



BOARD DECISION

2009-04 / RA08048

Review of Decision Summary RA08048

Rosehill Farms Inc.

November 2009

Background

On April 20, 2009, NRCB Approval Officer Sandi Roberts issued Decision Summary RA08048 to Rosehill Farms Inc., which denied an application to increase the capacity of an existing 200 milking cow dairy to 400 milking cows. The existing operation is located at SE 35-40-27-W4 in Lacombe County.

On May 11, 2009, a Request for Board Review was filed by Bert Tenbrinke and Rosehill Farms Inc. (Rosehill Farms or Rosehill dairy). Rosehill Farms' request met the 10-day filing deadline established by the *Alberta Agricultural Operation Practices Act (AOPA)*. Rebuttal submissions were filed by the Town of Lacombe (the Town) and Lawrence and Shirley Henderson, Frank and Bev Brunner, Bruce Henderson and Steven and Ann Marie Henderson (the Henderson Group). All parties who filed rebuttal submissions met the May 20, 2009 filing deadline and were previously established as directly affected parties in the Approval Officer's Decision Summary.

The Board met on May 25, 2009 to deliberate on the Request for Board Review filed by Rosehill Farms. In arriving at its decision to grant a review, the Board carefully considered Decision Summary RA08048, the Request for Board Review filed by Rosehill Farms and the rebuttal submissions filed by the Town and the Henderson Group.

In Board Decision RFR 2009-02/RA08048 issued on May 29, 2009, the Board noted that, while the Approval Officer must deny an application if it is found to be inconsistent with the Municipal Development Plan (MDP) land use provisions, the Board has broader jurisdiction under *AOPA* to have regard for, but not be bound by, the MDP. Therefore, the Board granted a review of Decision Summary RA08048 and advised that the hearing would take place on September 22 to 25, 2009 in Red Deer, Alberta. A Board Panel consisting of Vern Hartwell (Panel Chair), Jim Turner and Donna Tingley was appointed to conduct this review. As the main issue focused on the MDP and Lacombe County's adoption of the Intermunicipal Development Plan (IDP), the Panel felt that Lacombe County's participation in the hearing and review process was essential and therefore requested that Lacombe County (the County) attend the hearing.

Prior to the hearing, the Panel requested that parties file written submissions addressing the following questions:

1. Is the Rosehill application consistent with the Lacombe County Municipal Development Plan?
2. If the Board concludes there is an inconsistency, is this a proper case for the Board to approve the proposed CFO expansion?
3. Would the proposed Rosehill expansion cause unacceptable impacts on the community and does it represent an appropriate use of the land?

Hearing submissions were filed by the County, the Approval Officer, Rosehill Farms, the Henderson Group and the Town; each submission met the August 15, 2009 filing deadline. Subsequently, Rosehill Farms, the Henderson Group, the Town, and the Approval Officer filed rebuttal submissions by the established deadline of September 15, 2009.

The hearing was conducted on September 22, 23 and 24, 2009 at the Holiday Inn in Red Deer, Alberta. Parties to the review and their representatives are identified below:

| Parties to the Review | Counsel/Representative |
|---|---|
| <p>NRCB Approval Officer</p> <ul style="list-style-type: none"> • Sandi Roberts, Approval Officer | <p>Mike Wenig, Counsel</p> |
| <p>Rosehill Farms</p> <ul style="list-style-type: none"> • Bert Tenbrinke • Reta Tenbrinke • Steve Tenbrinke • Ken Tenbrinke • Jenny Tenbrinke • Gaylene Tenbrinke • Albert Kamps (witness for Rosehill Farms) • Shawna Low (witness for Rosehill Farms) • Robert Berrien (witness for Rosehill Farms) | <p>Keith Wilson, Counsel</p> |
| <p>Town of Lacombe (the Town)</p> <ul style="list-style-type: none"> • Ken Kendall, Chief Administrative Officer • Carol-Lynn Gilchrist, Manager of Planning and Development Services | <p>Nick Riebeek, Counsel</p> |
| <p>Henderson Group</p> <ul style="list-style-type: none"> • Lawrence and Shirley Henderson • Frank and Bev Brunner • Bruce Henderson • Steven and Marie Henderson • Ralph Salomons (witness for the Henderson Group) | <p>Shane King, Counsel</p> |
| <p>Lacombe County</p> | <p>Allan Williams, Manager, Planning Services</p> |

At the hearing, the Panel was assisted by Bill Kennedy, Board Counsel. Additional staff support was provided by Susan Schlemko (Manager, Board Reviews) and Carly Kaban (Review Coordinator).

Issues

1. Is the Rosehill application consistent with the Lacombe County Municipal Development Plan?

When deciding whether to issue an approval under *AOPA*, an Approval Officer is directed by s. 20(1)(a) of the Act to consider whether “*the application is consistent with the municipal development plan land use provisions*” and further, to deny the application if there is an inconsistency with the MDP land use provisions. The Board’s authority to consider an MDP when undertaking a review of an Approval Officer’s decision under *AOPA* is broader than that of the Approval Officer in that s. 25(4)(a) of the Act stipulates that the Board “*must have regard to, but is not bound by, the municipal development plan.*”

In this case, the Approval Officer found an inconsistency pursuant to s. 20(1)(a) of *AOPA* and denied Rosehill Farms’ expansion application. Accordingly, the Panel must make a determination at the outset as to whether the proposed expansion of the dairy is consistent with the MDP, recognizing the differences between the Approval Officer’s and the Board’s statutory authority to consider the MDP. The first question directed to the parties by the Panel addresses this issue.

What is included in the municipal development plan?

The question of which document or documents constitute the ‘municipal development plan’ for the purpose of the Board’s review under s. 25(4)(a) of *AOPA* was a matter for discussion by the parties. It was argued that three statutory planning documents could be included within the definition of ‘municipal development plan’: the *Lacombe County Municipal Development Plan*, the *Lacombe Intermunicipal Development Plan* and the *Town of Lacombe Municipal Development Plan*.

