

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

Suzanne K. Wiltshire, Presiding Member
Ron Kilmury, Chair

For the Complainant

Nicholas Swart

For the Respondents

Pirjo Holt

Date of Hearing

May 3-4, 2012

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 centre operation.
4. The respondent, Pirjo Holt, takes the position that the alleged disturbances arise from normal farm practice.
5. The matter proceeded to hearing on May 3 & 4, 2012 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.
6. Carl Withler P. Ag. was engaged as a knowledgeable person by BCFIRB under section 4 of the *FPPA*. Mr. Withler prepared a report in June 2011 and was subsequently called as an expert witness at the hearing.
7. On July 31, 2012 and prior to the release of this decision, panel member Cheryl Davies' term of appointment on BCFIRB expired and she is no longer seized of this matter. As such, this is a decision of the remaining panel members.

ISSUE

8. The issue, as identified during the February 17, 2012 pre-hearing conference call, is:

Do the noise, odour, flies, bright lights and unsightliness from the respondent's equestrian centre operation result from normal farm practice?

THE PROPERTIES AND FACILITIES

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 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.

KNOWLEDGEABLE PERSON

16. BCFIRB engaged Mr. Carl Withler, P.Ag. as a knowledgeable person. Mr. Withler has both practical and professional experience in relation to livestock and livestock husbandry. As a youth he spent time on farms and ranches involved in livestock husbandry of beef, horses and sheep. He has been involved as an owner in a beef herd operation and has raised ranch horses. He has spent his professional career as an Agrologist in the livestock sector and is currently a Regional Agrologist with the BC Ministry of Agriculture. Mr. Withler was qualified by the panel at the hearing as an expert entitled to give opinion evidence in the area of agriculture, including livestock and livestock husbandry.

17. Mr. Withler visited both properties in the spring of 2011. He noted that during his site visit he discussed and reviewed all aspects of the farm operation. His report dated June 17, 2011 was entered as evidence at the hearing.
18. Mr. Withler observed in his report that “[t]he activity of farming is noisy by its nature with the movement of equipment, livestock, humans and other related activities.” In his view there was “nothing ‘abnormal’ about the noise” generated by the farm. However, he did note that hours of operation were not posted and observed it might be helpful for the complainants to know when noise may be expected regularly.
19. As for the light complaint, Mr. Withler considered the type and placement of the light at the front of the barn over the door adjacent to the loading area and parking lot to be usual and common to other farms in the area.
20. With respect to the complaint of odour and flies, Mr. Withler considered the farm’s manure management practices met the requirements of the Agricultural Waste Control regulation and were in keeping with other farm operations in the area. He noted, however, that because horses were being pastured or turned out in areas A, B and C, all of which are bounded on one side by the common property line, manure could often be found in those areas in close proximity to the Swart property until it was picked out of those areas.
21. Mr. Withler provided information about confined livestock areas in British Columbia. He referred to a guide published by the BC Ministry of Agriculture entitled “Guide for Bylaw Development in Farming Areas”. (The panel refers to this guide in greater detail in our analysis under the sub-heading “B. Confined Livestock Areas”.)
22. Mr. Withler considered the run-outs in area B to be “confined livestock areas” as defined in that guide. He indicated that at the time the respondent constructed her equestrian facility, the guide called for a minimum 15 metre setback from the property line for confined livestock areas.
23. Mr. Withler also referred to the applicable City of Kelowna by-law. In Mr. Withler’s view this bylaw requires confined livestock areas to be set back 15 metres from the property line. In his opinion the fencing divisions within area B do not change the area’s use as a confined livestock area nor does the animal density. The suggestion by Kelowna staff that the area may be divided up into two smaller areas simply by ceasing to use the middle run-out in his view does not eliminate the need for the setback.
24. As for areas A and C, Mr. Withler noted that these are areas where the horses can graze. As such in his opinion these areas are seasonal feeding areas and neither the Ministry guide nor the Kelowna by-law call for any setback for these areas.
25. Mr. Withler stated that a 15 metre setback for confined livestock areas is also consistent with farm practices in other areas. In this regard he noted the Township

of Langley also has a bylaw requiring that a confined livestock area be set back 15 metres from the lot line.

26. Mr. Withler advised the reasons for requiring a setback for confined livestock areas include confining animal waste to the source property, as well as limiting noise and odour on neighbouring properties.
27. Mr. Withler recommended that the confined livestock area (area B) be pulled back 15 metres. He noted that this would also alleviate the nutrient laden leachate exiting the farm property along that portion of the property line adjacent to area B as evidenced by the enhanced grass growth at the lot line in this location.
28. While considering the other complained of disturbances to result from practices in keeping with the farm practices of others in the area, Mr. Withler made several recommendations in his report that he felt might lessen those disturbances, as follows:
 - A coniferous based vegetative buffer be agreed upon by the parties and planted along the property line with the parties splitting the costs;
 - The farm post operating hours for the equestrian centre along the lines of 9 a.m. to 8 p.m. Monday to Friday and 9 a.m. to 6 p.m. Saturday and Sunday similar to other centres in the area and also encourage limited night time loading and unloading of animals as well as reduced vehicle idling;
 - The complainants purchase drapes for use in their house to reduce light that may enter.

COMPLAINANTS' CASE

29. The complainants argue that the respondent's farm practices are not normal, given the proximity of the equestrian centre operation to their property.
30. Mr. Swart testified that his house was designed for natural cooling and to achieve this the windows must be open in the summer; but when they are, the noise, odour and light from the respondent's farm causes considerable disturbance to him and his family, even inside their home. As well, the increase in flies and odour and the unsightliness of the equestrian centre are disturbing.

