

#1 - REQUEST FOR REVIEW ON: LA18058A / Nelson Family Ranches Ltd.

Filed By: Hofer Family (c/o North & Company)

Deadline for RFRs: January 4, 2019

Date RFR received: December 20, 2018

Status of party as per Decision Summary: Directly Affected



NORTH & COMPANY^{LLP}
LAW OFFICES

Our File: 11048.011

December 18, 2018

Natural Resources Conservation Board
4th Floor, Sterling Place
9940 - 106 Street
Edmonton, AB T5K 2N2

Dear Sir/Madam:

Re: Section 23(1) Amendment

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DATE RECEIVED
DEC 20 2018
EDMONTON
ALBERTA

Reply To: Lethbridge
600 Chancery Court
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Lethbridge, Alberta T1J 4J7

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Further to Joe Sonnenberg's letter dated December 5, 2018 and the exercise of his power under section 23(1) of the Agricultural Operation Practices Act ("AOPA") to amend Nelson Family Ranches Ltd. ("Nelson Ranches") Development Permit 98-25 (the "Development Permit"), the Hofer Family, as a directly affected party requests that the Board review the decision to amend the approval.

The Hofer family requests a review on the following grounds:

The Development Permit

1. The justification provided by Mr. Sonnenberg to exercise his power under section 23(1) of AOPA, is that the Development Permit states an increase from 3,000 to 7,000 but does not specify a beef animal category and he now wishes to "clarify" or "formalize" what was meant is 7,000 beef finishers. It is the Hofer family's position that the Development Permit does not need to be clarified or formalized. The Development Permit is not ambiguous, it clearly states the authorized capacity of Nelson Ranches' confined feeding operation is for 7,000 head of cattle. Mr. Sonnenberg's exercise of power is not affecting a formalization, but it is allowing for a fundamental change to the Development Permit and as such his exercise of power is grossly inappropriate.

Pursuant to section 18(2)(c) of AOPA the capacity allowed by a deemed approval for a confined feeding operation which was constructed pursuant to a development permit that was issued before January 1, 2002, is the capacity authorized by the development permit. Form D of the Development Permit approval states "increase in intensive livestock operation from 3000 to 7000". Although the approval does not specify a beef animal category, the application package, read as a whole, clearly states that the approval was for animals, not beef finishers. Attached hereto and marked as Exhibit "A" is a copy of the Development Permit application package.

The September 25, 1998 letter from Andy Cumming, Intensive Livestock and Environment Management Engineer which forms part of the Development Permit approval states:

“The capacity of the existing feedlot, based upon the information supplied by Mr. Nelson, is approximately 3,000 head at the present, with the proposed expansion adding 4,000 animals. The proposed expansion is slated for the feeding of weaner calves through to full slaughter weight.”

Mr. Sonnenberg’s Decision Summary LA1805A uses the latter sentence in Mr. Cumming’s letter to justify his amendment under section 23(1) of AOPA, stating that he needs to clarify what was meant is 7,000 beef finishers. However, when you read the entire paragraph, Mr. Cumming’s letter clearly states the expansion was for animals, not beef finishers, and the addition of 4,000 animals was for the purposes of feeding weaner calves to slaughter weight. There is nothing ambiguous in Mr. Cumming’s words and therefore nothing for Mr. Sonnenberg to “clarify”. If Mr. Sonnenberg did feel compelled to “clarify” the Development Permit, it would be more appropriate and consistent to say what was meant is beef feeders, not finishers. Attached hereto and marked as Exhibit “B” is a copy of Mr. Cumming’s letter.

Grant Nelson’s application, Schedule 11, Form A of the Development Permit approval, in paragraph 3, states “proposed increase of 3,000.....to maximum of 7000 hd”. Mr. Nelson’s application again clearly states that the expansion was for animals, not beef finishers. We further direct you to page 2 of the Intensive Livestock Operation Management Plan which shows a proposed increase of calves from 3,000 to 7,000, with no increase to beef finishers. Attached hereto and marked as Exhibits “C” and “D” are copies of Mr. Nelson’s application and the Management Plan.

