered to the Appellants. Citing section 18 of the ALCA, the Order to Provide Information confirmed that the Property did not have "farm class" and as such the ALC Compliance and Enforcement ("C&E") Officer did not believe there was evidence that would "demonstrate the need for a second dwelling let alone a third and fourth". The Order to Provide Information stated that "[b]ased on all the information currently available" the immediate option to bring the Property into compliance with the ALCA would be to remove three of the residential structures and remediate the Property. The Order to Provide Information required the Appellants to "provide copies of all information and documents (including; invoices, receipts, proposals and contracts) pertaining to [the Property] and the construction of the dwelling units thereon for review".

[30] ALC records indicate that on April 25, 2013, a site review of the Property was undertaken by Margaret Henigman an ecosystem biologist working for the Ministry of Forests, lands, and Natural Resource Operations ("FLNRO") to establish whether the

construction of Dwellings on two separate foundations were within a riparian assessment area or within the channel of a stream (the "Site Review"). During the Site Review, the Appellants are reported to have met with Ms. Henigman and Mr. Martini is reported to have told her that his intention was to join the two new houses with a breezeway. The Site Review confirmed that the Property had wet, saturated areas, but did not confirm that the Dwellings were constructed in a riparian/stream area. Ms. Henigman observed disturbed soil around the two houses; that a small stream had recently been diverted away from the construction area; and a significant amount of fill was deposited.

[31] A June 17, 2013 letter confirming a Notice of Investigation under the *Water Act* was provided to the Martinis from FLNRO noting that the inspection revealed that construction activities had occurred in an area where requirements of the *Water Act* may apply. There is no record of a follow up, or determination in the ALC records.

[32] A May 17, 2013 letter to the ALC indicated that the Appellants intended to make an exclusion application but that the Appellants were awaiting reports in support of the application from professionals. The May 17, 2013 correspondence indicated that the Appellants had "ceased all work and operations pertaining to the new structures" on the Property while this process was ongoing.

[33] A June 17, 2013 letter from ALC C&E staff acknowledged the receipt of some information from the Appellants about the additional Dwellings on the Property. The June 17, 2013 letter indicated an intention to move forward with the ALC investigation and that the second, third and fourth Dwellings had been built in contravention of the ALCA. The June 17, 2013 letter indicated that the Order to Provide Information still stood and re-iterated the ALC's request for all of the information originally required. The June 17, 2013 letter indicated that if the required information was not received, the ALC C&E officer intended to move forward with a report to the CEO requesting remediation including a monetary penalty.

[34] A January 22, 2014 letter from the Appellants' counsel requested a meeting with ALC staff to discuss the possible ways in which the parties might resolve their differences. The January 22, 2014 letter offered some options including, among other things, demolition of one of the Dwellings.

[35] A February 13, 2014 ALC response to the Appellants' counsel indicated that the ALC would not entertain any further applications from the Appellants and that the Appellants had not complied with the Order to Provide Information. The February 13, 2014 correspondence indicated that the ALC C&E officer was obligated to submit a report to the CEO recommending a monetary penalty and removal of the Dwellings from the Property. The February 13, 2014 correspondence noted that if the Appellants wished to cooperate with the Order to Provide Information, the submission of a report to the CEO could be deferred.

[36] No response was received by the ALC to the February 13, 2014 correspondence and no report was submitted to the CEO.

[37] An August 21, 2015 ALC C& E Inspection Report observed that, contrary to the statements made in the May 17, 2013 correspondence, three of the four Dwellings had been completed and were now occupied.

[38] An October 27, 2015 ALC letter to the Appellants' counsel informed the Appellants that the ALC had a renewed interest in this file due to evidence of continuing contraventions of the ALCA, specifically construction and occupation of additional Dwellings despite the May 17, 2013 letter. The October 27, 2015 letter notified the Appellants that the ALC Chair was prepared to meet with the Appellants' to discuss bringing the Property into compliance with the ALCA and Regulations. The October 27, 2015 letter notified the Appellants that the ALC was prepared to receive and consider any further application that the Appellants might submit to the ALC.

[39] A December 22, 2015 letter from ALC counsel noted that the Appellants had advised they were preparing to bring an application with respect to the Property and provided information to the Appellants' counsel pertaining to the April 25, 2013 Henigman FLNRO assessment (email with photos).

