



## Agricultural Land Commission Appeal Decision, ALC File 50742

Appellants: William Robert Clendenning;  
Richard Dave Clendenning;  
Debra Ann Honcoop

Appeal pursuant to section 55 of the *Agricultural Land Commission Act* of the January 30, 2018 Remediation Order issued by Kim Grout, Chief Executive Officer (CEO) of the Agricultural Land Commission

---

### Introduction

- [1] On January 30, 2018, an Order of Kim Grout, CEO of the Agricultural Land Commission (“ALC”), was served on William Robert Clendenning, Richard David Clendenning, and Debra Ann Honcoop (the “Appellants”), who are owners of PID 013-864-807 - *Plan KAP3893B, Part NW ¼, Section 29, Twp. 20, Range 9 W6M, Kamloops Division Yale District Except Plan H400*, located at 4080 50<sup>th</sup> St. NE Salmon Arm (the “Property”). The Order required the removal of the unauthorized fill from the Property and the land’s remediation to the agricultural capability that existed prior to the importation of fill.
- [2] On March 28, 2018 the ALC received a Notice of Appeal from Christopher Hart of Nixon Wenger LLP on behalf of the Appellants pursuant to section 55 of the *Agricultural Land Commission Act* (ALCA). The Notice of Appeal was acknowledged in a letter from the ALC dated April 4, 2018.
- [3] On May 3, 2018 a letter from Christopher Hart was submitted to the ALC CEO which requested that the Order be rescinded, in exchange for a commitment to no longer place fill on the Property and to convert the existing filled area to a tree farm.

- [4] On June 25, 2018, the Appeal Panel provided direction regarding procedure related to the Appeal Hearing and applicable timelines (the “June 25, 2018 Directions”). The June 25, 2018 Directions included timelines for the submission of additional information and representations.
- [5] On July 16, 2018, written submissions were provided on behalf of the Appellants by Christopher Hart.
- [6] The appeal process included a review of written material provided by the Appellants, and an oral hearing conducted by the Appeal Panel consisting of Jennifer Dyson (ALC Chair) and ALC Vice Chairs Richard Mumford, Dave Zehnder, Linda Michaluk, and Dave Merz. The oral hearing occurred on July 26, 2018 at the ALC Offices located in Burnaby, BC (the “Oral Hearing”).

## Background

- [7] The Order relates to a property located at 4080 50<sup>th</sup> St. NE Salmon Arm, BC (as defined above, the “Property”). The legal description of the Property is:

*PID : 013-864-807 - Plan KAP3893B, Part NW ¼ , Section 29, Twp. 20, Range 9 W6M, Kamloops Division Yale District Except Plan H400.*

- [8] The Property is 8 ha in area 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 on March 30, 2018. Timeline highlights are set out below.
- On March 30, 2017 the ALC received information from the Ministry of Forest Lands and Natural Resource Operations (FLNRO) that a considerable amount of clay had been deposited on 1 ha of the Property.
  - The Property was inspected on April 6, 2017 by ALC C&E Officer Roland Persinovic, who issued a Stop Work Order (and posted a sign) to cease the further deposition of fill.

- On August 3, 2017 a contravention notice was issued to the landowners to submit a remediation plan by August 25, 2017 for the ALC's review and approval. The landowner contacted the ALC staff and advised that the purpose of the fill was for agricultural purposes, and to control mosquitoes.
- The property was re-inspected by Roland Persinovic on November 1, 2017. He confirmed that no further fill had been deposited in the interim.
- ALC staff agrologist Katarina Glavas advised the ALC C&E Officer that based on the characteristics of the imported fill (i.e. clay) the site is incapable of draining adequately and poses a flood risk to the subject land and neighbouring properties.

## The Order

[10] Among the various materials the Appeal Panel had before it is 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 June 25, 2018 as part of this Appeal.

[11] On January, 2018 the CEO issued the following Order:

*"Accordingly and in the circumstances, pursuant to Section 52(1) of the Act as Chief Executive Officer of the Commission I hereby Order the Owners, and their agents, representatives, employees and any other person acting on their behalf to;*

- 1) Remove all of the unauthorized fill from the Property; and*
- 2) Remediate the Property to the agriculture capability that existed prior to or better than what existed before the importation of the unauthorized fill.*

*The above requirements must be completed by June 30, 2018, unless prior to that time, I agree in writing to vary this remediation order."*

## 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 March 28, 2018 the ALC received a Notice of Appeal of the Order from the Appellants.