Noise

31. Mr. and Mrs. Swart testified that they and their children have been disturbed by noise both during the construction of the equestrian centre and, after its completion, by the day-to-day operation of the equestrian centre. The complainants identified their concern as the presence of noisy vehicles and equipment outside of reasonable hours. Mr. Swart identified the two main sources of noise as diesel pick-up trucks running in the equestrian centre parking lot and the use of a leaf blower.

32. Mr. Swart stated that diesel pick-up trucks frequently visit the farm early or late, waking him and his family. Often the trucks have a trailer and have to maneuver to get the trailer in position or to hitch up to a trailer. When his house windows are open, it takes very little activity from a diesel truck to awaken the family. When the windows are closed, the sound can go on for a longer period before waking them, but eventually does wake them. Mr. Swart, as an example, stated that in February 2012, a tractor shoveling snow on the respondent's property woke him at 5:20 am.
33. Both Mr. and Mrs. Swart testified that the farm uses a leaf blower early in the morning, about 7 am, which also wakes them, especially in the summer when the windows are open.
34. The complainants engaged Mr. Mark Bliss, an acoustical consulting engineer with experience in the area of environmental noise impact assessment and mitigation. He was qualified by the panel as an expert witness in the area of acoustic impacts. His report was admitted into evidence and he testified via voice over internet technology at the hearing.
35. Mr. Bliss addressed the noise impact on the complainant's property of an idling Ford F-550 diesel truck located in the parking area in front of the equestrian centre. Mr. Bliss did not conduct a site visit or do measurements at the site, but relied on maps and measurements provided by the complainants. Using a computer he then modeled the noise impact of a Ford F-550 idling 60 metres distant from the complainants' open bedroom window. The predicted noise from the truck was 44 decibels (dB(A)) at the exterior east facing side of the complainants' house and 35 dB(A) in the complainants' bedroom with the window fully open.
36. Mr. Bliss referred to the World Health Organization (WHO) Guidelines for Community Noise to assist in assessing the potential noise impact, noting that in British Columbia there are no government guidelines for noise disturbance nor any formal adoption of the WHO guidelines. The WHO guidelines indicate that for a good night's sleep sound levels should not exceed 30 dB(A) for continuous noise and individual noise events exceeding 45 dB(A) should be avoided. The guidelines also note that noise composed of a large proportion of low- frequency sounds may be more disturbing.
37. Mr. Bliss concluded that indoor sound levels from an idling diesel truck located in the equestrian centre parking lot have the potential to exceed the WHO recommended guideline of 30 dB(A) for continuous background noise with the complainants' windows completely open and therefore could possibly result in sleep disturbance. Mr. Bliss was unable to comment on actual noise level in the complainants' bedroom with the window closed without making on-site measurements but did indicate he would not expect sleep disturbance with the windows closed. He added that the noise level might exceed the WHO guideline of 30 dB(A) if the noise were louder or the window partially open.

38. Mr. Bliss also modeled the effect of the idling truck if an earth berm were to be located on the property line and concluded that the noise would fall under 30 dB(A) and be within the WHO guidelines.
39. The complainants submit the noise from the respondent's farm is not normal farm practice given the proximity of the equestrian centre and its related facilities to their property.
40. The complainants argue that the equestrian centre parking lot is in the worst possible location causing sound from vehicles in the lot to come directly into their house. They note there is no set back and no buffer.
41. While acknowledging that noise may result from normal farm practice, the complainants submit that in the case of the equestrian centre, the operation of diesel pick-up trucks and other vehicles and equipment such as the leaf blower should be restricted to the hours of operation recommended by Mr. Withler. They submit that if there is a need to load or unload horses after hours this should be done in another more distant area of the farm and not in the parking lot in front of the equestrian centre.

Light

42. The complainants testified that prior to the equestrian centre being built, they would enjoy the darkness of their property at night. Mr. Swart stated that the glare from the light mounted over the door of the equestrian centre is so severe that he has to turn his head away from it at night, even when he is inside his house. He stated that if he steps outside he can read a book by the glare from the light and can even read by it when in his home office. Mrs. Swart referred to a blinding glare from the light shining to the left when returning home down her driveway at night.
43. The complainants engaged Mr. Robert Dick, a Principal of the Canadian Scotobiology Advisory Group and manager of the Canadian Light Pollution Abatement Program of the Royal Astronomical Society of Canada. Mr. Dick has approximately 20 years' experience working on the use and impact of artificial light at night. The panel qualified him as an expert in light pollution abatement at the hearing. His report was admitted to evidence and he testified via voice over internet technology.
44. Mr. Dick did not visit the site in person. The complainants provided him with a map, sketches, photos and other information for his assessment, including a photometric plot of the light that was provided by the respondent. From this plot, Mr. Dick determined the type of light on the respondent's farm by searching various lighting databases. He described the light as a relatively old model 400 watt metal halide luminaire mounted on the front of the equestrian centre about 5 metres above grade.
45. Mr. Dick testified that this type of light, while designed to illuminate an area in front of the barn, also directs light horizontally and off the property. He described

the use of the light to illuminate the parking lot in front of the equestrian centre as a reasonable requirement often done as part of normal farm practice. However, in the present case because the light produces glare and light trespass he does not consider it an appropriate fixture for its intended application for the following reasons. Beyond 15 metres the light shines on the ground at a shallow angle less than 20 degrees with the result that the ground illumination is less than 4% of that near the fixture. Because the light under the fixture is very bright the glare from the light prevents the eye from seeing well enough to walk on the ground in areas not directly under the light. The fixture does not provide the desired relatively uniform distribution of light for vehicular traffic. As well, at least 50% of the light shines off the property and creates glare for the neighbours.