S. 1(d.2) of *AOPA* defines ‘municipal development plan’ as: “*a municipal development plan within the meaning of the Municipal Government Act.*” While the *Municipal Government Act (MGA)* does not define the term ‘municipal development plan’ per se, it establishes in s. 632 a requirement for municipalities of a certain size to pass a bylaw adopting an MDP and lists the matters that must be included in the MDP and the matters that may be included in the MDP at the discretion of the municipality. Neither of these provisions provides the Panel with guidance in determining which municipal statutory plan constitutes the MDP for the purposes of its review.

It was undisputed by the parties that the Rosehill Farms site is located entirely within the municipal boundaries of Lacombe County. Given that the application for the dairy expansion is site specific and falls within the jurisdiction of the County, the Panel finds that the *Lacombe County Municipal Development Plan* is included within the definition of ‘municipal development plan’ for the purposes of this review.

Whether the *Lacombe Intermunicipal Development Plan* and the *Town of Lacombe Municipal Development Plan* also constitute part of the ‘municipal development plan’ calls for a review of s. 3.10 of the *Lacombe County Municipal Development Plan* which is set out in its entirety below:

The County shall provide input on applications for confined feeding operations to the Natural Resources Conservation Board (NRCB) under the Agricultural Operation Practices Act. The County’s support is subject to the following:

- a) *no new confined feeding operation shall be permitted less than 1.6 kilometres (1 mile) from the boundary of:*
 - (i) *a town, village, summer village or hamlet;*
 - (ii) *an area developed or designated for multi-lot residential use;*
or
 - (iii) *a provincial or municipal park or recreation area, or other area used or intended to be used for a recreational facility development,*
except that where provincial regulations require a larger setback distance, that distance shall apply; and
- b) *further restrictions on the development of confined feeding operations may apply as directed by an Intermunicipal Development Plan or other local plan approved by Council.*

The Panel finds that s. 3.10(a), whereby the County places a limitation on the location of a new confined feeding operation (CFO), does not apply in this instance. This finding is based on the evidence before the Panel demonstrating that Rosehill Farms is not a new dairy as it was established pursuant to Lacombe County Development Permit No. 26/96, issued on April 11, 1996 for a 200 cow dairy operation.

The issues raised by s. 3.10(b) are twofold: one, is the *Lacombe Intermunicipal Development Plan* included in the *Lacombe County Municipal Development Plan* by reference, and two, is the *Town of Lacombe Municipal Development Plan* an 'other local plan approved by Council' as argued by the Town in its written submission to the Board.

The Panel has decided on the first issue that it will have regard to the *Lacombe Intermunicipal Development Plan* which has been adopted by the Councils of both Lacombe County and the Town of Lacombe. The Panel notes that the parties to this review agreed that the *Lacombe Intermunicipal Development Plan* is referentially incorporated, or at the very least, cross-referenced by s. 3.10(b) of the *Lacombe County Municipal Development Plan*, and the Panel accepts that the *Lacombe Intermunicipal Development Plan* forms part of the *Lacombe County Municipal Development Plan*.

With respect to the second issue, the Panel has decided that the *Town of Lacombe Municipal Development Plan* is not an 'other local plan approved by Council' under s. 3.10(b) of the *Lacombe County Municipal Development Plan* and is therefore not a document that the Panel should have regard to when determining whether the proposed Rosehill dairy expansion is consistent with the 'municipal development plan.' On its face, the *Town of Lacombe Municipal Development Plan* does not satisfy the requirement in s. 3.10(b) that the plan be 'approved by Council;' while the Town's MDP was approved by the Town, it was not approved by the County Council as specified by the section. Further, the location of the proposed Rosehill dairy expansion in relation to the municipal boundaries of the Town was not in dispute; the Approval Officer found as a fact in Decision Summary RA08048 that the site is located approximately 300 meters outside the nearest boundary of the Town. The Panel accepts this finding and concludes that it will not have regard for the *Town of Lacombe Municipal Development Plan* in making its determination on Issue 1, as it is not applicable to the Rosehill Farms site.

In summary, the Panel will have regard to both the *Lacombe County Municipal Development Plan* and the *Lacombe Intermunicipal Development Plan* in its

determination of whether the proposed Rosehill dairy expansion is consistent with the 'municipal development plan.'

What is the appropriate interpretation of s. 4.1(1)(b) of the IDP?

S. 631 of the *MGA* authorizes two or more Councils to pass a bylaw adopting an intermunicipal development plan (IDP) applicable to specified areas of land within their boundaries; an IDP according to the section may provide for the future use of land within the area, amongst other matters. This review is concerned with the *Lacombe Intermunicipal Development Plan (Lacombe IDP)* which was adopted by bylaw by the Councils of Lacombe County and the Town of Lacombe. The *Lacombe IDP* applies to an area of land described in Map 1 of the IDP and the Panel finds that the site of the proposed Rosehill dairy expansion is located within the land affected by the *Lacombe IDP*.

The interpretation of s. 4.1(1)(b) is crucial to the determination of this issue and the section is set out below:

4.1 The County and the Town, in consideration of their strategy, adopt the following policies

(1) Land Use

a) (Repealed)

b) The County will safeguard the Town's long term growth area as shown on Map 1 and Map 2 from developments which are or may become incompatible with urban land uses and which otherwise may have a detrimental effect on the Town. These areas are to be used predominantly for agricultural activities which will not include new or major expanded confined feeding operations.

...

At the outset, it is useful to confirm the location of the proposed dairy expansion in relation to the long term growth area referenced in subsection (b) of this provision. The *Lacombe IDP* establishes long term growth areas which are illustrated in Maps 1 and 2; however, the North-west Long Term Growth Area, which is of particular relevance to this matter, is referenced by name only in Map 1 (See map in Appendix 1 to this decision). Based on Map 1, the western boundary of the North-west Long Term Growth Area is to the east of the Queen Elizabeth II Highway, and the Panel finds that the site of the proposed Rosehill dairy expansion, which is to the west of the Highway, is located outside of the boundaries of the North-west Long Term Growth Area.

