IN THE MATTER OF THE
FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996, c. 131
AND IN THE MATTER OF A COMPLAINT
ARISING FROM THE OPERATION OF AN EQUESTRIAN CENTRE IN KELOWNA, BRITISH COLUMBIA

BETWEEN:

NICHOLAS and SANDRA SWART

COMPLAINANTS

AND:

PIRJO HOLT dba SERENDIPITY FARMS

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board:	Daphne Stancil, Presiding Member John Les, Chair, Andreas Dolberg, Vice Chair
For the Complainant:	Joni Metherell, Counsel Elise Everest, Counsel Nicholas Swart
For the Respondent:	Pirjo Holt
Dates of Hearing	June 25-26, July 15, 2015
Place of Hearing	Kelowna, British Columbia

INTRODUCTION

1. The British Columbia Farm Industry Review Board (BCFIRB) hears complaints about farm practices under the *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996, c. 131 (*FPPA*).

2. Under section 3 of the *FPPA*, a person who is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, may apply to BCFIRB for a determination as to whether the disturbance results from a normal farm practice.

3. The complainants, Nicholas and Sandra Swart, filed a complaint with BCFIRB on February 5, 2011 stating that they are aggrieved by the noise, odour, flies, bright lights and unsightliness of the respondent's equestrian farm.

4. The respondent, Pirjo Holt, took the position that the alleged disturbances arise from normal farm practice.

5. BCFIRB held a hearing into this matter on May 3 and 4, 2012 and issued a decision March 4, 2013. We refer to this hearing, the panel that heard it, and the decision that panel made, as the "2013 hearing", the "2013 panel" and the "2013 decision" respectively.

6. In its 2013 decision, the 2013 panel found that the complainants provided sufficient evidence to establish that they were aggrieved by noise, light and increased odour and flies from the equestrian centre operation [para 98]. The 2013 panel dismissed the complaint with respect to noise, light disturbance and unsightliness finding that these practices were consistent with normal farm practice.

7. As well, with respect to disturbance from odour and flies, the 2013 panel found that the respondent's manure management practices were consistent with normal farm practice. However, the 2013 panel determined that because the run-outs adjacent to the equestrian centre (in the area of the respondent's farm referred to as area B) were not set back from the southerly property line common with the complainants' property, the use of area B to turn out horses was not consistent with normal farm practice. The 2013 panel issued a modification order requiring the respondent to set back the run-outs in area B of the farm at least 15 metres from the farm's southerly property line by May 31, 2013 or to discontinue their use for livestock.

8. The respondent appealed the 2013 decision to the Supreme Court of British Columbia which ordered a stay of BCFIRB's decision. In its judgment[1], the Court ruled in favour of the respondent on one ground of appeal and set aside the modification order and remitted the complaint back to BCFIRB. We refer to the judgment as the Holt Court Decision.

[1] *Holt v Farm Industry Review Board*, 2014 BCSC 1389

9. With respect to that ground, the Court reviewed the 2013 panel's analysis and, in paragraphs 215 to 269 of that decision, concluded that BCFIRB applied its statute, the *FPPA*, unreasonably. It held this error arose because the 2013 panel failed to consider evidence that would enable it to apply past or present customs pertaining to the confining of horses on horse farms to the set-backs in area B of the Holt farm. The Court found the 2013 panel had not considered "accepted customs and standards as established and followed by similar farm businesses under similar circumstances" [paras 251 and 253].

10. The Court concluded that the 2013 panel made an error by effectively enforcing BC Ministry of Agriculture guidelines (Guide for Bylaw Development in Farming Areas) as a regulation [para 247] instead of determining the issue based on evidence of "proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances" [para 234] as a basis for a decision. The Court noted that "the *FPPA* does not instruct the FIRB to consider provincial guidelines and zoning bylaws" [para 241].

11. The Court accepted that provincial guidelines and zoning bylaws could be a consideration when assessing normal farm practice, but such a consideration could only be made in the context of the required evidence of similar farms under similar circumstances which determines the established practices.

12. The Court ordered BCFIRB to rehear and reconsider the issue of the set-back for the run-outs in area B in light of such evidence.

13. The following procedural history is relevant to the rehearing of the complaint:

a) Letter from Jim Collins, BCFIRB Executive Director dated November 7, 2014:

> As you know, the record before the original panel consisted of 34 exhibits and a transcript, all of which were before the Court. The Court's decision states that: "the parties may apply for directions on the use of the current record if there is to be reconsideration of the questions before the FIRB": para. 271. I take this to mean that the parties do not have to go back to court to address this issue, but they can do so if it is not otherwise resolved in this process.
>
> With respect to documents, I would propose that the simplest approach here would be for each party to identify and submit afresh any documents and witnesses they intend to rely on, whether or not that evidence was originally submitted as an exhibit. If a party wishes to rely on an exhibit that can *only* be found in the original record (this may be the case, for example, with Mr. Withler's Knowledgeable Person Report and associated transcript evidence), they can provide notice of this when they provide their other documentary evidence, along with an explanation of why they are relying on it. If the other party objects to the use of that evidence, the panel can rule on the issue in advance and a party would then have the opportunity to raise the issue with the Court as per paragraph 271 of the Court's judgment.
>
> With regard to the transcript, it seems to me that, subject to an agreement between the parties, the simplest approach would be for each party to provide their evidence and their witnesses' evidence afresh, subject to the right of a party to use the transcript to cross-examine a witness if their evidence is alleged to be inconsistent with the evidence they originally gave.

b) BCFIRB held a pre-hearing conference call on November 28, 2014 to clarify and confirm the issue before BCFIRB and establish the process for a new hearing (including what if any use would be made of the record from the 2013 hearing).

c) By email dated December 19, 2014, Ms Holt advised that, with respect to use of current record, she was in agreement that each party would identify and submit afresh any documents and witnesses they intend to rely on.

d) In the second pre-hearing conference on January 16, 2015, the parties agreed to a schedule for identifying and disclosing all documents and witnesses they intended to rely on, whether or not that evidence formed part of the original complaint.

e) By letter dated March 31, 2015, Counsel for the Swarts confirmed their intention to rely on several of the complainants' photographs from the original hearing, a photograph from the Knowledgeable Person (KP) report (but not the text of the KP report)[2], a plan and aerial photo of the Swart and Holt properties and a photo of the "run-outs" adjacent to the property line in addition to the new documents which were identified.

14. The matter was heard over three days (June 25-26, and July 15, 2015) in Kelowna, BC. On the day before the hearing, the panel visited both the complainants' property and the respondent farm to place the complaint in geographical context. The parties were present on their respective properties during the site visits.

15. In coming to this decision and pursuant to the agreement made between the parties on the use to be made of the record from the 2013 hearing, the panel has considered only that evidence placed before it by the parties. We have reviewed the 2013 decision and the Holt Court Decision and where necessary, we note those findings that are binding upon us.

ISSUE ON REHEARING

16. Does "normal farm practice" require Ms Holt to set back the run-outs located in area B of her property (used as part of her equestrian operation) from the common property line she shares with the Swarts and, if so, what setback is required to comply with normal farm practice?

PROPERTIES AND FACILITIES

17. Descriptions of the complainants' and respondent's properties are provided in the 2013 decision at paragraphs 9 to 15.

> 9. The complainants reside on Stewart Road East in Kelowna. They purchased their approximately 8 acre property in 2002 and built a home on it. The house is sited away

[2] Report of Carl Withler dated June 17, 2011 and prepared pursuant to section 4 of the *FPPA* which allows BCFIRB to obtain the advice of persons knowledgeable about normal farm practices.

from the road, about 1/3 of the way toward the back property line. The property is in the BC Agriculture Land Reserve (ALR). The complainants have a small raspberry operation on their farm and a few apple trees. A large part of the property is currently unused for farming or left fallow.

10. The respondent owns the property immediately to the north of the complainants' property. The property fronts on Stewart Road. It is bordered on the north side by a residential subdivision and on the east (back) by a cherry orchard. The property is approximately 17 acres in size and is in the ALR.

11. The respondent purchased the property in 2004 as a going concern horse farm and continued to operate it as a horse farm under the name Serendipity Farms. In addition to farm buildings, the property has two homes, one of which in the northern half of the property is the respondent's, while the other, in the southwest portion of the property, is her daughter's.

