



## **BOARD REVIEW DECISION**

**2022-09 / LA21037**

Review of Decision Summary LA21037

A&D Cattle Ltd.

July 27, 2022

***The Board issues this decision under the authority of the Agricultural Operations Practices Act (AOPA), following the Board's review of Decision Summary LA21037 via a virtual hearing held on July 7, 2022.***

## **Background**

NRCB Decision Summary LA21037 (Decision Summary), was issued by an approval officer on April 1, 2022, denying 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), 4 pens (each 20 m x 30 m), and a catch basin (61 m x 38 m x 1.6 m). The proposed CFO is located at NE 27-8-26 W4M in the Municipal District of Willow Creek No. 26 (MD), roughly 2.5 km southwest from the Town of Fort Macleod (Town).

Two requests for Board review (RFR) of the Decision Summary were filed by the MD and A&D Cattle, asking the Board to reverse the denial decision. One RFR was filed by Dwain Lewis, asking the Board to uphold the denial decision.

On May 10, 2022, NRCB Board Decision RFR 2022-06/LA21037 was released, advising that the Board had determined that an oral virtual hearing was warranted. The scope of the review was provided on page 4 of that decision.

The review submission filing deadline was set to be May 26, 2022. Four submissions were received from the Town, the MD, the NRCB approval officer and Field Services, and A&D Cattle. The reply submission deadline was set to be June 2, 2022. One reply submission was received from A&D Cattle.

## **Board Deliberations**

### **1. Timing of Statutory Plan Consistency Assessment**

The *Agricultural Operation Practices Act* (AOPA) requires that, when assessing an application, an approval officer determine whether that application is consistent with the land use provisions in the applicable municipal development plan (MDP). In Board Review Decision 2022-02/LA21033 (Double H Feeders Ltd.), the Board directed approval officers to assess land use planning consistency with any relevant intermunicipal development plan (IDP). Without fully restating the reasons for this direction, the Board determined that the 2017 amendments to the *Municipal Government Act* elevate the relevance of IDPs to approval officers' planning consistency considerations.

The timing of the approval officer's MDP/IDP consistency assessment is material to the A&D Cattle application, as the IDP was not in place at the time the approval officer determined the A&D Cattle application was complete, but was adopted and in effect at the time the approval officer made his decision on the application. As the application was inconsistent with the land use planning provisions of the IDP at the date of the approval officer's decision, the approval officer denied the A&D Cattle application.

In framing the scope of this review (Board Decision RFR 2022-06/LA21037, page 4), the Board determined that it would consider:

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.

The Board received review submissions from A&D Cattle, the MD of Willow Creek, the Town of Fort Macleod, and the NRCB approval officer and Field Services. The Board expresses its appreciation for the clear and direct submissions from all parties.

As the legislation does not specify the timing for determining MDP/IDP consistency, the Board's review of this issue will focus on the review participants' submissions, NRCB policy statements, and past NRCB decisions.

NRCB Operational Policy 2016-7: *Approvals* states its purpose as:

...Operational Policy 2016-7: *Approvals* provides policies to guide approval officers' exercise of this discretion, and to clarify the intent of AOPA and the regulations where those laws are unclear. Many of the policies below address the merits or substance of approval officers' permitting decisions, while other policies address the processes for making those decisions. All of the policies are meant to promote consistent and efficient permitting decisions (page 1).

In addressing the timing for determining MDP/IDP consistency, NRCB Operational Policy 2016-7: *Approvals* states:

#### 8.2.2 New and amended municipal development plans

In making MDP consistency determinations, approval officers will use the MDP in effect on the date they issue their permitting decision, even if it is not the same version of the MDP that was in effect when the Part 1 application was received (page 25).

The Board finds that NRCB Operational Policy 2016-7: *Approvals* provides a clear statement that the determination of MDP/IDP consistency will be done at the date of the permitting decision. This is not surprising, as past NRCB Board review decisions often provide the foundation for operational policy. There are past review decisions that support making the consistency decision at the date of the permitting decision. The Board did not find any Board review decisions that used a date other than that of the approval officer decision for assessing consistency. That said, the Board understands that established policy and past review decisions may be persuasive, but are not binding.