The fundamental question of interpretation for the Panel is this: does the restriction imposed by s. 4.1(1)(b) on new or major expanded confined feeding operations apply to land within the long term growth areas only or does it apply to lands outside the long term growth areas but which might negatively affect the lands within the long term growth areas. The parties to this review suggested three potential interpretations of s. 4.1(1)(b), categorized by the Panel as the broad, the narrow and the split-sentence interpretations. Argument on this challenging issue of statutory interpretation was comprehensive and helpful to the Panel. The three interpretations are summarized below, starting with the broad interpretation, which was employed by the Approval Officer in Decision Summary RA08048.

The Broad Interpretation

In Decision Summary RA08048, the Approval Officer observed that neither sentence in s. 4.1(1)(b) states expressly whether it applies to developments inside or outside the long term growth areas. Having said this, the Approval Officer suggested that it is theoretically possible for a development to be 'incompatible' with urban land uses or 'detrimental' to the Town, even if it were located outside of the boundary of the long term growth area. On this basis, the Approval Officer concluded:

Under these circumstances, it would make little sense for an IDP to focus on managing potentially adverse developments located within a long term growth area's boundaries, while ignoring any such developments situated just outside of those boundaries. Thus, a plain and not unduly narrow reading of the policy's first sentence suggests that it was intended to apply to any potentially "incompatible" or "detrimental" development, whether or not it is located within the long term growth area's boundaries.

The Approval Officer recognized that this interpretation could lead to the conclusion that new or expanded confined feeding operations are prohibited throughout the County outside of the long term growth area in areas zoned agricultural. To place limits on such an extreme consequence, the Approval Officer suggested an approach which would interpret the second sentence in conjunction with the first sentence, resulting in a prohibition of new or expanded confined feeding operations outside of the long term growth area if they "are or may become 'incompatible' or 'detrimental' within the meaning of the first sentence." Further, in the absence of reliable models to predict the dispersion of livestock odours, the Approval Officer adopted the minimum distance separation (MDS) methodology from AOPA as a tool for determining whether the potential odour nuisance from the proposed expansion would result in the Rosehill dairy becoming incompatible with urban land uses and would otherwise have a detrimental impact on the Town. Based on the Town's and County's intention to develop an area structure plan for the North-west Long Term Growth Area, including lands developed to urban standards and residential densities and the MDS calculations from AOPA, the Approval Officer concluded that:

...the proposed CFO expansion 'may become incompatible with urban land uses which otherwise may have a detrimental effect on the Town' for the northwest growth area, due to the CFO's proximity to potential future town residences.

The Approval Officer's conclusions were informed by responses she received to letters sent to the Town and the County where she requested clarification on four matters including whether "these areas" in s. 4.1(1)(b) refers only to the growth areas shown on the referenced maps. The County's response, provided in Decision Summary RA08048, was:

Regarding the intent of Policy 4.1(1)(b) in the IDP "As a broad overriding statement, the Policy commits the County as a planning authority not to approve (or support) a development that would be prejudicial to the Town's plans for this urban expansion area." The words "these areas" "...should not be interpreted so narrowly as the intent of the Policy is to ensure that any changes in land use or any development in proximity to these growth areas are compatible with the Town's expansion plans."

The Town's response to the same question provided in the Approval Officer's Decision Summary was:

Regarding the intent of Policy 4.1(1)(b) in the IDP 'This policy reflects our common understanding that adherence to good planning practice will result in sound, defensible decisions that provide for compatible land use patterns in the urban fringe. We would not be inclined to interpret the last sentence too narrowly, so as to only include the lands identified on Map 2 of the Plan'.

Further, in her written submission to the Panel, the Approval Officer asserted that her interpretation of the *Lacombe IDP* "based on this common sense notion is consistent with the 'broad and purposive' approach, directed by the Alberta Courts, toward interpreting municipal planning documents."

The Town, in its submissions, advocated that the Panel find the proposed dairy expansion to be inconsistent with the MDP. In its representations in this review, the Town adopted the position of the Approval Officer. In addition, it urged the Panel to consider several statutory planning documents in conjunction to fully understand the intent of the *Lacombe County Municipal Development Plan*, specifically the *Lacombe Intermunicipal Development Plan*, the *Lacombe County Municipal Development Plan*, various Lacombe County Economic Development Studies, the *Town of Lacombe Municipal Development Plan*, and the Town's West Area Structure Plan which is a schedule to its Land Use Bylaw. When taken together, the Town submitted that the documents confirm that the proposed dairy expansion is not consistent with the *Lacombe County Municipal Development Plan* land use provisions. The Town directed the Panel's attention to some guiding principles in the *Lacombe IDP* including:

- town growth, which will require the development of County land in the long term,
- a common goal and joint efforts to encourage commercial and industrial development along Queen Elizabeth II Highway, and
- the economic opportunities for both municipalities in encouraging the development of commercial and industrial development in areas along the Queen Elizabeth II Highway in the vicinity of the Highway 12 interchange.

The Town also drew the Panel's attention to future action set out in the *Lacombe Intermunicipal Development Plan* including for example the preparation of an area structure plan or outline plan for the North-west Long Term Growth Area including the circumstances when the area will be incorporated within the Town.

The Town also noted provisions in the *Lacombe County Municipal Development Plan* including: the significance of the Highway 2 corridor; cooperative development with municipal neighbours and protection of fringe areas to ensure mutually beneficial commercial, industrial and residential development patterns in the fringe area surrounding communities; and the Growth Management Strategy alluded to which provides for highway commercial opportunities in select locations along the Queen Elizabeth II Highway.

The Town also drew a distinction between the use of the term "*consistent*" in AOPA, s. 20, and "*contrary to*," in recognition that a municipal development plan is a high level concept plan which does not determine specific land uses as would an Area Structure Plan or Land Use Bylaw. Along the same vein, the Town argued that municipal development plans and intermunicipal development plans are "*almost philosophical documents... they're*

conceptual.” With this, it urged the Panel to take a broad and purposive interpretation of the provision.

Likewise, the Henderson Group asserted the position that the expansion application is inconsistent with the Municipal Development Plan. Initially, reference was made to Section 10.3 of the *Lacombe County Municipal Development Plan* with the conclusion that not only is there “*anticipation of urban expansion,*” but that there is also “*actual urban expansion*” that must be taken into account. The Henderson Group stated that if the expansion were approved, it would be directly across the highway from residences, commercial lands which could include a hotel or motel, and environmental lands.

