

# Smart Farm Models

## 1. Introduction

### 1.1 Purpose of the Report and Structure

The purpose of this report is to discuss three possible legal models for owning, residing on and operating a farm business on small parcels of land of between 3 and 15 hectares outside the Agricultural Land Reserve (ALR). The intent of these models is threefold:

- To protect land in perpetuity for farming;
- To contribute to the viability of small-scale farming; and
- To make housing for farming families affordable.

The Smart Farm project, of which this report is a part, envisions a small and site-appropriate increase in residential density on small rural parcels outside the ALR by three to seven units while limiting the built footprint as a way to assist in capitalizing a farm, support the viability of the farm business enterprise, provide at least one affordable home for a farming family, and increase food security for the region. It is important to note that these models are not intended as farm subdivisions or development-supported farm subdivisions of market homes that include an agricultural component. The Smart Farm models are explicitly small-scale and focus on providing affordable housing that minimizes the residential footprint while maximizing access to farmland and food production business viability. The residents on the parcel may not be involved in farming but their investment in the property as a home is a commitment to making agriculture viable and housing affordable for farm families in the context of an international land market in which farm incomes cannot compete.

When deciding which housing and land development model best meets the needs of Smart Farm project stakeholders, groups must weigh the costs and benefits of each model as they relate to owner autonomy, real estate marketability, long term food and agricultural use, farm business viability, community control and access to development financing. Some development models may be easier to fund due to increased marketability, but this marketability is often the result of increased owner autonomy. Where individual owners have more autonomy, it may be more difficult for a Smart Farm to enshrine food production use in perpetuity or place strict limits on future development of the land to maintain affordability and farm viability.

There are also tradeoffs between protecting housing and foodland affordability and food production, and marketability and return on investment. For example, limiting

the use of the property only to a farming use may limit the value of that property and the market appreciation of the other non-farm units on the property. Collaborative governance arrangement through strata corporations or a cooperative may also limit the number of people who would choose buy into this type of arrangement, resulting in a smaller market than for the residential land market as a whole. These tradeoffs are endemic to any specific piece of land and landholding arrangement. In the case of Smart Farm projects, additional considerations include other public interest factors such as support for farming viability and joint ownership.

Often the approval of these kinds of landholding arrangement are the result of long-term and complex negotiations between local authorities and landowners. Local governments appreciate the effort that landowners put into maintaining public values of farm viability and affordable housing, but want to ensure that these values endure into the future through many different landowners of the parcel. They can be more willing, when compared with provincial approval processes, to accept an unusual rezoning and development proposal if the parties secure the values that the rezoning sought to achieve through covenants, easements, and other community-involved legal mechanisms.

One of the goals of the Smart Farm innovation is to keep decision-making processes as local as possible, which recognizes that each Smart Farm will be a unique arrangement between landowners, farmers and local governments. There is no one ideal legal structure. Each parcel of land, ownership group, and local government are different. It takes multiple overlapping legal approaches to achieve the long term values of farmland protection and affordable housing. It is the interaction between the form of ownership (i.e. strata or cooperative), local government approvals (i.e. rezoning and covenants), and oversight by community organizations such as a farmland trust that will secure farmland protection and affordable housing on Smart Farm parcels into the future. Given the complexity and site-specific nature of Smart Farm arrangements, some local governments will prefer to work with Smart Farm models that remain entirely within their decision-making jurisdiction.

If you are a decision maker (a local government approving authority or group of people wanting to create a Smart Farm), you will want to ask yourself:

- Does the legal model chosen to hold the land secure affordable housing and land for farming in the long term?
- Is the local authority willing to work with us to create covenants and other ways to secure the long-term intent of the property use?
- Are provincial government or Health Authority approvals required? If so, will they change the nature of the local agreement?

Parts 2 and 3 of this report discuss in general terms the common elements of and legal issues related to housing, land, food production uses and the farm business, touching on the topics of:

- Ownership structure;
- Governance relationships;
- Accountability;
- Liability;
- Capitalization;
- Taxation; and
- Return on investment/distribution of profits.

Part 4 presents three potential land tenure and business models for a Smart Farm development, and explores each of those models using the topics introduced in Parts 2 and 3. The intent is to show a range of possibilities for supporting a farm business and affordable housing for a farm family through sensitive intensification in a rural landscape. However, these three examples are not exhaustive. They are only three of many possible models and different elements of each model can be incorporated to create site- and community-specific options.

## 1.2 Definitions

This report uses a number of concepts that are either legal in origin or have specific meanings. Definitions of some common terms are set out here for ease of reference:

*Affordable housing* is housing that requires 30 percent or less of a farmer or farm family's income. In the Smart Farm scenarios, affordable housing is targeted to the farmer and farming families only.

*Common property* is a legal term under the *Strata Property Act* that refers to common lands and assets owned collectively by the strata lot owners as tenants in common and administered and maintained by the strata corporation. Common property may include common systems such as water and sewer pipes, roads and heating systems. Related terms are *common assets* (personal property held by the strata corporation) and *common expenses* (expenses relating to the common property and common assets of the strata corporation). It can also be used in a plain language sense to refer to part of a property that is managed collaboratively and without exclusive use, for example on land owned by a cooperative.

*Community Foodlands Trust* refers to an organization, typically a stand alone non-profit or one linked to a local or regional government, which purchases interests in farm properties and resells or leases it to farmers. The intent is to take foodland out of the urban land market and make it available at an affordable price for food production.

*Cooperative* is a type of incorporated organization that, like companies or non-profit organizations, is governed by a board of directors. It can be for profit or not-for-

profit. Each member purchases at least one membership share and has one vote on important decisions and in electing the board of directors. This one member, one vote structure is viewed as a more equal form of governance and ownership.