46. Mr. Dick suggested three options to eliminate the light trespass onto the Swart property while also improving the illumination on the farm. He noted the situation could be easily corrected with the least expensive and simplest option, a customized sheet metal cover over the fixture to focus the light on the area below and minimize glare on the surrounding area.
47. The complainants submit that the light from the equestrian centre trespasses on their property and as such is a nuisance. They argue that practices evolve over time and that what was normal practice 20 years ago is no longer. The complainants seek an order that the respondent install the metal shield (Mr. Dick's option 1) or alternatively, replace the current fixture with a full cut off fixture (Mr. Dick's option 2).

Manure Management: Odour and Flies

48. The complainants argue that the respondent farm does not clean manure from the paddock and run-out areas adjacent to their property adequately and frequently enough and that the farm's manure management does not accord with normal farm practice. In addition, the complainants submit that the odour and flies are worse because the proximity of the livestock areas to their property is not consistent with normal farm practice.
49. The complainants entered photographs into evidence showing darker green grass areas and denser growth along the common boundary line adjacent to the paddocks and run-outs but not the boundary with the parking lot. Mr. Swart attributed the dark green grass and dense growth to increased nutrient leaching from the paddocks and run-outs along the common boundary (areas A, B and C).
50. The complainants argue that areas A, B and C are the main sources of odour and flies because these are the areas where livestock are located in large numbers. Mr. Swart testified that these areas are not cleaned of manure on a regular basis, particularly in the winter months. The complainants submitted a number of photographs showing manure in these areas.

51. Mr. Swart estimated that area A is about 0.65 acres and typically contains 2 horses. He noted this paddock slopes downward toward the southeast corner and runoff flows into this corner which also seems to be the horses' preferred area for manure deposits.
52. Mr. Swart estimated that area B is about 0.3 acres and stated that this area has contained as many as 9 horses and usually has 8 horses. He identified this area as the largest source of odour and flies, stating that the odour increases as one approaches this area. He testified that the grade brings spring run off to the fence line in this area.
53. Mr. Swart estimated area C as being approximately 0.4 acres and typically containing 1 horse. It slopes down toward the southwest corner and can be very messy in this corner for several months of the year because of runoff mixed with manure.
54. Mr. Swart testified that the flies had become so severe he and his family no longer use the back deck on their house for eating and have built a second deck on the south side of their house. He stated that it is almost impossible to keep the flies out of their house in the summer, and that flies were not a problem before the respondent commenced operating her equestrian centre.
55. The complainants submit that areas A, B and C are all confined livestock areas. They argue that the siting of these confined livestock areas along the common boundary is not normal farm practice because these areas are not set back from the property line by 15 metres as called for in the Ministry guide and by the City of Kelowna bylaw. The complainants argue that the interpretation of the bylaw given by Kelowna staff does not make sense. The complainants also referred to bylaws in Delta and Langley as requiring 15 metre setbacks for confined livestock areas.
56. The complainants seek an order requiring the farm to adhere to standard confined livestock setbacks.

Un sightliness

57. The complainants argue that the edge of the parking area along the fence line which is in plain view from their house is used as a short term storage area. The complainants submitted several photos including photos of vehicles, equipment, a horse trailer, and a portable toilet, which they described as unsightly. They also complained about snow that had been pushed up to the fence line, some of which spilled over onto their property, and the fact that the snow pile was unsightly because it was dirty and mixed with dirt and stones.
58. The complainants seek an order requiring the respondent to install appropriate screening to block the unsightliness of her property.

Further Submissions

59. The complainants submit that the only consideration given to the siting of the equestrian centre was to site it so as to better enable it to be later severed off and taken over by the respondent's daughter and son-in-law.
60. The complainants referenced three cases, which they described as having similar circumstances, where the issues of siting and proximity were a consideration: *Pyke v TRI GRO Enterprises Ltd.* (2001), 55 O.R. (3d) 257 (C.A.); *Ollenberger (Geertsma) v Breukelman* BCFIRB November 18, 2005; and *Lucas v Terpstra* (1995-02), Ontario Normal Farm Practices Protection Board, October 26, 2001. The complainants argue that what may be normal farm practice in one situation may because of proximity not be normal farm practice in another situation such as the one is this case.

RESPONDENT'S CASE

61. The respondent testified that her farm has been a horse farm for more than 20 years. In addition to building the equestrian centre, the respondent stated she has made a number of other improvements to the property. She argues that it should have been reasonable for neighbours to predict the property would become a more elaborate horse facility at some point in the future. She argues that her horse farm has not negatively affected other neighbours and that she is following farm practices similar to those of other horse farms in the Kelowna area. The respondent asks that the complaint be dismissed in its entirety.
62. The respondent entered into evidence a questionnaire completed by four neighbours. Two live in the subdivision to the north of the respondent's farm and therefore some distance from the equestrian centre, although the farm has large horse paddocks in this location that run along the farm's northerly property boundary with the subdivision and the properties of these two neighbours. The other two neighbours live on the opposite side of Stewart Road from the equestrian centre and the complainants' property. All four indicated the equestrian centre operations had not resulted in excessive noise, an increase in flies and odours, light pollution or loss of privacy, except for one neighbour in the subdivision who indicated some increase in flies and odour during periods of extreme heat.
63. The respondent stated she has made several adjustments to minimize the disturbance to the complainants over the last 3 years, including:
 - installing a timer on the barn light to shut it off at 9:30 p.m.;
 - moving a second light on her property so that it shines away from the complainants' residence;
 - seeking the expertise of a landscape consultant, who advised that because of grade differences the optimum location for a landscape buffer is on the Swart property;

- purchasing a tent to block the complainants' view of the barn, but then removing it when the complainants complained it was too close to the property line;
- choosing not to site her driveway on the south side of her property.