[40] A September 15, 2016 letter from the ALC's counsel to the Appellants' counsel requested an update on whether an application was going to the submitted to the ALC, as indicated by the Appellants. If not, the September 15, 2016 correspondence noted the Appellants had failed to update the ALC on any other plans to remedy the contraventions and indicated that the ALC was actively considering enforcement measures. The September 15, 2016 correspondence provided an opportunity for the Appellants to submit any further information they wished to have taken into account by no later than October 6, 2016.

[41] A September 16, 2016 letter from the Appellants' counsel confirmed that an exclusion application was being prepared, but that expert reports were being finalized.

[42] An October 14, 2016 letter from ALC counsel advised that the second Dwelling had been on the Property since approximately 2003, and that a third and fourth Dwelling were constructed between approximately Spring 2011 and Summer 2012. Each of these Dwellings appeared to be a non-farm use prohibited by the ALCA. The October 14, 2016 letter indicated that the CEO would be considering making a remediation order under s. 52 of the ALCA and that could include removal of up to three Dwellings. The October 14, 2016 letter offered the Appellants an opportunity to provide submissions and documentation for the CEO's consideration on or before November 10, 2016.

[43] A November 10, 2016 letter from the Appellants' counsel indicated that the Property was not capable of being used for agricultural purposes and should not be included in the ALR. It further indicated that an exclusion application had been

commenced and it enclosed supporting documentation. The November 10, 2016 submission stated that it may be efficient for the ALC's CEO to wait for the ALC decision on the exclusion application before making a Remediation Order. The submission enclosed an August 12, 2016 On Site Report from C & F Resource Consultants indicating, among other things, that the Property is severely constrained for soil bound agricultural production, drainage improvements would be difficult, non-soil bound agricultural uses would be challenged, and the Property is severely restricted in its potential for agricultural use. The submission also enclosed an October 21, 2016 Drainage and Ditching Report prepared by J.E. Anderson and Associates that concluded, among other things, that the Property would be difficult and expensive to drain for agricultural use, there were benefits to downstream properties in maintaining the existing drainage patterns, and there was "no practical or reasonable drainage solution".

[44] A January 19, 2017 inspection report by C&E staff officer Persinovic confirmed that three of the four Dwellings on the Property appeared to be occupied. Photographs of the dwellings were taken.

[45] On the basis of the aforementioned inspections, reports, and correspondence the ALC CEO issued the Feb 17, 2017 Remediation Order which is currently under Appeal requiring the removal of three of the four Dwellings.

Subsequent ALC Applications to the Remediation Order

2017 Exclusion Application/2019 Fill Application

[46] The ALC refused the Martini's exclusion application (55899) for the 2.7 ha Property on September 26, 2017 (Resolution #295/2017) on the grounds that the Property soils (of which 0.8 ha are anthropic – modified by human actions, likely by dwelling/building construction, septic fields, yards and access) are capable of

agricultural use with good farming practices and appropriate crops. The decision noted that there were three inhabited Dwellings on the Property, more than permitted by the RDN bylaw (which permits a maximum of two dwellings).

[47] The ALC refused the Martini's ALC Fill application 56987 by Resolution #100/2019 (April 1, 2019) to deposit 30,000 cubic meters of fill on the property to improve the property for farming activities. The ALC was not satisfied the importation of fill would agriculturally benefit the land and explained that the high cost of drainage improvements was not a consideration when making decisions.

[48] The ALC reconsidered Resolution #295/2017 refusing exclusion Application 55899 on December 12, 2019 on the basis of its refusal to permit filling of the Property by Resolution #100/2019 was new information. However, the ALC Island Panel reconfirmed its refusal to exclude the Property from the ALR because the Property had agricultural capability and the high cost of drainage required to improve its agricultural capability from soil based crops was not a consideration in making its decisions.

Appellants' May 29, 2020 Submission

[49] On May 29, 2020, the Appellants' counsel provided a written submission to the Panel. The submission included affidavits from each of the Appellants and provided:

- a chronology of the events occurring on the Property from the construction of the first Dwelling in 1955 to the present, including information about when the additional Dwellings were constructed and for what purpose;
- detailed information concerning the cost of constructing the Dwellings, including debts and demolition costs;
- evidence that only three of the four Dwellings are currently inhabited; and
- submissions summarized below.

