



AGENDA

**City of Salmon Arm
Development and Planning Services
Committee**

**Monday, November 2, 2020
8:00 a.m.
Council Chambers, City Hall
500 – 2 Avenue NE**

Page #	Item #	Description
	1.	CALL TO ORDER
	2.	ACKNOWLEDGEMENT OF TRADITIONAL TERRITORY <i>We acknowledge that we are gathering here on the traditional territory of the Secwepemc people, with whom we share these lands and where we live and work together.</i>
	3.	REVIEW OF AGENDA
	4.	DISCLOSURE OF INTEREST
	5.	REPORTS
1 - 16	1.	Development Variance Permit Application No. VP-520 [Clark, I. & L./Green Emerald Estates/Arsenault, G.; 3181 Okanagan Avenue NE; Fences and Retaining Walls height]
17 - 28	2.	Agricultural Land Commission Application No. ALC-398 [Charlton, S. & H./Browne Johnson Land Surveyors; Exclusion]
29 - 100	3.	Agricultural Land Commission Application No. ALC-397 [Smith, R. & M.; 1281 70 Avenue NE; Inclusion and Exclusion]
	6.	PRESENTATIONS
	7.	FOR INFORMATION
	8.	CORRESPONDENCE
	9.	ADJOURNMENT

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CITY OF SALMON ARM

TO: His Worship Mayor Harrison and Members of Council

FROM: Director of Development Services

DATE: October 26, 2020

SUBJECT: Development Variance Permit Application No. VP-520
 Legal: Lot 3, Section 18, Township 20, Range 9, W6M, KDYD, Plan EPP78527
 Civic Address: 3181 Okanagan Avenue NE
 Owner: I. & L. Clark
 Applicant / Agent: Green Emerald Estates / G. Arsenault

MOTION FOR CONSIDERATION

THAT: Development Variance Permit No. VP-520 be authorized for issuance for Lot 3, Section 18, Township 20, Range 9, W6M, KDYD, Plan EPP78527, which will vary Zoning Bylaw No. 2303 as follows:

Section 4.12.1 (a) Fences and Retaining Walls - increase the maximum permitted combined height of a retaining wall and fence from 2.0 m (6.5 ft) to 4.5 m (14.8 ft).

Subject To: Issuance of Development Variance Permit No. VP-520 be withheld subject to an amendment, at cost of the applicant, to the Statutory Right of Way registered under CA6583185 to document the area of encroachment of the retaining wall over Statutory Right of Way Plan EPP78528; and, should the City require access to the City sewer manhole, any removal or replacement costs for the wall, be the responsibility of the property owner.

STAFF RECOMMENDATION

THAT: The Motion for Consideration be adopted;

PROPOSAL

The subject property is located at 3181 Okanagan Avenue NE (Appendices 1 & 2). The applicant is requesting a variance to increase the maximum permitted combined height of a retaining wall and fence from 2.0 m (6.5 ft) to 4.5 m (14.8 ft). This application is for an existing retaining wall, which was built to the maximum permitted height of 2.0 m (6.5 ft) by a previous owner in 2010. The applicant increased the height of the retaining wall and now a portion of the wall, approximately 4.3 m (14 ft) is over the maximum permitted height. For safety, the applicant is proposing a 1.2 m (3.9 ft) fence on top of the wall; therefore, the maximum combined height of the retaining wall and fence will be 4.5 metres (14.8 ft). Attached as Appendix 3 is the applicants letter of rationale, a letter of understanding from the property owner and a letter of support from a neighbouring property owner. Site photos are attached as Appendix 4.

BACKGROUND

The original wall was built to the maximum height of 2.0 metres along the north parcel line of the parent property, 3161 Okanagan Avenue NE. No variance or building permit was required for the wall in 2010 because it did not exceed the maximum height. It was a previous owner's intention to build a higher retaining wall as there is record of a variance permit application (VP-338) made for the wall to increase the height from 2.0 m (6.6 ft) to 4.27 m (14 ft) in 2011. It was noted in VP-338 the wall was built over a statutory right of way for the City's sanitary sewer system. It was also noted that it was the owner's responsibility to provide engineered plans showing the location and cross-sections of the sanitary services and easements in proximity of the retaining wall and how the wall may impact the servicing to surrounding lots and how these services will be accessed for repairs or maintenance in the future.

The previous owner did not continue with the variance permit application nor increase the height of the wall. In addition to VP-338, the previous owner applied to subdivide and rezone the property to R-4, Medium Density Residential; however, the owner never followed through with these development applications and no development ensued. The property was cleared of all trees to prepare for development but remained as vacant bare land with only the retaining wall up until 2018, when the parent property, 3161 Okanagan Avenue NE was subdivided. The subject property was one of the two lots created via this subdivision.

The applicant purchased the property in 2018 and a building permit was issued for the construction of a new house. The building department during their final inspection (August 2020), noted the existing retaining wall was built higher than the maximum 2.0 metres, thus advising the applicant and owner at the time that a variance permit and building permit would be required for the wall.

STAFF COMMENTS

Fire Department

No Fire Department concerns.

Building Department

No concerns with application. Applicant has filed a building permit (16569B) for the retaining wall along with a professional engineer's assessment to ensure structural stability.

Engineering Department

Engineering Department comments attached as Appendix 5

Planning Department

The Zoning Bylaw permits a maximum height of 2.0 m (6.5 ft) for retaining walls in all rear and interior side yards in residential zones.

OCP Policy 8.3.22 suggests minimizing cut, fill and retaining walls on hillside areas, as well as the preparation of grading plans prior to servicing and construction. However, due to the topography of Salmon Arm, there are many residential neighbourhoods built on steep slopes and construction of retaining walls is a common approach to creating level backyards in residential neighbourhoods such as this.

In this situation, the applicant increased the height of an existing retaining wall that was already built to the maximum permitted height to achieve a level and more functional backyard. Statutory right of ways are put in place to protect City infrastructure and cannot be tampered with without authorization from the City. To achieve a level backyard, the applicant also raised the level of a City sanitary sewer manhole.

The location of the retaining wall did not change; therefore, the wall is still encroaching on a statutory right of way for the City's sanitary sewer system, see Appendix 6. To address the encroachment, consideration should be given to amending the statutory right of way to document the area of encroachment of the retaining wall and making it the responsibility of the property owner for any removal

or replacement costs for the wall, should the City require. Should Council choose to require the statutory right of way amendment as a condition to issuance of the Development Variance Permit, the applicant would be responsible for all costs associated, including, but not limited to, surveyor and legal fees

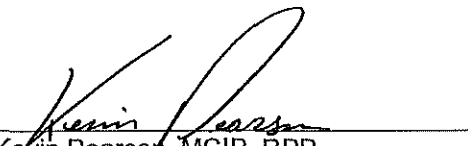
CONCLUSION

Although the applicant raised the height of the retaining wall without a permit and illegally modified City infrastructure in order to achieve a level backyard, Staff note the following considerations:

1. The wall was built to the maximum permitted height by a previous owner.
2. Only the height of the retaining wall was changed, not the location. Therefore, the wall still exists over a statutory right of way, protecting City infrastructure; and, this is an opportunity to address the encroachment.
3. The added height does not further increase the difficulty to access and maintain City infrastructure.
4. The applicant and owner of the property have initiated consultation with neighbouring property owners.
5. Structural safety of the wall will be ascertained through the building permit process.

The Engineering Department has noted in their referral comments that the retaining wall does not significantly affect access to the sanitary sewer manhole or the ability to operate or maintain the City infrastructure. For this reason and the above noted considerations, Staff support the variance, subject to amending the ROW document to address the retaining wall encroachment and placing responsibility on the property owner to incur any associated costs for the retaining wall, should the City require.


Denise Ackerman
Planner, Development Services Department

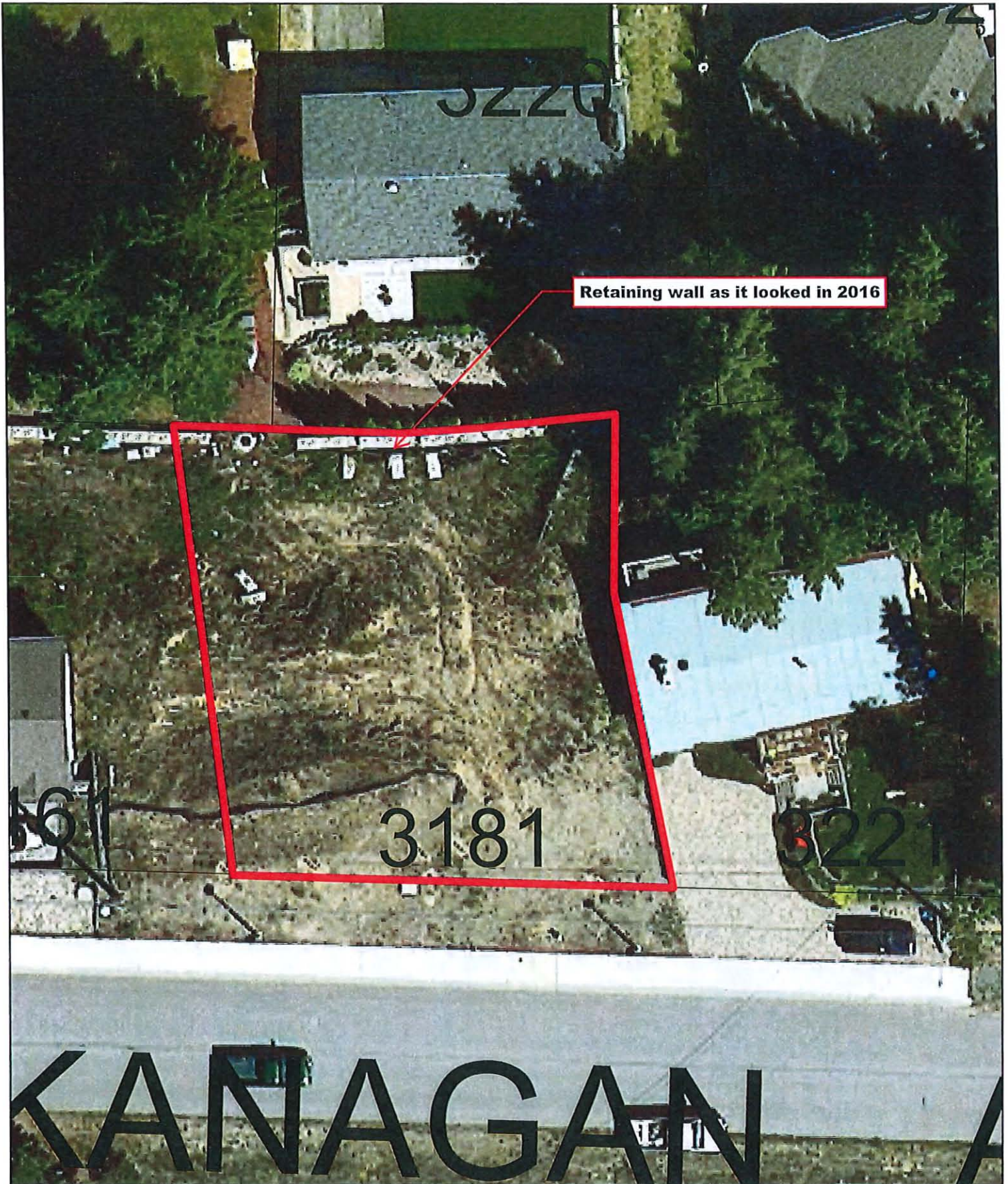

Kevin Pearson, MCIP, RPP
Director of Development Services



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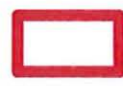
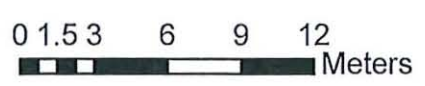
Subject Parcel



Retaining wall as it looked in 2016

3181

KANAGAN



Subject Parcel



August 21, 2020

City of Salmon Arm, Planning Dept.

RE: retaining wall at 3181 Okanagan Ave, NE, Salmon Arm

We are applying for a variance along with a building permit for 2 courses of block. We had thought that the variance would have been done when the original subdivision was built but are now informed that there is no record of that.

In order to cover the sewer easements on the property from the neighbours and make the back yard usable we have had to put 2 more courses of concrete block on the existing 2 block wall that was there.

Without this there would be no usable back yard.

The wall starts at 8 feet for 4 feet at the west end and tapers to four feet or 2 blocks high after 28 feet.

It is made of 2 foot by 2 foot by 4-foot textured concrete blocks with Engineered Geo Textile Fabric between each course tied back into compacted gravel behind and backfilled with the native sand from the site. The Geotech Engineers Stamp is attached.

The owners plan to install a 4-foot black chain link fence along the top with shrubs behind.

Thank you for your consideration.

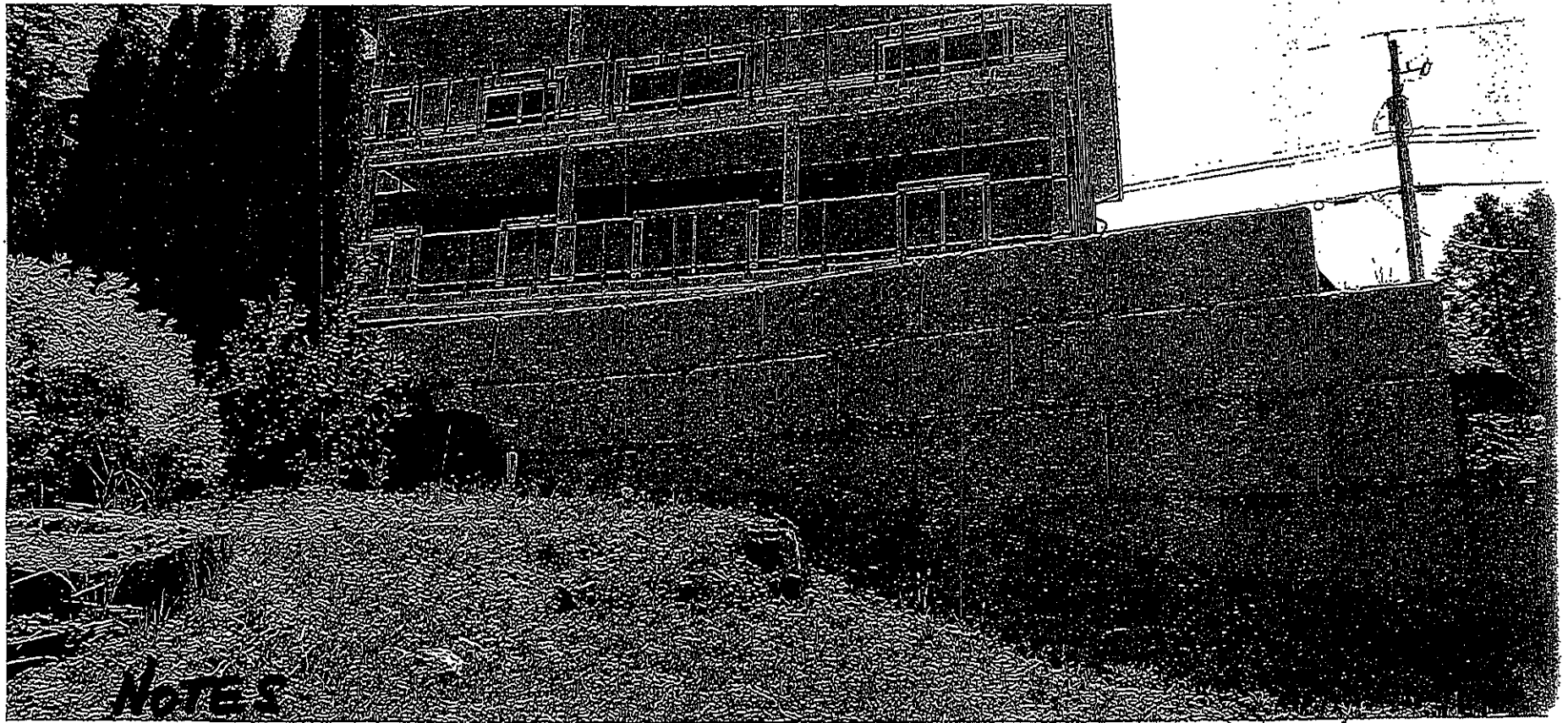
Questions please contact Gary Arsenault

Page 1 of 2

24 August 2020

Apple Broom Project
1856 - 3181 Okanagan
Avenue NE
Salmon Arm, BC

See Notes Below
And on Page 2 of 2
for Location of Wall.



NOTES

Based on field reviews, discussions in December 2018 & observations of backfilling, geogrid placement, interlocking nature of blocks and height & length constructed, lock block retaining structure considered acceptable. No fill to be removed from toe; no new fill to be placed above wall. Railing to be installed.

[Handwritten Signature]
24 August 2020
ENGINEER

Page 2 of 2

AppleBram Project 1856
24 August 2020

3181 Okanagan
Avenue NE
Salmon Arm
BC

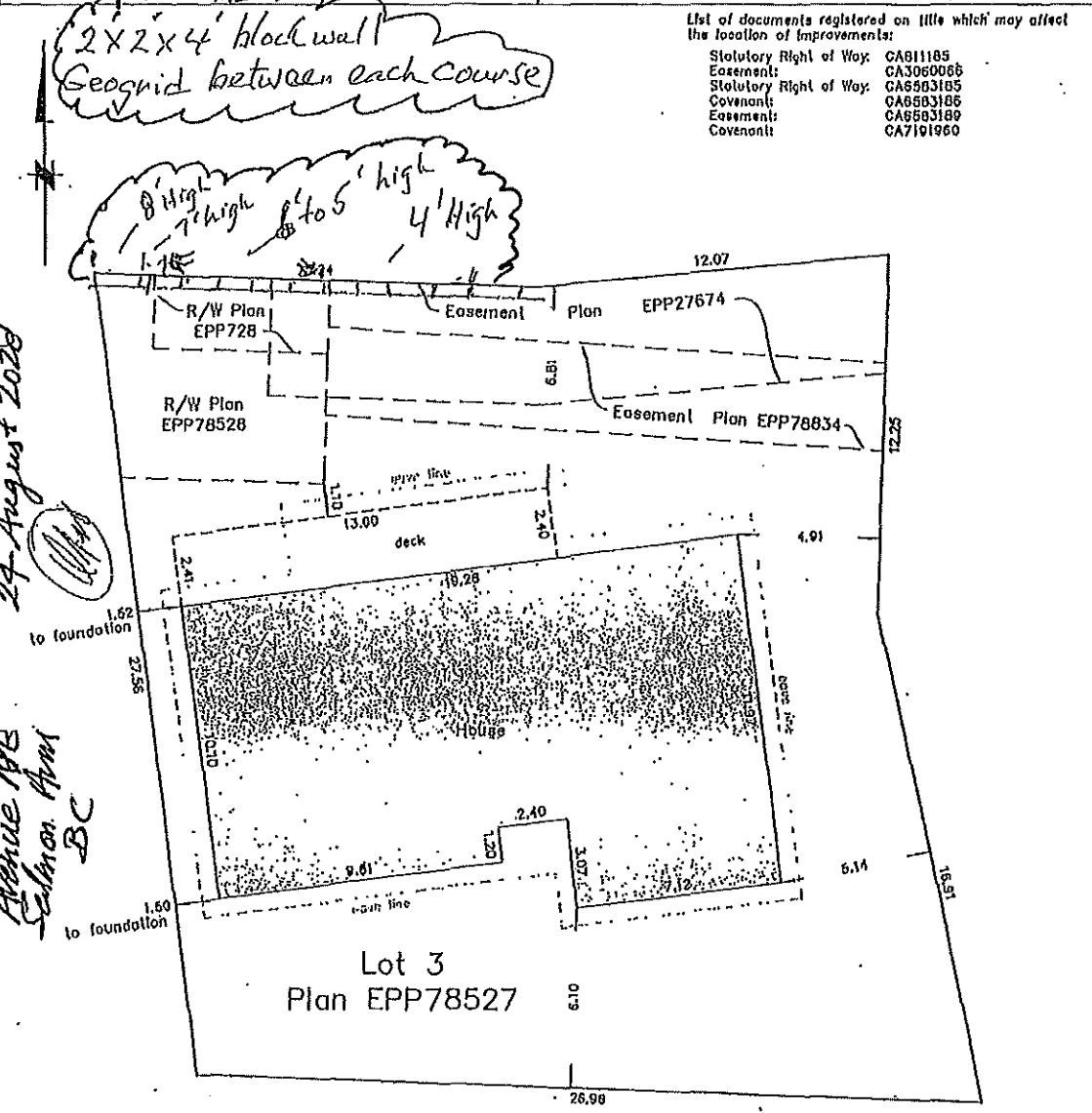


BROWNE JOHNSON
Land Surveyors

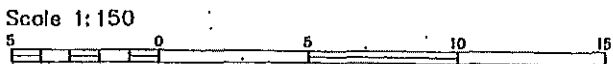
BRITISH COLUMBIA AND CANADA LANDS
Box 362, Salmon Arm, B.C. V1E 4N5
250-832-9701 | office@brownejohnson.com

BC LAND SURVEYOR'S BUILDING LOCATION CERTIFICATE

To: Gary Arsenault c/o Green Emerald 2100 45 Avenue NE Salmon Arm, BC, V1E 2A3	Re: Lot 3, Sec 18, Tp 20, Rge 9, W6M KOYD, Plan EPP78527 Parcel Identifier (PID): 030-354-706 Civic Address: 3181 Okanagan Avenue NE, Salmon Arm
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- List of documents registered on title which may affect the location of improvements:
- Statutory Right of Way: CA811185
 - Easement: CA3060066
 - Statutory Right of Way: CA8583185
 - Covenant: CA8583186
 - Easement: CA8583189
 - Covenant: CA7191960



All distances are in metres.
Dimensions derived from Plan EPP78527

Offsets from property line to building are measured from the siding unless otherwise noted

The signatory accepts no responsibility or liability for any damages that may be suffered by a third party as a result of any decisions made, or actions taken based on this document.

This plan was prepared for inspection purposes and is for the exclusive use of our client. This document shows the relative location of the surveyed structures and features with respect to the boundaries of the parcel described above. This document shall not be used to define property boundaries.

This building location certificate has been prepared in accordance with the Professional Reference Manual and is certified correct this 8th day of August, 2020.

Joseph Johnson
G5W5CT

Digitally signed by Joseph Johnson G5W5CT
Date: 2020.08.07 09:03:25 -07'00'

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All rights reserved. No person may copy, reproduce, transmit or alter this document in whole or in part without the prior written consent of BROWNE JOHNSON LAND SURVEYORS.

THIS DOCUMENT IS NOT VALID UNLESS ORIGINALLY OR DIGITALLY SIGNED.

BCLS

CITY OF SALMON ARM

October 13, 2020

Mr. & Mrs. Clark
3181 Okanagan Avenue NE
Salmon Arm, BC V1E 1E6

Dear Property Owner:

Re: Development Variance Permit No. VP-520 – Retaining Wall in Rear Yard
Legal Description: Lot 3, Section 18, Township 20, Range 9, W6M, KDYD, Plan EPP78527
Civic Address: 3181 Okanagan Avenue NE

On August 4, 2020 it was discovered that a retaining wall aligned along the rear parcel line of the subject property had been added onto by the previous owner. The wall addition was constructed without a Building Permit and is now over the maximum allowable height of 2.0 metres, which is a contravention of Section 4.12.1 of The City's Zoning Bylaw No. 2303.

The previous owner, Gary Arsenault (Green Emerald Construction), was advised that a Development Variance Permit application would be required to address the bylaw contravention. On August 25, 2020, the City received an application for a Development Variance Permit (VP-520), which requests to Council to vary the maximum height of a retaining wall in conjunction with a fence from 2.0 metres to 4.5 metres. Please note, the 4.5 metres takes into account a 1.2 metre fence on top of the existing retaining wall should that be your plan.

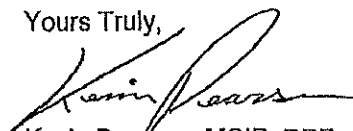
We understand that the property was sold to you on September 21, 2020. Because the application was made by the previous owner, there are several outcomes that you need to be aware of:

1. Should VP-520 proceed to City Council and the height variance not be approved, the wall height will need to be scaled back down to the previous height, which met the Zoning Bylaw requirement.
2. Should VP-520 proceed to City Council and the height variance be approved, you would be required to fulfil the Building Permit requirements for the wall, along with any conditions that Council may require.

In scenario 1., a timeline will be communicated to you for scaling down the wall height. As the previous wall was already at the maximum height, a fence affixed to the top of the wall would not be permitted.

In order to proceed VP-520 to City Council for their review, we require acknowledgment that you wish to proceed with this application and understand the circumstances noted above. Please sign and return this letter to attention of the undersigned via e-mail, kpearson@salmonarm.ca or mail or drop off at City Hall. This letter will be attached to the City staff report to Council with the associated Development Variance Permit application

Yours Truly,


Kevin Pearson, MCIP, RPP

cc. Building Department
Green Emerald Construction, 2100 – 45 Avenue NE, Salmon Arm, BC V1E 2A3

The variance was discussed as part of the purchase and Green Emerald will resolve all related issues as my current contractor.

2020-10-21

Ian Clark

Subject: VP-520-retaining wall

Hello Kevin,

Please find attached the signed acknowledgement as requested.

It should be noted that the current wall extends into the neighbouring property and will be removed (roughly one full block) back to the property line which will reduce the total height at the tallest point.

I have spoken with the three neighbouring property owners who are directly effected and understand that all three are supportive with Lorne @ 3150 1st ave providing a signed letter to Green Emerald, Cooper @ 3161 Okanagan Ave in full support while we collaboratively complete landscaping on both of our properties together and Abbey @ 3220 1st ave commenting that I can go as high as I want (because it improves his privacy).

I am also willing to provide cedar hedging at my expense along the bottom of the wall to improve its appearance for the neighbourhood if Lorne and Abbey would like them planted on their properties.

