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ALR UPDATE: WHAT LOCAL GOVERNMENTS NEED TO KNOW

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I. INTRODUCTION

The Agricultural Land Reserve (the "ALR"), a made-in-BC solution to protect a core base of arable land for farming and food production in the province, was established in 1973 and protects approximately 4.7 million hectares of land in BC for agriculture. Although impressive sounding, in reality this constitutes less than 5% of the province's total land base. Along with the ALR, the Province created the Agricultural Land Commission (ALC) to manage it.

The creation of the ALR did not eliminate the pressures on farmland. In several areas of the province, prime agricultural land is located in close proximity to core urban areas where residential land prices have skyrocketed, particularly over the past two decades. This, in part, has led to the proliferation of what have been referred to by many municipal officials as "lifestyle estates" on ALR land, which involve the construction of massive single-family mansions and the use of the balance of the land for expansive lawns, private gardens, or nothing at all, while farmers and ranchers seeking to procure land for primary production have been priced out of the market. Other issues with widespread non-farming uses of ALR land have included the unlawful dumping of poor-quality fill which reduces the productive capacity of the native soil, and inappropriate commercial uses such as truck parking. Prior to the legalization of cannabis in late 2018, questions arose regarding whether this activity, anticipated to be lucrative and popular, was an appropriate use of agricultural land given the pressures it could place on other types of crops if many farmers were to attempt to transition.

Political pressure regarding the above problematic uses of ALR property led the provincial government to direct a comprehensive review of the ALR in 2018. The result of this review was the amendment of the Agricultural Land Commission Act and passage of the Agricultural Land Reserve Use Regulation, BC Reg. 30/2019.

Although targeted to address the above-noted issues, the amendments to the Act and the new Regulation met with some criticism for failing to effectively address certain elements of these problems, while having overbroad effects with unintended consequences for others. The Province and the ALC have responded to this criticism with ongoing public consultation and engagement, some changes to the new legislative scheme, and proposals for others. This paper discusses the legal treatment of certain of these changes to date, and impacts of which local governments should be aware.

II. USE CATEGORIES

The revised Act and new Regulation divide land uses into 4 broad categories: farm uses, non-farm uses, soil and fill uses, and residential uses. Farm uses are defined in the Act as "an occupation or use of agricultural land for (i) farming land, plants, mushrooms, truffles or animals, (ii) a farm operation as defined in the *Farm Practices Protection (Right to Farm) Act*, or

(iii) a purpose designated as a farm use by regulation," and expressly does not include a residential use or a soil or fill use. The *Farm Practices Protection Act* defines a farm operation as "growing, producing, raising or keeping animals or plants, including mushrooms, or the primary products of those plants or animals", and ancillary activities.

A. Conditional Farm Uses

The Regulation complicates these categories by creating a series of what may be referred to as 'conditional' farm uses – Part 2 lists a series of activities with certain criteria, and provides in each section that if the activity meets the criteria, it is a "farm use". A notable exception to this pattern is Section 6 – Land Development Works, Section 7 – Soil Testing, Biosolids and Soil Amendments, and Section 8 – Cannabis, none of which include the language designating the conditional activity as a farm use. These sections do, however, in common with the other sections of this Part, provide that the activity "may not be prohibited as described in section 4". ALC interpretation bulletins insist that all qualifying activities in this Part are "Farm Uses" despite this significant unexplained drafting inconsistency.

Section 4(a) provides that the farm uses referred to in Part 2 may not be prohibited by a local government enactment except a bylaw under section 552 [*farming area bylaws*] of the *Local Government Act*. In order to pass a bylaw under section 552, a local government must be designated by the agriculture minister via regulation. Only a handful of local governments are currently so designated (for our discussion purposes, "farm municipalities"). The question then becomes, is the bar on prohibiting a conditional farm use intended to apply only to non-farm municipalities, thereby preserving the exception to the exception, or is it intended to prevent even farm municipalities from prohibiting these conditional farm uses? If the former, it is unclear why Section 4(a) exists at all, given that only farm municipalities may prohibit or restrict farm uses in a farming area under the *Local Government Act*; if the latter, one would have expected to see this provision drafted as a single straight exception rather than a series of two nested exceptions.