*Covenant* refers to a type of charge or restriction registered on the title to land that typically prohibits certain activities or uses of land. They are the primary way to control the use of private land into the future as, historically, they have “run with the land”, which means they bind future landowners and can only be discharged from title by application to a court.

*Designated backup farmer* is an individual or organization such as a community foodlands trust that is responsible for the farm business if the farm business ceases to operate on the property.

*Disclosure* is the information that developers must disclose to purchasers pursuant to the *Real Estate Development Marketing Act* in B.C. when they market designated new development units. Development units can include leasehold and cooperative interests in land.

*Food production use* refers to the preferred use of land relating to farming and agriculture. It goes beyond soil-based farming to include processing and sales.

*Farm business* is the individual or entity, such as company, who is responsible for food production uses on the land.

*Lease* refers to the legal instrument by which a farm business rents or has tenure over land that is in food production.

*Public entity* refers to an organization such as a local government or community foodlands trust that will provide long term accountability for food production uses and affordable housing on the property. While not involved in property management, public entities could, for example, be the party listed in a covenant in whose favour the conditions in the covenant are registered.

*Strata corporation* is the corporate entity created with the deposit of a strata plan in the Land Title Office. Under the *Strata Property Act* a strata corporation provides a governance structure for property that is part of a strata plan, which includes individual strata lots that can be purchased and common property of the strata.

*Viable farming* has two aspects. The first is access to farmland that is affordable for a farm business such that a farm business using normal farm practices within an identified market can turn a profit, taking into account the usual risks associated with farming. In the high cost land market in BC this will often mean that a farm business does not own the land but may lease or have part-ownership of the farmland. The second aspect of viable farming is security of tenure for farmland. Farmers need secure access over a long period of time to make capital investments

in the land affordable and to build the farm business. Thus, viable farming includes community support and investment in securing long-term access to farmland.

*Zoning* is land use regulation that delineates to what use and density (how much of a use) a property may be put. Smart farm properties must either be in the ALR or zoned for agriculture/farming/food production and residential uses.

## 2. Housing and Land

The intent of this part is to set out the ownership, accountability and capitalization principles for the relationships governing land and housing in the Smart Farm Models. Part 2.1 describes the overall vision for each Smart Farm residential aspect and Part 2.2 provides more detail on specific legal issues.

### 2.1 Assumptions about Housing and Land Common to all Models

Each Smart Farm will involve one property that will have owners or owners and investors. The owners jointly own, live on the land and allow the farm business to operate according to normal farm practices.<sup>1</sup> Each owner “owns” their own home, either through strata ownership or by lease agreement with a corporate entity such as a cooperative. The housing footprint is limited to maximize the availability of land for food production. The use of attached housing is encouraged to improve housing affordability, limit the built footprint, and improve energy efficiency.

The farm business operates on site with a long term lease that covers basic services. The farm family lives in affordable housing on-site, either owning their home or leasing it from the owners (for example, a strata corporation) or a non-profit entity owner such as a community foodlands trust. The housing can be tied to a specific farm business, or can be separate from it; however, the intent is that whoever is farming the land will live on-site.

The landowners are (1) a community foodlands trust that leases the property to an incorporated entity such as a cooperative; (2) an incorporated entity such as a cooperative; or (3) multiple owners of a strata corporation whose common property is largely earmarked for the farm business. These multiple owners can include individuals, a community foodland trust or other public entities, or a cooperative.

A covenant registered on the title to land in favour of a public entity such as a local government or community foodlands trust limits the non-residential areas of the farm to food production uses.<sup>2</sup>

---

<sup>1</sup> The term “normal farm practices” is defined in the *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996, c 131. [http://www.bclaws.ca/civix/document/id/complete/statreg/96131\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96131_01) Farm businesses that operate using normal farm practices, whether on land in the ALR or not, attract the protection of that Act. See Part 3.2 for further explanation of this protection for food production.

<sup>2</sup> See Part 2.2.1 for a discussion of covenants.

Site-specific zoning allows, at minimum, for the following uses:

- Residential, specifically allowing for the number of housing units that will accommodate the owners in either single detached or duplex/triplex/fourplex forms;
- A designated residential footprint;
- Agriculture;
- Agricultural processing and sales;
- Other food production-related uses.<sup>3</sup>

## 2.2 Specific Legal Issues for Housing and Land

### 2.2.1 Covenants

Covenants are an agreement between a landowner and another entity usually restricting how a property may be used. They are registered on the title of a property and are considered to “run with the land” because they remain on title even when the property is sold. Under BC’s *Land Title Act* (section 219), covenants can be positive or negative, meaning they can require that something be done or restrict the use of land. Historically, covenants were negative and there has not been any interpretation of positive covenants from courts in B.C. with some other jurisdictions not supporting enforcement of positive covenants.<sup>4</sup>

Covenants can direct the use of buildings, land, and whether land can or cannot be subdivided according to terms set out in the covenant. They can also direct that land or a specified amenity in relation to it be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state in accordance with the covenant and to the extent provided in the covenant. Amenity includes any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land that is subject to the covenant.

Covenants must be registered in favour of a government, Crown corporation or agency, municipality or regional district, a trust committee of the Islands Trust, or any person, such as a community foodlands trust, designated by the Minister. These

---

<sup>3</sup> See, for example, the uses that are permitted in the ALR under the Agricultural Land Reserve Use, Subdivision and Procedure Regulation, BC Reg No 171/2002. [http://www.bclaws.ca/civix/document/id/complete/statreg/171\\_2002](http://www.bclaws.ca/civix/document/id/complete/statreg/171_2002) These uses relate specifically to food production but also allow, for example, nature viewing, ecological reserve, and bed and breakfast uses.

<sup>4</sup> *Heritage Capital Corp. v Equitable Trust Co.* 2016 SCC 19. In this case the court did not find that the positive covenants ran with the land as they were reluctant to require future landowner to spend time and energy fulfilling the terms of a positive covenant agreed to by the original parties.

typically public entities are responsible for monitoring the covenant and ensuring that its terms are adhered to.

