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The Agricultural Land Reserve: Prohibitions and Limits on Land Development and Construction

In British Columbia, the Agricultural Land Reserve ("**ALR**") designates 4.6 million hectares of land for priority use in agriculture. Intended to protect valuable agricultural land across the province, this designation restricts the scope of construction and development activities that are permitted on ALR land as set out in the Agricultural Land Commission Act SBC 2002 C. 36 (the "**Act**") and the Agricultural Land Reserve Use Regulation B.C. Reg. 36/2022 (the "**Regulation**"). When acquiring, developing and building on land it is incumbent for a property owner to conduct due diligence investigations into the property's zoning and any other designations that may prohibit or limit their development plans for the property. To assist in determining whether a property falls within the ALR, the Agricultural Land Commission (the "**Commission**") operates a map finder tool on their webpage which can assist a property owner or builder in determining if a property falls within the boundaries of the ALR. In circumstances where a property is a part of the ALR a property owner will be required to limit their construction and development plans to what is permitted by the Act and the Regulation.

Construction and Development in the ALR

What structures and improvements are permitted to be built, maintained and operated in the ALR are set out in the Regulation. These include farm structures (section 5), land development works for farm operations (section 6), horse facilities (section 9), residential structures (section 29) and additional residence (sections 34.1 to 34.3). The Regulation also permits certain non-farm uses, but enables local governments to prohibit such uses through land use bylaws. Construction and development in the ALR will usually require consideration of both local government bylaws and the Regulation.

The General Prohibition of Non-Farm Uses & General Permission for Farm Uses

Section 20 of the Act prohibits non-farm uses of land designated as ALR subject only to limited exceptions found in the Act and in the Regulation. It is through this provision of the Act that the construction of non-

farm use structures or land development for non-farm uses is prohibited. While generally it is the local government that regulates permitted land and construction activities through its bylaws, where land is designated as ALR then the farm uses prescribed by the Act cannot be prohibited or interfered with by a local government and the provisions of the Act and the Regulation related to construction and development cannot be superseded by the local governments bylaws. However, this does not prohibit a local government from enacting land use and building restrictions on ALR that are more restrictive on construction and land development then the Act or the Regulation. For example, Section 26 of the Regulation provides that the total volume of aggregate that can be removed from any single parcel of land must be less than 500 m^3, however, this could be further curtailed by local government land use regulation so that the maximum amount of aggregate that is permitted to be removed from a single parcel is even less than the 500 m^3 set by Regulation (for example a local government could set out in its bylaws that the amount of aggregate removed from a single parcel must be less then 300 m^3).

Additionally, Section 552 of the *Local Government Act* permits local governments to enact farming bylaws subject to approval being granted by the Province's Minister of Agriculture. This allows a local government, with the appropriate governmental authorizations, to enact bylaws that prohibit or restrict agriculture and farming operations within a farming area that relate to:

1) the conduct of farm operations as part of a farm business;

2) respecting types of buildings, structures, facilities, machinery and equipment that are prerequisite to conducting farm operations specified by the local government and that must be utilized by farmers conducting the specified farm operations;

3) respecting the siting of stored materials, waste facilities and stationary equipment; and

4) prohibiting specified farm operations.

To adopt farming bylaws, a local government must be regulated under Section 553 of the Local Government Act. There are currently four communities regulated under this section. These include the Township of Langley, City of Abbotsford, City of Delta and City of Kelowna.

It is therefore, important for owners, builders and developers to not only have familiarity with the Act and the Regulation when developing or building on ALR land but to be further familiarized with the local governments' bylaws related to zoning, building and soil removal in the event those bylaws create further restrictions on development and construction on the property. Additionally, when building or developing on ALR land in cities regulated under Section 553 of the Local Government Act, owners, builders and developers should further familiarize themselves with the farming bylaws enacted by these local governments to assess how such bylaws may impact development, construction and other plans for the property.