The comments of Mr. Justice Mayer in the recent case of *English v. Richmond (City)*, 2020 BCSC 1642, (para. 94) are apt:

> With all due respect to the legislative drafters of the 2019 ALR Regulation, the limitations on a municipal government's right to prohibit cannabis production on ALR lands in s. 8 could have been made clearer.

B. Non-Farm Uses

Non-farm uses, of course, are generally not allowed in the ALR. However, Part 3 of the Regulation deals with "Permitted Non-Farm Uses" and further divides these into 2 categories: those which may be prohibited by local governments (including non-farm municipalities) and those which may not be prohibited by any local government. The activities which may not be prohibited include farm structures, driveways, utilities, parks, and temporary gatherings of 150 people or less. Activities which may be prohibited include certain types of infrastructure, home

occupations, and aggregate removal. Presuming that farm municipalities are able to prohibit conditional farm activities under Part 4 as discussed above, it is unclear from a policy perspective why the legislature would decide that they should be unable to exercise their special powers in relation to farmland for the purpose of regulating the ancillary and supportive types of activities which are protected as "Permitted Farm Uses Which May Not Be Prohibited".

C. Residential Uses

Prior to the 2019 amendments, residential uses were considered a non-farm use. In the recent case of *Dhanoa v. British Columbia (Agricultural Land Commission)*, 2020 BCSC 854, the ALC argues that the intent of Part 4 of the Regulation is to create a new category of use (para. 26):

> "[t]he February 2019 amendments to the Act added a new category of use: residential use" and that, by definition, "a residential use is now neither a farm use nor a non-farm use." The amendments prohibit landowners from constructing more than one residence per parcel and prohibit a principal residence on ALR land that has a larger total floor area than 500 square metres.

This arguably amounts to a small but significant expansion of the substantive powers of the ALC in relation to residential uses as such – an area traditionally reserved for local government regulation – rather than only as non-farm uses in relation to the ALC's principal mandate regarding farm uses. The amendments to Section 58(2) of the Act provide the express powers available in relation to residential structures which may be exercised by regulation and appear to confirm this substantive expansion, signalling that the legislature is open to the introduction of novel tools beyond the traditional scope of the ALC as established almost 50 years ago in order to accomplish its aims in the face of modern pressures.

Part 4 of the Regulation presumptively prohibits more than one residential dwelling on an ALR parcel. This element of the Regulation has received significant pushback from farmers, who argue that it is a response to pressures which are specific to the South Coast – in particular the Lower Mainland – and in other areas works to prevent multiple generations from residing on a family farm parcel to continue the business, among other deleterious effects. The Province has recently indicated that it is considering a modification to the secondary residence prohibition to address these concerns, suggesting that approval of a small secondary residence might be delegated to the applicable local government for decision-making. This would allow communities feeling the pressures of land speculation and lifestyle estates to continue to exercise tight controls on available living spaces on ALR land, while those more rural areas, in need of convenient and inexpensive on-farm accommodations to facilitate an active farming business, would be free to create such housing.

Given lawful non-conforming use protections and the number of "lifestyle estates" already entrenched in areas of the South Coast, which consists of a geographically constrained supply of farmland, the proverbial horse may have been said to have left the barn. Legal efforts by local governments to halt the progression of such buildings already under construction have been unsuccessful in some recent cases: see *Minster Enterprises Ltd. v. City of Richmond*, 2020 BCSC 455 and *Yu v. City of Richmond*, 2020 BCSC 454.

Given their recent willingness to forge new paths in the creation of substantive regulatory tools for farmland protection, it will be interesting to see if the Province moves toward adopting a model to permit value recapture against what it has deemed to be inappropriate land use in the ALR, as it has done in relation to residential property with the provincial Speculation and Vacancy Tax, and as it has enabled the City of Vancouver to do by granting the Vacancy Tax powers under Part XXX of the *Community Charter* in relation to Class 1 properties under the BC *Assessment Act* (which, notably, includes most farm buildings).