### ***Views of the MD of Willow Creek***

The MD submitted that AOPA s.20(1)(b) suggests that the determination of consistency with an MDP should occur prior to public notice and, in the event of an inconsistency, there would be no purpose in further consideration of the application. The Board accepts that such an interpretation could be supported by the language in s.20. However, the Board finds that such an interpretation is not supported when read in conjunction with the appeal provisions in AOPA s.25. NRCB approval officers' established practice has been to conduct a comprehensive review of applications despite an MDP inconsistency under s.20(1)(a).

It is understood that an MDP inconsistency does not mean that the approval officer denial directed by s.20(1)(a) is the end of the application process, as AOPA s.25(4)(g) provides an opportunity for Board approval. The Board has always required that approval officers conduct a comprehensive review of applications that have an MDP inconsistency to provide the Board with a complete record for review.

### ***Views of A&D Cattle***

A&D Cattle urged the Board to find that the approval officer either may or should have determined the MDP consistency question on or before the date that the approval officer circulated his draft decision for internal review.

### ***Views of the Town of Fort Macleod***

The Town of Fort Macleod submitted that the approval officer was correct in assessing consistency with the current MDP/IDP at the date of making his approval decision.

### ***Views of the Board***

The Board did review each of the court decisions cited by counsel. On balance, the Board is satisfied that the determinative findings in those similar fact court decisions generally support the approval officer's choice to determine MDP/IDP consistency as at the date of his final decision. Further, the course of conduct is consistent with the Board's past practice and written policy.

Having regard for the submissions of all parties, the Board finds that the approval officer's timing in determining consistency with the MDP and IDP at the date of his final decision was the correct choice.

## **2. Did the Approval Officer Intentionally or Unnecessarily Delay Issuing Decision LA21037?**

### ***Views of A&D Cattle***

A&D Cattle made several assertions that the approval officer unnecessarily or unduly delayed issuing Decision Summary LA21037. It was further asserted that without delays the permit could have been issued prior to the MD signing the IDP on March 9, 2022.

Specifically, A&D Cattle asserted that the approval officer:

*Point A:* Exceeded the amount of time taken to issue other permits of similar complexity for beef feedlots and made unnecessary and late requests of A&D Cattle for additional information (e.g., water well locations and usage).

*Point B:* Unduly delayed deeming the application complete and public notice to accommodate directly affected parties during the holiday season when NRCB staff are away from the office due to Christmas closure.

### ***Views of the Board***

#### *Point A—Board Findings*

The Board recognizes that there are similarities between permit applications for confined feeding operations of the same species. However, there are differences; each permit application is unique and often requires attention to specific and unique circumstances. Comparing timelines between permit applications is not an ‘apples to apples’ exercise. Field Services outlined a number of factors that impact how long it takes an approval officer to issue a decision including workload, complexity of the application, and response time by the applicant to meet information requests. The Board finds that a simple comparison of timelines for several cattle CFO permit applications is, on its own, not relevant to the A&D Cattle application.

There is broad discretion afforded to approval officers regarding the review and release of permit decisions. Having said that, there is an expectation that approval officers process applications in an orderly and timely fashion within individual workload constraints. The approval officer testified that he was under some workload pressure handling multiple files while processing the A&D Cattle application. The Board notes that Decision Summary LA21037 was released within 65 working days of the ultimate notice (January 5, 2022), which falls within the NRCB’s performance target.

Under cross examination, there were several assertions and questions by A&D Cattle that the approval officer unnecessarily delayed the application review process. For example:

A&D Cattle asserted that, since the Part 2 application was submitted on December 3, 2021, the approval officer could well have issued public notice immediately and met the notice deadlines prior to the Christmas closure starting on December 24. The approval officer testified that the Part 2 application required review and confirmation of completeness prior to public notice. He further testified that the earliest he could have deemed the application complete was mid-December—not in time to issue public notice prior to the Christmas closure. Nonetheless, between the December 3 filing of Part 2 and the start of the NRCB’s Christmas closure of December 24 there were 14 working days available—six days short of the 20 working day notice requirement.

A&D Cattle also asserted that the approval officer delayed the process of sending statements of concern (SOC) filed by directly affected parties to A&D Cattle. The Board notes that the SOC

filing deadline of February 2, 2022 was a Wednesday. Therefore, given the weekend, there were only two working days (Thursday, February 3 and Friday, February 4) between the SOC filing date and February 7, 2022, when A&D Cattle received the SOCs. The Board also heard from the approval officer that it is not unusual for SOCs to be sent to an operator a few days after the submission deadline to allow for time to receive SOCs that are sent by mail.

