



Agricultural Land Commission Appeal Decision, ALC File 87334

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

Appellants: Nancy Kinney and Matthew Mansell

BEFORE: An Appeal Panel of the ALC

Jennifer Dyson, ALC Chair
Bill Zylmans ALC Vice Chair
Dave Merz, ALC Vice Chair
Richard Mumford, ALC Vice Chair
Dave Zehnder, ALC Vice Chair

DATE: July 26, 2018

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

APPEARING: For the Appellants: Nancy Kinney and John Paul

Appeal

[1] On or around June 11-13, 2018, a Stop Work Order dated June 11, 2018 (“Stop Work Order”) together with a Compliance Notice from David Assels, an Agricultural Land Commission (“ALC”) Compliance and Enforcement (“C&E”) Officer, was served on Nancy Kinney, the owner of PID 003-193-110 – *Lot 1, VIP 22882, Section 36, Lake Land District, Except Plan VIP82329*, located at 5895 Old East Road, Saanich (the “Property”) and Matthew Mansell, the contractor retained by Ms. Kinney (collectively, the “Appellants”). The Stop Work Order halted the importation of fill material for the purpose of land development works.

[2] On June 19, 2018 the ALC received a Notice of Appeal from the Appellants pursuant to section 55 of the *Agricultural Land Commission Act* (“ALCA”).

[3] 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.

[4] The Appellant, Nancy Kinney is requesting the Stop Work Order be reversed.

The Appeal Process

[5] On June 19, 2018 the ALC received a Notice of Appeal on behalf of the Appellants pursuant to section 55 of the ALCA. The Notice of Appeal was acknowledged in a letter from the ALC dated June 20, 2018.

[6] On June 25, 2018, the 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.

[7] On June 25, 2018, the Appellants were provided electronic access to the information that was before the ALC C&E Officer Assels when he made the Stop Work Order under appeal, and to a copy of the Stop Work Order itself (“ALC Documents Package”).

[8] In the June 18, 2018 correspondence, the Appellants requested a stay of the operation of the Stop Work Order because of the current availability of fill, and the need to take advantage of the dry summer weather. Written arguments received from C&E Officer Assels (dated June 22, 2018) and the Appellant Kinney (dated June 25, 2018), were considered by the Appeal Commissioners. On June 29th, 2018 the Appeal Commissioners issued a decision declining to stay the Stop Work Order until the July 26, 2018 Appeal Hearing on the grounds the Appellants would not suffer irreparable harm if the stay was not granted, and because the balance of convenience did not favour granting a stay.

[9] The Appeal was conducted by way of an oral hearing which was attended by the Appellant Kinney, and John Paul, a Professional Agrologist, (Sunny Uppal attended as an observer). The ALC did not attend the hearing and submissions from the ALC consisted of the ALC Documents Package.

Background

[10] The Stop Work Order relates to the property located at 5895 Old East Road, Saanich, BC (as defined above, the “Property”). The legal description of the Property is:

PID 003-193-110 – Lot 1, VIP 22882, Section 36, Lake Land District, Except Plan VIP82329,

[11] The Property is 6.9 ha in area and is located within a designated agricultural land reserve (“ALR”) as defined in section 1 of the ALCA.

[12] The involvement of C&E staff of the ALC with the Property began in 2016. Timeline highlights follow.

- In May 2016, an ALC file # 50503 was opened on the Property in which the Appellant Kinney indicated her intention to fill the Property with 65,000 cubic meters of fill to improve its usefulness for a proposed horse boarding facility. Two reports submitted in support of the fill proposal one dated December 2, 2015 by John W. Paul P. Ag. “*Agrologist Report for 5895 Old East Rd, Saanich, BC*” and a second dated March 11, 2014 from Ryzuk Geotechnical (authored by Land Campbell P. Eng.) provided both a rationale for filling (to enhance agricultural potential) and cross sections of fill profiles. However, there was no evidence that the Appellant Kinney proceeded with the project and the file was eventually closed due to inactivity on the Property.
- In letters dated May 2, 2016 and June 1, 2016 ALC counsel (L. Herbst) responded to the Appellant Kinney’s e-mails to Kim Grout, ALC Chief Executive Officer about the proposed fill project. Ms. Herbst stated that the ALC had not provided the confirmation sought under s. 9(c) of Saanich Bylaw to Regulate or Prohibit the Deposit of Fill on

Lands in the District. Ms. Herbst stated that if the Appellant Kinney made a non-farm use application that was forwarded to the Commission by the local government the application would come before the commissions who would make a decision. On the Appellant Kinney's advice that she was proceeding with the proposed fill project, Ms. Herbst stated that the matter had been referred for review to a C&E officer of the ALC.

