



BOARD DECISION

2018-04 / RA17042

Review of Decision Summary RA17042

Milk & Honey Dairy Inc.

March 7, 2018

Background

This report provides the Board’s decision following its review hearing of Decision Summary RA17042.

On November 20, 2017, NRCB Approval Officer Francisco Echegaray issued Decision Summary RA17042 in relation to Milk & Honey Dairy Inc.’s (Milk & Honey) application to construct a new confined feeding operation (CFO) for 120 milking cows (plus associated dries and replacements), located at SE 14-43-26 W4M in Ponoka County (the County) approximately 1 mile from the Town of Ponoka. The proposed facilities included a dairy barn and a synthetic lined liquid manure storage. The approval officer denied Milk & Honey’s application, as he determined that it was inconsistent with the land use provisions of Ponoka County’s municipal development plan (MDP).

On November 27, 2017, a Request for NRCB Board Review of Decision Summary RA17042 was filed by Milk & Honey. A Panel (the Panel or Board) consisting of L. Page Stuart (Panel Chair), Michele Annich, and Sandi Roberts was appointed to conduct the review. On December 15, 2017, the Board advised parties by letter that it would conduct an oral hearing and that further details would be provided in a written Board decision on the Milk & Honey Request for Board Review; Board Decision RFR 2018-01 was issued on January 11, 2018.

Parties to the review were asked to file hearing submissions no later than January 29, 2018. To assist parties in preparing their submissions, the Board included a series of questions in Board Decision RFR 2018-01. Hearing submissions were submitted by Milk & Honey, the NRCB Approval Officer, Ponoka County, the Town of Ponoka, Bill Toporowski and Logan Kautz.

The hearing was conducted on February 7, 2018 at the Ponoka Legion in Ponoka. Parties to the review and their representatives attending the hearing are identified below:

Parties to the Review	Counsel/Representative
NRCB Approval Officer and Field Services <ul style="list-style-type: none"> • Francisco Echegaray, Approval Officer 	Mike Wenig, Counsel
Ponoka County <ul style="list-style-type: none"> • Charlie Cutforth, Chief Administrative Officer • Thomas G. Webber, Assistant Chief Administrative Officer 	Charlie Cutforth, Chief Administrative Officer
Milk & Honey Dairy Inc. <ul style="list-style-type: none"> • Marcel Wassink 	Marcel Wassink
Town of Ponoka	no appearance
Logan Kautz	Logan Kautz
William Toporowski	William Toporowski
Ryan and Ashley LaFontaine	Ryan LaFontaine

Bill Kennedy participated in the hearing as counsel for the Board. Additional staff support was provided by Laura Friend, Manager, Board Reviews.

Hearing Issues

Board Decision RFR 2018-01 identified two issues for consideration in the review:

- Issue 1. Whether the CFO application is consistent with article 2.3 of Ponoka County's MDP, and
- Issue 2. If the Board determines that the CFO application is not consistent with Ponoka County's MDP land use provisions, whether the Board should exercise its authority to approve the Milk & Honey CFO registration, notwithstanding an inconsistency with Ponoka County's MDP land use provisions.

Board Deliberations

Issue 1. Whether the CFO application is consistent with article 2.3 of Ponoka County's MDP

Milk & Honey asserted that the phrase "requests the NRCB not to allow" in article 2.3 of Ponoka County's MDP suggests that in considering whether to approve a CFO, there is discretion in relation to new or expanding CFOs in the 2 mile zone around the Town of Ponoka (the Town). Specifically, article 2.3 of Ponoka County's MDP (most recently amended in 2012) states that:

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 ... These areas are shown on Map 2.

The County Chief Administrative Officer (CAO)'s testimony described that the use of the term "requests" in the County's MDP reflects their understanding that municipalities no longer have approval authority for CFOs of a certain intensity. While previous NRCB Board decisions are not binding on this particular application, the Board does note that previous decisions have favoured the interpretation advanced by the County.

The Board finds that the phrase "...not to allow" following "requests the NRCB..." in article 2.3 suggests that a mandatory exclusion zone regarding CFOs exists within the 2 miles surrounding the Town of Ponoka's legal boundary. This interpretation is supported by the reference within article 2.3 to a map described as Map 2. The Board finds that the language on Map 2 supports the intent of the MDP under article 2.3 to be a mandatory prohibition of new CFOs in the two mile zone extending from the Town of Ponoka boundaries. There is no discretion afforded to waiver from the exclusion zone under the language contained on Map 2.

The applicant also asserted that the proposed Milk & Honey CFO satisfied the 2 mile distance requirement and that there is no inconsistency with the County MDP provision. Milk & Honey stated that the MDP uses ambiguous language in describing the 2 mile distance; to assess whether the Milk & Honey CFO application met the 2 mile separation, the measurement should be taken from the CFO facilities to the nearest existing residence in the Town of Ponoka rather than to the Town's boundary.

The Board finds that the language in the MDP is not ambiguous and that a plain reading supports that the County intended the measurement be taken from the Town's boundary. This interpretation is further supported both by testimony of the County's CAO at the hearing, and by the Town of Ponoka and County of Ponoka Intermunicipal Agreement on Development in the Urban Fringe (22 September 1998) (the 1998 agreement). The 1998 agreement, although acknowledged not to be legally binding as an intermunicipal

development plan, was written with the intent to “ensure that development in the County does not unreasonably interfere with the long term growth of the Town.” That agreement states that “no new intensive livestock operations will be allowed within two miles of the Town boundary.” At the hearing, the County’s CAO stated that the intention of the 1998 agreement was to manage conflict between agricultural and urban uses, and that when the County updated its MDP it included the CFO exclusion zone. The NRCB approval officer’s testimony confirmed that he did not find any ambiguity when he interpreted article 2.3 as requiring a measurement to be taken from the current Town boundary.

