

CANADA / JUDGMENT

Richmond (City) v. Jantunen

2026 BCSC 40

COURT

Supreme Court of British Columbia

DECIDED

13 January 2026

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2026 BCSC 40 Richmond (City) v. Jantunen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Richmond (City) v. Jantunen,

2026 BCSC 40

Date: 20260113

Docket: 190266

Registry: Vancouver

Between:

City of Richmond

Petitioner

And

Roy Jantunen

Respondent

Before: The Honourable Justice Schultes

Reasons for Judgment

Counsel for the Petitioner:

D. Russell

Counsel for the Respondent:

K. Maw

Place and Dates of Hearing:

Port Coquitlam, B.C.

May 2-3, 2024

Place and Date of Judgment:

Vancouver, B.C.

January 13, 2026

Introduction

- [1] The City of Richmond seeks a declaration that the respondent Roy Jantunen has contravened its bylaws by (1) placing fill on his properties without the necessary permit from the City, and (2) allowing some of the fill to encroach on an adjacent road allowance. It also seeks an injunction to enforce compliance with the bylaws.
- [2] In response Mr. Jantunen argues that he is protected from the orders being sought by provincial "right to farm" legislation, that the City has failed to prove the encroachment on the road allowance by admissible evidence, and that to the extent that any breaches may have been proven, this is a suitable case for the court exercising its discretion not to grant the orders sought.

Background

- [3] Mr. Jantunen owns three adjacent properties in Richmond, which have the civic addresses of 19200, 19300 and 19380 River Road. They are all part of the Agricultural Land Reserve (the "ALR"), which is administered by the Agricultural Land Commission (the "Commission").
- [4] An unopened road allowance borders the properties to the south. It contains an underground jet fuel pipeline. Since 2018 the pipeline has been owned by Pembina Pipeline Corporation, but many of the relevant events occurred during its previous ownership by Kinder Morgan.
- [5] Mr. Jantunen and his family live on the properties, and he has carried out various agricultural activities on them over the years. Since 1999, he has also placed significant amounts of fill on them. His position is that this has been necessary to address flooding issues, which were exacerbated by the fill that was placed on adjacent properties.
- [6] Although each party referred to an incident in 1999 in which he deposited fill on one of the properties in support of their position, the focus of this application was on the deposits that Mr. Jantunen placed during the years 2008 - 2018, and the legislation that applied during that period.

Relevant Legislation

Provincial

- [7] The Agricultural Land Commission Act (the "ALCA") established the regime for preserving agricultural land in the province. It is administered by the Commission.
- [8] Mr. Jantunen's properties are designated as "agricultural land" under the ALCA, which means that only "farm use" of them is permitted. According to the version of s.1 of the ALCA that was in force from 2008-2018, "farm use" was defined as meaning, in part:

an occupation or use of land for farm purposes, including farming of land, plants and animals and any other similar activity designated as farm use by regulation

- [9] This definition of "farm use" also included a "farm operation" as defined in the Farm Practices Protection (Right to Farm) Act (the "FPPA"). As I indicated at the outset, Mr. Jantunen relies on the FPPA to justify his placement of fill.
- [10] The version of s.20 of the ALCA that was in force during that period dealt with regulated uses that fell outside of the defined farm uses:

20 (1) A person must not use agricultural land for a non-farm use unless permitted under this Act.

- (2) For the purposes of subsection (1), except as provided in the regulations, the removal of soil and the placement of fill are non-farm uses.

[Emphasis added.]

- [11] This section allowed an owner of agricultural land to apply to the Commission for permission to carry out a non-farm use (ss.(3)). It also provided for a situation in which an owner intended to engage in a permitted use that involved the placement of fill. The owner was required to give at least 60 days notice of this intention, and the Commission had the authority to impose conditions on the intended use, or to require that it cease until the application was determined (ss.(4)-(6)).

- [12] The regulation in force under ALCA during this period was the Agricultural Land Reserve Use, Subdivision and Procedure Regulation, B.C.Reg.171/2002 (the "Regulation"). The relevant section provided that:

2 (2) The following activities are designated as farm use for the purposes of the Act and may be regulated but must not be prohibited by any local government bylaw except a bylaw under section 917 of the Local Government Act [which permitted local governments to make certain types bylaws in relation to "farming areas", and which is not being relied on in this case]

- (d) land development works including clearing, levelling, draining, berming, irrigating and construction of reservoirs and ancillary works if the works are required for farm use of that farm

- (4) Unless permitted under the Water Act or the Waste Management Act, any use specified in subsection (2) includes soil removal or placement of fill necessary for that use as long as it does not
 - (a) cause danger on or to adjacent land, structures or rights of way, or
 - (b) foul, obstruct or impede the flow of any waterway.
- (5) The removal of soil or placement of fill as part of a use designated in subsection (2) must be considered to be a designated farm use and does not require notification except under section 4 [which deals with some specific uses of agricultural land that do not apply in this case].

[Emphasis added.]

- [13] Although the extent to which the ALCA and the Regulation apply to Mr. Jantunen's actions is disputed, in general it is clear that the placement of fill was a "non-farm" use, and permission for it had to be obtained from the Commission. The exception was when it was necessary for a "land development use" under the regulation, in which case it was permitted if it did not cause either of the listed harmful effects.
- [14] The version of s.46 of the ALCA that was in force during this period provided that the local government was to "ensure consistency" with the ALCA and its regulations (ss.(2)). To the extent that it was inconsistent with them, a bylaw had no force or effect (ss.(4)). Under ss.(5) bylaws were deemed to be inconsistent with the ALCA in certain situations, including that the bylaw "contemplates a use of land that would impair or impede the intent of [the] Act".

Local Government

- [15] The City's Soil Removal and Fill Deposit Regulation Bylaw No. 8094 (the "Soil Bylaw") is the one that is said to have been breached by the placement of fill on the properties. It was enacted in 2007, and provided that:

3.1 Restrictions

3.1.1. Subject to a Provincial enactment and any procedure, authorization or permission thereunder, no person shall deposit soil, or cause, suffer or permit the deposit of soil on any land within the agricultural land reserve except in accordance with this bylaw.

3.1.2. Except as otherwise provided in this bylaw, but subject to any procedure, authorization, or permission respecting activity regulated under an applicable Provincial enactment, no person shall carry out, cause, suffer or permit the deposit of fill on, any land located within the agricultural land reserve without first making application for and obtaining a permit from the City, and every such deposit or removal shall conform in all respects to the requirements and regulations of this bylaw and the terms and conditions of the permit.

[Emphasis added.]

- [16] There is no dispute that Mr. Jantunen's actions over the years constituted a "deposit" of "soil" and/or "fill" (which is defined as soil, other kinds of permitted material, or a combination of them) onto the properties, and that he has never obtained a permit to carry out that activity as required by s.3.1.2.
- [17] Section 3.2.1 set out a list of exceptions to the requirement of a permit. Mr. Jantunen, who takes the position that the bylaw is inapplicable to his situation or invalid, is not relying on any of these exceptions. Nevertheless, it is relevant to note that the bylaw exempted deposits that were related to a "farm use" of the property, and were supported by a "notice of intent" to make the deposit pursuant to the ALCA that had been "acknowledged" by the Commission. This appears to be a reference to the approval process in s. 20 of the ALCA.
- [18] Section 4 set out the required contents of the permit application. These included evidence of an application for fill deposit under the ALCA that had been approved by the Commission (s.1(c)(i)). Similarly, such approval was a condition of the permit actually being issued (s.4.2.1(c)).
- [19] The successor to the Soil Bylaw, the Soil Deposit and Removal Bylaw No. 10200, was enacted in September 2021, after the last of Mr. Jantunen's deposits. It contains similar requirements to obtain a permit from the City to deposit fill on ALR land (s.3.1-3.4). As a result of it being passed, the Soil Bylaw was repealed (by means of Amendment Bylaw No. 10293).
- [20] The significance of the new bylaw for the purposes of this application is that, while Mr. Jantunen is obviously only responsible for breaches of the bylaw that was in force at the time of the actions in question, the fill remains in place, and the City's ability to obtain an injunction to bring it into compliance depends on the presence of those deposits continuing to violate the current bylaw. Section 9.1.2 of the new soil bylaw provides that each day on which a violation continues constitutes a new offence. It has not been suggested that Mr. Jantunen has received any permission, or is subject to any exemption under the current version of the ALCA or the current Agricultural Land Reserve Use Regulation, B.C. Reg. 30/2019, that would supersede a continuing bylaw violation.
- [21] The City's Solid Waste and Recycling Bylaw No. 6803 (1999) is the one that is said to have been violated by the intrusion of the fill into the road allowance. It provides that:

3.1.2 A person must not deposit

- (b) materials listed in s.1.6.1. [which includes "soil material"]

on any highway, park or other public place or on land owned by or under the jurisdiction of the City [this includes the road allowance].

