

Report

Date	March 15, 2023	File: ALR00048
Subject	Agricultural Land Commission Soil or Fill Use Application for 2441 Herd Road	

PURPOSE

To consider an Agricultural Land Commission (ALC) Soil or Fill Use (SFU) application for soil fill or removal at 2441 Herd Road to enable the construction of a dwelling, accessory buildings, and associated works at the subject property to proceed.

BACKGROUND

The property owner wishes to build a principal dwelling, several accessory buildings, a driveway, a septic area and a swimming pool on undeveloped land within the Agricultural Land Reserve (ALR). The property is in the ALR and subject to local government and ALC land use regulations.

A building permit was issued by North Cowichan (April 29, 2022) following consultation with the ALC (Attachment 4). Subsequent to this and due to the nature and extent of residential development proposed for the property, the ALC required a SFU application under Section 20.3(5) of the *ALC Act* (Attachment 1). Before the ALC will consider the SFU application, Council must authorize it (through resolution) to proceed to the ALC for a decision. If Council does not give authorization, the application will be terminated.

DISCUSSION

Proposal:

The property owners intend to construct a principal dwelling with a total floor area of 483.92 square metres (m²) and:

- two accessory buildings with a total floor area of 228.10 m² for each building;
- an outdoor pool at 53.51 m² in area and a pool house of 14 m² in area;
- on-site septic area of 18.5 m²; and,
- driveway area of 313.15 m².

Please see Attachment 4 for more information.

ALC Policy Context

The ALC regulates the removal or deposition of soil within the ALR. These controls are explained under the Agricultural Land Reserve Use Regulation [*Regulation* – which is anchored by BC Statute - the *Agricultural Land Commission Act (Act)* and is further explained through associated ALC bulletins and policies.

The ALC staff and the Commission interpret, apply and make determinations on homeowner applications against the ALC *Act, Regulation*, policy and associated bulletins. This approach is taken with all local governments in British Columbia by the ALC.

Section 35 of the ALC *Regulation* addresses soil or fill uses in a general fashion, whereas ALC Information Bulletin 07 (Attachment 3) codifies the ALR process and provides thresholds and guidance for landowners and local governments where soil removal or fill is contemplated in the ALR. *Section 8 - Residential Construction*, of Bulletin 07 states that fill placement or removal of soil or aggregate is permitted for the construction or maintenance of a principal residence provided:

- the total area from which soil or aggregate is removed or on which fill is placed is 1,000 m² or less, AND
- the total floor area of the principal residence is 500 m² or less, or the residence has been authorized by a Non-Adhering Residential Use Application.

The Bulletin identifies that a fill placement area of under 1000 m² for a principal dwelling is permissible, provided the home's total floor area is 500 m² or less. The submitted ALC SFU application (No. 66327) states that the total fill placement area will be 988 m², the principal dwelling 483.92 m² in floor area, and no soil material is to be removed from the property (Attachment 6).

The role of local government will depend on whether the landowner has submitted a *Notice of Intent* (NOI) or an SFU. The ALC Chief Executive Officer (CEO) has the authority to approve an NOI application for soil fill or removal within set parameters (Attachment 3 - Section 8 of Bulletin 07). The local government has no role in an NOI and is simply notified of the CEO's decision (Section 6 of Bulletin 07). In this case, an NOI for soil or fill area for 1300 m² was submitted to the ALC on March 8, 2022 (Attachment 5- No. 65028) by the homeowner and, in turn, denied by the CEO designate (Attachment 2). The homeowner confirmed errors made on the NOI form (for example, soil coverage area at 1300 m²); the corrected area is 988 m² and submitted under the SFU application.

North Cowichan Policy Context

North Cowichan Strategic Agricultural Plan

The 2001 Strategic Agricultural Plan (SAP) speaks in general terms about discouraging residential development within the ALR and, if necessary, clustering buildings in order to mitigate the impact on farmland. The clustering of buildings on this property is intended (total soil fill area is 988 m²). No SAP Policy direction is provided to deal with soil fill or removal areas associated with building construction.

North Cowichan Official Community Plan Policy

The Official Community Plan (OCP – Local Agricultural Systems, *Section 7.2.2 a) and c)*) counsels against inappropriate development on ALR land and suggests ALR SFU applications should include a professional soils analysis and environmental farm management plan demonstrating why the intended soil fill or removal is appropriate. Neither a professional soil analysis nor farm plan were submitted with SFU application no. 66327.

Floor Area of Principal Dwelling

The floor areas of the proposed home and ancillary structures, as interpreted by the ALC, are found on page 5 of the August 8, 2022 letter (Attachment 1). The principal residence is determined to have a total floor area of 483.92 m² and is under the 500 m² limit specified under *Section 20.1 b)* of the *Act*.

Accordingly, the letter confirms that construction may continue without any authorization from the ALC. With respect to soil fill or removal as per page 5 of the August 8, 2022 letter, at issue for the ALC are:

- the 1st and 2nd accessory residential structures
- and the pool house

The August ALC letter states that the installed foundations for the three structures are not in compliance with the *Act* and the ALC Use *Regulation* and instructs the homeowner to either:

1. Remove all fill associated with those structures and remediate the affected areas, or
2. submit a "Soil Use for Placement of Fill or Removal of Soil" application to the Commission and receive approval before construction can proceed.

