



BOARD DECISION

2011-04 / RA10053

Review of Decision Summary RA10053

Zealand Farms Ltd.

May 18, 2011

Background

On January 7, 2011 NRCB Approval Officer, Francisco Echegaray, issued Decision Summary RA10053, which approved an application made by Zealand Farms Ltd. (Zealand Farms) to construct and operate a new 95,000 poultry broiler operation to be located at NE 24-42-25 W4 in Ponoka County.

Subsequently, eight parties filed Requests for Board Review of Decision Summary and Approval RA10053, namely: Brad Shimwell, Mary Shimwell, Bernice and Larry Edwards, Donna Rudd, Marrion Owen, Darrell and Kate Gellatly, Ken and Cheryl Henkelman and Ponoka County (the County). Each of these requests met the 10-day filing deadline established by the *Agricultural Operation Practices Act (AOPA)*.

The Board issued a notice on January 31, 2011 granting a rebuttal opportunity to those parties who believed they would be adversely affected by the positions presented in the Requests for Board Review. In response, Wilson Law Office filed a rebuttal submission on behalf of Zealand Farms by the February 7, 2011 deadline.

The Board met on February 10, 2011 to deliberate on the Requests for Board Review. In its resulting decision (Board Decision RFR 2011-02/RA10053) issued February 17, 2011, the Board granted a review of Decision Summary RA10053 and advised that an oral hearing would be scheduled in Ponoka, Alberta.

In Board Decision RFR 2011-02/RA10053, the Board specified that it granted the review to consider whether the Zealand Farms application is consistent with the Ponoka County Municipal Development Plan (MDP), and, if not consistent with the MDP, whether the Board should exercise its authority under Section 25(4)(g) of *AOPA*, in the case of this application, to have regard to but not be bound by the MDP. Parties to the review were asked to address these matters in their written submissions.

A Board Panel (the Panel or the Board) consisting of Vern Hartwell (Panel Chair), Jim Turner and Donna Tingley was appointed to conduct the review.

The hearing date was scheduled for March 23, 2011 to accommodate all participants. Directly affected parties who wished to participate in the hearing were notified that the written submission deadline was set for March 10, 2011. Subsequently, submissions from those parties with standing to participate in the hearing were filed on behalf of: Ponoka County; Ron and Phyllis Shewchuk; Marrion Owen; Ken and Cheryl Henkelman; Brad Shimwell; Mary Shimwell; Approval Officer, Francisco Echegaray; and, Zealand Farms.

The hearing was conducted in Ponoka on March 23, 2011 at the Ponoka Community Golf Club. Parties to the review and their representatives are identified below:

Parties to the Review	Counsel/Representative
NRCB Approval Officer • Francisco Echegaray, Approval Officer	Mike Wenig, Counsel
Ponoka County	Charlie Cutforth, CAO

Parties to the Review	Counsel/Representative
Marrion Owen	Jill Owen
Ron and Phyllis Shewchuk	Ron Shewchuk
Brad Shimwell	Edith Williams
Mary Shimwell	Kevin Walcheske Bernice Edwards
Ken and Cheryl Henkelman	Ken Henkelman Roy Barrett
Zealand Farms Ltd. (Henk and Gerrie Krijger)	Keith Wilson, Counsel

Bill Kennedy participated in the hearing as General Counsel to the Board. Additional staff support was provided by Susan Schlemko, Board Reviews Manager.

The Board conducted a site visit on April 28, 2011 that allowed it to observe the proposed site in relation to other land and physical features (a summary of the route taken is attached as Schedule A).

This report briefly highlights the positions of the hearing participants and provides the Panel's decision following its review of Decision Summary RA10053.

Issues

The review hearing principally dealt with two matters for the Board's consideration:

- (1) whether the Zealand Farms application is consistent with the County's MDP; and,
- (2) if not consistent with the MDP, whether the Board should exercise its authority under Section 25(4)(g) of *AOPA*, in the case of this application, to have regard to but not be bound by the MDP.