This bylaw was in effect through the period in question, and remains in effect.

History of Fill Deposits and Applications for Authorization

1999 Deposit

- [22] In July 1999, Mr. Jantunen wrote to the Commission, seeking permission to retain approximately 653 cubic metres ("m3") of fill that he had previously placed behind his barn on the 19200 River Road property without authorization. His stated purpose was to provide footing for his cattle in the winter. He complained that the properties to his west and south had fill on them to a higher level than his property as well as poor drainage, which resulted in his property being underwater for most of the winter.
- [23] Later that month the general manager of the Commission wrote to the City, expressing the view that such a corral area was ancillary to a farm building, and therefore "within the spirit" of the applicable regulation, which exempted the deposit of fill associated with a farm building from the requirement of a permit. The general manager invited the City to advise Mr. Jantunen that he could retain the fill if it agreed with the Commission's position. The City was also invited to contact the Commission if it disagreed, or had any concerns.
- [24] Mr. Jantunen deposes that the City approved the deposit in August 1999, but does not attach any correspondence from it to that effect.

Further Deposits and Commission Involvement

- [25] The next major development occurred in 2008. Mr. Jantunen deposes that the flooding issues on his properties persisted, and that as a result in August of that year he met with Thomas Loo, a compliance officer with the Commission. He expressed his view to Mr. Loo that he had to raise the elevation of the properties and preserve his topsoil.
- [26] According to Mr. Jantunen, Mr. Loo recommended that he submit a proposal for doing so to the ALC, and that he retain an agrologist, Catherine Orban, to prepare a report.
- [27] In December 2008 Mr. Loo wrote to Mr. Jantunen advising that he should submit his proposal as an application "For a Non-Farm Use To Place Fill or Remove Soil". He explained, as I have previously summarized, that under the ALCA the placement of fill was a non-farm use, and that the regulations permitted it only when it was "appropriate and beneficial to the agricultural use and benefit" of the properties.
- [28] Mr. Loo's letter also included passages that are relevant to the role of the City's approval in this process:

The Commission takes the position that where a local government requires information to understand the purpose of a filling activity in order to establish or achieve compliance with their "Soil removal/deposit" by-law the authority expressed by the local government to request such information is both appropriate and consistent with the legislated mandate of the Commission to preserve ALR lands for agriculture.

Further on the matter, the Commission's position is that it is reasonable for local government officials, as it is for Commission officials, to request information that includes quantifiable and technical details specific to any fil proposal, including [there followed a list of required technical details with respect to the proposed project]

I would suggest that you contact the City as soon as possible to ensure the application is complete prior to submission to prevent any lengthy delays. I would also like to take this time to re-iterate, that you currently do not currently have an authorization from the Commission or the City to deposit fill upon your property.

[Emphasis added.]

[29] Mr. Jantunen does not refer to this letter in his affidavits, or attach a copy of it.

[30] He attaches an email from Ms. Orban to Mr. Loo in April 2009, in which she summarized the result of her site inspection in January, and her recommendations to improve the drainage and thereby the "agricultural capability" of the property.

[31] Mr. Jantunen deposes that in May, Mr. Loo came to his property and told him that he had obtained a copy of Ms. Orban's "draft or completed report", and that "everything was good to go for [Mr. Jantunen] to start filling". He began to do so the next day.

The Orban Report

[32] Ms. Orban delivered her report in July of that year. It referred to the 19300 River Road property, but the annotated aerial photos from the City's website that she included showed the proposed rehabilitation area covering a substantial portion of the 19200 property as well.

[33] She described the objective of placing fill as being "to improve the drainage and agricultural capability of the excessively wet areas of the Subject Property so they can be used for year round pasture and/or hay". To achieve this, she proposed stripping and preserving the existing topsoil, installing a drainage system, covering it with "good quality soil fill material" and the original preserved topsoil, and excavating new perimeter ditches to drain runoff and an existing perimeter ditch into the municipal ditch.

[34] Although the precise amount of fill required to complete the project was to be calculated by the contractor who conducted the required topographic survey, Ms. Orban estimated that approximately 13,600 m³ of fill would be required for the entire project. She recommended a "phased approach" to depositing it.

[35] The drainage system that she recommended would consist of an underground network of pipes to remove excess water and discharge it into the perimeter ditches. The installation of that system would be Mr. Jantunen's responsibility, as advised by a drainage specialist.

[36] Significantly from the City's perspective, in her report Ms. Orban referred to the need to comply with the requirement in the Soil Bylaw to keep the adjacent ditches free of fill. She proposed that the "blended edge" of the fill would be set back at least three metres from the

ditches, to ensure that no sediment entered them. In addition, when setting out the requirements of a topographic survey before soil handling activities commenced, she noted that "further details regarding the application documents and [the required] site survey" could be found in the Soil Bylaw.

- [37] It is also relevant that Ms. Orban acknowledged the alternative solution of installing a "drain and pump" system to discharge excess water into the municipal ditch. She did not recommend such a system because the large volumes of water that it would have to handle would make designing, installing and maintaining it "a complex and costly option". Instead, "[a] more passive system of enhanced internal and surface drainage would be more cost effective and have the added benefit of improving the soil quality by having good quality fill material placed on the site".
- [38] Mr. Jantunen says that he then met with Mr. Loo and two representatives of the City on the properties, and that they "walked around the properties" with the report (referring to it as they did so, I take him to mean).
- [39] When he called Mr. Loo a week later, Mr. Loo told him that "everything looked good with the Orban report and that [he] had permission to proceed". He understood, based on their conversations and the site meeting with City representatives, that the Commission and the City had approved his application to place fill on the properties in accordance with the report.
- [40] He then began to implement Ms. Orban's recommendations. He explains that the project took a significant amount of time because he was careful in his selection of material, and because of the restrictions imposed by the seasons, the weather conditions and the required settling periods for the fill.

The City Becomes Involved

- [41] Mr. Jantunen alleges that from 2009 - 2016 Amen Sharma, a bylaw inspector for the City, conducted "nearly monthly" inspections of the properties and spoke with him frequently about the project. The City's inspection records, which are attached to Mr. Jantunen's second affidavit, indicate that Mr. Sharma visited the property six times in 2014, twice in 2015 and twice again in 2016. The records also indicate that despite his repeated attempts to contact the Commission, Mr. Sharma was unable to obtain the necessary information from it to verify Mr. Jantunen's claims that it had authorized him to deposit the fill.
- [42] Mr. Loo wrote to Mr. Jantunen in July 2012, requesting an update on the project, and cautioning him that without regular updates and monitoring from Ms. Orban, the assessment of the project as a "permitted use" was "null and void" and he could face enforcement action.

- [43] In September a City official, apparently of the bylaw department, described receiving an email from Mr. Loo "confirming that this property [the City's file reference was to 19300] is authorized to bring fill on." The email itself forms part of the file, but at the size that it was reproduced in the application record, its contents are not legible.
- [44] In November Ms. Orban provided an email update to Mr. Loo, advising that Mr. Jantunen had made "excellent progress" but had not finished the work yet, adding that it was taking time for him to get fill material of acceptable quality. That same month there was a file entry from a City employee indicating that she had spoken to Mr. Loo, who was said to have advised that there were "no issues with this property" and that "what they are doing is a permitted use".
- [45] There is no evidence of specific monitoring of the project by the Commission for several years, although the City's files do contain some relevant entries by Mr. Sharma:
- In June 2013, that "[f]ill being brought in is a permitted use";
 - In January 2014, that the Commission "is aware of this property and the homeowners have been given permission to bring fill in";
 - In June of that year, once again that the Commission had "given permission", but adding that he did not know if it was "monitoring the amount of material being brought in"; and
 - In August, that the Commission had granted permission for the deposits.