Given the regional nature of the problem and the movement toward shifting first-line responsibilities such as exclusion applications to local governments (discussed below), a farmland vacancy tax could also conceivably be a local government responsibility, and could provide a revenue source to fund its own administration as well as initiatives such as farmland revitalization and public procurement or non-profit and educational partnerships for community farm gardens and food security education.

III. EXCLUSION APPLICATIONS

As of September 30, 2020, it will no longer be possible for a private owner of land in the Agricultural Land Reserve to initiate an application to exclude the land. Prior to that date, such an application was possible, though it had to be submitted to the local government having jurisdiction for forwarding to the Agricultural Land Commission or not, at the local government's discretion. The logic underlying this process may have been that, given the requirement for consistency between the ALR designation and local official community plans and zoning bylaws, it would be pointless for an owner and the ALC to spend time and resources resolving an exclusion application if the local government was not willing to entertain bylaw amendments, at least to the point of holding public hearings. The local government could, at an early stage, block applications that were, from its point of view, non-starters.

The effect of recent amendments to the *Agricultural Land Commission Act* is that only local governments can apply to exclude private land from the ALR. The new section 29 is worded in a droll way, given that the purpose was to eliminate owner applications:

> (1) A person may apply to the commission to have land excluded from the agricultural land reserve if the person is
>
> (a) the owner of the land and is

> (i) the Province, a first nation government or a local government, or
>
> (ii) a prescribed public body,
>
> (b) a local government, and the land is within the local government's jurisdiction, or
>
> (c) a first nation government, and the land is within the first nation's settlement lands.

The only reason that the local government authority has to make an exclusion application in respect of its own land is required under subsection (a), in addition to the application authority the local government has generally under subsection (b), seems to be that the local government might own ALR land outside its jurisdiction, a circumstance that is probably quite rare and could easily have been managed under the "prescribed public body" scenario. More transparency might have been achieved with wording along these lines:

> (1) A person may apply to the commission to have land excluded from the agricultural land reserve if the person is
>
> (a) the Province, a first nation government or a prescribed public body, and the application is made in respect of land owned by the applicant;
>
> (b) a local government, and the land is within the local government's jurisdiction, or
>
> (c) a first nation government, and the land is within the first nation's settlement lands.

The effect of s. 29 as amended is clear: a non-government owner of ALR land cannot make an exclusion application.

This amendment to the *Agricultural Land Commission Act* calls to mind the BC Supreme Court's decision in *McCall v. British Columbia (Agricultural Land Commission)* 2012 BCSC 443, in which the Court refused to set aside as unreasonable the Commission's rejection of an owner's exclusion application (though for procedural reasons the Commission was being required to re-hear the application). The significance that the ALC attached to the fact that the municipality had not made this application itself was noted by the Court as follows (at para. 7):

> The Commission noted that although the local government supported the petitioner's application for exclusion, the Municipality itself did not apply for exclusion of these properties for industrial development. As a result, the Commission was not prepared to entertain the conversion of agricultural lands to industrial use without their specific application.

The Court didn't share the Commission's perspective (at para. 17):

> Although the Municipality of Langley did not advance its own application to have these specific properties excluded from the Agricultural Land Reserve, as it is entitled to under the Act, it did issue a special resolution supporting the petitioner's application to exclude. Making a distinction between the local government initiating their own application rather than supporting a private owner's application ultimately seems to be a distinction without a difference.

With the amendment of s. 29 of the Act, the Province has given deep statutory significance to the distinction that the Commission had identified in *McCall*. Where the local government is not willing to make the exclusion application itself, there will be no application at all. It seems clear that provincial policy on ALR exclusion applications is to integrate the ALR designations more firmly with local government land use policy, and to deprive local governments of the option of standing aside as owners seek to have their land removed from the ALR. Local governments may drive the bus, or keep the bus in the parking lot; they may no longer ride the bus.