I would like to attend the session if possible in case there are any concerns I can help address and to understand specifically what is required as far as handrails as any requirements for this variance will be borne by Green Emerald who built the wall and continues on site as my current contractor.

Thank you

Ian Clark

Oct 16, 2020

Lorne and Jennie Plett

3150 First Avenue, NE, Salmon Arm, BC.

To Salmon Arm Council:

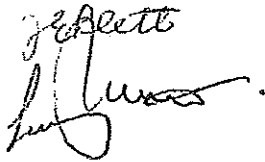
Regarding Variance for retaining wall at 3181 Okanagan Ave, NE, Salmon Arm.

Dear Council,

This wall is at the rear of our property on First Ave.

We have no objection to the wall where it is and its current height.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennie Plett". The signature is written in dark ink and is positioned below the word "Sincerely,".



Approximately 4.3 metres over the maximum permitted height of 2.0 metres.



Approximate area of encroachment.



View of City sanitary sewer manhole in the statutory right of way.

CITY OF SALMON ARM

*Memorandum from the
Engineering and Public
Works Department*

TO: Kevin Pearson, Director of Development Services
 DATE: October 21, 2020
 PREPARED BY: Matt Gienger, Engineering Assistant
 OWNER: **Green Emerald, 2100 – 45 Avenue NE, Salmon Arm, BC V1E 2A3**
 APPLICANT: **Green Emerald, 2100 – 45 Avenue NE, Salmon Arm, BC V1E 2A3**
 SUBJECT: **DEVELOPMENT VARIANCE PERMIT AMENDMENT APPLICATION No. VP-520**

LEGAL: Lot 3, 18-20-9, W6M, KDYD, Plan EPP78527
 CIVIC: **3181 Okanagan Avenue NE**

Further to the request for variance dated September 1, 2020, the Engineering Department offers the following comments:

The applicant has raised the height of the retaining wall and adjacent backyard grade of 3181 Okanagan Ave NE prior to applying for the variance. The retaining wall traverses a statutory right-of-way in favour of the City that protects a sanitary manhole, four services and a sanitary main. In order to lift the backyards, the applicant raised the manhole and services without City authorization.

Engineering and Public Works have visited the site to review the additional retaining wall height and illegal modifications to the adjacent City Sanitary manhole. It was determined that the modifications and retaining wall would not significantly affect access to the City's infrastructure or the ability to operate or maintain the infrastructure.

The existing ROW document registered on title must be amended to address the encroaching retaining wall and state that any removal or replacement costs for the wall should the City require access to our infrastructure will be the responsibility of the property owner.

Recommendation:

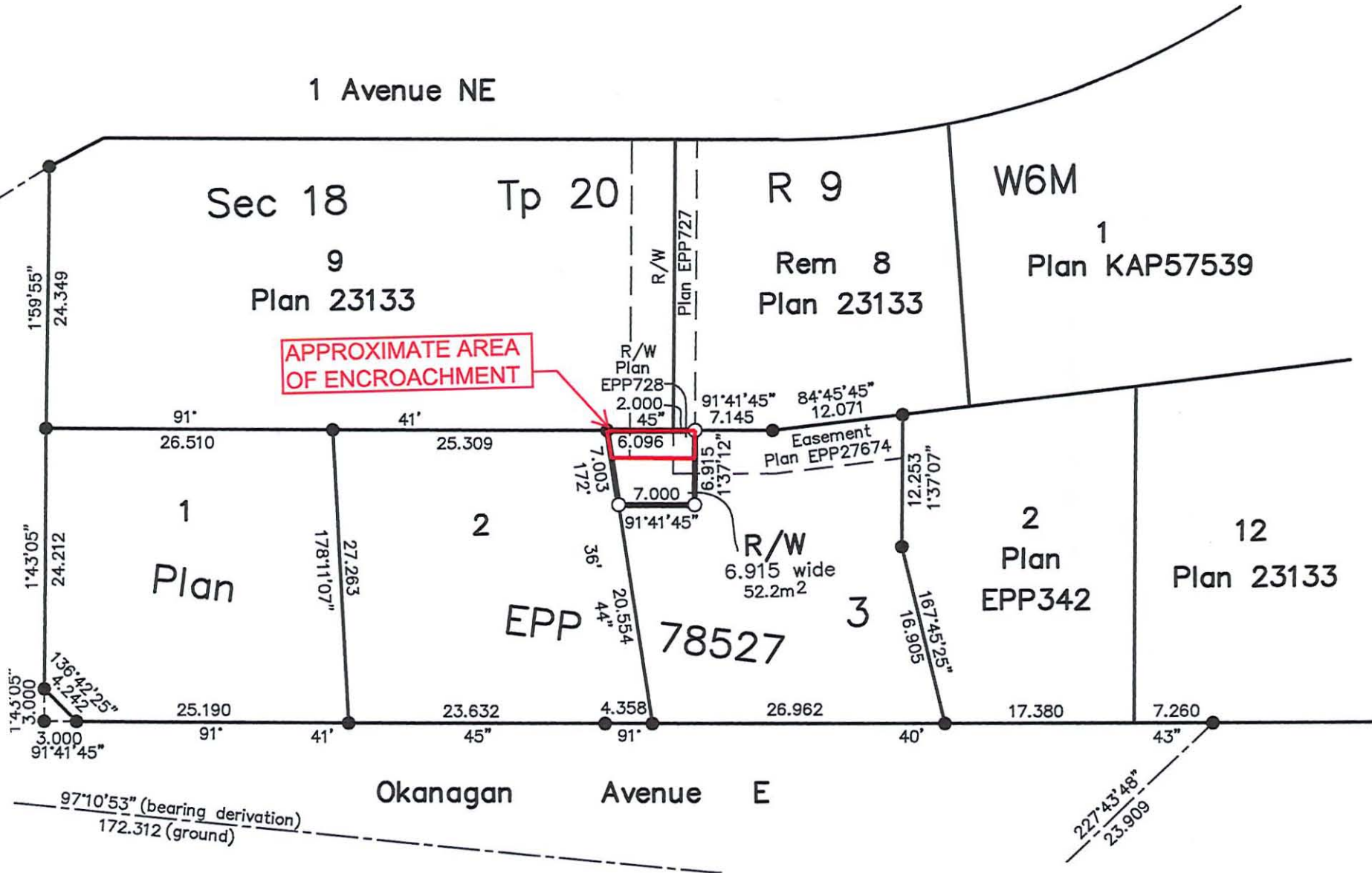
The Engineering Department has no objection to the proposed variance to increase the height of a retaining wall from 2.0m to 3.3m, subject to amending the ROW document to address the retaining wall encroachment.



Matt Gienger
Engineering Assistant



Jenn Wilson P. Eng., LEED® AP
City Engineer



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CITY OF SALMON ARM

To: His Worship Mayor Harrison and Members of Council

Date: October 27, 2020

Subject: Agricultural Land Commission Application No. 398 (Exclusion)

Legal: Lot 1, Section 7, Township 20, Range 9, W6M, KDYD, Plan 1538, Except Plans B4356, B5847, 6971 and 18058
 Civic Address: 4270 10 Avenue SE
 Owner: Stephen and Helen Charlton
 Agent: Browne Johnson Land Surveyors

MOTION FOR CONSIDERATION

THAT: Agricultural Land Commission Application No. ALC. 398 be authorized for submission to the Agricultural Land Commission

STAFF RECOMMENDATION

THAT: The motion for consideration be adopted.

PROPOSAL

The subject property is located on 10th Avenue SE between 37 Street SE and 43 Street SE and north of the Airport. The applicant has made application to the Agricultural Land Commission (ALC) to exclude the subject property (approximately 4.5ha) from the Agricultural Land Reserve (ALR).

BACKGROUND

The subject property is approximately 4.5ha in area, and contains a single family dwelling (Appendix 1 and 2) and is adjacent to the City's Frisbee Golf Course to the east and the CSRD Landfill and City Airport to the south. The subject property is designated Light Industrial in the City's Official Community Plan (OCP), within the Urban Containment Boundary, and zoned A2 – Rural Holding Zone in the Zoning Bylaw (Appendix 3 & 4).

Adjacent land uses include the following:

North: Rural Holding (A-2)/rural residential
 South: Airport (P-2)/CSRD Landfill and City Airport
 East: Rural Holding (A-2)/City owned land/recreation area
 West: Rural Holding (A-2)/residential/agriculture property

It should be noted that by way of ALC resolution #109/88, the ALC endorsed a preplan for this area as the site for the future expansion of the City's industrial land inventory. Consequently, the area was deemed a Special Development Area in the mid 1980's. Further to the endorsement and OCP review, in 2009 the City consulted with property owners in the Special Development Area and advised those owners of the designation. Appendix 5 is a map of the Special Development Area and the ALR boundary. For lands within this area the ALC endorses the Exclusion of these lands, provided the lands are rezoned to Industrial, which is supported in the OCP designation. If the application is approved by the ALC, the subject property would be required to proceed with a Zoning Bylaw amendment to rezone the property to M2 (Light Industrial Zone). At the time of writing this report, the applicant is assembling materials for the submission of a

rezoning application.

Soil Classification and Agricultural Capability is considered by the ALC in determining the suitability of land for agricultural uses. The ALC relies, in part, on the Land Capability Classification for Agriculture in their decisions. Under this classification system the best agricultural lands are rated Class 1 because they have the ideal climate and soil to allow a farmer to grow the widest range of crops. Class 7 soils are considered non-arable, with no potential for soil bound agriculture. Based on the Land Capability Classification for Agriculture, The subject property has an Improved Soil Class Rating of 70% Class 5 and 30% Class 4. A copy of the Improved Soil Class map is attached as Appendix 6.

COMMENTS

Public Input

Pursuant to the *Agricultural Land Reserve Act*, a sign was posted by the applicant advising that an application had been made. The sign also directed members of the public, that feel that their interests may be affected, should submit their comments directly to the City and/or ALC prior to October 23, 2020. Newspaper ads were placed in the October 2 and October 8 editions of the Salmon Arm Observer. Two (2) letters of support for the application was submitted with the application package and is enclosed as Appendix 7 – one letter is authored by a local realtor and notes land inventory constraints and the market need for an expansion to the industrial land base within the City. The second letter received is from the Economic Development Society which notes their support for an expansion of the City's industrial land base.

Engineering Department

No concerns with ALC exclusion application.

The City will secure road reserves and dedications from the owner/developer at the Development Permit or Subdivision stage, whichever comes first, as conditions for approvals and to align with the Advanced Street / Servicing Plan. Upgrading the roads and servicing fronting and through the property to the Industrial Standard of the SDS Bylaw will be required at development / subdivision stages.

The north east corner of the subject property is within the aerial easement area that restricts trees, building and structure heights in order to preserve clearance for the airport runway. The requirement to register an easement protecting clearance for the airport runway will be addressed in more detail at the time of rezoning.

Building Department

No concerns.

Fire Department

No concerns.

Agricultural Advisory Committee

Due to the COVID-19 pandemic and the suspension of all City Committees, Commissions and Panels this application was not referred to the Agricultural Advisory Committee.

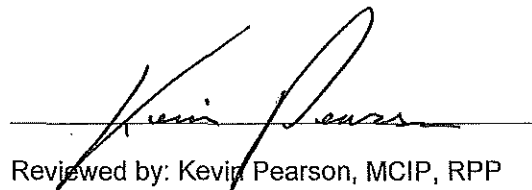
Planning Department

This application was received prior to September 30, 2020 and was processed under the ALC application regime in which the property owner could make an application for Exclusion directly with the ALC, then the application is forwarded to the City for review and comment. All Exclusion applications after September 30, 2020 require that the Local Government act as the applicant. Staff are currently reviewing application procedures to evaluate how to incorporate the legislation changes.

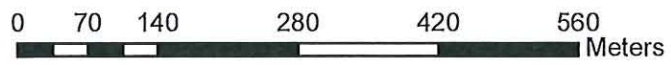
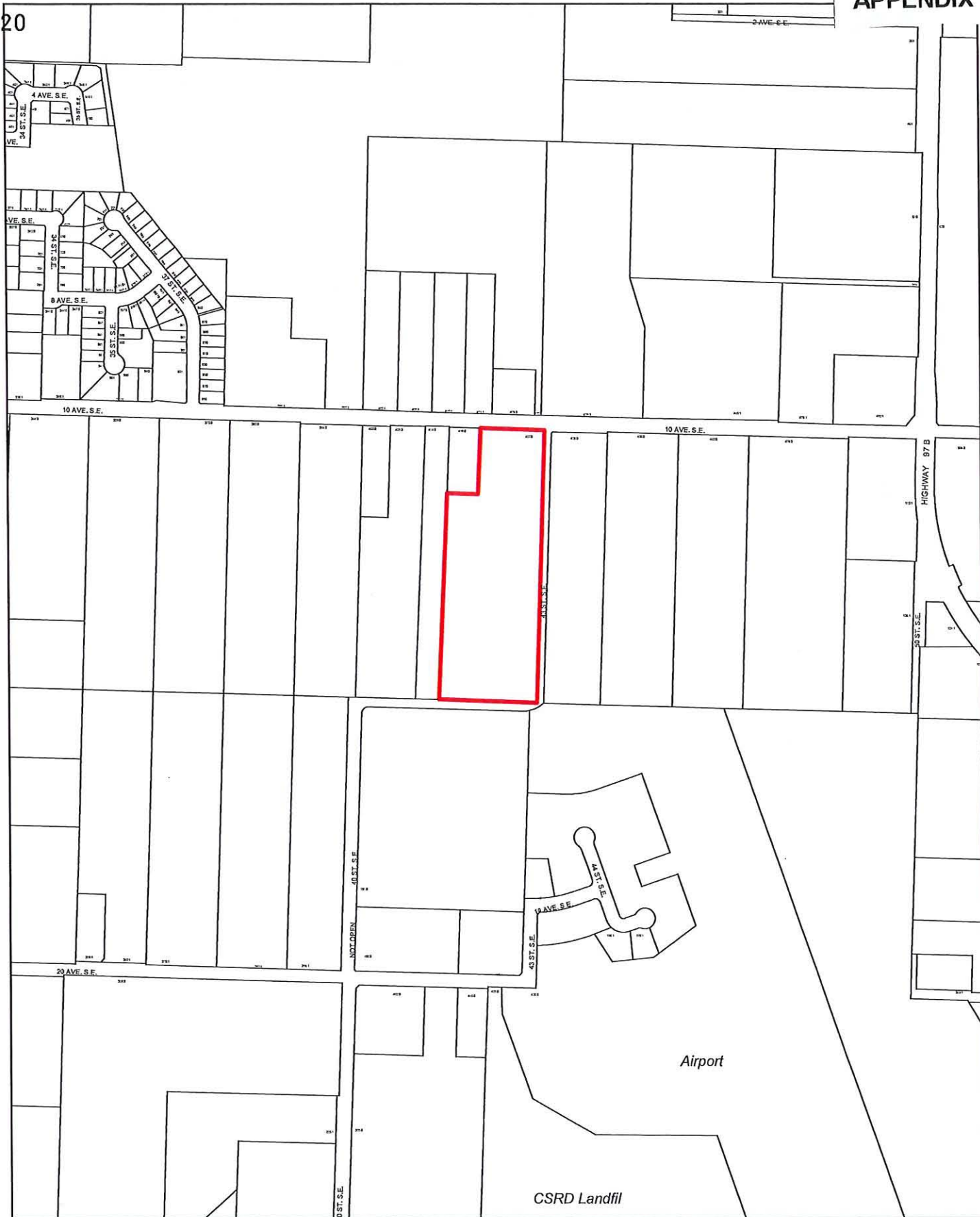
Given that the subject property is within a Special Development Area that has been identified in the OCP and endorsed by the ALC since 1988 and the applicant's proposal is consistent with the pre-plan design staff are supportive of the ALC Exclusion application. Since the ALC's endorsement supporting the Exclusion of the subject property and adjacent lands from the ALR expressly for the expansion of the City's industrial land base, the City has made investments toward developing a road and service network plan to have in place in preparation for development in this area. In situations in which there is an 'endorsed' area the ALC's CEO may expedite the decision-making process; however, the ALC would make the determination on eligibility for an expedited review of the application at the time that they consider the Exclusion. With regard to next steps, should the Exclusion application be supported, this area is in the "Industrial Development Permit Area" meaning a Form / Character DP is necessary to address architectural form and character, site planning and landscaping.




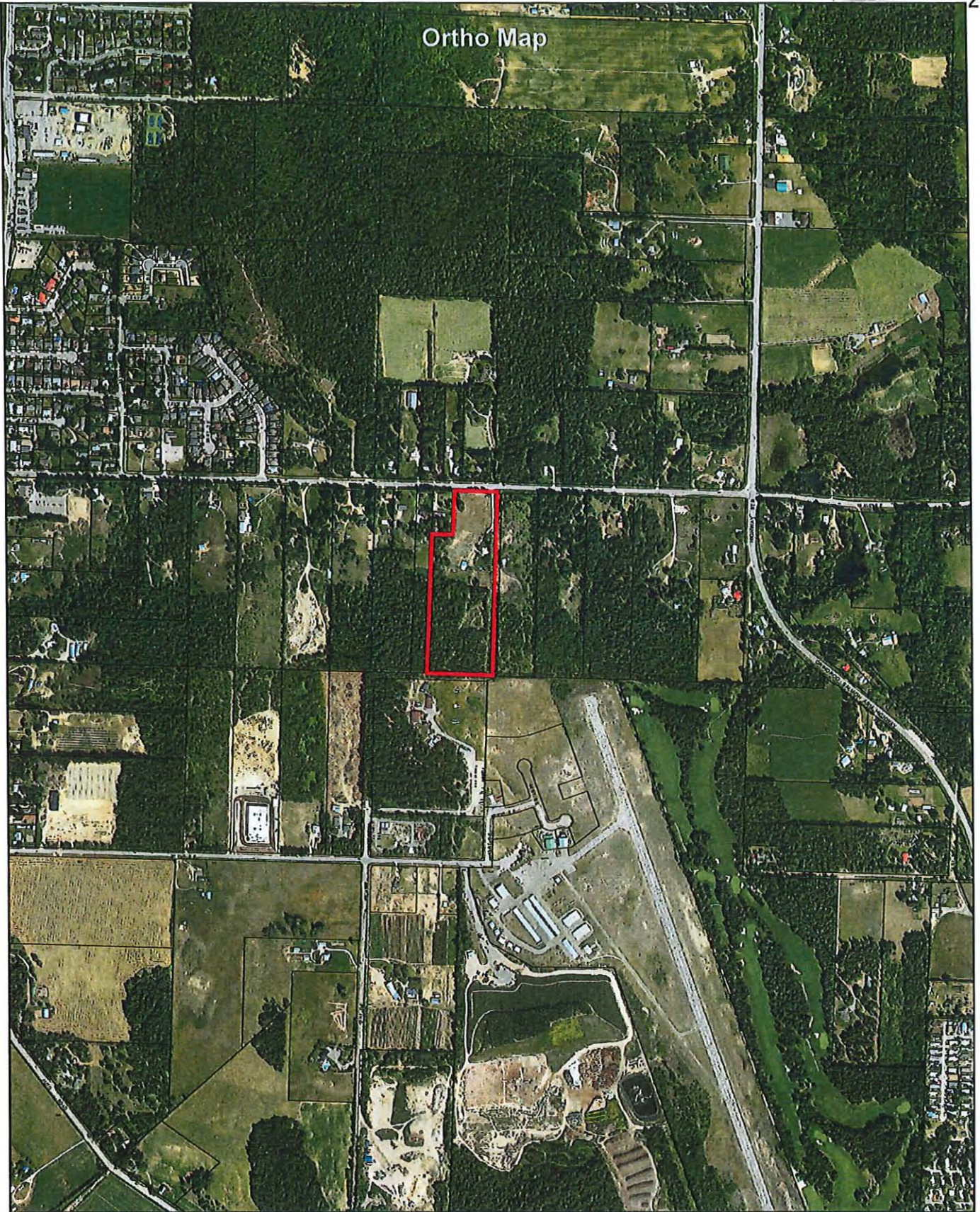
Prepared by: Melinda Smyrl, MCIP, RPP
Planner



Reviewed by: Kevin Pearson, MCIP, RPP
Director of Development Services



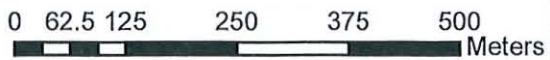
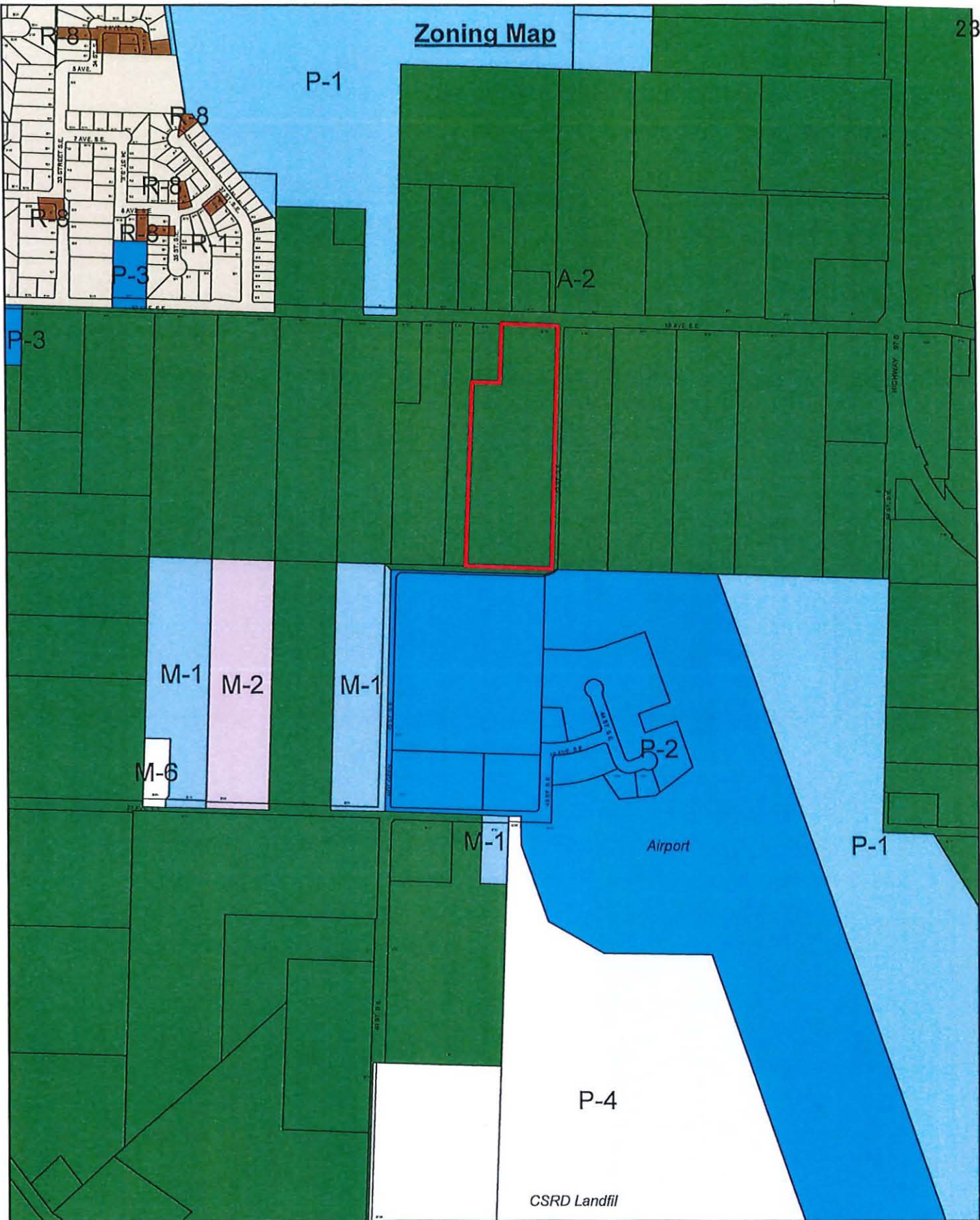
 Subject Property












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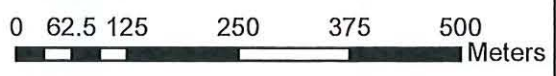
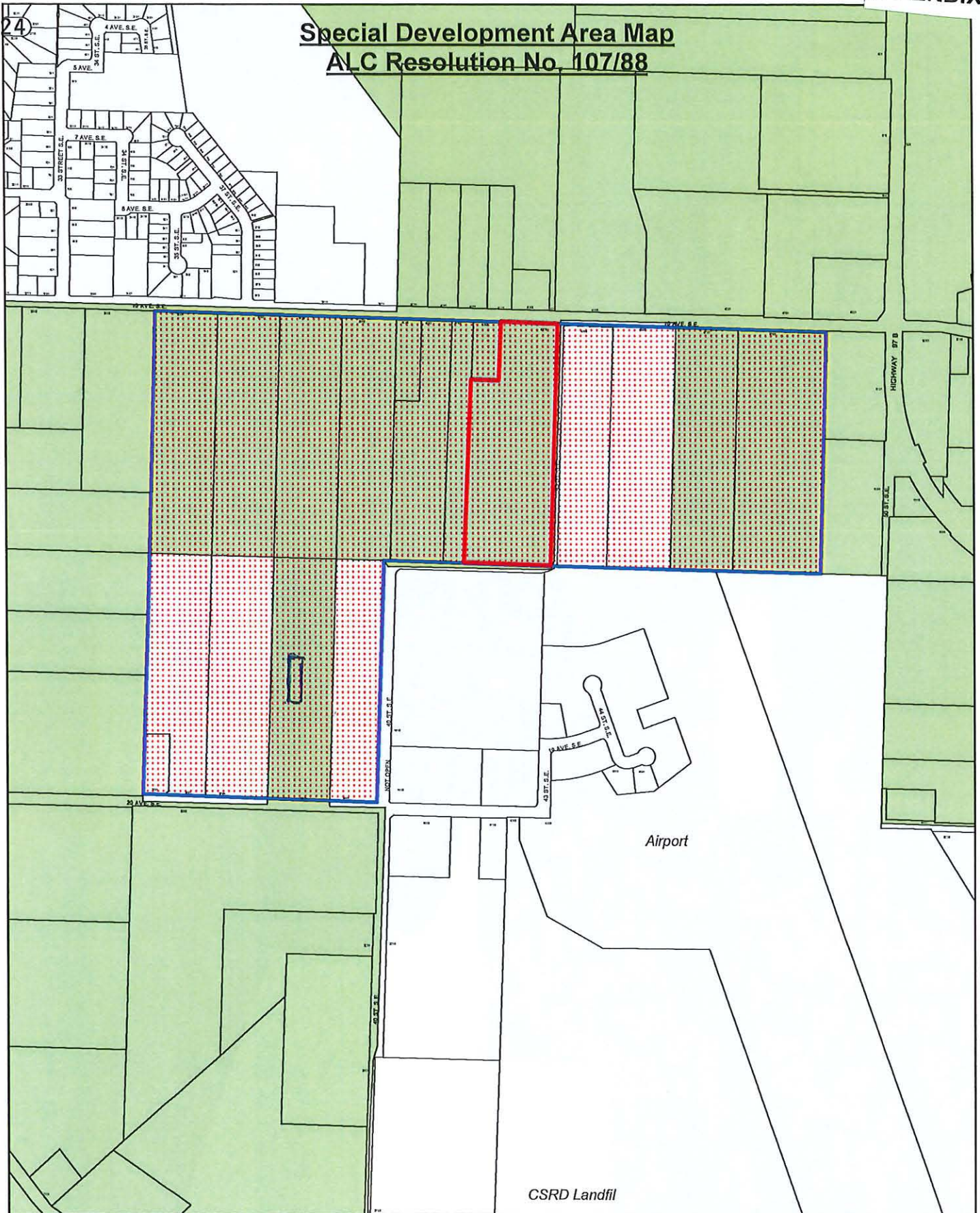
 Subject Property