The Henderson Group noted that Section 3.10(a) of the *Lacombe County Municipal Development Plan* would disallow a new confined feeding operation to be constructed if it were located less than 1.6 km from a town or an area designated for multi-lot residential use and that the County’s annexed lands are less than 1.6 km away from the proposed dairy expansion. They acknowledged that the application in question was for an expansion, however, stated that Rosehill Farms’ expansion plans were essentially to level the existing operation and create a new one. They submitted that as they believed the application was for a “*new*” operation, the 1.6 km exclusion zone should apply, therefore making it inconsistent with the MDP. The Henderson Group stated that, in the event the Panel did not deem the application to be a “*new*” operation, it had been determined that the application was a “*major expansion*” and therefore, would not be consistent with the *Lacombe Intermunicipal Development Plan*.

The Henderson Group also noted that the annexed lands identified by Lacombe County in its municipal planning documents were set to include highway commercial, residential – single family detached and multi-family, and environmental open space. More specifically, they suggested the highway commercial lands might be used for a Civic Centre or hotel or motel sites and that that the environmental open space would include expanded trail systems for pedestrian and cycling access, and would serve as a nature reserve. It was also submitted by the Henderson Group that the planned residential development would be considered an actual urban expansion. It was their position that the expansion was contrary to the determined use of the annexed lands as listed in the municipal planning documents.

The Narrow Interpretation

The Applicant, Rosehill Farms, advocated for a narrow interpretation of s. 4.1(1)(b) of the *Lacombe Intermunicipal Development Plan*. Its position is summarized in the following quotation from its written submission:

We submit that the wording of the IDP policy 4.1(1)(b) is clear and unambiguous. It clearly states that the areas delineated on Maps 1 and 2 should not be used for significant CFO expansions. This means that the IDP does not restrict major CFO expansions on lands outside of the boundaries specified on Maps 1 and 2. Therefore, if a CFO is proposed for lands within the areas set out in Maps 1 and 2, there is an ‘inconsistency with the application and the MDP’. However, if the proposed CFO is on lands in the areas outside of the boundaries on Maps 1 and 2, there is no inconsistency between the application and the MDP.

... a proper, legal interpretation of policy 4.1(1)(b) of the Lacombe IDP when applied to the facts of this review can lead to only one conclusion: there is no inconsistency with the Rosehill application and the Lacombe IDP. The CFO is plainly and simply outside of the areas of Maps 1 and 2.

Further analysis was provided by Rosehill Farms' expert, Mr. Berrien, who suggested that the reference to "*these areas*" in the second sentence of s. 4.1(1)(b) is limited by the following phrase in the first sentence: "*the Town's long term growth areas as shown on Map 1 and Map 2...*".

The Split-Sentence Interpretation

During cross-examination, the witness for the County advanced a third interpretation of s. 4.1(1)(b) that is a variation on the broad interpretation. This interpretation suggests that the Panel should look at the section in two parts. The first, consisting of the first sentence, it was argued, is a clear commitment on the part of the County to protect the long term growth areas that are identified in Maps 1 and 2 in the *Lacombe IDP*. It was explained that the County, in making this determination, looks at the impact of development outside of the long term growth areas and how it might affect the Town's long term expansion plans. The second statement is an express restriction, it was argued, whereby the long term growth areas should be predominantly limited to agricultural activities, not including new operations and major expanded confined feeding operations. The witness concluded that while the second sentence is not relevant as the dairy expansion site is outside of the long term growth areas, the County is nevertheless responsible to determine if the proposed development is incompatible or detrimental, and if it is, the County is responsible to recommend to the NRCB that the development not be approved.

The County acknowledged an onus or positive duty on its part to take a position on the outcome of the Rosehill dairy expansion application, but declined to do so.

What is a 'major new expanded confined feeding operation'?

It was undisputed by the parties that for the purpose of considering Issue 1, the doubling of animal numbers in the proposed Rosehill dairy expansion constitutes a major expansion of the confined feeding operation.

Panel's Conclusions

In the Panel's view, the wording of s. 4.1(1)(b) of the *Lacombe Intermunicipal Development Plan* is ambiguous as the provision can be read at least two different ways. If it is read narrowly, as advocated by Rosehill Farms, the outer boundaries of the areas where "*new or major expanded confined feeding operations*" are not allowed is delineated by the Town's long term growth areas in Maps 1 and 2. Since the site of the dairy is outside of the Town's long term growth areas, the outcome of this interpretation is that the Rosehill dairy expansion is not prohibited according to this section.

The remaining parties to the review urged the Panel to adopt a broader interpretation of s. 4.1(1)(b) which takes into account such far-reaching policy considerations as the function of statutory planning documents such as municipal development plans and intermunicipal development plans, the municipalities' intentions in entering into the *Lacombe Intermunicipal Development Plan* and related policy statements expressed in various provisions of associated planning documents. The outcome of this broader approach is that the Rosehill dairy expansion could be prohibited if it is also found to be incompatible

with urban land uses and otherwise has a detrimental effect on the Town. The variation on this interpretation, which leads to the same conclusion, is that the Panel is entitled to apply the first sentence in the provision, while disregarding the second sentence as it does not apply in these circumstances.

The Panel has given serious consideration to the arguments presented in support of the broader interpretation and appreciates the parties' efforts to explain the Town's long term growth plans and its joint efforts with the County to plan for and accommodate future development. The Panel understands the many challenges faced by small municipalities coping with growth pressures as well as the need to diversify and expand their local tax base. It is readily apparent to the Panel that the proximity of Queen Elizabeth II Highway presents economic opportunities for both the Town and the County and their respective residents. Although the pace and timing of future development in the Town's North-west Long Term Growth Area is unknown at the present time, clearly, it is prudent for both municipalities to anticipate and plan for future development, while at the same time minimizing potential future land use conflicts between new urban land uses and existing agriculture.

