



Agricultural Land Commission Appeal Decision, ALC File 50496

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

Appellants: City of Powell River

BEFORE: An Appeal Panel of the ALC

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

DATE: March 27, 2019

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

Appeal

[1] A Remediation Order dated October 22, 2018 (“Stop Work Order”) from Kim Grout, ALC Chief Executive Officer (“CEO”) was served on the City of Powell River (the “Appellant”) pertaining to PID 026-685-591 – *Lot A, Plan BCP23887, District Lot 450, Group 1, New Westminster District; Except Plan BCP42255* (the “Property”) located off Hemlock Street in the City of Powell River. The Remediation Order required that the City of Powell River remove the road and all fill from 0.2 ha of the ALR Property; remediate the Property (0.2 ha) to similar or better agricultural standard than previously; and have the right of way removed from the title of the Property.

[2] The October 22, 2018 Order was amended November 22, 2018 to permit the submission of the final report by a QEP detailing the completed remediation by September 30, 2019 (rather than the previously specified February 28, 2019).

[3] On December 12, 2018 the ALC received a Notice of Appeal from the Appellant pursuant to section 55 of the *Agricultural Land Commission Act* (“ALCA”). The Notice of Appeal requested a dismissal of the Order, but provided no grounds for the request for dismissal.

[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] The ALC acknowledged the Notice of Appeal in a letter dated December 13, 2018.

[6] George Orchiston, a City of Powell River citizen, requested in a letter dated January 21, 2019, that the ALC CEO not accept the City’s Notice of Appeal because no grounds for Appeal were provided in the City’s December 12, 2018 letter or apply to the Commission for summary dismissal of the Appeal.

[7] The ALC CEO did not apply for a summary dismissal of the Appeal under Rule 23 of the Appeal Rules, or section 31 of the *Administrative Tribunals Act* (the “ATA”).

[8] The ALC advised the City of Powell River (in a letter dated January 7, 2019) that the December 12, 2018 Notice of Appeal did not set out the grounds for Appeal (contrary to section 37 of the ALC regulation and section 23 of the ATA). However, section 23(3) of the ATA permits the Chair or the Chair’s delegate to allow a reasonable period of time to correct the Notice of Appeal. The City of Powell River was advised that the Chair was prepared to allow the Appellant until January 16, 2019 to correct the Notice of Appeal.

[9] The City of Powell River submitted a revised Notice of Appeal on January 16, 2019 which set out in detail the grounds for the Appeal. The essence of the Appeal is that the minor scale of the intrusion (0.2 ha), the poor soil capability of the ALR land (CLI Class 4/5) and the cost of remediation (~\$500,000.00) make the Order unreasonable. Amongst other things, the Notice of Appeal did incorrectly reference that the Appeal Panel should reconsider the ALC Regional Panel decision to refuse ALC Application #56916. Although a reconsideration by the Appeal Panel (which operates under s. 55 of the ALCA) of the ALC’s Island Panel decision in



Resolution #73/2018 to refuse to authorize the right of way and constructed road within it is not possible, sufficient grounds were set out in the Notice of Appeal for it to be accepted as an appeal from the Remediation Order.

[10] On January 17, 2018, the ALC acknowledged the corrected Notice of Appeal and provided the Appellant with electronic access to the information that was before the ALC CEO when she made the Remediation Order under appeal, a copy of the Order itself, as well as ALC maps and soil capability maps (“ALC Documents Package”).

[11] The Appeal was conducted entirely in writing. There was no oral Appeal Hearing.

Request for Intervenor Status

[12] George Orchiston, a Powell River citizen, in a letter dated January 28, 2019 requested intervenor status in the Appeal. His letter set out his involvement in the matter, provided a timeline of his understanding of the events, and requested that the ALC dismiss the Appeal of the City because the City did not dispute its contravention of the ALCA or the ALC CEO’s authority to order the removal and remediation of the road. Instead the City incorrectly requested reconsideration of the ALC decision, by Resolution #73/2018, to refuse the road. George Orchiston believes that this request is an abuse of process.

[13] ALC CEO Kim Grout indicated (by email dated January 30, 2019) that she has no objection to Mr Orchiston’s petition to be an intervenor; stating: “*he has specific background knowledge and has made submissions to the City of Powell River*”.

[14] The City of Powell River (when requested to comment on Mr. Orchiston’s request) indicated (by e-mail dated January 29, 2019) that the City would not provide a response to Mr Orchiston’s application for Intervenor Status.

[15] George Orchiston submitted additional information in a letter dated January 31, 2019 and requested that the ALC refuse to accept the City’s grounds for appeal because of confusion as to whether the City Council really understood what it was appealing: the original ALC decision to refuse the road, or the Remediation Order dated October 22, 2018.