### **Written Evidence and Written Submissions**

[14] The Appellants' submissions as presented by Christopher Hart, counsel for the Appellants, included: the Notice of Appeal received March 28, 2018; the May 3, 2018 letter from Christopher Hart and the July 16, 2018 Appeal Submission (together, the "Appeal Submissions"). The Appeal Submissions indicate the following:

1. The property was purchased by William Clendenning in 1990 and at that time the land at issue (~1 ha) was low lying, boggy and incapable of growing crops. Also horses boarded on the Property suffered from hoof rot.
2. Around 1997 William Clendenning arranged for fill to be placed on the land to prevent hoof rot.
3. Between 1997 and 2018 the other Appellants Richard Clendenning and Debra Honcoop became co-owners of the Property for estate purposes.
4. The Appellants assert that the CEO of the ALC does not have the authority to require the Appellants to remove unauthorized fill and remediate the land because the placement of fill was undertaken as a designated use in Subsection 2(2) to 2.2 of the Regulations and, as such, is considered a farm use for the purposes of the ALCA.
5. The Appellants state that Section 4 of the Regulation provides for notification for specified farm uses but do not provide the CEO with the authority to make orders.
6. It is the Appellants' position that they have not caused damage to the land because prior to filling the land had no agricultural potential. Since placing the fill, the land can now support crops and would no longer harm horses' hooves.
7. Richard Clendenning and Debra Honcoop are William Clendenning's children and became landowners solely for estate purposes only. At no time did Richard Clendenning and Debra Honcoop play any role in the filling of the land.

## Oral Hearing

[15] The Oral Hearing was held on July 26, 2018 at the ALC Offices at #201, 4940 Canada Way, Burnaby, BC.

[16] Christopher Hart attended the hearing in person while Richard Clendenning, William Clendenning and Debra Honcoop attended by way of telephone.

[17] During the Oral Hearing, oral submissions addressing the written Appeal Submission of July 16, 2018 were made.

## 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 relief sought by the Appellants as set out in the Appeal Submission dated July 16, 2018 is:

*“...the Order of the Chief Executive Officer dated January 30, 2018 should be completely or partially reversed for all of or one more of the Appellants, or, alternatively that the matter be referred with or without direction back to the person who made the initial determination decision or order”*

## Appeal Panel's Findings

[20] The Appeal Panel made the following observations and findings:

- 1) The Appeal Panel notes that the CEO's authority to order the removal of unauthorized fill from the Property and to remediate the Property derives from Section 52 of the ALCA. The Panel notes that a person who intends to fill must give notice of doing so prior to

importing the fill. No evidence was provided that the Appellants approached the ALC with notification of intention to fill. Consequently, the Panel does not concur with the Appellants' assertion that the CEO has no authority to issue the order that is the subject of this appeal. The Panel finds that the CEO has the authority to order the removal of unauthorized fill from the Property and to remediate the Property.

- 2) The Appeal Panel considers the Appellants' assertion that no damage was caused to the land to be compelling. The word "damage" refers to loss or injury, or deterioration of the land's capacity to support agriculture. The Appeal Panel notes that while a statement from the ALC agrologist was referenced, there was no evidence on the record to show a site visit was undertaken, that test pits were dug or that an on-site agricultural assessment was conducted by a professional agrologist and/or a soils specialist to confirm that damage had, in fact, occurred. As a result, the Panel finds there were no assessments undertaken to confirm that the land was materially worse for agriculture after the deposit of the fill, i.e. that "damage" had occurred.
- 3) The Panel notes that section 52 (2) of the ALCA provides the authority for the CEO to make an order that a person repair or mitigate damage caused to agricultural land. In the absence of assessments to confirm that agricultural land was "damaged", the Appeal Panel finds that the Order should be reversed, and allows the appeal.

## Conclusion

[21] Having received and considered the information submitted as part of the appeal, the Appeal Panel reverses the Order.

Appeal Panel:

Richard Mumford



Dave Merz



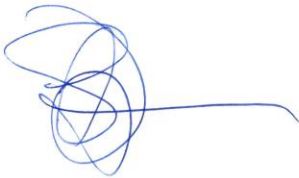
Linda Michaluk

A handwritten signature in black ink, appearing to read 'Linda Michaluk'.

Dave Zehnder

A handwritten signature in black ink, appearing to read 'Dave Zehnder'.

Jennifer Dyson

A handwritten signature in blue ink, appearing to read 'Jennifer Dyson'.

William Zylmans

A handwritten signature in black ink, appearing to read 'William Zylmans'.

Appeal Decision Date: August 27, 2018