12. In 2009, the respondent built a covered riding arena and indoor horse boarding facility (the equestrian centre) of approximately 25,000 square feet in size. The equestrian centre lies to the rear of the daughter's home in the south east portion of the property.

13. Along the common property line between the complainants' and respondent's properties lying to the rear of the daughter's house and yard, are: a grass paddock where horses are turned out during the day (referred to as area A), then the parking lot for the equestrian centre, the equestrian centre and finally to the rear of the equestrian centre in the southeast corner another grass paddock area (referred to as area C).

14. The equestrian centre is a large rectangular-shaped barn with a riding arena in the middle and horse stalls along each of the longer sides (which run east to west). The stalls on the south side adjacent to the complainant's property were a focus of this hearing because each stall has direct access to a separate outdoor, non-grazing area (i.e. "dirt" run) where the horse may be turned out. Each individual turnout area is separated from the next by wood fencing. The respondent referred to these outdoor areas as "run-outs". The run-outs on the south side of the barn (referred to as area B) extend to the common property line.

15. A wood fence runs along the common property line, and is complimented by an electric fence in the run-out areas.

18. This panel notes that a chain link fence surrounds the wood fence around area B. The respondent uses the eight run-outs in area B by dividing them into two groups of four run-outs each, separated by an unused run-out, for a total of nine. All run-outs are 20 metres in length and eight metres wide, with the exception of the run-out immediately adjacent to the western border of the middle unused run-out which is about seven metres in width, for a total of 0.3 acres. The run-outs are separated by wooden fencing. The parties in this complaint referred to run-outs as non-grazing paddocks and we use the terms interchangeably in this decision.

COMPLAINANTS' CASE

19. The complainants' case proceeds on the basis of the 2013 panel's finding that the complainants are aggrieved by odour and flies related to manure as a consequence of the location of the run-outs in area B. They assert that these disturbances would be less severe if the run-outs in area B were set back from the common southerly property line and seek an order reinstating the 2013 panel remedy requiring Ms Holt to set back area B 15 metres from the common property line or discontinue its use for livestock. The complainants submit that such a setback would be consistent with normal farm practice.

20. The complainants provided an exhibit containing the following:
    - Guide for Bylaw Development in Farming Areas, BC Ministry of Agriculture, 2013.
    - Copies of extracts from several local government bylaws pertaining to agricultural zoning and the keeping of livestock (City of Armstrong, Regional District of Central Okanagan, City of Vernon, District of Lake Country, City of Kelowna, District of Peachland, District of West Kelowna, City of Enderby, Regional District of North Okanagan, Township of Langley)
    - Photographs of the Swart and Holt properties at various times of year
    - Aerial and ground photographs of other equestrian farms in the area
    - A report dated May 29, 2015 prepared by Andrea Lawseth of AEL Agroecological Consulting.

21. The respondent objected to the introduction of the guidelines and various bylaws noted above indicating that if the panel relied on the guidelines and bylaws, it would repeat the error of the 2013 hearing. Counsel for the complainants suggested that these documents be submitted to support the proposition that, in British Columbia, there are often set-backs for animal enclosures established by local governments. The Court held that such bylaws and guidance were not conclusive but were relevant in the determination of normal farm practice. The panel accepted them on this basis and considered the documents along with other evidence in coming to its decision.

Nicholas Swart

22. Mr. Swart summarized and updated the information he provided the 2013 panel about his property and the disturbances of odour and flies due to the adjacent horse farm. He suggested that runoff from area B onto his property occurred during wet weather and was due to:

    - the inability of the soil to absorb water under certain environmental conditions in part because of changes in the composition of soils around the equestrian centre made during its installation, and
    - the slope of the run-outs away from the centre toward the back of his property.

23. He advised, as he had in the 2013 hearing, that the vegetation adjacent to area B of the Holt farm was different (different plants, thicker, greener and taller) to the rest of the vegetation along his northern property line.

24. He provided photographic evidence of horses standing along the common property line and of manure in the run-outs during times when the manure could not be picked up daily due to weather. During part of the winter, he says the manure freezes to the ground and during the spring, the manure can be "messy" as it, and any snow, thaws.

25. Mr. Swart advised that accumulated manure in area B, particularly during the spring melt, is a source of odour. His observation of the dispersion of odour from area B is that at 15 to 30 metres away (from the property line) the odour becomes less concentrated. He also suggested that the low elevation in the back half of his property served as a trap for odour from the Holt farm. The distance from one corner of his house structure to the closest corner of the nearest run-out attached to the equestrian centre is 192 feet.

26. Mr. Swart says that the production from the raspberry plants at the front of his property (closest to Stewart Road East) had decreased significantly from 2011 to 2014. Yields have dropped from about 2000 pounds to about 1000 pounds and as a result, he plans to replant at a different location leaving the land at the front of his property fallow. He has considered using the area of his property adjacent to the common property line with area B on the Holt property as this location would be ideal for raspberry production. He has a number of concerns, however, with using that area, given the location of the run-outs in area B, including the risk that pickers on the future "u-pick" operation may startle horses, the potential impact of runoff from area B on the raspberry field, the impact of odours and flies on the pickers, and the possible restrictions that may be placed on his use of herbicides. As long as the horses in area B are along the property line, he says he would not be able to produce raspberries in that location.

27. Mr. Swart testified as to the efforts he made to find a farm for comparison purposes in his neighbourhood but says he was unable to find a comparator to the Holt farm. He has not found a farm with the exact configuration of enclosures, with run-outs off a barn adjoining a common property line. He provided photographic evidence from 2012 of a farm on Stewart Road West (Complainants' exhibit, tab 14)[3] where there are a total of five non-grazing paddocks associated with two barns, set at a right angle with one another (two off one barn, three off the other). They are located in the centre of the western part of the property and are set back from any common property lines.

[3] For properties referred to by the parties, but for which the owners did not appear as witnesses, the panel has cross-referenced the exhibit where the address is identified. The panel has adopted this convention to respect the privacy of owners of property who did not appear as witnesses.

28. He provided aerial photographic evidence from 2012, of the farm south of his property (Claimants' exhibit, tab 12, property on Stewart Road East) where the barn and run-outs are set back from common property lines. He also provided aerial photographic evidence from 2012 of two other farms at Wallace Hill Road (Claimants' exhibit, tab 12) and Packinghouse Road (Claimants' exhibit, tab 19), which had barns with adjacent non-grazing paddocks that were also set back from any common property lines. Mr. Swart provided an aerial photograph (Claimants' exhibit, tab 14) of the Stewart Road West property referred to above in paragraph 27, which confirmed the configuration of barns and run-outs noted in that paragraph.

29. Mr. Swart referred to photographic evidence of another property on Stewart Road East (Claimants' exhibit, tab 14) showing a barn constructed in 2013 with run-outs also located away from any property line. Mr. Swart also compared the paddocks located along the property line of a farm on Saucier Road (Claimants' exhibit, tab 20) to area B, suggesting that area B has about 10 times the horse density than the paddock area located on the property line of the Saucier Road farm.

30. Mr. Swart commented on several of the 44 aerial photographs[4] of horse farms provided by Ms Holt. He referred to aerial photographs of the following Kelowna properties:
    - Reynolds Road (Respondent's exhibit, tab 11, photograph12)
    - Jaud Road (Respondent's exhibit, tab 11, photograph 29)
    - Miller Road (Respondent's exhibit, tab 11, photograph 33)
    - Swamp Road (Respondent's exhibit, tab 11, photograph 44)
    - Saucier Road (Respondent's exhibit, tab 11, photograph 16)
    - Gordon Drive. (Respondent's exhibit, tab 11, photograph 5).

31. Mr. Swart observed from the aerial photographs of the properties noted above, that multiple non-grazing paddocks, including barn run-outs, were set back from property lines and often centrally located on properties. He also noted that where non-grazing paddocks were located along a common property line there were never as many as nine. Therefore, assuming one horse per paddock, there would never be the same density of horses as in area B.

32. Mr. Swart concluded that one does not regularly find non-grazing paddocks or run-outs from barns abutting a common property line. Based on this, he submits that configuring the run-outs from the Holt barn so that they abut the common property line between his property and the Holt property is not common practice.