Background

[16] The Remediation Order relates to small area (0.2 ha) of the Property consisting of the road bed and right of way of Hemlock St in the City of Powell River. The legal description of the Property is:

PID 026-685-591 – Lot A, Plan BCP23887, District Lot 450, Group 1, New Westminster District; Except Plan BCP42255

[17] The Property is 53.7 ha in area, of which 47.7 ha is located within a designated agricultural land reserve (“ALR”) as defined in section 1 of the ALCA.

[18] ALC involvement on the subject property began in 2016 when an application was made to the ALC for the exclusion of 12 ha for a private school (the “Exclusion Application”). The Exclusion Application was refused by Resolution #380/2016 because the land had capability for agricultural development.

[19] Involvement of C&E staff of the ALC with the Property began in January 2016 when a complaint was received alleging that a non-compliant dedication of a right of way and construction of an asphalt road had taken place on the Property. Timeline highlights follow.

- On June 9, 2016 an exclusion application (#55021) was submitted for the property
- On June 13, 2016 ALC Compliance and Enforcement Officer David Assels conducted an inspection confirming the complaint of a non-compliant road.
- January 4, 2017 Officer Assels was notified that ALC application 55021 was refused.
- April 26, 2017 Officer Assels sent a Notice of Contravention to the City and requested a compliance proposal.
- May 4 and August 9, 2017 letters from the City confirmed that the road was not compliant and that a proposal to bring the road into compliance would be submitted.

- On September 27, 2018, City of Powell River staff advised ALC C & E staff of an impending application, then submitted a non-farm use application on October 17, 2017 for the constructed road.
- The non-farm use application # 56916 was refused by the Island Panel of the ALC on the grounds that the 0.2 ha affected area had capability for agriculture and because ALR land should not be used to accommodate urban development.
- Following the refusal of the ALC non-farm use application, the ALC CEO issued the Remediation Order under Appeal.

Appellant's Submission

[20] The Appellant (the City of Powell River) provided preliminary information in support of the Appeal in a letter dated January 16, 2019. The preliminary information acknowledged that the City of Powell River did not provide adequate information for its previous application, nor did it respond in a timely way to the ALC's Notice of Contravention. However, the City pointed out that it is a strong supporter of agriculture. The City's arguments in the Appeal rest on the following:

- 1) the City's active support for Regional Agricultural initiatives (supported by multiple reports of soil capability on City owned lands and economic opportunity for agriculture reports),
- 2) impact to agriculture resulting from the non-compliant right of way,
- 3) the severe financial burden of complying with the ALC remediation order,
- 4) proposed offsets through the inclusion of land into the ALR.

[21] The City points out the land has limitations for agricultural development and is best developed in a staged manner, in a planned Horticulturist Technicians teaching facility. The current road would provide access to the teaching facility and enable the agricultural development of the property.

[22] Soil capability information (Madrone Environmental Services Ltd 2007 report) indicates that the right of way is not reasonably improvable for agriculture because of stoniness. Activities to



remove the 2000 cubic meters of fill underlying the road might further damage agricultural capability.

[23] The City estimates that it will cost \$561,000.00 to remove the road, remediate the soil and replace emergency access. This cost is a burden on taxpayers and will deplete resources for agricultural initiatives.

[24] The City is proposing to include new land into the ALR (which is within the subject property) to offset the impacts of the road.

[25] George Orchiston, a City of Powell River citizen, requested and received permission for intervenor status in the Appeal (as noted previously). George Orchiston submitted letters to the ALC dated January 28, 2019, and January 31, 2019. The letters request that the Appeal Panel reject the City's Appeal of the Remediation Order because of confusion by the City as to what it was appealing; i.e. reconsidering ALC application resolution # 73/2018 to refuse the road right of way and road rather than the Remediation Order. Mr. Orchiston indicates accepting the Appeal would be an abuse of process because the City resolved by Council Resolution to not appeal ALC Resolution #73/2018.

[26] The City, subsequent to the Appeal Panel's acceptance of George Orchiston as an intervenor, submitted another letter dated February 14, 2019 which re-iterated the substance of its arguments set out in its January 16, 2019 letter noted above.

[27] George Orchiston submitted further letters and addendums dated February 18, 2019, and February 25, 2019 in response to the City's February 14, 2019 submission. The February 18, 2019 letter was to the City and challenged the veracity of the City's statements that Island Timberlands LP held the rights to a first cut of the subject property's timber and requested proof of the allegation. The February 25, 2019 letter to the Appeal Panel emphasized that the City was circumventing due process in the Appeal by seeking to have ALC Resolution #73/2018 reconsidered, and that the Appeal should be dismissed.