A. Fees

Exclusion applications cost money. In addition to charging a $750 application fee, the ALC requires the applicant to post a sign on the land and hold a public hearing, and expects an exclusion application to be accompanied by convincing evidence that the land should not be within the ALR. In particular, because existing ALR designations are based on land inventory data on agricultural capability, a successful application will likely have to be supported by technical information that supports an alternative or contradictory view of agricultural capability. The significance of such evidence in an exclusion application was emphasized by the Supreme Court in *McCall* in sending the application back to the ALC for a procedurally fair determination (at para. 14):

> A major reason advanced by the petitioners for exclusion in the Agricultural Land Reserve will again be the agrologist's report that the subject properties are unsuitable for soil based farming. If that factor is not regarded as determinative on the issue of ultimate suitability of the properties for farm use, the Commission should at least detail what weight was given to the agrologist's report compared to other considerations included in either the Act or its regulations regarding other forms of farm use suitable for these properties and the reason why these forms of farm use prevailed to justify refusal of exclusion. If that type of analysis and explanation are absent, reasonableness of the outcome, no matter how correct, will always be questionable.

There have been no amendments to the ALC Act or Regulations to enable a local government to charge private owners of ALR land a fee for any of this. The underlying idea seems to be that the location of the ALR boundary within a municipality or regional district is a matter of joint land use policy – only the ALR or the local government can initiate a change. (For simplicity the

role of the Province itself, First Nations and prescribed public bodies in making applications under s. 29 is here left aside.) This idea may be somewhat at odds with the BC Supreme Court's view of the matter expressed in *Greater Vancouver Regional District v. Langley (Township)* 2014 BCSC 414, that as between a local government and the ALC, the ALC has "preeminent authority for the identification and preservation of agricultural land". Be that as it may, on its face the amended *Agricultural Land Commission Act* clearly substitutes for the passive role that local governments previously played in exclusion applications for private land, the active role of applicant. It's the local government as applicant (perhaps represented by legal counsel) that will have to attend a hearing of the Commission to advocate the exclusion (though the Commission will hear representations from the owner as well if the owner is present at the hearing, which seems likely). The ALC's FAQ document on these amendments says that "all associated exclusion application fees [here it seems to mean "costs"] are paid by the local government". The document goes on to state that a local government "should only submit applications that it independently and objectively supports" (emphasis added). Presumably this means independently of the opinions and objectives of the owner of the land – which is the same principle as applies to local government OCP designations and general zoning regulations, which are typically enacted regardless of the opinions and objectives of individual owners.

Some years ago, it was apparently established that a "New York minute" is the amount of time that elapses between a change to the green phase of a traffic light in that city and the sound of horns from the vehicles in one's rear-view mirror. A definition of a "BC minute" could be the amount of time that elapsed between the coming into force of the amended s. 29 and our first request for legal advice as to whether local governments are allowed to charge a fee to owners for making a local government exclusion application in respect of their land. The ALC itself laid some groundwork for us in its FAQ document, recommending that local governments "speak to your legal counsel" about whether fees and other costs can be charged to the owner of the land.

The fee authorities in s. 462(1) of the *Local Government Act* do not authorize ALR exclusion application fees, except perhaps as part of a fee that's being charged for OCP or zoning amendment applications (which are expressly authorized) where bylaw amendments would not be possible until the land in question is excluded from the ALR. That possibility may be weak given the following subsection of s. 462:

> (5) No other fee, charge or tax may be imposed in addition to a fee under subsection (1) as a condition of the matter referred to in that subsection to which the fee relates.

Unfortunately, s. 462 also goes on to say this:

> (6) A local government, the City of Vancouver or an approving officer must not do either of the following unless authorized by this Act, by another Act or by a bylaw made under the authority of this Act or another Act:

(a) impose a fee, charge or tax;

(b) require a work or service to be provided.

The scope of this prohibition is not limited to the matters for which s. 462 expressly authorizes fees; it reaches outside of Part 14 and the *Local Government Act* itself to encompass fees that could potentially be imposed under s. 194 of the *Community Charter* or the general regional district fee provisions in s. 397 of the *Local Government Act*. The only basis in s. 462(6) for fees for s. 29 applications dealing with private land would be "a bylaw made under the authority of this Act or another Act", which simply takes us back to the search for authority to enact a bylaw imposing fees for this type of application.