In exchange for increasing rural residential density a local government may require that a landowner register a covenant on the property to prohibit further subdivision, increase in density, or that the land be used for farming. While a property held by a non-profit organization such as a community foodland trust appears to be secure for future farming, the additional safeguard of a covenant may give local governments additional assurance that the amenity bonus – the provision of additional residential units in exchange for foodlands protection and support – will be preserved into the future. In any case, covenants, particularly positive covenants, complement other pro-farming arrangement such as leases and should not be relied upon as the sole means by which farming is secured for the future.

### *2.2.2 Leasehold Interests*

A lease is an agreement between two parties (typically a land or property owner and a tenant) granting an interest in land for a fixed period of time. A lease sets out the short and long term rights and responsibilities of each party. In addition to what space will be secured through the lease and how much will be paid for that space, the parties agree to who is responsible for upkeep, paying for renovations, and utilities, and the expected behaviour of tenants, staff and visitors to the property. Leases can come directly from a property owner or from a person or entity that already holds a lease from the property owner. This “sub” lease defines the terms and responsibilities between the “head” tenant and the “sub” tenant, and must take into account the terms of the lease agreement between the property owner and the head tenant. Commercial leases can be bankable, however many residential leases are not. For a lender to secure a mortgage against a leasehold property the landowner would need to agree to have a mortgage registered on the title to the property.

It is important to note that under the *Land Title Act* a lease of a portion of land for a period of more than three years cannot be registered on the title to the property without the consent of the local government approving officer, unless the lease is for a building only.<sup>5</sup> While many local governments do not deal with the approval of long term leases, others treat them as a subdivision. In these cases, if the land development project meets local government bylaws, the approving officer may be willing to give their consent before the lease is registered in the Land Title Office. These approvals lapse when the lease ends. It is important to note that the Ministry of Transportation and Infrastructure is the approving authority for land subdivision in most unincorporated areas in regional districts. Some regional districts can be the approving authority for building strata.

---

<sup>5</sup> Land Title Act, RSBC 1996, c 250 s.73.

Leasehold stratas involve the subdivision of a leasehold interest in land into stratified “parcels” that are sold as long term leases, for example for 99 years. They are often used where the landowner is either prohibited from selling its land or does not desire to, and are available only to government entities and universities in B.C. under the *Strata Property Act*. The leasehold interest may be sold directly to new owners. Such owners could be development partners who undertake construction of a multi-unit building. Then the leasehold interest in these units may be sold to new leasehold strata unit owners. A strata corporation is also the form of governance for this form of tenure. This option is, however, only available to government entities and universities who own land.

### 2.2.3 Zoning

Most Smart Farm projects will require a change to existing land use zoning or an exemption or variance from certain zoning restrictions or requirements.

Zoning is one of the staples of local government services and regulation. It is also one of the most controversial. The zoning goals set out above in section 2.1 can be achieved in a variety of different ways through zoning or land use bylaw amendments. The key is for Smart Farm proponents to work in collaboration with their regional district or municipal local government to agree upon a workable zoning. This process will likely take from six months to two years, and will involve:

- meetings with staff, the public, and municipal council or regional board (at minimum one or more council meetings plus a public hearing);
- the application process of providing documentation and information to the local government, including studies if requested; and
- payment of application and other fees.

The rezoning process is highly discretionary in nature. Local government councils or boards can simply say “no” to a request in the public interest, even after years of work with staff and elected officials. It is imperative that Smart Farm proponents work closely with staff and ensure they gain the support of the public and elected officials both before and during the rezoning process.

### 2.2.4 Strata Development

In British Columbia, subdivision of property under the *Strata Property Act* combines individual ownership of parcels of land or buildings with communal ownership and control of common property and common assets shared by the owners within a development.

When a strata property subdivision plan, called the Strata Plan, is deposited in the land title office, a strata corporation is established and the land is subdivided into



individual strata lots, common property and limited common property. A Strata Plan may subdivide structures into individual strata lots or it may subdivide land into strata lots along a single horizontal plane, generally referred to as a 'bare land strata plan'.<sup>6</sup>

Within a strata development, the strata corporation controls the common property, limited common property and common assets.<sup>7</sup> Individual persons own strata lots within the strata corporation.<sup>8</sup> Both the strata corporation and the individual owners must comply with the governance requirements set out in the *Strata Property Act* and the strata corporation's bylaws and rules, as well as local government zoning bylaws.

Benefits of using a strata property development model include marketable legal title, a governance structure and the ease with which most financial institutions will provide purchase and equity financing of strata lots. Strata title is a well-established and easily recognized form of ownership.

Drawbacks of using a strata property development model include restrictions on the use and control of common property and common assets, limited tools with which the strata corporation or other owners may restrict or require particular uses of land and an inability to approve or prohibit certain groups or persons from acquiring ownership with the development. For example, most agreements as expressed in strata bylaws can be changed by agreement of between 50 and 75 percent of the owners, and current strata owners cannot screen purchasers based on their commitment to upholding farming and affordable housing.

It is important to note that approval of bare land strata subdivision in unincorporated rural areas is usually the responsibility of the Ministry of Transportation and Infrastructure as approving authority, and not the regional district. Removing land-related decisions to the provincial level may prevent detailed site-specific agreements and oversight in furtherance of the community values that Smart Farms are upholding.

When deciding whether to use a strata property development model, Smart Farm stakeholders must weigh the benefits of operating under the *Strata Property Act* with the limitations that this legislation may place on their ability to develop and maintain a unique community that meets their needs. For example, in a strata

---

<sup>6</sup> *Strata Property Act*, SBC 1998, c.43, s. 1. See definition of "bare land strata plan".