Farm Structures

Under Section 5(1) of the Regulation, any structure, driveway or utility that is "necessary for farm use" may be constructed, maintained or operated on a property in the ALR. For certainty, Section 5(2) of the Regulation sets out that this includes greenhouses, structures for use in an intensive livestock operation or for mushroom production or an aquaculture facility. As based on the foregoing, it is permissible for an owner or contractor to build any structure that is required for a farm use on

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ALR property. "Farm Use" is defined in the Act as meaning occupations or uses of agricultural lands for farming land, plants, mushrooms or animals, farm operations (as defined in the *Farm Practices Protection (Right to Farm) Act* RSBC 1996 c. 131) or a purpose designated as a farm use by regulation.

As based on the broad definition for farm use, it would be permissible to build various structures and improvements on ALR land so long as they are geared towards an agricultural or livestock operation, such grain silos, barns or livestock holding pens. As set out in the ALR Guidelines, structures must be commensurate with the level of farm use occurring on, or planned for, the property.

Necessary farm use structures in the ALR should generally be designed with regard to:

1) Compliance with the National Farm Building Code of Canada (1995) whenever possible;
2) Exterior and interior designs consistent with farm use. In particular, necessary farm use structures should include:
    a. Exterior design and materials that are consistent with farm use;
    b. Interior layout that is functional for a farm use such as high ceilings, large open interior spaces, door clearance for farm equipment;
    c. Single-story only (mezzanine acceptable) unless a farm use need is demonstrated; and
    d. If necessary, bathrooms limited to a maximum of two plumbing fixtures (i.e., sink and toilet), unless the need for an additional fixture such as a shower is demonstrated for specific farm purposes such as "shower-in, shower-out" for biosecurity requirements, etc.[1]

So as to ensure that the structure's intent remains to only be used for agricultural purposes, a farm use structure should not be designed to include or to permit easy conversion into a residential use, accessory residential use, or non-farm use. Additionally, a farm use structure should not include excessive storage areas not justified for farm use and should be commensurate with the size and scale of the agricultural operation.

Depending on the building permitting and approval process of the local government, it may be necessary to submit detailed building plans for farm use structures so as to confirm their total floor and area and the proposed layout of the structure.

Placement and Removal of Fill

The Regulation permits only a certain amount of fill to be removed from or placed on ALR land for the construction of necessary farm use structures without the Commission's review. These are set out in section 35 of the Regulation, which provides that it is permissible to remove soil or place fill on ALR land for:

1) constructing or maintaining a structure for farm use or for a principal residence;
2) constructing or maintaining berms for producing cranberries;
3) constructing or maintaining flood protection dikes, drainage, irrigation and livestock watering works for farm use;
4) maintaining an existing farm road;
5) using clean sand as a top-dress for berry production;
6) applying soil amendments; and
7) conducting soil research and testing.

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These are subject to the following conditions as set out in the Regulation for each of these activities:

1) constructing or maintaining a structure for farm use or for a principal residence if both of the following conditions are met:
    a. the total area from which soil is removed or on which fill is placed is 1 000 m2 or less;
    b. if the area from which the soil is removed or on which the fill is placed is in a floodplain, the resulting elevation level is consistent with the minimum elevation level established under all applicable local government enactments and first nation government laws, if any, respecting flood protection in the floodplain;
2) constructing or maintaining berms for producing cranberries if any fill placed on the area is
    a. no higher than 2 m above the natural grade; and
    b. no wider than 10 m at the base;
3) constructing or maintaining flood protection dikes, drainage, irrigation and livestock watering works for farm use, if the total annual volume of soil removed or fill placed is 320 m3/16 ha or less;
4) maintaining an existing farm road, if the total annual volume of soil removed or fill placed is equal to or less than the ratio of 50 m3 of soil or fill to 100 m of existing road length;
5) using clean sand as a top-dress for berry production, if the total annual volume of soil removed or fill placed is 100 m3/ha or less;
6) applying soil amendments, if incorporated into the soil to a depth of 30 cm or less; and
7) conducting soil research and testing, if the soil removed or fill placed is limited to the amount necessary for the research or testing.[2]