The homeowner has selected option two, and North Cowichan has received the application (No. 66327). The role of local government is explained under *Section 34.1(2)* of the *Act*:

(2) A local government or first nation government that receives an application must review the application and do one of the following:

(a) **forward to the commission**

(i) **the application**, and

(ii) **the comments and recommendations of the local government** or first nation government respecting the application;

(b) notify the applicant that the application will not be forwarded to the commission if

(i) the application is refused, or

(ii) the application may not, under this Act, proceed **unless authorized by a resolution of the local government** or a law of the first nation government and the required resolution or law is refused

Analysis

Council has been asked to provide a resolution, which may include comments and recommendations concerning the "Soil Use for Placement of Fill or Removal of Soil" as per the *Act* and in response to the submitted SFU application. In terms of ALC guidance concerning residential structures associated with soil fill or removal - page 12 of the Bulletin states:

Accessory Residential Facilities: Pools, tennis courts, basketball courts, and landscaping which alters the topography or grade of the land, fountains, looping driveways >6 m in width, large workshops and playgrounds are generally not considered to be necessary for residential uses **except in exceptional circumstances where their size and siting presence little to no impact to arable land**. Placement of soil or fill for these uses requires submission of a Notice of Intent or a Soil or Fill Use Application.

The Bulletin language provides some context as to how the ALC views residential uses within the soil fill or removal area (and confirms policy exceptions are considered and applied by the ALC). That is, the ALC determination appears somewhat subjective. The homeowner is obligated to clarify the soil fill or removal area to the ALC in order to facilitate their determination and approval.

The soil fill area for this project (Attachments 4 and 6) is 988 m², which is under the 1000 m² area permitted for soil fill or removal for siting of a principal dwelling less than 500 m² in floor area (per the ALC *Regulation* and *Act*, respectively [Attachment 1]). The August 8, 2022, ALC Enforcement letter does, in fact, confirm that the construction of the 483.92 m² principal dwelling may proceed (within the 988 m² of soil fill area). Therefore, the ALC SFU application before Council seeks comment and recommendation on a soil fill area of 988 m² - for which ALC staff has already granted approval.

ALC staff leeway over interpretations of ALR soil fill or removal policy and determination of the use of land and/or buildings (present or future) introduces an element of subjectivity. This subjectivity, in turn, poses a challenge to local governments when required to comment and provide recommendations to the ALC on ALR applications and processes. As the entire soil fill area (which will include all buildings, a pool, a driveway and a septic area [Attachment 6]) is 988 m² and was pre-approved by the ALC (for the principal dwelling), input from a local government for the same 988 m² soil fill area would therefore seem redundant. Accordingly, we advise that Council provide a resolution to forward this application to the ALC for their deliberation with no comment and no recommendation.

OPTIONS

1. **(Recommended Option)** THAT Council advise the Agricultural Land Commission to proceed with its deliberation and decision on Soil or Fill Use application No. 66327 for 2441 Herd Road without comment or recommendations from the District of North Cowichan Council.
 - Providing a resolution to forward the application without comment or recommendations will complete North Cowichan's obligation and permit the ALC to then consider the applicant's soil fill or removal application against the ALC *Act*, *Regulation*, relevant policies and bulletins.
2. THAT Council recommend that the Agricultural Land Commission approve the Soil or Fill Use application No. 66327 for 2441 Herd Road for the following reasons: [Council to identify reasons]
 - Providing a resolution and forwarding the application with comments and recommendations will complete North Cowichan's obligation and permit the ALC to then consider the applicant's soil or fill removal application against the ALC *Act*, *Regulation*, relevant policies and bulletins.
3. THAT Council deny Soil or Fill Use application No. 66327 for 2441 Herd Road and not authorize it to be forwarded to the Agricultural Land Commission.
 - Not forwarding to the ALC will terminate the application.

IMPLICATIONS

Should the ALC SFU application be denied, the homeowner has explained that costs due in part to interrupted construction timelines, building material storage fees and deposits lost to contractors while awaiting ALC approval will continue to accumulate. Should the ALC choose to approve the soil fill or removal application, construction may resume on the building site.

RECOMMENDATION

THAT Council advise the Agricultural Land Commission to proceed with their deliberation and decision on Soil or Fill Use application No. 66327 for 2441 Herd Road without comment or recommendations from the District of North Cowichan Council.

Report prepared by:

Glenn Morris

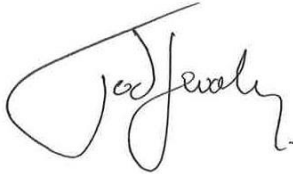
Glenn Morris
Development Planning Coordinator

Report reviewed by:



Rob Conway, MCIP, RPP
Director, Planning and Building

Approved to be forwarded to Council:



Ted Swabey
Chief Administrative Officer

Attachments:

- (1) ALC Enforcement Letter
- (2) ALC NOI Denial Letter
- (3) ALC Bulletin 07
- (4) Email & Plan to ALC for Review
- (5) Denied NOI Application
- (6) SFU Use Application