Noise

64. The respondent emphasized that the farm is not a public facility, and so does not have hours of operation posted to the public. However, all individuals who board a horse at the farm must enter into a standard form of boarding contract that specifies the hours of operation are Monday to Sunday from 8:00 a.m. to 9:00 p.m., with the closing time extended in July and August to 10:00 p.m. In addition to the boarding agreement, a separate document called the "Serendipity Farms Rules" sets out the hours of operation and is given to everyone allowed on the farm. The farm fences and gates have signs indicating that the facility is private and visitors may come by appointment only.
65. The respondent testified that she has instructed all visitors to the farm to not idle their vehicles on farm property. She communicated this via a message on the white board inside the barn near the entrance that everyone reads. Once this message was communicated, she removed it from the white board.
66. The respondent stated that there may be times when there will be visitors to the farm after hours, such as animal health emergencies or when horses are being transported to shows as she boards sport horses that travel to competitions in the early morning and return later in the evening.
67. The respondent testified that most of the equestrian centre activity occurs between 10 a.m. and 5 p.m., with the exception of a cleaner who arrives between 7 and 7:30 a.m. Another staff member who is responsible for training about seven horses arrives later in the morning. She noted that the parking lot area is much larger than needed for parking to permit vehicles hauling trailers to maneuver safely. The respondent submitted a photo of her parking lot on a typical afternoon, when most boarders visit, showing six cars parked in front of the equestrian centre, noting that most farm visitors drive cars not diesel pick-up trucks. She added that there may be more vehicles when the farm holds a clinic and on the twice monthly occasions between 4:30 p.m. and 7:30 p.m. that the farm hosts the Pony Club.
68. The respondent stated that, in addition, there are vehicles that make farm deliveries such as hay and shavings on a regular monthly basis. Because local hay may be delivered in the evening, to accommodate the complainants she switched and now buys stored hay which is delivered between 10a.m. and 1 p.m. Other deliveries such as wood chips and gravel occur once a year.
69. In reference to the complainants' argument that horses be offloaded in a more distant area of the farm, the respondent explained that when horses are loaded and unloaded from a trailer, it needs to be done close to the barn for safety reasons.

When horses are unloaded from a trip, they are energetic and need to get to their home stall as quickly as possible to minimize the chances of them bolting and/or escaping.

Light

70. The respondent argues that the light mounted over the door at the front of the equestrian centre is a suitable security light of a type that is commonly used on farms. She stated that it automatically turns on at dusk and is programmed to turn off at 9:30 p.m. It is needed not only to light up the parking area, but also to light up the paddock areas at night when horses are led back to the barn.
71. The respondent argues that if she were to block the light as suggested, the light would not go where it is needed.

Un sightliness

72. The respondent stated that she has tried to minimize the parking activity at the corner of the parking lot closest to the complainants' residence by minimizing access to that area. For example, she arranged for a car intended for her grandson's birthday gift to be parked there to discourage others from parking there in order to minimize the noise disturbance.
73. The respondent testified that horse trailers are not stored in the parking lot in front of the equestrian centre; although sometimes a trailer may be parked there for a few days if the horse owner is loading it for a long trip.

Manure Management: Odour and Flies

74. The respondent argues that her manure management practices accord with normal farm practice. She testified that an employee picks up manure every morning in the run-outs and every other day in the paddocks unless prevented by weather conditions, such as low temperatures in the winter when manure can become frozen to the ground. The respondent indicated that horses have about 10-12 drops of manure per day and so it is common to see this number of manure drops in a horse stall or a pasture area.
75. The respondent referenced the British Columbia Horse Industry Report as showing that for operations like hers (sport horses), 57% of the farms spread manure on their property and 33% compost and use manure as a fertilizer or sell it.
76. The respondent stated that she is constantly doing research and adapting her farming practices to minimize the flies on her operation because flies which can carry disease are a concern in a horse operation. It is because flies lay their eggs in manure that manure is picked up on a regular basis from stalls and paddocks. The manure is composted in several piles in an area on the far side of the equestrian centre. The piles are at different stages and she folds fresh manure in the middle of old manure to compost it properly, to kill fly larvae and break the life cycle of the

fly. She says this makes the manure safe to put on pastures while minimizing odour.

77. The respondent argues that there are several animal agriculture operations in the area whose manure could be contributing to the increase in flies and odour the complainants have observed. The respondent stated that hers is the only farm in the neighbourhood that picks up the manure on a regular basis.
78. The respondent stated that the run-outs are an important part of the equestrian centre operation and are essential for high-end sport horses that are fed a specified diet of prescribed foods. These horses cannot be permitted free access to grazing because it would jeopardize their diet and, as a consequence, their performance in sporting competitions. However, they still need an area in which to move and be outside and the run-outs accomplish this.
79. The respondent submits that the regulations surrounding confined livestock areas apply to more intensive livestock operations such as feedlots but should not apply to horses.
80. The respondent argues she had the right to build her equestrian facility and did so with proper permits. The equestrian centre building is 20 metres from the southerly property line and this clearly exceeds the setback requirement of 15 metres. Letters from the City of Kelowna state that her barn is compliant with City bylaws.
81. The respondent indicated that if she had known that she had to have a 15 metre setback from the property line to the outer edge of the run-outs, she would have situated the barn differently. She stated the run-outs in area B are about 70 feet long. If they had to be shortened by 15 metres, the respondent indicated it would have a negative impact on her operation because the horses might not have sufficient room to exercise and could injure themselves.