[50] The Appellants' counsel's submissions in support of the orders sought were that the Martinis had made innocent mistakes in ignorance of the law. They argued that there was insufficient evidence that the contravention of the ALCA caused damage to the agricultural land. As well, the Appellants submitted that the Remediation Order was based on irrelevant factors, while not all relevant factors were considered. In particular, the Appellants submitted that the following facts were irrelevant: the history of unsuccessful subdivision application requests for reconsideration and all of the facts about the RDN. Further, the Remediation Order was unfair because the CEO failed to consider facts that the RDN supports the Appellants' applications, failed to provide the Appellants with the April 2013 FLNRO report, and the ALC failed to provide the Appellants an opportunity to be heard in respect of whether they were in breach of the Order to Provide Information. The Appellants submitted that the Remediation Order is contrary to ALC C&E policy, and not necessary, does not further the ALC's purposes, and is unduly harsh and designed to punish the Appellants. Finally the submission indicates that the Order is unclear about which buildings are "residential dwelling houses" and of those which "three of the four" must be removed.

[51] The Appellants' submission seeks that the Remediation Order be reversed and that the Dwellings (which they refer to as Existing Buildings) be retroactively approved subject to the following conditions:

- *Within one and one half years the Martinis will demolish or remove Existing Building 1 save and except that portion of the structure which encloses a swimming pool with ancillary changing room and washroom and remove the demolition debris from the Property*;
- *Existing Building 4 may not be used for any non-farm use except as may be permitted by the Act and Regulation in effect at the time, or for storage of the household good of the Martinis and their immediate family;*
- *Existing Buildings 2, 3 and 4 will remain in their current footprint*;
- *No additional non-farm structures may be placed or constructed on the Property without the consent of the Commission;*

- *In the event that any of Existing Buildings 2, 3 or 4 are completely destroyed, by whatever means, or are considered by the RDN to be so destroyed, such buildings can only be replaced as may be permitted by the Act and Regulation in effect at the time. Alternatively, the landowner may make application for non-farm use to replace such buildings should they be so destroyed.*

Other alternative options were suggested by the Appellants, such as referring the Order back to the CEO for a less punitive remedial measure; or a suspension of the Order for 4.5 years so that the Appellants may remove the three Dwellings from the Property in an orderly manner.

Respondent's June 12, 2020 Response to the Appellants' Written Submission

[52] The Respondent provided a June 12, 2020 response to the Appellants' written submission. The Respondent submits that at all relevant times during the ownership of the Property by the Appellants the ALCA prohibited construction of a second, third and fourth Dwelling on the Property. The Respondent submits that ignorance of the ALCA and Regulation does not relieve the Appellants from the consequences of their actions. In respect of the record, the Respondent submits that new evidence from the Appellants should be approached with caution. The Respondent says there is no prejudice arising from late delivery of the Additional Materials because the Appellants have had these materials for years and because the Respondent does not object to the Appellants making further submissions on these materials or seeking an adjournment to address them. The Respondent says both the history of unsuccessful subdivision reconsideration requests were properly considered by the CEO. The Respondent denies knowledge of more recent support by the RDN at the time the Remediation Order was made. The Respondent submits that construction of residential dwellings causes damage to agricultural lands inherently and these impacts do not require evidence. Even if evidence was required, the Respondent says there is relevant evidence of damage on the record. The Respondent submits that the Remediation

Order is clear. The Remediation Order does not aim to punish but to bring the Property into compliance with the ALCA. To reverse the Remediation Order, the Respondent submits, would incentivize other property owners who were not diligent in their understanding of relevant legislation and reward the Appellants with a benefit of multiple homes and increased property value. The Respondent submits that the retroactive approval sought by the Appellants is beyond the scope of the authority of the Panel as set out in section 55(2) of the ALCA. Finally, the respondent submits that the Remediation Order is consistent with the purposes of the ALCA and asks that the Remediation Order be confirmed. In the alternative, that it only be varied to provide a reasonable period of time to comply.

