IN THE MATTER OF A REVIEW BY THE NATURAL RESOURCES CONSERVATION BOARD ("NRCB") REGARDING A & D CATTLE LTD., APPLICATION NO. LA 21037

AND IN THE MATTER OF THE *AGRICULTURAL OPERATIONS PRACTICES ACT*, RSA 2000, c A-7, AS AMENDED

WRITTEN SUBMISSIONS OF THE MUNICIPAL DISTRICT OF WILLOW CREEK NO. 26

On Behalf of the Municipal District of Willow Creek No. 26:
Reynolds Mirth Richards & Farmer LLP
Attention: Shauna N. Finlay
3200 Manulife Place
10180 – 101 Street
Edmonton, Alberta
T5J 3W8
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Email: sfinlay@rmrf.com

I. Introduction

1. Willow Creek's position in this review is that the application for a confined feeding operation ("CFO") by A & D Cattle Ltd. ("A & D Cattle") under the *Agricultural Operation Practices Act,* R.S.A. 2000, c. A-7, as amended ("AOPA") should have proceeded in the ordinary course. If the decision to deny the approval proceeded without delay resulting from either:

   a. the pending approval of the Intermunicipal Development Plan ("IDP") between Willow Creek and the Town of Fort McLeod; or

   b. the pending decision of the Natural Resources Conservation Board respecting Double H Feeders,

   then Willow Creek takes no position on the issuance of the approval.

2. Ultimately, Willow Creek's participation in this review is driven by its concern respecting the process followed by the Natural Resources Conservation Board ("NRCB"). Although there was ample time to review the application and confirm its technical compliance by early March, a decision from the Approval Officer wasn't issued until after:

   a. Willow Creek and the Town of Fort McLeod adopted an IDP (March 9, 2022); and

   b. the decision of Double H Feeders was issued (March 17, 2022).

3. The decision in Double H Feeders regarding the consideration of IDPs in approval decisions was contrary to the understanding of A. Cummings, Director, Field Services, of the NRCB. During the review hearing on Double H Feeders, Mr. Cummings articulated his understanding that the *AOPA* required Approval Officers to consider compliance of an application with a municipality's municipal development plan, not an intermunicipal development plan. The status of an IDP in an approval officers' deliberations was not clarified by the NRCB until after A & D Cattle had submitted their application and the approval officer had, it appears, mostly completed his review.[1]

4. The IDP between Willow Creek and the Town of Fort McLeod came into force on March 9, 2022 in Willow Creek and is intended to guide future development in the IDP areas of Willow Creek and the Town of Fort McLeod. It does not purport to interfere with vested rights. In other words, it takes effect from the time it was adopted.

5. These written submissions will address the following:

   A. The Process

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[1] See Technical Document from Approval Officer with comments and dates attached (**Attachment 1**). It would appear that the review was principally complete by March 4, 2022.

(i) The result of processing delays

(ii) Proper time to consider compliance

B. Willow Creek's Position

C. Rationale for the CFO area

II. The Process

a. The Result of Processing Delays

6. Willow Creek agrees with the finding in the NRCB RFR Decision regarding *500016 Alberta Ltd.* that a decision regarding an approval application should be made in the ordinary course, even when a municipality is reviewing its MDP or IDP[2]. Willow Creek submits this approach should also apply where there is a decision of the NRCB that is pending.

7. In this case, there were a number of delay periods that appear to have interrupted the processing of A & D Cattle's approval application and the decision of the Approval Officer. These delay periods overlapped with the process being undertaken by Willow Creek and the Town of Fort McLeod to come to agreement on an intermunicipal development plan. These delays also overlapped with the deliberation process of the NRCB on a matter wherein the status of an IDP in an Approval Officer's deliberations was in issue.

8. The result is that the delay periods pushed the ultimate decision date in this matter out past the adoption date of a new IDP and the NRCB deliberation process. If these delays were unnecessary, improper or deliberate, A & D Cattle's application should have been approved earlier, in which case A & D Cattle would have had a vested right when the IDP came into force.

9. To illustrate, the application of Double H Feeders can be contrasted. In that case, the application was deemed complete a mere seven days after the submission of the Part 2 application, and a decision was rendered by the Approval Officer two months later on November 25, 2021.[3] In the case of A & D Cattle's application, the application was deemed complete <u>one month</u> after the Part 2 application was received and a decision wasn't rendered until almost three months later.

