



## **BOARD DECISION**

**2011-03 / FA10003**

Review of Decision Summary FA10003

Grow North Inc.

April 11, 2011

## **Background**

On December 10, 2010, NRCB Approval Officer Randy Bjorklund issued Decision Summary FA10003 to Grow North Inc., which approved an application to construct and operate a confined feeding operation (CFO) to be located at NE 4-111-19-W5 in Mackenzie County. The CFO consists of four feedlot barns which would collectively house a total of 5,000 beef finishers.

Requests for Board Review were filed by Ernie Derksen and Gerhard Neudorf on December 27, 2010 and January 4, 2011, respectively. Both parties were previously established as directly affected parties in the Approval Officer's Decision Summary and their requests met the 10-day filing deadline established by the *Alberta Agricultural Operation Practices Act (AOPA)*. A rebuttal submission was filed by Grow North Inc. (Grow North) in advance of the January 14, 2011 filing deadline.

The Board met on January 18 and 20, 2011 to deliberate on the Requests for Board Review filed by Mr. Derksen and Mr. Neudorf. In arriving at its decision to grant a review, the Board carefully considered Decision Summary FA10003, the Requests for Board Review and the rebuttal submission filed by Grow North.

In Board Decision RFR 2011-01/FA10003 issued on January 26, 2011, the Board found that the Approval Officer's rationale in concluding that the operation as located is consistent with the Municipal Development Plan (MDP) contained a number of assumptions and conclusions that warranted review. Therefore, the Board granted a review of Decision Summary FA10003 and advised that the hearing would take place on March 1 or 2, 2011 in High Level, 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 Mackenzie County's MDP, the Panel felt that Mackenzie County's participation in the hearing and review process was essential and therefore requested that Mackenzie County (the County) attend the hearing.

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

- Whether the application is consistent with the Municipal Development Plan, including the Inter-Municipal Development Plan; and,
- Whether the Board should exercise its authority under Section 25(4)(g) of the *Agricultural Operation Practices Act* in the case of this application, to have regard to, but not be bound by, the Municipal Development Plan.

Hearing submissions were filed by Ernie Derksen, Gerhard Neudorf, Mackenzie County, Grow North, Tammie and Alvin Elder, William and Tina Wiebe, Aaron and Doreen Fischer, and the Approval Officer; each submission met the February 15, 2011 filing deadline.

The hearing was conducted on March 1, 2011 at the Best Western Mirage Hotel in High Level, Alberta. Parties to the review and their representatives are identified below:

<b>Parties to the Review</b>	<b>Counsel/Representative</b>
NRCB Approval Officer <ul style="list-style-type: none"> <li>• Randy Bjorklund, Approval Officer</li> </ul>	Mike Wenig, Counsel
Grow North Inc. <ul style="list-style-type: none"> <li>• Mike Mihaly</li> </ul>	Larry Hryniuk, Q.C., Counsel
Mackenzie County <ul style="list-style-type: none"> <li>• William (Bill) Kostiw, Chief Administrative Officer</li> <li>• Marion Krahn, Supervisor of Planning and Development</li> </ul>	Barry A. Sjolie, Q.C., Counsel
Ernie Derksen	Ernie Derksen
Gerhard Neudorf	Gerhard Neudorf
Aaron and Doreen Fischer	Aaron Fischer
Alvin and Tammie Elder	Tammie Elder
William and Tina Wiebe	William Wiebe
In addition, the Board was assisted by Bill Kennedy, Legal Counsel, and Susan Schlemko, Manager of Board Reviews.	

Mackenzie County, Ernie Derksen, Gerhard Neudorf, Aaron and Doreen Fischer, Alvin and Tammie Elder, and William and Tina Wiebe made submissions asking the Board to refuse to grant Approval FA10003 to Grow North. Each of these parties made submissions asking the Board to find the siting of the CFO inconsistent with the provisions of the Mackenzie County Municipal Development Plan and the Mackenzie County – Town of High Level Inter-Municipal Development Plan. Grow North’s submission asked the Board to reach the same finding as Decision Summary FA10003 with respect to the municipal planning documents.

