



BOARD REQUEST FOR REVIEW DECISION

RFR 2022-06 / LA21037

In Consideration of a Request for Board
Review filed under the *Agricultural
Operation Practices Act*

A&D Cattle Ltd.

May 10, 2022

The Board issues this decision document under the authority of the *Agricultural Operation Practices Act (AOPA)*, following its consideration of a request for Board review of Decision Summary LA21037.

Background

On April 1, 2022, a Natural Resources Conservation Board (NRCB) approval officer issued Decision Summary LA21037 (Decision) in relation to an application by A&D Cattle Ltd. (A&D Cattle) to construct a new 2,000 head beef finisher confined feeding operation (CFO), including 12 pens (each 40 m x 50 m), four pens (each 20 m x 30 m), and a catch basin (61 m x 38 m x 1.6 m). The proposed CFO would be located at NE 27-8-26 W4M in the Municipal District of Willow Creek (MD or Willow Creek). The approval officer denied the application, finding that the proposed CFO is not an appropriate use of land because it would be inconsistent with the land use provisions of the Intermunicipal Development Plan (IDP) between the MD of Willow Creek and the Town of Fort Macleod. The approval officer determination was made under Board direction from Decision 2022-02 / Double H Feeders Ltd. / LA21033. In that decision, the Board identified the need for approval officers to determine whether applications are consistent not only with applicable Municipal Development Plans (MDPs) but also with relevant IDPs since, under the *Municipal Government Act (MGA)*, IDPs now prevail over MDPs.

Requests for Board review (RFR) were received from A&D Cattle, the MD of Willow Creek, and Dwain Lewis (a directly effected party). All three RFRs were received on April 25, 2022, meeting the April 26, 2022 filing deadline. On April 27, 2022, the NRCB sent a Notice of Filed Requests for Board Review and Rebuttal Opportunity to the directly affected parties, as established by the approval officer. Parties were also provided with a copy of the RFRs. Parties having an adverse interest to the matters raised in the RFRs were given the opportunity to submit a rebuttal. The Board forwarded the public material on this file to the Town of Fort Macleod on April 28, 2022.

Rebuttals were received within the filing deadline of May 3, 2022 from Wade and Kaitlyn Conner, and the Town of Fort Macleod. Portions of the public record maintained by the approval officer were provided on April 29, 2022.

Under the authority of section 18(1) of the *Natural Resources Conservation Board Act*, a division of the Board consisting of Peter Woloshyn (chair), Sandi Roberts, Walter Ceroici, and Earl Graham was established on April 28, 2022, to consider the RFR.

The Board considers that a party requesting a review has the onus of demonstrating that there are sufficient grounds to merit review of the approval officer's decision. Section 13(1) of the AOPA Administrative Procedures Regulation describes the information that must be included in each request for Board review.

Documents Considered

The Board considered the following information:

- Decision Summary LA21037, dated April 1, 2022
- Technical Document LA21037, dated April 1, 2022

- RFR#1 filed by the MD of Willow Creek, dated April 25, 2022
- RFR#2 filed by A&D Cattle Ltd., dated April 25, 2022
- RFR#3 filed by Dwain Lewis, dated April 25, 2022
- Portions of the public record maintained by the approval officer, dated April 29, 2022
- Rebuttal response filed by Wade and Kaitlyn Conner, dated May 2, 2022
- Rebuttal response filed by Town of Fort Macleod, dated May 3, 2022
- Intermunicipal Development Plan, Town of Fort Macleod and Municipal District of Willow Creek, Bylaw No. 1949 and Bylaw 1922, dated March 2022
- MD of Willow Creek Land Use Bylaw No. 1826, dated April 2019
- MD of Willow Creek Municipal Development Plan Bylaw No. 1841, dated August 2019

Board Jurisdiction

The Board’s authority for granting a review of an approval officer’s decision is found in section 25(1) of AOPA, which states:

- 25(1) The Board must, within 10 working days of receiving an application under section 20(5), 22(4) or 23(3) and within 10 working days of the Board’s determination under section 20(8) that a person or organization is a directly affected party,
- (a) dismiss the application for review, if in the opinion of the Board, the issues raised in the application for review were adequately dealt with by the approval officer or the issues raised are of little merit, or
 - (b) schedule a review.

In addition, where an approval application is appealed through the Board “request for review” process and the Board finds that a review is warranted, the Board’s consideration of MDPs is addressed in AOPA section 25(4)(g):

- 25(4) In conducting a review the Board
- (g) must have regard to, but is not bound by, the municipal development plan, . . .

Although this affords clear discretion to the Board with respect to its consideration of MDPs, the Board is conscious of its responsibility to weigh carefully the planning objectives of municipal planning documents in relation to an application to develop or expand a CFO.

Board Deliberations

Preliminary Matters

1. In its May 3, 2022 letter to the NRCB, the Town of Fort Macleod (Town) requested directly affected party status. Given that the Town is party to the IDP at issue in this review, the Board grants the Town directly affected party status.
2. Wade and Kaitlyn Conner submitted a rebuttal to the RFRs on May 2, 2022, meeting the filing deadline of May 3. The rebuttal did address issues raised in the RFR filings. However, the Conner’s rebuttal went further into issues that are normally raised by RFRs submitted within ten days of the approval officer’s decision release. Since the approval officer’s decision was to deny the application, the Connors likely felt that there was no need for

them to file an RFR. The Board will comment on whether the approval officer adequately addressed issues raised in the Conner rebuttal in so far as the issues are consistent with those raised by the Conners in their statement of concern submitted to the approval officer during the application stage.