Pursuant to the foregoing, it is the Hofer family’s position that the Development Permit does not need to be “clarified” by Mr. Sonnenberg or the NRCB. When the application package for the Development Permit approval is read as a whole, there is no doubt that Nelson Ranches’ Development Permit is for 7,000 animals and AOPA clearly states that the capacity authorized is the capacity authorized by the Development Permit.

Bias

2. The relationship between the local NRCB representatives and Nelson Ranches’ has caused concern for the Hofer family regarding the NRCB’s ability to carry out its inspections and enforcement obligations under the AOPA in an unbiased manner.

The Hofer family has consistently and continuously lodged complaints to the NRCB that Nelson Ranches is operating in excess of its authorized capacity.

At the hearing on November 23, 2017, Kevin Seward, in response to aerial photographs of Nelson Ranches’ feedlot, and questioning by Bill Kennedy, stated that the NRCB was surprised to hear that there were more than 7,000 animals on the feedlot, as the NRCB had not heard about this before the hearing. Mr. Seward went on to explain there is research that supports the theory that if there are more animals, there is less dust, but this research has not affected the NRCB’s regulatory approach. Despite the NRCB being informed of the breach of Nelson Ranches’ authorized capacity under their Development Permit in November 2017, the NRCB did not take any measures to enforce or rectify the situation. Attached hereto and marked as Exhibit “E” is page 17 of the Practice Review Committee decision.

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More recently, in March 2018, Richard and Rod Hofer met with Joe Sonnenberg and Denny Puszkar at the NRCB office. At the start of this meeting, Mr. Puszkar stated that he was reluctant to approach Nelson Ranches regarding animal numbers as they have a good relationship with the Nelsons and don't want to do anything that might affect it. Later on, at the meeting, both Mr. Sonnenberg and Mr. Puszkar agreed with the Hofers that Nelson Ranches is operating over their authorized capacity and assured the Hofers the issue would be further investigated. Instead of enforcing the authorized capacity of 7,000 animals under the Development Permit, Mr. Puszkar informed the Hofers in May 2018 that the NRCB would be making an amendment to the Development Permit under section 23(1) of AOPA.

The Hofer family has serious concerns regarding the motivations of Mr. Sonnenberg in making the amendment, and strongly believe that he has been unduly influenced by Nelson Ranches in doing so. Pursuant to AOPA, if a permit holder wishes to operate above its stated livestock capacity, they are required to obtain a permit authorizing the desired expansion. Given the proximity of Nelsons' feedlot to the Hofers' residence, the NRCB has expressed the opinion that such a permit would never be approved. By making the amendment to the Development Permit, Mr. Sonnenberg has actively helped Nelson Ranches get around this issue. It is not however Mr. Sonnenberg's job to help CFO operators find loop holes in the legislation, and certainly not to the detriment of surrounding neighbours.

The concern of bias extends past NRCB Inspectors and Approval Officers, Walter Ceroici, Acting Chief Executive Officer/Director of Compliance, Science and Technology, in an email mistakenly sent to Richard Hofer on January 23, 2017 stated "I think our key messages will come in useful. Hopefully someone buys his place – only solution". Attached hereto and marked as Exhibit "F" is a copy of Mr. Ceroici's email.

Encounters such as these have led the Hofer family to believe that the NRCB representatives tasked with ensuring compliance by Nelson Ranches with their Dust Control Plan and AOPA are more interested in finding ways to excuse the Nelson Ranches for breaches to their Development Permit and Dust Control Plan, then enforcing them. Given the concerns of bias and lack of enforcement by the NRCB, it is the Hofers position that Mr. Sonnenberg should not be entitled to exercise his powers under section 23(1) of the AOPA, as he is not exercising his power in a neutral and unbiased manner.

Size of the Feedlot

3. At the March 2018 visit, Mr. Sonnenberg also discussed the size of the Nelson feedlot and the generally accepted living space for cattle in a confined feeding operation. In Southern Alberta, for a feeder-finishing operation, the generally accepted allocation is between 200 to 250 square feet per head. Mr. Sonnenberg stated that his accepted rate is 200 square feet per head. Based on Richard Hofer's online calculation, Nelson Family Ranches has approximately 1,320,000 square feet of pen space, which means the feedlot only accommodates between 5,280 (based on 250/head) to 6,600 (based on 200/head) head of cattle, which is already 400 to 1,720 head more than their Development Permit currently allows.

