200 - 2006 West 10th Avenue
Vancouver, BC V6J 2B3
www.wcel.org

tel: 604.684.7378
fax: 604.684.1312
toll free: 1.800.330.WCEL (in BC)
email: admin@wcel.org

February 9, 2011

Garden City Lands Coalition Society
Attn. Jim Wright, President

***** BY EMAIL AT GARDENCITYLANDS@SHAW.CA *****

Dear Sirs/Mesdames:

Re: Metro Vancouver Regional Growth Strategy and ALR Lands

You have asked us to provide an opinion further developing our view of Metro Vancouver's Regional Growth Strategy[1] (the RGS) in relation to the Garden City Lands and other ALR lands designated General Urban or Industrial. This opinion builds on the legal analysis provided in our Environmental Law Alert blog post: Metro Vancouver Growth Strategy on thin legal ice,[2] as well as responding to the response to that post received from Metro Vancouver.[3]

You have also instructed us to provide a copy of this legal opinion to Ms. Jessica Beverley, In-house Counsel to Metro Vancouver. She is cc'd on this opinion.

The Facts

The legal facts on which this opinion is based are as follows. A change in the information available could alter our legal conclusions.

For the most part the Regional Growth Strategy is very supportive of agricultural land and the vast majority of ALR lands are designated as being for agricultural use. This designation, according to the RGS, is (in part) "intended primarily for agricultural uses, facilities and supporting services with an emphasis on food production where appropriate."

There are a small number of exceptions. Significant amounts of ALR lands are included in Special Study Areas, which may be reviewed for possible development in the future. Since Special Study Areas do not in and of themselves allow a particular type of development the Agricultural Land Commission (ALC) has suggested, and we agree, that there is no legal inconsistency between this designation and the *Agricultural Land Commission Act* ("the Act").

However, there are also lands located in Richmond and Aldergrove which are ALR lands and which are specifically designated by the RGS for urban residential or (in the case of one area in Aldergrove) industrial use. The affected lands in Richmond include, of course, the Garden City Lands.

---

1 *Regional Growth Strategy*, Bylaw No 1136, 2010.
2 http://wcel.org/resources/environmental-law-alert/metro-vancouver-growth-strategy-thin-legal-ice.
3 Letter from C. De Marco to Andrew Gage dated January 27, 2011.

I have been advised by Metro Vancouver staff that these designations are based upon the designations found in the previous Regional Growth Strategy (known as the Livable Region Strategic Plan).[4]

I have also been advised by Metro Vancouver staff that they are based upon the designations that appear in the Official Community Plans (OCP) for the respective municipalities, although at least in the case of Richmond this appears not to be the case in at least some cases: the Garden City Lands are identified as Public and Open Space in Richmond's Official Community Plan (a designation in respect of which the Agricultural Land Commission passed an order, confirming it as an appropriate use within the ALR).

I am advised by Metro Vancouver staff that as a result of discussions with the ALC the draft RGS was modified to add a clause which explicitly recognized that nothing in the RGS could be inconsistent with the Agricultural Land Commission Act (s. 6.11.2 – discussed below).

However, this general clause apparently did not fully satisfy the ALC in relation to the Richmond and Aldergrove ALR Lands. In October 2010, after Metro Vancouver referred the RGS to the Agricultural Land Commission, Mr. Brian Underhill, Executive Director of the Commission, wrote to Metro Vancouver. While he expresses appreciation for wording changes in the RGS (presumably including s. 6.11.2), he clearly sets out his concerns about the Richmond and Aldergrove ALR lands designated by the RGS for urban residential or industrial use:

> From the Commission's perspective, the most important outstanding issues are the two instances where the Urban Containment Boundary encroaches into the Agricultural Land Reserve. … These designations are not consistent with the *Agricultural Land Commission Act*, with the … Regulation or with any existing order of the Commission. Under section 46 of this Act a local government in respect of its bylaws [including a bylaw to adopt a regional growth strategy] must ensure consistency with this Act, the regulations and the orders of the commission. … If the Regional Board decides to adopt a bylaw enacting a regional growth strategy without any modification, subsection 46(4) of the Agricultural Land Commission Act provides that to the extent of the inconsistency, the bylaw is of no force or effect.

When Metro Vancouver went ahead and gave second reading to the RGS without addressing the ALC's concerns, the Chair of the ALC, Mr. Richard Bullock, took the unusual step of writing to the regional district for a second time to further emphasize that the RGS violates the *Agricultural Land Commission Act*.

> Reference is … made to section 46 of the Agricultural Land Commission Act (the Act), which requires that a local government must ensure consistency with the Act, the regulations and the orders of the commission. … This letter identifies lands with respect to which Bylaw 1136 as currently drafted is inconsistent with the Act, [the Regulations] … or with any existing order of the commission.