Stricter Enforcement

- [46] According to Mr. Jantunen, a new compliance officer from the Commission, Dave Birchmore, along with Mr. Sharma from the City, conducted a site inspection in August 2015. He said that Mr. Sharma remained behind after the inspection and responded to his question about whether he could continue filling with, "Yes, go ahead."
- [47] Mr. Birchmore wrote to Mr. Jantunen in October 2015, requesting an updated agrologist's report, as well as information that included the amount of fill needed to complete the project and a reasonable timeline for its completion. He quoted Mr. Jantunen as having told him that the fill areas were for "planting blueberries and to expand [his] chicken barn and [for] future agriculture endeavours". Mr. Birchmore's letter referred to all three of the properties as being subject to the fill project.
- [48] Ms. Orban emailed Mr. Birchmore in January 2016, asking him what additional information he needed. She advised that she had last inspected the properties in August 2012.
- [49] Mr. Jantunen then engaged Ms. Orban and another agrologist, James Richard, to prepare a new report. A site inspection report completed by Mr. Richard in March 2016 indicated that between 2012 and 2015 Mr. Jantunen had deposited 7,800 m³ of soil fill material. Mr. Richard cited Mr. Jantunen as the source of that information.

- [50] Mr. Richard and Ms. Orban completed their report in November 2016. It included Mr. Richard's site inspection report from March, and annotated photos of the various rehabilitation sites on the properties, which explained the work completed and that which remained to be done. As in the case of Ms. Orban's original report, it referred only to rehabilitation on 19300 River Road, but showed the proposed fill area on copies of aerial photos from the City's website as including a substantial portion of the 19200 properties.
- [51] Also in November, Mike Morin, a soil bylaw officer with the City, began to investigate the placement of fill on Mr. Jantunen's properties. In his affidavit Mr. Morin explains that until he was hired that year, the City did not have a bylaw officer who was dedicated to soil issues, and the general bylaw officers did not always have the capacity or specialized knowledge to deal with such infractions.
- [52] Mr. Jantunen said that in contrast to his previous "amicable and cooperative" relationship with the City and the Commission, once Mr. Morin became involved, those relationships turned "progressively adversarial".
- [53] Mr. Morin has reviewed aerial photos from the City's website, which show the growth of the fill across the properties since 2002, to a point in 2016 at which it had expanded to cover approximately half of 19380 as well.
- [54] In December Mr. Jantunen advised him by email that since the site inspection in March he had deposited 88 additional truckloads of fill, and that the last loads had been deposited in September.
- [55] Later in December Mr. Jantunen conducted an inspection of the properties with Mr. Morin, two agrologists who were working on behalf of the City, Mr. Birchmore, Mr. Richard and representatives of Kinder Morgan. Mr. Morin noted the placement of the fill on the properties, which was three to four metres high in some areas, and on the road allowance, and took photos that he attaches to his affidavit. He also noted that the Jantunen properties and the road allowance were higher than the surrounding properties.
- [56] On January 5, 2017, Mr. Birchmore wrote to Mr. Jantunen to follow up on the December meeting. He explained that his file review had revealed that there had been no formal approval by the Commission or the City allowing Mr. Jantunen to bring fill onto the properties. Nor had Mr. Jantunen provided a copy of the "notice of intent" that he claimed had given him permission to do so, which Mr. Birchmore had asked for in November. Mr. Birchmore "strongly" advised him to cease that activity and explained that he would have to submit a "Non-Farm Use Application" to the Commission in order to continue. He also wrote that:

The issues surrounding your properties with the City of Richmond and Kinder Morgan Jet Fuel Line will need to be dealt with prior to [the Commission] giving any further authorization to being fill onto your property.

[Emphasis added.]

Finally, Mr. Birchmore pointed out that the most recent agrologist report had not answered his outstanding questions (the amount of fill required to complete the project, the type of farming to be engaged in once it was completed, and a timeline for its completion) from 2015, and requested those answers by February 6.

[57] Mr. Jantunen described himself in his affidavit as being "very shocked" by this letter, as he had not received any prior notice from the Commission that it was going to reverse its prior authorization. Based on the verbal and written communications from the Commission and the City, he believed that his deposits on the properties, going back to the 1980s, had had the necessary approvals.

[58] In response he wrote to the City's bylaw manager, explaining once again that his requirement for fill had been caused by filling on adjacent properties, and emphasizing that his activities had been regularly monitored by Commission and city officials. He accused Mr. Morin of having an overly aggressive attitude, and of making false accusations in an attempt to intimidate him. He also described the fill project as being 80% complete.

[59] Mr. Morin had a survey of the properties carried out in February. The survey and the photos taken during the course of it, show the fill sloping down "significantly" past the Jantunen property line and being deposited "well within" the road allowance, he said.

[60] The Commission's compliance and enforcement co-ordinator wrote to Mr. Morin in January 2018, confirming the information that Mr. Birchmore had provided to Mr. Jantunen in his letter the previous January - that no formal authorization has been provided by the Commission, no proof of such authorization had been provided by Mr. Jantunen, a non-farm use application was required for any further fill, and resolution of the current issues was required before any authorization would be provided. This letter was in response to a request from Mr. Morin in December for information about Mr. Jantunen's 2008-2017 deposits, in relation to which the City had no records.

[61] In March 2018, Mr. Morin went to the properties in response to a complaint and found Mr. Jantunen engaged in depositing fill on the 19380 River Road property. Mr. Jantunen told him that this fill was "pre-load" for a future building, although he did not have building or soil deposit permits from the City. He wrote to Mr. Jantunen shortly after that, confirming that the deposit had occurred despite the Commission's 2017 letter advising that a non-farm use application was required first. He also advised that a "stop work" order had been placed on the property, and that any further placement of fill would lead to tickets (for bylaw violations) and fines being issued.

[62] Mr. Jantunen deposes that as soon as Mr. Morin visited his property and asked him to stop his "pre-load" of this fill (which was for a future house for his daughter), he did so, and told Mr. Morin that he would not load any more fill until he had the necessary authorizations.

- [63] Later that month, following a meeting at the properties, Kinder Morgan's manager for land and rights of way wrote to Mr. Jantunen, confirming that the fill on the road allowance needed to be removed to provide Kinder Morgan access to the pipeline and to avoid concerns about soil movement putting pressure on the pipeline.
- [64] In April, Mr. Morin sent a letter to Mr. Jantunen demanding that by August 31 Mr. Jantunen (1) remove all of the fill from the road allowance; (2) remove all non-soil material from it to a permitted site; (3) pull back all fill to a minimum of three metres from the property lines; and (4) establish ditches and a corresponding professionally-approved drainage plan confirming that the fill would have no negative impacts on the surrounding properties, including the pipeline and the road allowance. By September 21, Mr. Jantunen was to provide a report from a geotechnical engineer confirming the lack of any negative impact from the fill placement, and a topographical survey showing the elevation of the properties after the fill had been deposited and the total volume of soil that had been deposited.
- [65] In May the Commission issued its own stop work orders for each of the three properties, on the basis of unauthorized deposit of fill, contrary to s.20(1) of the ALCA, and a notice of contravention in relation to the fill deposit in March 2018 to pre-load for the construction of a building. The notice required that the unauthorized materials be removed, or an application for a non-farm use authorizing them be made, by June 3. Mr. Jantunen annotated the letter by hand, providing the requested information.
- [66] Later in May, another Commission enforcement officer amended its stop work orders to the extent of permitting Mr. Jantunen to remove the fill from the road allowance, subject to certain conditions.
- [67] Also in May, Mr. Jantunen wrote to the City's chief administrative officer, setting out the history of placing fill on his property to address flooding issues. The completed areas of his farm (by placing fill on them, I took him to mean) were now "growing blueberries, raspberries, [and contained] pasture land, free range laying hens in a large outdoor fenced area, a number of fruit trees, an all-weather riding ring for horses, and a smaller round pen for lessons and training." Of particular relevance, he admitted that "the toe of my fill exceeds my property", and that the City and Kinder Morgan had requested that it be removed, even though it had been there "for 3-5 years", and many other owners in the area had filled directly over the pipeline.
- [68] In June 2018, he and his daughter met with the City's bylaws manager at his request to discuss the poor treatment that he had received from Mr. Morin, whom he said had been overly aggressive with him and his family and made false accusations that he had engaged in illegal activity and deliberately breached the bylaws.