<sup>7</sup> While the strata corporation controls the common and limited common property, under section 66 of the *Strata Property Act*, each strata lot owner is also a 'tenant in common' owner of the common and limited common property, with a share of ownership equal to their relative proportion of aggregate unit entitlement.

<sup>8</sup> Strata corporations may be freehold or leasehold. For the purpose of this report, we will not consider leasehold strata corporations, as only federal, provincial, municipal and regional governments, First Nation groups and other public authorities may be leasehold landlords under the *Strata Property Act*.

property development, the community cannot prohibit a person from purchasing or selling their strata lot, and certain limitations on the use of common property or enforcement of strata property bylaws may be incompatible with the community's residential and food production or farming business goals.

### 2.2.5 Disclosure

Subject to certain exceptions, the *Real Estate Development Marketing Act* of B.C. requires that a landowner or developer file a disclosure statement with the British Columbia Superintendent of Real Estate and provide that statement to potential purchasers before they enter into a purchase contract.

Disclosure statements disclose the structure and history of the developer and detailed information on the nature of the development.<sup>9</sup> The intent is to provide sufficient information to those interested in purchasing a unit so that they can make an informed decision about whether or not to make an offer.

The number of residential units being marketed to the public and the legal nature of the development will determine whether a disclosure statement must be filed. A residential unit may include a subdivision lot, strata lot, bare land strata lot, cooperative interest, time share interest, shared interest in land or residential leasehold unit. Once the threshold number of units is achieved, the disclosure requirements add some complexity to offering units for sale and can add to the cost of a project that is focused on housing and farm affordability.

Groups developing a Smart Farm project should consult with a lawyer to determine whether they will need to prepare and file a disclosure statement before they can market or sell interests in the project to the public.

### 2.2.6 Water

Where more than one building will be relying on a single water source or system for potable water the standards under the *Drinking Water Protection Act* and regulations apply.<sup>10</sup> All water supply systems that service more than one single family residence, except as excluded by regulation, are treated as a community water system that is subject to the regime established by the *Drinking Water Protection Act* and regulation.<sup>11</sup>

---

<sup>9</sup> *Real Estate Development Marketing Act*, S.B.C. 2004 c. 41.

<sup>10</sup> *Drinking Water Protection Act*, S.B.C. 2001, c. 9 and the *Drinking Water Protection Regulation* B.C. Reg. 200/2003.

<sup>11</sup> The legislation and regulations are not explicit about this requirement. The definition of "water supply system" in the *Drinking Water Protection Act* is a domestic system other than a domestic system that serves only one single family residence or that is excluded by regulation. This means that any system serving more than one single family residence is a water supply system that attracts the requirements of the Act and regulation beyond the requirement that water be potable.

Where land in a bare land strata is not required to be connected to a community water system under a *Local Government Act* bylaw, the approving officer shall not approve the plan unless satisfied that each strata lot has an adequate proven source of potable water or a water distribution system connecting all the strata lots to an adequate proven source of potable water has been constructed in accordance with provincial codes or good engineering practice.<sup>12</sup> An approving officer may approve a bare land strata plan if these requirements are not met if the owner enters into a restrictive covenant.<sup>13</sup>

The combination of bylaws or requirements for approving officer approval of adequate potable water means that each unit needs to have its own water source, such as a well, access to a community water system from either an on- or off-site source (such as a local government water system), or have a point of entry or point of use treatment system from a small system that makes the water potable.

### *2.2.7 Liquid Waste Disposal/Sewage*

The owner of every parcel where a structure is constructed must ensure that all domestic sewage is discharged into a public sewer, holding tank, or sewerage system, and does not cause a health hazard.<sup>14</sup> An approving officer shall not approve a bare land strata plan unless satisfied that a sewage disposal system can be constructed on each lot in accordance with standards set out in provincial codes or a sewage collection system connecting each strata lot to a common or other sewage disposal facility has been constructed to code or good engineering practices.<sup>15</sup>

Each lot to be created by subdivision must have an area that is sufficient in size to satisfy the requirements of the Sewerage System Regulation under the *Public Health Act* for sewage disposal (septic tank or a package treatment plant) for the buildings and uses permitted on the lot.<sup>16</sup>

### *2.2.8 Interaction Between Lot Size, Water and Sewage Regulations*

The interaction between minimum lot sizes under zoning and public health regulations for water and sewer often means that in unincorporated rural areas the use of bare land strata or subdivision will require not only local government and health authority approval, but permission from the Ministry of Transportation and Infrastructure as approving authority. For example, if the property does not have water available from a community water system, typically local governments limit

---

<sup>12</sup> Bare Land Strata Regulation, B.C. Reg. 75/78 s.13(2).

<sup>13</sup> Bare Land Strata Regulation, s. 13(5).

<sup>14</sup> Sewerage System Regulation, B.C. Reg. 326/2004 s.3.

<sup>15</sup> Bare Land Strata Regulation, s.13(3).

<sup>16</sup> *Public Health Act* S.B.C. 2008 c.28; Sewerage System Regulation B.C. Reg. 326/2004.

the smallest individual lot size to 1 hectare, which would be prohibitive in the Smart Farm model. If there is water available and no sewer the individual property size could be reduced to 2,000 square metres, which may be viable on some properties.

In contrast, using a single entity as the owner of the property can reduce the number of approvals required. For example, zoning may permit a single ownership entity – a cooperative, corporation or strata corporation – to have multiple dwellings on the property without the need for subdivision or provincial approvals. Adherence to requirements for water and sewer will always be necessary.

### 3. Farm Business

The intent of this part is to set out in more detail the principles for the relationships governing the interaction between the farm business and the landowner entity(ies). Part 3.1 describes the overall vision for each Smart Farm farm business aspect and Part 3.2 provides more detail on specific legal issues.

