

● Construction Law Advisory

Date August 22, 2012

Subject **Beware disposal of materials on Agricultural Land – Why a Farmer’s Handshake may not be good enough**

Disposal of materials excavated from construction projects in rural areas is rapidly becoming more problematic. Historically, a contractor could rely on obtaining agreement from a nearby land owner to dispose of material on their property. Now, with the advent of the Agricultural Land Commission (the “Commission”) and the restrictions placed on land falling within the agricultural land designation by the Commission, approval from the land owner is may not be enough.

Section 20 of the Agricultural Land Commission Act (the “Act”) provides the Commission with the authority to restrict disposal of material on agricultural land despite a land owner’s agreement. Section 20 reads as follows:

Use of agricultural land reserve

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

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

(3) An owner of agricultural land or a person with a right of entry to agricultural land granted by any of the following may apply to the commission for permission for a non-farm use of agricultural land:

(a) the Surface Rights Board, or its predecessor, the Mediation and Arbitration Board, under the Petroleum and Natural Gas Act, the Mining Right of Way Act or section 19 of the Mineral Tenure Act;

(b) [Repealed 2010-9-1.]

(c) any other authority under an enactment.

(4) A person who intends to use agricultural land for a prescribed use that involves soil removal or placement of fill must give notice of that intention to the commission in the prescribed form at least 60 days before engaging in the intended use.

(5) In response to a notice under subsection (4) or if a person engages in a use specified in subsection (4) without giving the required notice, the chief executive officer, by written order, may

(a) if the owner of the land agrees to restrictions on the use, specify terms and conditions for the conduct of that use of the agricultural land, or

(b) order that an application to the commission under subsection (3) is required for permission to engage in the use and may include as a term in the order that the person cease or not engage in the use until the application is determined.

(6) If the chief executive officer does not respond to a notice under subsection (4) within 30 days by making an order under subsection (5), the owner of the land may engage in the intended use.

[emphasis added]

For a road contractor, the timeframe to commence construction after contract award is inadequate to secure the necessary approval from the Commission considering the necessary 60 day notice requirement. The approval process also creates additional costs for which the contractor typically does not account for in its unit prices.

So what can be done to appease the difficulties associated with disposing material in rural areas? Apart from ensuring unit prices account for costs associated with obtaining the Commission's approval, the risk the Commission will involve itself is a risk contractors must assume. While the Owner is in a superior position to secure approval from the Commission of potential dump sites, the reality is that the Commission will rarely involve itself in disposal of organic materials on a consenting individual's agricultural property. The Commission's power is intended to prohibit landfills from occurring, not to stop property owners from improving their property by importing fill material.

Agricultural land restrictions are yet another inherent risk of providing a tender for public work projects. Unless the risk is assumed by the owners, which is unlikely, contractors should look for pre-approved dump sites included in tender documents and should run from environmental consultant oversight, the true winners of a Commission decision to become involved.

Further information is available from McLean & Armstrong LLP at 604-925-0672. Article written by Chris Moore.