As such, Nelson Ranches' Development Permit should not be increased to 7,000 beef finishers, as they currently do not have enough room for 7,000 head of cattle.

Proximity to Neighbours

4. Current standards for Minimum Distance Separation (“MDS”) would require a confined feeding operation the size of Nelson Ranches to be at least 621 meters from a neighbouring residence. Nelson Ranches’ feedlot is currently located a ¼ mile to the east or 402 meters from the Hofer’s residence, which means the feedlot is 219 meters closer than current MDS standards allow. For comparison, this is equivalent to more than two football fields and 35% less than currently permitted.

At the time of the Development Permit approval in the 1990’s, the proximity of Nelson Ranches’ feedlot to the surrounding neighbors was noted and the distance requirements waived. It is important to note that the distance requirement was waived for 7,000 animals, not 7,000 beef finishers. As such, the proximity of the feedlot to the Hofers’ residence and the current MDS requirement should be taken into consideration in any amendment to the Development Permit or increases to the authorized capacity. In fact, in his May 5, 2017 letter, Mr. Ceroici cited the proximity to the Hofers’ residence as a significant limitation to eliminating feedlot dust emissions. The NRCB further echoed this concern in their November 13, 2018 Report to the Farmer’s Advocate Office, stating that they are concerned about the ability to adequately control dust given the proximity to the Hofers’ residence. If the number of animals permitted in Nelson Ranches’ feedlot is increased, this limitation and the dust will only get worse. Attached hereto and marked as Exhibits “G” and “H” are copies of Mr. Ceroici’s letter and the Report.

In a letter dated October 12, 2018, Mr. Ceroici explained that an amendment to the Development Permit to 7,000 beef finishers would not increase the amount of manure produced at Nelson Ranches’ feedlot. We would point out that the issue here is manure dust, not manure, and the amount of manure in the feedlot was not the basis upon which the original permit was granted and the MDS requirements waived and not objected to by Jake Hofer. If the Development Permit is amended and more animals are permitted to be in the feedlot, there will be more hooves to kick up the dust. More hooves equal more dust. The Hofer family has further concerns about the NRCB’s ability to adequately monitor and enforce the manure restrictions, as they seem to currently not be able to enforce head counts. Attached hereto and marked as Exhibit “I” is a copy of the October 12 letter.

Additional Pen

5. An additional pen has been added to Nelson Ranches’ feedlot, constructed out of steel pipe panels, with concrete feed bunks, holding approximately 500 head of cattle. In addition, they have completed dirt work to slope the pen for water drainage. Nelson Ranches claim this pen is used for seasonal bedding and feeding as permitted by the AOPA.

In Mr. Ceroici’s October 12 letter, he explained that the pen is not being used for confined feeding when grazing is available and the pen area is seeded to silage crop when grazing is available. The Hofers submit that the pen is used for confined feeding. In 2014, Nelson Ranches’ had portable feeders in their 60-acre pen for seasonal bedding and feeding, however in 2015 Nelson Ranches’ poured concrete feed bunks into the “seasonal site” similar to the feed bunks used in the rest of the feedlot. It is our understanding that concrete feed bunks are not typically used in seasonal sites, but for confined feeding. Furthermore, at the PRC Hearing, the Nelsons’ testified that they built a seasonal feeding facility approximately 1 ½ miles south

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east of the feedlot. As such, Nelson Ranches should not need the additional pen at the feedlot for seasonal bedding and feeding. The Hofers also submit that the pen was not seeded in 2018.

No Adequate Dust Control Now

6. Of most concern to the Hofer family is the inability or unwillingness of Nelson Ranches to adequately control the manure dust coming off of their feedlot with its existing approval numbers. The November 23, 2017 Practice Review Committee (“PRC”) recommendation held that there was a dust problem and gave Nelson Ranches one year to obtain a certificate of “generally accepted agricultural practice”, provided they implement the 2017 Dust Control Plan.