[4] The City of Kelowna is the source of the aerial photographs which were taken in 2012 and reproduced for the rehearing (2015) at a scale of 1 cm = 26 m. The legends provide: "This map is for general information only. The City of Kelowna does not guarantee its accuracy, currency or completeness. All information should be verified."

AEL Agroecological Consulting, Andrea Lawseth, P. Ag.

33. The panel accepted Ms Lawseth, P. Ag. (B.Sc., M.Sc. in Agroecology) with professional experience in the area of agricultural planning, as an expert witness. She gave evidence by telephone, reviewing her report dated May 29, 2015 which followed her visit to the Swart property on May 1, 2015. She answered two questions in her report:
    - As a consultant to farmers seeking to establish equestrian centre operations, would you recommend locating a confined livestock area in a configuration similar to area B?
    - If you would not recommend locating a confined livestock area in a configuration similar to area B, what considerations would impact your recommendation?

34. In answering "no" to the first question, Ms Lawseth outlined how a farmer could approach development on a property to avoid conflict with neighbours, relying on setbacks and vegetative buffers. She indicated that both were mechanisms that, if used, would avoid disturbances of odour, dust, flies and manure runoff.

35. In answering the second question, Ms Lawseth relied on the approach that the Ministry of Agriculture guidelines took for horse farms and challenged the City of Kelowna's interpretation of its bylaws to approve the placement and use of the run-outs of area B. She expressed concern about locating run-outs without footings on common property lines, especially when the run-outs sloped toward the neighbouring property and suggested these factors could result in urine and manure leaching onto the neighbouring property. However, in response to questions from the panel, she indicated that she had observed non-grazing paddocks directly abutting a common property line on other farms.

36. Her opinion was that the run-outs for area B should be closed and relocated elsewhere on the farm or set back at least 15 metres. She did not consider a vegetative buffer an appropriate remedy. Her report did not provide an analysis of potential alternate placements or the implications of any potential alternate placements on the overall Holt farm operation. She did not offer any detailed evidence about the customs and standards established and followed by similar farms under similar circumstances.

RESPONDENT'S CASE

37. The respondent provided an exhibit containing the following:
    - Correspondence between Ms Holt and the City of Kelowna regarding area B and the conditions of the City's approval of area B
    - Sketch of the farms in the general vicinity of the Holt farm showing the primary uses of the farms
    - Excerpts from Ministry of Agriculture documents pertaining to farming and local government bylaws
    - Affidavit sworn by Isabel Pritchard pertaining to the use of small non-grazing paddocks and their location in relation to shared property lines
    - Correspondence dated May 26, 2015 from Clark Underwood, a resident of Langley, BC with horse farm experience

- Email correspondence between Kelly Coughlin a manager with the Horse Council of British Columbia and BCFIRB case manager Gloria Chojnacki sent June 16, 2015
- Email correspondence sent May 28, 2015 between Kelly Coughlin and Bill Storie, Manager of Bylaws for the Township of Langley, BC
- 44 aerial photographs taken by the City of Kelowna in 2012, and made available to Ms Holt, of farms where horses are raised and kept in the vicinity of the Holt farm
- Report dated May 14, 2015 of Anton Schori, P. Ag. of ATS Environmental Consulting.

38. In a ruling made during the course of the hearing, the panel excluded from evidence the affidavit of Terrance Thompson and Wanda Haddad as they were not available in person or by telephone to respond to questions. There were also miscellaneous excerpts from journal articles in the exhibit which were not relied upon by Ms Holt and which the panel did not consider to be relevant to the issue on this complaint.

39. Ms Holt introduced 12 witnesses (including herself) who provided direct knowledge and evidence of horse farming practices. She also relied on the expert evidence of agricultural soil expert Mr. Schori P. Ag..

40. Ms Holt submits that it is normal farm practice to align run-outs or non-grazing paddocks side by side and extending, to a common property line and seeks an order that the complaint be dismissed.

Isabel Pritchard

41. Ms Pritchard gave evidence that she has considerable experience with horses, as she grew up on a farm that used horses for work and has kept riding horses ever since she moved to the Kelowna area in 1972.

42. She referred to an aerial photograph of the farm she currently owns located at 2080 Saucier Road, and advised that there are several non-grazing horse paddocks on the north side of her property which abut the common property line with her neighbour. Two of these run-outs are from a barn and others have shelters, and are along the property line to the west of the run-outs attached to the barn. She can keep up to six horses on the two acre property with the current facilities.

43. Ms Pritchard advised that the City of Kelowna approved the configuration of facilities in 1974. She indicated that with the size of the properties in the Kelowna area it was important that farmers be able to utilize it all to support farm businesses. Ms Pritchard advised there are currently four horses on her farm, two of which she owns and two of which she boards.

44. Ms Pritchard indicated that owners of horse facilities practice regular cleaning and maintenance. Horses are often kept in non-grazing paddocks, which can be configured as run-outs from barns or shelters for the following reasons:
- to control horses' access to pasture for grazing,

- to maintain separation of animals to prevent injury while keeping them in a centralized area,
- to manage and provide horses select feed, and
- to ensure horses have appropriate exercise.

Heather Henderson

45. Ms Henderson is a founder of an enterprise known as Arion Therapeutic Riding. She initially began the enterprise on a leased property on Spiers Road (Respondent's exhibit, tab 11, photograph 8) in Kelowna (now Orchard Hill Equestrian). Referring to an aerial photograph of that property, she stated that there were four non-grazing paddocks abutting the western common property line with the neighbour and that eight horses were kept in this area (i.e. two in each paddock). The barn was directly east of the paddocks with a driveway separating them. There were several run-outs connected to the barn. Much of the property, allocated to the keeping of horses, was configured with non-grazing paddocks.

46. In 2009, Ms Henderson moved Arion Therapeutic Riding to its current location, a 12-acre property at 2457 Saucier Road in Kelowna where she keeps 23 horses along with llamas and alpacas. This property had previously been run as a horse boarding facility and the southern half of the property is configured as non-grazing paddocks. Four paddocks abut the shared western property line and four abut the eastern property line. These paddocks are not connected with nor run off a barn. She said it is typical and important for horse operations to have non-grazing paddocks in order to control the animals' diets.

47. Ms Henderson had never encountered anyone taking issue with non-grazing paddocks located along a property line.

Glen Roth

48. Mr. Roth gave evidence that he owns a property of about eight acres at 2150 Saucier Road in Kelowna. Referring to an aerial photograph of the property, he advised that he used his acreage efficiently to support his horse business. Of the six horses on the property, four are boarded. He also raises goats as part of his farm business.

49. He keeps three horses in two non-grazing paddocks on the mid-east boundary of his property which abut the common property line with the neighbour. A driveway runs along the neighbour's western property line at that location. He stated that the horses are kept in the paddocks most of the day and are fed there as well. Manure is removed from the paddocks every day.

50. Mr. Roth further advised that he was a civil engineer and currently works as a builder. In building on various properties used for raising horses, his observation is that owners wish to use all their land effectively. He was not aware of any requirement to set back non-grazing paddocks from a common property line and that, in his view, locating paddocks along a property line is common practice.

Nicole Jardine

51. Ms Jardine gave evidence that in addition to keeping ten horses, she raised goats and chickens and has a cherry orchard on her farm at 4441 Stewart Road West in Kelowna. She utilized all of the available land of the 12-acre parcel for farming, noting that there was one large shed on the property utilized for a storage business. She advised that she regularly hosted many horse "events" (i.e. one or two per week during the summer) that included educational, 4H, sporting and competitive events when many horses not usually kept on the property utilized the land and facilities. She indicated that she did not host these events as part of a business venture but did carry commercial liability insurance to cover potential liabilities that could arise from hosting these events.

52. Based on an aerial photograph, she identified three non-grazing paddocks on the south east property line, two behind the barn on the south property line and pointed out that the eastern boundary of the riding ring runs along much of the eastern portion of the common property line with her neighbour. She confirmed that there is a road way along the neighbouring side of the southern property line. She indicated that it is typical for horse paddocks to be located along property lines because owners need to fully use their land.