[28] A February 27, 2019 letter from Mr. Orchiston to the City was provided to the ALC which outlined further inconsistencies in the City's February 14 submission, in particular that City staff



actions associated with the Appeal were not authorized by City Council, nor were the proposed residential and institutional uses on the Property permitted in the Official Community Plan.

[29] Finally, February 28, 2019 and March 1, 2019 letters were submitted to the ALC by the City of Powell River responding to the Orchiston letters clarifying the tree farm license tenure on the subject property and the status of the zoning of the subject property.

Discussion and Findings:

[30] The Appeal Panel considered all of the City of Powell River actions taken to date on the authorization and construction of the road right of way; the City of Powell River response to requests for compliance with ALC notifications, decisions and orders; the City of Powell River representations and arguments in the Appeal; and the George Orchiston representations in numerous letters to both the ALC and City of Powell River staff.

[31] The Panel finds the City to have ignored the ALC's legislated authority in its dedication and construction of the road. In addition the Panel finds the City's support of and submission of applications (for exclusion and the road) to be inappropriately timed – following rather than preceding road dedication and construction.

[32] 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 refuse the exclusion of the subject property or the construction of the road, but notes that they appear in any event to be consistent with the ALCA mandate to preserve and protect farmland and encourage farming. The decisions appear to have been appropriately argued and justified.

[33] The Panel finds the Remediation Order to be appropriate given the ALC authority over non-farm land uses in the ALR (including road right of way and construction), and the ALC Island Panel's refusal of the Appellant's application for a right of way and road by Resolution #73/2018.

[34] The Appellant's argument that the Remediation Order did not consider the City's active support for agriculture in its actions and planning, was supported by the submission of the

following agriculture and soil reports undertaken in the past decade: *Economic Development Plan for Agriculture, Nov. 2009; Agricultural Land Capability Assessment Phase II Powell River Airport Reserve Lands, March 2018; Land Capability and Soil Assessment for Three Parcels in the City of Powell River, BC, May 10, 2007; Powell River Farm Sector Opportunities and Challenges 2018.*

[35] The Appeal Panel acknowledges that the City has devoted resources to generating reports that assess soil capability and discuss opportunities and challenges for agricultural development within the City, but does not find the submission, or the substance of the reports, or the rationale for the creation of reports to be relevant to the matter of the Appeal of the Remediation Order. Although the Appellant asserts that the City is an active supporter of agriculture, the Appeal Panel is unaware of what direct or indirect actions by the City have encouraged or enhanced agricultural development in the City. The Appeal Panel does not find the existence of reports exploring options for agriculture to be the same of actually proceeding with investments and other actions to enhance agriculture.

[36] The Appellant has argued that the remediation of the road would lead to additional degradation of the site. This argument is based on the potential for excavation and remediation works to do additional damage to the disturbed site, and to extend that damage to currently undisturbed areas.

[37] However, the current state of disturbance is already significant due to the presence of fill, clearing of vegetation, and disturbance of the existing soil structure, including but not limited to soil compaction resulting from construction. The remediation of the site to an agricultural standard would be unlikely to have any further significant negative effects on agricultural capability of the site or adjoining areas.

[38] The Appellant has argued that that there is a severe financial burden to the City taxpayers to remediate the site and that this could also reduce agricultural investment by the City to establish a horticultural training facility and develop the Property for agriculture.

[39] However, there is no information provided in support of the City's estimate of the proposed cost of remediation, nor any evaluation of City's ability to pay for the remediation. In addition,

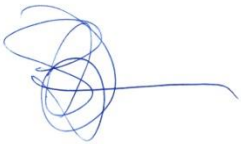
the Appeal Panel has not been provided with a timeline or business plan that outlines the City's stated intent to establish a horticultural training facility or develop the property for agriculture. As such the Appeal Panel is unconvinced that the cost of remediation is a severe financial burden, or that the Appellant will proceed with the planned agricultural development.

[40] The Appellant has indicated that it was prepared offset (or compensate for) the impacts of the use of 0.2 ha for a road right of way by including more than 0.2 ha into the ALR, either on the property or elsewhere in City (i.e. other lands owned by the City).

[41] The Appeal Panel finds this offer to include land to compensate for the 0.2 ha encroachment to be irrelevant to the matter of the Remediation Order. Instead the issue of inclusion would be more appropriately addressed through the ALC application process.

[42] In summary the Appeal Panel is not persuaded by the Appellant's arguments and confirms the Remediation Order.

Appeal Panel:



Jennifer Dyson



Richard Mumford



Gerry Zimmermann



Dave Zehnder



Janice E. Tapp

Janice Tapp

Appeal Decision Date: April 25, 2019