



BOARD REVIEW DECISION

2022-16 / FA21002

Review of Decision Summary FA21002

Hutterian Brethren Church of Cleardale

December 19, 2022

The Board issues this decision under the authority of the *Agricultural Operations Practices Act (AOPA or the Act)*, following the Board’s review of Decision Summary FA21002 and subsequent submissions for the written review.

Background

NRCB Decision Summary FA21002 (the Decision Summary), was issued by an approval officer on October 12, 2022, denying an application by the Hutterian Brethren Church of Cleardale (Cleardale or the Colony) for a beef confined feeding operation (CFO) consisting of 6,000 beef finishers. The application included a request to permit previously constructed pens and a catch basin, and construct new pens and a new catch basin. The CFO is located at SW 32-84-9 W6M in Clear Hills County (the County).

Under section 20(1)(a) of AOPA, approval officers must consider whether the application is consistent with the municipal development plan (MDP) land use provisions and, where an inconsistency exists, the approval officer must deny the application. In this case, the approval officer denied application FA21002 since, in the opinion of the approval officer, the application is inconsistent with Clear Hills County MDP.

The Board received one Request for Review (RFR) of the Decision Summary from the Colony, asking the Board to reverse the denial decision.

On November 15, 2022, NRCB Board Decision RFR 2022-14 / FA21002 was released, advising that the Board had determined that a written review was warranted. The issues for review were provided on page 4 of that decision.

The review submission filing deadline was November 23, 2022. The County, the Colony, NRCB Field Services, and John and Mary Peters filed submissions prior to the deadline. The reply submission deadline was November 30, 2022. Sylvia Gula filed a reply submission before the deadline.

Hearing Issues

Board Decision RFR 2022-14 identified one issue for consideration in the review:

Whether the CFO application is consistent with Schedule G exclusion zone map and setbacks in the County’s MDP or whether the Board should exercise its authority to approve application FA21002 from Cleardale, notwithstanding an inconsistency with the County’s MDP land use provisions.

By way of reminder, the Board notes that 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

Views of Clear Hills County

Clear Hills County's review submission spoke to only one of the three matters the Board requested the County to address in its November 15, 2022 RFR decision.

The County stated that it is not opposed to approval of Application FA21002, and explained that because the livestock operation at this site predates the current MDP, it views this operation as grandfathered, and therefore the existing MDP setbacks do not apply. The County commented that it was not aware the operation does not have an NRCB approval for its current herd size, and took the application to expand at face value.

Views of Hutterian Brethren Church of Cleardale (the Colony)

The Colony stated that in its view the County's MDP setback provisions are not reasonable or appropriate for the purposes of determining CFO exclusion zones. The Colony questioned why such setbacks are needed given that all AOPA requirements have been met or exceeded. In addition, the Colony reminded the Board that the County is not in opposition to the application.

Views of Directly Affected Parties (DAPs) John and Mary Peters, Sylvia Gula

In their review submissions, the DAPs raised a number of issues that were previously raised during the RFR rebuttal stage.

The Peters did not submit an RFR rebuttal; however, in their hearing submission they expressed a concern about possible contamination of their dugout from surface water runoff.

The Peters questioned why the application is being considered since the entire county is an exclusion zone. The Board recognizes this is the central issue at hand and addresses it below.

Views of the Board

Concerns of DAPs

The Board previously ruled that the approval officer adequately dealt with issues related to property values, odour, traffic and public notification. Regarding the Peters' concern about possible contamination of their dugout from surface water runoff, the Board finds that the approval officer adequately dealt with this concern as explained in the Decision Summary, Appendix C.

Whether the application is consistent with the County's MDP

The Board reviewed and is in agreement with the approval officer's analysis that concluded application FA21002 is inconsistent with Clear Hills County MDP. The Board notes that no party to the RFR claimed that the approval officer erred in his conclusion that the application is inconsistent with the MDP.

Whether the Board should approve application FA21002 despite its inconsistency with the MDP

The Board's RFR decision released on November 15, 2022 included a request, primarily directed to the County, to address several questions related to the MDP. The County filed a submission that met the filing deadline and is dated November 17, 2022. Unfortunately, the County's submission only addressed one of the questions posed by the Board.