When the Metro Vancouver Board considered the RGS, staff summarized Mr. Bullock's letters as part of the public submissions as relating to "mapping inconsistencies" – clearly an inadequate description of the serious legal concerns raised in that letter.

---

4 I know that you have provided a detailed rebuttal of this claim on your Garden City Lands Blog: http://gardencitylands.wordpress.com/2011/02/02/weak/, last accessed February 9, 2011. I do not believe that it is necessary to resolve this dispute at this time; as discussed below, Metro Vancouver's claim on this point makes no difference to my conclusion.

Issues

1. Does the designation of the Richmond and Aldergrove lands in the RGS as General Urban and Industrial comply with the legal requirements of the Act?
2. If the answer to 1 is no, does the general clause in 6.11.2 of the RGS bring the RGS back into compliance with the Act?

Brief Answers

1. No. Section 46 of the Act clearly prohibits the enactment of bylaws, including bylaws enacting regional growth strategies, that provide for the development of ALR lands, even if further changes to zoning bylaws or Official Community Plans or other government approvals will also be required before ALR lands could in fact be developed.
2. No. The Act identifies very clearly when a bylaw will be considered inconsistent with the Act, or associated regulations and orders. A general condition such as s. 6.11.2, which simply reiterates the legal requirements of section 46, cannot save an otherwise illegal portion of the bylaw.

Analysis

Legality of designations of Richmond/Aldergrove Lands

Section 46 of the Agricultural Land Commission Act very clearly states that every local government must make sure that its bylaws (including bylaws enacting Regional Growth Strategies) are "consistent" with the Act and its regulations. Section 46 states, in part:

> **46** (2) A local government in respect of its bylaws and a first nation government in respect of its laws must ensure consistency with this Act, the regulations and the orders of the commission. …
>
> (4) A local government bylaw or a first nation government law that is inconsistent with this Act, the regulations or an order of the commission has, to the extent of the inconsistency, no force or effect.[5]

"Bylaws" is explicitly defined as including bylaws adopting a regional growth strategy.[6]

In general "consistency" is not a strong legal requirement. However, section 46(5) explicitly addresses this problem:

> (5) Without limiting subsection (4), a local government bylaw or a first nation government law is **deemed to be inconsistent with this Act** if it
>
> (a) **allows a use of land in an agricultural land reserve that is not permitted under this Act**, or
>
> (b) **contemplates a use of land that would impair or impede the intent** of this Act, the regulations or an order of the commission, whether or not that use

---

5 *Agricultural Land Commission Act*, S.B.C. 2002, c. 36 (the "Act"), s. 46 (2) and (4)

6 Act, ibid, s. 46(1).

> requires the adoption of any further bylaw or law, the giving of any consent or approval or the making of any order.[7]

This section goes out of its way to clarify that a bylaw that meets that requirement will be inconsistent if it merely "contemplates" non-farm uses of land in the ALR, even if further zoning bylaws or other approvals (including ALC orders) are required before the land can be converted to a non-farm purpose.

The remaining subsections of section 46 confirm the ability of local governments to restrict agricultural use on ALR lands, but do not alter the clear legal requirements of the subsections quoted above to ensure that bylaws, including regional growth strategies, do not allow, or even contemplate, non-farm uses on ALR lands.

On its face the RGS does purport to allow and/or contemplate the use of the Richmond and Aldergrove Lands for residential development and industrial uses: clearly uses of lands not allowed in the ALR under the Act or its regulations without the approval of the ALC.

Metro Vancouver staff have suggested that the fact that the designations in respect of these lands remain the same as in the previous RGS[8] and/or that they may have been (in at least some cases) similarly designated in the Official Community Plans for some years in some way overcomes any problem of consistency.

With respect, it does not. The responsibility of local governments under s. 46(2) to ensure consistency is an ongoing one, and the legality of new bylaws must be considered at the time they are adopted, even if they are merely adopting previous terms.

In relation to the Richmond lands, Metro Vancouver staff have also suggested that the RGS designations of the Garden City Lands as General Urban are consistent with the Richmond Official Community Plan's designation of those lands as Public and Open Space. They further note that the ALC has approved Richmond's Public and Open Space designation.