- The Property was inspected on May 28, 2018 by ALC C&E Officer David Assels who observed a sign on the Property indicating that a Soil Deposition Application was submitted to the District of Saanich for filling the Property with 65,000 cubic meters of fill to create access and usable space on the property. The ALC C & E Officer Assels was also aware of a May 23, 2018 e-mail from District of Saanich staff to the Appellant indicating that the District was unprepared to issue a fill permit until given authorization from the ALC.
- On or around June 11-13, 2018, ALC C&E Officer Assels served a June 11, 2018 Compliance Notice and Stop Work Order on the Appellant Kinney, and submitted another Compliance Notice (with the June 11, 2018 Stop Work Order) dated June 12, 2018 on the Appellant Mansell of Finish Line Transport (the fill contractor), to prohibit the deposit of fill on the Property.
- The June 11, 2018 Compliance Notice took note that ALC staff had suggested on several occasions in 2013-2016 that the Appellant Kinney seek the Commission's approval for the proposed deposit of fill by application under s. 20 of the Act. The Compliance Notice stated that the proposal for filling of the Property relates to land development works for which the Appellant Kinney had not established that the proposed filling was required for farm use. The proposed volume of fill is significant. The agrologist, Dr. Paul, characterized the proposed fill deposit as one which would improve accessibility of horse facilities but did not suggest that depositing fill was necessary to or part of those horse facilities. The fill proposal is not necessary to and is not part of the designated farm use of "horse riding, training and boarding, including a facility for horse riding, training and boarding. The Compliance Notice referred to ALC Bylaw No. 2, Placement of Fill in the ALR, sections 5-6, which addresses when the placement of fill under the Regulation is considered necessary and to what threshold.

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- In correspondence dated June 18, 2018 the Appellants submitted a Notice of Appeal of the Stop Work Order, and sought a stay of the Stop Work Order pending resolution of the July 26 Appeal so as to take advantage of available fill and dry weather.
 - On June 22, 2018 ALC C&E Officer Assels provided a submission opposing the application for a stay of the Stop Work Order which referenced two judgments (*Tree To Me Agricultural Products Inc. v. British Columbia (Agricultural Land Commission)*, 2010 BCSC 1647 and *Kandola v. (British Columbia) Agricultural Land Commission*, 2016 BCSC 2511). ALC C&E Officer Assels indicated that the rationale for the Stop Work Order is as set out in the June 11, 2018 Compliance Notice, including enclosures. He stated that the proposed filling was not “necessary” for farm use. He further stated that the Stop Work Order was consistent with Commission Bylaw No. 2, Placement of Fill in the ALR, which provides guidelines on when the placement of fill is considered necessary. He further stated that an expert’s opinion is never determinative and that the Appellant Kinney would not suffer irreparable harm because the deadline for filling was self imposed. The balance of convenience, he said, weighed against granting a stay in light of the purposes of the Commission, and the potentially irreparable and certainly significant harm the filling project would cause to agricultural land. If the stay was granted, the Owner could complete or substantially advance what the Stop Work Order tried to stop even if the appeal was dismissed thereby defeating the purpose of the Stop Work Order.
 - A June 25, 2018 response from the Appellant to ALC C&E Officer Assels June 22, 2018 correspondence set forth arguments that:
 - She had a reasonable prospect of success on appeal. She was proposing a farm use of the Property and wished to place fill according to s. 2(5) of the Regulations. She argued that the ALC could not require an application because it does not have statutory authority to do so;
 - To use the Property for farming, a large previously mined area must be restored by replacing the soil that was excavated by a previous owner. Without such restoration, the “pit” that exists is not capable of sustaining any sort of

agricultural use. The “pit” separates portions of the Property. The “pit” needs to be filled to form a reasonable grade.