53. Ms Jardine confirmed her property is located next to an organic blackberry farm. The blackberries are picked manually, as opposed to mechanically. While the blackberry field is more adjacent to her riding arena than the paddocks, she testified that there has never been any expression of concern by the berry grower with respect to the interface between her equestrian operation and the activities at the blackberry farm.

Shawneen Jacobs

54. Ms Jacobs testified that she had 37 years of experience keeping horses in different parts of British Columbia. She experienced non-grazing paddocks located along common property lines in Nanaimo, Aldergrove, and Cumberland, where six non-grazing paddocks were "neatly" aligned along a common property line. She indicated this was not always the case when she lived in northern British Columbia where property parcels tended to be larger than in the Okanagan and there were greater choices as to where to locate non-grazing paddocks within those parcels. She stated that in southern British Columbia, virtually all commercial horse farms have non-grazing paddocks which are often located along property lines to make maximum use of the property.

55. Using an aerial photograph, Ms Jacobs identified her current property (4460 Stewart Road East) of just over six acres in size where she has lived for the last five years. She installed two new non-grazing paddocks along the common property line in the south west corner of her property. She also pointed out two large and two small run-outs from the barn abutting the northern common property line with her neighbour. The neighbour has a tennis court nearby.

56. Ms Jacobs described the neighbourhood as agricultural and said four neighbours also have horses and one was a berry grower. She indicated that she has never had any issues with

pickers or workers from the neighbouring berry farm. In her experience, horses become accustomed to various activities and noises on adjacent property, including construction noise.

Diane Drummond

57. Ms Drummond has been a horse owner since early 2000 and has boarded her horse at a number of facilities, including Ms Holt's horse farm. She was familiar with a property located on Reynolds Road in Kelowna (Respondent's exhibit, tab 11, photograph 12) where the owners changed the riding ring facility on the north common property line into non-grazing paddocks. This contradicts Mr. Swart's evidence that this property had many centrally located non-grazing paddocks. She said that the non-grazing paddocks are located on elevated flat land which slopes away to the mid-eastern boundary.

58. Ms Drummond referred to a number of other equine facilities where she has boarded her horse, all of which had non-grazing paddocks along common fence lines. Her view was that such a configuration was typical.

Tarja McLean

59. Ms McLean is Ms Holt's daughter. She got her first horse at the age of seven and has worked with horses her entire life. Her farm, known as McLean Ranch, is located at 4640 Stewart Road East, Kelowna. Her farm business includes the raising of horses, cows, pigs, geese, ducks, turkeys, broiler chickens (meat birds) and hens for eggs.

60. Referring to an aerial photograph of her farm, she identified an area along the south side of her property where there is an alignment of ten non-grazing paddocks, five of which abut the common property line, at a distance of approximately sixty feet from the neighbor's mobile home. A driveway runs along the north side of the neighbour's property adjacent to the paddocks on Ms McLean's property.

61. Ms McLean testified that it is typical for horse paddocks to be located along a common property line, but that some may be in other locations as a result of the layout of the property.

Dr. Sheila McDonald

62. Dr. McDonald, a practising veterinarian, testified that she operates a farm and veterinary clinic at her property at 4656 Wallace Hill Road, Kelowna. On her property, non-grazing paddocks are centrally located. This has more to do with running her business and property efficiently than with avoiding a common property line. She indicated that she travels the Okanagan area for her work and has seen a range of farm configurations, often including non-grazing paddocks up against property lines.

63. She noted that many people with an interest in horses move to the Okanagan to be in an area where there are other horse farms. These farms may be small, requiring owners to strive to use their property efficiently. She observed that horse farms are commonly located amongst orchards and vineyards.

64. Her evidence was that, more often than not, holding paddocks (non-grazing paddocks) will be placed in relation to the overnight horse stalls. Pen access for feeding and cleaning is a major consideration in farm layout. Her view is that there is no ideal single paddock size; the size will depend on the horse's needs. A horse can be maintained in a small area for specific reasons.

65. Dr. McDonald testified that non-grazing paddocks are cleaned out every day and the manure is moved to a centrally located compost/manure pile for storage. In her view, it is the storage areas that are the source of flies and odour, explicitly stating that "the real issue is manure and how it is handled".

Therese Washtock

66. Ms Washtock owns property at 14309 Denike Street, Summerland. She gave her evidence by telephone and began by outlining her 42 years of experience with teaching various equestrian skills, training horses for competition, competing in a range of equestrian events, judging a range of equestrian competitions and raising horses. She no longer operates a farm business but continues to keep horses on her property. Based on her previous farm business experience, which included several years of operating several Kelowna-area facilities, she advised that a property owner's needs are based on the type of horse business. The specific horse purpose will determine how the farm is configured and what type of facilities are required. She confirmed her familiarity with the use of non-grazing paddocks. She suggested that most owners do not allow horses to eat grass alone and the use of non-grazing paddocks helped owners to control diet and exercise, and prevent injury.

67. Ms Washtock said it was 'absolutely necessary' and therefore typical for horse centres in both North America and Europe to have non-grazing paddocks. She observed that often, particularly on small acreages, they will be placed on common property lines. Her run-outs abut the neighbour's property and are cleaned daily.

68. She knew of three farms that boarded horses in Prairie Valley (near Summerland) with non-grazing (dry) paddocks that extended to their property lines.

69. Her farm now adjoins a vineyard. Her horses are not bothered by the workers on the neighbouring farm and have adjusted to the noise-making bird deterrent devices.

Patricia Barbara Amos-Thomas

70. Ms Amos-Thomas lives in Spallumcheen where she owns a 5-acre horse breeding farm and equestrian facilities including a centre with turn outs, a riding ring, a training area and an exercise track. She advised the shape of the property was long and narrow and the turn-outs

were located at the "bottom" of the property along a common property line with a neighbour. She stated that she keeps 30 horses on the property throughout the year.

71. She described her experience riding in competitive events, judging equine events, and coaching at a national level for others participating in jumping events, since 1987.

72. She also works as an insurance agent, providing insurance to farmers. She visits many farm properties with horses regularly and noted that a typical placement for non-grazing paddocks was along common property lines.

73. Ms Amos-Thomas advised that in Spallumcheen, there are many small acreages of five to ten acres. Some have non-grazing paddocks along property lines and some have centrally located paddocks. Other farms in the area have sheep, cattle, tree fruits and berries. She had visited Ms Holt's farm and she did not find the configuration of the non-grazing paddocks unusual.

Clark Underwood

74. Mr. Underwood testified by telephone. He commented and expanded on the information in his correspondence of May 26. 2015. He had over 30 years direct experience as an owner of an equine facility and farm, and owner of horses in the Township of Langley. He also worked for over 30 years off the farm, constructing horse facilities of all sizes on a number of farms on Vancouver Island, in the Fraser Valley and in the interior of British Columbia.

75. Mr. Underwood advised that he had constructed many buildings set back 15 metres from a common property line. He further advised that he had never set back non-grazing paddocks from a common property line. He did not refer to these as confined livestock areas and indicated that he built in compliance with local government bylaws. When asked under cross examination specifically whether or not he had set paddocks back from property lines in Kamloops or Merritt, he advised he had not.

Pirjo Holt

76. Ms Holt testified regarding the details of her purchase of the property and the construction of the current facilities, including her contact with the City of Kelowna. She reiterated her evidence given in the first hearing about her manure management practices which the 2013 panel concluded were consistent with normal farm practice. These matters are not in issue in this appeal but we expressly note here that based on the evidence heard in this hearing we are satisfied that Ms Holt's manure management practices continue to be consistent with normal farm practice which is a relevant factor in our contextual analysis below.

77. Ms Holt reviewed the aerial photographs of 44 farms included as evidence in the exhibit she submitted. With the exception of one, all were located within an eight kilometer radial distance from her farm. In particular, she pointed out the farms that were farm businesses based on equestrian activities:
    - Jardine Farm 4441 Stewart Road West (Respondent's exhibit, tab11, photograph 3)

- Diamond R Ranch on Benvoulin Road (Respondent's exhibit, tab11, photograph 2),
- Cattail Creek Equestrian farm on Casorso Road (Respondent's exhibit, tab11, photograph 4),
- Mission Creek Ranch on Gordon Drive (Respondent's exhibit, tab11, photograph 5),
- K&S Elite Equestrian farm on Casorso Road (Respondent's exhibit, tab11, photograph 7),
- Orchard Hill Equestrian farm on Spiers Road (Respondent's exhibit, tab11, photograph 8),
- Full Throttle Equestrian farm on Bedford Road (Respondent's exhibit, tab11, photograph 10) and
- Hillcrest Equestrian farm on Reynolds Road (Respondent's exhibit, tab11, photograph 12).

