

**Submission to Richmond City Council Regarding the Removal of the Garden City  
Lands from the Agricultural Land Reserve**

By  
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Thank you for the opportunity to come before you tonight.

My name is Doug McArthur. By way of introduction, I am Professor of Public Policy in the Graduate Program in Public Policy at Simon Fraser University. For a number of years I was the senior deputy minister and Cabinet Secretary in the BC Government. I teach courses in First Nations Policy and Law, and Negotiations. I am a professionally trained agrologist and some years ago was Deputy Minister of Agriculture in the Saskatchewan Government.

I come before you this evening to speak in favour of the application that is before you to withdraw the designated lands from the ALR. I do so because I believe that the proposed uses of the land constitute a creative solution to a very difficult challenge in this city and in this province.

I wish to clarify that I am not and have not been retained by either the Musqueam First Nation (MFN) or any other party involved with this proposal. I have and do advise the Tsawwassen First Nation (TFN) on treaty and other matters, but the views I will express are mine and mine alone. I do not represent the position of TFN.

I want to take a few minutes to explain why I support the proposal before you.

Based on what I have observed, the preferred way of most First Nations is to address the historical wrongs and their exclusion from many of the benefits from modern development in a constructive way rather than conflictual way. The desire is to minimize the use of direct conflict, extreme posturing, and litigation. The most common concern, regardless of legal positions, is to accommodate and reconcile. There is a belief that something bigger and better can be built in this way.

That is very much how I see the MOU that underlies this application. It is a partnership. It provides real and meaningful benefits to all of the parties. It is a way through a problem that we all share.

The difficulty is that if you turn down this application, the whole undertaking collapses. That is not something any of us should wish for. It would mean that you will have little to say in the future about what happens after that. But one thing one can say with certainty is that you will have removed yourself as a serious future partner in deciding the future of these lands.

The MFN has been pushed to state in these hearings whether they would accept some other deal. Let's be fair, no rational party in MFN's position would respond to these questions at this time. These hearings are to determine Council's, not MFN's support for a deal negotiated in good faith. If you cannot support it, I expect that MFN will do what is rational. It will pursue its interests in some other way, and in so doing will be free to pursue a range of options.

It does not seem to me to be plausible that a re-negotiation of the deal will be a high priority. At the top of the list I predict will be an insistence on recognition of aboriginal title.

The consequences are not limited to Richmond alone. The future for all of us in BC requires that we address the land question and the future of the First Nations people through constructive cooperative means.

To do so, we must make major strides across a whole portfolio of policy measures. BC has made some good progress over the last few years with the creation of the Treaty Commission and process, and with the New Relationship set out in 2004.

Progress will not be possible unless all people and public bodies in BC see it as part of their duty to support and contribute to solutions.

This must inevitably involve reaching understandings about land. I need not go into the importance of land to FN people. It is of great cultural significance. It is integral to their identity. It is tied to a sense of place and community. It is necessary to make self government meaningful. It is essential if First Nations are to have sufficient space to house growing populations and provide public amenities. And it is much needed to support economic development.

The problem we have in the lower mainland is that First Nations were pushed back onto postage stamp reserves with the result that much of the land generally has been used to support residential, commercial and industrial development.

The ALR was a necessary measure to protect against further encroachment on farm land. It has been an admirable measure justifiably supported by virtually all people in BC.

Unfortunately however First Nations land needs were not considered when the ALR was created. In the best of all possible worlds the ALR would have been instituted as part of a land planning and settlement initiative that would have included lands set aside for First Nations settlements.

That was not done for reasons we all understand.

Now if we want to accommodate and work cooperatively with First Nations, we need to find land that can contribute to their needs. Needless to say there is not going to be a

willing transfer of already developed residential, commercial and industrial sub-divisions. As much as these have served our needs at the expense of those of First Nations, it is not practical to look to these to contribute to settlements with First Nations.

The only practical solution is to look to lands such as the Garden City Lands. All of us must make accommodations. It is fruitless in the face of complexity to reject workable solutions that avoid litigation, support First Nations needs, and contribute shared benefits. It is evident that for many many years BC failed to meet its lawful and moral obligations to First Nations people. First Nations people have referred to this as the land question.

A basic underlying issue is that large amounts of land in this province were used and occupied by FN's prior to and at the time of contact, settlement and colonization. Under law, these lands were recognized and protected as Indian title lands.

Wherever First Nations had that title, it continues to this day, and this protection continues to this day, with the added protection of the Constitution. You heard yesterday evening that this is not relevant to you considerations, and further if I understand the claim made, that there is little or no basis for thinking about future outcomes in these terms if this agreement falls.