- Commission Bylaw No. 2 and section 20 of the ALCA are not applicable to the Property.

- The ALC has not made any Order, Determination or Decision on necessity and has no evidence to support their opinion. In contrast, she has led evidence showing it is necessary.

- *Tree To Me Agricultural Products Inc. v. British Columbia (Agricultural Land Commission)*, 2010 BCSC 1647 and *Kandola v. (British Columbia) Agricultural Land Commission*, 2016 BCSC 2511 are distinguishable.

- She will suffer irreparable harm because she will miss a month of dry weather for safe placement of fill and may lose access to the fill material. If she makes a non-farm use application, she will lose the protection of the Farm Industry Review Board. Further, the Property is not productive and has lost years of productivity due to its challenging topography; and

- The balance of convenience favours her application. She has a reasonable chance of success on appeal. The order was issued unlawfully. She has shown the project is necessary and the ALC has not shown it is not necessary. The onus should be on the ALC regarding necessity. She will lose dry weather and access to fill during a peak month of excavation projects. The agricultural integrity of the land will not suffer if the stay is granted. The project is supervised by accredited experts to ensure that the land is reclaimed for farm use. The land will lie dormant and not be used for agriculture if the stay is not granted.

- The Appeal Commissioners considered the above noted arguments provided both for and against the stay of the Stop Work Order and declined to stay the Stop Work Order in a letter dated June 29, 2018 for the following reasons:

“□ The Appeal Panel acknowledges that the Appellants do have a reasonable prospect of success at the July 26, 2018 Appeal Hearing, but that prospect alone does not compel the Appeal Panel to grant the stay of the Order.”

□ *The Appellants will not suffer irreparable harm if the stay is not granted, because dry weather generally continues into August and September. In addition the Appellant has had ample opportunity to make an application (for non-farm use) to the ALC for the fill prior to their June 30, 2018 deadline.*

□ *The Appellants have not convincingly argued that the balance of convenience trends in their direction. The ALC C & E's concerns about this fill project are borne out by experience with other fill projects throughout the province. Specifically, there is concern that if the ALC is not involved it is possible that professional oversight may not occur (as this is at the discretion of the Appellants), and that the fill project will not be completed appropriately, with the correct amount and appropriate quality of fill, or with assurance of arability on completion. In addition there is no certainty that the proposed farm structures will be constructed as proposed. "*

- A June 29, 2018 letter from the Appeal Commissioners to the Appellants requested additional information about:
 - 1) *The total "final" usable area created by the filling, and in particular the combination of the fill area to the new ridgeline back to and including the existing field – i.e. how much overall pasture is being created.*
 - 2) *The existing slope incline prior to filling, and the proposed slope incline after filling.*

Appellants' Submission

[13] The Appellants provided all the background material referenced above at the July 26, 2018 Appeal hearing in addition to two additional reports both dated July 13, 2018. The additional reports provided the following information:

[14] Ryzuk Geotechnical provided a July 13, 2018 response to the ALC's June 29, 2018 letter requesting additional information, indicating that approximately 0.9 ha would be made "usable" by the fill project (that is currently unusable), and that an additional 0.64 ha of the currently usable 2 ha pasture would be filled in order to transition the 0.9 ha filled area to the existing usable pasture at the east portion of the Property. The purposes of filling the 0.64 ha area is to ensure safe machinery movement.

[15] John Paul, P. Ag. provided a July 13, 2018 update to his Reports, referenced above (the "Update"). The Update was prepared in response to the Stop Work Order and follows on Mr. Paul's reports dated December 2, 2015 and June 14, 2018. The Update concludes that the

decision to issue the Stop Work Order did not consider the facts regarding the Property, the ALCA and Regulations, and the objectives of the ALC. The Update also references seven (7) examples of filling in the ALR with C&E involvement and alleges inconsistencies in ALC C&E approaches to fill projects. The Update concludes that the suggestion that the ALC be involved to ensure the work is completed appropriately is not necessarily true, and that the Stop Work Order should be removed.