Evidence of Kris Hultgren

82. Mr. Hultgren, the respondent's son-in-law, lives on the respondent farm with his wife in the house beside the main gate on the road leading into the equestrian centre. His evidence confirmed the respondent's evidence respecting hours of operation. He stated that after regular hours vehicles might arrive because a horse required medical attention and that trucks with horse trailers sometimes operated on the property outside of regular hours, mainly in the summer during show season. He testified that the truck operators were good about not idling, shutting off their engines once they were in position to load or unload. He agreed that this could take some 2 to 5 minutes if a driver was inexperienced. He noted that he is a licensed transport mechanic and motor vehicle inspector and in his view none of the vehicles have been exceptionally noisy.
83. Mr. Hultgren testified that he had previously run an equestrian centre for about two years and it had similar hours of operation. Riding was permitted from 8 a.m to 9

p.m., shipping of horses was unrestricted, and he started chores daily at 6 a.m. with staff arriving at 8 a.m.

84. Mr. Hultgren indicated the light from the barn was in a direct line with his house and not noticeable unless he stared at it. He agreed his house, at approximately 200 metres distant from the front of the barn, was somewhat further away than the complainants' house. He confirmed that the light was on a timer and shut off at 9:30 p.m.
85. Mr. Hultgren stated that the respondent's manure management practices were similar to the equestrian centre he had run where stalls were cleaned daily with paddocks being picked every second day unless freezing prevented this in winter in which case they were cleaned when it thawed. He indicated that for equestrian centre operations some odour, flies and early stall cleaning are normal. He denied there had been an increase in flies because of the equestrian centre, noting new animal farms had been established elsewhere in the area nearby since the equestrian centre opened.
86. Mr. Hultgren testified that previously he also had a farm for 7 years and bred horses. He described that farm as having non-grazing run-outs extending out to one property line from the barn and also a number of non-grazing pens or paddocks running along another property line.
87. Mr. Hultgren indicated the equestrian centre had been sited on the respondent's property to provide a full view of the barn from his house and was in the centre of the area of the property he and his wife planned to eventually take over. He described the run-outs in area B as an essential part of the operation. He said it would be a hardship to require a 15 metre setback as horses are large animals and need room to move around,

Evidence of Mac McCormack and Other Horse Farm Owner/Operators

88. Mr. MacCormack, a witness for the respondent, owns and operates an equestrian centre in the Kelowna area that is similar to the respondent's in that he boards horses that are in training and competing. He testified that his facility is also private and he therefore does not post hours publicly. The facility is open from 8 a.m. to 8 p.m. for riding with access outside of these hours to tend to horses and for shipping to and from shows. His staff starts early. In the summer they may arrive as early as 6 a.m. Noise from trucks, vehicles and equipment is usual. Horses are loaded and unloaded at the front of the barn because it makes sense. Trucks are not to idle while loading.
89. As for lighting, Mr. MacCormack stated that he has a number of dusk to dawn yard lights.
90. Mr. MacCormack described his manure management as similar to the respondent's in that manure is picked out of paddocks daily except when it is difficult to do so in winter. In the spring when it thaws the entire paddock is cleaned out if there is

residual manure. He composts some manure for use in the paddocks and the rest is removed every month or two. He indicated his facility does not have run-outs similar to the respondent's. Instead horses are lead in and out to the paddocks for turn out. He stated that another equestrian centre in the area turns horses out in paddocks along its property line. He testified that when he went through the planning process to get approval for his facility, no consideration was given to setbacks with respect to paddocks and that his understanding was the setback requirements applied only to buildings. He agreed that he had no neighbours whose residences were nearby his facility.

91. Mr. MacCormack considered the respondent's farm and its operations to be above standard.
92. The respondent submitted questionnaires completed by four other Kelowna-area horse farms to support her argument that her farm practices accord with normal farm practices. The responses provided by the owners/operators of these facilities indicate that the nature and hours of their operations, manure management practices and other aspects of their operations were generally consistent with Mr. MacCormack's testimony with respect to his facility.

ANALYSIS

93. The complaint was filed pursuant to s. 3(1) of the *FPPA*. That section provides as follows:

3(1) 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.
94. A complaint under the *FPPA* involves a two-step analysis. The first step involves standing; complainants must establish that they are aggrieved by the odour, noise, dust or other disturbance that is the subject of the complaint.
95. The evidence of the complainants and Mr. Bliss establishes that noise from diesel pick-up trucks in the parking lot in front of the equestrian centre is likely to disturb the complainants and may do so even inside their residence if the windows are open. The evidence as to the level of disturbance caused by the farm's use of a leaf blower is less clear but we accept Mr. Swart's evidence that it is disturbing. While the responses of other neighbours to the respondent's survey questions generally deny any disturbance, we note that their residences are further away from the equestrian centre.
96. We accept the evidence of the complainants and Mr. Dick that the light cast by the fixture located on the front of the equestrian centre extends onto the complainants' property and may extend even into their house, causing a disturbance.

97. The complainants' evidence was clear that they can no longer enjoy certain parts of their property due to an increase in odour and flies since the equestrian centre commenced operation. We accept the respondent's argument that given the various farm operations in the area surrounding the complainants' property this increase may not be solely due to the equestrian centre operations. However, because of the proximity of the equestrian centre to the complainants' property and the temporal connection between the increase in odour and flies and the commencement of the equestrian centre operations, we conclude that some of the increase in odour and flies is due to those operations.
98. Accordingly, we find the evidence sufficient to establish that the complainants are aggrieved by noise, light and increased odour and flies from the equestrian centre operation.
99. As to the complaint of unsightliness, a similar complaint respecting aesthetic concerns was dismissed in *Ollenberger* at paragraph 74, the panel stating:
- The Panel heard a great deal about the aesthetics of the Breukelman farm and the fact that the barns are an "eyesore" obliterating the view of Mount Baker. The Panel dismisses this aspect of the complaint. The Breukelman property is in the ALR where barns are a normal fact of life. There is nothing unusual about the appearance of these barns and in fact, both our observations and the evidence confirmed that, in terms of growing chickens, the Breukelman operation is indeed state of the art.
100. In the panel's view the photographic evidence in the present case shows a farmyard that is reasonably tidy and well kept. We do not find the evidence sufficient to establish that the complainants are aggrieved by a disturbance. While the complainants may consider some items on the respondent's farm unsightly, in the panel's view the presence of equipment, vehicles and portable toilets on a farm is consistent with normal farm practice as is the presence of snow piles in a cleared parking area. We dismiss the unsightliness aspect of the complaint.
101. If the view of the farmyard, in particular the parking area in front of the equestrian centre, remains of concern to the complainants, the option is always open to them to establish some sort of buffer on their side of the property line to block the view.
102. With the initial threshold question met in respect of the complaints respecting noise, light and increased odour and flies, the panel must go on to make a determination as to whether these disturbances result from normal farm practices.
103. Section 1 of the *FPPA* defines "normal farm practice" as 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...".
104. In various decisions, including *Ollenberger*, BCFIRB has considered the meaning of "normal farm practice" and "proper and accepted customs and standards as established by similar farm businesses under similar circumstances". Consistent