78. Ms Holt testified that in her view, these represented efficiently used properties for the purpose of horse farm businesses.

79. She noted that of these, the Jardine Farm, Mission Creek Ranch, K&S Elite Equestrian, Orchard Hill Equestrian, Arion Therapeutic, Cattail Creek, and Full Throttle Equestrian had multiple (two to five) non-grazing paddocks that abutted a common property line. Orchard Hill Equestrian has four non-grazing paddocks with two horses each. Diamond R Ranch had multiple (eight) grazing paddocks aligned along one of its common property lines, as did the McDonald property (nine). Others had placed exercise type facilities to abut a common property line.

80. Ms Holt testified that she had direct knowledge of many, but not all, of the farms represented by the photographs. She conceded that there was no farm with the exact configuration of buildings, facilities, and paddocks as hers, but that many had the same components: one or more residences, horse shelters or barns, grazing paddocks or pastures, manure storage and composting facilities, non-grazing paddocks and roadways or paths for access to the facilities by people and equipment.

81. She advised that farmers configured these components to meet the operational and business needs of their farms, taking into account any constraints imposed by the land. Some farms had non-grazing paddocks that did not abut a common property line while other farms did. She concluded from the farm businesses she referred to and her own farm that there was no specific rule regarding the placement of non-grazing paddocks to abut a property line but that the needs of the operation determined the placement.

82. Ms Holt pointed out several of the aerial photographs where non-grazing paddocks were a similar distance to a neighbouring residence as is the case between her property and the Swart residence, others where the distance was greater and yet others where the distance was less.

83. The distance between the non-grazing paddocks of Hillcrest Equestrian and the neighbour to the east (Respondent's exhibit, tab 11, photograph 12) is roughly equivalent to the distance between the Holt and Swart properties. Due to a steeply sloping eastern border on the

Hillcrest property, she agreed that the distance from the non-grazing paddocks to the property line may appear in the photograph to be closer than it actually is.

84. Farms where the distance between a non-grazing paddock and the closest neighbour are greater than the Swart and Holt distance include: McLean and neighbour to the south (Respondent's exhibit, tab 11, photograph 18); Cattail Creek Equestrian and neighbour to the southeast (Respondent's exhibit, tab 11, photograph 4); Jardine and neighbour to the southeast (Respondent's exhibit, tab 11, photograph 3); K&S Elite Equestrian and neighbours to east and west (Respondent's exhibit, tab 11, photograph 7); Henderson and neighbour to the east (Respondent's exhibit, tab 11, photograph 9); and McDonald and neighbour to the east (Respondent's exhibit, tab 11, photograph 11). These six examples have a greater distance between the closest non-grazing paddock and neighbouring residence than in the Swart-Holt scenario.

Anton Schori P.Ag.

85. The panel accepted Mr. Schori P. Ag. (B.Sc. Ag., M. App. Sc. in Soil Science) as an expert witness in the field of agricultural soils. Based on soil maps for the area, his opinion in his report dated May 14, 2015, (p. 2) was that the soils of area B "are rapidly drained, rapidly pervious, have low water hold capacity and slow surface runoff." He expected runoff to infiltrate rapidly except when the soil was frozen.

86. On cross examination, Mr. Schori agreed that although he had visited the Holt property (most recently on May 7, 2015), he took no soil samples and did not perform any drainage tests but based his conclusions on his expectations arising from the soil maps he reviewed and relied on. He assumed the ground in area B to be undisturbed and did not take into account compaction or the use of fill. He noted the addition of "road crush" to the surface of the run-outs and stated that this addition may affect the permeability of the surface somewhat. His visual observations of exposed soil in the area compared favourably with the mapped data and he did not observe anything negative or unusual about the vegetation along the common property line adjacent to area B.

ANALYSIS

Section 3(1)

87. Section 3(1) of the *FPPA* provides:

> If a person is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, the person may apply in writing to the board for a determination as to whether the odour, noise, dust or other disturbance results from a normal farm practice.

Two step analysis

88. Ordinarily panels considering an *FPPA* complaint undertake a two-step analysis where the panel first determines whether the complainant is aggrieved by a disturbance that results from a farm operation conducted as part of a farm business. If the answer to that question is yes, the panel goes on to determine whether the disturbance complained of results from a normal farm practice. In this case, the 2013 panel has made the finding that the complainants are aggrieved and that determination is binding on this panel. As a result, we turn to consider the second step in the analysis: whether the disturbance complained of (the placement of run-outs located in area B along the common property line) is a normal farm practice within the meaning of the *FPPA.*

Definition of "normal farm practice"

89. The *FPPA* defines normal farm practice as follows:

> **"normal farm practice"** means a practice that is conducted by a farm business in a manner consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances. (emphasis added).

90. The purpose of this rehearing was to give the parties an opportunity to introduce fact and context specific evidence regarding the proper and accepted customs and standards for set-backs of non-grazing paddocks followed by similar farm businesses under similar circumstances. From this evidence, the panel will determine whether the practices of the respondent are consistent with such customs and/or standards.

91. Before turning to the evidence, we find it necessary to make the following preliminary points about the test we have applied.

Contextual approach

92. The test for "normal farm practice" is the contextual approach BCFIRB has applied before, based on the decision of the Ontario Court of Appeal in *Pyke v. Tri Gro Enterprises Ltd.*, [2001] O.J. No. 3209 (C.A.), leave to appeal to the Supreme Court of Canada dismissed. The court was unanimous that normal farm practice is not determined exclusively based on what other farmers do: *Pyke*, paras. 21, 41-42; 71-82. As noted in the detailed analysis in the majority judgment in *Pyke*, the determination of normal farm practice goes beyond a consideration of what other farmers actually do; there is "an appropriately evaluative" aspect to the inquiry, which considers the nature and extent of harm suffered by third parties:

> [74]... This latter decision, like the others I have cited, indicates that the Board does take into account a broad range of factors, including the nature and the extent of the harm suffered by third parties, in determining whether farm practices gain the protection of the Act. In effect, **the Board adopts an appropriately evaluative approach that is in keeping with the legislative language, and does not strictly equate "normal farm practice" with those practices actually adopted by industry in Ontario**. **[emphasis added]**

> [78] ... I agree with the trial judge that the legislative language indicates that there should be a qualitative or evaluative element to the interpretation of "normal farm practice". As I read both the 1988 and the 1998 Acts, farming operations do not automatically gain statutory protection by showing that they follow some abstract definition of industry standards.

93. *Pyke* made clear that this contextual approach was supported based on the 1988 Ontario statute whose wording was identical to the *FPPA*. The Court held that, given the use of the word "proper", the reference to "circumstances", the impact of the Act on property rights and the larger purposes of the Act, the change from "accepted" to "acceptable" in 1998 did not materially alter the evaluative nature of the inquiry: *Pyke*, paras. 42, 70-74.

94. Some passages in the Holt Court Decision (paragraphs 225-226) appear to accept the approach in *Pyke* as being reasonable for BCFIRB to adopt. However, another passage (paragraph 256) can be read as calling that into question on the basis that the *FPPA* is "more restrictive" than the Ontario statute – without commenting on or recognizing the fact that *Pyke* considered the differences to be immaterial given all of the other circumstances referenced by the Court. The Holt Court Decision also does not, in paragraph 256, make reference to the Supreme Court of British Columbia's prior decision in *Ollenberger v. Farm Practices Board*, August 10, 2006, Chilliwack Registry No. S16527, where the Court stated:

> Here, the Board considered that the location of the barns near to the property line, together with the level of activity and the location of the bulk of that activity at the west end of the barns, created a situation which exceeded the tolerance limits of normal farm practice, requiring the farm to implement some mitigating steps….
>
> In this case, while the actual practice of the farm had been normal farm practice, the Board's more expansive view is to require modifications of those practices on what might be called a "good neighbour" principle. This, I find, is consistent with the purpose of the *Act*.