[16] At the July 26, 2018 Oral Hearing, the Appellant Kinney described to the Appeal Commissioners the history of her involvement with the fill project (since 2016), and her desire to establish a horse boarding facility on the Property. The Appellant outlined that the current facility layout is not satisfactory because there is no accessibility between the developed upper stall/riding ring area, and the existing east pasture. There is a trail, but it is not usable.

[17] The Appellant indicated that filling the originally excavated gravel pit area would connect the two portions of the Property. She argued that Section 20 of the ALCA indicates that the placement of fill is a non-farm use unless it is allowed by the ALC Regulation, and that a horse boarding facility is allowed by the ALC Regulation, and therefore filling is permitted. She argued that the Stop Work Order was made without statutory authority.

[18] The Appellant also indicated that if she makes a non-farm use application for the fill project she will not be protected under the *Right to Farm Act*.

[19] The Appellant submits that the Stop Work Order was made unreasonably, citing *Tree To Me Agricultural Products Inc. v. British Columbia (Agricultural Land Commission)*, 2010 BCSC 1647 which indicated that an Stop Work Order of the ALC must be reasonable. The Appellant also submits that the Stop Work Order was made without evidence that the fill project would harm the Property, unreasonably dismissing the expert reports of Geotech and the Agrologist without providing any expertise of its own.

[20] John Paul, the Agrologist who accompanied the Appellant Kinney at the hearing also provided *viva voce* evidence as to the necessity of the filling to make the Property useful for a horse boarding facility – to connect the upper and lower areas of the property.



[21] The Appellant Kinney argued that she believes that the proposed fill project is permitted outright by the ALCA and regulation because the fill project is for agricultural uses (a horse boarding facility, and cannabis production).

[22] The Appellant Kinney requests that the Stop Work Order be reversed on the grounds the fill project will enhance the agricultural potential and agricultural use of the property, consistent with the ALCA and Regulation, and the purposes of the ALC.

Discussion and Findings:

[23] The Panel finds the ALC C&E Officer's concerns with the fill project to be appropriate given its scale and the limited net usable area arising from the fill project. Currently there is approximately 2 ha of existing usable pasture. An additional 0.9 ha of pasture would be created, but at the expense of creating a slope on 0.6 ha of the 2 ha area. The final grades of the fill project would create a new 0.9 ha area, joined by a filled, sloped 0.6 ha area to a 1.4 ha area of original grade pasture.

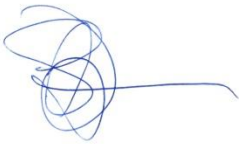
[24] The Panel finds that there is no compelling evidence submitted that gives comfort that the fill project outcome would benefit agriculture. This is because there is no way to ensure that the fill project will substantively improve the Property for agriculture. Though 0.9 ha of pasture would be created, 0.6 ha of existing pasture would be covered by fill, at a grade that might not be useful for cropping or pasture. In addition the Panel finds that it is impossible to be certain that the agricultural activities would be developed after the completion of the fill project. The Panel is not aware that any active agriculture is occurring on the presently usable areas.

[25] The Panel finds the direction of C&E and other ALC staff to the Appellant Kinney to submit a non-farm use application for filling to be consistent with its interpretation of the ALCA and Regulation, and with other advice provided for similar fill projects of this scale throughout the ALR. The ALC's Fill Bylaw #2 (adopted April 2018) specifically requires the submission of a non-farm use application for fill areas covering an area larger than 0.2 ha, clarifying permitted fill for agricultural uses outlined in s. 2(5) of the Regulation

[26] An ALC application would permit ALC Commissioners who have farming experience to review the project and, if convinced of its benefit to the ALR, and farming in the province, to permit the project, and/or impose any conditions it deems necessary.

[27] Therefore, the Panel considers the advice to submit a non-farm use application for the fill project to be appropriate, and upholds the June 11, 2018 Stop Work Order.

Appeal Panel:



Jennifer Dyson



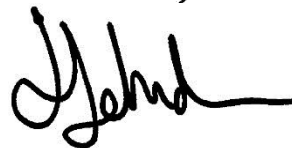
Richard Mumford



Dave Merz



Bill Zylmans



Dave Zehnder

Appeal Decision Date: September 10, 2018