with those decisions and the Ontario Court of Appeal decision in *Pyke v TriGro*, the analysis involves an examination of industry practices but also includes an evaluation of the context out of which the complaint arises. This evaluation may include factors such as the proximity of neighbours, their use of their lands, geographical or meteorological features, types of farming in the area, and the size and type of operation that is the subject of the complaint.

105. Under section 6(1) of the *FPPA* the panel must dismiss the complaint if it is of the opinion the disturbance complained of results from a normal farm practice or order the farmer to cease or modify the practice causing the disturbance if it is not a normal farm practice.
106. We address below the question of normal farm practice in relation to each of the disturbances.

Noise

107. The earliest noise disturbance occurred during the construction of the equestrian facility and ceased with the facility's completion. Because construction noise is not part of the ongoing farm operations, no remedy is required and the panel will not address this aspect further.
108. With respect to the operation of the equestrian centre, the panel concludes that the complained of noise from vehicles and the use of a leaf blower in connection with the operation of the equestrian centre results from normal farm practices.
109. In particular, we rely on the opinion of Mr. Withler that there is nothing abnormal about the noise generated by the farm. We also note Mr. MacCormack's testimony with respect to his similar equestrian centre operations confirming that noise from trucks, vehicles and equipment is usual.
110. We accept the respondent's testimony that most of the activity giving rise to noise from visitors to the farm occurs between 10 a.m. and 5 p.m. and that it is common practice for other Kelowna horse farms to have employees starting, as does her staff, as early as 7 a.m. Mr. McCormack and Mr. Hultgren both confirmed it is usual for equestrian centre staff to start early in the morning. We consider the use of equipment such as leaf blowers and farm vehicles in connection with stall cleanout and other early morning staff activities to be a normal practice for an equestrian centre in this area.
111. The farm is not open to the public and the respondent has set hours of operation for the equestrian centre by including such hours in the boarding agreements and farm rules provided to those persons permitted on the farm. While these hours are not the same as recommended by Mr. Withler, they are similar to the hours set by Mr. McCormack for his equestrian centre and the hours of operation indicated in the questionnaire responses for other horse farms in the area. We consider the hours of operation set by the respondent and the manner of communicating such hours to

those permitted on the farm to be reasonable and consistent with normal farm practice in connection with the operation of an equestrian centre in this area.

112. We agree with the respondent that since the farm is not open to the public there is no need to post the hours of operation at the entrance to the property. In this regard we note the respondent's evidence that signage at the entrance indicates the farm is not open to the public and the entrance to the equestrian centre area is through a gate on the farm road running beside the respondent's daughter's house, permitting observation of those who enter.
113. In response to the complaints, the respondent has already made modifications to her farm practices to minimize noise disturbance by instructing permitted visitors not to idle their vehicle engines, and minimizing vehicle visits late at night or early in the morning. We consider these modifications appropriate given the proximity of the complainants' residence and they form part of the basis for our conclusion that the equestrian centre operation so far as noise is concerned is consistent with normal farm practice. These modifications will need to continue for the equestrian centre's practices to remain consistent with normal farm practice. In this regard, we observe that in addition to reminding people verbally not to idle vehicles in the parking area, this practice might be enhanced by permanent signage prohibiting idling that is placed in a location visible to drivers of vehicles in the equestrian centre parking area.
114. As for the complainants' suggestion that horses be loaded and unloaded from trailers elsewhere on the property, the panel accepts the respondent's evidence that it is unsafe for both horses and the people handling them to load/unload horses at a distance from the equestrian centre. We also note Mr. McCormack's testimony that at his equestrian centre horse loading activities take place near the barn entrance because it makes sense to do so. We consider that it is normal farm practice to load and unload horses close to the stables.
115. We have found that while the equestrian centre operation does result in noise disturbance, that disturbance is the result of normal farm practices. We must therefore dismiss the portion of the complaint concerning noise.

Light

116. With respect to light disturbance, Mr. Withler opined that the placement, use and brightness of the light at the front of the equestrian centre building are similar to lights used on other working farms in the Okanagan valley.
117. In addition, we note the evidence of the respondent and that of Mr. Dick and Mr. MacCormack supports Mr. Withler's view.
118. The panel, on the basis of this evidence, finds the light in use at the front of the equestrian centre is consistent with normal farm practice. We observe that while not required to do so, the respondent may still wish to consider the helpful recommendations of Mr. Dick to either alter the light or replace it in order to both

enhance the equestrian centre lighting and minimize light disturbance. Having found that the light in use at the front of the equestrian centre is consistent with normal farm practice, we must dismiss the portion of the complaint pertaining to light disturbance.