It is important to note that there is no concrete way to guarantee that farming continues on any property. Economic factors, weather, the capacity of farmers/farm families and supporting organization such as community foodland trusts, the personalities of the landowners, and the availability of water all influence the viability of farming. The intent is to build into each model several pro-foodland and farming mechanisms to create legal and relationship structures that envision farming in perpetuity on each property.

#### 3.1 Assumptions about the Farm Business Common to all Models

The legal structure of the farm business is up to the farmer. A legal entity, meaning a person or incorporated organization such as a business corporation, will operate the farm business. The farm business will operate under a lease from the landowner(s), unless the farmer owns a strata unit or is a member of a cooperative that includes the farmland as common property. Food production is the primary non-residential activity on the land and all other uses are subject to zoning, local government bylaws and cooperative or strata corporation bylaws if applicable. These can be tailored to supporting the viability of farming.

The landowner(s), residents (if different from the landowners), farm business, and designated backup farmer will enter into a property stewardship agreement that clearly defines the relationships between the parties, each party's roles and responsibilities on and for the property, and a dispute resolution process. The intent is to put policies and procedures in place to avoid conflict between residential and farm business activities, and ensure that the residents' need for privacy and sanctuary is respected while maintaining the priority food production use of the land. The agreement would include policies for:

- The location of food production and related activities, infrastructure, and residential uses, typically depicted on a map;
- Resident access to land under food production;
- Normal farm practices and notice provisions when farm practices may have unusual or time-limited impacts on residential use and enjoyment of the property;
- Water infrastructure, use, licensing, payment of annual rentals/fees and maintenance;
- Internal driveway/road access and use;
- Parking and public use of the land, for example if there are food sales on-site;
- Anticipated expenses and responsibility for new infrastructure;
- Maintenance and replacement of existing infrastructure;
- Insurance for residences, the property and farm business; and
- A dispute resolution process.

A designated backup farmer or farm entity such as a community foodlands trust will be responsible for the farm businesses if the farm business ceases to operate on the property.

## 3.2 Specific Legal Issues for the Farm Business

### 3.2.1 Farm Practices Protection (Right to Farm) Act

The *Farm Practices Protection (Right to Farm) Act* exempts farm operations (activities) from local government bylaws that address nuisance concerns.<sup>17</sup> It provides that a farmer is not liable in nuisance to any person for any odour, noise, dust or other disturbance resulting from the farm operation as long as the farm operation is conducted using normal farm practices on land in the ALR or where local government zoning allows. Likewise, the farmer must not be prevented by injunction or other order of a court from conducting that farm operation. The farm practice must not be conducted in contravention of the *Health Act*, *Integrated Pest Management Act*, *Environmental Management Act*, the regulations under those Acts or any valid land use regulation.

Therefore, while local governments can regulate against nuisances and noise, when they are created by a farm operation on land zoned for food production and the farm business uses normal farm practices, the nuisance or noise is not actionable. Farm businesses in the ALR are exempt from a wider array of activities and the application of specific local government bylaws, such as firearms and animal control, than are farm businesses located outside of the ALR.

---

<sup>17</sup> *Farm Practices Protection (Right to Farm) Act* R.S.B.C. 1996, c. 131.

### 3.2.2 Tax Implications

Significant thought should be put into corporate structure from the beginning of a Smart Farm project because of tax and other implications of changing corporate form after a few or many years. For example, when corporate form is changed, for example from a corporation to a cooperative, from a tax perspective that transfer may be considered a deemed disposition of assets from the corporation and the value of the assets could attract capital gains tax. At a rate of 50 percent of the capital gain, it could result in a significant tax liability and an erosion of capital that may necessitate mortgaging land or obtaining loans.

In addition, a change in corporate form that requires conveying land from one entity to another may require the payment of property transfer tax. Property transfer tax may not be payable for a name change or some amalgamation of corporations, however it is likely payable if corporate form is changed (corporate reorganization) such as from a corporation to a cooperative.<sup>18</sup> Transactions such as a transfer of property between a company and its shareholders are taxable at fair market value regardless of the purchase price. A taxable transaction includes a transfer of an estate in fee simple including strata properties, a right to occupy land under a lease agreement and a leasehold interest in land exceeding 30 years. However, tax does not have to be paid on the transfer of an unregistered interest in land as payment is triggered upon application for registration of a taxable transaction. Property transfer tax may be payable upon conversion to a bare land strata on the fair market value of the transaction for lots created as an estate in fee simple if the ownership of the property changes upon creation of the strata. Of note is that a taxable transaction is exempt from payment of the property transfer tax to the extent of the fair market value of a portion of a property against which a conservation covenant is registered in favour of the Crown.

When a property is subdivided under the Strata Property Act the owner of the land prior to subdivision becomes the owner of individual strata lots after subdivision. The strata corporation becomes the registered owner of the common property. When planning a Smart Farm development, special care must be given to minimizing or planning for property transfer taxes.

There will also be tax implications associated with a strata corporation or cooperative receiving revenue from a farm business, or paying fees related to a farm business outside of a statutory governance regime such as a strata corporation.

Groups planning a Smart Farm should seek tax advice and consider working with charitable groups that may qualify for exemptions from the property transfer tax.

---

<sup>18</sup> *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378.

## 4. Sample Models

Based on the principles set out in Parts 2.1 and 3.1, three sample models are described here. The bare land strata property model involves several detached dwellings with farming on a larger strata lot designated for agricultural use. The strata property model involves attached residential units in one or more buildings with the farming occurring on common property. The cooperative model describes leasehold residential and farming interests in a cooperatively owned property.