The Panel is cognizant of the role of intermunicipal development plans and municipal development plans in the strata of statutory planning documents. As suggested, they are indeed almost philosophical documents which set out the overall direction of the region and the Town, respectively, and are rife with inspirational language. The Panel is also aware of the fact that this intermunicipal development plan is the product of a negotiation process between two municipalities, and that the specific text in some parts of the document might reflect compromise wording. It is not insignificant, in the Panel's view, that the two authors of the *Lacombe Intermunicipal Development Plan*, the Town of Lacombe and Lacombe County, both urged the Panel to adopt a broad interpretation of s. 4.1(1)(b) which recognizes their intentions with respect to the future of the Town's long term growth areas.

Having said this, the Panel also values clarity in the language of municipal development plans, and in this case, an intermunicipal development plan. Clarity in the drafting of statutory plans is invaluable to an Approval Officer, and indeed the Board, who are directed by *AOPA* to decide whether a specific application for a confined feeding operation is consistent with an MDP. Precision in drafting is also important to those who must base investment decisions on an understanding of these documents, whether they wish to invest in confined feeding operations or commercial developments in the Town.

In this case, if the Panel were to apply the broad interpretation to the simple question of whether there is a limitation on confined feeding operations outside of the long term growth area, the answer would be a conditional "yes" because it gives rise to the further question of fact which is whether the expanded dairy would become incompatible with urban land uses and otherwise have a detrimental effect on the Town. The Approval Officer concluded in Decision Summary RA08048 that there was no science available to her on whether odour from the expansion would have an actual impact on the potential commercial and other development in the long term growth area. In the absence of scientific evidence, the Approval Officer borrowed the MDS calculation process from *AOPA* and used it as a gauge to determine whether the effects of the expansion on odour in the long term growth area would be acceptable. The use of this calculation, while perhaps understandable in the absence of an alternative methodology, is questionable in the Panel's view, as it results in the application of a very specific statutory tool from *AOPA* to a statutory planning document under the *MGA*. This is a use for which it was not intended.

The Panel is concerned by the position of Lacombe County in this review in that while it urged the Panel to take a broad view of the municipal development plan and the intermunicipal development plan to take into account the stated intentions of the two municipalities, it steadfastly declined to assert a position on whether the NRCB should approve the Rosehill dairy expansion. The County's answer that it had insufficient time and expertise to assess the dairy application is simply not defensible given the length of time between the application and the hearing, the long-standing issues in the County concerning this dairy's potential expansion, and the fact that the County must deal with issues surrounding CFOs on a regular basis given the overall agricultural nature of the County.

Despite the ambiguity in s. 4.1(1)(b), the Panel respectfully disagrees with the Approval Officer and adopts a narrow reading of the section, thereby finding that the proposed Rosehill dairy expansion is not prohibited by the *Lacombe Intermunicipal Development Plan*. The Panel is entitled to rely on a plain reading of a statutory document and bases its finding on the conclusion that "*these areas*" in the second sentence in the section refers to the areas within the boundaries of the lands described in Maps 1 and 2. While the Panel appreciates the need to take a "*purposive approach*" in some cases in the face of ambiguity, in this case, the search for the statutory purpose of the MDP and IDP raises a difficult question, namely: "*where is the outer boundary where new or major expanded confined feeding operations would be prohibited if a broader interpretation were taken?*" While the Approval Officer looked to the AOPA MDS to answer this question, the MDS methodology was used out of its statutory context.

The Panel declines to adopt an interpretation where it would separate the two sentences in s. 4.1(1)(b) and apply them independently as suggested by the County. This interpretation is not justified by the structure of the provision as the second sentence is clearly intended to modify the first.

The Panel also finds that the proposed Rosehill dairy expansion, which anticipates a doubling of the number of dairy cows, constitutes a "*major expansion*" of the dairy for the purposes of considering this issue.

Nevertheless, because of the lack of clarity on this issue, the Panel will also address issues 2 and 3 and provide its reasons in respect to those issues.

The Panel's response to issues 2 and 3 are amalgamated below:

- 2. If the Board concludes there is an inconsistency, is this a proper case for the Board to approve the proposed CFO expansion?**
- 3. Would the proposed Rosehill expansion cause unacceptable impacts on the community and does it represent an appropriate use of land?**

The second question that the Panel determined relevant to this review is premised on the conclusion that the Panel determine that the expansion is not consistent with the current municipal development plan. While the Panel has concluded that the proposed expansion is not inconsistent with Lacombe County's *Municipal Development Plan*, the Panel believes that there is merit in expressing an opinion as to whether this is a proper case for it to approve the proposed CFO expansion. This question requires that the Panel understand the various community impacts and reach a conclusion as to whether, having regard for these impacts, the expansion represents an appropriate use of land.

The Panel notes that the Approval Officer found that “*the effects of the proposed confined feeding operation expansion on the community will not be acceptable.*” The Approval Officer stated that this conclusion was dictated by the NRCB Approval Policy for the *Agricultural Operations Practices Act* which states at page 12:

Appropriate use of land and effect on the economy, community and environment

Approval officers are required to consider the effects on the economy, community and environment, and the appropriate use of land, when they review applications for approval-size confined feeding operations and applications to amend approval-size confined feeding operation permits.

1. Appropriate use of land

Municipal land use zoning of the land on which the facility is proposed will be used to determine whether the facility is an appropriate use of the land.

2. Effects on the economy

The Alberta Agriculture and Food economic calculator will be relied upon as evidence that the economic effects of a cfo development are acceptable.

3. Effects on the community

Consistency with the terms of the municipal development plan (MDP) will be relied upon as evidence that the community effects are acceptable.

Consequently, the finding by the Approval Officer in relation to this issue was determined solely by her interpretation that the proposed expansion is inconsistent with the land use provisions of the *Lacombe County Municipal Development Plan* and the *Lacombe Intermunicipal Development Plan*.

As the Panel is not bound by provisions of the municipal development plan on a review from a decision made by an Approval Officer, the Panel finds that it should take a different approach to the assessment of “*the effects on the environment, the economy and the community and the appropriate use of land.*” In the Panel’s view project impacts must be well understood before it can make a decision as to whether it is appropriate to approve a project that would be inconsistent with the *Lacombe County Municipal Development Plan* and the *Lacombe Intermunicipal Development Plan*. Despite the Panel’s finding that the proposed expansion is consistent with the *Lacombe County Municipal Development Plan* and the *Lacombe Intermunicipal Development Plan*, the Panel believes it appropriate to conduct an analysis of the project’s impacts on the economy and community and assess whether the project would represent an appropriate use of land. If for no other reason, the Panel believes this appropriate as its conclusion of consistency with the *Lacombe County Municipal Development Plan* and the *Lacombe Intermunicipal Development Plan* is debatable given the ambiguity of the relevant provisions of those documents.