The Board reviewed A&D Cattle's concern that a request for additional information by the approval officer on March 10, 2022 relating to the location of two water wells (one to be decommissioned and the other to be used as a water supply) at the proposed CFO, and identification of additional spreading lands, delayed the approval officer's decision by six days. The approval officer, in his testimony, acknowledged that information on the water wells was provided by the operator in November 2021. A&D Cattle contended that the approval officer's request for additional land base for manure spreading was not warranted since it was their view that the land base provided met regulatory requirements. A&D Cattle argued that the information request should have been made before the application was deemed complete. The Board agrees with A&D Cattle that some of the additional information requested by the approval officer may not have been required or was provided previously by the applicant. However, the Board finds that the delay in getting this information did not materially impact the timing of the approval officer's decision, given the timing of the NRCB internal review process and other factors, including the approval officer's workload.

The Board heard no substantiated evidence that the approval officer deliberately or unnecessarily delayed his decision.

#### *Point B—Board Findings*

The Board is in agreement with Field Services' unwritten policy to avoid public notice on permit applications over the Christmas closure. In this case, the NRCB (and Government of Alberta) Christmas closure occurred from December 24, 2021 through January 3, 2022 inclusive. During this time, directly affected parties may not be aware of or have the time to focus on submitting statements of concern. During the permitting process, applicants have access to NRCB staff to answer questions. It is also appropriate that NRCB staff be available to answer questions from directly affected parties during the public notice period. The Board finds that the long-standing practice of avoiding public notice during Christmas closure is reasonable. This approach ensures that all parties have the opportunity to review the application outside of the Christmas closure period and have access to NRCB staff in order to answer questions arising from the notice. In the Board's view this approach is procedurally fair.

The Board notes that A&D Cattle filed its Part 1 application on July 19, 2021 and the Part 2 was filed on December 3, 2021. The approval officer deemed the application complete and filed the public notice on January 5, 2022. The approval officer acknowledged that the application could have been deemed complete by mid-December. However, the approval officer stated at the hearing that approval officers routinely avoid public notice until the New Year, unless the 20-day deadline for statements of concern can be filed prior to Christmas closure. In this case the Christmas closure began on December 24, 2021. The approval officer stated that given the local

newspaper publication dates, in conjunction with an at best mid-December application completeness date, the public notice needed to be done in early January. The approval officer notified all parties on December 21, 2021 that public notice would occur on January 5, 2022.

A&D Cattle testified that they were unaware of NRCB's practice regarding public notice during the Christmas closure and were not notified of a 'cutoff' date in order that notice be advanced prior to December 24, the first day of the Christmas closure. The Board recognizes that this oversight is a source of frustration for A&D Cattle. The Board encourages Field Services to:

- i. Notify operators of impending notice restrictions due to the Christmas office closure period where appropriate.
- ii. Consult with its Policy Advisory Group and move to implement a formal policy regarding avoiding public notice during the Christmas closure dates. The policy should include a notice deadline that reflects the last date that public notice will be issued in order to ensure public participation and access to NRCB staff during regular office hours. The Board further suggests that public notice may be split before and after the Christmas closure period. Under a split notice period, directly affected parties would have more, not less, time to review and respond to the application because the closure period dates are not considered working days. A split notice period, where appropriate, is fair to neighbours by providing adequate time to respond to the notice of application and is fair to operators in moving applications through the decision process expeditiously.

### **3. Could an Earlier Notice Period and/or Shorter Timelines to Process the Application Have Led to a Decision Prior to the Board's March 17, 2022 Review Decision on Double H Feeders Ltd.?**

The Board has ruled that the approval officer processed the application in his normal course of action and did not unnecessarily delay his decision. The Board finds no steadfast evidence or approach to retrace and assess the approval officer's daily work on LA21037 and the other files in front of him during the December 2021 to April 2022 period. In any event, the Board finds it unlikely that, even with a slightly accelerated notice timeline (split notice) coupled with additional efficiencies during the review process, the approval officer could have issued his decision ahead of the Board's March 17, 2022 decision on Double H Feeders Ltd. (requiring approval officers to determine an application's consistency with the MDP and IDP).