10. This might be understandable if A & D Cattle's application was particularly complex. However, the Approval Officer's decision does not suggest this to be the case. The only issue that prevented the Approval Officer from granting the application on April 1, 2022 appears to be the combination of the establishment of the CFO exclusion zone in the

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[2] See para. 3 of the 500016 Alberta Ltd. NRCB Decision (**Attachment 2**)

[3] See the Approval Officer's decision dated November 25, 2021 Re: Double H Feeders (**Attachment 3**)

IDP which was passed on March 9. 2022 and the Double H Feeders decision of the NRCB that found that Approval Officers were required to consider compliance of an application with an IDP instead of only with an MDP. That decision was issued on March 17, 2022.[4]

11. Therefore, if the evidence establishes that any of the delays in the processing of the A & D Cattle application did not occur in the ordinary course, the NRCB should consider such factor in its review and decision.

b. When should the Approval Officer have considered compliance with the IDP?

12. The question of when an Approval Officer should consider compliance of an application with an existing MDP or IDP is in issue in this case where timing is such a critical issue. This requires interpretation of the requirement in s. 20 of *AOPA*. Is the date on which the application is deemed complete the relevant date, or the date the Approval Officer renders their decision?

13. As noted in *Love v. Flagstaff (County of) Subdivision and Development Appeal Board*, the correct approach to statutory interpretation is the purposive and contextual approach.[5] This requires a decision maker to consider the statutory interpretation exercise in the context of the purposes of the legislation.

14. AOPA provides a framework for the siting and regulation of agricultural activities that, under certain conditions, provides immunity from nuisance claims and the requirement to strictly comply with municipal planning requirements. It replaces a local process with a provincial framework. That said, local planning documents are to be taken into consideration when making decisions about the siting of certain types of agricultural operations. It is mandatory that an Approval Officer consider compliance with a municipal development plan and an application must be refused if it doesn't comply.

15. However, if the application *does* comply, only then (see s. 20(1)(b)(iii)) does the Approval Officer give directly affected parties a reasonable opportunity to review the application and provide additional evidence and written submissions relevant to the application. The wording of s. 20(1)(b) appears to suggest that the determination of consistency with an MDP occurs prior to public notice and circulation of the application to other ministries. This makes sense. If there is an inconsistency and the application is required to be denied, there would be no point to soliciting comments or circulating the application. Therefore, arguably, the wording of s. 20 supports the conclusion that compliance is required to be assessed at the time an application is deemed complete, but prior to the circulation and public notice of an application.

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[4] See **Attachment 4**

[5] *Love v. Flagstaff (County of) Subdivision and Development Appeal Board*, 2002 ABCA 292, see para. 19 to 22. **(Attachment 5)**

16. Further, there is caselaw that arguably supports the conclusion that changes to planning rules after a permit application will not always compel the denial of an application.

17. In *Love v. Flagstaff,* the issue was competing applications. A land use bylaw contained a provision that related to the siting of residential dwellings in close proximity to an intensive livestock operation ("ILO"), whether "existing or proposed". Two parties filed applications for residential residences that were permitted uses. Soon thereafter, another company filed a development permit application for an ILO in close proximity to the proposed residences. The permitted use residential development applications were denied on the basis of the "proposed" livestock operation. The Court of Appeal found that one issue in the case was "the date on which the Love and Alderdice applications ought to have been assessed for compliance with s. 6.1.7.3 of the *Bylaw*".

18. A majority of the Court of Appeal found that the proper date for considering compliance with the applicable bylaw provision was at the date the application was filed. Their reasoning placed emphasis on the fact that permitted uses are entitled to a development permit "as of right".[6]

19. The Court acknowledged that there was previous caselaw that had found that the law in effect at the time a decision is made is usually the operative law, but that there were exceptions.[7] *Ottawa (City) v. Boyd Builders Ltd.* [1965] S.C.R. 408[8] was cited as one of those exceptions. In that case, and in the *Love v. Flagstaff (County of)* case, the answer to this question turned on whether any rights had crystallized on the filing of the application. The *Boyd Builders* case also dealt with a permitted building permit application.