Appellants' June 22 reply to the Respondent's June 12 Written Submission

[53] The Appellants' counsel replied in writing on June 22 to the Respondent's June 12 submission. In reply, the Appellants submit that ignorance of the law is a mitigating factor while intention and gain are aggravating factors. The CEO made a punitive order because of a mistaken perception that the Appellants intentionally flouted the rules for personal gain. The Appellants have not benefitted from the additional Dwellings. The new evidence from the Appellants is sufficient evidence of the financial impact of the Remediation Order. The Appellants object to consideration of the Additional Materials, in the alterative, the Appellants make submissions in respect of the Additional Materials. The Appellants submit that evidence of damage to the land is required because many types of buildings are allowed on agricultural land, including dwellings and farm structures. Counsel notes that the C&F Land Resource Consultants Report refers to disturbed land but does not supply evidence of damage caused to agricultural land. The Appellants' counsel argues that amendments to Section 6(2) of the Act on March 12, 2020 cannot be applied to the Appellants as their actions preceded the adoption of the amendments.

Oral Hearing:

[54] An oral hearing was held on June 23, 2020.

[55] The Appellants' counsel relied upon her written submissions and added that the Appellants were the authors of their own misfortune and placed a misguided reliance on permits from other authorities. For example:

- No local government building permits were required for any of the residences in the RDN.
- The RDN provided addresses to the additional residences without comment.
- The Appellants wrongly assumed that Section 514 (subdivision for a relative) of the *Local Government Act* applied to the Property.

[56] The Appellants' counsel also indicated that houses are temporary structures and that eventually the Property would be brought into compliance as the buildings aged and had to be decommissioned.

[57] The Appellants' counsel emphasized that most of the Property is wetland and unsuited to agriculture.

[58] The Appellants' counsel submitted that the Panel may make any order the CEO could have made at the time of the Remediation Order. The Appellants agree that section 6(2) of the ALCA applies retroactively. The Appellants submit that there is no statutory requirement to make a remediation order in respect of every contravention of the ALCA. It is open to the Panel to vary to Remediation Order to require Existing Building 1 or perhaps Existing Building 1 and 4 to be removed and such a variation is not the same as permitting the other Dwellings to remain.

[59] The Respondent's representative relied upon his written submissions and provided an oral rebuttal to the Appellants' June 22, 2020 written reply submission. The

Respondent's representative clarified that the CEO had not imposed a penalty under section 64 of the ALCA. He clarified that the Additional Materials were erroneously omitted from the earlier record provided to Appellants' Counsel on April 23, 2020. His late delivery of the Additional Materials did not give rise to an issue of admissibility and did not give rise to any prejudice to the Appellants. The Respondent's representative submits that all of the information germane to the appeal that was omitted from the April 23, 2020 pre-Remediation Order information package, had been provided to the Appellants throughout the years. The Respondent's representative submits that the 2017 version of the ALCA applied when the Remediation Order was made, but that the ALCA as it stands now applies to this appeal.

[60] The Appellants' counsel submitted that even though no penalty was imposed, the Remediation Order was intended to be punitive. No penalty was imposed because there was a limitation period in effect barring a penalty in this case. In addition the Appellants' counsel submitted that information gaps in the earlier record called into question the Remediation Order's integrity.

[61] The Respondent's representative submitted that the CEO had the option to issue a penalty under Section 54 of the ALCA because the time period ran three years from when the CEO became aware of the infraction.

[62] The Chair of the hearing opened it up to questions from the Appeal Commissioners.

[63] The Chair asked when the Appellants became aware of the problems with the number of Dwellings on the Property. The Appellants' counsel submitted that they were aware of the requirements in 2009 when the subdivision application was submitted before the construction of Dwellings 3 and 4. However, even at this time the Appellants thought Dwellings 3 and 4 would be considered a single dwelling because they were planned to be connected by a breezeway. Their plan was that Dwelling 1 would be demolished.

[64] The Chair asked how two Dwellings would be connected given that each of the four Dwellings was located in one of the four corners of the Property. The Appellants submitted they were within a couple hundred feet and Dwellings 3 and 4 could be connected.

[65] Commissioner Zehnder, asked whether there was a benefit to the Appellants in having more Dwellings on the Property in that more families could live on the lot. The Appellants' counsel submitted that there was clearly a benefit in that Dwelling 2 and 3 were occupied and there would be benefits if Dwelling 4 was occupied, but because of the vacant structure there was no benefit.

[66] Commissioner Smith asked when the Martini's were aware of restrictions on the number of dwellings in the ALR. The Appellants indicated that they planned to demolish the original dwelling leaving two dwellings. In 2009, nobody had told them the second dwelling was not permitted. The Appellants' replied that they believed Dwelling 2 was legal, and that Dwelling 3 and 4 was a "single" residence, and that Dwelling 1 would be demolished.