Zoning Map

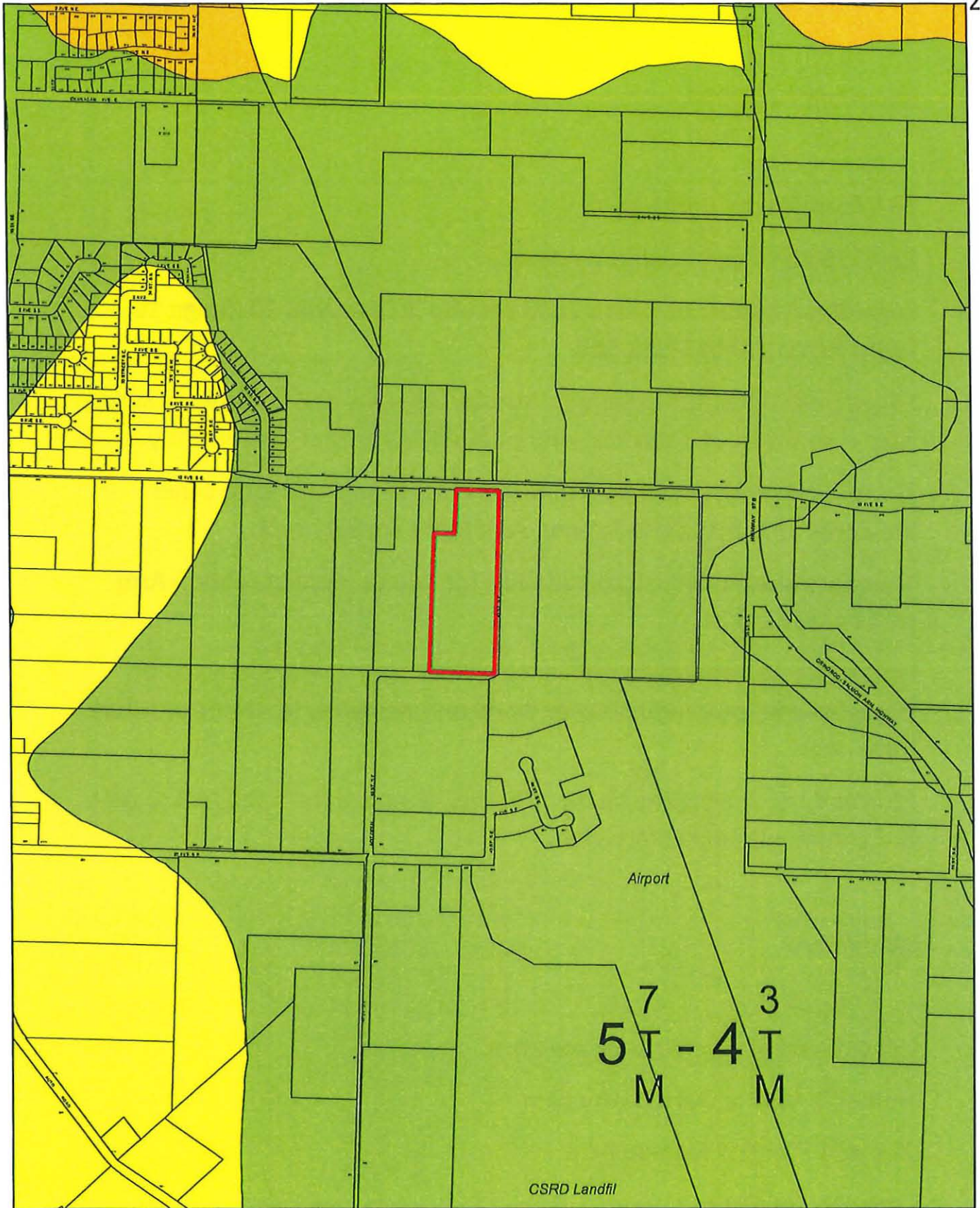


	Subject Property		A-2		P-1		R-1
	M-1		P-2		R-8		
	M-2		P-3				

Special Development Area Map ALC Resolution No. 107/88



-  Subject Property
-  Special Dev Area (ALR Reso N.107/88)
-  ALR



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Meters

 Subject Property **Unimproved Soil Class**
 CLASS 3
 CLASS 4
 CLASS 5

September 23 2020

To Whom it may Concern

Re 4270 10th Ave SE Salmon Arm BC

**Legal Description Lot 1 Plan 1538 Section 7 Township 20 Range 10
W6M KDYD PID 011-518-596**

I have been a Realtor in Salmon Arm for 30 years and have never seen such a shortage of industrial land or buildings as there is currently.

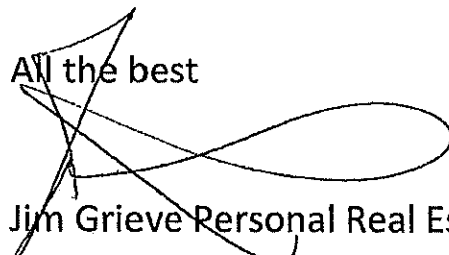
There is currently one 8.9 acre property for sale, there is no other industrial land for sale in Salmon Arm that I am aware of.

There are also no industrial buildings for sale or lease in Salmon Arm that I am aware of.

I get contacted approximately once a week from people looking for shops, buildings or industrial land and unfortunately let them know we have none

I full endorse having the above property removed from the ALR to help our community move forward

All the best



Jim Grieve Personal Real Estate Corp

Homelife Salmon Arm Realty.com

251-404 TCH NW Salmon Arm

Cell 250 833 6312



September 23, 2020

To Whom It May Concern:

Salmon Arm Economic Development Society (SAEDS) is a non-profit organization with a mandate to support and provide services to existing businesses, attract new businesses to the community and assist in developing strategies and programs to foster economic development and prosperity in our community.

Included in the services SAEDS provides is site selection support to prospective investors. Salmon Arm is a vibrant city with strong population growth trends over the last decade. Recently BC stats identified Salmon Arm as the fastest growing municipality in British Columbia, with a 9.3% growth rate. Additionally, last year Maclean's magazine named Salmon Arm the number one best place to live in Western Canada. Coinciding with this population growth and favourable public exposure, Salmon Arm has seen increased demand for light industrial space from both domestic and international investors.

In our work supporting interested investors over the last few years, we have been increasingly challenged to source available light industrial properties to meet investment inquiries, and, in many cases, have been unsuccessful in doing so.

SAEDS staff feel the lack of available light industrial zoned buildings is a barrier to the current and future economic development of our city.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lana Fitt", is written over a light blue circular stamp.

Lana Fitt
Economic Development Manager
Salmon Arm Economic Development Society

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CITY OF SALMON ARM

To: His Worship Mayor Harrison and Members of Council

Date: October 27, 2020

Subject: Agricultural Land Commission Application No. 397 (Inclusion and Exclusion)

Legal: The Fractional Legal Subdivision 4 of Section 1, Township 21, Range 10, W6M, KDYD, Except Plans 31 and 8077

Civic Address: 1281 70 Avenue NE

Owner/Applicant: Richard and Margret Smith

MOTION FOR CONSIDERATION

THAT: Agricultural Land Commission Application No. ALC. 397 be forwarded to the Agricultural Land Commission.

STAFF RECOMMENDATION

THAT: The motion for consideration be defeated.

PROPOSAL

The subject parcel is located at 1281 70 Avenue NE (Appendix 1 and 2). As shown on Appendix 3, the property is bisected by the Agricultural Land Reserve (ALR). The applicant is proposing both an Inclusion into the ALR (Appendix 4) and an Exclusion of land from the ALR (Appendix 5). The site plan submitted by the applicant in support of their application is attached as Appendix 6.

BACKGROUND

The parcel is designated Acreage Reserve in the City's Official Community Plan (OCP) and is outside the Urban Containment Boundary. The subject property is zoned A2 – Rural Holding Zone and P1 – Park and Recreation zone (waterfront portion) in the Zoning Bylaw (Appendices 7 & 8). A single family dwelling, and four (4) 'agricultural buildings' are on the property. The siting of the buildings, constructed closer than the required 15.0m setback, were sanctioned by a Development Variance Permit in 2013.

Adjacent zoning and land uses include the following:

North: Rural Holding (A-2)/ rural residential/
Park and Recreation Zone (P-1)/CP Rail/Shuswap Lake

South: Rural Holding (A-2) / rural residential

East: Rural Holding (A-2) / rural residential

West: Rural Holding (A-2) / rural residential
Park and Recreation Zone (P-1)/CP Rail/Shuswap Lake

The total area of the subject property is approximately 6.2ha (15.3ac) and includes land on both sides of 70 Avenue NE. There is also a portion of the subject property north of the CP Railway tracks. The applicant submitted a drawing in support of their application that indicates the area that they are proposing to be excluded from the ALR is approximately 1.8ha (4.4ac) and an equivalent portion of 1.8ha (4.4ac) to be included into the ALR. Using the approximate locations shown on this map in conjunction with ALR data the map included as Appendix 9, created by staff, shows that there is approximately 2.6ha (6.45ac) proposed to be excluded from the ALR and 1.9ha (4.7ac) of land proposed for inclusion into the ALR. The applicant provided supplemental mapping after making their application to the ALC and in that mapping the

areas proposed to be included in the ALR total 1.66ha and the area proposed to be excluded from the ALR is 2.43ha. Table 1 provides of a list of the various proposed areas and sources. Ultimately, the final areas for exclusion and inclusion would be determined by the ALC in their decision.

Table 1. Proposed Areas

	Inclusion Area	Exclusion Area
Maps submitted with ALC Application (Appendix 6)	1.8ha	1.8ha
Maps created by staff (Appendix 9)	1.9ha	2.6ha
Maps submitted October 20, 2020 (Appendix 14)	1.66ha	2.43ha

Based on the land Capability Classification for Agriculture, the best agricultural lands are rated Class 1 because they have the ideal climate and soil to allow a farmer to grow the widest range of crops. Class 7 is considered non-arable, with no potential for soil bound agriculture. Based on the Land Capability Classification for Agriculture, The property has an Improved Soil Class Rating of 60% Class 4 and 40% Class 5. A copy of the Improved Soil Class map is attached as Appendix 10. A site-specific agrologist's report was not provided in support of the application.

According to the ALC application, the applicant has stated that they seek to take the "flat arable land" into the ALR and "swap it for the steep non-arable land that is not in the ALC. The current ALR land is covered in Mature Fir trees which protect it from sloughing, The ALR land is restricted from clearing by local government bylaw identifying land as geotechnically at risk" (see Appendices 4 and 5). It should be noted that the A2 zone encourages agricultural land uses and permits farming whether the land is within the ALR or not.

OFFICIAL COMMUNITY PLAN

The OCP includes the following guidelines and general policies related to on Rural and Agricultural lands within the City.

Objectives

- 7.2.1 Maintain the rural and agriculture character and land use pattern of open space, agriculture, forestry and rural/country residential lands outside of the Urban Containment Boundary.

General Policies

- 7.3.3 Maintain or enhance the configuration and size of parcels designated Acreage Reserve, Salmon Valley Agriculture and Forest Reserve through boundary (lot line) adjustment and/or consolidations; rezoning, subdivision and/or Agricultural Land Reserve exclusion applications are not encouraged.
- 7.3.12 Support the maintenance and enhancement of lands for agricultural use within the Agricultural Land Reserve.

In contemplating decisions regarding the ALR, the 2004 Agricultural Area Plan recommends that given the responsibilities and expertise to implement provincial policy that the City defer decisions related to the development of agriculture lands to the ALC.

COMMENTS

Public Input

Pursuant to the *Agricultural Land Reserve Act*, a sign was posted by the applicant advising that an application had been made. The sign also directed members of the public that feel that their interests may be affected to submit their comments directly to the City and/or ALC prior to October 23, 2020. Newspaper ads were placed in the September 20 and October 7 editions of the Salmon Arm Observer. City staff

received two letters regarding the applications. In the ALC Exclusion application process, the City may be in receipt of letters from neighbours in advance of receiving notice that an application has been made.

The letters from neighbouring property owners are attached as Appendices 11 and 12. The letters do not indicate support. The applicant also submitted letters in support of the application and in response to the letters from neighbours. The applicant's letters and supplemental information is included as Appendix 13. The applicant also provided additional site plans on October 21, 2020 and are included as Appendix 14.

Engineering Department

No comments received.

Building Department

No concerns.

Fire Department

No concerns.

Agricultural Advisory Committee

Due to the COVID-19 pandemic and the suspension of all City Committees, Commissions and Panels this application was not referred to the Agricultural Advisory Committee.

Planning Department

Staff have no comment regarding the inclusion application as the OCP guidelines and policies are silent on ALR inclusions. The City has no policy on ALR 'land exchanges' or 'no-net loss' proposals. Informally the ALC had accepted applications of similar 'no-net loss' format and may have supported these in the past; however, staff have been advised by the ALC that is a policy that is no longer in practice at the ALC. The applicant's proposal to result in a 'no-net loss' of land in the reserve by 'trading' areas is an example of an unplanned proposal in which there has been no long term planning, policies or regulations that provide explicit direction.

Staff acknowledge written communications in August 2016, when the applicant discussed the idea of an ALR land swap as a possible means to legalize the accessory building that was subject to the recent Non-Farm Use application. The idea at that time of excluding the home plate area (where the principal dwelling, accessory buildings and driveway accesses are located) is approximately 375 m², and staff thought a proposal that would involve that area of home plate being excluded in exchange for the lower bench, non ALR portion of land being included could potentially be supported by the Planning Department. Senior ALC staff soon followed up on that idea the same month and did not offer support. Three years after that the Non-Farm Use application related to the accessory building proposed for a detached suite was not supported by the ALC.

Development Potential

In these types of scenarios staff assess the application on the basis of future development potential should an application such as this be supported. The submission provided with the application is not specific in terms of next steps and future development potential. Given the effort required to make an ALC exclusion application and the limited amount of information provided by the applicant, staff are providing a short summary of development potential for the property. Should the exclusion be supported the area of land unaffected by the ALR would be approximately +/- 4.0ha. To clarify, the only OCP policy that may support subdivision in the Rural Area is subdivision for a relative if the parent parcel is a minimum 8ha, not in the ALR and the proposal meets all sections of 514 of the *Local Government Act*. The parent lot size alone negated subdivision potential.

The applicant could apply to rezone the property to A3 (Small Holdings) and satisfy the 2.0ha parcel minimum; however, the OCP provides clear direction on this point and the rezoning of lands from A2 to A3

is only supported in the Gleneden area. Also, given the state of the adjacent roads, topography and servicing required, subdivision could be considered unfeasible. Again, the OCP polices related to Rural and ALR policies would not support rezoning or subdivision in the Acreage Reserve area for the same reasons the ALR Exclusion application is not supported – discouraging rezoning and subdivision applications as a means to maintaining or enhancing the existing configuration and size of parcels designated Acreage Reserve in the OCP. Furthermore, the OCP also discourages development outside of the Urban Containment Boundary.

Existing buildings on the subject property include a single family dwelling and four 'agricultural buildings'. Building Permits for 'agricultural buildings' are not required when a building is constructed for agricultural purposes, on land classified as Farm by BC Assessment and the occupancy does not exceed 40m²/person. The existing 'agricultural buildings' did not require Building Permits.

A detached secondary unit is not an outright permitted structure or use under the ALR regulations. As noted in the Table 2 below, this property was the subject of a previous ALC Non-Farm Use related to the possible conversion of one of the 'farm buildings' to a detached secondary dwelling and the application was rejected by the ALC. The A2 zone allows for detached secondary dwellings. Should the Exclusion be supported, one of the four 'farm buildings' could be converted to a detached secondary dwelling. The applicant would then have to apply for a Building Permit and pay Development Cost Charges.

In the ALC applications the applicant notes that the subject property is encumbered by topographical challenges and geotechnical hazards, indicating this as rationale to 'swap' the ALR designation. City records indicate that there are slopes greater than 30% that affect the property and any potential development. As with any proposed development in an area with similar topography, development approvals would only be supported with assessments completed by a Registered Professional Engineer following best engineering practices.

Application Procedures

This application was received prior to September 30, 2020 and was processed under the ALC application regime in which the property owner could make an Exclusion application directly with the ALC; the application is then forwarded to the City for review and comment. All Exclusion applications after September 30, 2020 require that the Local Government act as the applicant. Staff are currently reviewing application procedures to evaluate how to incorporate the legislation changes.

Conclusion

With the new Exclusion application methodology imposed by the ALC staff is concerned with receiving high volumes of exclusion requests similar to this one, which may make sense to the individual landowner of have practical merits, but are not aligned with the City's Growth Management, Rural and ALR Polices of the OCP. Support of this application may bolster expectations for exclusion support, ALR subdivision approvals and non-farm use development by other ALR property owners, and the exclusion application the City will be tasked to make a decision whether to take on the role as the applicant for each request.

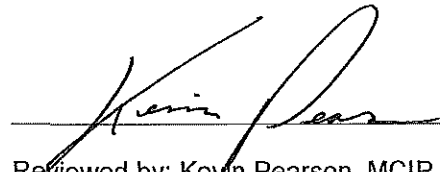
OCP polices regarding ALR exclusions in this instance are inconclusive. The excerpts from the OCP mentioned in the above section encourage the alignment of the ALR boundary as is and encourage farm uses on properties appropriately sized and zoned for that purpose. Table 2 below highlights recent decisions regarding the subject property and other ALR exclusions that have been processed recently. As noted, none of the applications progressed. Staff have no comment regarding the Inclusion application and are recommending that the application for Exclusion not be forwarded to the ALC for a decision.

Table 2. Previous ALR Applications

Applicant	Application Type	Decision	ALC Decision
Smith (1281 70 Ave NE)	Non-Farm Use	Staff Support	ALC Rejected
Balen (6751 Lakeshore Rd NE)	ALC Exclusion/Inclusion	Staff Support	Council defeat
Sonmor (3101 10 Ave (TCH) SW)	ALC Exclusion	Staff Support	Council defeat
Stevenson (3191 10 Ave (TCH) SW)	ALC Exclusion	Staff Support	Council defeat



Prepared by: Melinda Smyri, MCIP, RPP
Planner



Reviewed by: Kevin Pearson, MCIP, RPP
Director of Development Services

Shuswap Lake

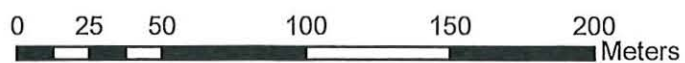
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991
70 AVE NE

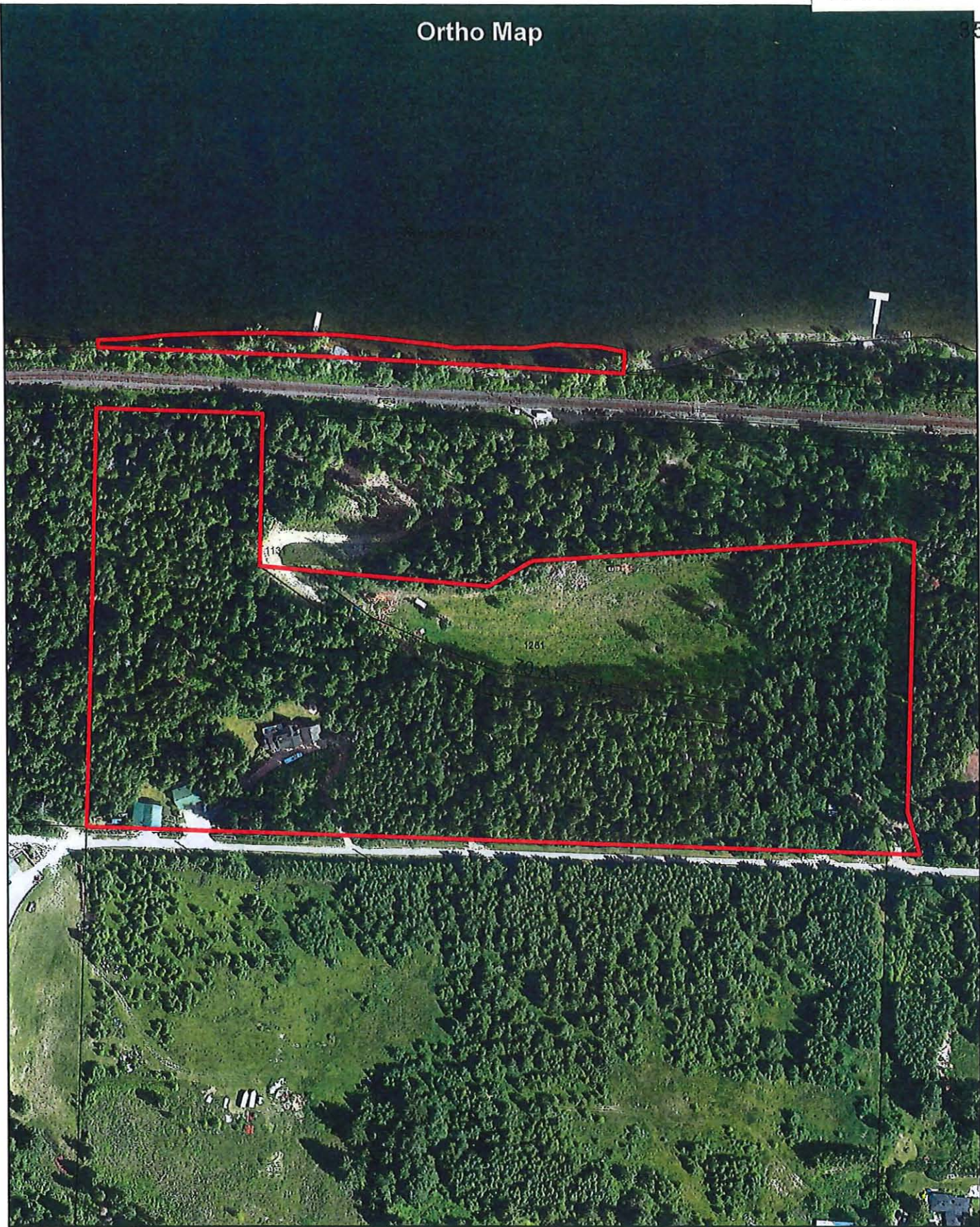
1281
70 AVE. N.E.