"Fill" is defined in the Act as meaning "any material brought onto ALR land other than materials exempted by regulation." This includes aggregate or other structural fill materials necessary for construction of a necessary farm use structure. However, property owners and builders should note that under Section 36 of the Regulation that the following fills are prohibited from use on ALR land: construction or demolition waste, including masonry rubble, concrete, cement, rebar, drywall and wood waste, asphalt, glass, synthetic polymers, treated wood and unchipped lumber. However, as outlined in section 36(2) of the Regulation recycled concrete aggregate and recycled asphalt pavement may be used as fill on ALR land for the purpose of maintaining an existing farm road if the total annual volume of soil removed or fill placed is equal to or less than the ratio of 50 m^3 of soil or fill to 100 m of existing road length.[3] The removal and placement of fill on a property in the ALR may be further regulated by local government land use regulation bylaws and owners, builders and developers should further familiarize themselves with the applicable soil removal and deposit bylaws to assess how such bylaws' interplay with the Act and the Regulation.

Land Development Works

Under Section 6 of the Regulation, ALR properties contained within the boundaries of a Local Governments and First Nations (the "**Local Authority**") region cannot have prohibitions placed upon the use of agricultural land for conducting land development works by the Local Authority if the works are required for farm uses conducted on agricultural land.

Land development works including levelling and berming agricultural land, constructing reservoirs and

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constructing works ancillary to clearing, draining, irrigation, levelling or berming agricultural land and to constructing reservoirs. Additionally, the definition encompasses the activities as defined in "farm operation" under the *Farm Practices Protection (Right to Farm) Act* RSBC 1996 c. 131, including growing, producing, raising or keeping animals or plants, including mushrooms, or the primary products of those plants or animals, clearing, draining, irrigating or cultivating land, using farm machinery, equipment, devices, materials and structures, applying fertilizers, manure, pesticides and biological control agents, including by ground and aerial spraying, intensively cultivating in plantations any specialty wood crops or specialty fibre crops, conducting turf production, prescribed types of aquaculture, raising or keeping fur bearing animals or game and processing or direct marketing by a farmer.

As based on these provisions, owners, builders and subcontractors may undertake land development projects on ALR properties where the development is for a farm use and construction may occur on property to build reservoirs, irrigation systems or other works related to farming operations.

Horse Facilities

Under Section 9 of the Regulation, horse riding, training and boarding facilities may be constructed, maintained and operated on ALR properties so long as the following conditions are met:

1) facilities for horse riding do not include a racetrack that is or must be licensed by the British Columbia Racing Commission; and

2) no more than 40 horses are boarded on the agricultural land.[4]

Property owners and builders are therefore permitted to construct horse riding facilities on ALR land subject only to the above referenced restrictions found at section 9 (a) and (b) of the Regulation.

Residential Structures

The Regulation does permit prescribed residential structures to be constructed or maintained on ALR land for the provision of temporary or permanent accommodation. Generally, land in the ALR may have no more than one residence per parcel subject to certain grandfathering exceptions. The Act defines residential structures as meaning a structure used, during all or part of the year and whether fully or partially, as:

1) a residence;

2) if prescribed, accommodation; or

3) if prescribed, in relation to a residence or accommodation.[5]

In order to comply with the Act, a Local Authority may not approve or permit construction or alteration of a principal residence on ALR land unless the principal residence has a total floor area of 500 m2 or less and is sized, sited and used in accordance with the Regulation, or is permitted by the Commission following an application made to it.[6] These restrictions on the size of principal residences on ALR land were adopted into the Act in response to the construction of large residences and estate homes on ALR properties and the ensuing public outcry over the rising number of properties that were being developed into large luxury homes within ALR land throughout the Lower Mainland.[7] On November 5, 2018, the Minister of Agriculture, Lana Popham, tabled Bill 52 to amend a number of provisions of the Act. Bill 52 was passed by the Provincial Legislature on November 27, 2018, after its third reading and the bill adopted new provisions into the Act to restrict the size of homes that could be constructed on ALR land in direct response to this growing issue with the development of luxury properties on ALR land.