Whether Zealand Farms' application is consistent with Ponoka County's MDP

The issue raised by this question is whether the Approval Officer correctly determined that the Zealand Farms application to construct and operate a new 95,000 poultry broiler operation was consistent with the Ponoka County MDP. An Approval Officer's authority to make this determination comes from Section 20(1)(a) of *AOPA* which says that an Approval Officer, when considering an application for an approval of a confined feeding operation (CFO), must consider whether the application is consistent with the MDP land use provisions. In making this determination, the Approval Officer is expressly prohibited, by Section 20(1.1) of *AOPA*, from considering provisions "*respecting tests or conditions related to the construction of or the site for a confined feeding operation or manure storage facility*" or provisions "*respecting the application of manure, composting materials or compost.*" If it is the opinion of the Approval

Officer that there is an inconsistency between the CFO application and the MDP land use provisions, the Approval Officer is required to deny the application.

The Board, when reviewing an Approval Officer decision under *AOPA*, is also pointed to the relevant MDP; but unlike the Approval Officer, the Board is directed by Section 25(4)(g) of *AOPA* to “*have regard to*” but not be bound by the applicable MDP. The result is that *AOPA* expressly empowers the Board not to follow the requirements of an MDP in appropriate cases.

In the Board’s opinion, the overall legislative scheme set out in *AOPA* governing the interplay between the specific requirements of *AOPA* and the land use provisions of the applicable MDP, and the need to resolve any conflicts between the two, divides the responsibilities between Approval Officers and the Board in a manner which respects the roles and responsibilities of the two. Under *AOPA*, Approval Officers interpret the land use provisions in the applicable MDP and apply those provisions to an application for an NRCB permit; the Board, on review, must interpret the MDP, but also bears the burden of deciding whether to override a municipal bylaw in respect to a specific CFO approval application in the event of a conflict. This is always a difficult decision, one which the Board believes is appropriate for a quasi-judicial board appointed by the Lieutenant Governor in Council.

In the matter of the Zealand Farms review, the relevant provision in the Ponoka County *By-Law 6-08-MDP Municipal Development Plan* is:

Policy 2.3 The County requests the NRCB not to allow new or expanded CFOs in the following areas:

- *within two miles of the towns of Ponoka and Rimbey*
- *within one mile of the hamlets of Bluffton and Hobbema*
- *in the Gull Lake and Red Deer Lake watersheds*
- *land within one mile of Chain Lakes*
- *Land designated for multiple lot acreage development*

And to impose very strict conditions on manure handling and storage in the following areas:

- *the Chain Lakes watershed*
- *the Maskwa Creek watershed, which is part of the watershed supplying the City of Wetaskiwin*

*These areas are shown on Map 2.
[emphasis added]*

The Board notes that the Approval Officer concluded in Decision Summary RA10053 that the proposed CFO would be within the one mile setback from Chain Lakes that is listed in the policy. Further, the Board notes that Zealand Farms, the CFO applicant, conceded in its written submission to the Board that the proposed CFO is within one mile of Chain Lakes and that “*it is a reasonable legal interpretation of the MDP wording and map [Map 2] that Ponoka County intended the NRCB to find an inconsistency between an application for a new CFO and the MDP where an application is on lands within one mile of Chain Lakes.*”

While the Board might conclude its discussion on question one on the basis of this admission by Zealand Farms, it will provide its full reasons on the matter of whether the Zealand Farms

application is consistent with the Ponoka County MDP in the interests of responding fully to the extensive arguments by the other parties.

Ponoka County advanced the position that the Zealand Farms application is *“in direct contravention of Ponoka County’s General Municipal Plan, Policy 2.3”*. This position was supported by directly affected parties Marrion Owen, Ron and Phyllis Shewchuk, Brad Shimwell, Mary Shimwell, and Ken and Cheryl Henkelman.

The Approval Officer, in Decision Summary RA10053, focused his reasoning in reviewing Policy 2.3 on the County’s intent in using the word “requests”, concluding that *“the NRCB interprets this provision as intending to give the County a considerable discretionary and ad hoc decision-making function for itself through its provision of comments to the NRCB on individual AOPA permit applications. And further, “the MDP policy’s use of the term ‘request’ also implies that it was intended to give the NRCB discretion in deciding whether a proposed CFO meets the MDP consistency test in AOPA, even if it is within the specified setback distance. The fact that the County itself has never officially objected to, or requested that the NRCB deny, the application, supports this interpretation that the MDP policy was not intended to be rigidly applied.”*

In his written submission, the Approval Officer clarified his reasoning in finding that the Zealand Farms application was consistent with Policy 2.3 of the Ponoka County MDP. He explained that the fact that the County’s responses to the Zealand Farms application raised issues that did not pertain to the one mile setback in Policy 2.3, such as the availability of one of the lands listed for manure spreading and the County’s interest in seeing a more detailed soil investigation, suggested *“that the County itself did not view the one mile setback as definitive – either for purposes of the NRCB’s consistency determination or for the County’s development of its own position on Zealand Farms’ application.”*