The key issue raised by the review participants focused on the effects on the community from manure odour associated with the expanded operation. Similarly, effects on the economy and the determination as to whether the expansion would represent an appropriate use of land were attributed to the effects of odour from the facility. Both the Henderson Group and the Town expressed concern that odours associated with the

expansion would result in nuisance odours that would have an adverse effect on certain land uses and might have an adverse effect on land values.

Assessing or predicting the magnitude of odour requires a qualitative rather than quantitative analysis, as the scientific tools do not exist to accurately assess or predict the impact of odour from livestock operations. The minimum distance separation calculations contained in *AOPA* do provide some assistance in providing quantitative values of the distances that may provide reasonable buffers in order to avoid unacceptable odour levels. While not the determining factor in the Panel's consideration of anticipated community impacts, the Panel has had regard for the minimum distance separation values in its qualitative assessment of the odour associated with the Rosehill dairy expansion.

All parties at the hearing anticipated that an expansion at the dairy would increase the amount of odour generated by Rosehill Farms. The critical element in this conclusion is the direct consequence of a doubling in the number of animals on site. Simply put, the amount of manure generated at a confined feeding operation is a direct product of the type and number of animals at the facility. While it may be a straightforward exercise to determine the amount of increased manure, the more relevant question to the Panel is what consequence this will have on odour production and how this will affect the surrounding community and land use.

Operating practice and facility design are important considerations when assessing odour generation from a confined feeding operation. Rosehill Farms currently engages in a number of practices that reduce odour from its operation. These include maintaining clean floors in the barn and milking parlours, minimizing disturbances to the crust that naturally forms on the earthen liquid manure storage, liquid manure injection and removal of dead stock. None of these practices are required by *AOPA*. Rosehill Farms volunteered, for the Panel's consideration, certain conditions in the event that the proposed expansion were approved. Those conditions are:

1. No manure spreading on the Campbell lands (NE 26-40-27W4).
2. Removal of dead stock (i.e. no composting or scavenging allowed associated with this dairy).
3. All manure to be injected.
4. Removal of the outdoor pens when construction of the expansion begins.
5. No further expansion of livestock numbers at this location.

The Panel can include conditions in an approval and the operator has made a commitment or has indicated a willingness to be bound by certain conditions. Therefore, the Panel believes that it is appropriate to have regard for these commitments during its assessment of the application.

Rosehill Farms stated that several existing topographical features have a mitigating effect on odour moving toward the Town of Lacombe. These features included the presence of rolling terrain, a natural wind break formed by bush and trees east of the barn and the presence of high speed traffic along Queen Elizabeth II Highway. While the Panel acknowledges that one or more of these features may mitigate odour, it does not believe it was provided with sufficient evidence to reach any qualitative understanding of the net effect of these factors on odour. The Panel also observes that these factors currently exist

and would not change with the expansion. Consequently, the Panel has not considered these topographical features.

The relevant sources of odour at this operation currently include the freestall barn, milking parlour, outside pens, earthen liquid manure storage and spreading events. The Panel understands that the proposed expansion will include expansion to the milking parlour building and freestall barn. Rosehill Farms is proposing to move all animals indoors and eliminate the outside pens, should the expansion be approved. Replacement stock, currently kept in the outside pens located north of the existing barns would be moved into the proposed extension to the milking parlour barn.

The Panel accepts that the removal of outside pens will eliminate a source of odour. Manure in outside livestock pens is typically removed only once or twice a year and consequently can build up in substantial quantities over the course of a winter and the summer months when its removal is inconvenient or impractical. The amount of odour generated in these facilities is subject to the number of cattle present, animal size, amount of moisture, temperature, bedding material employed and animal movement. The Panel finds that the removal of the outside pens will result in the elimination of a significant odour source and the requirement for solid manure spreading would also be eliminated.

In terms of the housing of twice the number of animals inside structures to be built on site, the Panel accepts that all parties to the proceeding agreed that there would be an increase in odour from the barns. The proposed manure handling procedures at the expanded facility would be the same as those currently employed within the barns. These include keeping the barn floors clean by scraping and washing manure into under floor pits and the removal of manure from the pits into the earthen manure storage. The Panel did not receive any expert submissions that would allow it to do anything beyond a qualitative assessment of the effect on odour from this source. In examining this issue the Panel finds that there will be a significant increase in odour from the barns. The Panel notes that the amount of odour leaving the barns will be affected by the amount of air movement through the structures and that the controls available to the operator will encourage greater air flow during warmer weather. The Panel is aware that this is also the time when people within the community will be conducting outdoor activities.

The existing earthen manure storage facility is large enough to accommodate the increased manure from the proposed expansion. Rosehill Farms submitted that there would not be any perceptible increase in odour from storage in this facility. Rosehill Farms stated that to this point in time the facility has been operated in such a fashion that it is not entirely emptied during spring and fall spreading events and therefore the storage facility has been operated at fill levels tantamount to those anticipated with the expansion in place. This is of some significance in that the surface area of an earthen manure storage facility is a product of the volume stored due to the side slopes established to protect the lagoon's integrity. The lagoon forms a solid surface crust and is bottom filled as required by *AOPA* regulations. The Panel does not anticipate that there would be a perceptible increase in odour from the liquid manure storage facility except when it is being emptied for spreading.

The evidence before the Panel was that there would be an increase in the number of hours required to empty the earthen manure storage facility. The Panel finds that with the doubling of the number of animals and the removal of the outdoor pens there will be more than a doubling of the amount of liquid manure spreading associated with the expansion. The Panel concludes that there will be an increase in the amount and duration of odour

associated with this activity. As the lagoon will be emptied outside the active crop season (spring and fall), the Panel expects that the level of outdoor activities conducted by the receptor populace will not be as great as that during the warmer summer months during most years. In addition, the temporal nature of the activity will limit the odour nuisance. Further, the Panel heard that manure spreading from many other confined feeding operations is conducted on lands that are close enough to the Town to cause nuisance odours at the same time of year. In reality, while this operation would contribute to those nuisance odours it may be difficult to distinguish the source. There are no restrictions imposed by the County on land spreading of manure.