- [69] In August Mr. Jantunen submitted a soil deposit application to the City. He describes it as seeking authorization to deposit the soil "to build a new home and to turn the properties into a working farm." According to Mr. Morin, the application was incomplete, so the City did not process it.
- [70] As of the time that he swore his first affidavit in December, Mr. Morin believed that more than 20,000 m³ of fill had been deposited on the properties. This belief was based on his assessment of the aerial photos, the site inspections and the survey that he had directed.
- [71] In October 2019 Mr. Jantunen retained Ward Phillips, a geotechnical engineer, to provide a stability report in relation to the fill at the slopes of the property boundaries. He also retained another firm to provide a topographical survey, drawings, and fill and drainage plans.
- [72] In November and December 2019, Mr. Morin wrote to Mr. Jantunen, advising that because of his repeated failures to comply with City requests for the missing parts of his application, the City would be cancelling it, and would also be cancelling the "corresponding file within the [Commission] portal".
- [73] Shortly after the second of these letters, Mr. Jantunen received an email from the Commission advising that his application to it had been cancelled at his request, even though he had not made such a request. I infer that this was in response to the City's action.

The Petition and Subsequent Negotiations

- [74] The City filed the original petition in January 2019. In October of that year the parties entered into a consent order. It required Mr. Jantunen to provide several items within specified timelines:
- a topographical survey of the existing "elevations and profile" on the properties;
 - a report from a geotechnical engineer providing a plan for the removal of all fill shown on the topographical survey from the road allowance, and on three metre strips adjacent to the properties' southern, eastern and western boundaries (except for any fill in relation to which City permits had previously been issued);
 - A report from an engineer setting out a plan for installing measures that would address drainage in the neighbouring properties (including the road allowance and the pipeline) without adversely affecting them and;
 - Confirmation that he had obtained the necessary permits for working "on over or around" the pipeline.
- [75] Extensive discussions took place between his counsel and counsel for the City over the next several years, which are set out in numerous emails in the material.

- [76] Mr. Jantunen submitted a drainage plan, which was approved in its initial form, but a resolution of the overall dispute foundered on the City's insistence on the three-metre setback, which it was prepared to reduce if the engineer could confirm that a lesser distance would not adversely affect the adjacent properties. Mr. Jantunen's concern was that the setbacks would in total cost him three-quarters of an acre of farmable property.
- [77] Subsidiary issues were the City's insistence (1) on a slope of 3:1 (three units of length of every one unit of height) for the edges of the fill over Mr. Jantunen's proposed 2:1 slope, although once again it was prepared to moderate that demand based on an engineer's assurances, and (2) that Mr. Jantunen return the height of the soil over the road allowance to its original height (two metres), rather than the 3.14 metres that he proposed.
- [78] In February 2024, as part of the preparation for the hearing of this matter, Mr. Jantunen obtained an opinion from Mr. Phillips, the geotechnical engineer whom he had retained in 2019. In it, Mr. Phillips addresses the specific issues that have resulted in the impasse:
- A setback of somewhere between zero and three metres from the boundaries of other properties "will place the slope in a position to meet adequate factors of safety." As a result, it may be possible to reduce the setback from three metres without "endangering, damaging or otherwise adversely affecting" the neighbouring properties;
 - A slope of 2:1 on the setbacks would not have any negative impacts on the road allowance, the pipeline or the neighbouring properties;
 - Establishing the height of the fill over the road allowance at the level proposed by Mr. Jantunen would pose less of a risk of "settlement" (a negative outcome involving the downward movement of the ground when a load is applied to it) than reducing the height to its level before his fill began to encroach; and
 - The risk of settlement on Mr. Jantunen's properties would be reduced if whatever fill has to be returned to them from the road allowance were to be evenly distributed over all three properties.
- [79] The City's position on this new opinion was that it had been provided too recently in relation to the preparation for the petition hearing for its officials to absorb its contents and comment on them.
- [80] In what I gather is intended as support for Mr. Phillips's more flexible approach to the issue of fill over the road allowance, Mr. Jantunen has also attached an email from Pembina's land agent, which was sent in January 2024. However, it simply indicates that the minimum depth of cover over the pipeline, in order to comply with the Canadian Standards Association safety requirements is 0.75 metres, with Pembina reserving the right to a greater amount of a case-by case basis, so it does not assist with the issue of excess soil being allowed to encroach on the area.

Mr. Jantunen's Position

[81] As I have said, the FPPA is essential to his position. Its s. 2 provides the following protection:

Normal farm practices protected

2 (1) If each of the requirements of subsection (2) is fulfilled in relation to a farm operation conducted as part of a farm business,

(a) the farmer is not liable in nuisance to any person for any odour, noise, dust or other disturbance resulting from the farm operation, and

(b) the farmer must not be prevented by injunction or other order of a court from conducting that farm operation.

(2) The requirements referred to in subsection (1) are that the farm operation must

(a) be conducted in accordance with normal farm practices,

(b) be conducted on, in or over land

(i) that is in the agricultural land reserve

(c) not be conducted in contravention of any land use regulation

(3) The following apply if each of the requirements of subsection (2), except subsection (2) (b) (ii), is fulfilled in relation to a farm operation conducted as part of a farm business:

(c) despite section 274 [actions by municipality] of the Community Charter[1] and section 420 [enforcement by civil proceedings] of the Local Government Act, a farmer must not be prevented by injunction or other order of a court from conducting that farm operation.

[82] The following definitions in s.1 are relevant:

"farm business" means a business in which one or more farm operations are conducted,

"farm operation" means any of the following activities involved in carrying on a farm business:

(a) growing, producing, raising or keeping animals or plants or the primary products of those plants or animals;

(b) draining, irrigating or cultivating land;

(c) using farm machinery, equipment, devices, materials and structures

(e) conducting any other agricultural activity on, in or over agricultural land

[the definition goes on to include several more specific activities within the definition, and to exclude others from it. Mr. Jantunen has not engaged in any of these activities.]

"farmer" means the owner or operator of a farm business;

"land use regulation" means an enactment that restricts or prescribes the use to which land or premises may be put or the nature of business or activities that may be conducted on land or premises

"normal farm practice" means a practice that is conducted by a farm business in a manner consistent with

(a)proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and

(b)any standards prescribed by the Lieutenant Governor in Council [None have been prescribed]

[Emphasis added.]

[83] The extent of the protection that the FPPA offers Mr. Jantunen is disputed, but it is clear that in general a farmer who is conducting a "farm operation" as part of a "farm business" in accordance with "normal farm practices" on ALR land, and who does not contravene the applicable land use regulations, cannot be prevented by court order or injunction from conducting that operation.

[84] The first argument put forward by Mr. Jantunen's counsel is that the City is prevented by the FPPA from obtaining an injunction to restrict his placement of fill on his property.

[85] His counsel submits that by placing fill on his property under the drainage plan created by the agrologists, he is thereby "draining" land, which is a listed "farm operation" under the FPPA. His actions have been in accordance with "normal farm practices", because he has taken the same approach as the adjacent landowners, and he has adhered to "proper and accepted standards", by following the plan developed by agrologists.

[86] Crucially, a local government does not have the authority to create bylaws that restrict normal farm practices (*Holt v. Farm Industry Review Board*, 2014 BCSC 1389, at para.112), and the court has jurisdiction to determine whether a particular activity meets that definition: *Agricultural Land Commission v. Munro*, 2006 BCSC 1408, at para.97.

[87] An order by the City preventing him from completing the remaining 20% of the plan will thereby prevent him from draining it. Similarly, the requirement to remove fill three metres back from the property lines will prevent him from draining the areas within that margin (or even farther back from the property line, if the City should decide to require it at a later point) that currently contain fill. Or, if the City does not approve a permit, it could purport to require him to remove the rest of the fill that he has placed, pursuant to the authority of the 2021 soil bylaw.