Issues Raised in the RFRs and Rebuttals

The Board reviewed the RFRs from A&D Cattle, the MD of Willow Creek, Mr. Lewis, and the rebuttals from the Conners and the Town. The Board has distilled the issues raised as follows:

1. Whether the approval officer should have assessed the application against the MDP as of December 3, 2021 (date of part 2 application submission) or the IDP as of April 1, 2022, the date the decision was released.
2. A&D Cattle asserted that the approval officer unnecessarily delayed making the decision on the application by holding off the initial notice during the month of December 2021, and waiting for Board Decision 2022-02 / Double H Feeders Ltd. to be released. A&D Cattle asserted that without these delays, the approval officer could have issued his decision prior to the IDP coming into force.
3. A&D Cattle stated “It is understood that the Board can also approve the CFO application given that it is appropriate to do so.” While unclear, the Board presumes this to be in reference to AOPA:
*s. 25(4) In conducting a review the Board,
(g) must have regard to, but is not bound by, the municipal development plan, ...*

Should the Board find that the March 9, 2022 IDP is the relevant municipal planning document, and that the application is inconsistent with the IDP, the Board presumes that A&D Cattle are requesting that the Board assess whether the application should be approved despite the inconsistency.

4. Mr. Lewis raises concerns in his RFR to the Board that are different from those in his statement of concern submitted to the approval officer as part of the application process. The Board has determined that the approval officer adequately considered issues raised in the statement of concern submission. The Board notes that several of Mr. Lewis’ RFR issues were adequately considered by the approval officer as items normally reviewed by approval officers during their consideration of applications. However, some of the concerns noted by Mr. Lewis are relevant to land use planning considerations, and as such are matters that could be raised in submissions and at the hearing.
5. The Conners repeated a number of issues raised in their statement of concern during the application stage. The Board has assessed these and determined that the approval officer adequately dealt with all concerns, including the imposition of conditions in response to those concerns should the application be subsequently approved.
6. The Conners raised new concerns, namely that it is inappropriate for Willow Creek to request a review on a CFO denial. They asserted that Willow Creek indicated to them that the MD would be neutral and “have nothing to say”.

Given the issues raised and the unanswered questions that remain, the Board finds that a review is warranted.

Scope of the Review

1. The Board recognizes that NRCB Operations Approval Policy, updated May 8, 2018, directs approval officers to determine whether an application is consistent with the relevant MDP as of the decision date. The Board would benefit from Field Services' explanation of this policy and whether the policy contemplates delaying decisions based on an MDP/IDP pending approval and implementation.
2. Willow Creek asserted that *City of Ottawa et al v. Boyd Builders Ltd. [1965]* and *Love v. Flagstaff (County) Subdivisions and Development Appeal Board, 2022* are comparable cases to LA21037. The Board acknowledges similarities but identified that the *City of Ottawa et.al. v. Boyd* decision also had an underpinning related to bad faith decision making on the part of the City of Ottawa. Further discussion and evidence that the two cases submitted by Willow Creek are relevant to decision making under Alberta's legislative scheme (AOPA and the MGA) is warranted.
3. A&D Cattle asserted that the approval officer unnecessarily delayed his decision. Further, A&D Cattle submitted that if the delay had been avoided the application would have been assessed against the MDP in force prior to March 9, 2022 and been approved.
 - a. Did the approval officer delay the decision?
 - b. What is the rationale for delaying permit notices for December 2021?
 - c. Did the approval officer delay his decision in waiting for the Board Decision 2022-02? If so, was it appropriate to do so?
4. The Conners questioned whether it was appropriate for Willow Creek to RFR a denial, especially in light of the newly implemented IDP that contains a CFO exclusion zone in which the proposed CFO development is located. The Board would benefit from a greater understanding of the rationale for Willow Creek's RFR.
5. Whether the Board should approve the operation despite its inconsistency with the IDP. The Board has established that the following considerations are reasonable in a determination of whether a permit application is approved notwithstanding an inconsistency with the MDP/IDP presented as a CFO exclusion zone:¹ Accordingly, the Board expects to hear argument from all parties related to:
 - the municipal authority's rationale for establishing the relevant provision(s) in the municipal development plan,
 - whether the relevant provision is reasonable and reflective of good planning,
 - whether there is a direct link between the planning objectives and the establishment of the CFO exclusion zone, and
 - whether the municipal development plan is in conflict with the AOPA objective of establishing common rules for the siting of CFOs across the province.

¹ 2011-04 Zealand Farms Ltd., 2016-01 Peters, 2017-08 Friesen & Warkentin

Form of Review

The Board has determined that an oral virtual review hearing is warranted. The Board finds that eligible parties to this proceeding include A&D Cattle Ltd., the MD of Willow Creek, the Town of Fort Macleod, Wade and Kaitlyn Conner, Dwain Lewis, and NRCB approval officer Joe Sonnenberg.

Written submission filing dates:

- Hearing submissions must be filed no later than May 26, 2022
- Reply submissions must be filed no later than June 2, 2022

All submissions are to be directed to the attention of Laura Friend, Manager of Board Reviews, at laura.friend@nrcb.ca.

All filings and correspondence made with respect to this review will be posted on the Board's website [A&D Cattle project page](#).

The Board anticipates that a hearing of the issues for review will be completed in a single day. Board staff will contact the parties to determine an appropriate hearing date. All parties will be notified once the specific hearing arrangements are finalized.

Should the Board have questions of a party during the review, it will pose those questions in writing and request a written response that will form part of the public record.

DATED at EDMONTON, ALBERTA, this 10th day of May, 2022.

Original signed by:

Peter Woloshyn (chair)

Sandi Roberts

Walter Ceroici

Earl Graham