### **4. A&D Cattle Request that the Board Rule on the Relevance of the Approval Officer's March 16 Draft Decision**

#### ***Views of A&D Cattle***

A&D requested the Board to rule on whether the draft decision (which approved the application) circulated for internal review on March 16, 2022 should be the decision considered for consistency with the MDP.

### ***Views of the Board***

The Board finds that draft decisions are just that—draft. Draft decisions have no legal effect. Relying on draft decisions would create havoc and are not legally binding in any event. Only final decisions that are signed, dated, and issued publicly are relevant. This applies to all decisions made by Field Services or the Board.

## **5. Should the Board Approve the Proposed CFO Despite its Inconsistency with the IDP?**

### ***Views of A&D Cattle***

A&D Cattle explained that it considers the proposed 2,000 head beef finisher feedlot to be relatively small compared to most feedlots. They commented it met all AOPA technical requirements and that, due to its small size, it is unlikely to create much in the way of odours, dust, or other nuisances that could be of concern to the citizens of the Town of Fort Macleod.

A&D Cattle confirmed that the feedlot's proposed location is approximately 4.5 km (2.8 miles) from the nearest residence in the town, and would be located on a quarter section that is just inside the southern boundary of the IDP's CFO exclusion zone.

A&D Cattle suggested that there was an inconsistency between planning objectives in the IDP and the CFO exclusion zone. Several policies in the IDP promote the protection of agricultural lands and practices but, according to A&D Cattle, no rationale was provided as to why CFO growth should be limited. A&D Cattle noted that there are already several existing CFOs in the CFO exclusion zone and several in close proximity to the town. A&D Cattle asserted that the CFO exclusion zone was created to mitigate nuisance effects of CFOs rather than for land use planning. They argued that AOPA provides more fair and consistent rules (minimum distance separation or MDS) for addressing nuisance and environmental issues at CFOs rather than an exclusion zone.

### ***Views of the Town of Fort Macleod***

The Town testified that establishing CFO exclusion zones are one of the few opportunities that municipalities have to provide input to the NRCB regarding suitable locations for CFOs. The Town commented that coming to agreement on an IDP is a political negotiation process between elected officials. The Town stated that it intends to develop more residential areas toward the south town boundary and that it has no plans in the foreseeable future to annex more land from the MD of Willow Creek.

The Town commented that the CFO exclusion area in the final IDP (Map 3 in the IDP) is smaller than what it originally recommended. The Town indicated that it had originally recommended that the CFO exclusion area surrounding Fort Macleod be two miles to the north and east of the town boundary and three miles to the south and west. According to the Town, the current exclusion zone area resulted from extensive political negotiations involving the Town and MD. An agreement between the Town and the MD on the current CFO exclusion zone was reached on November 19, 2021. The rationale provided by the Town as to why the current CFO exclusion area extends southwest of the town is that the local prevailing wind direction is from the southwest. When questioned by A&D Cattle about whether scientific evidence was used to



determine the prevailing wind direction, the Town stated that local knowledge was relied upon rather than scientific data and reiterated that the final CFO exclusion area resulted from extensive political negotiation.

The Town questioned the merit of the MD's letter of support for the proposed A&D Cattle CFO and its Request for Board Review in light of the MD's agreement to the IDP (including the CFO exclusion zone) on November 19, 2021. The Town clarified that the reason for the delay between the agreement on the IDP and adoption of the IDP was due to the required statutory steps, which were delayed in part by the Christmas holiday break.

The Town testified that A&D Cattle should have been aware of the IDP CFO exclusion zone based on a conversation the applicant had with the approval officer on November 3, 2021 where the proposed IDP was discussed, and because the IDP showing the exclusion zone was posted to both the Town's and the MD's website on or within days of November 19, 2021. The Town noted that both the November 3 conversation with the approval officer and posting of the IDP on the Town's and MD's websites occurred before the final version of the Part 2 application was received by the NRCB in early December 2021.

In closing, the Town stated that an important element of the planning process is to balance agricultural interests with the needs of town residents in order to minimize conflicts.

### ***Views of the MD of Willow Creek***

The MD of Willow Creek stated during the hearing that the purpose of the CFO exclusion area is to limit nuisance effects such as odour and dust. It confirmed that the CFO exclusion zone around the town that was initially proposed was a much larger area than what was finally agreed upon after negotiations between the MD and the Town. It noted that the map showing the exclusion zone in the IDP has not changed since November 2021.