- [88] In counsel's submission, neither the applicable provincial legislation nor the Soil Bylaw prohibit this activity, so it cannot be said that it is in contravention of any "land use regulation". The ALCA also expressly allows "draining" land, as part of land development work that is required for farm use of the properties, along with the placement of fill that is necessary for that use. There is also no evidence that the placement of fill for that purpose will cause either of the harms described in ss. (4)(a) or (b) of its regulation.
- [89] The verbal permission to place fill that he says was provided by Commission officials during the years before Mr. Morin became involved, as well as the Commission's written recording of that permission and communication of it to the City, are said to be consistent with, and to confirm, his interpretation of these sections of the ALCA.
- [90] The consequence of the placement of fill being allowed by the ALCA would be that ss.3.1.1 and 3.1.2 of the Soil Bylaw do not apply. In the case of s. 3.1.1 "a Provincial Enactment" allowed it, and in the case of s.3.1.2 there was an "authorization or permission respecting activity regulated under a Provincial Enactment".
- [91] In the alternative, Mr. Jantunen submits that the Soil Bylaw was inconsistent with these provisions of the ALCA and therefore, pursuant to s.46 of that legislation, it did not apply. Inconsistencies are said to have arisen in this case because the bylaw:
- Granted exemption from the requirement for a permit based on notice of the deposit of fill having been given to the Commission (s.3.2.1(a)(i)) when, pursuant to s.20, notice was not required;
 - Made it a requirement of granting a permit that approval for the deposit had been granted by the Commission (ss.4.1.1(c)(i) and 4.3.1(c)) when, once again pursuant to s.20, approval was not required; and
 - Required two sets of approvals (provincial and municipal) when none were actually required, which thereby "contemplated a use of land that would impair or impede the intent of [the ALCA]". In other words, it contemplated the undrained land being incapacitated from farm use pending unnecessary approvals.
- [92] While s.46(6) provides that a bylaw that imposes additional restrictions on farm use of agricultural land is not inconsistent with the ALCA for that reason alone, Mr. Jantunen's counsel says that the Soil Bylaw purported to second-guess the legislature's policy choices and impose obligations on the Commission that were not provided for in the provincial legislation.
- [93] With respect to the allegation that the fill encroaches on the road allowance, the submission is that the evidence put forward by the City falls short of establishing it.
- [94] Mr. Morin began his role as a soil bylaw officer in 2016 and is not in a position to describe matters that occurred before then except by resort to hearsay evidence, which is not admissible in an application for a final order such as this one.

- [95] In particular, he has not provided the source of the aerial photos that form part of the City records and is not in a position to authenticate them. These photos do not speak for themselves, and he has not established that he has the expertise to interpret them, as he purports to do. The same is true of the evidence of the representative of Kinder Morgan and the photos that the company provided with respect to the encroachment, the survey and the photos taken by the City's survey team, and the photos taken by the Commission's compliance officers. All are hearsay, once again unsourced and unauthenticated, with no admissible basis being provided on which to assess the encroachment that is described by, or depicted in them.
- [96] These deficiencies link with broader concerns about the affidavits provided by Mr. Morin which, in addition to their substantial reliance on hearsay, are said to contain significant amounts of opinion, argument and speculation, and also purport to state legal conclusions.
- [97] The proper approach to all of this offending material is to strike it from the affidavits, or to give it no weight in the analysis.
- [98] The result, counsel argues, is that the remaining admissible evidence filed in support of the petition is not capable of proving a breach of the Solid Waste Bylaw, or any trespass on the road allowance generally, by Mr. Jantunen.
- [99] Finally, Mr. Jantunen's counsel submits that even if clear breaches of the bylaws have been established, this is a situation in which the court should exercise its discretion not to grant the relief that is being sought.
- [100] He has complied with the terms of the Soil Bylaw by placing fill in accordance with the agrologist's report, and no "public utility" would be served by enforcing that compliance by an injunction. The Court of Appeal declined to impose an injunction sought by a local government that lacked such utility in *District of West Vancouver (Corporation of) v. Liu*, 2016 BCCA 96, at paras.70-71.
- [101] His counsel also points out that the uncertainty surrounding the placement of the fill over such a lengthy period means that it cannot be said that the bylaw was being flouted. In fact, its goals - to allow the City to receive notice and monitor the situation when fill was being placed pursuant to the ALCA, to become aware of any stop work orders imposed by the Commission, and to regulate fill that was being placed for some other purpose than was regulated by ALCA - were all met in this case. The delays in the Commission responding to Mr. Sharma's inquiries on behalf of the City about these issues are not Mr. Jantunen's responsibility.
- [102] Counsel argues further that even if it is appropriate to grant some form of relief, several of the terms of the injunction that are being sought are inappropriate. The timeline under which it would require the work to be completed is unrealistic, the City cannot compel anything beyond what would have been required by the bylaws (in particular, the three metre setback), and the proposed term enjoining him from "otherwise interfering, with the

Road Allowance" is impermissibly vague and not capable of enforcement. Counsel refers to *North Cowichan (District) v. Fokkema Enterprises Ltd.*, 2014 BCSC 886, at paras. 95-101 and 103-107, in which the court modified the relief sought to impose more reasonable timelines for the necessary remediation, and restricted it to what the petitioner was entitled to require under the bylaw.

- [103] His counsel has provided the terms of a preferable order, if it is necessary for that one issue.

The City's Position

- [104] Its counsel characterizes this as a relatively straightforward bylaw breach, which has featured Mr. Jantunen repeatedly placing fill on his property and only concerning himself with authorization for it after the fact. Counsel emphasizes that since early on in the process, and certainly by 2009, it has been clear to him that a permit from the City to carry out the deposits is one of the essential requirements.
- [105] The Soil Bylaw, although its is obviously subordinate legislation, is intended to work in tandem with the ALCA, and permits are required under both sets of legislation, to address the interests that each level of government is required to protect. At the end of the day, Mr. Jantunen still has not done what is required to obtain one from the City.
- [106] Regardless of any ambiguities in its communications with him over the years (and the City's counsel points out that the statements attributed to Mr. Sharma are also hearsay in that regard), a bylaw officer cannot grant permission for a breach. In any event, a municipality's duty to carry out the provisions of a statute "are of such a public nature that they cannot be waived, lost or vitiated by mere acquiescence, laches or estoppel": *Langley (Township) v. Wood*, 1999 BCCA 260, at para. 12.
- [107] Counsel also submits that it is disingenuous for Mr. Jantunen to maintain that he thought he was complying with the Soil Bylaw. Ms. Orban's report, which forms the centrepiece of that claim, was based on actual compliance with the requirements of that bylaw, rather than the conduct that he has engaged in. It also proposed procedures for the placement of the fill that there is no evidence he has implemented, and required the installation of a subsurface drainage system, which has certainly not taken place yet.
- [108] With respect to Mr. Jantunen's arguments, the City submits first that the FPPA does not apply to its situation. As is apparent from the "and" between ss. 2(1)(a) and (b), the prohibition against injunctions and other orders to prevent farm operations is with respect only to the liability in nuisance set out in (a). It is not a general protection against restraint for other purposes, such as for regulatory enforcement[2]. This is said to be clearly shown by the requirement in ss.(2)(c) that the protected farm use not contravene any "land use regulation", which includes a bylaw.

- [109] The structure of the FPPA is to refer nuisance complaints resulting from a farm operation to the Farm Industry Review Board (the "FIRB"), which then determines if the "odour, noise, dust, or other disturbance" complained of results from a normal farm practice. The Holt decision on which Mr. Jantunen relies was a judicial review of a FIRB decision, based on the adequacy of the evidence that it had considered. In fact, the court in that decision approved of the FIRB's consideration of local bylaws, just not its adoption of them as the standard for normal farm practices (paras.229-230).
- [110] While, as confirmed in Munro, a court is also entitled to engage in a consideration of whether the activity complained of meets the definition of such a practice in the context of an application by a local government for an injunction, there needs to be sufficient evidence to determine whether it meets the definition in the FPPA. In Munro at para.87, the farm owners' evidence, which consisted of photos of the activity in question being carried on in neighbouring properties, was found to fall short of demonstrating the accepted customs and standards of similar farm businesses. Mr. Jantunen's assertion that his neighbours have placed fill in a similar manner is said to be similarly lacking.
- [111] With respect to the alleged protection provided by the Regulation and the ALCA, the City's counsel submits that placing fill is a very different activity from "draining" and, more importantly, that Mr. Jantunen has not provided any evidence that the placement was "necessary" in order for "land development works" to be carried out, as the subsection requires.
- [112] The obstacle to finding the bylaws to be of no effect based on the alleged conflict with the ALCA, according to the City's counsel, is the presumption of validity that attaches to bylaws. In essence, this presumption requires that bylaws be followed until and unless they have been declared invalid. Specifically, "in the absence of the clearest of situations, a chambers judge is unlikely to find that the presumption has been supplanted to the extent of allowing a clear breach of the law": *Peachland (District) v. Peachland Self Storage Ltd.*, 2011 BCCA 466 at paras.37-38, 40-45, 49, 51.
- [113] The proper approach therefore, if Mr. Jantunen believed the Soil Bylaw to be invalid, would have been to bring his own petition for a declaration to that effect, as was done in *Windset Greenhouses v. Delta (Corp.)*, 2003 BCSC 570. Also on this issue, the City's counsel notes that the *Island Berry* decision, which was cited by Mr. Jantunen as support for a conflict between the FPPA and a bylaw being an arguable issue for the purposes of an injunction, actually found that it was not such an issue, because s.2(2)(c) of the FPPA made the activity in question subject to a land use regulation. It was also distinguished by the chambers judge in *Peachland* for not having considered the presumption of validity.
- [114] As to the supposed agreement of the Commission that he could place the fill, Mr. Jantunen relies only on the verbal authorizations described in his own affidavits, and if Mr. Loo's statements are relied on to prove the truth of what he told Mr. Jantunen (that is, that the Commission approved of his activity) then, like Mr. Sharma's statements, they are

inadmissible as hearsay. Counsel points out that in fact in 2017 and 2018 he received explicit written indications that there was no approval. Only his deposit of fill in 1999 was ever officially sanctioned by the Commission, and then only retroactively.