[67] Commissioner Tapp requested clarification as to whether the 3rd and 4th additional Dwellings were constructed to replace the original Dwelling occupied by the Appellants. The Appellants confirmed that the original Dwelling could not be renovated due to its poor foundation and that their children had agreed to be their caretakers so they could age in place.

[68] The Appellants' counsel submitted that the Appellants' relied on incorrect advice from the surveyor who indicated that two Dwellings connected by a breezeway were deemed to be a single Dwelling.

[69] Appellants' counsel requested the recording of the oral hearing upon the issuance of the decision.

Discussion and Findings:

[70] The Panel has considered all of the information supplied by the Appellants' and the Appellants' counsel, including information provided at the oral hearing.

A. The Appeal Record

[71] Rule 26(a)(b) of the Agricultural Land Commission Rules of Practice and Procedure for Appeals (the "Rules") require the Respondent to deliver to the Appellant and the Commission, the Earlier Record, within a prescribed period of time. Rule 3 provides that the Earlier Record means "the evidence that was before the respondent in making the determination, decision, order or penalty being appealed together with the determination, decision, order or penalty being appealed".

[72] Following receipt of the Earlier Record, Rule 26 requires the appellant to deliver the appellants' written appeal package within a prescribed time.

[73] In this case, the Respondent acknowledges that the Earlier Record that was delivered in the time period set out in the Rules, erroneously omitted some evidence that was before the Respondent in making the Remediation Order. These erroneous omissions were not corrected until after delivery of the Appellants' Written Appeal Package.

[74] Although the Appellants argue that Additional Materials from the Earlier Record were missing, and although the Respondent consented to an adjournment if the Appellants required one to respond to the Additional Materials, no adjournment was sought. No prejudice is caused to the Appellants by the late delivery of the Additional Materials in these circumstances given that all of the materials were provided to the Appellants years earlier and in any event the Appellants were

provided an opportunity to seek an adjournment to address these materials prior to the oral hearing. The Appellants declined to seek an adjournment and made reply submissions in respect of the Additional Materials. The Panel rejects that the erroneous omission of the Additional Materials from the Earlier Record casts a shadow on the integrity of the Remediation Order. The impact of refusing to consider the Additional Materials in this case is that it would deprive the parties (and the Panel) of the full record of what was before the Respondent in making the Remediation Order. Consideration of this appeal in the absence of that record is not in the public interest. The Panel finds that the Additional Materials are admissible on this Appeal.

B. Section 52 of the ALCA

[75] The Remediation Order was made under section 52(1)(b) of the ALCA which provides:

> ***52*** *(1)If the chief executive officer determines that a person has contravened this Act, the regulations or an order of the commission, the chief executive officer, in accordance with the regulations, may order the person to remedy the contravention by*
>
> *…*
>
> *(b)repairing or mitigating damage caused to agricultural land by the contravention, including the removal of buildings or structures.*

i) The Contravention

[76] The record supports, and it is not contradicted, that the CEO determined that the Appellants contravened the ALCA.

[77] In making the Remediation Order, the CEO concluded the Appellants had contravened section 20 of the ALCA. As at the date of the Remediation Order, section

20 of the ALCA provided "*A person must not use agricultural land for a non-farm use unless permitted under this Act.*"

[78] At all relevant times the ALCA and Regulations allowed one residence. In addition, the ALC Regulation in effect permitted the following, non farm uses:

> *3(1) The following non-farm uses are permitted in an agricultural land reserve unless otherwise prohibited by a local government bylaw or, for lands located in an agricultural land reserve that are treaty settlement lands, by a law of the applicable treaty first nation government:*
> *…*
> *(b) for a parcel located in Zone 1*
> *i) one secondary suite in an single family dwelling, and*
> *ii) either*
> *A) one manufactured home up to 9 m in width for use by a member of the owner's immediate family, or*
> *B) accommodation that is constructed above an existing on the farm that has only a single level.*

[79] Section16 (a) of the ALCA in effect at the time of construction of each of the additional Dwellings provides: *"….any authority may not permit …..a building to be erected on the land except for farm use, or for residences necessary for farm use or as permitted by regulation.*"

[80] No evidence was ever provided to the ALC that during the 2002 to 2015 period the Property had "farm" assessment status or that farming was occurring on the Property of sufficient intensity to require farm labour to reside on-site. In fact the Panel notes that the Appellants have admitted that a non-farm business is located on the Property and provides the primary source of income for the Appellants.