The 2017 Dust Control Plan requires Nelson Ranches to use the existing watering system and record its use, install a permanent pen watering system in pens 15 to 26 on or before July 21, 2017, its use and performance recorded and feedlot pens to be scraped on a regular basis and recorded. At the time of the PRC hearing, Nelson Ranches had not complied with the requirements set forth in the 2017 Dust Control Plan.

This is not the first dust control plan the NRCB has imposed on Nelson Ranches’ feedlot. In 2015 the NRCB worked with Nelson Ranches to develop a written dust control plan, however Nelson Ranches failed to fully comply with the 2015 plan and the NRCB failed to adequately enforce it, or follow the compliance strategy. This failure to comply with the 2015 plan was acknowledged by the NRCB at the PRC hearing and at the date of the hearing the plan was still not in place. Attached hereto and marked as Exhibit “J” is a copy of the 2015 dust control plan. Nelson Ranches have a history of not complying with their Development Permit, AOPA and their dust control plans and the NRCB has a history of not adequately enforcing them. It is for this reason that the Hofers are gravely concerned about an increase in the authorized capacity of Nelson Ranches’ feedlot.

It is the Hofers’ position that Nelson Ranches has failed to properly implement and/or follow the 2017 Dust Control Plan as directed by the PRC. During the 2018 dust season, there was once again unacceptable amounts of dust emanating from Nelson Ranches’ feedlot and settling on the Hofers’ residence. Manure dust started to invade the Hofers’ farm at the end of April and continued until September. Relief from the dust came not from Nelson Ranches following the 2017 Dust Control Plan, but from rain. Attached hereto and marked as Exhibits “K” and “L” are statements from Rodney and Richard Hofer.

In the NRCB’s November 13, 2018 Report to the Farmer’s Advocate Office, the NRCB provided the opinion that Nelson Ranches has complied with the 2017 Dust Control Plan, however we note the following:

- (a) The upgrades to the pen watering system are “almost complete” and won’t be completed until spring 2019. The 2017 dust control plan stipulated the upgrades were to be complete by July 21, 2017; and
- (b) Only 72.5% of feedlot pens can be watered using a permanent system. The November 23, 2017 PRC recommendation noted that Nelson Ranches’ Feedlot was to have a permanent watering system in place over 84% of the feedlot.

During the 2018 dust season, the Hofers observed that Nelson Ranches would only turn the sprinklers on at the feedlot for short periods of time, often only over a portion of the feedlot and too late in the day to adequately suppress the dust. At the PRC Hearing, it was submitted that Nelson Ranches' manure dust control log showed 45 minutes of dust control per day. Sean Nelson testified that it takes 2, 10-12-hour days to cover the entire feedlot to suppress the dust. As such, watering 45 minutes per day is simply not enough to control the dust. In order to adequately control the dust, all pens need to be watered, early on in the day, and on a daily basis during the hot summer months. Nelson Ranches simply did not adequately control the dust on their feedlot during the summer months. Attached hereto and marked as Exhibit "M" is a USB with photo and video evidence of the uncontrolled dust.

Requested Remedy

The Hofer family, as a directly affected party, urges the Board to review Mr. Sonnenberg's decision to amend Nelson Family Ranches Development Permit. The Hofers request that the Board exercise their powers to refuse to grant the amendment and instead insist that the authorized capacity of 7,000 animals be strictly enforced by the NRCB.

The Hofers are making this request based on the following facts; Nelson Family Ranches' Development Permit is for 7,000 animals; Nelsons' feedlot is more than two football fields closer to the Hofers' farm than current MDS standards would permit; the NRCB has demonstrated favoritism to Nelson Family Ranches; Nelsons' pen space is too small to accommodate the currently approved 7,000 head of cattle; Nelsons have constructed additional pen space on their feedlot; and Nelson Family Ranches is currently unable and/or unwilling to adequately control dust coming from their feedlot with their current approval numbers.

We thank you for your time and attention to this matter and look forward to your response.

Yours truly,


NORTH & COMPANY LLP

PER: R. PHILIP M. NORTH, Q.C.

Enclosures

Cc: Richard and Rodney Hofer