On the second question, Mackenzie County, Ernie Derksen, Gerhard Neudorf, Aaron and Doreen Fischer, Alvin and Tammie Elder, and William and Tina Wiebe made submissions asking the Board not to override the MDP. Grow North submitted that the provisions of the separation distances in Section 4.2.9 of the MDP would have the cumulative effect of eliminating confined feeding operations throughout the County. Grow North submitted that the site had the benefit of access to rail lines and good roads and that the development would provide substantial economic benefits to the community.

## Issues

### 1. Whether the application is consistent with the Municipal Development Plan, including the Inter-Municipal Development Plan

Sections 20(1) and 20(1.1) of *AOPA* require that an Approval Officer, in considering an application for a confined feeding operation, consider whether the application is consistent with the land use provisions contained within the relevant municipal development plan. If the application is inconsistent with the relevant land use provisions, the Approval Officer has no discretion and must deny the application. In Decision Summary FA10003 the Approval Officer determined that the Grow North application was consistent with Mackenzie County's MDP.

The MDP considered by the Approval Officer was adopted as Bylaw #735/09 by Mackenzie County on November 10, 2009. The Approval Officer concluded that the Mackenzie County – Town of High Level Inter-Municipal Development Plan (IDP) must also be considered as the MDP. Policy 15.2.3 provides that, "*Planning and development applications that are subject to the Town of High Level and Mackenzie County IDP, and are located within the area shown on Map 7, shall be directed by the policies of the IDP.*" The Board is satisfied that the Approval Officer was correct in considering the IDP, as this conclusion is supported by a plain reading of the MDP.

Key provisions in the IDP provide that areas identified as agricultural areas are to remain agricultural in nature in accordance with the County's Land Use Bylaw. Also included is a map reference identifying an area preferred for future residential development that included the Grow North application lands.

The Board was challenged in interpreting the relevant sections of the "*land use policy directions*" section in the IDP concerning "*agriculture*" and "*residential*," and in particular, the maps included as schedules to the pertinent sections. For example, Schedule E which is to identify agricultural lands in the IDP plan omits "*agriculture*" in the legend, thus making it difficult to determine which lands are indeed considered "*agricultural lands*." The best explanation, which the Board accepts, is found in the County's evidence that the land in the Schedule F map designates areas which will be residential in the future and that they are currently zoned agriculture until a decision to change them to something else. Accordingly, the provisions of the IDP, while relevant, are not helpful in answering the question of the consistency of the application to the MDP due to their general nature.

The key provisions contained in the MDP provide:

- 4.2.8 Mackenzie County encourages the development of Confined Feeding Operations (CFOs), as a way of adding value to grain crops, and providing more employment and income per hectare of land.
  - a) Mackenzie County considers CFOs greater than ten times the size shown in Column 3 of Schedule 2 of Agricultural Operations, Part 2: Matters Regulation (Alberta Regulation 257/2001) as an inappropriate land use and encourages the NRCB to prohibit them in the County.
  - b) Some areas are especially suited to intensive animal operations because of good roads, plentiful water supply, superior soil conditions, and a lack of conflicting land uses. In these areas, the County may apply appropriate zoning to allow a CFO.

4.2.9 Applications to the NRCB for the establishment or expansion of CFOs shall not be supported by the County unless they are compatible with adjacent land uses, do not generate adverse health or environmental effects, follow the Agricultural Operations and Practices Act (AOPA) guidelines, and meet or exceed the following separation distances:

- a) 3.2 kilometres (km) from an adjacent municipality, Hamlet, Indian Reserve or a multi-lot country residential subdivision;
- b) 1.6 km from any federal, provincial or municipal park, water body, swamp, gully, ravine, coulee or natural drainage course, and may not be located in an area subject to flooding; and
- c) within a natural area.