LOT OPEN



 Subject Property

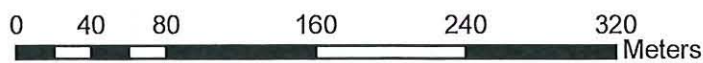
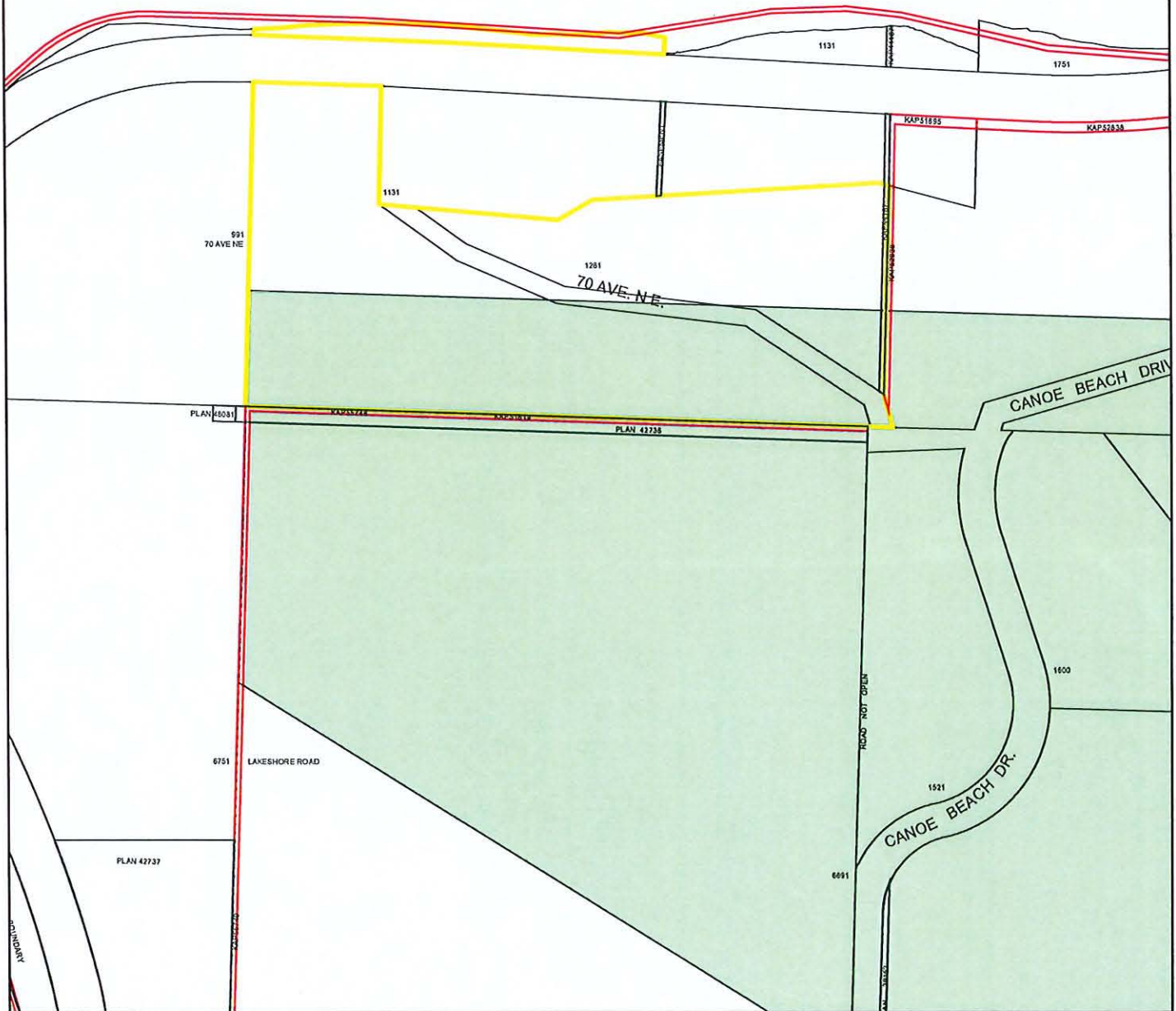
Ortho Map



 Subject Property

Agricultural Land Reserve (ALR) Map

Shuswap Lake



ALR
 Subject Property

Provincial Agricultural Land Commission - Applicant Submission

Application ID: 61443

Application Status: Under LG Review

Applicant: Richard Smith , Margaret Smith

Local Government: City of Salmon Arm

Local Government Date of Receipt: 09/24/2020

ALC Date of Receipt: This application has not been submitted to ALC yet.

Proposal Type: Exclusion

Proposal: To make the flat arable land on my property in the ALR and swap it for the steep non-arable land that is not in the ALR. The Current ALR land is covered in Mature Fir trees which protect it from sloughing. The ALR land is restricted from clearing by local government bylaw identifying land as geotechnically at risk

Mailing Address:

1281 70 Ave NE box 1903

Salmon Arm, BC

V1E 4P9

Canada

Primary Phone: (250) 832-5975

Mobile Phone: (250) 832-2513

Email: richard@tekamar.ca

Parcel Information

Parcel(s) Under Application

1. **Ownership Type:** Fee Simple

Parcel Identifier: 007-498-047

Legal Description: LS4Section 1 Township 21 Range 10 W6M KDYD Except Plan 31 & 8077
Fractional Legal Subdivision 4

Parcel Area: 6 ha

Civic Address: 1281 70 Ave NE.

Date of Purchase: 10/30/1991

Farm Classification: Yes

Owners

1. **Name:** Richard Smith

Address:

1281 70 Ave NE box 1903

Salmon Arm, BC

V1E 4P9

Canada

Phone: (250) 832-5975

Cell: (250) 832-2513

Email: richard@tekamar.ca

2. **Name:** Margaret Smith

Address:

1281 70 Ave NE box 1903



Applicant: Richard Smith , Margaret Smith

Salmon Arm, BC
 V1E 4P9
 Canada
 Phone: (250) 832-5883
 Cell: (250) 832-2513
 Email: marg@thesmithclan.ca

Current Use of Parcels Under Application

1. Quantify and describe in detail all agriculture that currently takes place on the parcel(s).

35 Laying Hens

17 fruit trees

1.5 acres of pasture 4-6 Sheep On non ALR land.

300 Haskap bushes on 1/4 acre planted 2017 and 2018 irrigated on non ALR land

Old Cherry Orchard with about 15 trees remaining from previous owner .

More land cleared awaiting tree planting 2019 on nonalr land .5 acre

2. Quantify and describe in detail all agricultural improvements made to the parcel(s).

Chicken barn built 1995

2.5 acres of land cleared 2012 Non ALR

Planted with nut trees 2013 trees survived until drought 2014 2015 years so land fenced and Sheep pastured 4-8 per year. 1.5 acres on Non ALR

2018 Haskap bushes planted with irrigation 2017 and 2018 300 bushes on Non ALR

8 Fruit trees planted on Non ALR land

6 fruit trees on ALR land near home

Shop built for storage and repair of vehicles and equipment 2002

3. Quantify and describe all non-agricultural uses that currently take place on the parcel(s).

House built 1992

Secondary residence built 1998

Adjacent Land Uses

North

Land Use Type: Other

Specify Activity: Shuswap lake and one cabin on 6 acre parcel

East

Land Use Type: Residential

Specify Activity: Vacant land in Alr used for junk storage

South

Land Use Type: Other

Specify Activity: Vacant Alr land used for container and Garbage/junk storage

West

Land Use Type: Residential
Specify Activity: one home on 10 acres

Proposal

1. How many hectares are you proposing to exclude?

1.8 ha

2. What is the purpose of the proposal?

To make the flat arable land on my property in the ALR and swap it for the steep non- arable land that is not in the ALR. The Current ALR land is covered in Mature Fir trees which protect it from sloughing. The ALR land is restricted from clearing by local government bylaw identifying land as geotechnically at risk

3. Explain why you believe that the parcel(s) should be excluded from the ALR.

*The land being proposed to include is currently being used as farm land with Farm status. This land is flat and the site of an 80 year old cherry and tree orchard which we have put back into ALR production. It was covered with 20 year old fir at the time of clearing
The land currently in the ALR is too steep to clear and farm . The ALR land currently is in mature fir trees and protects a steep bank from erosion . The city will not allow us to clear it for fear of the bank sloughing and taking out their road. The current ALR land also has our home on it , a shop chicken coop and a secondary building .*

Applicant Attachments

- Proof of Signage - 61443
- Proof of Serving Notice - 61443
- Proposal Sketch - 61443
- Proof of Advertising - 61443
- Other correspondence or file information - Agent letter
- Certificate of Title - 007-498-047

ALC Attachments

None.

Decisions

None.

Provincial Agricultural Land Commission - Applicant Submission

Application ID: 61439

Application Status: Under LG Review

Applicant: Richard Smith , Margaret Smith

Local Government: City of Salmon Arm

Local Government Date of Receipt: 09/23/2020

ALC Date of Receipt: This application has not been submitted to ALC yet.

Proposal Type: Inclusion

Proposal: To make the flat arable land on my property in the alr and swap it for the steep no arable land that is not in the alr. The Current ALR land is covered in Mature Fir trees which protect it from sloughing. The AIR land is restricted from clearing by local government bylaw identifying land as geotechnically at risk

Mailing Address:

1281 70 Ave NE box 1903

Salmon Arm, BC

v1e 4p9

Canada

Primary Phone: (250) 832-5975

Mobile Phone: (250) 832-2513

Email: richard@tekamar.ca

Parcel Information

Parcel(s) Under Application

1. **Ownership Type:** Fee Simple

Parcel Identifier: 007-498-047

Legal Description: LS4Section 1 Township 21 Range 10 W6M KDYD Except Plan 31 & 8077

Fractional Legal Subdivision 4

Parcel Area: 6.9 ha

Civic Address: 1281 70 Ave NE.

Date of Purchase: 10/01/1991

Farm Classification: Yes

Owners

1. **Name:** Richard Smith

Address:

1281 70 Ave NE box 1903

Salmon Arm, BC

v1e 4p9

Canada

Phone: (250) 832-5975

Cell: (250) 832-2513

Email: richard@tekamar.ca

2. **Name:** Margaret Smith

Address:

1281 70 Ave NE box 1903

Applicant: Richard Smith , Margaret Smith

Salmon Arm, BC
 V1E 4P9
 Canada
Phone: (250) 832-5883
Cell: (250) 832-2513
Email: marg@thesmithclan.ca

Current Use of Parcels Under Application

1. Quantify and describe in detail all agriculture that currently takes place on the parcel(s).

*35 Laying Hens 17 fruit trees 1.5 acres of pasture 4-6 Sheep On non ALR land.
 300 Haskap bushes on 1/4 acre planted 2017 and 2018 irrigated on non alr land
 Old cherry orchard with about 15 trees remaining from previous owner . MOre land cleared awaiting
 tree planting 2019 on nonalr land .5 acre*

2. Quantify and describe in detail all agricultural improvements made to the parcel(s).

*Chicken barn built 1995
 2.5 acres of land cleared 2012
 Planted with nut trees 2013 trees survived until drought last 2 years so land fenced and Sheep pastured
 4-8 per year. 1.5 acres
 2018 Haskap bushes planted with irrigation 2017 and 2018 300 bushes
 Shop built for storage and repair of vehicles and equipment 2002*

3. Quantify and describe all non-agricultural uses that currently take place on the parcel(s).

House built 1992

Secondary residence built 1998

Adjacent Land Uses

North

Land Use Type: Other

Specify Activity: shuswap lake and one vacant 6 acre parcel

East

Land Use Type: Unused

Specify Activity: vacant land in Alr used for junk storage

South

Land Use Type: Other

Specify Activity: Vacant Alr land used for container and junk storage

West

Land Use Type: Residential

Specify Activity: one home on 10 acres

Proposal

Applicant: Richard Smith , Margaret Smith

1. How many hectares are you proposing to include?

1.8 ha

2. What is the purpose of the proposal?

To make the flat arable land on my property in the alr and swap it for the steep no arable land that is not in the alr. The Current ALR land is covered in Mature Fir trees which protect it from sloughing. The AIR land is restricted from clearing by local government bylaw identifying land as geotechnically at risk

3. Does the proposal support agriculture in the short or long term? Please explain.

The land being proposed to include is currently being used as farm land with Farm status. This land is flat and the site of a 80 year old orchard which we have put back into ALR production. It was covered with 20 year old fir at the time of clearing

The land currently in the ALR is too steep to clear and farm . The ALR land currently is in mature fir trees and protects a steep bank from erosion . The city will not allow us to clear it for fear of the bank sloughing and taking out their road. the current ALR land also has our home on it , a shop and a secondary building .

4. Describe any improvements that have been made to, or are planned for the parcel proposed for inclusion.

Drip Irrigation to site

300 Haskap bushes planted

10 fruit Trees

2 acres Fenced and currently used for sheep pasture

one more acres available of flat land available for clearing and more farming

Applicant Attachments

- Proposal Sketch - 61439
- Certificate of Title - 007-498-047

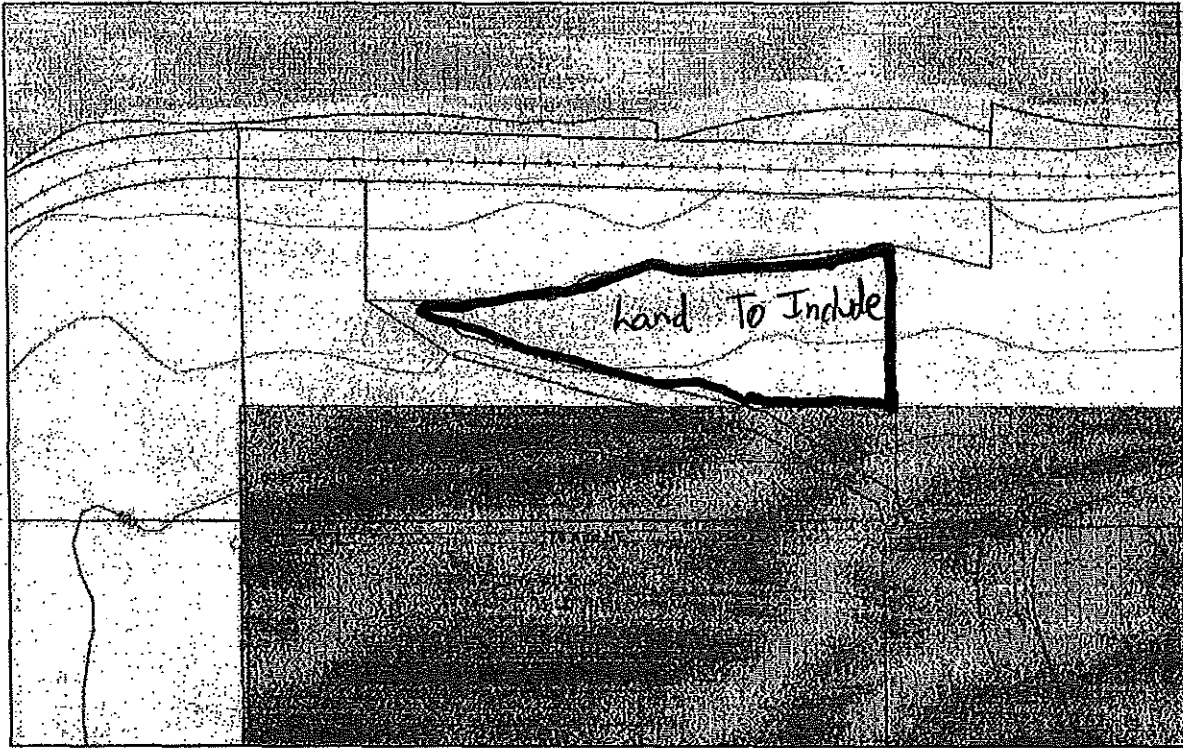
ALC Attachments

None.


Decisions


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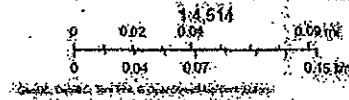
ALR Property and Map Finder



2020-09-23, 12:05:18 p.m.

 ALR Polygons

 ParcelMap BC Parcel Fabric

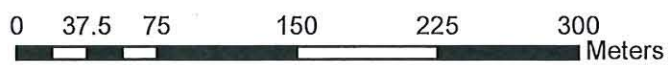
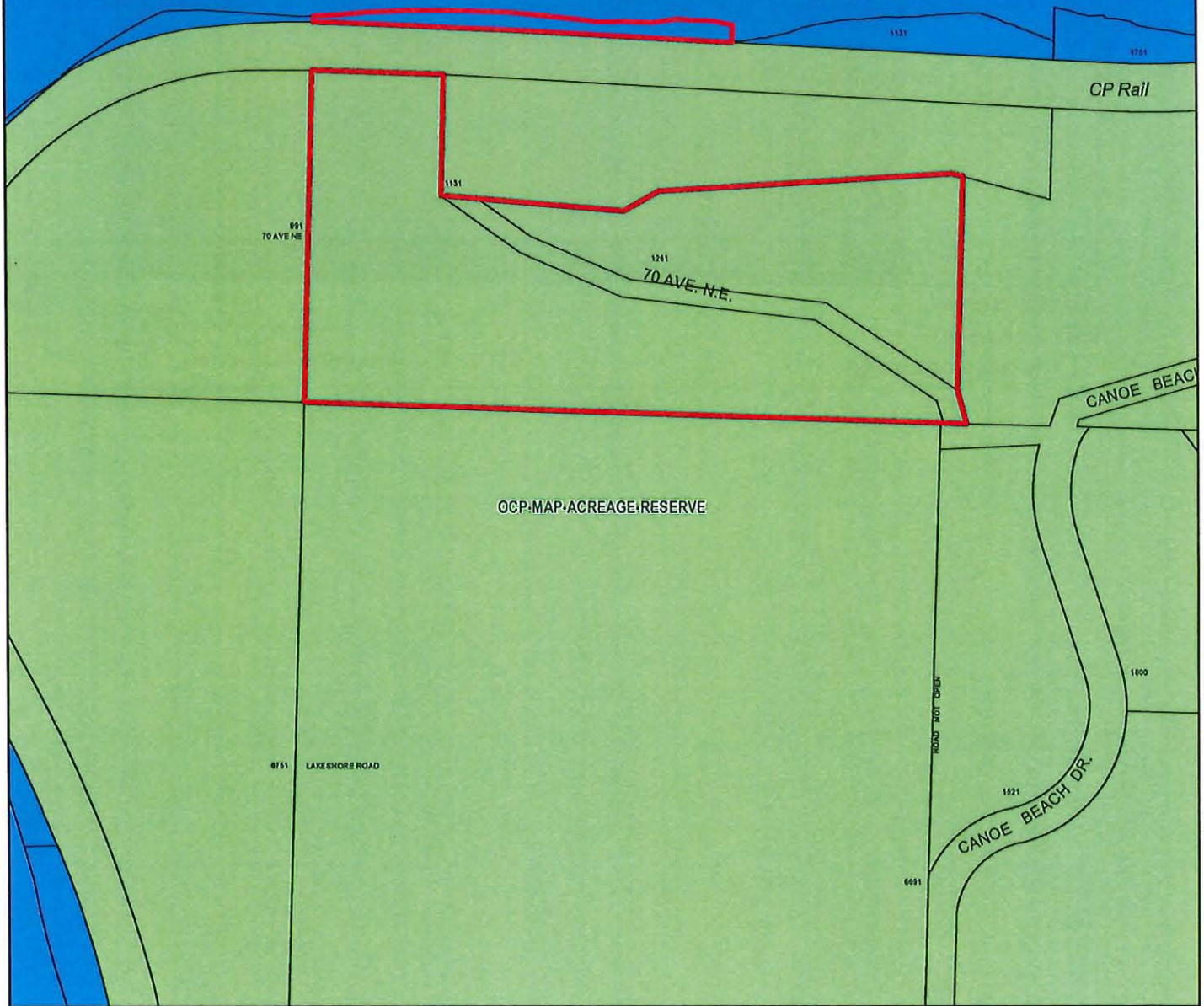


British Columbia Land Commission. The parcel information is for informational purposes only and does not represent the current state of the ALR.

Official Community Plan (OCP) Map

Shuswap Lake

OCP-MAP-LAKE_RECREATION



- Subject Property
- Acreage Reserve
- Lake Recreation

Zoning Map

Shuswap Lake

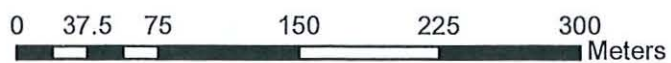
P-1



CP Rail

CANOE BEACH

A-2

P-1

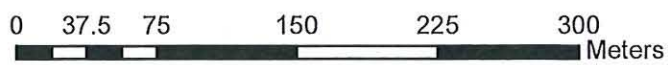
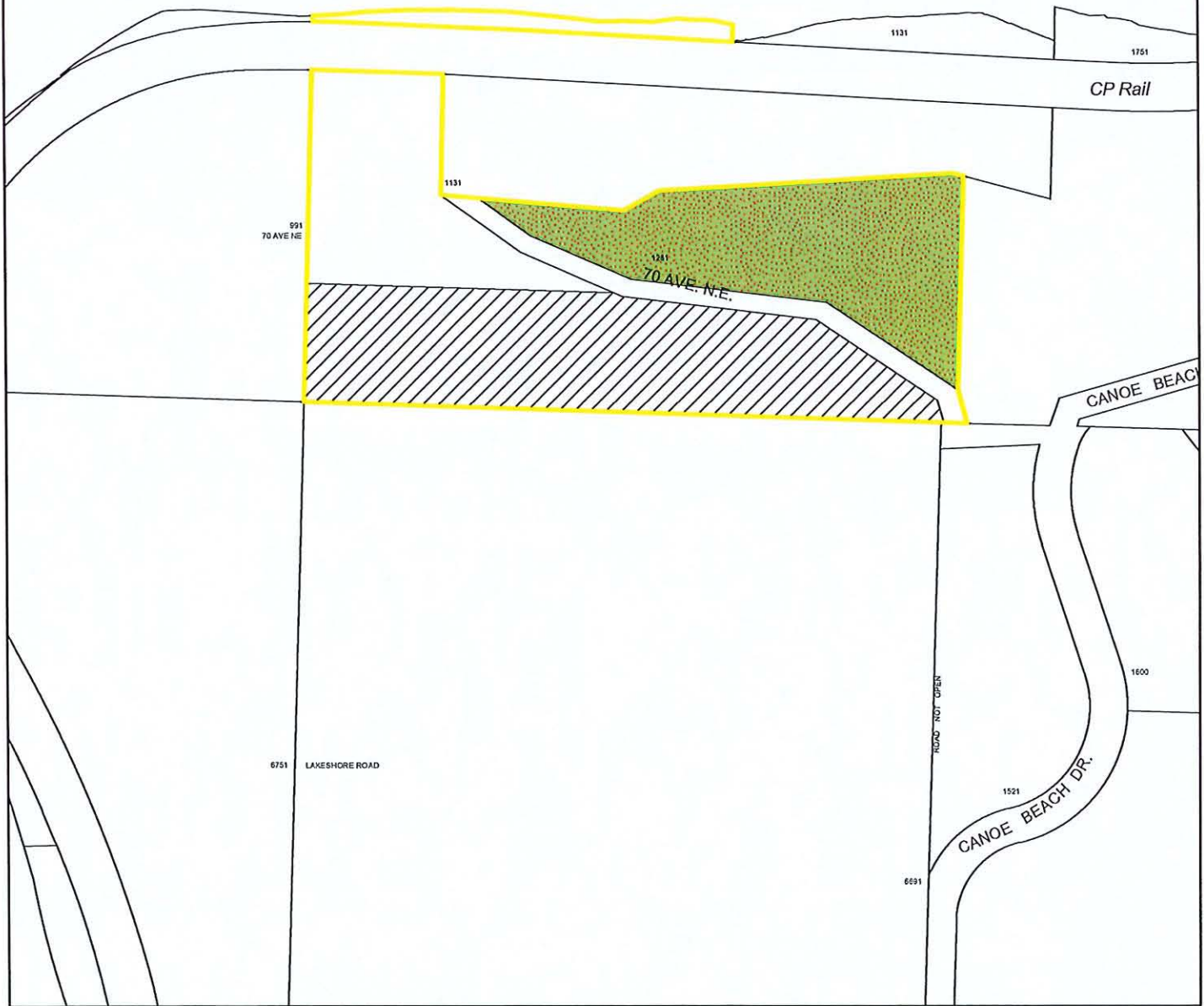


 Subject Property  A-2  P-1

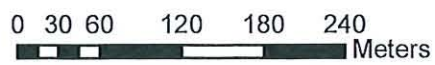
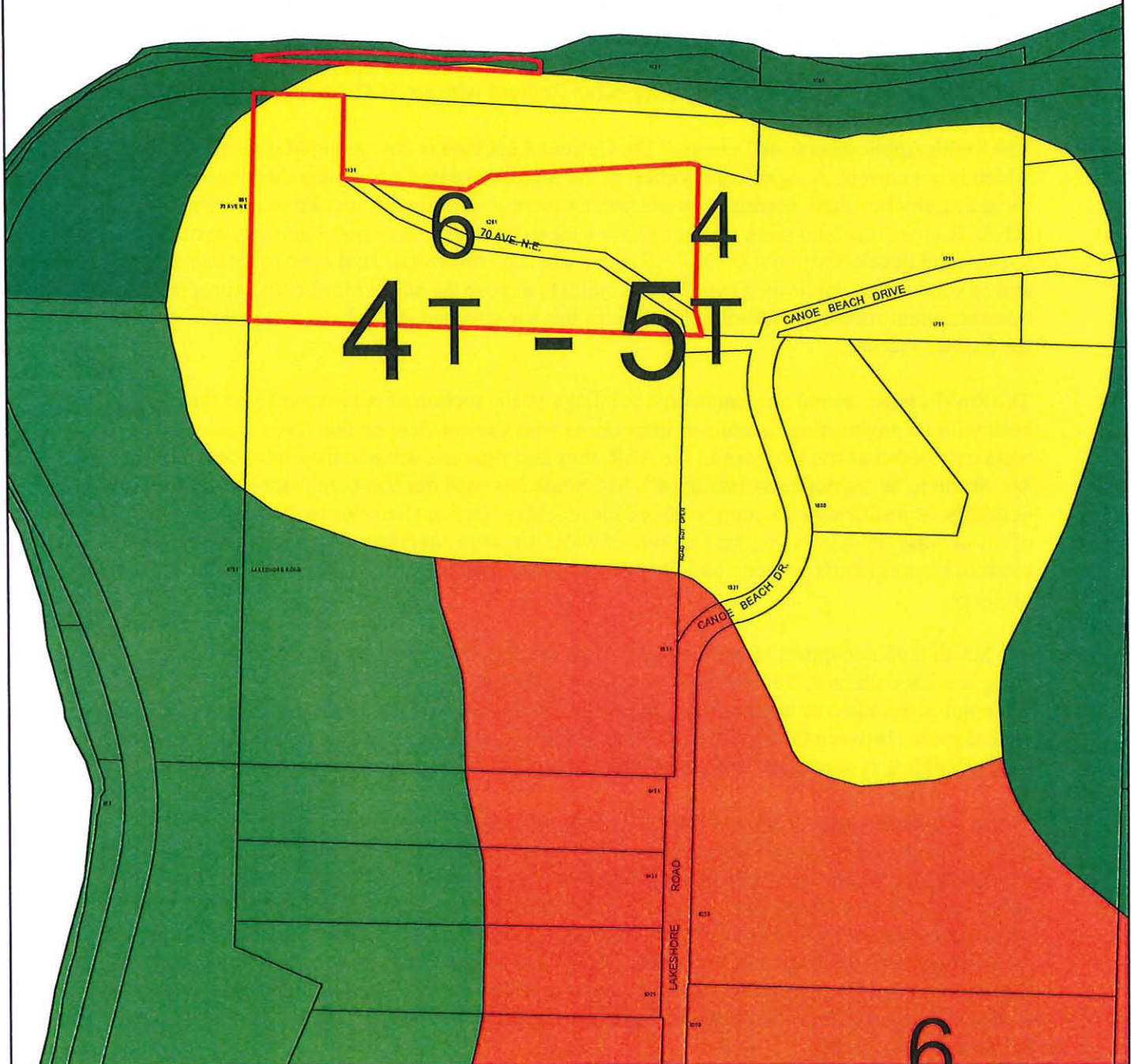
46

Agricultural Land Reserve (ALR) Map

Shuswap Lake



-  Subject Property
-  Proposed Exclusion Area (approx. 6.45ac)
-  Proposed Inclusion Area (approx. 4.7ac)



Legend	Unimproved Soil Class
	Subject Property
	CLASS 2
	CLASS 4
	CLASS 6
	CLASS 7

Provincial Agricultural Land Commission – Applicant Submission – ID 61443

Richard Smith, Margaret Smith - application for removal of land in the ALR

This application must not be allowed to proceed for the following reasons

The application appears to be a further attempt by the Smiths to manipulate the ALC, local government bylaws, zoning and code requirements to have a non-compliant second residence on the property used as a rental. Please review all information submitted to the ALC and Local government regarding the Smith **Application ID: 58273** which was received by the local government 12/18/2018 and the City of Salmon Arm File No. ALC-380. This application continued through the process, ultimately being Refused with an ALC Decision, 03/Jun/2020.