> The Garden City Lands are designated "Public and Open Space Use" in Richmond's Official Community Plan and have been designated as such since the 1990s. We are aware that the status of the Garden City Lands has been the subject of ongoing dialogue within the community and with the Agricultural Land Commission. Richmond provided to us the attached letter from the Agricultural Land Commission in which the Commission consents to Richmond's designation of the Garden City Lands as "Public and Open Space Use".
>
> The regional "General Urban" designation can contain a number of municipal designations, including "Public and Open Space Use" as it is reasonable to consider parks within a general urban context.[9]

Again, with respect, this argument is flawed. The Public and Open Space Use designation does not provide for urban development; despite that fact the City of Richmond still sought (and received) specific ALC approval for that designation.[10]

By contrast, the "General Urban" designation, while allowing for the use of land for urban parks, also explicitly allows those lands to be used for residential development (indeed, that is the main

---

7 Act, ibid, s. 46(5), emphasis added.

8 Again, I am aware of your objection to this assertion. Above, note 4.

9 Above, note 3.

10 You advise that this request for approval came after a refusal by the ALC to remove the Garden City Lands from the ALR and while a second request was still pending.

purpose of the designation). Unlike the Public and Open Space designation, it explicitly allows or contemplates a non-farm use. And, again unlike Richmond, Metro Vancouver has not sought the consent of the ALC in respect of those uses. Given the very strong wording of section 46, the General Urban designation is inconsistent with both the Act and with the consent given by the ALC to Richmond in respect of the Public and Open Space designation.

In my view the designations of these ALR lands for urban and industrial purposes is on its face inconsistent with the Act, regulations and orders of the ALC. The remaining question is whether this apparent inconsistency is saved by section 6.11.2 of the RGS.

The legal effect of s. 6.11.2

Metro Vancouver staff argue that even if the Richmond and Aldergrove ALR land designations are by themselves inconsistent with the ALC Act, section 6.11.2 of the RGS rectifies these inconsistencies by conceding that the ALC takes precedence. Section 6.11.2 reads:

> In accordance with the *Agricultural Land Commission Act,* in the event that there is an inconsistency between the regional land use designations or policies set out in the Regional Growth Strategy and the requirements of the *Agricultural Land Commission Act* or regulations and orders made pursuant thereto, the Agricultural Land Commission requirements will prevail.[11]

Metro Vancouver states its position as follows:

> The intent of this section is to make it clear that Metro Vancouver recognises that the Agricultural Land Commission Act takes precedence over the Regional Growth Strategy and to address the Commission's concerns. It is Metro Vancouver's position that the Regional Growth Strategy is not inconsistent with the Agricultural Land Commission Act. However, to the extent there is any inconsistency, the Agricultural Land Commission Act resolves the issue by providing that the Regional Growth Strategy has, to the extent of the inconsistency, no force or effect.[12]

There are several problems with argument that section 6.11.2 makes everything good again.

Purely on a technical level, section 6.11.2 doesn't change the fact that the RGS "contemplates" residential and industrial development on ALR lands.

In addition, the interpretation also undermines what we take to be the intent of the *Agricultural Land Commission Act*. In our view the very strong requirements of section 46 contemplate two levels of protection for ALR lands.

- The ALC has a general mandate to ensure that no non-farm uses occur on ALR lands (or to regulate such use if it views it as appropriate); and
- Local governments are specifically charged (under section 46(2)) with ensuring that their bylaws also protect ALR lands against development for non-farm purposes.

This means that in general approval for the development of land for a non-farm purpose will require at least two levels of approval, from both the ALC and from relevant local governments, creating a high level of legal protection for ALR lands. This is consistent with the purposes of

---

[11] Above, note 1.

[12] Above, note 3.

the Act and the high level of protection for agricultural lands provided in other sections of the Act.

Metro Vancouver acknowledges that as a result of the designations in the RGS this level of protection no longer exists for the Richmond and Aldergrove Lands:

> The practical effect of the Garden City Lands and the Aldergrove Lands having a regional "General Urban" or "Industrial" designation is that if, at some point in the future, the Agricultural Land Commission determines that these lands may be removed from the Agricultural Land Reserve, Richmond and the Township of Langley, respectively, will not need to apply to the Metro Vancouver Board for a change to the regional designation.[13]

In our view this "practical effect" is precisely what section 46 attempts to prevent.

We also note that the idea that a general acknowledgment of the existence of a legal requirement (and section 6.11.2 essentially just repeats the legal effect of section 46 of the Act) can give a person the ability to violate it at the specific level is a curious one. If correct it would mean that Metro Vancouver could designate all ALR lands for future industrial development, relying on section 6.11.2 to rectify the clear illegality. The concept is analogous to a person prefacing threats to another person with the words: "I know that it's illegal to threaten you, so please disregard everything I'm about to say." These results are clearly absurd.

For the above reasons, we do not believe that a general recognition that the Act has precedence over the RGS, such as that found in section 6.11.2, can save otherwise illegal specific cases of inconsistency between the RGS and the Act.

Conclusion

For the above reasons, we are of the view that the RGS, as currently drafted, is illegal in respect of the designations of the Richmond and Aldergrove lands for future urban and industrial development. We believe that the designation of these Lands in the RGS should be re-evaluated prior to adoption of the RGS.

Sincerely,

Andrew Gage,
Staff Counsel

cc. Jessica Beverley, Barrister and Solicitor (by email at Jessica.beverley@metrovancouver.org)

[13] Ibid.