95. It is important that the test for normal farm practice be clearly stated. It is pivotal to the operation of the *FPPA*. BCFIRB has been given primary responsibility to interpret this highly specialized and ambiguous term.

96. BCFIRB is entitled to adopt any reasonable construction that it considers best achieves the objects of the *FPPA*. In our view, and to address any confusion that may arise from the Holt Court Decision on this issue, we find that the principles set out in *Pyke*, as adopted in BCFIRB decisions, are the principles that best achieve the objects of the *FPPA*. Only a fully contextual approach can meaningfully account for the words "proper" and "similar circumstances" in their context, and achieve the balancing of interests that is inherent in the very creation of a complaints structure. This also means, as set out by the BC Supreme Court in *Ollenberger*, that this panel will consider if on application of the "good neighbour principle", it is required to go beyond accepted farm practices to order a farm to do something more in order for its practices to be consistent with normal farm practice. That is the approach we have applied to this case.

Impact of local government's interpretation of bylaw

97. Given how this case developed, we must also address the significance, from a "normal farm practice" standpoint, of the findings of the 2013 panel and the Court (Holt Court Decision, para. 135) that the City of Kelowna misinterpreted its own bylaw and failed to require a 15-metre setback.[5]

98. The findings raise a question: how can a farmer be in a position to assert "normal farm practice" when that farmer would never have engaged in that practice to begin with if the local government had interpreted and enforced its own bylaw in a manner consistent with the 2013 panel's findings?

99. BCFIRB cannot dictate local government behaviour and it cannot adjudicate based on "what might have been". The remedy for a person who believes local government is failing to

accurately and consistently apply its bylaws is either to take the matter up directly with the local government, or to commence a suit in nuisance and argue that the farmer cannot rely on the *FPPA* defence because the farm has failed to comply with a "land use regulation": *FPPA*, s. 2(2)(c). These approaches raise separate questions from what is "normal farm practice": *FPPA*, s. 2(2)(a) (i.e. a person could be compliant with such a regulation but still be found by a panel not to be following normal farm practice).

100. However, on a complaint, BCFIRB must take the world as it finds it. In this case, local government approved the location of run-outs in area B, with a minor adjustment for operations, based on its interpretation of its bylaw. This panel will apply the contextual approach based on the evidence of "proper and accepted customs and standards as followed by similar farm businesses under similar circumstances". As noted in the Holt Court Decision, BCFIRB may consider the terms of that bylaw as one factor in the contextual approach it is required to apply.

Relevant comparators

101. The complainants have urged the panel to adopt a narrow approach to "similar farm businesses in similar circumstances" in this context. They say that "what might be "normal" in the context of large acreages with one or two horses and neighbours who also keep horses, is not necessarily normal farm practice for an equestrian facility the size and intensity of (the respondent farm)". They say none of the respondent's comparators are remotely similar in terms of intensity, density (9 horses kept in 0.3 acres where multiple run-outs extend from a building or equestrian centre to the property line), business type, no vegetative buffer[6] and a non-horse owning neighbour.

[5]This panel notes that both the 2013 panel and the Court made these findings in the absence of hearing and considering submissions from the City of Kelowna.

[6] The complainants do not seek a vegetative buffer as a remedy. Ms Lawseth's opinion was that a vegetative buffer would result in half the non-grazing paddocks being unusable and would need to be maintained by both parties. The complainants say this is an unreasonable burden to place on them.

102. The respondent takes a broader view of "similar farm businesses in similar circumstances" and offers up some 44 examples of horse farms, not all businesses, many with run-outs abutting property lines. She says that the evidence of these farms with operations based on horse husbandry, have similarities which provide a basis for the panel to make a determination in her favour.

103. In our view, the approach to "similar farm businesses in similar circumstances" is neither as narrow as the complainants argue nor as broad as the respondent argues. The *FPPA* instructs the panel to look at the proper and accepted practices as established and followed by similar farm businesses under similar circumstances". By definition, similar means "like" or "resembling something but not the same".

104. In short, similar does not mean exactly the same. In this case, we consider "similar farm businesses" to include horse-based businesses involving a similar number of horses and a similar-sized property. Businesses may include activities such as breeding, training, riding, exercising, treating, boarding and showing of horses, so long as the horse activity is part of a farm business and not a farm operated for pleasure only.[7]

105. "Similar circumstances" refers to conditions or facts which resemble those of other farm businesses. Consistent with the approach adopted in previous BCFIRB decisions, the panel considers the circumstances of the farm itself and in relation to properties around it (contextual factors) to determine if there are any site specific factors that are relevant to the determination of what is normal farm practice for this farm. As has been stated in previous decisions, and as emphasized above, the statutory definition does not simply require that we apply an abstract test where a particular farm practice is condoned regardless of the different circumstances that may arise on different farms. Instead, the test requires us to consider what are proper and accepted customs and standards that are established and followed by similar farm businesses under similar circumstances and as we discuss below, this includes a consideration of unique and/or disproportionate impacts on neighbours.

[7] We wish to note here that unlike other agricultural activities, there may not be a marked distinction between equestrian operations carried out for pleasure purposes as opposed to business purposes. During the hearing witnesses often provided evidence of practices of horse farms generally as opposed horse businesses specifically. To the extent possible, where we could connect the evidence with a farm business, we have confined our analysis to the accepted customs and standards of equestrian farm businesses.

Evidence of actual practice

106. The panel heard from the following witnesses with respect to their farm businesses located primarily in Kelowna (except where noted):

WITNESS	PHOTOGRAPH	ADDRESS	FARM BUSINESS
I. Pritchard	14	2080 Saucier Rd	Boards 2 horses, has 2 of her own, 4 non-grazing paddocks abutting property line
H.Henderson	9	2457 Saucier Rd	Arion Therapeutic (non-profit); was a boarding facility; 4 non-grazing paddocks on each of E and W property line
H.Henderson (leased this property and has current knowledge of its use)	8	Spiers Rd	Orchard Hill Equestrian (boarding facility); 4 non-grazing paddocks abutting property line; 2 horses/paddock close to residence – now run by someone else
T. McLean	18	4640 Stewart Rd E	Mixed farm; some income from horse boarding; 5 non-grazing paddocks along property line (neighbours' driveway)
S. McDonald	11	4656 Wallace Hill Rd	Vet clinic; property line lined with grazing paddocks but testified about other farm businesses.
T. Washtock	-	14309 Denike St, Summerland	No longer in business but business did use non-grazing paddocks along property line
P. Amos-Thomas	-	Spallumcheen	Breeding operation; non-grazing paddocks along property lines
Glen Roth	13	2150 Saucier Rd	Boards 4 horses, 2 non-grazing paddocks on E property line for 3 horses

107. Ms Holt testified that the following farms in Kelowna were also farm businesses:

Name	Photograph	Address	Comment
Jardine Farm	3	4441 Stewart Road West	Multiple non-grazing paddocks abutting common property line.
Diamond R Ranch	2	Benvoulin Rd	Grazing pastures (29) around periphery of property, 8 grazing paddocks and riding arena on property line
Cattail Cr Equestrian	4	Casorso Rd	2 non-grazing paddocks on S property line; 22 centrally located
Mission Cr Ranch	5	Gordon Dr	5 non-grazing paddocks on SE property line

K&S Elite Equestrian	7	Casorso Rd	5 non-grazing paddocks on S property line; 20 plus non-grazing pastures centrally located
Full Throttle Equestrian	10	Bedford Rd	At least 4 non-grazing paddocks on E border
Hillcrest	12	Reynolds Rd	Non-grazing paddocks (6-9) centrally located on property

108. The complainants submit that the accepted standard or custom of similar farms in similar circumstances is "to concentrate the confined livestock areas in the interior (of the property), and have the grazing areas radiate outwards or make up the perimeter of the property". In support, they rely on the photographic evidence of farms found at several addresses [Swamp Road, Heimlich Road (Respondent's exhibit, tab 11, photograph 26), Stewart Road West (paragraph 27)]. In addition, and based on direct testimony and the cross-examination of Dr. McDonald and Ms Holt, they say this custom is seen on other farms in the area (Miller Road, Wallace Hill Road, Casorso Road, Reynolds Road).