Each of these models has its benefits and drawbacks for securing farm activities and affordable housing on site, as well as ease of purchase/sale and governance. Strengths of the strata models include a pre-made governance structure and rules established under the *Strata Property Act*, as well as a well-recognized legal structure for which financial institutions will provide mortgages to individual owners. Weaknesses include limitations on how securely the strata legal structure can lock in farmland and affordable housing for the long-term, and the requirement, as a subdivision in rural areas, to seek provincial government approvals. The benefits of the cooperative model include its flexibility for designing governance and decision-making for the site, and the ability to structure farmland and affordable housing commitments on site and with a local government. Its weaknesses include being an uncommon structure with which financial institutions may have little familiarity for the purposes of financing.

It is up to each Smart Farm group to assess their site-specific and personal needs to decide what model and combination of legal approaches will best achieve their farmland protection and affordable housing goals.

### 4.1 Bare Land Strata Property Model

In this model, the Smart Farm would develop a mixed used bare land strata plan with at least one large strata lot designated for agricultural use and several smaller strata lots designated for residential use.

#### 4.1.1 General Legal Description

This form of development would create a mixed use bare land strata plan with one or more agricultural strata lots and one or more residential strata lots. Access roads, utilities, and any structures or other assets whose use, maintenance costs, or both, are to be shared by all owners would be designated as common property within this plan.

The farming business would operate within one or more a bare land strata lots under an operating agreement and lease. A community foodlands trust, non-profit

or other default backup farming entity would own the farming strata lot and act as landlord.

To ensure ongoing access to common property and common assets of the strata corporation, the strata corporation would need to grant an easement over common property and assets in favour of the agricultural strata lot.

The municipality or regional district in which the Smart Farm is located would require a section 219 covenant over the agricultural strata lot, or the entire strata property development, to secure approval of the project.

#### *4.1.2 Application of Analysis Criteria*

##### *Ownership structure*

The agricultural strata lot would retain all freehold rights normally associated with property ownership. To ensure ongoing use of the property for agricultural food production purposes, a Smart Farm project should consider: (1) zoning and strata bylaws that are tailored to Smart Farm integrated uses with a pro-food production emphasis (i.e. by limiting dwellings and auxiliary buildings in the farming area); and (2) a community foodlands trust, non-profit or other default backup farming entity retaining ownership of the agricultural strata lot and lease the strata lot to an active farm business.

##### *Governance relationships*

A primary governance relationship exists between the farming business as tenant and the strata corporation. The *Strata Property Act*, the bylaws of the strata corporation and any easements over the common property or other strata lots in favour of the agricultural strata lot form the framework for this relationship.

A secondary governance relationship exists between the community foodlands trust, non-profit or other default backup farming entity as landlord and the farming business as tenant. The agricultural strata lot lease and any operating agreements between the parties form the framework for this relationship.

##### *Accountability*

In its day to day operations, the farming business must comply with the strata corporation bylaws and is accountable for any breaches of the bylaws to the strata corporation. Under the *Strata Property Act*, a strata corporation may collect a fine levied against a tenant from the owner of the property. This issue is generally addressed in long term lease agreements.

Where this model includes covenants granted in favour of the local government or other qualifying entities, that party may enforce the covenant. While local governments rarely commence court proceedings to enforce covenants, future



development plans must generally conform to covenants registered on title to the subject property.

### *Liability*

Owners may be liable for injuries or damage that occur on, or flow from, their property. Where a strata lot is leased to a farming business, that business may be liable to the extent that it controls the strata lot and contributes to any injury or loss. The strata corporation may be liable for injury or loss that occurs on, or flows from, the common property. All parties would hold insurance against damage claims.

In financial matters, the farming business would be liable for its financial obligations. Anticipating that the farming business may grant a mortgage over the rights contained in its lease of the agricultural strata lot, careful consideration would need to be given to default mechanisms under the lease. A lender may also ask that the owner waive certain rights under the lease as a condition of providing farming business financing.

### *Capitalization*

A long term lease over the agricultural strata lot may be registered in the Land Title Office. The farming business may grant a mortgage over these rights to a lender as security for financing. This model may provide an opportunity for third-party financing, as the farming operations would primarily take place within the strata lot used as security for financing.

The residential strata lot lease may reduce initial capitalization requirements by providing below market housing for the farming family.

Benefits flowing from residential development and increased density may help fund the creation of common utilities and facilities within the strata corporation providing a material benefit to the farming business. Where these common utilities and facilities are designated as common property within the strata plan, all owners must contribute to their maintenance and repair even if they primarily benefit the farming business.

### *Taxation*

In this model, the farming business would operate primarily within a leased strata lot and incidental activity on the common property of the strata corporation. Excluding development tax planning based on ownership of development land and the identity and ownership goals of various stakeholders, no special or unique tax considerations apply to this model.

Where the strata corporation charges for the use of common utilities and facilities, it must do so on a cost recovery basis. If the strata corporation operates as a profit making entity, it may lose its tax exempt status.

### *Return on investment/distribution of profits*

No profits would flow to the strata corporation under this model. A return on investment and distribution of profits may be payable to the community foodlands trust, non-profit or other default backup farming entity as owner of the property under the lease or other operating agreements.

Each strata lot would appreciate with the market value of the property.

## 4.2 Community Strata Model

In this model, the Smart Farm would develop a building strata with the majority of the land designated as common property or limited common property for the exclusive use of one or more residential strata lots and on which the farming would occur.

### 4.2.1 General Legal Description

This form of development would create a strata plan with several residential strata units. A large portion of the common property would be designated as limited common property for the benefit of one or more residential strata units intended to provide housing for one or more farming business families, or alternatively, may be subject to an easement in favour of one or more farming family strata units for that area of the common property that may be used for agricultural purposes.

Access roads, utilities, and any structures or other assets whose use, maintenance costs, or both, are to be shared by all owners would be designated as common property within this plan. Any areas or structures that the farming business will be exclusively responsible to repair and maintain should form part of the limited common property or be subject to maintenance obligations in an easement.