The Board notes that the County stated it was originally unaware that the Colony's existing feedlot did not have an NRCB permit and the construction was unauthorized. However, in the Decision Summary the approval officer clearly stated that the existing facilities are not grandfathered and the application applies to the entire CFO footprint and capacity for a beef feedlot. The County's November 17, 2022 letter indicated that the County remains unopposed to what they describe as an **expansion**. The Board fails to understand the County's conclusion that the application is for an expansion. During its deliberations, panel members expressed their frustration that the County offered minimal response to the Board's questions contained in its November 15, 2022 RFR decision.

The Board reviewed in detail the Clear Hills County MDP and makes the following observations and conclusions.

Schedule G map "Confined Feeding Operations Permitted and Exclusion Areas" depicts nearly the entire county, less one small area of land in TWP86 RGE11 W6 and the Grimshaw Gravels, as a CFO Exclusion Area (light yellow). The Schedule G map legend lists a number of setbacks that either are used to create the exclusion area or are to apply to applications made within the Exclusion Area. The setback distances are the same for all potential receptors, suggesting the distances are arbitrary rather than based on any form of risk analysis. The Board notes that the CFO Exclusion Area as depicted in Schedule G includes essentially the entire county.

There is one small area of land in TWP86 RGE11 W6 depicted as "CFO Permitted Area". It is unclear to the Board whether the setbacks listed in Schedule G have been met for all lands located within the CFO Permitted Area or the setbacks don't apply in the CFO Permitted Area. The Board also notes that the CFO Permitted Area is entirely crown land. In any event, this proposed CFO is not located within the CFO Permitted Area as depicted on the map in Schedule G.

The Board found it confusing that the County may or may not support CFO applications proposed in the tiny CFO Permitted Area (several sections of land) depicted in Schedule G. It appears that there is no property in the County that is not subject to the County's opinion whether an application for a CFO should be supported. For reference, the MDP indicates that the County may support CFOs that are not located within the exclusionary zones (i.e.: CFO Exclusion Zone). MDP section 3.1.2 (f) states:

*(f) The development of the CFO's **may** be encouraged in areas that are not impacted by the exclusionary zones map or other restrictive policies.*

i. The exclusion zones for confined feeding operations (CFO) shall be established by Schedule G.

With respect to the CFO Exclusion Zone that encompasses essentially the entire county, the Board notes that the County may restrict or relax a number of the Schedule G setbacks under

certain conditions. For example, MDP s. 3.1.2(f)(ii) indicates the County may relax setback requirements if mitigation measures limit potential effects stemming from CFOs.

(ii) Notwithstanding the above, the County may relax the setback requirements if the proposal includes mitigative measures to limit negative impacts to adjacent land owners or environmental features, and to lessen the cumulative effects from nearby CFOs, as identified within an environmental assessment prepared by a qualified environmental professional.

Also confusing is MDP subsection 3.1.2(h):

*The County **may** recommend to restrict the development of a new Confined Feeding Operations (CFO) to a minimum of 3.2 km from an existing country residential development and an intensive recreation area unless the proponent provides proof of measures to be used on site that would mitigate negative impacts to the existing country residential development, as identified within the required environmental assessment prepared by a qualified environmental professional.*

The Schedule G setbacks appear on their face to be definitive (restrictive) unless the County relaxes the setback as indicated in s. 3.1.2(f)(ii) above. Yet, subsection 3.1.2(h) states that the “County **may** recommend to restrict the development of a new CFO to a minimum of 3.2 km from an existing country residential development...” The Board is unclear which of the Schedule G setbacks are intended to be definitive, restrictive or discretionary.

What is clear to the Board is that the County’s MDP provisions are designed to provide the County with the latitude to restrict or relax the Schedule G MDP provisions regarding CFOs on a case-by-case basis. In other words, it appears to the Board that through the MDP the County expects to make a discretionary decision on each and every CFO application.

The Board next focused its attention on the nature and objectives of the Schedule G setbacks. The Board finds that the setbacks are broad based County wide criteria intended to be applied to every CFO application (less the 3-4 sections of land in the CFO Permitted Area). More typically, planning objectives are designed to target development such as CFOs in areas that are suitable for intensive livestock and away from areas that have the potential to create significant land use conflicts. The Board also reviewed the explanation of Schedule G setbacks as outlined in the County’s Land Use Bylaw (LUB) (<https://clearhillscounty.ab.ca/wp-content/uploads/2021/07/Bylaw-No.-189-16-Land-Use-Bylaw-consolidated-to-June-2019.pdf>).