The Smith Application 61443 claims "The Current ALR land is covered in Mature Fir Trees..." which is not correct. A significant portion of the Smith's claimed agriculture development, including chicken shed, garden, claimed fruit trees and self defined agricultural buildings are in the ALR area. This land swap would remove a significant portion of his claimed current agricultural development out of the ALR and leave it on residential land open to further zoning and or subdivision applications while continuing to expose the adjacent residential properties to non-compliant zoning violations and activities that the city, and ALC, have explicitly instructed the Smiths to cease.

The Smiths have several non-compliant buildings on the section of land currently in the ALR built without engineering, permits or inspections with the justification that these requirements were not needed as the land was in the ALR, they had right to farm and they were deemed by Mr. Smith to be "agricultural buildings". Mr. Smith has used his non-compliant agricultural buildings as justification in court to attack his neighbor. He has used this section of land as part of his defense for demanding the removal of water drainage structures designed to protect the roads to his neighbor's property and for the removal of fences on the adjacent agricultural property

Mr. Smith does not appear to be forthright about the neighboring properties or how they are being used and utilized. To the east is an agricultural property with a 6000 square foot building pad engineered and constructed for an agricultural building which has been put on hold until the legal disputes between the Smiths and the neighboring properties has been resolved. Engineering for the building is completed and a schedule "B" for this site has been submitted to the city.

To the south, the entire section of land proposed to be removed from the ALR is immediately adjacent to an active agricultural property to with a greenhouse development currently stalled due to actions filed in the courts by the Smiths. It must be noted that Mr. Smith appears to be venomously opposed to this development. It would appear that the Smiths have taken every action and opportunity to disrupt the neighboring agricultural development, including petitions to council regarding development, suing this neighboring property owner over the construction of fences, disputing the installation of a cattle guard, plugging culverts and demanding the removal of drainage and stabilization structures designed to protect a shared road easement through / to the farm development.

Please note the Smiths referencing the agricultural development of the property to the south, where heavy equipment and tree farm machinery is parked, in derogatory statements as in his current application where it states "Vacant ALR land used for container and Garbage/junk storage".

Inclusion of the area the Smith application claims to be agricultural would place ALR land directly adjacent to non ALR land to the east and to a lakefront lot to the north with significant future residential potential.

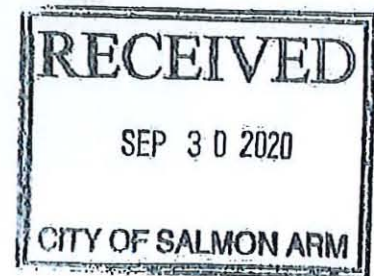
Removing the ALR area of the Smith property while making the area the Smiths claim to be agricultural would create a small ALR "island" with marginally viable agricultural capabilities, significantly separated from all other ALR land. Please notice the Smiths note this in their application the loss of the nut trees in this area due to drought a mere 1-2 years after they were planted, even though the Smiths claim to have irrigation. Creating a small ALR island within residential properties could set a serious precedent within the ALR.

Mr. Smith recently disputed the neighboring properties request to do a similar land swap that would have created a continuous unit within the ALR while removing a small section of marginally viable agricultural land. The land swap that Mr. Smith disputed on the neighboring agricultural property would have been far more productive in the ALR than his current proposal and was part of the development for young farmers in Salmon Arm to which Mr. Smith has opposed.

The area the Smiths are proposing to put into the ALR was a well-established and productive cherry orchard. Using historical photographs of the area it is noteworthy that all but a couple of the viable trees have been removed leaving a non-irrigated slightly sloped piece of property that is good for grazing at this time. It is noted by Mr. Smith he has only been able to graze 4 or 5 sheep in that area, observations are for three months or so in the summer, and monitoring the quality of the feed it is not recommended that anything else should be allowed to graze in that area for any length of time as the vegetation dries up and has low food value.

Currently the section of property that the Smiths propose to put into the ALR is at the end of a significant length of undeveloped road that is the legal access to the property to the east and the only legal access to the properties below. There is no legal access defined off of that road to the Smith's property. Mr. Smith has himself referred to the section of road as a trail and recently used it for a logging operation resulting in substantial damage to the travel surface and access / egress with logging equipment from the area he claims in his application as "geotechnically at risk".

Bret Wiseman
 1751 Canoe Beach Drive
 250 540 6874
~~Bret Wiseman~~
 Bret.a.wiseman@gmail.com



Objection to Provincial Agricultural Land Commission – Applicant Submission – ID 61443
Richard Smith, Margaret Smith - application for “Exclusion” of land in the ALR

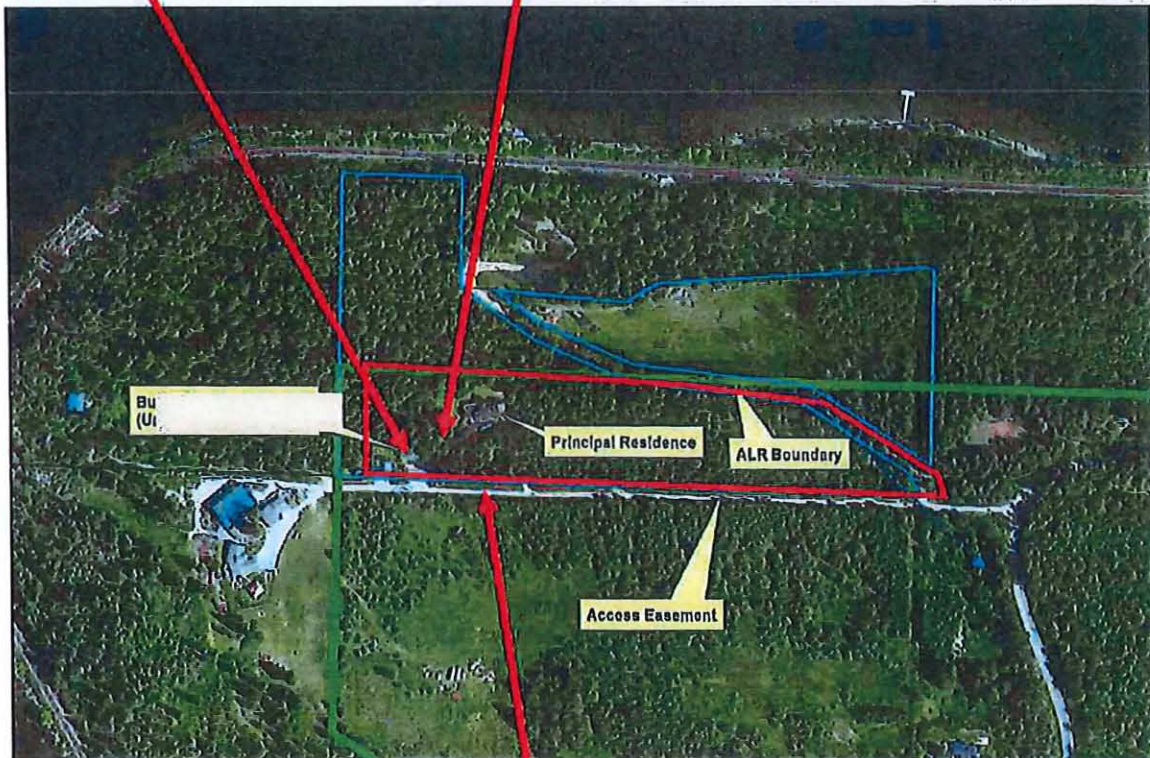
This application should not be approved for the following reasons:

1. The applicant has claimed farm status or developing farm status for the property for most of the time they have owned the property and all the early development of farm was done in the portion now being applied for exclusion such as:
 - a. Chicken barn built in 1995 and in use today, 25 years later is in the requested exclusion area.
 - b. The building built in 1998 was previously claimed to be an agricultural building for agricultural storage with small quarters for farm help for the last 22 years and is in the exclusion area.
 - c. The agricultural building built in 2002 for storage and repair of agricultural equipment and in use today after 18 years of farm development is in the exclusion area.
2. The “Secondary Residence” listed in the application was built without permits or approvals as an agricultural building. The City has previously indicated via email that this building is an agricultural building and could not be used as a human residence.
3. The applicant has spent more than 25 years developing and claiming the exclusion area as a viable agricultural operation and it should clearly remain in the ALR as it is definitely an essential and important part of this active farming property as claimed by the applicants in earlier submissions throughout the years.
4. The applicants have shown substantial interest and activism in preserving all ALR land even to the point of organizing objection petition and actively canvassing neighbors for objections against another ALC Exclusion application in the area a couple of years ago where the Exclusion area was 0.21ha and the Inclusion area was 0.63ha.
5. Lack of respect for the ALC application procedure and posting the required signage contrary to ALC specifications partially obscured by shrubs.



Agricultural Storage/Shop
Built 2002

Agricultural Building
Built 1998



Chicken Barns
Built 1995

With 20+ years put into developing a farm on the proposed exclusion area it appears that this land should certainly stay in the ALR, especially with the continuing farm development on the rest of the property.

Sincerely,

Mark Balen
Adjacent property owner
mark.balen@shaw.ca
1131 – 70th Ave NE
6691 Lakeshore Road NE

Provincial Agricultural Land Commission – Applicant Submission – ID 61439

Richard Smith, Margaret Smith - application for "Inclusion" of land in the ALR

Since our 1130 – 70th Ave property is only accessible via 70th Ave and the "Inclusion" area is only accessible via 70th Ave, I would not object to this application IF the City of Salmon Arm enforces its bylaws and:

1. Defines a City approved approach from 70th Ave to the Inclusion area for the commercial farm development.
2. Prohibits and stops the applicant from damaging the road by driving off the edge of 70th in unapproved sections as the applicant has done in the past contrary to the engineering report the City required be done several years ago by myself.
3. City of Salmon Arm protects the public road and ensures access to our 1131 – 70th Ave property will not be compromised.

Provided the City of Salmon Arm fulfills its obligation to enforce its bylaws, protect the public road and access to our adjoining property I would fully endorse the applicant's "Inclusion" proposal to the ALC's Agricultural Land Reserve.

Sincerely,

Mark Balen
Adjacent property owner
mark.balen@shaw.ca
1131 – 70th Ave NE
6691 Lakeshore Road NE

Melinda Smyrl

From: Richard Smith <richard@tekamar.ca>
Sent: October-19-20 3:54 PM
To: Melinda Smyrl
Subject: RE: ALR Application for Inclusion and Exclusion - Input Received
Attachments: Wiseman ALC letter rebuttal oct 2020.docx; Rebuff to Balens comments oct 202.docx; Smith and Smith v Balen and Balen; WP_20171208_002.jpg; Balens Cabin on Easement may 2017.jpg

Thank you very much Melinda. We have lived very well with our neighbours, raised 3 boys and taught them how to garden and farm for the first 20 years. Balens arrived from Alberta and wanted to drive us out. Unfortunate I have had to have 2 lawsuits which we have won both to protect our property from these people that appeared to want to drive us off after they were unable to buy our land when a realtor approached us. They bought 4 neighbouring properties. We got along fine with wiseman for 20 years also but Balen has led Brett along sort of letting him believe he will fund Wisemans grandiose pipe dreams and as a result has become a proponent of Balens methods. Neither of them appear very smart and Ms Balen is quite verbally offensive swearing at us and makes derogatory statements. Read the judges comments pages 20-22 of the court hearing to confirm of the nuisance they have caused including suing the city. This has wasted countless hours for us and the city . I apologize to everyone involved for more time being spent.

Attached are the following

- 1] Rebuff to Wisemans comments I numbered each paragraph and replied to each paragraph . Please provide council with each of Wisemans paragraphs numbers 1-10
- 2 Rebuff to Balens comments
3. Judges court order court decision from us suing them in BC supreme court.
- 4.. BC small Claims court decision awarding us for him wrecking pavement on our shared road. It also shows Balens business partner who was going to buy land if he could have subdivided as trying to mislead the judge as a professional
5. Pictures of fallen un-engineered wall . you tell me if it looks like junk around it. Wall fell 4 months later
6. Non permitted cabin picture

From: Melinda Smyrl <msmyrl@salmonarm.ca>
Sent: October 19, 2020 10:05 AM
To: Richard Smith <richard@tekamar.ca>
Subject: ALR Application for Inclusion and Exclusion - Input Received

Good morning Mr. Smith,

I've attached input that was received regarding your applications to include and exclude land from the ALR.

I'm working on the staff report this week and it is scheduled to be received by the Planning and Development at their meeting on November 2, 2020 and then Council on November 9, 2020. Once the report has been reviewed for the

Planning and Development Committee Agenda I will forward it to you. If you wish to add input to be submitted to the Committee and Council please provide that input prior to October 22.

Kind regards,

Melinda Smyrl, MCIP, RPP | Planner | Development Services Department
Box 40, 500-2nd Avenue NE, Salmon Arm, BC, V1E 4N2 | P 250.803.4011 | F 250.803.4041
E msmyrl@salmonarm.ca W www.salmonarm.ca

CITY OF
SALMONARM



BE CLIMATE ACTION
COMMUNITY 2018

Oct 19 202

Replies to Brett Wisemans Statements

Please note I have Numbered his paragraphs as it is so long it would be difficult to comment otherwise. I apologize for the long-winded explanation. Mr. Wisemans comments are misleading. I feel obligated to defend myself as I feel his accusations are defamatory and slanderous.

Paragraph 1

This would allow our 2nd residence to become legal as the city recommended to the ALR when we did apply for a non-compliant use within the ALR. This swap would then allow the second residence to conform to current zoning. It would provide cheap housing for someone. It is now vacant which is a waste as it was built to BC building code and we rented it for \$750 per month to a very nice lady, Lis Mezie, who helped us with our farm work. She now has to commute from Sunnybrae. We will give her the chance to move back and rent for the same rate if this is approved. I will be happy to provide the rental contract if this is approved.

Para # 2

I have a 2 plums 1 peach, 1 Apple and one pear tree on the current ALR land The rest of the developed land is covered by homes driveways secondary buildings, a garden and lawns. This land is permanently taken out of Agriculture production. The rest is Mature fir on a sloping and partly steep hillside the city has designated a potential slide area. It makes much more sense to have the flat land currently farmed as ALR. The way it currently is I think I can clear the trees under the ALR act for farming purposes without the city's approval which would cause slope instability to the city's main water line .

Para #3

Incorrect. The buildings they were built without permit as we had farm status at time of building or prior to farm status were built without permit as per city rules at the time of building. The final building built was permitted and had engineering. There was no defense needed to enforce court order. Balens built a fence and other structures in direct defiance to a registered easement and the registered city's right of way. We have taken this to court and the Balens were court ordered to follow the easement rules. The judge found them highhanded and causing a deliberate nuisance. See pages of the judge's findings pages 22. The water drainage etc. was a non-issue for the period from 1990 to 2012. During that time, the largest developer in Salmon Arm Bill Laird found no reason to change the drainage of the existing road. The road was built by the head of maintenance by Eric Enger, the foreman of the highway's maintenance contractor at that time. It is built like many roads in salmon arm with a ditch. It historically has not been a problem There was never a drainage issue prior to Balens clearing the land above. They thought the solution was just to run excess water from their land onto ours which is steep and prone to sliding. Another note is it is built the same as Wisemans access to his land with a ditch.

Paragraph #4

We have never opposed agriculture development of the land to the south. There has been none to date.

All Balen did was remove 40 + producing cherry trees, load rock onto agriculture land and place containers and build a road across ALR land when there already was one. There is no greenhouse. At one time Wiseman led us to believe they were putting a marijuana grow op on the property which we opposed but as with most other projects of Wisemans nothing has become of it. There is no dispute with Wisemans land to the East or ever any opposition to his development. Brent is Using our access dispute with Balens on a road which now has a court injunction stopping Balen from his damaging activities. There is also another court awarded settlement for Balen damaging the road is of no effect on Wiseman. Wiseman uses the pad for containers his motorhome he camps on in the summer and it appears storage of tires and other unsightly items

Para 5.

Balens attempted to subdivide property under the highways act stating it was for his family member which was not misleading to the city and ALR. In truth the land was to be attained for Balens busines partner for his personal home who placed a road, septic system and services without the subdivision approval. This would have subdivided the property and then allowed for a second home on ALR land removing it from production. Our family and over 40 neighbors signed a petition opposing this.

We sued and won against Balen for placing structures on a road which were deemed a nuisance by a Supreme court Judge. We sued and won due to Balen deliberately causing a nuisance and deliberately building structures on our easement and the cities water main right of way which was not allowed in either instance. Why would one fence a road and place a cattle guard , gates, when he could have placed the fence on the other side and bothered no one?

Para 6.

A gross misrepresentation of the facts There is a trailer , 4-6 containers , a dump truck , a large packer ¼ acre of rock and a bunch of junk placed on property that I see each day I drive home see attached picture or drive by and see for yourself

Para 7

WE already farm the land adjacent to the land to the north. The land being talked about has no developed city road. No city water connection or sewer and would be very difficult to access in the winter. The land has a small cabin built on it in contravention to current regulations on lakeshore development. It has no building permit and is not 30 meters from the high water mark as per current regulations. It was built without permit and faked to be a travel trailer by putting an axel and wheels under it.

Para 8

The proposed eastern border would be touching Wisemans agriculture land and it would not be an island. This swap if approved would define farming on the farmable and protect the steep land from being cleared which is currently in the ALR. When did Mr Wiseman become an expert on the viability of land for Farming?

Trees grow all over our property without irrigation. The weather of those years was very dry. Trees were not irrigated. Land was changed to pasture, fenced and has had sheep on it for 3 years. We also irrigate 300 Haskap and 10 newly planted fruit trees as well as 4- 5 old cherry trees. We had irrigation with a system we paid for from the lake until Mr. Balen restricted our ability to access pump and repair. Pumphouse was accidently not built on the easement but a few meters off it.

Para 9

See previous comments on Paragraph 5. The sole purpose was for a subdivision and had little to do with ALC swaps. We have never opposed anything with young farmers just grow ops next to our home on ALR land.

Para 10

These are very misleading statements the orchard was over 80 years old. Most cherry trees were dead choked by the fir trees, the live ones were left kept for historical value. Old varieties cherry trees which few orchards have now. The area was overgrown with 50-foot-high fir trees after we bought it. We cleared it tried a nut orchard and then turned it into active food producing pasture. We have 4 sheep, and the land has had double that. It has irrigated Haskaps just coming into production and 10 fruit trees. Brent with his grade 10-12 education is now an agriculture expert stating and recommending what we should farm on our land, limiting the numbers. He also has the gall to state the food value without any testing for nutrient value of the pasture. Wow!

The road is an undeveloped city right of way with no developed road. The city has been consulted for access and a water crossing. The city engineer has inspected the road after we removed trees and found the road to be equivalent to what it was prior to our use of it. Rob has only asked us to clear up on 5-meter area where we were still cleaning up deadfall and debris which poses a risk to our home.

Again, I apologize for the long letter which wastes councils time and mine. but it needs to be done

To defend myself and our application to false and misleading information

Yours sincerely

Richard And Margaret Smith

Oct 19 2020

Defense of Balens Letter to council and ALC.

Numbers are in reference to Balens letter and numbered paragraphs

1a. Chicken barn will continue to exist as it has and does not depend on ALR status as current zoning allows.

1b. Excluding this will provide low income housing for Lisa Mezie and others as it has for 22 years prior to Balens with no other previous neighbors complaining about it. They do help with labour on property.

1c. that is an advantage for ALC as the building will stay conforms to current zoning and will allow equal amount of land to be in the ALR which is farmable.

2. The secondary residence was built with the city's knowledge. I told them in 1998 I was building a secondary 1200 square foot building. The city replied no permit needed as we were over 10 acres and could proceed. I had many meetings with city Alderman Kental , Mayor Mayes and staff and lived next door to a councilor Petch with no complaints or comments prior to Balens arrival from Alberta . They tried to buy our property then when unsuccessful have been a nuisance we think trying to drive us off our property.

3. Balen has no idea of our timing or what we have done. He also is an Albertan mechanical engineer with no formal education in farming expertise. He built a wall which was over 4 feet high without permit or engineering. This wall fell down in less than 4 months and sits in ruins today , there seemed to be no expertise on slope stability or civil engineering of sloped land.

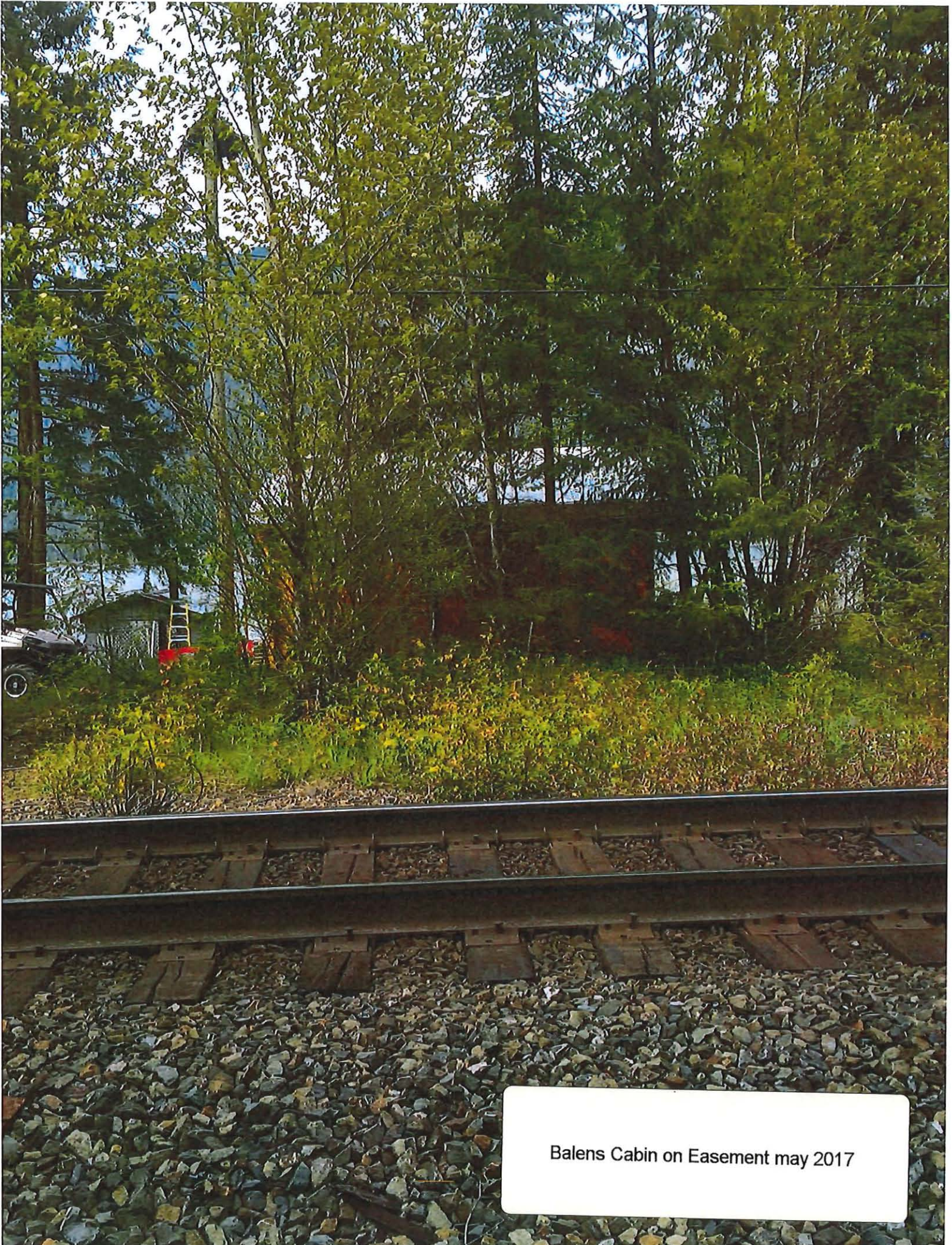
We obtained farm status with our chickens originally. Farm status was taken away due to rule changes about 2010. We then cleared the non alr land, (the only land able to be cleared without slope instability or rock and was previously an orchard and redeveloped it as farm land.

4. We participated in a signed petition with over 40 neighbors opposing a subdivision of ALR land. Balens tried to subdivide ALR land. The application to the ALC and the city stating it was a subdivision for his family when in truth it was for his business partner . The swap was just to enable him to include a road built on ALR land to be included in subdivision.