The Applicant has committed to subsurface injection of all manure coming from the expanded operation. This practice results in less odour during and immediately following land spreading. While the NRCB might encourage this practice as it provides nutrient benefits and reduces nuisance odours, the regulations do not generally require sub-surface injection of liquid manure. Further, the NRCB does not normally consider the nuisance associated with land spreading as a relevant consideration as the Board does not specify which lands must be used for land spreading. In this case, the Panel believes it should have regard for the nuisance odours associated with manure spreading as it could be relevant in the consideration of community impacts. As previously stated, the Panel heard evidence that land spreading in close proximity to the Town of Lacombe was a well established practice. This would include the lands currently used by Rosehill Farms for its existing operation. The proposed condition of not spreading manure on NE 26-40-27 W4 would also ensure that this land which is closest to the current Town boundary will not be used for manure spreading. The Panel finds that the increase in liquid manure being spread by Rosehill Farms would be significant if considered in isolation; however, it is not significant when considered in relation to the land spreading conducted by other confined feeding operations on lands in the immediate area.

The Rosehill dairy is located within 300 metres of the current Town of Lacombe boundary and in close proximity to the area identified as the North-west Long Term Growth Area for the Town in the *Lacombe IDP*. The Town is contemplating that the lands closest to the dairy within its boundary would be best suited to commercial development. These lands, located immediately south of the North-west Long Term Growth Area, were annexed by the Town in 1999 (the annexed lands) and are currently undeveloped. As described to the Panel future developments might include big box retail, restaurants, theatres and hotel facilities. Residential development is anticipated to occur on the annexed lands slightly farther from the Rosehill dairy but would be within the calculated minimum distance separation (expansion factor applied) for the expanded operation. Currently the closest existing residence located within the Town of Lacombe is 1019 metres from the Rosehill dairy.

The Panel is aware that the Town has concerns that the expanded dairy will have adverse effects on the commercial and residential development expected for the North-west Long Term Growth Area and the annexed lands. Further, the current owners of the annexed lands immediately south of the North-west Long Term Growth Area are concerned that the value of their land will be negatively impacted if potential purchasers identify the presence of the expanded dairy as a negative site influence. The owners of these lands, the Henderson Group, submitted that the proposed expansion is not consistent with the Town's development scheme as identified in the Town's West Area Structure Plan.

Having regard for the increased odour anticipated from the expanded operation and the anticipated development in the areas identified as the annexed lands and the North-west Long Term Growth Area, the Panel concludes that the effect will not have a significant impact on commercial or residential development. The Panel is satisfied that the commitments given by Rosehill Farms will reduce odour issues. While many of these commitments reflect the current voluntary practice of the operator, the Panel will require these commitments to form part of the approval issued as a consequence of this decision. By so doing, the operator will be required to respect these operating conditions on a go forward basis and such conditions will remain in place despite any changes of ownership or management at this site.

The Panel notes that with or without the expansion of Rosehill Farms, agricultural odours will be present from time to time at residences and commercial operations in the Town of Lacombe given the presence of a large number of confined feeding operations within close proximity to the Town. The Panel finds that the incremental odour associated with the expansion of the Rosehill dairy will likely be imperceptible given current activity at this site as well as the presence of other confined feeding operations and extensive land spreading in the immediate area.

Having regard for all of the evidence and submissions, the Panel concludes that the proposed Rosehill dairy expansion represents an appropriate use of land and that it will not cause unacceptable impacts on the community. Further, the Panel finds that even if there were an inconsistency with the *Lacombe County Municipal Development Plan* and the *Lacombe Intermunicipal Development Plan*, this is a proper case for the Panel to exercise its discretion and approve the proposed CFO expansion.

Board Decision

For the reasons set out above, the Board hereby directs the Approval Officer to issue an approval to Rosehill Farms Inc. to expand its confined feeding operation located at SE 35-40-27-W4, subject to the conditions related to technical matters set out by the Approval Officer in Decision Summary RA08048, and standard construction, operating or inspection conditions as appropriate. For ease of reference, the conditions identified by the Approval Officer in Decision Summary RA08048 are set out below:

- *The CFO owner or operator must provide the NRCB with verification (land title certificate) that the CFO owner or operator has purchased NE 26-40-27-W4 before any permitted construction may commence and the number of animals on site may increase.*
- *Water well ID 0274924, located immediately north of the most westerly dairy barn, must be decommissioned according to Alberta Environment requirements. Written evidence of this must be provided to the NRCB before any manure or livestock are allowed to enter the west barn addition.*
- *A completion report confirming the project #1 new addition to the existing 46m x 43m dairy barn floor materials and construction procedures, prepared by a qualified third party, must be provided to the NRCB prior to animals or manure entering the new addition. The completion report must include verification of the following: dimensions of the addition, concrete floor thickness, concrete strength, % fly ash content, and size and spacing of reinforcing material used.*

- *A completion report confirming the project #2 new addition to the existing 71m x 33.5m dairy barn floor materials and construction procedures, prepared by a qualified third party, must be provided to the NRCB prior to animals or manure entering the new addition. The completion report must include verification of the following: dimensions of the addition, concrete floor thickness, concrete strength, % fly ash content, and size and spacing of reinforcing material used.*
- *Construction of the manure collection and storage portions of the CFO facility(ies) must be completed prior to December 30, 2011 unless otherwise agreed upon by the NRCB.*
- *The manure collection and storage portion of the new 74m x 43m addition to the 46m x 43m existing dairy barn must be inspected by NRCB personnel prior to animals or manure being placed in the new addition.*
- *The manure collection and storage portion of the new 49m x 33.5m addition to the 71m x 33.5m existing dairy barn must be inspected by the NRCB personnel prior to animals or manure being placed in the new addition.*

The Board further directs the Approval Officer to include conditions in the approval which give effect to the conditions volunteered by Rosehill Farms during the course of the NRCB Review. Those conditions are:

1. No manure spreading on the Campbell lands (NE 26-40-27W4);
2. Removal of dead stock (i.e. no composting or scavenging allowed associated with this dairy);
3. All manure to be injected;
4. Removal of the outdoor pens when construction of the expansion begins; and,
5. No further expansion of livestock numbers at this location.