The written submission of the MD of Willow Creek (exhibit 12, paragraph 23), provided a more detailed explanation of the MD's planning rationale for the CFO exclusion area. It stated, in part:

The use of "CFO exclusion areas" are a land use planning approach widely utilized for its simplicity and the corresponding ease of interpretation which clearly prohibits or limits the development or expansion of CFOs in specific areas of a municipality. These CFO exclusion areas are likely to be found around urban centres..." "The planning objective in the context is clear: to reduce the likelihood and/or severity of land use conflict stemming from the nuisance generated by a CFO. The exclusion distances range anywhere from 0.5 to 4.0 miles and are often oriented to account for the primary southwest winds in the region, topography, geographical features, or future growth directions of both the rural and urban municipalities.

### ***Views of the Board***

Although NRCB approval officers must deny applications that they determine are not consistent with MDP/IDP land use provisions, the Board is not bound by this requirement. Board Review Decision 2022-05/RA22002 (R&T Penner Farms Ltd.) lists considerations established by the

Board that it believes to be reasonable when determining whether a permit application should be approved notwithstanding an inconsistency with the MDP. What follows is a discussion about these considerations and the Board's findings.

The NRCB encourages municipalities to identify areas that they do not consider suitable for CFO development due to future land use planning objectives. This informs CFO applicants and the NRCB about potential conflicting land uses. Map 3 of the IDP illustrates the area agreed to by both the MD and the Town as the CFO Policy (Exclusion) Area. Policy 3.1 of the IDP states that new CFOs, and expansions of existing CFOs that would increase livestock numbers, are not permitted within this area. The Board observes that the land designated as the CFO exclusion zone in the IDP follows the north and east town boundaries, and then expands beyond the town boundaries to the south and west a maximum of 1.5 miles each way. This is consistent with the explanation provided by the Town that its goal was to locate CFOs farther away from the town in the southwest direction due to the prevailing southwest winds in the area. Also, in exhibit 12 the MD stated that CFO exclusion distances are often oriented to account for the primary southwest winds in the region. Although scientific evidence was not provided to support the prevailing wind direction, the Board accepts that the predominant wind direction in this area is primarily from the southwest based on local knowledge.

The *Municipal Government Act* requires that IDPs must address the future land use within the IDP area. The Board understands that when municipalities negotiate an IDP it is a political process. Both municipalities emphasized the importance of minimizing land use conflicts between urban and agricultural uses, and that this was their primary objective when establishing the CFO exclusion zone in the IDP. The Board finds this rationale is reasonable and reflective of good planning, and that there is a direct link between the planning objectives and the establishment of the CFO exclusion zone.

The Board has considered A&D Cattle's argument that having an exclusion zone does not accurately predict how nuisance effects from a CFO will impact town residents; therefore, the MDS calculation provided in AOPA's Standards and Administration Regulation should be used instead. The Town of Fort Macleod is one of many urban communities that designate a CFO exclusion zone. Though the proposed CFO meets the MDS distance requirement to town residences today, this may not be the case for the lifetime of the CFO, especially since CFO permits do not have an expiration date. AOPA requires the Board to have regard for MDPs/IDPs, and the Board firmly believes that when there is a future land use plan for an area, it must be taken into consideration when siting CFOs. Although the Town does not expect to grow rapidly, it is anticipating modest growth and has developed its land use plan accordingly.

The Board respects that the IDP was designed to meet joint planning objectives of the MD and the Town. Further, the Board appreciates that establishing CFO exclusion zones are one of the few opportunities that municipalities have to provide input to the NRCB regarding suitable locations for CFOs and their potential impacts on municipal planning. Although the proposed CFO is relatively small, the Board finds that it is not compatible with the IDP even though MDS requirements are met. The rationale for this is that the CFO is located southwest of the town (the prevailing wind is from the southwest). Additionally, the Board finds that the use of

exclusion zones is a reasonable planning tool for municipalities and has been supported by the Board in previous decision. In this case, the Board is not willing to approve this proposed CFO application, given its inconsistency with the IDP.

## **Decision**

The Board upholds the approval officer's decision that denies the A&D Cattle Ltd. Application LA21037.

DATED at EDMONTON, ALBERTA, this 27<sup>th</sup> day July, 2022.

Original signed by:

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Peter Woloshyn (chair)

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Sandi Roberts

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Walter Ceroici