109. The complainants say that Ms Holt has in part complied with this pattern in setting up her operation by centrally locating manure handling facilities and locating run-outs on the north side of the equestrian centre. The larger grazing pastures are on the north side of the property running along that common property line. However, they submit that the run-outs of area B do not comply with the custom of centrally locating confined livestock areas and should be set back from the common property line, preferably a minimum of 15 metres, to comply with the custom.

110. We disagree with this submission. First of all, we do not have enough evidence to conclude whether the farms on Swamp Road, Heimlich Road, Stewart Road West and Miller Road are, in fact, farm businesses. The remaining three are farm businesses and summarized in the above tables. While the Reynolds Road property had centrally located non-grazing paddocks, Dr. McDonald of 4656 Wallace Hill Road testified that her non-grazing paddocks were centrally located but she had personally seen many situations where farm businesses abutted non-grazing paddocks along property lines. With respect to the Cattail Creek property on Casorso Road, two of 24 non-grazing paddocks abutted the common property line.

111. Based on the above, the panel is satisfied that on the preponderance of evidence before us, in the interior of British Columbia generally and Kelowna specifically, equestrian businesses use a range of facilities including shelters, grazing areas, feeding areas, holding and exercising areas, waste collection and treatment facilities and roads or paths for access to these facilities. There are many factors that influence the configuration of facilities on the farm and no two farms are configured identically. The same holds true with respect to the siting of non-grazing paddocks. Accepted customs and standards for equestrian businesses include a range of possibilities. Sometimes paddocks are centrally located in the interior of the property and sometimes they abut common property lines.

112. Given that the City of Kelowna interprets its zoning bylaw[8] so as to only require a setback where a confined livestock area has more than four animals and that any confined livestock area needs a 3 metre separation from any other contained livestock, it is not surprising that there are many examples of non-grazing paddocks abutting common property lines within Kelowna.[9]

113. We have concluded, based on the evidence set out above, that it is an accepted practice of equestrian farm businesses in and around Kelowna to locate non-grazing paddocks on common property lines with neighbours. Having made that determination, we must now consider the circumstances of the farm itself and in relation to properties around it (contextual factors) to determine if there are any site specific factors that are relevant to the determination of what is normal farm practice for this farm. We will consider whether there are factors that would render the accepted practice not to be a "proper" practice based on similar circumstances or unique and/or disproportionate impacts on neighbours so as to require this farm to modify its practices on what might be called a "good neighbour" principle (see paragraph 94 above).

Contextual Analysis

114. The complainants submit the panel should consider the context and site specific facts of each farm offered in evidence to determine if they are similar. This should include intensity of the operation, density of the animals on the operation, size of the property, location of residences on neighbouring properties and the land use of neighbouring properties.

115. The respondent suggests that similar farm businesses operate within the neighbourhood in similar ways to her farm. She relies on the evidence of Ms Amos-Thomas and Ms Washtock, both with considerable experience in the industry, that locating multiple non-grazing paddocks along common property lines is customary for farms in similar circumstances to the Holt farm. She points out that their farms are located in areas of similar circumstances within the Okanagan Valley (Kelowna, Spallumcheen and Summerland). Similarities include the climate, the dense arrangement of many small farms with associated residences in a finite area, the competing pressures on land use in the ALR and the variety of farm types.

[8]The relevant text of City of Kelowna Bylaw No. 8000 can be found at paragraphs 130-132 of the 2013 decision.

[9]The 2013 panel's alternate interpretation of this bylaw, upheld on appeal, can be found at paragraph 143. "As we have already noted the definition of "confined livestock area" under the bylaw is the same as that in the Guide and makes no reference to the number of livestock permitted in such an area. The phrase in section 11.1.6(f) that is in question reads "confined livestock areas and/or buildings housing more than 4 animals, or used for the processing of animal products or for agricultural and garden stands". It is clear on a plain reading that the words "housing more than 4 animals, or used for the processing of animal products or for agricultural and garden stands" all modify the term "buildings" and do not modify (and would render the bylaw provision nonsensical if they were considered to modify) the already clearly defined term "confined livestock areas".

116. The panel concludes that the location and size of farms and other land uses in the area are important to determining "similar circumstances". The Kelowna neighbourhood is in the Okanagan Valley and part of the interior plateau. It has a semi-arid climate. Most of the properties have at least one residence on the farm. The numerous horse farms, including those that are operated as a farm business, in and around Kelowna are of a relatively small size, and owners and operators often utilize all of the farm property to achieve their farm and/or business objectives. There are few unused portions of land on these farms. Topography may assist or constrain the full utilization of the property. The numerous examples of horse farms shown in the evidence from both the complainants and respondent confirm that these farms border on many different types of properties, including horse farms, other farm types such as orchards and berry farms and residential properties.

117. We turn now to consider the specific contextual features of the respondent's farm that the complainant argues render this farm's practices inconsistent with "normal farm practice" including the intensity of the operation, the proximity of neighbouring residences and the existence of specific geographical features (slope of land and drainage).

Intensity of Operation (Including Density of Animals and Size of Property)

118. The complainants argue that the respondent has chosen to configure her farm, so that of the approximately 40 horses she houses on her 17.7 acre property, 9 horses are kept in area B (0.3 acres). They say that this means that 25% of the horses on the property are kept in 1.7% of the available land abutting the common property line. They rely on what they say is Mr. Swart's uncontroverted evidence that at a distance of 15-30 metres back from area B there is a marked decrease in odour and say that confining horses in this type of density on the property line is not normal farm practice and requires a setback.

119. Ms Holt disagrees with the complainants' density calculations. With respect to the area B paddocks, only eight are actually used (as per the City of Kelowna's direction). In addition, the horses do not live in the paddocks; they spend considerable time inside the barn, where they are fed, watered, bedded, groomed, ridden and treated by veterinarians, farriers and massage therapists. In addition, some of the horses spend time in the pasture elsewhere on the farm. She says if density is a factor to be considered, it relates to the entire farm and not just the specific area in dispute. She points to the evidence of Ms Henderson of Arion Farms who keeps 22 horses on 10 acres of land and K&S Elite Equestrian, Orchard Hills and Cattail Creek Equestrian which are between five and seven acres with each housing approximately 40 horses.

120. On the issue of density, the panel agrees with the respondent that the complainants' calculation of 25% of the horses being kept on 1.7% of the land is an oversimplification and mischaracterization. The evidence was clear that there are eight horses (not nine) in area B at one time and these horses have access beyond area B into the barn and as well spend time away from their paddock areas altogether. Various witnesses, including Ms Pritchard, Ms Henderson, Ms Washtock and Ms McLean, testified that horses may have specific dietary needs which are met through limiting grazing time and providing customized feeds in non-grazing paddocks where they also can exercise and interact socially, while keeping them off

grass. The complainants' density calculation also does not account for the accepted practice followed by horse farms generally, and this farm specifically, of daily cleaning out manure from the paddocks. The manure is removed and stored in a centrally located compost/manure pile away from area B which veterinarian Dr. McDonald acknowledged may be a potential source of flies and odour.

121. Given this evidence, the panel finds that the specific management practices of each farm will determine how much time the horses spend in the non-grazing paddocks as opposed to other locations on the farm. To the extent animal density is a relevant factor, we find it more reasonable to consider density based on the whole farm as opposed to a portion of it.

122. Further and consistent with the evidence heard, applying the rough approach of calculating density as number of horses per acre of property, the Holt operation falls within the range of densities calculated for other neighbouring horse properties.

123. The complainants strenuously argue that the density of horses in area B is not consistent with accepted practice; there are simply too many paddocks and too many horses located on the property line. We agree that the evidence did not disclose another farm with eight paddocks on a common property line. We did, however, hear examples of non-grazing paddocks on common property lines holding as few as two and as many as eight horses in paddocks of various sizes, some of which exceeded the size of area B, some of which did not.

124. Our conclusion, based on the evidence, is that size and configuration of the respondent's equestrian operation is consistent with "the customs and standards" of "similar farm businesses" in and around the Kelowna area. The fact that the non-grazing paddocks on this farm hold 8 horses is within the range of accepted practices in the area. However, we would observe that the size of the paddock and the density of the operation cannot be divorced from a consideration of the management practices within that area, which we do below.