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The Commission has published Information Bulletin 05 which provides guidance in interpreting the Act and the Regulation. This can assist property owners and builders in the planning, development and construction of residential structures on ALR land and should be considered in conjunction with other resources and materials.

Additional Residential Structures

As of December 31, 2021, land in the ALR may have one additional residence per parcel if there is only one residence on the parcel when construction begins. This allows property owners and builders to construct additional residences that can be used for housing extended family of the property owner, agritourism accommodation, housing for farm labour or as rental property for supplemental income.

A Local Authority can be more restrictive of residential use of the ALR than the Act. The Regulation identifies certain designated farm uses and permitted non-farm uses that a Local Authority must not prohibit, but places no limitation on the power to prohibit or otherwise restrict residential uses of ALR land. As such, a Local Authority may impose restrictions on sizing, siting and use of residences on ALR land additional to those found in the Act.

Accordingly, when building residential structures on ALR land, property owners and builders should not only familiarize themselves with the construction requirements and prohibitions set out in the Act and the Regulation but further familiarize themselves with the zoning bylaws and building regulations of the Local Authority so as to ensure all residences are constructed in conformity with these standards.

Exclusions

Section 29 of the Act allows an owner to apply to the Commission to have land excluded from the ALR where the owner is the Provincial Government, a prescribed public body or a Local Authority and the land is within the Local Authority's jurisdiction. Therefore, non-government owners of ALR land are expressly excluded from making an application to the Commission to exclude their land from the ALR by the Act. As a result, where individuals, privately held companies or other non-governmental parties own property within the ALR then they will be unable to rely upon the exclusion application process as set out in Section 29 of the Act. However, the Commission on its own initiative, is empowered by Section 30 of the Act to exclude land from the ALR or permit non-farm uses, non-adhering residential uses or soil or fill use or subdivision of land in the ALR. This is subject to the Commission giving notice of its intentions to exclude land from the ALR or permit one of these non-conforming uses or subdivision of ALR land and the conducting of a public hearing regarding these intentions. Additionally, the Commission must give written notice of the action to the owner of the land.

Recent Case Law

A recent case from the British Columbia Supreme Court, *Peace River (Regional District) v. Pringle* 2023 BCSC 1172 , highlights the legal troubles that may arise in situations where a property owner acquires and builds on land without first determining whether it falls within the ALR and whether their development and construction plans are compliant with the Act, the Regulation and local zoning and building requirements.

In this petition proceeding, the respondents, Lyle Pringle and Doreen Shadow, purchased a property in 2015 in Pouce Coupe, which is located in the Peace River Regional District (the "**Regional District**"). The respondents intended to develop the property for various recreational and commercial purposes that included a cultural center, campground, community garden and gift shop. They were unaware that their property was located

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in the ALR. By the time the owner learned that their property was ALR land they had constructed various dwellings and structures on the property along with a campground.

The respondents then sought to have their property excluded from the ALR by making an application to the Commission. These efforts were not successful and the property remained part of the ALR. Because the property remained in the ALR, the respondents would not be able to ask the Regional District to change the zoning bylaw to permit the non-farm uses they had constructed, even if there was local support for a zoning amendment.

In 2021, the Regional District issued two bylaw notice tickets to the respondents. One for contravening its building bylaw and the second for prohibited use of property. Specifically, the Regional District alleged that the property contained four dwelling units (two more than permitted by its zoning bylaw) and alleged that the property contained a campground that was in use and which was contrary to the uses permitted on the property under the Regional District's zoning bylaw.

The respondents disputed the tickets through the Regional Districts bylaw notice adjudication system, which provides hearings and determinations of disputes in respect of whether the contravention alleged in the bylaw notice occurred. The adjudicator ultimately dismissed the two bylaw notice tickets against the respondents following which the Regional District sought a judicial review of the adjudicators decision under the Judicial Review Procedures Act RSBC 1996 c 241.

The decision of the adjudicator was ultimately set aside and the court ordered the respondents to pay the penalty set out in the bylaw notice tickets.