5. All neighbors in Addition to sign were provided with printed copies and advertising in the local paper.

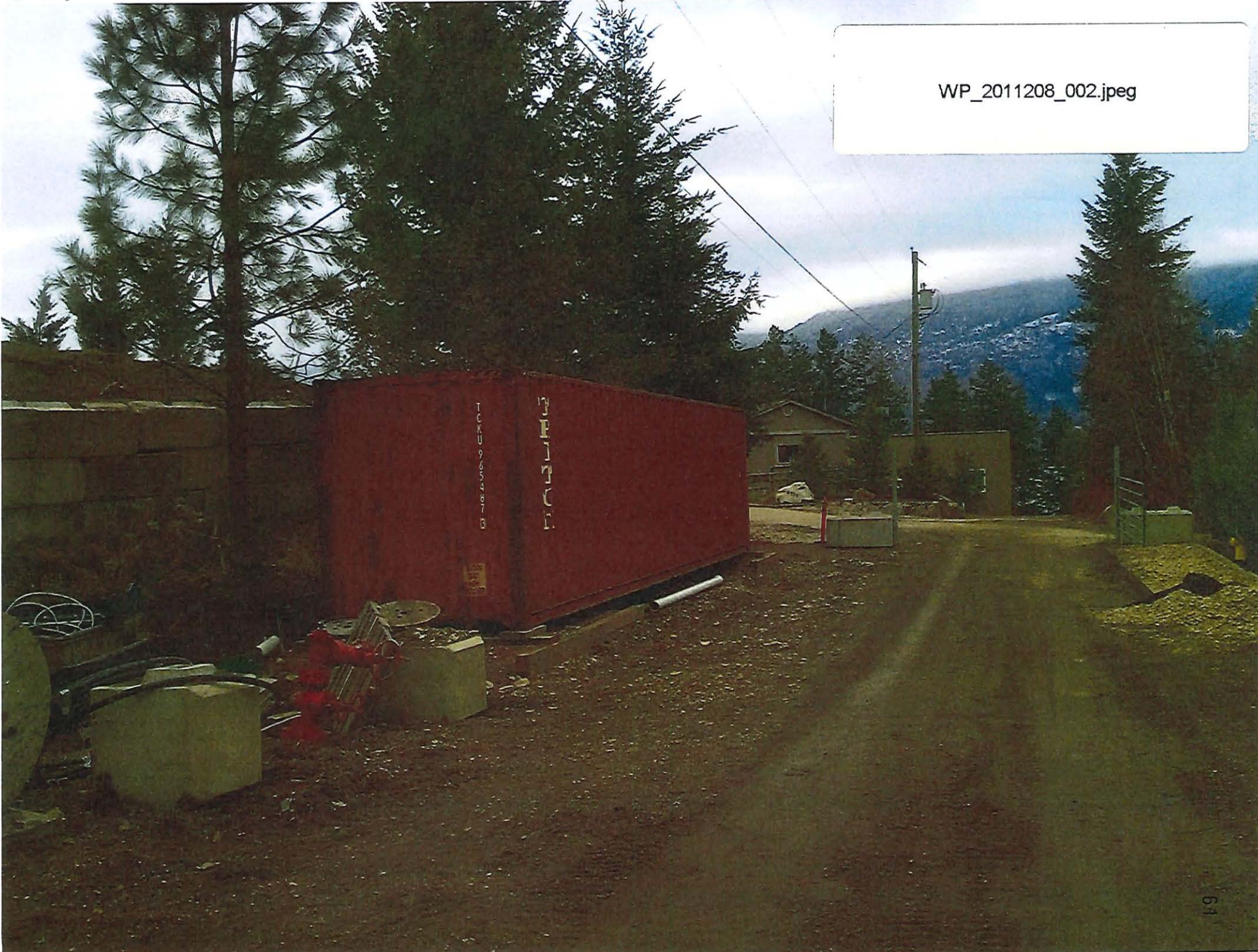
Inclusion Application ID 61439

1. When has the city asked for approved approaches on developed roads throughout the city for farmable land let alone a non-developed dirt trail? Mr. Balen has attempted to have the city pay for these upgrades in the past.
2. Balen never had engineering approved by the city. He Took city land and fill and used it for his road building activities without permission directly below my home. A stop work order was placed on Balen to do no more development until the road was engineered and approved to city standards . Nothing has happened since then for several years except very trees being destabilized and falling onto my land and erosion to his clay road. Prior to Balen doing the unauthorized worke we had a 2nd access of 70th which Balen ruined with his unauthorized work to the city road. If more emails documentation is needed I will provide as I have Pictures and emails from City engineer proving this.
3. Balen has been the main source of damage as the dirt trail was fine for over 50 years prior to his arrival



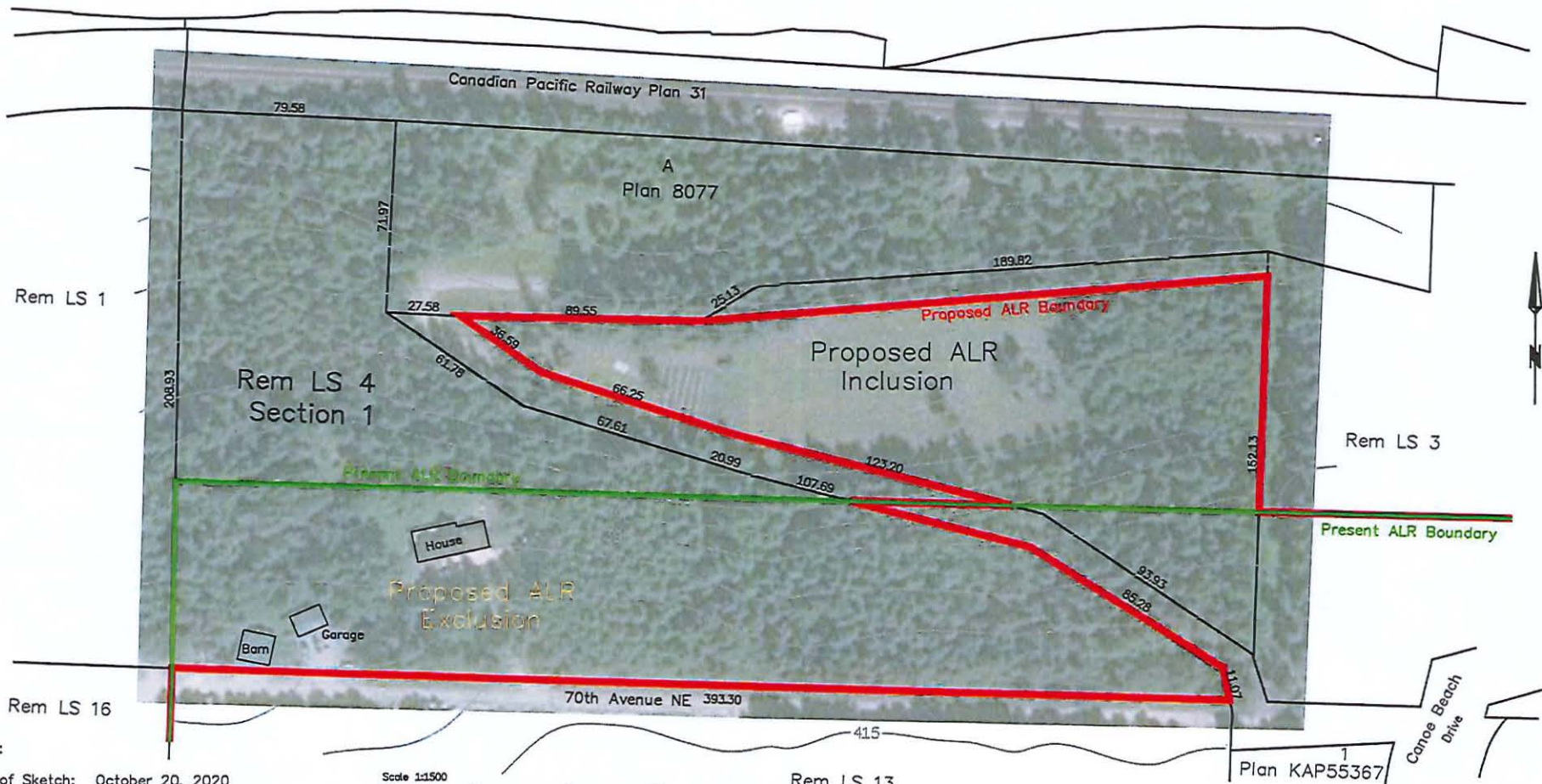
Balens Cabin on Easement may 2017

WP_2011208_002.jpeg



Sketch Plan of Proposed ALR Inclusion/Exclusion Exchange LS 4, Sec 1, Tp 21, R 10, W6M, KDYD, W6M

except Plans 31 and 8077



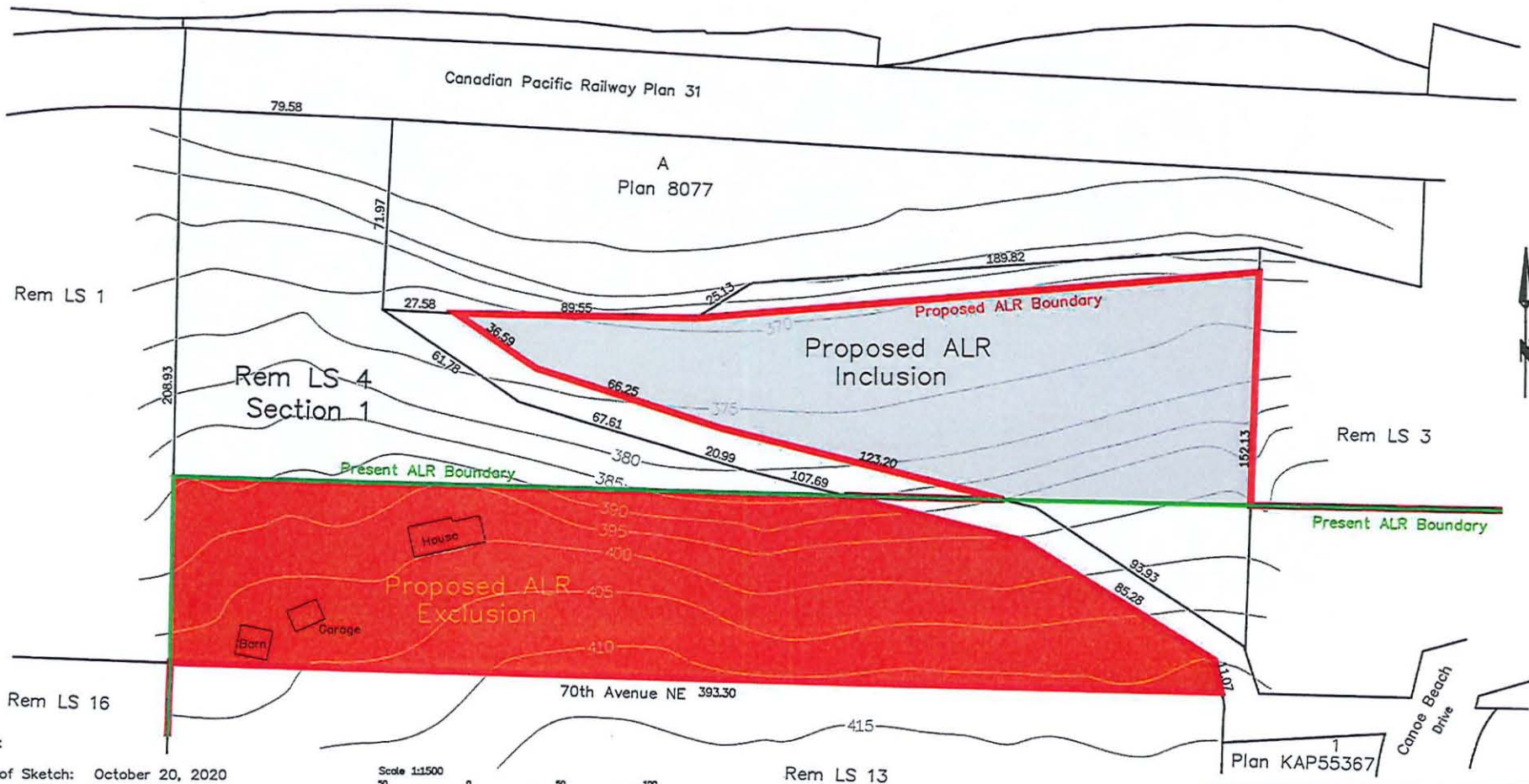
Notes:
 Date of Sketch: October 20, 2020
 Area Proposed to include in ALR : 1.66ha
 Area Proposed to exclude from ALR : 2.43ha

Scale 1:1500
 0 50 100
 All distances are in metres.
 The intended plot size of this plan is 560mm in width
 by 432mm in height (C size) when plotted at a scale of 1:1500

B.D. Sansom Land Surveying Inc.
 Land Surveying and Geomatics Engineering
 Salmon Arm, BC sansomsurveying.com
 File No: 2020083

Sketch Plan of Proposed ALR Inclusion/Exclusion Exchange LS 4, Sec 1, Tp 21, R 10, W6M, KDYD, W6M

except Plans 31 and 8077



Notes:
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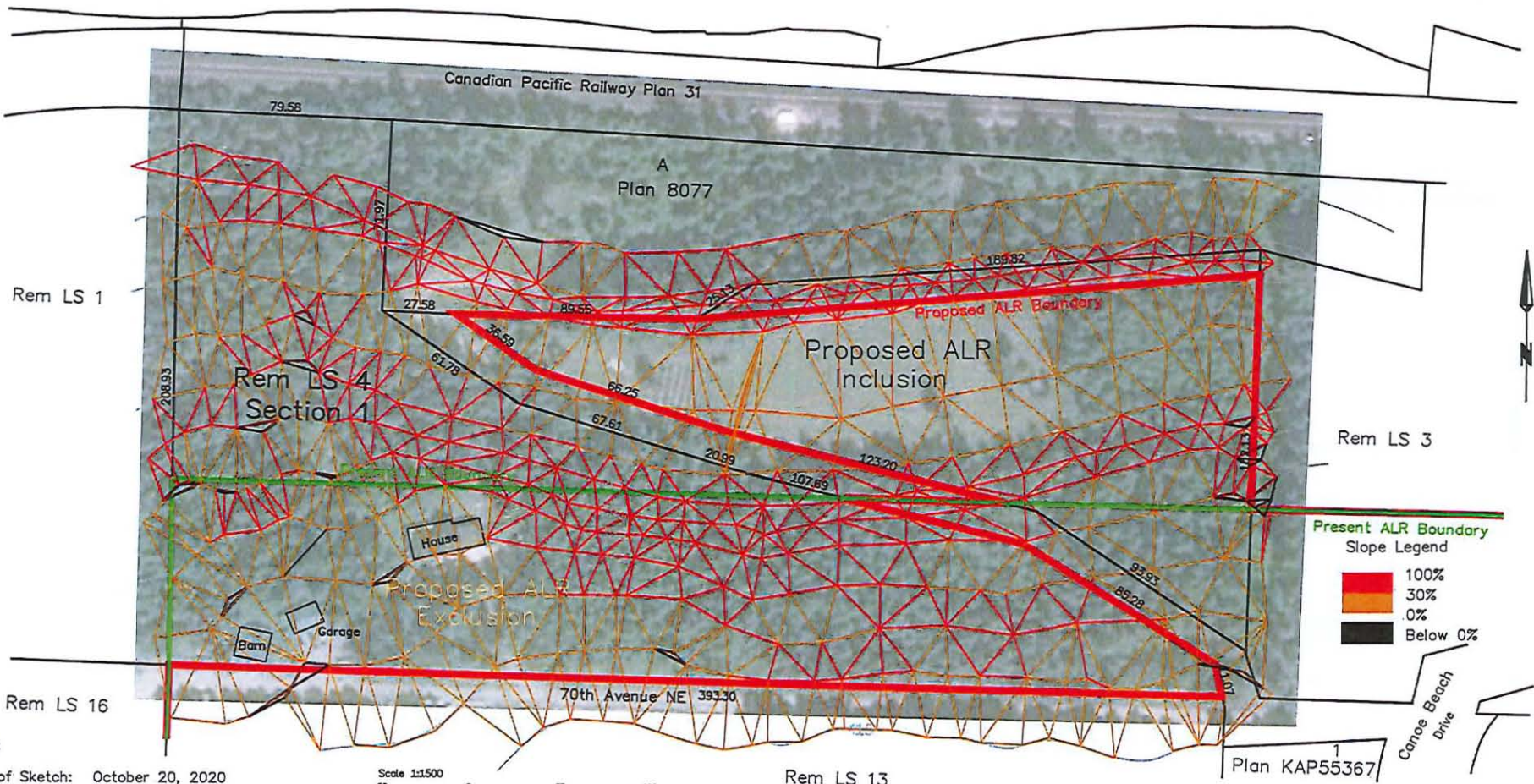
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B.D. Sansom Land Surveying Inc.
 Land Surveying and Geomatics Engineering
 Salmon Arm, BC sansomsurveying.com
 File No: 2020083

Sketch Plan of Proposed ALR Inclusion/Exclusion Exchange

LS 4, Sec 1, Tp 21, R 10, W6M, KDYD, W6M

except Plans 31 and 8077



Notes:

Date of Sketch: October 20, 2020

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Scale 1:1500



All distances are in metres.

The intended plot size of this plan is 560mm in width by 432mm in height (C size) when plotted at a scale of 1:1500

B.D. Sansom Land Surveying Inc.
 Land Surveying and Geomatics Engineering
 Salmon Arm, BC sansomsurveying.com
 File No: 2020083

Melinda Smyrl

From: Cathie Carmichael <ccarmichael@owenbird.com>
Sent: June-14-18 8:58 AM
To: Richard Smith; 'crowlinson@das.ca'
Cc: Paul Brackstone
Subject: Smith and Smith v Balen and Balen
Attachments: Letter to C. Rowlingson and Smith (01028235x9DEBD).PDF; Reasons - 2018 BCSC 918 Smith v. Balen (01021617x9DEBD).pdf; AR report (01028239x9DEBD).pdf; client trust detail (01028237x9DEBD).pdf

Please find attached Paul Brackstone's letter of today's date, together with the enclosures referred to therein.

Regards,

Cathie Carmichael
 Legal Administrative Assistant
 to Paul A. Brackstone

Direct Line (604) 697-5603 | Direct Fax (604) 641-4712
 Email ccarmichael@owenbird.com



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 Edith A Ryan*
 Daniel H Coles*
 Patrick J O'Neill

Carl J Pines, Associate Counsel*
 Rose-Mary L Basham, QC, Associate Counsel*
 Jennifer M Williams, Associate Counsel*
 Hon Walter S Owen, QC, QC, LLD (1981)
 John I Bird, QC (2005)

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 E-mail: pbrackstone@owenbird.com
 Our File: 33666/0000

June 14, 2018

VIA ELECTRONIC MAIL

DAS Canada
 390 Bay Street, Suite 1610
 Toronto, Ontario M5H 2Y2

Attention: Chris Rowlinson

VIA ELECTRONIC MAIL

Richard Smith
 1281 – 70th Avenue NE
 PO Box 1903
 Salmon Arm, BC V1E 4P9

Dear Sir:

Re: **Smith and Smith v. Balen and Balen**
BCSC, Vancouver Registry Action No. S153637

I write to follow up on the status of this matter.

Attached for your information is a copy of Mr. Justice Brundrett's oral reasons for judgment.

I am awaiting joint instructions on how to handle the matter of costs.

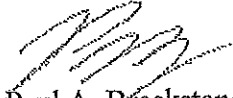
Attached for everyone's information is a copy of the trust reconciliation showing the accounts and payments history, as well as the accounts receivable. Please make arrangements for payments of the accounts receivable, and confirm your instructions on how to address the issues of costs.

Page 2

I look forward to hearing from you.

Yours truly,

OWEN BIRD LAW CORPORATION



Paul A. Brackstone
PAB/chc
Encl.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Smith v. Balen*,
2018 BCSC 918

Date: 20180517
Docket: S153637
Registry: Vancouver

Between:

Richard Smith and Margaret Smith

Plaintiffs

And

Robert Mark Balen and Beryle Maureen Balen

Defendants

And

**Piero Vezzani, Marinanne Vezzani, and
the City of Salmon Arm**

Defendants by Counterclaim

Before: The Honourable Mr. Justice Brundrett

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiffs:

P.A. Brackstone

Counsel for Defendants:

M. Russman

Place and Date of Trial/Hearing:

Vancouver, B.C.
May 8, 2018

Place and Date of Judgment:

Vancouver, B.C.
May 17, 2018

INTRODUCTION

[1] This is a summary trial application by the plaintiffs, Richard Smith and Margaret Smith, in relation to alleged interference with an easement (the "Easement") which is situate over the property of their neighbours, Robert and Beryle Balen. The parties' properties are located in a rural area of Salmon Arm near the shores of Shuswap Lake.

[2] The Smiths seek both a prohibitory and mandatory injunction (as well as damages) for what they say is the defendants' nuisance and interference with the Easement which runs between the two properties. The outcome of their application turns on the determination of whether the erection of fences, hedges, a drainage field, and other obstacles within and along the Easement substantially interferes with the Smiths' use of the Easement.

[3] In particular, the Smiths apply for the following orders:

1. A declaration that the defendants have breached the Easement (defined below) and have committed a private nuisance.
2. Judgment against the defendants for breach of the Easement and private nuisance.
3. General damages for interference with the Easement, and private nuisance.
4. Special damages for interference with the Easement, and private nuisance.
5. An injunction [requiring the Balens to remove anything interfering with or obstructing the Easement, and an injunction restraining the Balens from interfering with or obstructing the Easement].
6. In the alternative, an order permitting the Smiths to abate the interference with the Easement, and private nuisance, with the reasonable costs of doing so to be assessed as special damages once they are known.
7. Pre-judgment and post-judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.
8. Special costs.

[4] Although the Smiths have also claimed damages for trespass and invasion of privacy, the Smiths did not pursue these claims at the summary trial.

[5] The Balens deny that they have interfered with the Smiths' rights under the Easement and argue that the matter is not suitable for a determination by summary trial.

[6] The Balens oppose all of the orders sought by the Smiths. They seek the following orders:

- 1) the summary trial application of the plaintiffs be dismissed;
- 2) this action be transferred to the Salmon Arm or Vernon registry for all purposes;
- 3) the matter be remitted to the trial list; and
- 4) costs.

[7] The defendants by counterclaim are the Vezzani (another neighbour) and the City of Salmon Arm. The action against the City of Salmon Arm has been discontinued. No one appeared at the summary trial hearing for the Vezzani and I am satisfied that I need not deal with that aspect of the counterclaim.

BACKGROUND

The Properties in Issue

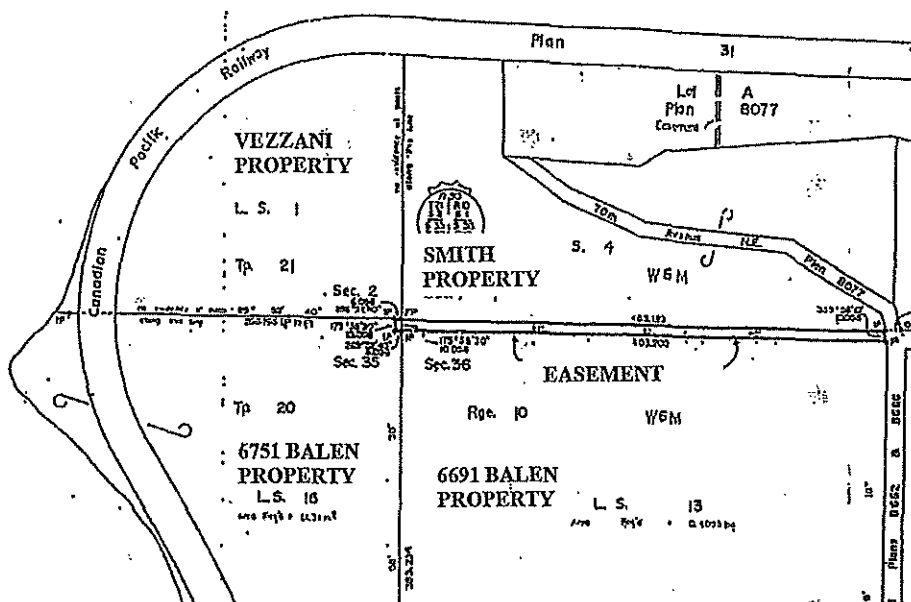
[8] The Smiths have owned the property at 1281 70th Avenue Northeast, Salmon Arm, British Columbia (the "Smith Property") since about 1990. The Smiths live on the Smith Property and operate a small developing hobby farm.

[9] The Balens own neighbouring properties to the south and southwest of the Smith property. They have owned the 6751 Lakeshore Road NE property (the "6791 Balen Property") since 2009 and the 6691 Lakeshore Road NE property (the "6691 Balen Property") since 2011 (collectively, the "Balen Properties").

[10] The Vezzani have owned the property at 991 70th Avenue NE, Salmon Arm, BC (the "Vezzani Property"), since about 1990. The Vezzani Property is to the west of the Smith Property.

[11] The two Balen Properties, the Smith Property, and the Vezzani Property are located on a point extending out into Shuswap Lake.

[12] A map of the four multi-acre properties and the Easement is reproduced here for ease of reference:



R. Smith No. 1, ex. F

[13] The topography of the Smith Property is such that the land decreases in elevation from the Easement on the northern edge of the 6691 Balen Property down to the rail line along Shuswap Lake at the north end of the Smith Property.

[14] There is a municipal road dedication in the form of an unpaved, steep, undeveloped road running diagonally across the Smith Property. It does not lead directly to the structures on the Smith Property and does not currently provide good vehicle access.

The Easement

[15] The prior owner of these four properties was the Estate of Meeri Anneli Ilona Long. By an agreement in writing dated November 11th, 1989, the Long Estate granted the Easement in perpetuity on, over, and through a portion of the Balen Properties for ingress and egress to the Dominant Tenements. I find that the

intention at the time was to make the properties marketable and provide access to the other tenements; hence, the creation of the Easement.

[16] The properties were rural and undeveloped at the time the Easement was created in 1989, and there were no significant structures upon them. There were cattle on the 6691 Balen Property at one point prior to 1984, and a barbed wire fence running between the Smith and the Balen Properties which later fell into disrepair.