In his written submission, the Approval Officer drew the Board’s attention to a recent County response to an application by SceKris Management Inc. (SceKris) for an NRCB approval to expand a dairy operation within another setback in Policy 2.3, the two mile setback from the Town of Rimbey. According to the Approval Officer, the dairy was roughly 0.3 miles from Rimbey, well within the prescribed two mile setback. When asked for comment on the SceKris application, the County suggested that the application be referred to the Town of Rimbey and if it did not object, the County would endorse the application. There was no objection from the Town, and the permit was issued by the NRCB on the basis that *“the provision does not appear to intend that the exclusion zone be applied automatically or rigidly in every instance...”*. Ponoka County did not request a Board review of the Approval Officer decision in SceKris.

The Approval Officer also, in his written submission, argued that the word “request” in Policy 2.3 should be interpreted to mean that the requestor *“believes the person being requested has a choice or discretion to decide whether or not to provide or do what the requestor is asking”*, based on the dictionary definition of the word. The County, in oral testimony, replied that: *“when we say we ‘request the NRCB’ that may sound weak. Well, the reality is... that we don’t have jurisdiction; you do. That’s why we have said “request” rather than arbitrarily trying to restrict it because we know you have the authority to go beyond that and we accept that.”*

Having considered the evidence and the parties’ arguments on question one, the Board concludes that the Zealand Farms application is inconsistent with Policy 2.3 of the Ponoka County MDP for the following reasons.

At the outset, the Board finds that the location of the Zealand Farms application is within the one mile exclusion zone established by Policy 2.3 based on the submissions of both the Approval Officer and Zealand Farms. The remaining question is what is the correct meaning of the opening words of Policy 2.3: can the Approval Officer infer from the dictionary meaning of the word “request”, plus the actions of the County in responding to the Zealand Farms application and the SceKris applications, that the Approval Officer is authorized to use his discretion when applying the MDP.

In a recent Board Decision, 2011-03, *Grow North Inc.*, the Board was required to consider a similar provision in a different MDP which provided 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...*” [emphasis added]. In *Grow North Inc.*, Mackenzie County did not provide a substantive response to requests from the Approval Officer for assistance interpreting the MDP, leading the Approval Officer to conclude that the language in the MDP was intended to provide discretion. In its decision, the Board offered the following direction to an Approval Officer interpreting an MDP:

“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...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.”

Following the same reasoning, in this case the Board does not agree that the Approval Officer can infer from the County’s responses to his requests for interpretation which raised concerns about the proposed CFO that did not relate to Policy 3.2, that the one mile setback in Policy 2.3 was not intended to be definitive. Similarly, the inconsistent response of the County to the NRCB in similar cases, being SceKris and Zealand Farms, while disappointing to this Board, and most likely frustrating to the citizens of Ponoka County who no doubt expect fair and consistent application of their laws, does not create discretionary decision-making power for an Approval Officer. The actions of the County in this instance are not sufficient to override the plain meaning of Policy 2.3.

The Board agrees with the position of the Approval Officer that any input to the Approval Officer concerning an MDP constitutes an aid to interpretation and that it must be the Approval Officer’s interpretation of the MDP that prevails. However, the Board does not agree with the Approval Officer’s interpretation of the word “requests” in Policy 2.3. In the Board’s view, the MDP’s use of the word “requests” is acceptable in these circumstances where a municipality is communicating its preferred policy outcome to a statutory decision-maker, the NRCB. It is not only courteous, but it fairly represents the respective roles of the County, Approval Officer and Board under the legislation. As stated by one directly affected party, “*it seems to me ‘request’ is the only thing that you can do when you ask for something that’s not in your jurisdiction or authority.*” Accordingly, the Board concludes that the position of Ponoka County regarding the siting of CFOs within the County is clear from the wording of Policy 2.3.

Having found that the Zealand Farms application is inconsistent with Policy 2.3 of the Ponoka County MDP, the Board must consider question two and decide whether to exercise its discretion to override the MDP in this case.

Whether the Board should exercise its authority under AOPA Section 25(4)(g), to have regard to but not be bound by the MDP.