- [115] It is also noteworthy that his proposed interpretation of the ALCA to the effect that no permission from the Commission was ever actually required runs directly counter to its communications with him and its enforcement actions.

Discussion

Deficiencies in the City's Material

- [116] Although there are certainly evidentiary shortcomings in this material, I conclude that not much ultimately turns on them.
- [117] Mr. Morin is not in a position to authenticate the accuracy of the aerial photos from the website, the contents of the survey, the photos of the road allowance supplied by Kinder Morgan that predate his employment, or the three photos of the area from 2017 whose origins he does not provide. The City has also not sought to prove that they are business records pursuant to s.42 of the British Columbia Evidence Act[3]. It is not open for municipal employees to rely on documents in their department's possession of which they are not the authors to prove the truth of the facts asserted by those documents, without overcoming their status as hearsay in some manner: *Surrey (City) v. Kallu*, 2025 BCCA 19.
- [118] Despite this, the core proof of Mr. Jantunen's fill deposits comes from his own admissions, including that they encroach on the road allowance, and the observations that Mr. Morin made and the photos that he took himself during the inspection in December 2016. There is really no doubt on this issue, even if the objectionable means of proof are given no weight.
- [119] I also do not find anything troubling in the manner in which Mr. Morin expresses himself on his affidavits. He was entitled to set out the statutory provisions that he understood himself to be operating within, and if his explanation of their meaning trenches on opinion at all, it does so in the mildest and least offensive manner imaginable, and has had no effect on my interpretation of their meaning. Nor can those portions of his affidavits be reasonably characterized as statements of legal conclusions. His second affidavit responds to certain aspects of Mr. Jantunen's main affidavit by referring to contrasting evidence, and does not amount to argument on those points. I am also unable to identify any statements of a speculative nature by him, as has been alleged.

Authorizations

- [120] Turning to the merits, I find it telling that despite the protestations to that effect in Mr. Jantunen's affidavits, his actual defences to this application do not include the actual existence of authorization to place the fill. Nevertheless, his claims to have received contradictory information from the Commission and the City over the years are relevant to how his actions are characterized, and should be addressed.
- [121] The history that I have summarized makes it clear that since 2008 he has never been officially authorized by the City (or the Commission) to deposit fill, and that any ambiguity that Mr. Loo may have introduced into the situation by his personal interactions with Mr. Jantunen did not represent such an authorization.
- [122] Mr. Loo's letter in 2008 confirmed that Mr. Jantunen was not authorized by either level of government to place the fill, and the subsequent oral statements that Mr. Jantunen attributes to him, which find some circumstantial support in the City's contemporaneous records and his 2012 letter indicating that the assessment as a permitted use could "become" void due to a lack of ongoing compliance (implying that it was currently valid), are hearsay to the extent that they purport to demonstrate the truth of the Commission's approval at that stage. Even if they are relied on only for the fact that Mr. Jantunen was given that information, Mr. Sharma could not bind the Commission not to further enforce the ALCA, and in any event there was no way that Mr. Jantunen could have believed in their continued accuracy once Mr. Birchmore became involved on behalf of the Commission in 2015.
- [123] More importantly, as for his alleged belief in the City's approval, that rests on one oral statement that he attributes to Mr. Sharma in 2015. Given Mr. Sharma's repeated references (and those of other bylaw officials) in the City's records to the Commission's approval, seemingly as a restriction on their own ability to act, I find it unlikely that he would have taken it upon himself to encourage Mr. Jantunen to proceed. But regardless of whether or not that statement was made by him (and it is hearsay as proof of the City's actual position), Mr. Loo's 2008 letter had affirmed the City's role in the approval process, Ms. Orban's 2009 report set out the requirement to comply with the Soil Bylaw as an aspect of the proposed plan, and any belief by Mr. Jantunen in Mr. Sharma's authority could not reasonably have survived Mr. Morin's arrival on the file the following year. To the extent that any miscommunication on behalf of the City could have informed Mr. Jantunen's understanding of his obligation to obtain a permit from it, and could be relevant in some way to the defences he is raising, I am satisfied that any such understanding would only have been of very brief duration.

Protection under the FPPA

- [124] First, I am satisfied by the plain language of s.2(1)(b) of the FPPA, and the use of the "and" between it and s. 2(1)(a), which prevents a farmer from being "liable in nuisance", that the restriction on injunctions in s. 2(1)(b) is only in relation to nuisance claims: *Saanich (District) v. Kinney*, 2025 BCSC 1132, at para.37, citing *Holt* at para.9.
- [125] However, s.2(3)(c) is another matter. *Alberni-Clayoquot (Regional District) v. Durmuller*, 2013 BCSC 2533, at para.23 - 24, distinguished the protection from nuisance-type actions in ss.2(1) from those in s.2(3), with the latter providing "injunction immunity" in the situations to which it applied. The application for an injunction in that case, which was not nuisance-related, was found not to be precluded by s.2(3) because the land in question did not meet any of the definitions of property in s.2(2), and not because s.2(3) applied only to nuisance. I will therefore proceed on the basis that Mr. Jantunen is entitled to the protection from an injunction provided by s.2(3)(c) if he is able to meet its requirements.
- [126] The first of these is that his actions amount to "draining land", one of the farm operations that is protected from an injunction.
- [127] As is well established, a statutory provision is to be interpreted based on its text, context, and purpose, to find a meaning that is harmonious with the legislation as a whole: see, for example, *Lundin Mining Corp. v. Markowich*, 2025 SCC 39, at para. 46.
- [128] Considering the text itself, the most obvious meaning attributable to the term "draining land" would be the active process of removing existing water from it, so that it can then be farmed. However, I think that in its ordinary sense the term is sufficiently broad to also encompass putting in place a system by means of which the land can continue to be passively drained to maintain its usefulness, even if that might be more accurately described as installing, or improving drainage. Of course, all Mr. Jantunen has done to this point is raise the height of his land so that surface water flows elsewhere - the actual drainage system has yet to be installed - but he has mainly been placing the fill in furtherance of the agrologists' plan to achieve an overall system for draining the land on an ongoing basis (aside from the aborted pre-load for his daughter's residence).
- [129] Looking at the context within which draining appears, the other terms used in ss.(b) of the definition of farm operation ("clearing", "irrigating", and "cultivating") all describe active practices that are performed on the land to make it suitable for farming use. Clearing and cultivating do not really imply the installation of infrastructure to support such actions. On the other hand, the concept of irrigating the land could include installing an irrigation system to carry on that task on an ongoing basis, although unlike a drainage system, it would require active human involvement to operate.
- [130] The other activities described in s. 2 are all of a more active and direct nature in relation to farming, and are not analogous to an expanded definition of draining. Subsection(c) refers to using equipment to farm, and ss. (d) to applying the various substances that enhance the

land's productivity. The specific additional activities that are included in the definition of farm operations (for example, intensive cultivation of speciality wood crops, or turf production) also describe actions being carried out directly. This is all in addition to the activities listed in ss.(a), which are types of actual farming, and the catch-all ss.(e), which refers to "any other agricultural activity".