The *Peace River Regional District* case can be contrasted with *Dhanoa v. British Columbia (Agricultural Land Commission)* 2020 BCSC 85, a judicial review proceeding in which the petitioners successfully appealed a decision of the Commission to refuse them permission to construct a road on an undeveloped road right of way that would provide access to three properties located in the ALR (the "**Properties**"). The Properties had been created through a subdivision that had been deposited to the Land Title Office in 1911 which subdivided a parent parcel into a number of rural properties of varying sizes with a highway dedication running throughout. A portion of the road dedication had been developed into a roadway but ended before it provided access to the Properties.

The petitioners applied to the City of Surrey (the "**City**") seeking its support to extend the roadway to the Properties. Being dedicated highway, the roadway was owned by the City. The City agreed to provide support to the Petitioner's applications following some amendments to their proposal that would limit the size of any homes built on the Properties. The City then applied to the Commission for permission to develop the proposed roadway extension.

The Commission rejected the City's application on a number of grounds, including that the extension of the roadway would result in the opportunity for residential development of the Properties and there was an existing internal farm access road connecting the Properties and the two other properties to the north, and this existing internal farm access road satisfied demand for vehicle and equipment access to the Properties for the purposes of agricultural production.

The petitioners filed for judicial review of the Commissions decision in the Supreme Court of British Columbia and the decision of the Commission was overturned on the grounds that one of its considerations for refusal of the application, the potential for an increase in residential development on ALR land, was unreasonable because the Act permitted the construction of a single family residence on a parcel of land within the ALR and this building scheme did not require the oversight or approval of the Commission. Accordingly, the refusal to allow the road development on the basis

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that it would facilitate a use of ALR land that was permitted pursuant the Act (the construction of a single residence on each of the Properties) did not justify the reasons given for refusal of the application for the roadway extension, and was therefore unreasonable. The court ordered the case be remitted back to the Commission to be reconsidered.

Takeaways for Owners, Builders and Developers

The regulatory framework for ALR land limits what can be built within the ALR. When developing land or constructing structures or improvements on ALR land, owners and builders alike need to be familiar with the statutory rules and regulations related to building and development in the ALR as well as with local zoning designations and building requirements of the Local Authority.

Where development or construction occurs on properties inside the ALR without compliance with such regulatory requirements, the Local Authority and/or the Commission may seek enforcement through their respective authorities, such as by way of bylaw enforcement, issuance of orders and imposing of penalties.

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David Giroday

Footnotes:

1. Agricultural Land Commission, "Necessary Farm Use Structures in the ALR Guidelines" (16 June 2023) online: https://www.alc.gov.bc.ca/app/uploads/sites/763/2023/06/Necessary-Farm-Use-Structures-in-the-ALR-Guidelines.pdf.

2. *Agricultural Land Reserve Use Regulation* Reg. 36/2022 s. 35 (a) to (g).

3. *Ibid* s. 35(d) and 36(3).

4. *Ibid* s. 9(1) (a) and (b).

5. *Agricultural Land Commission Act* SBC 2002 c. 36. s. 1.

6. Agricultural Land Commission, "Information Bulletin 05 Residences in the ALR" (27 June 2023) online: https://www.alc.gov.bc.ca/assets/alc/assets/legislation-and-regulation/information-bulletins/ib_05_residences_in_the_alr.pdf

7. Government of British Columbia, "ALR is for farming, not mega-homes or construction waste" (19 November 2018) online: https://news.gov.bc.ca/factsheets/alr-is-for-farming-not-mega-homes-or-construction-waste

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David is an associate lawyer of the firm. His practice is focused on municipal, land development and construction matters. Prior to working at Civic Legal LLP, David worked as a litigator and represented insurance corporations, local governments, construction managers and local and national companies in a variety of legal actions and disputes. David has developed a unique perspective on risk management, negotiation, and strategy from his litigation experience, which he draws on to advise his clients on a variety of legal and regulatory issues. In his solicitors practice David routinely advises clients on local government issues, procurement processes and land use planning and development regulatory matters. He has further drafted construction contracts and municipal service agreements on varied construction projects and contractual matters.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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