20. In the *Boyd Builders* case, a change to zoning rules allowed apartment buildings where they previously hadn't been permitted. A building company subsequently applied for a building permit to construct an apartment house but local residents objected. So, a variation to the zoning was proposed and passed by the municipality that would not permit the building of apartments. Before the change to zoning would be effective, the Ontario Municipal Board had to approve the new zoning changes. The building company applied for an order requiring the municipality to issue the permit before the hearing in front of the Ontario Municipal Board. The Ontario Court of Appeal found that the building company had a *prima facie* right to be granted a building permit as there was no bylaw in existence that allowed it to be defeated. While not the critical finding, the Court also found that the municipality had not established that it was proceeding with the zoning change in good faith and with dispatch.

21. In this case, the wording of the legislation supports the conclusion that the correct time to consider compliance with an MDP (or IDP as the NRCB has determined is the correct

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[6] *Ibid.* at para. 70-72.
[7] *Ibid.* at para. 73-74.
[8] *Ottawa (City) v. Boyd Builders Ltd.* [1965] S.C.R. 408 **(Attachment 6)**

consideration) is once the application is deemed complete. However, it is acknowledged that even where an Approval Officer does not find there to be a conflict between an MDP (or IDP) and the application, they may still exercise their discretion to deny the application (see s. 20(3) of AOPA). Therefore, it is problematic to conclude that A & D Cattle had a vested right to an approval.[9] The better view is that the correct time to consider compliance with an MDP or IDP is at the time an application is complete, but an Approval Officer is still able to exercise discretion under s. 20(3) with respect to an approval application.

III. Willow Creek's Position in this Review

22. Willow Creek notes the NRCB's request for comment on the Connor's statement that Willow Creek advised that they would be neutral. In that regard, please see the letter from C. Chisholm of Willow Creek (**Attachment 8**). This letter sheds some light on this statement. It is suggested that this statement may have been made by someone at the Town of Fort McLeod as opposed to Willow Creek. Ms. Chisholm will be available to respond to questions regarding this point.

IV. Rationale for the CFO Exclusion Area in the IDP

23. The planning rationale for the CFO Exclusion area is, as explained by D. Horwath (Planner for Willow Creek):

The sustained confinement of large livestock numbers can have environmental impacts on soil, water, and air and as agriculture intensifies, odour, water and soil contamination, noise and dust become focal points for potential conflict between the use and neighboring properties and urban centres. Confined Feeding Operation (CFO) "exclusion areas" began to appear in municipal planning documents after 2002 out of consultation that occurred with the Natural Resource Conversation Board (NRCB). 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 and areas of clustered residential development, valued tourism resources, etc. The planning objective in this 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.

[9] What is a "vested right" is articulated in *Dikranian v. Quebec (Attorney General),* [2005] 3 SCR 530 at paras. 29-31. (**Attachment 7**) Bastarache J. found that a vested right arises when an individual's legal (juridical) situation is tangible and concrete rather than general and abstract; and the legal situation must have been sufficiently constituted at the time of the new statute's commencement. Therefore, where discretion may still be exercised and the right is not sufficiently certain, a basis may be lacking for finding a vested right has accrued to a party.

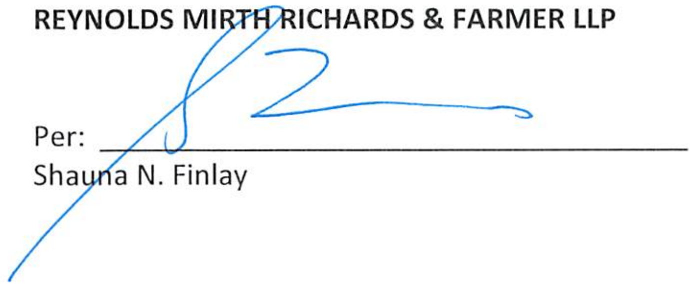
24. In this case, the exclusion area identified in the IDP between Willow Creek and the Town of Fort McLeod applies to the southwest area around the urban municipality of the Town of Fort McLeod and is consistent with these planning objectives. It is to prevent future land use conflicts that could arise due to the conflict between residential or commercial growth in the Town and the nuisance effects of confined feeding operations.

V. Conclusion

25. Willow Creek's position is that the review of A & D's Cattle should have proceeded without the delay in December, and a decision should have been issued on or around March 4th, 2022. Willow Creek's concern is that a decision was delayed pending the IDP approval and the NRCB's decision in Double H Feeders. If the NRCB finds that the decision making process proceeded in accordance with the legislation and without delay, in the ordinary course, then Willow Creek takes no position on whether the approval should be issued.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26TH DAY OF MAY, 2022.