Prior to making his decision, the Approval Officer contacted Mackenzie County on more than one occasion to request assistance with the interpretation of the language contained within the MDP and IDP. When the County did not provide a substantive response to these requests, the Approval Officer determined that the language stated in 4.2.8 stating that the County “*encourages the NRCB to prohibit them in the County*” and in 4.2.9 stating “*CFOs shall not be supported by the County unless*” (emphasis added) were intended to provide discretion. In the words of the Approval Officer, “*The fact that the County itself has never officially objected to, or requested that the NRCB deny, Grow North’s application, supports this interpretation that the MDP policy was not intended to be rigidly applied.*”

Section 20(1)(b) of AOPA states that the Approval Officer must deny the application if there is an inconsistency with the municipal development plan. While obligating the Approval Officer to interpret the land use provisions of the MDP it does not extend any discretion to the Approval Officer. The Approval Officers’ practice of seeking assistance from the municipal authority as an aid to the required interpretation is both appropriate and prudent.

The Board finds that the Approval Officer erred in imparting meaning to the lack of response from Mackenzie County. In the absence of advice from the municipality, the Approval Officer is left to interpret the MDP based on the wording in the plan. Even in cases where the municipality provides advice to the Approval Officer, this should be viewed as nothing more than an aid to interpretation.

The Board believes that the correct approach is to look to the relevant provisions of the MDP, having regard for any advice provided by the municipal authority and other directly affected parties, and determine whether the application filed is inconsistent with those provisions. In this case, the Board finds that the relevant provisions are found in Sections 4.2.8 and 4.2.9. While the MDP does include some general provisions promoting agriculture, the Board does not see how those provisions can be read in a manner that overrides a plain and simple interpretation of provisions that speak directly to the siting of CFOs.

While understanding that the MDP contains strategic direction rather than the level of detail found in the land use bylaw, the Board finds that language in Section 4.2.9 is clear. The statement that, “*Applications to the NRCB for the establishment or expansion of CFOs shall not be supported by the County unless they.....meet or exceed the following separation distances...*” contains a clear statement of the County’s vision for the siting of a CFO. The Board struggles with understanding that the absence of a response from the County could be interpreted as extending discretion to an NRCB Approval Officer. The Board further questions the purpose of

the Approval Officer asking the County whether or not it supported the Grow North application when the MDP contains a clear statement that it does not support them when they do not meet specified siting criteria. Even if Mackenzie County were to have advised the Approval Officer that it supported the Grow North application, this in itself would not have made this application consistent with the MDP.

The Board adopts the finding of the Approval Officer in Decision Summary FA10003 that the proposed CFO is within 3.2 km of a multi-lot country residential subdivision, the actual distance being 1350 metres. The Board therefore concludes that the proposed CFO, to be located within this area, is inconsistent with Section 4.2.9(a) of the MDP. In this case, given this inconsistency, the Approval Officer should have denied Grow North's application. The opportunity would then exist for the applicant to request a Board review, asking the Board to exercise its discretion under AOPA Section 25(4)(g) to have regard to, but not be bound by, the MDP. As the Board's conclusion in respect to Section 4.2.9(a) of the MDP is sufficient to answer the first question set for this review, and recognizing that the interpretation of this section was the focus of evidence and argument in this review, the Board will not address the consistency of the Grow North application with Section 4.2.8 or the remaining stipulations in Section 4.2.9 of the MDP in its findings on the first question, although it offers further comment in the final paragraph of the next section of this decision report.

Having concluded that Decision Summary FA10003 was incorrect in its finding that the Grow North application was consistent with the MDP, the Board must then consider the second question established for the review.

## **2. Whether the Board should exercise its authority under Section 25(4)(g) of the Agricultural Operation Practices Act in the case of this application, to have regard to, but not be bound by, the Municipal Development Plan**

Section 25(4)(g) of AOPA provides that the Board must have regard to, but is not bound by, the municipal development plan. In essence this provision provides the Board with the discretion to override the provisions of an MDP in the siting of a confined feeding operation.

In previous decisions the Board has been called upon to determine whether to use its discretion to approve an application for a CFO despite its inconsistency with the applicable MDP. In the recent Ekkel case<sup>1</sup>, the Board said:

*In past decision reports that considered CFO exclusions zones, the Board has been clear that, while it places a high priority on science-based decisions in AOPA, "it recognizes that good planning, supported by a transparent public process, must also be respected in the regulatory process." However, the Board has also stated that in exercising its obligation defined in AOPA, "it must evaluate the rationale for the designation of a zone or area where CFOs are excluded by the terms of an MDP."*

And further on determining whether a CFO exclusion zone is reasonable in the circumstances and reflective of good planning, the Board:

*...must inquire into the purposes for which the particular exclusion zone was established and whether those purposes related to good planning practice and*

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<sup>1</sup> 761714 Alberta Ltd. (John and Marlene Ekkel), Board Decision 2008-04/RA07043 dated May 23, 2008.