The Board finds that the proposed Milk & Honey CFO is not consistent with article 2.3 of the County MDP, as it is within the 2 mile exclusion zone measured from the Town of Ponoka boundary.

Issue 2. If the Board determines that the CFO application is not consistent with Ponoka County’s MDP land use provisions, whether the Board should exercise its authority to approve the Milk & Honey CFO registration, notwithstanding an inconsistency with Ponoka County’s MDP land use provisions.

Milk & Honey asserted that the exclusion zone has ballooned beyond a reasonable distance because of the annexations approved for the benefit of the Town. The applicant further submitted that the development of the annexed lands closest to the CFO site was not currently taking place, and that the annexed lands were not ripe for development. On this basis, Milk & Honey submitted that the CFO site should be approved because it would not interfere with expansion of the Town.

In considering whether to approve the Milk & Honey registration application notwithstanding the MDP land use provisions, the Board first identified the County’s rationale for establishing the 2 mile exclusion zone. In asking the Board to honour the exclusion zone, the County’s CAO stated that the intention for this provision was to avoid land use conflicts with the anticipated industrial and commercial growth in the Town of Ponoka. The evidence before the Board was that the Town lands closest to the Milk & Honey CFO are well-suited to commercial and industrial development that takes advantage of the Queen Elizabeth II Highway (QE2 Highway) exposure and access. The Town, in its written submission, advised the Board that permitting of the Milk & Honey CFO prior to its development of an Intermunicipal Development Plan (IDP) with the County may be detrimental to its long term planning interests. The Town further advised the Board that it has commenced the development of an Area Structure Plan (ASP) which includes the land annexed from the County in 2011 along Highway 53 to the Junction with the QE2 Highway. In the Municipal Government Board (MGB) Order MGB 019/11, the Executive Summary stated that a major objective of the annexation was to allow the Town exposure to the QE2 Highway for institutional and business development.

The Board also examined the available evidence on whether there is a direct link between the exclusion zone and the planning objectives of both the Town and County. Neither the IDP between the County and the Town, nor the relevant ASP for the 2011 lands annexed by the Town, have been completed. Both of these documents require consultation and collaboration; however, the Board heard from both the County and the Town (Exhibit 22) that these documents were a priority for 2018. Both municipal authorities asked the Board not to exercise its discretion in a manner that would approve the Milk & Honey CFO as such a decision would be detrimental to the Town’s future planning interests.

The Board accepts that the current planning initiatives described by the County and Town are reflective of sound planning. While the Board has to assess the relevance of the proposed Milk & Honey CFO in the exclusion zone, in absence of a completed IDP and ASP, the Board believes there is sufficient evidence to understand the relevant planning objectives.

When reviewing an approval officer decision to deny an application because of an inconsistency with an MDP's land use provisions, 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. Previous Board decisions have stated that the purpose of this provision is to establish common rules for the siting of CFOs across the province. At the hearing, the County submitted that there is no planning rationale for approving the Milk & Honey CFO in the exclusion zone. The County noted that it has 282,500 hectares of land in its boundaries and that agriculture is its priority land use; the exclusion zones around Rimbey and Ponoka take out about 20,000 hectares, leaving 262,500 hectares of land; and if an allowance is made and subtracted for country residential, hobby farms and other development, there is still well in excess of 220,000 hectares of land available for agricultural use, and consistent with the MDP. The County stated that it welcomes new confined feeding operations and other agricultural land uses, and that they are critical to the municipality.

Finally, in considering the foreseeability of development in the Town's annexed lands closest to the Milk & Honey CFO, the Board finds the most persuasive evidence in the decision of the MGB in Order MGB 019/11. The MGB describes an extensive 28 month public consultation process that started in April 2008. The MGB references the 1998 intermunicipal agreement as "providing a framework that allows the Town and the County to resolve potential land use and development differences at the local level." The MGB was clearly satisfied that the Town's annexation of lands adjacent to the QE2 Highway "will not take farmland out of production prematurely." The NRCB recognizes the MGB as the expert planning authority in relation to the establishment of the current Town of Ponoka boundary and the urban development forecast for the annexed lands closest to the proposed Milk & Honey CFO. It follows that the applicant's submission that the annexed lands and the exclusion zone are not indicative of the planning for the area, is directly contradicted by the MGB's Order 019/11, and by the land use provisions of the County's MDP (amended as recently as 2012).

The Board agrees with both the Town and the County that the proposed Milk & Honey CFO has the potential to create land use conflicts with contemplated land uses in the Town of Ponoka. Key to the Board's deliberations is the fact that the Milk & Honey CFO as proposed is approximately 1 mile from the current Town boundary. Having regard for all submissions, the Board concludes that it should not exercise its discretion to approve the registration of the proposed CFO, notwithstanding the inconsistency with the MDP.

Decision

For the reasons set out above, the Board declines to direct the approval officer to issue a registration to Milk & Honey to construct and operate a confined feeding operation as described in the application.

DATED at EDMONTON, ALBERTA, this 7th day of March, 2018.

Original signed by:

L. Page Stuart
Panel Chair

Michele Annich
Panel Member

Sandi Roberts
Panel Member

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