Schedule G lists the following setbacks

- **152.4 m from roads**

Section 20(1)(b)(i) of AOPA directs approval officers to consider matters that would normally be considered if a development permit were being issued. The Board notes that approval officers routinely respect municipal CFO setback requirements from roads. The Decision Summary, section 9, stated the County responded that based on the LUB required setbacks the proposed expansion would be appropriate. The Board has no comment whether the County’s setback of 152.4 m is appropriate.

- **3.2 km from residence**

The Board finds the County's 3.2 km setback from residences a broad based non-targeted provision intended to replace the Minimum Distance Separation (MDS) provisions in the *Standards and Administration Regulation of AOPA* (the Standards). The Board has previously ruled on MDP provisions that impose setbacks by modifying AOPA's MDS. The Board is particularly concerned in situations where the MDP attempts to modify MDS through setback provisions that apply to all existing and future receptors that are already governed by MDS provisions in AOPA (e.g.: residences). The Board provided an opinion on this issue in the 2007 Wyntjes decision:

MDS is a "flexible nuisance mitigation setback that addresses both the odour production components of a CFO (including size, management system, and species type) and the odour sensitivity objectives of the surrounding area according to the category of land zoning (e.g. agricultural, country residential, recreational, town or city). Wyntjes, 2007-11 at 7. MDS "represents the legislature's intent to prevent nuisance associated with CFOs by setting back operations from residences.... In this regard, the statutory framework accounts for the concerns associated with citing a CFO in proximity to higher density populations by imposing a larger MDS."

The Board finds that the Schedule G 3.2 km setback from residences is indiscriminate and inappropriately replaces the MDS provisions in AOPA and is inconsistent with the spirit of the Act.

- **3.2 km from licensed CFO**

The Board is unclear what land planning objectives are intended to be met with a reciprocal CFO setback. The County provided no background or explanation in its November 17 hearing submission. The County's LUB makes no mention of this setback provision. Since no CFO was identified within the 3.2 km setback the Board does not need to assess this setback further.

- **3.2 km from water bodies, rivers, streams, tributaries, wetlands**

The Board finds the Schedule G setback to water bodies, rivers, streams, tributaries and wetlands is similar to Board findings in relation to the MDP setback provision to residences. The Board finds this setback represents a broad based non-targeted provision intended to replace environmental setbacks in section 7(1) of the Standards. As stated in RFR 2018-11:

"In past decisions, the Board has consistently respected municipal setbacks to public recreational facilities when it finds that municipal development plan setbacks are reasonable and established to support current and future land uses. When assessing MDP land use provisions that deal strictly with environmental protection related to CFOs, the Board will generally rely on AOPA standards as they provide the statutory tool to accomplish those objectives." 500016 Alberta Ltd., RFR 2018-11, pp. 3-4.

The Board finds that the Schedule G 3.2 km setback to water bodies, rivers, streams, tributaries and wetlands inappropriately replaces the environmental setbacks in the

Standards, is indiscriminate and is not consistent with the spirit of the Act.

- **3.2 km from a Town/Hamlet**
3.2 km from the Grimshaw Gravels Aquifer
3.2 km from Intensive Recreation Area
3.2 km from Environmental Sensitive Area

The Board recognizes that setbacks to these four categories have merit. Whether the Board would approve an application for a CFO despite an inconsistency with any one of these setbacks would be made on a case-by-case basis. None of the directly affected parties, approval officer, or County claimed that any one of these setbacks applied for application FA21002. The Board makes no finding in relation to these setbacks.

Decision

For the reasons set out above, the Board hereby directs the approval officer to issue an approval to the Hutterian Brethren Church of Cleardale to construct and operate a confined feeding operation as described in application FA21002. Given the indiscriminate and far reaching impact of the Schedule G setbacks, the Board notes that most, if not all, applications for CFOs will be found inconsistent with the County's MDP. In the Board's view this outcome is inconsistent with the legislative scheme and the spirit of the Act.

DATED at EDMONTON, ALBERTA, this 19th day December, 2022.

Original signed by:

Peter Woloshyn (chair)

Sandi Roberts

Daniel Heaney

Earl Graham