[17] The Easement runs east to west along the border of the 6691 Balen Property and the Smith Property. It is approximately 10 metres wide and runs the entire length of the 6691 Balen Property. It terminates approximately 6.1 metres west of the northeast corner of the 6751 Balen Property. Thus, the Easement runs the full length of the northern edge of 6691 Balen Property and 6.1 metres into the northeastern edge of the 6751 Balen Property as well.

[18] In terms of the relationship between the parties, the Easement provides as follows:

- a) the Grantor is the owner of the 6691 Balen Property and the 6751 Balen Property;
- b) the Grantee is the owner of the Smith Property, the Vezzani Property, and the 6751 Balen Property;
- c) the Servient Tenement is the 6691 Balen Property and the 6751 Balen Property; and
- d) the Dominant Tenement is the Smith Property, the Vezzani Property, and the 6751 Balen Property.

[19] While I will turn more closely to the wording of the Easement momentarily, it generally provides that the Grantor has agreed to grant the Grantee an Easement in perpetuity on, over, and through the Easement.

[20] Both of the Balen Properties are the Servient Tenements in the Easement to the Smith Property and the Vezzani Property. The 6751 Balen Property is a Servient Tenement in relation to the 6691 Balen Property (and the Smith Property and

Vezzani Property) in relation to the extra 6.1 metres of the Easement extending into the 6751 Balen Property.

[21] A private road runs along the Easement and services the properties. The Smiths contributed to the construction of the private road by paying to construct it and later to pave it. The Easement and the private road provide the only effective vehicle access to various parts of the Smith Property.

[22] There is also a 3.0 metre wide statutory right of way on the 6691 Balen Property in favour of the City of Salmon Arm, entirely within the Easement area and running along the northern edge of the Easement.

[23] The Smiths' house and several of the Smiths' outbuildings are all accessible only by the private road running along the Easement. The Vezzanis, as well as the occupants of the 6751 Balen Property, also require access along the Easement to get to their properties.

[24] To the west of the Smiths' shop is a parking area (the "Parking Area"), which is a clearing of sorts slightly to the north of the Easement and on the southwest corner of the Smith Property. The Smith family owns approximately nine vehicles as well as a number of trailers, a boat, and all-terrain vehicles. Hence, this area is important to them.

[25] The language of the Easement is wide and unrestricted.

[26] Recital C of the Easement specifically grants a right of ingress and egress to "all parts" of the Dominant Tenement. It provides as follows:

The Grantee has requested the Grantor to grant, and the Grantor has agreed to grant to the Grantee, an Easement in perpetuity on, over and through that portion of the Servient Tenement hereinafter described for ingress and egress to all parts of the Dominant Tenement.

[27] Para. 1 of the Easement includes a grant allowing the Smiths (and the other Dominant Tenements) to "enter" the Easement area at any time and to "pass and re-pass along the Easement". There is no restriction in the Easement with respect to

the points of entry onto or off the Easement area. It also uses the language "any part or parts thereof" when referring to access by the Dominant Tenement. Para. 1 provides as follows:

The Grantor hereby grants, conveys, releases and assigns unto the Grantee, the owners or occupiers for the time being of the Dominant Tenement or any part or parts thereof, an Easement in perpetuity for the benefit of the Dominant Tenement or any part or parts thereof and the full right and liberty for the Grantee, the owners or occupiers for the time being of the Dominant Tenement or any part or parts thereof and his and their respective servants, agents, workers, contractors, licencees, and all other persons by his authority, at any time or times hereafter to enter at any time and from time to time, day or night, upon that part of the Servient Tenement outlined with heavy black ink on a Reference Plan completed by M.D. BROWNE & ASSOCIATES a copy of which is attached hereto as Schedule "I" (herein called the "Easement") and thereon by himself or by agents, servants, workers, contractors, licencees, and all other persons by his authority, both with and without vehicles, animals, implements, and equipment to pass and re-pass along the Easement and also thereon to place, construct, bury, maintain and use any poles, wires, transformers, cables, lines or any other similar apparatus necessary for the transmission and distribution of electrical energy and for communication purposes (herein collectively called the "Electric Works") and also thereon or thereunder to place, construct, bury, maintain and use any pipelines, meters, connections and other apparatus as may be necessary or desirable for sewer, water, natural gas and other normal residential services (herein collectively called the "Other Services").

[28] Para. 2 references the authority of the Grantee (being the Dominant Tenements) to construct and maintain a roadway upon the Easement as may be reasonable. The language is noteworthy in that it repeats the words "pass and re-pass along the Easement":

The Grantor will permit the Grantee to construct and maintain upon the Easement such roadway as may be reasonable to permit the Grantee to pass and re-pass along the Easement as aforesaid.

[29] Para. 3 of the Easement provides for a restriction on the Grantor (being the Servient Tenements) which restriction applies to the 6691 Balen Property. Para. 3 thus restricts the Balens from placing, erecting, constructing, or maintaining any building, structure, foundation, or obstacle whatsoever, or planting any growth which might interfere with access by the Grantee (e.g. the Smiths). Again the language is wide. Para. 3 reads as follows:

The Grantor will not make, place, erect, construct, or maintain on the Easement any building, structure, foundation, or obstacle whatsoever or plant any growth which might interfere with access by the Grantee or construction of the roadway or with the maintenance and use of the Electric Works or Other Services.

[30] Para. 4 of the Easement confirms that the Grantor may use the Easement for his own purposes and enjoyment, subject to the rights of the Grantee (including the Smiths):

The Grantor may use the Easement for his own purposes and enjoyment subject to the rights of the Grantee herein granted, provided however that the Grantor shall not grant to any other person or corporation a right to use the Easement unless the Grantor has first obtained the written consent of the Grantee which consent may be arbitrarily withheld.

[31] Para. 5 of the Easement obligates the Grantee (which includes the Smiths and the Balens) to maintain the roadway, electric works, and other services constructed by him on or in the Easement in good condition:

The Grantee will maintain any roadway and/or Electric Works and/or Other Services constructed by him on or in the Easement, in as good condition as may reasonably be expected for properties of similar location and use as the Dominant Tenement.

[32] Para. 6 provides that the Easement runs with the land and continues notwithstanding any subdivision:

That rights, privileges and obligations herein set forth are and shall be of the same force and effect to all intents and purposes as covenants running with the lands or any subdivision of the lands and they shall enure to the benefit of and be binding upon not only the Grantor and the Grantee but also their respective successors, assigns, successors in title, servants, agents and licensees.

[33] The Balens point to references in the Easement which they say supports an interpretation that requires reasonableness and the need to balance the parties' rights. In particular, para. 2 refers to the Grantee constructing and maintaining such roadway "as may be reasonable" to permit the Grantee to pass and re-pass along the Easement. Para. 5 refers to the Grantee maintaining any roadway in as good condition "as may be reasonably expected" for properties of similar location and use.

[34] The word "reasonable" does not appear in paras. 1, 3 or 4 of the Easement, and I find its appearance elsewhere is of little significance in interpreting the Easement.

THE INJUNCTION ISSUE

Suitability for Summary Trial

[35] Rules 9-7(11) and 9-7(15) of the *Supreme Court Civil Rules* govern suitability. Applying those rules to the present context, I find that the injunction issue is suitable for determination by summary trial. The necessary facts are fully set out in the affidavits filed by the parties, and the issues may be decided by inferences from those facts: *MacMillan Bloedel v. British Columbia Hydro & Power Authority*, 72 B.C.L.R. (2d) 273 (C.A.) at paras. 62–64; *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.); *Canada Wide Magazines Ltd. v. Columbia Publishers Ltd.* (1994), 55 C.P.R. (3d) 142 (B.C.S.C.).

[36] The primary issue revolves around interpretation of the Easement and whether the facts support an inference that interference with the Easement has occurred. There is no conflict in the admissible evidence with respect to the existence of the Easement and the circumstances surrounding the grant of the Easement and the placement of certain obstacles within the Easement. The effects of the obstacles such as the fence, gate, and hedges are readily discernible on the evidence.

[37] Counsel for the Balens points out that certain questions of credibility or possible inconsistency exist on some of the surrounding facts. I am satisfied, however, that to the extent those matters cause any difficulty, I can put those matters aside and find the necessary facts to decide the issues.

[38] This is not a case where the Court needs to hear further witnesses before being able to determine the relevant facts. In my view it would not be unjust to decide the injunction and prohibition issues by way of summary trial.

Legal Principles Impacting the Proper Interpretation of the Easement

[39] In *Avanti Mining Inc. v. Kitsault Resource Ltd.*, 2010 BCSC 1181, Mr. Justice Joyce summarized the applicable principles for interpretation of an easement. In doing so, he summarized the main authorities in this province which have interpreted rights of way, easements, and contracts. At para. 61 the Court stated as follows:

[61] From the foregoing review of the authorities, I would distil the following principles that I think should govern my interpretation of the meaning and scope of the Right of Way:

1. The Right of Way is limited in its scope to purposes that are necessary for the operation of the grantee's undertaking as a mining corporation.

s. 218 of the *Land Title Act*.

2. The following principles that apply to the construction of a contract also apply to the interpretation of the Right of Way:

(a) The intention of the parties is to be determined by looking first to the plain and ordinary meaning of the words used, in the context of the whole of a contract and in a manner that does not render one part of the contract ineffective.

(b) The words must be read in the context of the surrounding circumstances when the contract was made, including facts known to both parties but not negotiations or evidence of subjective intent.

(c) The standard is an objective one.

(d) If the words of the instrument are unambiguous that is the end of the matter. If there is ambiguity or if the plain language leads to an absurdity, a result that both parties could not have intended, then regard may be had to extrinsic evidence to assist in determining the parties' intent.

(e) Evidence of context or surrounding circumstances must not be allowed to overwhelm the plain language of the document.
0746727 B.C. Ltd. v. Cushman & Wakefield LePage Inc.;
Water Street Pictures Ltd. v. Forefront Releasing Inc.

3. Thus, with regard to an easement in particular, the wording of the instrument creating the Right of Way should govern its interpretation unless (a) There is an ambiguity in the wording or (b) the surrounding circumstances demonstrate that both parties could not have intended a particular use of the easement that is apparently authorized by the wording of the document.

Granfield

4. The use to which the easement is intended to be put at the time of the grant is not a surrounding circumstance which shows a common

intention of the parties that the easement was not to be put to any other use.

Granfield; White, Robertson; Laurie v. Winch; and Hillside Farms Ltd. v. British Columbia Hydro Power Authority

5. Evidence of negotiations or subjective evidence of the person who drafted the instrument purporting to explain the intent of the easement is not a "surrounding circumstance" and is not admissible as an aid to construction.

Kassell

6. To the foregoing, I would add this: where the instrument granting the easement contains an expression of the use for which the easement is intended, the court should be cautious about relying on extrinsic evidence as to use or purpose.

[40] The defendants argue that *Avanti* is of limited application and its principles should be confined to the "use" or purpose of a statutory right of way. I disagree.

[41] *Avanti* itself repeatedly refers to easements in para. 61 above. Further, it has been subsequently referred to as one of several cases which helpfully summarize the rules of construction for easements and rights of way: see, for instance, *Robinson v. Pipito*, 2014 BCCA 200 at paras. 29 and 32; *Grant v. Lowres*, 2016 BCSC 1654 at para. 25; *Sherbinin v. Jackson*, 2011 BCSC 74 at paras. 30–31.

Defendants' Alternative Interpretation

[42] The defendants submit that the language of the Easement is open to an alternate interpretation to that proposed by the plaintiffs; namely, that the access points to the Smith Property were meant to be limited to certain specific areas. The defendants' interpretation flows from the fact that the Dominant Tenement comprises three different properties (the Vezzani Property, the 6751 Balen Property, and the Smith Property) and the Servient Tenement comprises two (the two Balen Properties). The language in para. C of the recital and in para. 1 of the Easement refers to "all parts" or "any part or parts." The defendants say these modifying words refer to the possible types of ownership scenarios or combinations in relation to the three Dominant Tenements, not portions of those individual properties.

[43] I would reject this interpretation. In my view, it does not provide an alternate reasonable interpretation of the Easement. First, the language of the Easement is wide and unqualified and does not support a more restrictive interpretation.

[44] Second, reading the Easement as a whole, I view this interpretation as strained and unfounded.

[45] Third, para. C of the recital refers to “on, over, and through that portion of the Servient Tenement hereinafter described for ingress and egress to all parts of the Dominant Tenement.” The preceding words include “on, over, and through that portion” and “ingress and egress,” making it clear that the modifying words refer spatially to land and not possible ownership entities. The fact that para. 6 of the Easement allows for future subdivision tends to confirm this.

[46] Fourth, para. 1 of the Easement refers to the right of the “Dominant Tenement or any part or parts thereof ... to enter at any time and from time to time, day or night, upon that part of the Servient Tenement outlined with heavy black ink” on an attached plan. The plan attached to the Easement appears to mark the full width of the Easement in slightly more prominent black ink without any interruptions or breaks.

[47] Fifth, even if the defendants’ interpretation is valid in relation to para. 1 of the Easement in respect of the reference to “the Dominant Tenement or any part or parts thereof,” the same paragraph provides a right to “pass and re-pass along the Easement.” Again, the use of the word “along” is an open-ended, modifying word. I reject the defendants’ argument that the word “along” should be given a more restrictive interpretation.

[48] Finally, in the further alternative, para. 3 of the Easement provides that “[t]he Grantor will not make, place, erect, construct, or maintain on the Easement any building, structure, foundation, or obstacle whatsoever or plant any growth which might interfere with access by the Grantee...” [Emphasis added]. Again, this is clear,

unrestricted language which independently prohibits the Balens from interfering with the access to the Easement, apart from the other paragraphs in the Easement.

[49] The language in the Easement is clear, and I do not find ambiguity in the language such that it is necessary to go beyond the words employed: *Granfield v. Cowichan Valley (Regional District)* (1996), 16 B.C.L.R. (3d) 382 at paras. 20-21 (C.A.); *Rob v. Walker*, 2015 BCCA 117 at para. 32.

Intent of the Grantor

[50] The defendants further invite me to have regard to the surrounding circumstances of the grant of the Easement. In that regard, the defendants point me to the affidavit of Helena Long, the executrix of the estate which owned all of the properties in question. Ms. Long deposes as follows:

- Because the Smith Property was underdeveloped at the time, the Easement defined no access points to enable a future purchaser to choose where to build;
- Access to the Smith Property (referred to as the 1281 property) was an issue because of the fact that there was no residence on it at the time. It was impossible to predict where a future purchaser may ultimately construct his or her residence;
- In the end, the Easement was worded in order to permit the future owner of the 1281 property to construct his or her residence wherever they wished and put in place a corresponding access point;
- It was not the estate's intention to provide access to the Smith Property from any portion of the Easement; rather, the intention was to provide access from a defined access point;
- Para. C of the recitals does not refer to the right to access the Smith Property from any location on the Easement;
- It was not her intent that the Smith Property would be afforded an unlimited number of access points from the Easement;
- The difficulty with defining an appropriate access point or points to the Smith Property was that it was impossible to know where the future owner or owners would construct a residence; and
- Para. 3 of the Easement was intended to prevent future owners of the 6691 Balen Property or the 6751 Balen Property from doing things which might prevent the owners of the Smith Property, the 6691 Balen Property, and the 6751 Balen Property from reasonably accessing the properties. This provision was not intended to prevent construction of

a fence along the northern edge of the Easement, so long as reasonable access was provided to the owners of the Smith Property.

[51] Ms. Long's affidavit thus speaks to Ms. Long's subjective belief that a future owner of the Smith Property would enjoy only defined access points over the Easement. This may well have been Ms. Long's subjective intention; however, the language in the Easement was certainly not crafted that way. Instead, as noted, the language in the Easement is clear and unconstrained by any reference to access points for the Smith Property.

[52] When interpreting an easement, the court must have regard to the plain and ordinary meaning of the words in the grant to determine what the intention of the parties was at the time the agreement was entered into. Surrounding circumstances, that is, objective evidence of background facts at the time of the execution of the contract, are to be considered in interpreting the terms of the contract: *Robb v. Walker* at para. 31.

[53] Looking at the surrounding circumstances objectively, it appears that the context at the time the Easement was created was such that the properties were at that point largely undeveloped, future subdivision and marketability was contemplated, and there was a desire for open-ended language in the Easement to provide flexibility to the future owner of the Smith Property, the 6751 Balen Property, and the Vezzani Property, in choosing their access point(s).

[54] The focus remains on the words of the Easement. If the parties' intentions contradict the contract's language, it is the language which must prevail: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 387 per Dickson J. (as she then was); *Hillside Farms Ltd. v. British Columbia Hydro & Power Authority*, [1977] 1 A.C.W.S. 677 at para. 11 (C.A.) (WL); *Kassell v. Probasco*, 2007 BCSC 937 at paras. 23–24 per Hinkson J. (as he then was).

[55] Here, with respect, Ms. Long's subjective intent concerning defined access points appears to be contrary to the express language in the Easement, and I find I ought not to take it into account. Moreover, if the intention was to market individual

component properties for sale, marketability would not have been served by restricting access points across the Easement.

[56] Furthermore, the use to which the Easement is intended to be put at the time of the grant is not a surrounding circumstance which shows a common intention of the parties that the Easement was not to be put to any other use; and evidence of negotiations or subjective evidence of the person who drafted the instrument purporting to explain the intent of the Easement is not a “surrounding circumstance” and is not admissible as an aid to construction: *Avanti* at para. 61(4) and 61(5).

[57] It follows that the evidence from Ms. Long as to the use she intended the Easement to be put is not helpful to my analysis. In my view, the plain and ordinary meaning of the words used in the context of the whole of the Easement and having regard to an objective view of the surrounding circumstances when the Easement was made, admits no other interpretation than a wide prohibition against the Servient Tenement interfering with the Dominant Tenement’s access on, over, through, and along the Easement.

The Alleged Interference with the Easement

[58] The Smiths allege the Balens have interfered with the Easement in several ways. The Balens admit some of the Smiths’ factual assertions though some of the Smiths’ allegations are not admitted. The Balens submit more context is required to allow the Court to appreciate what occurred and to assess whether the acts complained of actually constitute interference with the Smiths’ Easement rights or a nuisance.

[59] In particular, the Balens admit to the following:

- 1) Mr. Robertson, a contractor of the Balens, placed a container on the Smith Property during construction of their workshop between November 2010 and May 2011. The container was almost 20 feet long and 8 feet wide and was placed on the southwest corner of the Smiths’ property. The Balens say they thought Mr. Robertson had obtained the Smiths’ permission;

- 2) The parking of a Cadillac on the Easement for a period of time. The Balens deny it significantly or materially inconvenienced the Smiths or interfered with their access;
- 3) Parking a steamroller on the Easement intermittently for brief periods during the May 1st to June 24th, 2014 period. The Balens deny that it significantly or materially inconvenienced the Smiths or interfered with their access; and
- 4) Placing a water valve on the Easement. Again, the Balens deny the valve hinders access to the Smith Property.

[60] I agree with the defendants that some of these matters, such as the parked Cadillac, may be relatively minor and would not on their own amount to interference of any lasting effect.

[61] The larger container is a concern. It is not sufficient for the Balens to claim they believed their contractor had permission to place it on the southwest corner of the Smith Property. It was the obligation of the defendants to control the behaviour of their contractor so as not to interfere with the lawful use of neighbouring property: *Moyer v. Mortensen*, 2010 BCSC 1528 at para. 111.

[62] Of perhaps greater concern are the more permanent obstacles placed on the Easement by the Balens or their agents. In particular, on July 2nd, 2014, Mr. Balen planted 10 trees along the Easement, blocking the access to the Smiths' Parking Area on their side of the property line. The more recent photos show two additional rows of trees planted along the northern portion of the Easement. The Balens do not dispute that they planted the trees. I have seen photos and video of the trees, which are a line of tall hedge-type trees.

[63] A video taken on one occasion shows Mr. Smith attempting to manoeuvre his vehicle and trailer around the trees with great difficulty. There is no doubt that the trees interfered with access to the Smith Property over the Easement, including the Parking Area.

[64] The Balens argue that the hedge trees they planted could be preserved and that the Smiths would have better access if the Smiths removed one or two additional trees on the Smiths' property. The Smiths dispute this and point to the

positive benefits of the trees on their property, such as shielding their property from the Balens' surveillance cameras.

[65] While the hedge trees restrict access along the northern edge of the Easement, the larger trees on the Balens' property referred to are located entirely on the Smiths' property. Regardless, I reject the proposition that the Balens' interference with the Easement by planting the hedge trees is justifiable on the basis that the Smiths could potentially undertake remedial actions to alleviate the restriction on access to their property unilaterally imposed by the Balens.

[66] Between August 24th and September 3rd, 2014, the Balens placed large concrete blocks next to the hedge trees. They were connected by a red steel railing (the "Barricade") with a boulder at each end. The Barricade prevents Mr. Smith from directly accessing the Parking Area from the Easement without going on to the Vezzani Property and manoeuvring with difficulty. The Smiths have no legal right to use the Vezzani Property for access.

[67] In February 2015, a further concrete block was placed at the eastern end of the Barricade near the entrance to the Smiths' shop. The placement of that block interfered with Mr. Smith's ability to reverse his boat trailer into the shop where he stores the trailer and boat.

[68] In April 2015, a number of additional concrete blocks were placed at various places in the Easement. I find that these blocks substantially narrowed the useful width of the Easement for the Smiths and made it more difficult for them to manoeuvre into the Parking Area.

[69] The Balens admit the concrete blocks were placed along the Easement, but they say they were only placed there temporarily and they are no longer on the Easement, with the exception of the blocks forming part of the hedges' protective rail.

[70] On or about April 24th, 2015, the Balens commenced construction of a fence, fence posts, and gates along the Easement. The fence is currently partially

complete. Gates have been installed in front of the Smiths' shop and the driveways leading to the Smiths' house and garage. Fence posts have also been installed along the rest of the Easement. The result of the completed fence will be that the Smiths will only have access to their property through defined points where there is a gate going through the fence. Mr. Smith attests, and I accept, that these obstacles substantially interfere with ingress and egress from the Smiths' property.

[71] Initially, the gates near the Smiths' outbuildings only swung on to the Smiths' property. The gates and fence have since been reconfigured (after the start of a previous summary trial in this matter, and again without consultation) along with the road being widened, and the gates have now been modified to swing in two directions.

[72] Nevertheless, since the changes, Mr. Smith deposes and I accept that the reconfigured fence and gates still interfere with the Smiths' access to the shop and the Parking Area. Even after the changes, Mr. Smith has difficulty backing large trailers or boats into his shop and requires the assistance of another individual outside the vehicle to guide him. Also, even in a partially constructed state, a fence prevents the Smiths from using the asphalt pad on the Smiths' property in front of their shop for parking (which they could do before).

[73] To back a trailer into the shop, Mr. Smith attests that he has to first park on the Easement, disconnect the trailer, re hitch the trailer to an ATV, then back the trailer into the shop. Mr. Smith states, and I accept, that the difficulty manoeuvring around the fence caused Mr. Smith to damage his boat while attempting to back into the shop.

[74] The defendants dispute that the fence and gate caused such difficulty, but judging by the width of the road and the positioning of the fence in the photos, I accept Mr. Smith's evidence on this point. The gates even as modified still impede access to the Smith property. As well, of course, they were placed there without permission.

[75] The Smiths say the fence makes ploughing the road for snow more difficult. I accept this, but I do not accept that this is a significant factor I should take into account in terms of access over the Easement.

[76] Mr. Smith also attests that the fence interferes with his ability to cut grass on his property adjacent to the fence. I regard this as a minor complaint not worthy of consideration for the present purposes.

[77] The Balens say the steel rail or Barricade was installed to protect the hedges due to the fact that the hedge was previously vandalized and destroyed by Mr. Smith. As noted, I have seen the video of that incident. It shows Mr. Smith backing into one of the hedges, then subsequently, after exiting his vehicle in frustration, making a half-hearted attempt to replant the hedge by moving it upright and kicking it into place before going into his home. I do not accept the Balens' characterization that the hedge tree was vandalized by Mr. Smith. Backing into the tree appears to have been an accident caused at least in part by Mr. Smith's difficulty backing around the hedge.

[78] The Balens maintain that the hedge, fence, and gates were all planted and installed in order to clearly delineate the property lines for all parties and to address ongoing issues between the neighbours, such as late-night parties that were allegedly occurring at the Smith Property. That may well be the case, but the effect of these items was to impede the Smiths' ability to access their property. At times, that impediment has been significant. I note that the Balens do not dispute that the hedge and "protective rail" detrimentally affected the Smiths' ability to access the Parking Area.

[79] Para. 3 of the Easement restricts the Balens from placing, erecting, constructing, or maintaining any building, structure, foundation, or obstacle whatsoever or planting any growth which "might interfere" [emphasis added] with access by the Smiths. While it is true that the Balens own the property upon which the Easement is situate, their activity with respect to the hedge, trees, fence, and gates runs afoul of this restriction on their rights as property owners.

[80] Concurrently with the reconfiguration of the fence and gates in August and September of 2016, Mr. Balen installed a French drainage system in the Easement area immediately beside the roadway and widened the roadway at the same time. The Balens argued that they undertook the drain system to address the deteriorating roadway, and that they were motivated in part by the obstructed and damaged culverts the Smiths installed during construction of the Easement roadway. The Balens say the Smiths refused to clear the obstruction in the culverts which were located on the Smith Property. The Balens attest that the drainage system cost them approximately \$15,000 and that it cannot be driven over without damaging it.

[81] The Smiths dispute that the French drainage system was necessary.

[82] The question of whether driving over the French drain and covering decorative rocks would damage the drain is questioned to some extent by an engineering report from Mr. Lawson filed by the Smiths. The engineering report indicates that properly constructed, a French drain may not be damaged by large vehicles driving over it.