[81] If the Appellants were ignorant of the requirements of the ALCA when any of the additional Dwellings were constructed, such ignorance does not relieve them of

compliance with the ALCA. Nor does reliance on the actions of other government actors negate the ALC's authority under the ALCA. For example, the Panel understands that there were no building permit bylaw requirements for the RDN for the period when the Dwellings were constructed. However, lack of local government oversight or regulation about housing in the ALR does not negate the authority of the ALC under the ALCA.

ii) Damage

[82] The Appellants' argument that there was insufficient evidence of damage to support the making of the Remediation Order is dismissed by the Panel.

[83] It is the Commissioners' experience that disturbed soils, associated with building construction, septic fields, yards and driveways constitute an impediment to soil-based agriculture and represent a direct loss of land available for agricultural activities. Although farm structures and a single residence are permitted by the ALCA, the three additional Dwellings (and arguably the other structure that houses the Appellants' business, although this issue is not before the Panel), occupy areas of land that have potential to be developed for agricultural purposes. The alienation of these areas for buildings and infrastructure represents an inherent harm to the agricultural resource.

[84] Further, if evidence of damage is required, there is evidence of damage in the record. The C & F Land Resources Report identified ~0.79 ha of the soils on the property as anthropic, which represents 28% of the 2.8 ha Property.

[85] The case authorities cited by the Appellants in their written submission do not suggest that the construction of additional dwellings on ALR land does not damage the agricultural land. In *Walters* the petitioner sought a declaration from the Court about the correct interpretation of the ALC Regulation. The case was determined on the basis that it was not properly brought as a petition and should have been commenced as an action. In *obiter*, the Court held that even if it the proceeding was properly constituted (which it was not), the Court would decline to grant the relief sought because to do so

would usurp the jurisdiction of the ALC. The Court did not find, and the Panel does not accept, that damage to agricultural land means permanent damage to the physical capability of the land for agricultural use. Section 52 is premised on the idea that damage can be repaired or mitigated.

[86] Nor does *Henson* support that the ALC should permit reversible damage to ALR resources to persist in contravention of the ALCA. At issue in *Henson* was a judicial review refusing an application to have land excluded from the ALR. The petitioner argued that only land suitable for a *bona fide* farm purpose may be put or kept in the ALR. The Court dismissed the judicial review noting that the land already was placed in the ALR. The Court discussed the process which was followed in assisting regional districts to establish the ALR noting that some non-agricultural land was included where the current use was incompatible with a farm use but the impact was reversible. The case does not consider or suggest that a remediation order may not be granted unless damage to the ALR is permanent.

[87] Finally, in *Somal* a stop work order was issued by the ALC and an application was then made to the ALC to use an existing gravel pad for commercial vehicle storage. The application was dismissed and the removal of the pad was not raised. Again, *Somal* is no authority for the proposition that the ALC should permit reversible damage to ALR resources to persist in contravention of the ALCA.

iii) Factors Considered in Order

[88] The Panel rejects the Appellants' submission that the Remediation Order is based on irrelevant factors, while not all relevant factors were considered.

[89] The Remediation Order references the Appellants' history of unsuccessful subdivision applications and applications for reconsiderations. This history is relevant because it indicates that the Appellants were aware that the ALCA imposed restrictions on their land use. The ALC decision of May 14, 2012 concludes that "[*t]he second*

dwelling was not constructed for farm purposes and required the approval of the Commission as a non-farm use." After this decision, according to their own submissions, the Appellants continued with construction of the third residential dwelling which was completed in 2014. This continued construction was also in the face of the 2013 Order to Provide Information that noted that the immediate option to bring the Property into compliance with the ALCA would be to remove three of the residential structures and remediate the Property, and contrary to the Appellants' counsel's assurance that the Appellants had ceased all work and operations pertaining to the new structures.

[90] The RDN's enforcement steps are also relevant background. No unfairness arises from the CEO's failure to consider the RDN authorization for the exclusion application to proceed to the ALC. This authorization was not available to the CEO at the time the Remediation Order was made.

[91] The Panel finds that the Remediation Order is designed to bring the Property into compliance with the ALCA, not to punish the Appellants.