Odour and Flies - Manure Management and Confined Livestock Areas

A. Manure Management

119. With respect to the issue of odour and flies, the evidence of the knowledgeable person and that with respect to other horse farm operations in the area indicates that (not taking into consideration the matter of setbacks) the respondent's practices in regards to manure management are consistent with usual practice.
120. We find 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.
121. We note the respondent's evidence that sometimes weather conditions may prevent the manure from being picked up, such as when the manure is frozen or covered in snow and that it must be dealt with later. This is a practice that Mr. McCormack and Mr. Hultgren testified was usual depending on weather conditions and which we agree is consistent with normal farm practice.
122. We find the respondent's manure management practices to be consistent with normal farm practice.

B. Confined Livestock Areas

123. One of the questions raised by the complainants in relation to the complained of increase in odour and flies is that of appropriate setbacks with respect to areas A, B and C.

Provincial Standards for Zoning Bylaws

124. Both Mr. Withler and the complainants referred to the Ministry of Agriculture's Guide for Bylaw Development in Farming Areas (the Guide).
125. Part 26 of the *Local Government Act*, RSBC 1996, c.323 concerns planning and land use management. Section 903(5) requires zoning bylaws that prohibit or restrict the use of farm land for a farm business in a farming area to be approved by the minister responsible for the *FPPA*. Section 916 authorizes the minister to create standards in relation to farming areas for the guidance of local governments in the preparation of zoning bylaws and bylaws under Part 26. The Guide contains

these standards as well as other information that can be used by a local government when developing or amending bylaws affecting farming areas.

126. As noted in the Guide,

Ensuring greater land use compatibility and reducing the potential for farm and non-farm complaints is a fundamental objective in the development of the bylaw standards. This represents an important policy link between the ‘right to farm’ provisions in the FPPA and the ‘plan/bylaw’ provisions in the Local Government Act. ... the intent is to use ... the bylaw standards and farm bylaws to enhance compatibility between land uses.

127. The Guide deals specifically with setback distance standards, setting various setback ranges to deal with different situations.

128. The Guide sets out a number of definitions in relation to the bylaw standards. The following are pertinent here:

Livestock means cattle, horses, sheep, goats, swine, rabbits and fish. (emphasis added in bold)

Confined Livestock Area means an outdoor, non-grazing area where livestock, poultry, or farmed game is confined by fences, other structures or topography including feedlots, paddocks, corrals, exercise yards and holding areas, but not including a seasonal feeding area. (emphasis added in bold)

Exercise Yard means an area used to exercise horses and other livestock, and includes outdoor equestrian riding arenas and training tracks.

Grazing Area means a pasture or rangeland where livestock, poultry or farmed game are primarily sustained by direct consumption of feed growing in the area.

Seasonal Feeding Area means an area:

- (a) used for forage or other crop production and
- (b) used seasonally for feeding *livestock, poultry or farmed game* that is primarily sustained by supplemental feed
but does not include a *confined livestock area or grazing area*.

129. With respect to land in the ALR, the Guide (Table 3B) sets out setbacks from lot lines for accessory farm buildings, structures and areas. A confined livestock area is to be set back 15-30 metres from all lot lines (except for edge lot lines¹ where the setback is 30-60 metres). There is no setback for a seasonal feeding area.

City of Kelowna Zoning Bylaw

130. The City of Kelowna did not participate in the hearing as a witness, although we

¹ An edge lot line is a lot line separating urban land not in the ALR that is zoned for residential, commercial or industrial purposes from farming land in the ALR.

understand from the parties that they were requested to do so. However, correspondence from the City of Kelowna and copies of relevant by-laws were submitted into evidence.

131. City of Kelowna Bylaw No. 8760, a bylaw amending City of Kelowna Zoning Bylaw No. 8000, was approved by the then Minister of Agriculture, Food and Fisheries and adopted by the City of Kelowna in 2002.
132. As amended, City of Kelowna Bylaw No. 8000 (the Zoning Bylaw) provides in Section 11.1.6 “Development Regulations” the following:
 - (f) Notwithstanding subsections 11.1.6 (c) to (e), 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, shall not be located any closer than **15.0 m from any lot line**, except where the lot line borders a residential zone, in which case the area, building or stand shall not be located any closer than 30.0 m from the lot line. (emphasis added).
133. The amended Zoning Bylaw definition of “livestock” includes horses, the definition of “confined livestock area” is the same as that set out in the Guide, and the definition of “seasonal feeding area” is similar to the Guide definition.
134. In a letter to the respondent dated May 11, 2011, staff in the Land Use Management Department of the City of Kelowna noted that they had previously become aware of a complaint with respect to the respondent’s property regarding confined livestock areas and as discussed in their telephone conversation with her had “formalized an interpretation of the matter”. Referring to section 11.1.6(f) of the Zoning Bylaw they observed that according to the building permit application made by the respondent in 2009 the equestrian centre building had been located approximately 20 metres from the south property line to conform with that provision. They described the issue in question as being whether the corrals/paddocks adjacent to the barn (i.e. area B) “should be considered a single confined livestock area, or if each individual corral/paddock would be a confined area on its own”. They advised as follows:

The corral areas in question should be considered as a confined livestock area, as it is outdoor, non-grazing and would not be considered a seasonal feeding area. As there are approximately seven corrals in a relatively small area, and they are linked to the barn, these seven corrals should be considered one confined area in sum, and you would need to ensure that there are no more than four (4) livestock within this area at any time. This would appear the easiest way for you to conform to the bylaw.

Alternatively, you may wish to separate these individual confined areas to accommodate your livestock. Any confined area would need to be separated from any other area used for the confinement of livestock. However, the bylaw does not specify a minimum distance between “confined livestock areas”. In enforcing this separation, we have determined that the side yard setback for the A1 zone would be appropriate (3.0m). In this way, you would be able to have multiple confined areas with more than four livestock as long as there is a minimal separation of 3.0m between each area.