DATED at CALGARY, ALBERTA, this 5th day of November, 2009.

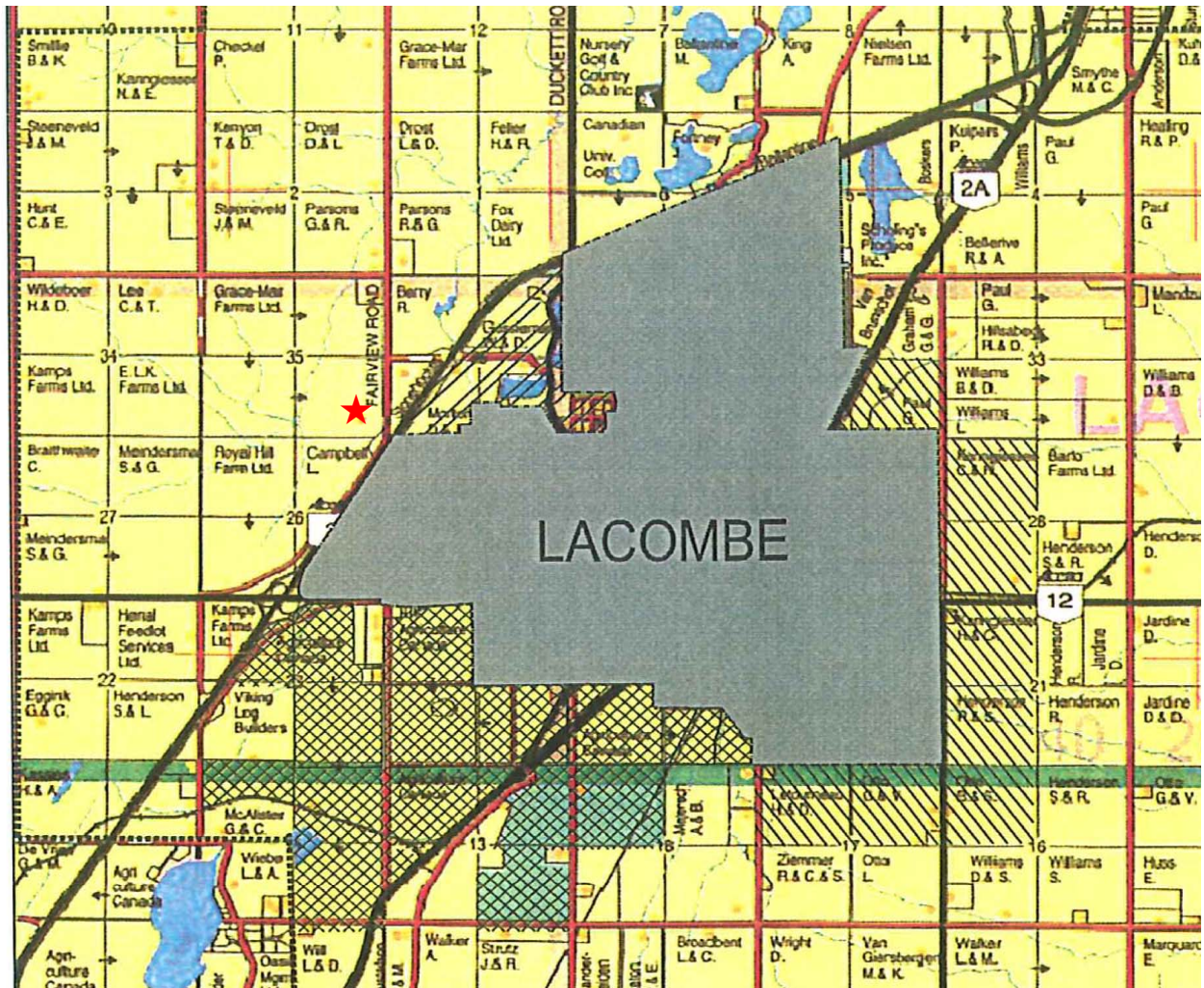
Original signed by:

Vern Hartwell
Panel Chair

Donna Tingley
Panel Member

Jim Turner
Panel Member

Appendix 1: Excerpt from Lacombe IDP Map 1



★ Marker depicting Rosehill Farms has been inserted into the IDP Map 1 excerpt.

Legend

-  North-west Long Term Growth Area
-  South East Long Term Growth Area within Lacombe County
-  Agricultural Research Lands
-  Notification Zone Boundary

Contact the Natural Resources Conservation Board at the following offices. Dial 310.0000 to be connected toll free.

Edmonton Office

4th Floor, Sterling Place, 9940 - 106 Street
Edmonton, AB T5K 2N2
T (780) 422.1977 F (780) 427.0607

Calgary Office

3rd Floor, 640 - 5 Avenue S.W.
Calgary, AB T2P 3G4
T (403) 662.3990 F (403) 662.3994

Fairview Office

Provincial Building, #213, 10209 - 109 Street
P.O. Box 159, Fairview, AB T0H 1L0
T (780) 835.7111 F (780) 835.3259

Lethbridge Office

Agriculture Centre, 100, 5401 - 1 Avenue S
Lethbridge, AB T1J 4V6
T (403) 381.5166 F (403) 381.5806

Morinville Office

Provincial Building, #201, 10008 - 107 Street
Morinville, AB T8R 1L3
T (780) 939.1212 F (780) 939.3194

Red Deer Office

Provincial Building, #303, 4920 - 51 Street
Red Deer, AB T4N 6K8
T (403) 340.5241 F (403) 340.5599

NRCB Response Line: 1.866.383.6722

Email: info@nrcb.gov.ab.ca

Web Address: www.nrcb.gov.ab.ca

Copies of the *Agricultural Operation Practices Act* can be obtained from the Queen's Printer at www.qp.gov.ab.ca or through the NRCB website.