[92] The Panel does not accept the Appellants' claim that the February 13, 2014 letter from the ALC signals that staff, let alone the CEO, considered the Martini's to have "pestered" the ALC and evinces a desire to punish the Appellants. The ALC took steps to correct this communication on October 27, 2015 by advising the Appellants that an application from them would be received and considered according to due process. In addition the February 13, 2014 letter was issued after the majority, if not all, of the additional Dwellings were constructed to the current state. The Appellants took the opportunity to submit two subsequent ALC applications: one for exclusion and one for filling.

[93] The Appellants have been provided opportunities to submit multiple applications to the ALC and have had multiple reconsiderations of these applications. Different Panels and Commissioners have adjudicated the applications and reached similar conclusions.

These multiple applications and reconsiderations have led to a lengthy delay in compliance and enforcement actions on the Property, permitting two additional, illegal inhabited Dwellings to be retained for 17 years and 6 years respectively.

[94] The Panel finds that the Appellants were afforded the widest opportunity through multiple post-2015 applications to approach the ALC through legislated application processes to gain authorization for the additional Dwellings.

[95] The breach of the Order to Provide Information was properly considered an aggravating factor in making the Remediation Order. The Order to Provide Information was first made in April 2013. Following receipt of a response from the Appellants on May 17, 2013, the ALC notified the Appellants that the response was incomplete and provided a further opportunity for the Appellants to provide the information required. No further response was received.

[96] The Appellants were provided with additional opportunities to provide information for the CEO's consideration in September and October 2016. The information sought in the Order to Provide Information was never provided.

[97] The Appellants' claim that the Remediation Order is unduly harsh and does nothing to further the purposes of the ALCA because a second dwelling (a manufactured home) for a family member was allowed under the regulations between 2002 – 2015 when the homes were constructed (see above excerpt from the ALC Regulation #171/2002). The Panel agrees that under current ALC regulations a manufactured home 9 meters wide could be placed on the Property as a second dwelling for a family member. However, the Panel notes that the residences are not manufactured homes, and furthermore considers a manufactured home to be significantly different from the current homes due to its smaller size and impermanent nature.

The Order is Clear and Precise

[98] The Panel considers that the Remediation Order is sufficiently clear and precise. That the Appellants understand which four structures are referred to in the Order is clear from their affidavit materials filed on this appeal that contain multiple references to the Dwellings (as "Existing Buildings") including a sketch plan of their location on the Property.

[99] Nor is the Panel persuaded that the meaning of the term "residential dwelling houses" excludes the fourth Dwelling because it is not occupied and not capable, as currently constructed, of being occupied. The Appellants acknowledge that the fourth Dwelling was constructed to be a living area.

[100] The Order permits the Appellants to determine which of three of the four Dwellings to demolish.

Remedies

[101] The Panel does not have the power on an appeal under section 55 of the ALCA to revisit the ALC Island Panel decisions either to exclude the Property from the ALR or to permit subdivision, or to retroactively permit additional dwellings.

[102] The Panel is not prepared to send the Remediation Order back to the ALC CEO with instructions. The Remediation Order has been appropriately justified based on the evidence.

[103] The Appellant has argued that that there would be a severe financial burden to removing three of the Dwellings on the Property, citing debts on the existing and unfinished residences, and significant deconstruction and debris removal costs. The Panel appreciated the financial information provided in the Appellants' Written Submission. However, the information is incomplete. The Appellants' provided

evidence that two of their adult children live on the Property and have agreed to be their caretakers. These two adult children have long benefited from living in the additional Dwellings on the Property. It would appear the individual financial circumstances of the Appellants is not a complete account of the financial resources available.

[104] The Panel finds that the Remediation Order is not excessively harsh, nor is it punitive. It is aimed at bringing the Property into compliance with the ALCA. The cost of complying with the Remediation Order is driven by the large scale of the multiple contraventions of the ALCA.

[105] The Appeal Panel is not persuaded by the Appellants' arguments to set aside the Remediation Order based on the alternate options offered in the "Nature of the Order Sought" portion of the Appellants' Written Submission, or the oral submissions of the Appellants that suggested removal of two of the four Dwelling. The Panel refers the matter back to the CEO with the direction to, amend the timetable for removal of three of the four Dwellings to allow for at least one year from the date of this decision to remove the three Dwellings.

Appeal Panel:

Ione Smith

Richard Mumford

Gerry Zimmermann

Dave Zehnder

Janice Tapp

Appeal Decision Date: August 20, 2020