Location of Neighbouring Residences and Their Land Use

125. The complainants argue that the location of area B in close proximity to their residence is another contextual factor which, together with the density factor just referenced, favours a finding that the location of the non-grazing paddocks in area B are inconsistent with normal farm practice. They say the evidence does not disclose a similar density of horses in such close proximity to a neighbouring residence of a "non-horse owning neighbour" and where there is no vegetative buffer.

126. The respondent argues that the distance from the closest point of non-grazing paddocks of area B to the Swart residence is 58 metres, comparable to three city lots. It is not "near", "next to" or "adjacent to" the Swart residence. The portion of the Swart property closest to area B is the undeveloped back portion of approximately four acres. Several of Ms Holt's witnesses who owned property in Kelowna commented on the distance of their non-grazing paddocks from residences on neighbouring properties. Some were closer to a neighbouring residence than area B is to the Swarts and others were further away. The panel was not able

to make a finding regarding the typical distance between homes and non-grazing paddocks. We cannot conclude that a distance of 58 metres is sufficiently close to be considered an element of the contextual analysis.

127. On the issue of the complainants' use of their land, we heard that Mr. Swart had considered moving his u-pick raspberry operation from its current location to a location adjacent to area B but could not do so due to concerns that pickers could startle horses or be bothered by odour and flies, runoff from area B could damage the raspberry field and his use of herbicides could be restricted. He says that as long as the horses are in area B, he will be unable to produce raspberries in that location which amounts to an expropriation of a portion of his farm.

128. The fears of the complainants were not borne out by the evidence. Many horse farm owners testified that they were not aware of any conflicts arising out of the location of their non-grazing paddocks on the common property line with other farm uses, including berry production. Others testified that horses quickly adjusted to new repetitive disturbances. Given that the *FPPA* deals with actual disturbances and not potential disturbances[10], we have not addressed this aspect of the complaint.

129. The complainants also argued that the fact that they are non-horse owning neighbours is a relevant contextual factor. In the absence of something more, we do not consider this a relevant contextual factor especially given that both properties here are located within the ALR.

Slope of Land/Drainage

130. The complainants say that water pools in area B during and after rain events, and the paddock is "messy" from late fall to early spring. Mr. Swart stated that the messy conditions are not a result of poor manure management but rather are a function of what happens in a confined livestock area, further cementing his view that such confined livestock areas do not belong on property lines. He further says this pooling water runs off area B onto his property due to the inability of the soil to absorb water because of changes to the soils (compaction and fill) during the construction of the facility and the slope of the run-outs toward the back of his property. He also believes that the low elevation in the back of his property serves as a trap for odour from the Holt farm.

131. The complainants also say that no reliance can be placed on Mr. Schori's expert opinion and his conclusion that area B has good drainage given that he conceded on cross-examination that he took no soil samples. He did not perform any drainage tests but based his conclusions on the original soil mapping and had no idea what was under the crushed gravel.

132. First, we observe that the disturbances underlying this complaint relate to odour and flies, and not runoff from area B. Runoff is only relevant to the extent that it may be a source of odour and flies. We do not agree that Mr. Schori's evidence was discredited to the extent

[10] See for example *Yunker/Nurkowski v. Longhorn Farms Ltd*., (BCFIRB July 31, 2014) at paragraph 144.

suggested by the complainants. Mr. Schori's conclusions about the drainage conditions were confirmed by his observations of exposed soil in comparison to mapped data and his observation that there was nothing unusual about the vegetation along the common property line. Further, his observation that he expected runoff to infiltrate rapidly except when the soil was frozen seems consistent with Mr. Swart's own evidence that he observes water pooling in late fall to early spring, a time when the ground would likely be frozen and prevent or slow drainage.

133. Our conclusion, based on the equivocal nature of the evidence, is that the slope of the land in area B and the associated drainage do not require this farm to do something other than the accepted or established practice.

Manure Management

134. We have considered the contextual factors raised by the complainants relating to the intensity of the respondent's operation, the proximity of area B, the location of the complainants' residence, their use of the land, the slope of the land and its drainage, as well as Mr. Swart's anecdotal observation of the decline in odour he observes some 15-30 metres back from the property line. On this latter point, we would observe that Mr. Swart's evidence is inconclusive as it speaks only to a decline in odour as one moves away from the common property line and not to the proximity of the odour source to the property line. It would seem intuitive that the further one is from an odour source, the greater the opportunity for dissipation. Further, even if we accept this evidence of declining odour further from the property line, it does not assist us in determining normal farm practice.

135. We have considered each contextual factor individually and, as well, asked ourselves whether the disturbances complained of here do more than encroach on the complainants' lifestyle and sensibilities (which in and of themselves are insufficient to ground a complaint). We have considered both the magnitude of the disturbance and the finding of the 2013 panel at paragraph 120 that:

> ...the respondent manages manure well, picking it up regularly from paddocks and run-outs and then expending considerable effort to ensure the manure management on her farm meets, if not exceeds usual standards. In particular, she takes care to properly compost manure so as to kill fly larvae and break the life cycle of the fly and to ensure the manure is safe to put on pastures while minimizing odour.

136. We would also observe that the respondent provided detailed evidence regarding her current manure management practices and we are satisfied these practices are at a minimum consistent with, if not better than, the 2013 panel's findings which were accepted in the Holt Court Decision.

137. Our conclusion is that the respondent's use of the non-grazing paddocks found in the area B run-outs are consistent with normal farm practice and the respondent's manure management practices, as accepted by the 2013 panel, the Court and as independently confirmed by this panel, are sufficient and reasonable steps aimed at mitigating disturbances related to odour and flies.

138. While we acknowledge that odour and flies may persist, applying the "good neighbour principle" we find that the proper and accepted practices of similar farm businesses in similar circumstances require no more or less than the taking of reasonable steps to attempt to ameliorate their impact. We conclude that the respondent has met this obligation.

Terms of the Kelowna Bylaw and other bylaws

139. Finally, we have considered the terms of the Kelowna bylaw as well as the other local government bylaw extracts provided by the complainants. As we have concluded above, Ms Holt's farm is not the only farm with non-grazing paddocks abutting the common property line and at paragraph 112 above, we observed that this is not surprising given the City of Kelowna's interpretation of its bylaw.

140. With respect to how other local government bylaws deal with confined livestock areas, we had very little evidence of the actual farm practices from other areas of British Columbia for which the complainants submitted bylaws or excerpts of bylaws.[11] The respondent's witness, Mr. Underwood testified that he resides in the Township of Langley and while he has been required to set barns 15 metres back, paddocks run to the property lines and this seemed to be his experience throughout the province. Given the foregoing, we conclude that the bylaws alone do not outweigh the evidence of actual farm practices in the Okanagan Valley. As demonstrated above, we considered the actual farm practices in the context of the nature of the respondent's operation, similar comparators, the use of neighbouring lands and the impact of the farm practices on the complainants.

CONCLUSION

141. Factors such as proximity and density of operation could result in a farming operation having to cease or modify its practices by increasing its separation distance from its neighbour or by installing a vegetative buffer to mitigate the disturbance. However, as we have concluded that, in this region, the proper and accepted practices used by other equestrian farm businesses for mitigating odours and flies are both reasonable and sufficient to mitigate the disturbances in this case, nothing more is required of the respondent. It is an inescapable fact that farming operations produce disturbances such as odour and flies. It is unreasonable to expect a farm to eliminate all disturbances especially when it is operating in an area designated for agriculture.

[11] On this issue, we do note that the Holt Court Decision states (at paragraph 244) in reference to the evidence of the KP, "As evident in reviewing the FIRB transcript, Mr. Withler said that certain BC townships do not have required setbacks. Mr. Withler also said that certain BC townships choose not to follow the provincial guidelines. And he was quite clear: not every BC farm has a 15m setback nor does (sic) is every BC farm required to have a 15m setback."

ORDER

142. The complaint is dismissed.

Dated at Victoria, British Columbia this 12th day of January, 2016.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

Daphne Stancil, Presiding Member

John Les, Chair

Andreas Dolberg, Vice Chair