I am not sure whether I fully understood that claim, but if it as I believe I heard it, I must offer a word of caution. I would argue that on the balance of the evidence, these lands are likely encumbered by aboriginal title. I don't doubt that there are lawyers who will be prepared to mount a vigorous challenge to such an assertion, but I believe they are wrong. If I am right, any decisions made with respect to the disposition of the Garden City lands can only be made by the Federal Crown with the consent of the MFN. Absent this agreement, my view is that *the Government may not dispose or transfer the rights of use to these lands to any party without the consent of the MFN*. The Constitution requires it to get the consent of the MFN. Without that, the land belongs to MFN. If this agreement falls, I would fully expect the MFN to pursue this option. It is the only reasonable course in that event, and I believe the federal government will adhere to the force of the argument in its favour.

You have in a sense unavoidably been brought into a very complex policy web. An integral aspect of the application you are considering is the disposition of these lands by the federal government. Without the consent of the MFN, it is reasonable to expect that neither this proposal nor any other possible development other than one undertaken by MFN can proceed. And this of course means that MFN can set the terms of any development involving a disposition of the lands.

In this regard I would to make two brief points.

First, it is pretty clear that the ALR does not lawfully apply to aboriginal title lands unless and except with the consent of the First Nation. Perhaps, it may seem to you that you should proceed as if this is not your problem. I urge you to see that this matter is considerably more complicated. The decision you make here must consider the

possibility that if you do not go along with it, you will trigger a full aboriginal title claim in its stead. I don't think that is in the interest of anyone. To turn this down and force it into a new situation that forces the hand of the MFN seems to me to be risky and shortsighted.<sup>1</sup>

Second, this hearing and your decision provides an opportunity for you to work for the time being as if MFN has consented to proceed *as if the ALR applies* to the lands. In other words, the MFN has agreed to set aside pure legal argument to achieve something in which all parties can benefit. I have not asked MFN about this, but to an outsider and seeing the facts, it would appear to me that MFN has agreed to the package of measures outlined, and thus to working with you on the basis that cooperation and mutual engagement will produce better results than simply drawing a line in the sand based on its aboriginal title. I see a hand being extended, offering to proceed on the basis of negotiation and cooperation, rather than fighting over legal facts and forcing a confrontation through litigation.

Under these circumstances, in my view the best path for Richmond Council and the ALC is to view this as a positive hand of cooperation and reconciliation in search of a mutually agreeable solution that circumvents debilitating conflict, including future court cases and injunctions that will consume millions of dollars and years of fruitless fighting.

Which brings me to another related by somewhat different point. All First Nations in BC agree that rights and title are important and that they cannot be ignored or disrespected. However, most also recognize that they and larger society must and will co-exist in some form, and that this means that there will be differences in interests that will inevitably come into conflict.

I mentioned earlier that I am trained and have worked as a practicing agrologist. Like virtually all agrologists, I believe that governments need to protect agricultural land through regulation. Indeed, it is important, given our depleting farm land, to give such protection a very high priority.

However given our history and our governments' past failures, we must also give First Nations settlement lands a high priority. Agricultural land preservation should not trump First Nations legitimate needs and rights. We are thus faced with a finding the right balance.

The MFN has worked to accommodate many of the needs and demands of the larger society in its approach to land and its land needs. The proposed plan for the use of these

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<sup>1</sup> The contention that the ALR does not in fact apply to aboriginal title lands is supported by the evolving policy and legal environment around the impact of title on provincial land use regulation. With respect to the law, the most recent supporting case is that of *T'silhqot'sn Nation vs. British Columbia (2007 BCSC 1700)*.

lands contains all the elements of a collaborative approach based on mutual respect and accommodation.

It would in my view be unfortunate to bring this collaborative approach to an end by refusing the application to remove the ALR designation from these lands. Given their condition, they are very unlikely ever to be used as farm lands in the future. Under the circumstances this is a good compromise that makes it possible to move forward and to do something meaningful and exciting in the face of the underlying problems. I believe that the parties have in fact done a very good job in shaping the MOU. The removal of the ALR designation is a necessary step and should be supported.

If the concern is about ALR protection, I would urge Richmond and other municipalities to be much more vigilant in protecting ALR lands from other kinds of encroachments. Indeed, in my view the *only* reason for the removal of lands from the ALR should be to support land settlements with First Nations as all of us in BC work to bring the land question to a conclusion through reasonable settlements such as this.

Respectfully Submitted

  
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