Section 25(4)(g) of *AOPA* provides that the Board must have regard to, but is not bound by, the MDP. This section provides the Board with discretion to approve a CFO, notwithstanding provisions in an MDP that prohibit siting an operation at that location. The Board must determine whether it is prepared to exercise its discretion in relation to Policy 2.3 of the Ponoka County MDP that states “*the County requests the NRCSB not to allow new or expanded CFOs in the following areas:land within one mile of Chain Lakes.*”

Consistent with previous Board decisions and with the knowledge that MDPs are adopted through an open and transparent process, the Board believes that a reasonable approach to this issue requires that it must:

1. identify the municipal authority’s rationale for establishing the relevant provision(s) in the MDP;
2. determine whether the relevant provision is reasonable and reflective of good planning;
3. determine whether there is a direct link between the planning objectives and the establishment of the CFO exclusion zone; and,
4. identify whether the MDP is in conflict with the *AOPA* objective of establishing common rules for the siting of CFOs across the province.

The planning authority and obligations of municipalities must be conducted in accordance with the *Municipal Government Act*. In order to identify the municipal authority’s rationale for establishing the various provisions of an MDP it is important to understand the purpose of municipal planning. Section 617 of the *Municipal Government Act* provides:

- 617 *The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted*
- (a) *to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and*
- (b) *to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta, without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.*

Ponoka County stated that it had identified a CFO exclusion zone for land within one mile of Chain Lakes and in the Gull Lake and Red Deer Lake watersheds, in recognition of the potential for higher density use. The County advised the Board that, while it had many other lakes within its boundaries, only these lakes are specifically named as they are larger and have greater potential for cottage and acreage development. While Red Deer Lake and Gull Lake were identified as including highly concentrated cottage development, development surrounding Chain Lakes focuses on acreage properties. The County stated that the purposes for establishing the CFO exclusion zone related to incompatibility of use, citing odour, traffic and surface water quality.

The Board notes that Ponoka County is located in the corridor between Edmonton and Calgary that has and will continue to experience significant growth pressures. The County clearly faces

challenges in protecting the agricultural nature and history of the community in the face of such growth pressures and must respond by exercising its planning authority. The Board acknowledges that the targeting of areas within the municipality for development of small parcel or acreage development around land that has recreational potential reflects good planning. The Board accepts that establishing a buffer for new or expanded CFOs that would extend one mile from the lakeshore of Chain Lakes is not excessive. The County advised the Board that currently no CFOs exist within the one mile setback from the Chain Lakes. In this instance, the Board accepts that the provision for a one mile setback from the lake is reasonable.

In considering the rationale for excluding new or expanded CFOs within the one mile lake proximity zone, the Board had regard for each of the considerations provided by the County in support of the provision. Odour, traffic and the potential to affect lake water quality were all cited by the County as the contributing reasons to the MDP provision. Odour and traffic are often cited as inherent effects associated with confined feeding operations; and while the magnitude of these effects may vary greatly dependent on the type and design of operation, the Board generally accepts that these aspects of a CFO are appropriate considerations for a municipality in establishing a plan in accordance with Section 617 of the *Municipal Government Act*.

The Board is less convinced that the prohibition of CFOs as a measure to protect surface water quality is a reasonable planning provision. Having regard for the regulated nature of manure storage and handling contained within *AOPA*, the Board is satisfied that the relative risk associated to surface water is recognized and addressed through the technical regulatory requirements established under *AOPA*. While it acknowledges that there has been a decline in surface water quality throughout settled areas of the province, the Board does not believe it reasonable to single out the confined feeding industry as the only activity to be excluded specifically from these areas.

Before addressing the question of whether the MDP is in conflict with *AOPA*'s objective of establishing common rules for the siting of CFOs across the province, the Board believes that it must consider if *AOPA* Section 25(4)(g) intended to grant the Board with the general power to override MDPs in situations where it concluded that the plan went too far in restricting the development of CFOs, or whether the intent was to consider the specific aspects of a CFO application and determine whether it would create a conflict with the planning objectives. This question is particularly relevant to this review given the evidence heard by the Board.