The farming business would lease one or more residential strata units and obtain the benefit of any limited common property or easement granted exclusive or primary rights to the agricultural farming area. A community foodlands trust, non-profit or other default backup farming entity would own the strata unit and act as landlord.

When determining whether the designation of limited common property or granting of an easement would be preferable, the Smart Farm stakeholders should consider the specific rights they wish to grant to the farming business. Designating an area as limited common property would grant the right of exclusive use to the residential strata lots leased to the farming business, and use of the limited common property is subject to the strata corporation bylaws. Granting rights over common property through an easement allows for shared use of common property with the holder of the easement having certain proprietary rights, but a breach of the easement may require legal action to enforce. An easement cannot alienate or effectively subdivide land, so may not be appropriate where exclusivity is required.

As a strata corporation cannot make owners responsible for the repair and maintenance of common property in its bylaws, an easement would need to establish what obligations the farming business has to repair and maintain portions of the common property.<sup>19</sup>

Regardless of whether the agricultural area is designated as limited common property or subject to an easement in favour of the farming business strata unit or units, the strata corporation may grant an easement in favour of the strata lot to entrench any rights required to facilitate operation of the farming business.

The municipality or regional district in which the Smart Farm is located would require a section 219 covenant over one or more strata units, or the entire strata property development, to secure approval of the project.

#### *4.2.2 Application of Analysis Criteria*

##### *Ownership structure*

The residential strata lot retains all freehold rights normally associated with property ownership. Limited common property rights attach to the strata lot and any easement granted in favour of the strata lot run with the land.

To ensure use of the agricultural area for food production purposes, a community foodlands trust, non-profit or other default backup farming entity may retain ownership of the residential strata lot and lease the strata lot and related land use rights to an active farm business.

##### *Governance relationships*

A primary governance relationship exists between the farming business as tenant and the strata corporation. The *Strata Property Act*, the bylaws of the strata corporation and any easements over the common property or other strata lots in favour of the agricultural strata lot form the framework for this relationship.

The common property or limited common property agricultural areas are subject to the strata corporation bylaws. Use of one or more underlying easements to entrench rights to farm certain areas and use common property and facilities as required to support food production is recommended.

---

<sup>19</sup> Section 72(1) of the *Strata Property Act* states that a strata corporation is responsible for the repair and maintenance of common property. While section 72(2) of the *Strata Property Act* states that a strata corporation may make owners responsible for the repair of common property if permitted in the regulations, no such common property has been identified in the regulations to date. Under section 121(1)(a) of the *Strata Property Act*, a bylaw is unenforceable to the extent that contravenes the *Strata Property Act* or any other enactment of law. Therefore, a strata corporation must rely on separate contracts, easements or other forms of agreement to make owners and their tenants responsible for the repair of common property.

A secondary governance relationship exists between the community foodlands trust, non-profit or other default backup farming entity as landlord and the farming business as tenant. The residential strata lot lease and any operating agreements between the parties form the framework of this relationship.

#### *Accountability*

In its day-to-day operations, the farming business must comply with the strata corporation bylaws and is accountable for any breaches of the bylaws to the strata corporation. Under the *Strata Property Act*, a strata corporation may collect a fine levied against a tenant from the owner of the property. This issue is generally addressed in long-term lease agreements.

Where this model includes covenants granted in favour of the municipality or other qualifying entities, that entity may enforce rights and obligations set out in the covenant. While municipalities rarely commence court proceedings to enforce covenants, future development plans must generally conform to covenants registered on title to the subject property.

#### *Liability*

Owners may be liable for injuries or damage that occur on, or flow from, their property. Where a strata lot is leased to a farming business, that business may be liable to the extent that it controls the strata lot and contributes to any injury or loss. The strata corporation may be liable for injury or loss that occurs on, or flows from, the common property. All parties would hold insurance against damage claims.

In financial matters, the farming business would be liable for its financial obligations. Anticipating that the farming business may grant a mortgage over the rights contained in its lease of the agricultural strata lot, careful consideration would need to be given to default mechanisms under the lease. A lender may also ask an owner to waive certain rights under the lease as a condition of providing farming business financing.

#### *Capitalization*

A long-term lease over the residential strata lot may be registered in the Land Title Office. The farming business may grant a mortgage over these rights to a lender as security for financing. As the agricultural land usage rights fall outside of the strata lot that may secure financing, access to financing may be limited.

The residential strata lot lease may reduce initial capitalization requirements by providing below market housing for the farming family.

Benefits flowing from residential development and increased density may help fund the creation of common utilities and facilities within the strata corporation providing a material benefit to the farming business. Where these common utilities and facilities are designated as common property within the strata plan, all owners

must contribute to their maintenance and repair even if they primarily benefit the farming business.

#### *Taxation*

In this model, the farming business would operate primarily on limited common property or common property subject to an underlying easement. Consideration must be given to how this arrangement may limit the ability of the farming business to claim any applicable tax credits.

Additionally, in the event that the strata corporation shares in the profits of the farming business, tax advice should be sought to determine if, and how, this may affect the strata corporation's tax status.

Where the strata corporation charges for the use of common utilities and facilities, it must do so on a cost recovery basis. If the strata corporation operates as a profit making entity, it may lose its tax exempt status.

#### *Return on investment/distribution of profits.*

Under this model, if the agricultural area is subject to an easement, the strata corporation may institute user fees for the use of common property or enter into a usage agreement with the farming business in addition to the easement.

A return on investment and distribution of profits may be payable to the community foodlands trust, non-profit or other default backup farming entity as owner of the property under the lease or other operating agreements.

Each strata unit would appreciate with the market value of the property.

### 4.3 Cooperative Model

The cooperative model described in this Part is just one of many variations and permutations that may meet Smart Farm goals and objectives. Cooperatives offer significant flexibility in structuring ownership, governance and financing structures to meet the needs of the parties involved with the property.