Both municipalities and regional districts have authority to impose a fee in respect of a local government "service", which is in each case defined as an activity, work or facility undertaken by the local government. Assuming that under the new exclusion application regime the owners of ALR land will from time to time propose to their local governments that their land be excluded from the ALR, it doesn't seem an unreasonable interpretation of the fee provisions in ss. 194 and 397 (that being the judicial review standard that applies under the Supreme Court of Canada's *Vavilov* decision) that they permit a fee to be imposed for evaluating owners' ALR exclusion proposals and, in cases having sufficient merit, pursuing them via an exclusion application to the ALC. A fee imposed in respect of such a service could include components in respect of ALC application fees, local government staff and public hearing costs, and the cost of independent assessments of agricultural capability and similar technical evidence required for the ALC hearing of the application. Equally, however, and perhaps more in line with the Province's intentions, the local government position may be that the only ALR exclusion proposals that it will consider are those that arise from the local government's own planning processes, and therefore no occasion for imposing a local fee can arise.

We suggest that the absence of express authorization to impose local fees in relation to local government ALR exclusion applications is of a piece with the idea that ALR designation ought to be considered as a facet of local government land use management policy, analogous to OCP designation. Local governments can and do implement land use management policy by initiating reviews and revisions of their OCPs, and no question of charging the owners of affected land a fee for such an amendment typically arises (even though the amendments may be extremely valuable to the land owners). The amendments to s. 29 seem to deal with ALR exclusions in precisely the same way. While it's true that owners are entitled to initiate OCP applications, and it's arguable that they ought to be entitled to initiate ALR exclusion applications as well, the official plan amendment application procedures that are permitted in BC are conceptually strange – it is, after all, the local government's plan – and it's notable that there is no statutory entitlement of an owner to initiate an application to amend a regional growth strategy.

B. Assistance to Business

In relation to the assistance rule in s. 25 of the *Community Charter* and s. 273 of the *Local Government Act*, which the author of the ALC's FAQs on the s. 29 amendment presumably thought might apply in respect of local government applications to exclude land owned by industrial, commercial or business undertakings, there is another suggestion in the FAQ document to consult with legal counsel. Taking a step back, if the government genuinely thought that these types of applications could come within the scope of the assistance rule, it's not clear why the government wouldn't have provided a statutory exception to the assistance rule, as it has done in respect of such matters as partnering agreements, since most farmland in the province is owned by "industrial, commercial or business undertakings" – every farm is a business undertaking of some sort. Perhaps requiring local governments to run this risk is an indirect way of discouraging exclusion applications. Be that as it may, if ALR designation is viewed from the perspective suggested above – as merely one means of implementing local government land use policy, alongside OCP land use designation and zoning regulations – it seems very unlikely that initiating an ALR exclusion application would be seen as the type of "assistance" to the land owner that is the target of the assistance rules, any more than forwarding an owner's application to the ALC has in the past been considered to raise the issue.

C. Statutory Right of Way Notifications

As of September 30, 2020, the ALC must be notified before applying to register a charge granting or otherwise creating a statutory right of way ("SRW"). The notification must include a description of the purpose of the statutory right of way.

The notification process does not currently include provision for the ALC to approve or disapprove the proposed SRW; ALC staff will provide a notification response within a target period of 1-2 business days titled 'Receipt of Notification of Statutory Right of Way', which must be appended as a supporting document to the LTSA Form C Charge SRW application.

Presumably, the notification process will serve as a method for the ALC to gather information about the purposes for which SRWs are being registered on agricultural land, and to determine whether substantive regulation limiting the permissible terms of such SRWs is needed to further the ALC's farmland conservation goals.

IV. CONCLUSION

The regulatory regime in relation to BC's farmland is developing at a novel and exciting pace to address long-identified shortcomings. These changes bring both responsibilities and opportunities for local governments when it comes to ALR lands within their jurisdiction.

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