- [131] The overall purposes of the FPPA were described in Windset, at para. 42 as "(a) recognizing the importance of the farming industry to the Province and its economy; and (b), establishing a more uniform standard of regulation applicable throughout the Province". It also described the definition of farm operation as "extremely broad" (para.41). Alberni-Clayquot at para.25 quoted the Minister of Agriculture in Hansard as indicating that the legislation was intended to "protect farms from bylaw interference on land within an ALR". Holt at para. 240 described it as to "protect farming and the right to farm". My own reading suggests a purpose of safeguarding the core activities of farming on agricultural land, while ensuring that the practices utilized to that end are recognized as being appropriate and do not offend against necessary regulatory protections.
- [132] None of these purposes favours a particular interpretation of the activity of draining, although the common thread of recognizing the importance of, and protecting farming that runs through them would seem to be best achieved by an inclusive approach to various reasonable ways in which a protected activity could be carried out.
- [133] At the end of the day, I do not see the more direct nature of most of the activities that are protected under s.2 as indicating a legislative intention to exclude Mr. Jantunen's plan from that protection merely because it is intended to equip the land to go on and drain itself as required, especially when the ordinary sense of draining can encompass the activity without being tortured. Nor is there any indication in the FPPA or its purposes of an intention to define the terms in s.2 narrowly than their ordinary sense would permit. I conclude therefore that Mr. Jantunen's plan falls within the definition.
- [134] Despite this, I am not satisfied that the FPPA applies to his situation.
- [135] First, I do not think that his bare assertion that the owners of the adjacent properties have engaged in the same practices as he has with respect to depositing fill to improve their drainage is sufficient to establish that he has acted in a manner consistent with "proper and accepted customs and standards as established by similar farm businesses under similar circumstances". The evidence provides no indication of how the neighbours have gone about that process, and given the detrimental effect he says their efforts have had on his property, they could well have been improper.

- [136] The fact that Mr. Jantunen claims to be following reports prepared by agrologists is some evidence of professional standards being applied in the placement of fill. But once again, there is no evidence of where their recommendations fall within the overall range of approaches to this drainage issue on similar properties. For all the current evidence shows, they could be outliers with respect to the accepted customs and standards in this aspect of farm.
- [137] As Munro made clear, evidence satisfying the required standards, not just at large but with respect to similar farms in similar circumstances, is essential in order for the decision maker to determine whether the protection of the FPPA applies. This is obviously why, when the applicability of s.2 is determined by the FIRB, it is permitted by s. 4(a) to "obtain the advice of persons who are knowledgeable about normal farm practices".
- [138] I am also satisfied that Mr. Jantunen is ineligible for protection under the FPPA due to his contravention of land use regulations.
- [139] The ALCA makes it clearer than the FPPA that placing fill ordinarily falls outside of the core activities of farming by its presumption in s.20(2) that it is a "non-farm use". The Regulation then provides an exception for "land development works" that is not present in the FPPA's definitions of farm operations. Its definition of "draining" is accompanied by other activities that are directly analogous to what Mr. Jantunen has been doing ("levelling", "berming" and "construction of reservoirs and ancillary works") if they are "necessary for farm use". This seems to exempt activities that are a step removed from the activities of actual farming, but are necessary in order for the farming to occur.
- [140] Despite this stronger indication of a broad definition of draining, I do not think Mr. Jantunen's activities fall within the exemption. As the reports of the agrologists and the geotechnical engineer, (and the years-long dialogue between counsel) clearly show, the essential issue in this ongoing dispute is the risk posed by the fill to the neighbouring properties, including the pipeline under the road allowance, and what setbacks and soil depth over the road allowance will mitigate those risks to an acceptable level. The material that Mr. Jantunen has provided, in particular the expert report that he obtained once enforcement proceedings began, fails to demonstrate that the fill he has placed "does" not cause danger to those areas. It only suggests that it is possible to configure it in that manner in the future. It is his burden to prove the present application of the exemption, and he offers no more than a route to curing his ongoing breach.
- [141] As a result, he is not exempt pursuant to s.2(4) of the Regulation, and is in contravention of the ALCA for engaging in a non-farm use without being excused by the Regulation or having been approved by the Commission.

- [142] This conclusion also means that his failure to obtain a permit pursuant to s. 3.1.2 of the Soil Bylaw is not excused by authorization under a Provincial enactment, and constitutes a further breach of a land use regulation, once again disentitling him to the protection of the FPPA.
- [143] Given my finding that there is no conflict between this bylaw and the provincial legislation, the issue of its validity in the absence of a stand-alone challenge by Mr. Jantunen does not arise. For the sake of clarity it is still worth noting that the Peachland decision on which the City relies, and the extensive authorities referred to in it, deal with interlocutory injunctions sought by local governments. In that situation, there are strong reasons for presuming the bylaw in question to be valid, since the merits of the underlying application have not been determined yet. I do not think such a presumption is applicable in relation to the actual hearing of the petition in support of a permanent injunction, in which it is argued that a bylaw is inconsistent with provincial legislation and therefore of no effect. It would be highly artificial to require a separate application with respect to the invalidity when it is at the core of the defence to the final order that is being sought.

Proof of the Encroachment

- [144] My conclusion on the evidentiary objections disposes of Mr. Jantunen's argument that an encroachment of fill on the road allowance has not been proven by admissible evidence. As I have said, Mr. Jantunen has admitted the encroachment himself, and Mr. Morin's observations and his own photos, which he is able to authenticate, illustrate it as well.

Exercise of Discretion

- [145] Finally, this is not one of those situations in which I should exercise my discretion and decline to issue an injunction even though the technical requirements for it have been met.
- [146] It is not accurate to suggest that the objectives of the injunction that is being sought have already been met, so that no valid public purpose would be served by now issuing it. The situation is that a massive amount of fill has been placed on the property without any official permission, and it still lacks the underlying drainage system that the agrologists' plan that led to it being placed there depends on in order to have any beneficial effect on agricultural use.
- [147] More importantly from a public interest perspective, Mr. Jantunen and the City remain at an impasse on the very point that most engages the City's involvement: the risks posed by the fill to adjoining properties, including the road allowance and its buried contents.
- [148] Declining to enforce a resolution of that impasse in a way that ensures safety on those properties on an ongoing basis would be an abandonment of the court's responsibility, rather than an exercise of its discretion.

Terms of an Injunction

[149] The meaningful differences between the draft terms proposed by Mr. Jantunen and the injunction sought in the amended petition are that the draft terms:

- Delete the declaration that Mr. Jantunen is trespassing on the road allowance and the term enjoining him from such trespassing;
- Reconfigure the obligations on him in the amended petition. They define a drainage plan that ensures that the fill removed from the road allowance would have no negative impacts on neighbouring properties, the road allowance and the pipeline, which is to be prepared by a qualified professional within 45 days. Then, within 60 days of the City's approval of the drainage plan, they require the removal of the unauthorized fill to a location approved by the City, and pulling the fill back three metres from all boundaries with his properties, except those between his own properties. 30 days after completing those steps he would be required to provide a report from a geotechnical engineer certifying the lack of any harmful impacts, as well as a topographical survey showing the elevations on his properties and the total amount of soil deposited. (The amended petition dealt first with the relocation and pulling back of the fill and then required the drainage report, and required the former be completed within 60 days of the order and the later within 30); and
- Directs that the slopes for the fill would be 2:1 "unless" the geotechnical engineer provided a letter of assurance that the slope as constructed would not have any negative impact on the adjoining properties (I think this proposal contains a proofreading error, since 2:1 is the slope sought by Mr. Jantunen, and the assurances that his geotechnical engineer would provide would likely be in support of it being safe, not in contrast to that proposition. The correct sense of the proposal can be achieved by substituting "subject to" for "unless" with respect to the role of the assurances of the engineer.)

[150] Mr. Jantunen's counsel proposes these terms despite her primary position that the set back is beyond the City's powers to compel and that the language dealing with the risk of harm is permissibly vague.

[151] Since the bulk of the terms of the injunction in the amended petition and Mr. Jantunen's draft are the same, with changes in the order of some of the paragraphs and their accompanying timelines, I think it will be simpler to consider what changes are appropriate to the petition version.

[152] I can see no evidentiary of legal impediment to finding that Mr. Juntunen's fill has trespassed on the road allowance, or any prejudice to him from being enjoined from continuing or repeating it, so those terms will remain.

[153] I view his proposed reordering of the fill removal process to provide for a drainage report first, followed by the removal steps with a further period after the report has been approved, as a recipe for further disputes and delays, especially if the City is dissatisfied with the contents of the report. I think it is preferable to require him to comply fully with

the removal and setbacks within a specific time period following the injunction, with the report going only to the question for where he can then place the relocated fill, as the petition proposes.

[154] The slightly extended overall timeline of 60 days that he seeks for the removals and setbacks is innocuous, and not unreasonable in light of the duration of this dispute.

[155] Lastly, I do not consider it prudent to allow a slope that the City has characterized as being potentially unstable, subject to the engineer's assurances. On a matter of safety the default should be the presumptively stable slope, with the ability to vary it upon proof that this can be safely accomplished.