Cooperative associations can be incorporated in B.C. under the *Cooperative Association Act* and, like corporations, the purpose is to provide members with a way to pool capital to undertake one or more enterprises.<sup>20</sup> Housing cooperatives attract additional process requirements for terminating membership.

#### *4.3.1 General Legal Description*

---

<sup>20</sup> R.S.B.C. 1996, c. 28. See sections 35-39, 49, 50, 170-173.

In this model, the housing cooperative owns both residential housing and agricultural land. The farming business would operate either as a for-profit wholly owned corporate subsidiary of the housing cooperative, or as an independent farm business. If owned by the cooperative, the farming business would operate the agricultural land under a long term land use agreement with the cooperative. If owned by a farmer, the farm business would operate under a long term lease with the cooperative. Residents purchase membership shares to obtain the right to live in a housing unit. Zoning would permit the construction of several dwellings on the property without the need for subdivision because one legal entity – the cooperative – owns the whole property.

#### *4.3.2 Application of Analysis Criteria*

##### *Ownership structure*

Members are the owners of the cooperative association, which in turn owns the land and buildings. Members purchase, at minimum, membership shares. Rights and restrictions attached to those shares may enable members to occupy and have use of the property and/or a building. Different classes of shares can reflect different entitlements and responsibilities. A cooperative must redeem the shares of a member who withdraws or where membership is terminated. The member application and approval process may contain restrictions on who qualifies for membership. These member qualification requirements can limit or reduce the ability to transfer membership shares while also ensuring that the “fit” between new members and the purposes/values of the cooperative association are maximized.

In this model, the housing cooperative would own the whole property and would either own the farming business or lease land to the farming business.

##### *Governance relationships*

The interest of a cooperative member is that of a member of the association. The rights, duties and liabilities of a member are set out in the cooperative association’s incorporation documents, rules, and, where applicable, membership agreement(s) and other policies. Members elect a board of directors to govern the cooperative association except for certain fundamental decisions that require direct approval by the members. The defining feature of a cooperative is the governance structure of “one member one vote” that applies irrespective of the amount of financial investment and number of membership or investment shares held by any one member. The directors of the housing cooperative would in turn exercise the housing cooperative’s farming business shareholder rights to elect the directors of the farming business.

##### *Accountability*

The cooperative members would control the cooperative through their voting rights, in particular in electing the board of directors. The cooperative board of directors would control the farming business through a lease, land use agreements,

member agreements, cooperative rules, and other policies. The farm business class of shares may also direct the behaviour of a farm business. If the farm business is not owned by the cooperative, the lease would establish the rights and responsibilities of each party, with the farmer also being a member of the cooperative and subject to the cooperative-wide policies and agreements.

### *Liability*

Member's liability is limited to the amount of their membership and investment shares. The ability to have investment share classes is a relatively recent phenomenon for cooperative associations and the majority of existing cooperatives in B.C. do not permit investment shares. Where one or more members default on monthly payments to the cooperative association, the other members may have to make up the difference to avoid foreclosure if the property is being used as security for payment of a loan for the cooperative.

The cooperative and farming business may be liable for injuries or damage that occur on, or flow from, the property based on their respective control of the area and contribution to the injury or damage. However, the single entity of the cooperative could obtain insurance that covers all activities on the property.

In financial matters, the farming business would be liable for its financial obligations. The housing cooperative would be liable for any mortgage granted over the housing cooperative lands and any debts or other liabilities of the farming business guaranteed by the housing cooperative.

In the event the farming business fails, the housing cooperative's exposure as a shareholder would be limited to the value of its capital contributions to the farming business.

### *Capitalization*

Financial institutions may provide loans to a cooperative as an organization but not to individuals based on their membership shares or equity in the cooperative. While a cooperative's ability to raise capital can be limited, it may borrow money to acquire and improve property upon obtaining member approval. Given their social purpose, housing cooperatives may be able to obtain preferential access to public and private financing.<sup>21</sup>

The housing cooperative may be able to leverage these private and public programs to provide below market rate access to agricultural land. It may also guarantee loans on behalf of the farming business to secure financing for the business entity.

---

<sup>21</sup> Financial institutions such as the Vancouver City Savings Credit Union offer special programs for housing cooperatives (see <https://www.vancity.com/BusinessBanking/Financing/SpecializedSectorSolutions/Cooperatives/>) and the Canada Mortgage and Housing Corporation previously offered preferred financing rates and capital contribution programs (see [http://www.cmhc-schl.gc.ca/en/inpr/afhoce/exsoho/exsoho\\_002.cfm](http://www.cmhc-schl.gc.ca/en/inpr/afhoce/exsoho/exsoho_002.cfm))

### *Taxation*

A Smart Farm wishing to adopt this structure would need to seek tax advice to minimize taxation on the farming business and the housing cooperative.

### *Return on investment/distribution of profits.*

If the farm business is owned by the cooperative, as a subsidiary of the housing cooperative, after-tax profits of the farming business may flow back to the housing cooperative through dividends. As a cooperative is prohibited from distributing profits to members, profits flowing from the farm business to the cooperative must help subsidize the cooperative or otherwise be applied to further the purposes of the cooperative. If the farm business is independently owned, all profits would remain with the farm business owner.

Appreciation in the market value of the property would accrue to the cooperative and not the members individually.

## **5. Conclusion**

There are many options for, and considerable complexity in, ownership and governance models for Smart Farm arrangements. While the arrangement chosen for each property will likely be different, the commonality between all Smart Farm projects is to secure land for farming and affordable housing for farm families. Such an approach necessarily affects the marketability of the property in support of farming and collaborative ownership. In an era where farmland is inaccessible to most farmers, Smart Farm arrangements offer the opportunity for the broader community to support sustainable and resilient food systems with unique landholding and governance agreements.