[83] I have seen the photos showing the difficulty Mr. Smith had in backing up a boat with a trailer into the shop, and I am satisfied that the French drain, even on the south side, would interfere with his ability to do so. One has to account for the fact that this is a semi-rural property where the parties are accustomed to driving large trucks, sometimes towing trailers or boats, which may have difficulty manoeuvring in tight spaces.

[84] As with the other obstacles on the Easement, construction of the drainage system was undertaken unilaterally without the permission of the Smiths. Unfortunately, while the French drain may well be useful for drainage at one level, it replaces a ditch and curb to the road which the plaintiffs previously could use a vehicle to pass over (albeit sometimes with difficulty) with a system which now impedes the Smiths accessing their property. I have no doubt that its existence (even with a wider roadway) hinders access to portions of the Smiths' property,

especially if one accepts the Balens' own evidence that the French drain should not be driven over.

Whether a Permanent Injunction Should be Ordered

[85] The test as to whether there has been an actionable disturbance on an easement is whether the way could be practically and substantially exercised as conveniently after as before the interference; to be actionable, the interference must be substantial: *Grenier v. Elliott*, 2007 BCSC 598 at para. 35; see also *Fallowfield v. Bourgault* (2003), 68 O.R. (3d) 417 at paras. 11 and 33 (Ont. C.A.).

[86] The defendants point to the fact that an unpaved, underdeveloped road runs diagonally across the Smiths' property. The implication appears to be that this could potentially provide an alternate means of access and that it is therefore unnecessary to construe the Easement widely. I view this argument as misplaced and the existence of the "bush road," as it was referred to, as being irrelevant to the interpretation of the Easement except as part of the overall context.

[87] I have no difficulty concluding from all the circumstances that the Balens' placement of the hedge trees, concrete blocks, fence, boulders, and gates are contrary to the language of the Easement. That language (1) provides the Smiths with a broad right to enter, pass, and re-pass along the Easement; and (2) restricts the Balens from placing, erecting, or constructing any structure, foundation, or obstacle whatsoever or any plant growth which might interfere with access by the Smiths.

[88] I also find that the Balens' placement of the hedge trees, concrete blocks, boulders, fence, posts, gates, and the French drain, even with the Balens' more recent litigation-induced attempts at mitigating their highhanded earlier unilateral actions in placing these items along the Easement, constitutes an unreasonable and substantial interference with the intended use and enjoyment of the Easement by the Smiths and their guests: similarly see *Livingston v. Millham*, 2005 BCSC 1292 at para. 22; *Firman v. Michaleski* (1995), 60 A.C.W.S. (3d) 174 at para. 6 (B.C.S.C.) (WL); *Campbell v. Blainey*, 2005 BCSC 250 at para. 56.

[89] Moreover, this unreasonable and substantial interference with the Easement and the Smiths' use and enjoyment of their property constitutes a nuisance: *St. Lawrence Cement v. Barrette*, 2008 SCC 64 at para. 77; *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paras. 18–24.

[90] The Balens' interference and nuisance is deliberate and likely to be continue, thereby making a prohibitory injunction appropriate: *1465152 Ontario v. Amexon Development Inc.*, 2015 ONCA 86 at para. 27, leave to appeal ref'd [2015] S.C.C.A. No. 102; *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396 at para. 28.

[91] Given the repeated substantial interference with the Easement, I find it appropriate to permanently restrain the Balens from interfering with the Easement, putting obstacles in the way, or committing further nuisance: *Livingston v. Millham* at paras. 26–27; Robert Sharpe, *Injunctions and Specific Performance*, 2 ed. (Toronto: Canada Law Book, 1992) at paras. 4.10 to 4.20; *North Vancouver City v. North Shore Land Company*, [1973] 6 W.W.R. 295 at para. 29 (B.C.S.C.) (WL).

[92] I also find it appropriate to make a mandatory injunction to provide justice between the parties: *Englehart v. Holt*, 2015 BCCA 517 at para. 25. Such an injunction may include orders requiring the defendant to remove obstacles creating the interference: *Kozik v. Partridge* (2000), 36 R.P.R. (3d) 254 at para. 6 (Ont. S.C.J.) (WL); *Firman v. Michalesk*, at para. 7 (WL). I therefore agree with the request for a mandatory injunction ordering the defendants to remove the fence, gate, fence posts, concrete blocks, and hedges they placed in the area and on the Smiths' property.

[93] However, with regard to the scope of both orders, I intend to make the orders somewhat more focussed than requested by the plaintiffs.

Scope of the Injunction

[94] Having found that an injunction is appropriate, I must concern myself with the appropriate breadth of the order. I remind myself that the Smiths are not the only

Dominant Tenement. The Balens (by virtue of their ownership of the 6751 Balen Property) and the Vezzanis are also Dominant Tenements in relation to the Easement. As such, they, along with the Smiths, have the right to undertake certain activities for the provision of electrical works and residential services (para. 1) and to maintain the roadway (para. 2). I must therefore have regard to the parties' respective interests and authority under the Easement.

[95] It has been held that a grant of Easement cannot usurp the property rights of a servient owner: *Macdonald v. Grant* (1993), 85 B.C.L.R. (2d) 180 at para. 31. That said, the Smiths' rights as defined in the Easement must be protected and the Balens' continuing infringement addressed.

[96] It is important in the context of a mandatory injunction that the order clearly define to the defendants what their obligations to remove obstacles are, and thus I will scrutinize the terms of the orders sought.

[97] In particular, the Smiths' request for an order to remove the French drain and the pipeline valve may not be necessary if the French drain can be modified so that it can be driven over. Whether that is feasible is only within the knowledge of the Balens, who constructed it. They say it cannot be driven over in its current form. If that is the case, the French drain on the Easement must be removed because it directly interferes with the Smiths' access to their property.

[98] The order will specifically refer to the objects to be removed. It will also provide a removal period of 45 days, not the 30 days suggested by the plaintiffs, and it will allow for deviation from the terms of the order by the consent of all parties.

[99] Therefore, the order will go as follows. The defendants, Robert Balen and Beryle Maureen Balen:

- 1) Are required within 45 days from the pronouncement of this order, and at their own cost, to remove any fences, fence posts, gates, concrete blocks, boulders, metal railings, trees, hedges, shrubs or bushes, placed or made by themselves or by their agents and servants on that part of the lands and premises situate at 6691 and 6751 Lakeshore Road Northeast, Salmon Arm, British Columbia,

affected by Easement number KD26743 which might interfere or obstruct access to, or egress from, any part of the lands and premises situated at 1281 70th Avenue Northeast, Salmon Arm, British Columbia, unless deviation from this term is consented to in writing by all neighbouring landowners, including the Smiths and Vezzanis.

- 2) Are required within 45 days from the pronouncement of this order, and at their own cost, to render any ditches or French drains on the aforesaid Easement suitable to be driven over by a one tonne truck and trailer, and if that is not possible, to remove the French drains completely and restore the areas now covered by French drains to their former preconstruction condition as of July 31, 2016, at a surface elevation that is level with the paved roadway unless deviation from this term is consented to in writing by all neighbouring landowners, including the Smiths and the Vezzanis.
- 3) Are restrained by themselves, their agent, servants, or otherwise, from interfering with or obstructing the Easement by making, placing, erecting, constructing or maintaining on the easement any building, structure, foundation or obstacle whatsoever or plant any growth which might interfere or obstruct with access to, or egress from, any part of the Smith property from or to the aforementioned Easement unless deviation from this term is consented to in writing by all neighbouring landowners, including the Smiths and the Vezzanis.

THE DAMAGES ISSUE

[100] The plaintiffs also seek general damages for interference with the Easement and for nuisance and ask for an award of \$40,000 on this basis. Given that the evidence at the summary trial established an ongoing infringement of the Easement and the defendants are experienced property developers who are capable of remediating the Easement, I view the injunctive relief provided above as the appropriate remedy at this time to address the Balens' continuing violation of the Easement. The defendants are obligated to remedy the Easement at their own cost.

[101] I am aware that damages for nuisance in the context of a substantial or significant interference with another's enjoyment of property can be awarded in some cases in addition to injunctive relief: for instance, *Campbell v. Blainey* at paras. 53–57; *Kozik v. Partridge* at paras. 5–6 (WL).

[102] In other cases, the practical and proper step is to order an injunction by itself which, instead of attempting to compensate for damages suffered, will terminate the interference causing such damages: *North Vancouver City* at para. 27 (WL);

Century 21 Canada Ltd. Partnership v. Rogers Communication Inc., 2011 BCSC 1196 at paras. 369–76.

[103] Here, the focus has been on injunctive relief, which is the usual remedy to refrain continuation of a wrong in relation to property rights. The question of damages for past nuisance or infringement of the Easement may well overlap with the plaintiffs' claims for trespass and invasion of privacy which are being pursued in the main proceeding.

[104] Given that overlap, and the fact that the underlying activity is not yet resolved, I would adjourn and defer the issue of damages to the main action. Nothing said in these reasons should be taken as binding on a trial judge who addresses damages in that proceeding.

COSTS

[105] The plaintiffs have been substantially successful. I would order the defendants to pay the plaintiffs' costs on Scale B.

[106] Mr. Brackstone, you have a copy of the language of the order. As I said, please provide that to Mr. Russman.

[107] Anything else counsel?

[108] MR. BRACKSTONE: No, My Lord.

[109] THE COURT: Mr. Russman?

[110] MR. RUSSMAN: Nothing, My Lord.

[111] THE COURT: Thank you, gentlemen.

"Brundrett J."

Type	Invoice	Date	Fees	Cost	Other	Tax	Interest	Total
InvoiceTotal	204158	04/26/2018	3,500.00	40.65	0.00	421.68	0.00	3,962.33
GRAND TOTAL			3,500.00	40.65	0.00	421.68	0.00	3,962.33

Transaction Type	Date	Cleared Date	Index No	Document No	Amount	Description	Balance
TRSF IN	05/26/2015	05/26/2015	184960	Visa	5455.64	*Visa: Richard Smith	5455.64
CHEQUE	06/30/2015	06/30/2015	185927	37011	-5455.64	*OB Gen - partial pymt 176869	.00
TRSF IN	09/10/2015	09/10/2015	187876	M/C	6874.12	*M/C: Richard Smith	6874.12
CHEQUE	09/17/2015	09/17/2015	188019	37301	-72.28	*OB Gen - pay 176869	6801.84
CHEQUE	09/17/2015	09/17/2015	188020	37301	-6801.84	*OB Gen - pay 178520	.00
TRSF IN	04/27/2016	04/27/2016	194702	M/C	9059.37	*M/C: Richard A. Smiths	9059.37
CHEQUE	05/09/2016	05/09/2016	195194	39177	-9059.37	*OB Gen - pay 181675	.00
TRSF IN	07/21/2016	07/21/2016	197682	M/C	14535.71	*M/C: Richard Smith	14535.71
CHEQUE	07/28/2016	07/28/2016	197845	39508	-14535.71	*OB Gen - pay 186129	.00
DEPOSIT	12/12/2016	12/12/2016	203386	526	5600.00	*Maureen/Mark Balen N/C	5600.00
CHEQUE	12/23/2016	12/23/2016	203889	40130	-5600.00	*OB Gen - partial pymt 190841	.00
TOTAL					.00		

Melinda Smyrl

From: Richard Smith <richard@tekamar.ca>
Sent: October-21-20 12:30 PM
To: Melinda Smyrl
Subject: FW: Preliminary mapping
Attachments: LS 4 Inclusion Exclusion (with image).pdf; LS 4 Inclusion Exclusion.pdf; LS 4 slope analysis.pdf; fallen engineered wall dec 19 2018.jpg

Hi Melinda . Attached are better maps for inclusion exclusion. They will be improved Friday when Brian gets back but if you are pushed for time Here is the early ones also here is a pictures backing up my statement Balen using land to south for junk storage, old water tank old barb cue discarded excavator tracks and the 6 foot wall that fell down

From: Brian Sansom <brian@sansomsurveying.com>
Sent: October 20, 2020 1:59 PM
To: Richard Smith <richard@tekamar.ca>
Subject: Preliminary mapping

Hello Richard,

I did get a bit of time on this earlier today and thought I should send over a few preliminary plans to see if I am displaying the information you want added to the application.

I have attached:

- a general plan of the property including the areas proposed to be included and excluded
- the same with the aerial image added
- a slope analysis of the property based on the City's contours. The red triangle in the TIN are the areas over 30% whilst the brown are less. If this adds to your arguement for the exchange then I can create shaded areas for each of the above and below 30% grades which would look better than the coloured triangles.

I'm back in the office on Friday again and can finalized based on your comments then.

Brian

From: Brian Sansom <brian@sansomsurveying.com>
Sent: October 13, 2020 8:24 AM
To: Richard Smith <richard@tekamar.ca>
Subject: Re: Hi Brian

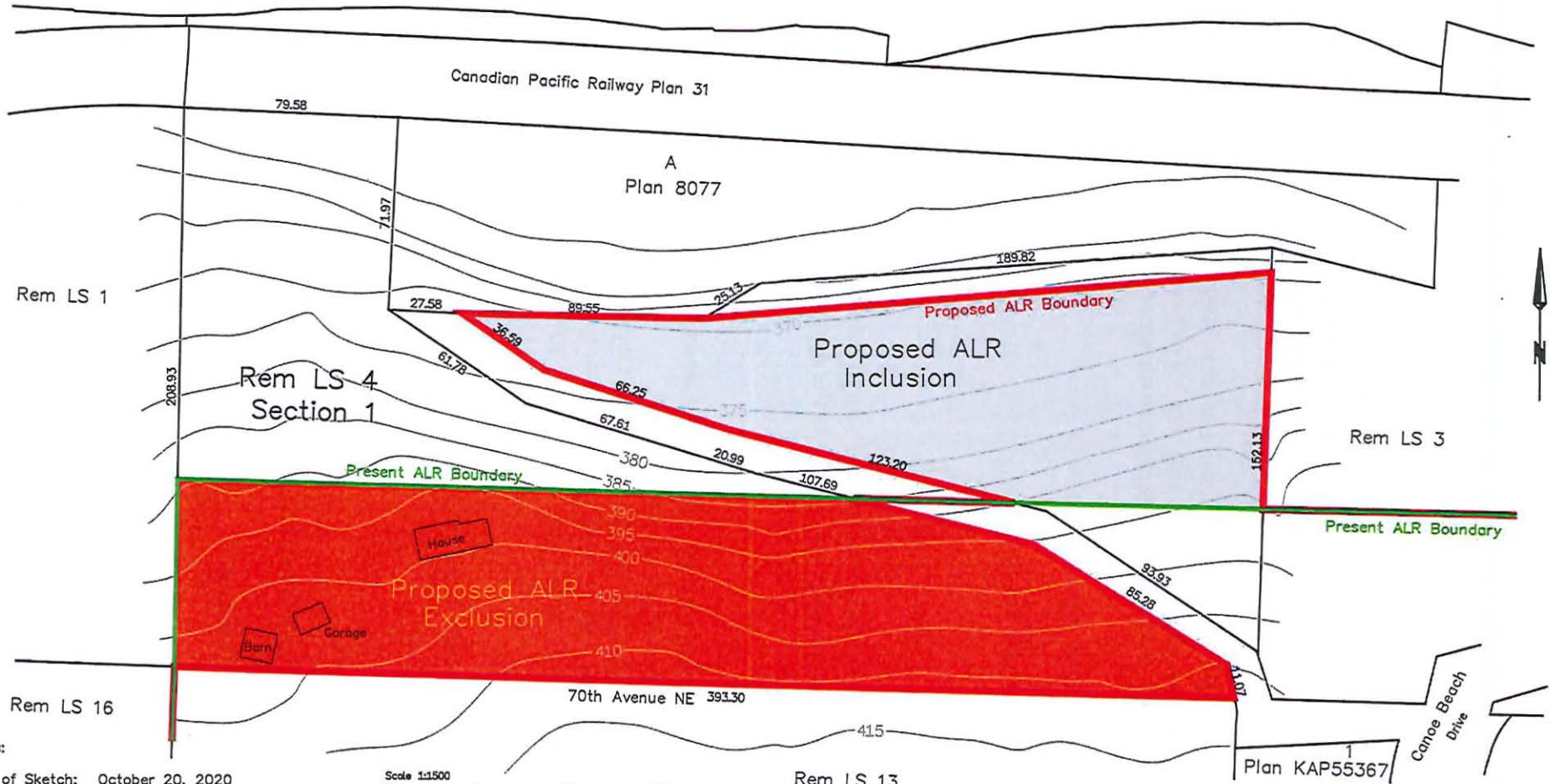
Morning Richard,

Your description of what is required makes sense, and I can see why having a formal plan showing the various overlaps will make it obvious to the Commission why this exchange is a logical proposal. I'm happy to provide that formal plan. I expect the cost to be similar to the one I just completed for your Chum Creek Gravel -

Sketch Plan of Proposed ALR Inclusion/Exclusion Exchange

LS 4, Sec 1, Tp 21, R 10, W6M, KDYD, W6M

except Plans 31 and 8077



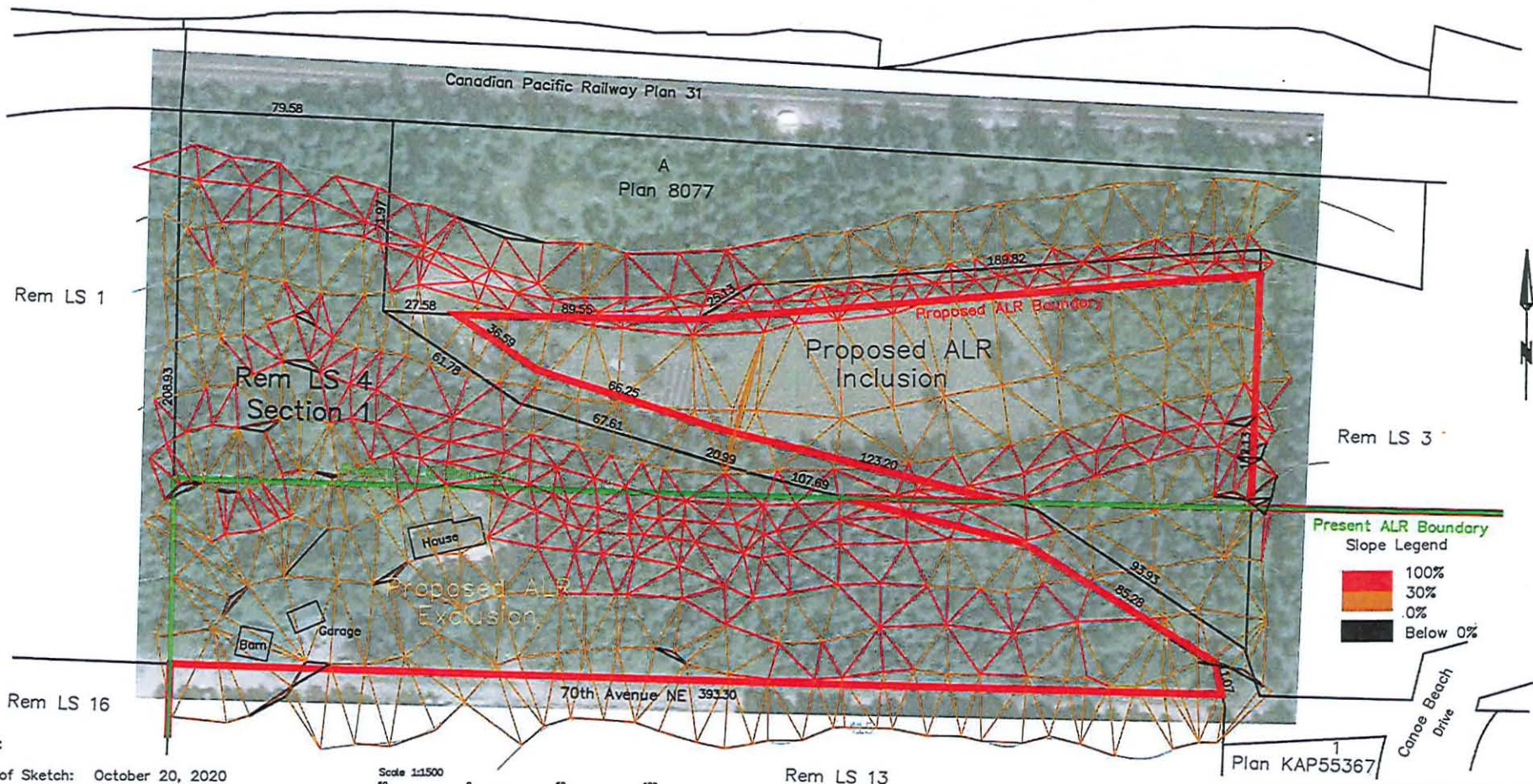
Notes:
 Date of Sketch: October 20, 2020
 Area Proposed to include in ALR : 1.66ha
 Area Proposed to exclude from ALR : 2.43ha

Scale 1:1500
 0 50 100
 All distances are in metres.
 The intended plot size of this plan is 560mm in width by 432mm in height (C size) when plotted at a scale of 1:1500

B.D. Sansom Land Surveying Inc.
 Land Surveying and Geomatics Engineering
 Salmon Arm, BC sansomsurveying.com
 File No: 2020083

Sketch Plan of Proposed ALR Inclusion/Exclusion Exchange LS 4, Sec 1, Tp 21, R 10, W6M, KDYD, W6M

except Plans 31 and 8077



Notes:

Date of Sketch: October 20, 2020

Area Proposed to include in ALR : 1.66ha

Area Proposed to exclude from ALR : 2.43ha

Scale 1:1500

All distances are in metres.

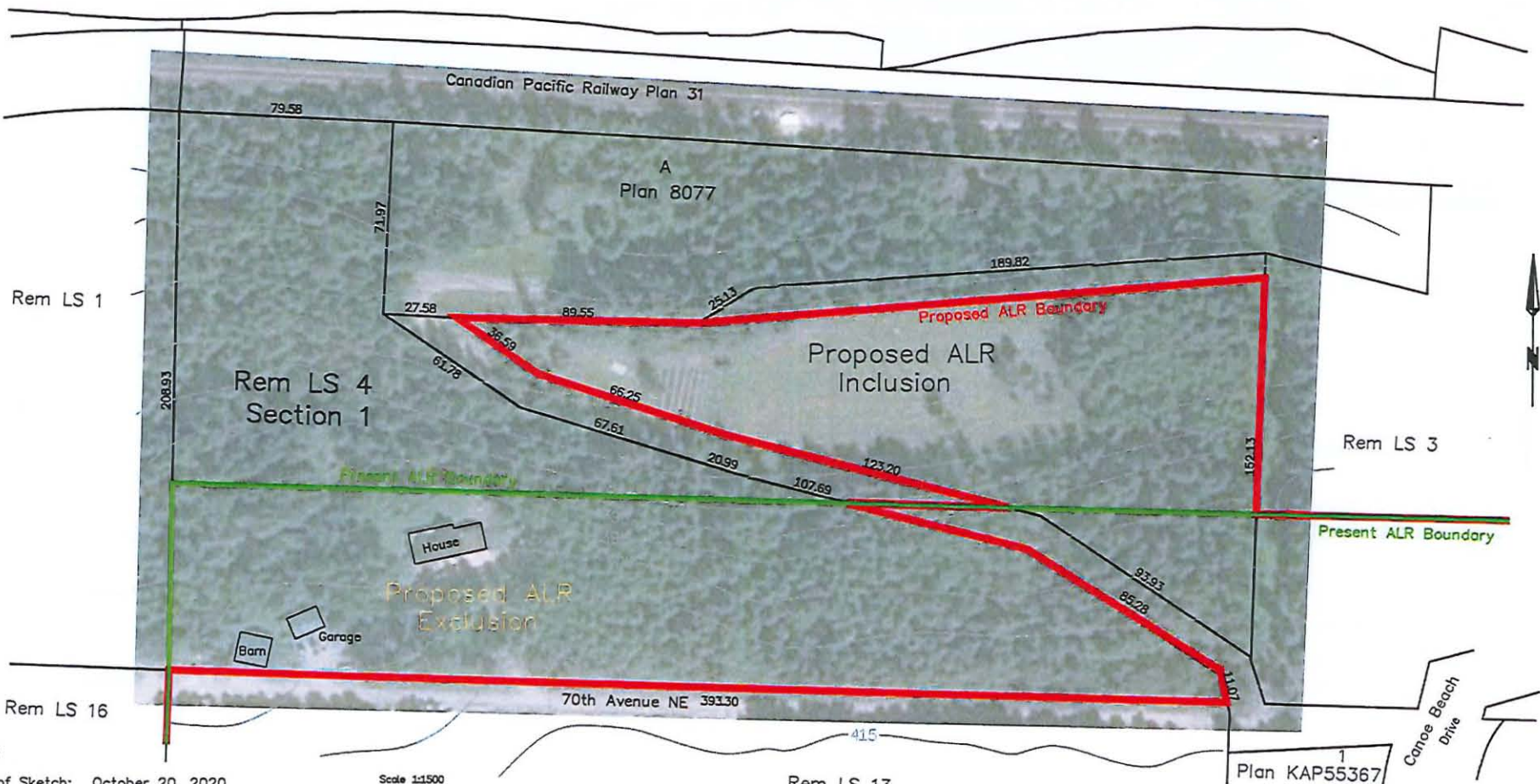
The intended plot size of this plan is 560mm in width by 432mm in height (C size) when plotted at a scale of 1:1500

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Sketch Plan of Proposed ALR Inclusion/Exclusion Exchange

LS 4, Sec 1, Tp 21, R 10, W6M, KDYD, W6M

except Plans 31 and 8077



Notes:

Date of Sketch: October 20, 2020

Area Proposed to include in ALR : 1.66ha

Area Proposed to exclude from ALR : 2.43ha

Scale 1:1500
 0 50 100

All distances are in metres.
 The intended plot size of this plan is 560mm in width
 by 432mm in height (C size) when plotted at a scale of 1:1500

Plan KAP55367
 B.D. Sansom Land Surveying Inc.
 Land Surveying and Geomatics Engineering
 Salmon Arm, BC sansomsurveying.com
 File No: 2020083

fallen engineered wall dec 19 2018 (002)



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