135. In a second letter of the same date, a Kelowna Licence and Bylaw Enforcement Supervisor who was copied on the first letter, after referring to the interpretation, noted the need for the respondent to comply with the Zoning Bylaw.
136. In response to the above-mentioned letters from the City of Kelowna, the respondent discontinued housing horses in the fourth stall and attached run-out to provide sufficient separation between the run-outs so as to create in her view two separated confined livestock areas and thus eliminate any confined livestock area that would accommodate more than four horses.
137. In an email sent to BCFIRB on September 27, 2011 the Kelowna City Clerk, who had also been copied on the Land Use Management Department's May 11, 2010 interpretation letter, indicated that Kelowna did not agree with Mr. Withler's view that there was a bylaw violation with respect to the run-outs in Area B.

Discussion

138. Provincial guidelines such as those in the Guide are not binding on BCFIRB in its determination of normal farm practice and the present case concerns a complaint and not a bylaw prosecution. However, provincial guidelines and local government bylaws are informative and instructive on the question of "proper and accepted customs and standards" in that they indicate what governments believe to be appropriate practice in different settings and with respect to various uses.
139. Based on Mr. Withler's evidence and our own reading of the Guide and the Zoning Bylaw, we find that areas A and C are seasonal feeding areas. Neither the setback standards in the Guide nor the setbacks provided for in the Zoning Bylaw call for any setback of seasonal feeding areas A and C from the southerly lot line of the respondent's property.
140. Mr. Withler indicated it was common for seasonal feeding areas to abut a property's lot line. Evidence respecting other farm's operating in the area indicated some with paddocks that could be described as seasonal feeding areas that are bounded on one or more sides by property lot lines.
141. We find that, although areas A and C abut the common property line, the respondent's use of these areas as seasonal feeding areas for horses is consistent with normal farm practice.
142. With respect to area B, consisting of the run-outs attached to the south side of the equestrian centre building, we agree with Mr. Withler that these run-outs, whether considered singly or as a group, are a confined livestock area or areas as defined in the Guide. Since the definition of confined livestock area in the Zoning Bylaw is the same as that in the Guide, in our view these run-outs are also a confined livestock area or areas under the bylaw.
143. We have considered the interpretation given by City of Kelowna staff to section 11.1.6(f) of the Zoning Bylaw referenced above. We do not agree with that

interpretation. 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”.

144. In our view at the time the equestrian centre was constructed with its attached run-outs the Zoning Bylaw in effect called for a 15 metre setback from the lot line for all confined livestock areas regardless of the number of livestock in any such area.
145. The panel notes the argument of the complainants that the proximity of their residence to the run-outs in area “B” must be considered with respect to setbacks for this area from the property line. While the complainants’ present use of their property may be less agricultural and more residential in nature than that of other properties in the area, we find that the respondent’s southerly lot line is not an edge lot line because both properties are in the ALR. Therefore, 15-30 metres would be the setback range under the Guide standards. The 15 metre setback under the Zoning Bylaw is of course consistent with the Guide as it falls within the range specified in the Guide.
146. We also note the respondent’s evidence that being required to shorten the run-outs on the south side of the equestrian centre to provide a setback would be a hardship. While we accept that shorter run-outs of approximately 30 feet may be less desirable from her viewpoint and that of her affected horse owners, that is not a factor that assists in the determination of normal farm practice.
147. We consider the setback provisions in the Guide and those in the Zoning Bylaw to be standards in relation to normal farm practice that have been designed to take into account proximity issues such as those raised in this case by the complainants. These standards together with the evidence of the knowledgeable person in our view clearly outweigh the evidence, which we did not find sufficiently detailed in any event, brought forward by the respondent as to what others keeping horses in the area may be doing. In this regard, we observe that normal farm practices are not static. While there may be other horse farms in Kelowna with confined livestock areas that run along a property line, we expect farmers to be updating and changing to keep their practices current and observe that they may have to change their practices over time to remain consistent with normal farm practices.
148. Further we note the additional testimony of Mr. Swart, as confirmed by the provided copy of the relevant bylaw, that Delta requires confined livestock areas be setback at least 15 metres from lot lines. This evidence further supports that current accepted standards for confined livestock areas such as the run-outs would require

a setback of at least 15 metres from the southerly lot line of the respondent's property.

149. The question of setbacks is clearly relevant to the complaint respecting odour and flies on the basis of proximity. We also note the issue of runoff onto the complainants' property and in this regard we accept the evidence of Mr. Withler that prevention of runoff of nutrients from manure is one of the reasons for setbacks with respect to confined livestock areas.
150. We find the run-outs on the south side of the equestrian centre in area B are confined livestock areas regardless of the number of horses turned out in the area or whether or not there is a separation between some of the run-outs. Their present use for turning out horses is not consistent with normal farm practice because the run-outs are not setback from the southerly property lot line that forms the common boundary with the complainants' property. For the area B run-outs use as confined livestock areas to be consistent with normal farm practice we find that they must be setback at least 15 metres from the respondent's southerly property line.

Conclusion

151. The portions of the complaint with respect to noise, light disturbance and unsightliness are dismissed.
152. With respect to disturbance from an increase in odour and flies, we find the respondent's manure management practices to be consistent with normal farm practices except with respect to the respondent's failure to comply with setback standards applicable to confined livestock area B.

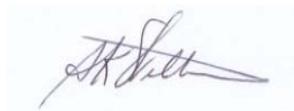
Order

153. Accordingly, we order the respondent to set back the run-outs in area B at least 15 metres from the farm's southerly property line by May 31, 2013 or to discontinue their use for livestock.

Dated at Victoria, British Columbia, this 4th day of March 2013.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Suzanne K. Wiltshire, Presiding Member



Ron Kilmury, Chair