[156] Therefore, an injunction will issue, consisting of:

1. A declaration that the Respondent is in contravention of the City of Richmond Soil Removal and Fill Deposit Regulation Bylaw No. 8094, 2007 (the "2007 Soil Bylaw") and the City of Richmond Soil Deposit and Removal Bylaw No. 10200 (the "2021 Soil Bylaw"), by depositing, or causing, suffering or permitting the deposit of, fill on the following properties (the "Jantunen Properties"), without a permit:
 - a) the property legally described as PID 003-539-890, Lot 3 Except: Parcel "B" (Rd2990e), Sec. 20, Block 5, North Range 4 West, New Westminster District, Plan 3635, and civically known as 19200 River Road (the "19200 Jantunen Property");
 - b) the property legally described as PID 004-865-499, Lot 4, Fractional Section 20, Block 5, North Range 4 West, New Westminster District, Plan 3635 (the "19300 Jantunen Property"); and
 - c) the property legally described as PID 010-966-994, Lot 5, Section 20, Block 5, North Range 4 West, New Westminster District, Plan 3635 (the "19380 Jantunen Property");

together, the "Jantunen Properties".

2. A declaration that the Respondent is contravening the City of Richmond Solid Waste and Recycling Regulation Bylaw No. 6803, 1999 (the "Solid Waste Bylaw"), by depositing soil material on the road allowance vested in the City and located immediately to the south of the Jantunen Properties (the "Road Allowance");
3. A declaration that the Respondent is trespassing on the Road Allowance by entering on to and depositing fill on the Road Allowance;
4. An order enjoining and restraining the Respondents, and all persons with notice of this order, from using or occupying the Jantunen Properties except in compliance with the Soil Bylaw;
5. An order enjoining and restraining the Respondents from trespassing upon, or otherwise using or interfering with, the Road Allowance;

6. An order requiring the Respondents, within 60 days of the date of this order, to:
 - a) Under the guidance of a Pipeline Inspector appointed by the Pipeline owner or permit holder, remove all fill placed in the Road Allowance;
 - b) Relocate the fill removed from the Road Allowance to a permitted site approved by the City, which application for approval is to be made by the Respondents within 15 days of the date of this order;
 - c) Under the guidance of a qualified geotechnical engineer, pull back all fill placed within 3 metres of each Jantunen Property's boundary, other than a boundary with another Jantunen Property, to a location on the same Property which is not within 3 metres of the property line;
 - d) Prior to relocating the remaining fill as described in paragraph 6(c) of this order, obtain and provide the City with a copy of a drainage plan for the Jantunen Properties (the "Drainage Plan"), prepared and certified by a qualified professional, designed to ensure that the placement of the remaining fill will have no negative impacts on:

I. drainage for the neighboring properties;

II. the Road Allowance; or

III. the subsurface jet fuel utility pipeline owned and operated by Pembina, known as the Trans Mountain Jet Fuel Pipeline (the "Pipeline") that is located within the Road Allowance; and

- e) Implement the Drainage Plan;
7. An order requiring the Respondent, within 30 days of completing the steps required by Paragraph 6 of this Order, to:
 - a) Provide to the City a report from a qualified geotechnical engineer certifying that the remaining relocated fill on the Jantunen Properties will not negatively impact the Pipeline, neighboring properties or the Road Allowance; and
 - b) Provide to the City a topographical survey by a registered Land Surveyor that sets out post-fill elevations and the total volume of soil deposited on the Jantunen Properties;
 8. In the event that the geotechnical engineer retained to provide the certification in Paragraph 6(d) determines at any point that the remaining fill placement on the Jantunen Properties outside of the three metre zone may negatively impact the Pipeline, the Respondents must provide notice of this determination to the Pipeline owner or permit holder within three days;

9. The setback requirements in paragraph 6(c) above may be reduced from three meters to a lesser amount on the east and west boundaries provided that the respondent's geotechnical engineer provides a written assurance that a lesser setback will not endanger, damage or otherwise adversely affect the adjacent properties; and
10. With respect to the slopes of the setbacks, the slope shall be 3V:1H unless the respondent's geotechnical engineer provides a letter of assurance that the slope, as designed and constructed, is stable and will not have any negative impact on the road allowance, underground pipeline or neighboring properties.

Costs

- [157] The City seeks special costs, based on authorities that have held that they are appropriate when a municipality is compelled to use court processes to enforce bylaws.
- [158] In *Kootenay Boundary (Regional District) v. Demski*, 2000 BCSC 877, at para. 11, the respondents had built a second residence on their property, contrary to the bylaw. The chambers judge noted the importance to the Regional District of demonstrating that its bylaws would be enforced as a matter of public policy, that the breach in question had been "particularly flagrant", and that it would be inappropriate for taxpayers to pay the difference between the actual cost of enforcing it and what would be payable as ordinary costs under the tariff.
- [159] A similarly flagrant breach - opening a marihuana dispensary that the respondent knew was unlikely to be licenced, in the expectation that the municipality would ignore its operations - was found to justify special costs in *Delta (Municipality) v. WeeMedical Dispensary Society*, 2016 BCSC 1566, at paras.34-35.
- [160] The City's counsel characterizes Mr. Jantunen's breach as equally flagrant. She emphasizes the length of time that his non-compliance has been ongoing, his knowledge since early in the process of the need for permission, and his ongoing deposits of fill in complete disregard for that requirement. The City has attempted to gain his cooperation without resorting to litigation, but he chose to push matters to the level of an injunction. She also points out that the City was still not asking that he be ordered to do anything by means of the injunction that the bylaw did not require in the first place.
- [161] In response, Mr. Jantunen's counsel stresses his understanding that he had approval for his activities, and his good faith efforts to come to a resolution of the matter once concerns were raised, which has included significant expenditures for the various surveys and plans along the way. His conduct is certainly not deserving of rebuke (often described in the authorities as "reprehensible conduct"), which is the standard that must be met to impose special costs.

- [162] Counsel also notes that special costs are not to be ordered to address pre-litigation conduct (Central Kootenay (Regional District) v. Lisanti, 2020 BCSC 1042 at paras. 43-44.), and most of the matters on which the City relies to aggravate the breach occurred before the first petition was filed.
- [163] Obviously the submissions of Mr. Jantunen's counsel that he believed that he was authorized to place the fill (which were made at the same time as his main submissions) cannot survive my rejection of any reasonable basis on which to believe that he had permission from the City to place the fill, other than for brief periods. Viewed in totality, it is also fair to say that until the stop work orders were imposed he essentially did whatever he wanted to do on the property, and addressed any regulatory consequences afterwards. Both the length of the violation and his attitude towards it therefore tend towards the more aggravated end of the range in cases of this nature.
- [164] Nevertheless, I do not think that the test for ordering special costs in bylaw enforcement matters is separate from the regime dealing with such costs in litigation generally, and a fundamental aspect of that regime is that special costs are only for conduct during the course of the litigation. Neither of the authorities relied on by the City suggest otherwise. This means that the period for which special costs can be considered begins with the filing of the first petition in January 2019.
- [165] For that period, I am unable to find that Mr. Jantunen's conduct amounted to a flagrant breach or, using the language that is more tailored to the special costs issue, deserving of rebuke or reprehensible. Obviously his violation of the bylaw continued, but counsel for the parties were in ongoing negotiations to resolve it without the need for the present application. The fact that Mr. Jantunen was the violating party does not make his efforts through counsel to bring himself into compliance on the most favourable possible terms blameworthy, and there was nothing in the correspondence between counsel that suggested an obstructive attitude on his part to this resolution process.
- [166] In particular, the fact that the terms of the injunction sought by the City include opportunities for him to vary the amount of the setbacks and slope of the fill if he can demonstrate that they are safe, suggests that they were not unreasonable positions for him to take during that process.
- [167] Accordingly, I am unable to find any basis on which to award special costs. Instead, the City, as the successful party, will receive its costs of the petition at the ordinary scale of difficulty.

"Schultes J."

- [1] This section permits a local government to bring civil proceedings to enforce or restrain the contravention of a bylaw.

- [2] Mr. Jantunen's counsel concedes that such an interpretation of ss.2(1) is fair, but points out that it does not address the additional prohibition against preventing farm practices by injunction in ss.(3)(c).
- [3] Mr. Morin refers to business records in relation to Mr. Sharma's visits to the properties, but does not comply with the requirements of the Evidence Act or the common law business exception.
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Prepared on 28 October 2026 · Esheria