*whether there is a clear and direct link or rationale which links those purposes and the exclusion zone itself.*

In this case, there was no issue raised with respect to the County's evidence at the hearing that it followed the necessary public process in adopting its most recent MDP. Accordingly, this decision will focus on the matter of the rationale for Section 4.2.9(a) of the MDP and whether it reflects good planning. In exercising its discretion under *AOPA*, the Board will evaluate whether the MDP establishes a clear plan for assigning future land use within the County and the longer term impact on the community, if the Grow North application were to be approved.

In evaluating the rationale for the designation of a zone or area where CFOs are excluded by the terms of the MDP, the Board finds that the relevant provision is set out in Section 4.2.9(a) of the MDP which provides for a 3.2 km setback from a multi-lot country residential subdivision. The other provisions in Section 4.2.9(a) do not apply to the Grow North application (adjacent municipality; Hamlet; Indian Reserve). Also relevant to the Board's consideration were the provisions in the IDP that:

- country residential development north of the Heliport Road may be allowed according to the County's Land Use Bylaw; and,
- identifies the area north of the Town of High Level to be preferred for residential development on the Future Land Use Zoning Map.

In evaluating municipal restrictions on the siting of CFOs the Board is aware that one of the purposes of *AOPA* is to establish common rules across the province for the confined feeding industry. The Board understands the benefit such rules provide specifically to the agricultural industry and more generally to the provincial economy.

The Board also respects the importance of municipal land use planning and the public involvement necessary to establish a vision for a municipality. The Board heard that the County developed the MDP reflecting the vision of county residents. Part of this vision includes the balancing of conflicts between confined feeding operations and country residential development. The 3.2 km setback from existing country residential development was characterized as one response to this conflict. The Board finds that Mackenzie County provided adequate reasons for the Board to conclude that it would not be appropriate for the Board to override the restrictions on CFOs within 3.2 km of a country residential development in the specific case of Grow North, which is 1350 metres from the closest country residential subdivision. Having said this, the Board finds that the rationale provided by the County was not completely clear and for that reason the decision was a difficult one to reach. Conversely, Grow North did not provide a compelling argument for the Board to override the MDP provisions on this site. The determining factor for the Board, in this case, was based on the proximity of the existing country residential subdivision in the IDP area north of the Town of High Level and that this development appeared to represent an orderly progression of non-agricultural development between the Town and the airport. Accordingly, the Board will not exercise its discretion to approve the Grow North application for a CFO at the proposed site.

Having reached this conclusion, the Board does not have to consider Sections 4.2.8(a) or 4.2.9(b) of the MDP. However, the Board does believe that some comment may be helpful and therefore will provide its observations. The Board questions whether the size limitations contained in Section 4.2.8(a) are too generic in that they apply to the whole county, and whether the inclusion of such a provision is in direct conflict with the *AOPA* objectives that are intended to provide siting criteria across the province. The Board also questions those provisions in

Section 4.2.9(b) for setbacks from a water body, swamp, gully, ravine, coulee and natural drainage course, as depending on the particular circumstances, they could be matters intended by *AOPA* to be excluded from an Approval Officer's consideration when determining consistency with an MDP or are so lacking in specificity as to be impossible to apply throughout the county. The Board received no information concerning the planning rationale for the 1.6 km setback from a federal, provincial or municipal park and therefore will not comment on this restriction.

### **Board Decision**

Following consideration of all of the evidence, the Board hereby denies Application FA10003.

DATED at CALGARY, ALBERTA, this 11<sup>th</sup> day of April, 2011.

*Original signed by:*

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Vern Hartwell  
Panel Chair

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Donna Tingley  
Panel Member

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Jim Turner  
Panel Member



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