The Board concludes that the intent of Section 25(4)(g) is to limit its authority to override MDP provisions that exclude CFOs in cases where the planning rationale is not consistent with clear and reasonable development objectives. In cases where the Board is satisfied that the MDP respects the intent of *AOPA* to create a level playing field for this component of the agricultural industry across the province, the Board will not interfere with the municipal land use planning mandate. Ponoka County has established an MDP that contemplates CFO development throughout the majority of its lands. While some of the restrictive provisions contained in the County's MDP may warrant consideration in respect of their consistency with *AOPA* in future reviews, this specific provision (i.e., "land within one mile of Chain Lakes") is entirely consistent with the objectives of *AOPA*. For this reason, the Board cancels Approval RA10053.

Having reached this decision, the Board wishes to comment on some specific elements of this application. Zealand Farms presented evidence and argument to the Board that the nuisance type effects from a poultry operation are substantially less than might be associated with operations that rely on liquid manure storage and the transport of large animals and large

quantities of feed and bedding. Further, the evidence submitted by Zealand Farms, Ponoka County and some directly affected parties was that Zealand Farms was respected for the quality of its current operation located northeast of the proposed site. The Board does not take exception with any of these submissions, and notes that Zealand Farms has incurred a significant investment of time and capital to advance its application to this point.

The proposed operation is located on a quarter section parcel that includes land both within and outside of the one mile lake setback, with the proposed building located approximately 0.8 miles from the lakeshore. There may be an opportunity to move the building site within the same quarter section parcel that would result in the operation respecting the one mile lake setback. Should this occur, the new application would have to be assessed by an NRCB Approval Officer, although there could be the potential to incorporate many components of the existing proposal.

Board Decision

Approval RA10053 is cancelled.

DATED at CALGARY, ALBERTA, this 18th day of May, 2011.

Original signed by:

Vern Hartwell
Panel Chair

Donna Tingley
Panel Member

Jim Turner
Panel Member

Schedule A

Panel site visit, April 28, 2011

The Panel members began their site tour at Highway 2A and Junction 53 heading eastbound. They turned south at Secondary 815 and followed it to Township Road 424 where they turned left (to head eastbound on 424). The Panel proceeded to travel three miles along Township Road 424, then turned right at RR 250 (travelling southbound).

Next, they drove past the proposed site of the Zealand Farms operation and observed runoff drainage from the quarter to the east (passing through a culvert under the road). They also observed three seasonal feeding and bedding sites along RR 250 (southbound) and water running in the general area. The Panel continued to follow the road as it veered down to the right and arrived at the lake. They walked to the lake's edge and observed the lay of the land.

They proceeded again heading southbound on RR 250, turned right and crossed the lake – passing by Fish & Game Association property. The Panel crossed the bridge at the south end of the lake (they turned around after reaching an impassable roadway).

The Panel then returned to RR 250 and proceeded eastbound until reaching a dead end. They then headed northbound again on RR 250. They observed the boundary where the Krijger's property for the proposed operation begins and surveyed the general lay of the land. At the Krijger's property the Panel took note of the wellheads and a fenceline, as well as the row of trees on the property near the proposed barn site.

The Panel then turned right to head east on Township Road 424. The Panel members observed wetlands to the left and the Krijger's existing barn also to the left. Next, the Panel turned left on RR 244 (Rosas Road) travelling northbound.

Next, the Panel turned left onto Hwy 53 (travelling westbound); then turned left onto RR 245 towards Zealand Farms and observed their existing farm operation. The Panel then returned to Highway 53 and turned left onto RR 250 going southbound (Chain Lakes Road), turned right onto 424 (westbound) and again drove past the proposed barn site, this time passing by on its north side.

Next the Panel turned left, heading southbound on RR 251, and observed the lay of the land. Then they turned left onto 241 (heading eastbound) and observed a dairy barn. They drove by the barn and a gravel pit operation and past C.L. Edwards' property. They then turned back and returned to RR 251 (turned southbound) following RR 251 to County Line Road and turned left entering Lacombe County (heading in easterly direction). The road veered to the right, and the Panel observed the lake to the left. From RR 24-5 the Panel turned left onto TWP Rd 41-4.

Next, the Panel turned left onto RR 24-3 (northbound) and drove to the lake (third Chain Lake). They walked to the lake's edge and observed the area. The Panel then headed back south on 24-3. The Panel then travelled east bound and crossed a bridge over outflow water. The Panel then turned left onto Hwy 821, travelled north on 821, turned left on Hwy 53 and headed back to Ponoka thereby completing their site tour.

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

19th Floor, 250 – 5 Street SW
Calgary, AB# T2P 0R4
T (403) 297-8269# 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
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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
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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.