REYNOLDS MIRTH RICHARDS & FARMER LLP



Per: ______________________________
Shauna N. Finlay

ATTACHMENTS

1. Technical Document LA21037

2. Board Decision RFR 2018-11 / RA18016 dated September 21, 2018 re: *500016 Alberta Ltd.*

3. Approval Officer's Decision dated November 25, 2021 re: Double H Feeders

4. Board Decision 2022-02 / LA21033 dated March 17, 2022 re: Double H Feeders

5. *Love v. Flagstaff (County of) Subdivision and Development Appeal Board,* 2002 ABCA 292

6. *Ottawa (City) v. Boyd Builders Ltd.* [1965] S.C.R. 408

7. *Dikranian v. Quebec (Attorney General),* [2005] 3 SCR 530

8. Letter from Cindy Chisholm of the Municipal District of Willow Creek dated May 26, 2022

3656953.docx

Application under the *Agricultural Operation Practices Act* for a confined feeding operation, manure collection area, and/or manure storage facility(ies)

NRCB | Natural Resources Conservation Board

NRCB USE ONLY

☒ Approval ☐ Registration ☐ Authorization ☐ Amendment

Application number: LA21037

Legal land description: NE 27-8-26 W4M

APPLICATION DISCLOSURE

This information is collected under the authority of the *Agricultural Operation Practices Act* (AOPA), and is subject to the provisions of the *Freedom of Information and Protection of Privacy Act*. This information is public unless the NRCB grants a written request that certain sections remain private.

Any construction prior to obtaining an NRCB permit is an offence and is subject to enforcement actio[n, incl]uding prosecution.

I, the applicant, or applicant's agent, have read and understand the statements above, and I acknowledge th[at th]e information provided in this application is true to the best of my knowledge.

Date of signing: Nov 3, 2021

Signature: [signature]

Corporate name (if applicable): A&D cattle LTD

Print name: Hdr.un

GENERAL INFORMATION REQUIREMENTS

Proposed facilities: list all proposed confined feeding operation facilities and their dimensions. Indicate whether any of the proposed facilities are additions to existing facilities. (attach additional pages if needed)

Proposed facilities	Dimensions (m) (length, width, and depth)
12 pens (12 pens each is 40 m x 50 m) [1]	40m x 50m
catch Basin (61 m x 38 m x 1.6 m) [3]	200ft x 124ft [2] x 5ft
4 pens (4 pens each is 20 m x 30 m) [4]	20m x 30m

Existing facilities: list **ALL** existing confined feeding operation facilities and their dimensions

Existing facilities	Dimensions (m) (length, width, and depth)	NRCB USE ONLY

NRCB USE ONLY

Application is for a new CFO and as discussed in DS LA21037, has been denied due to inconsistency with an Inter-municipal Development Plan [5]

Last updated: 31 Mar 2020

NRCB USE ONLY

Summary of Comments on Full page photo

Page: 1

Number: 1 Author: jsonnenberg Subject: Typewritten Text Date: 12/1/2021 1:59:53 PM -07'00'

(12 pens each is 40 m x 50 m)

Number: 2 Author: jsonnenberg Subject: Typewritten Text Date: 12/1/2021 2:02:34 PM -07'00'

4

Number: 3 Author: jsonnenberg Subject: Typewritten Text Date: 3/2/2022 2:48:25 PM -07'00'

(61 m x 38 m x 1.6 m)

Number: 4 Author: jsonnenberg Subject: Typewritten Text Date: 12/1/2021 2:00:15 PM -07'00'

(4 pens each is 20 m x 30 m)

Number: 5 Author: jsonnenberg Subject: Typewritten Text Date: 3/29/2022 10:25:49 AM

Application is for a new CFO and as discussed in DS LA21037, has
been denied due to inconsistency with an Inter-municipal Development Plan

If a new facility is replacing an old facility, please explain what will happen to the old facility and when. ☐ N/...

Construction completion date for proposed facilities Dec 30, 2024

Additional information

Livestock numbers: Complete only if livestock numbers are different from what was identified in the Part 1 application. Note: ... livestock numbers increase in your Part 2 application, a new Part 1 application must be submitted which may result in a loss of priority for minimum distance separation (MDS).

Livestock category and type (Available in the Schedule 2 of the Part 2 Matters Regulation)	Permitted number	Proposed increase or decrease in number (if applicable)	Total
Beef finishers	2000 → [1]		2000

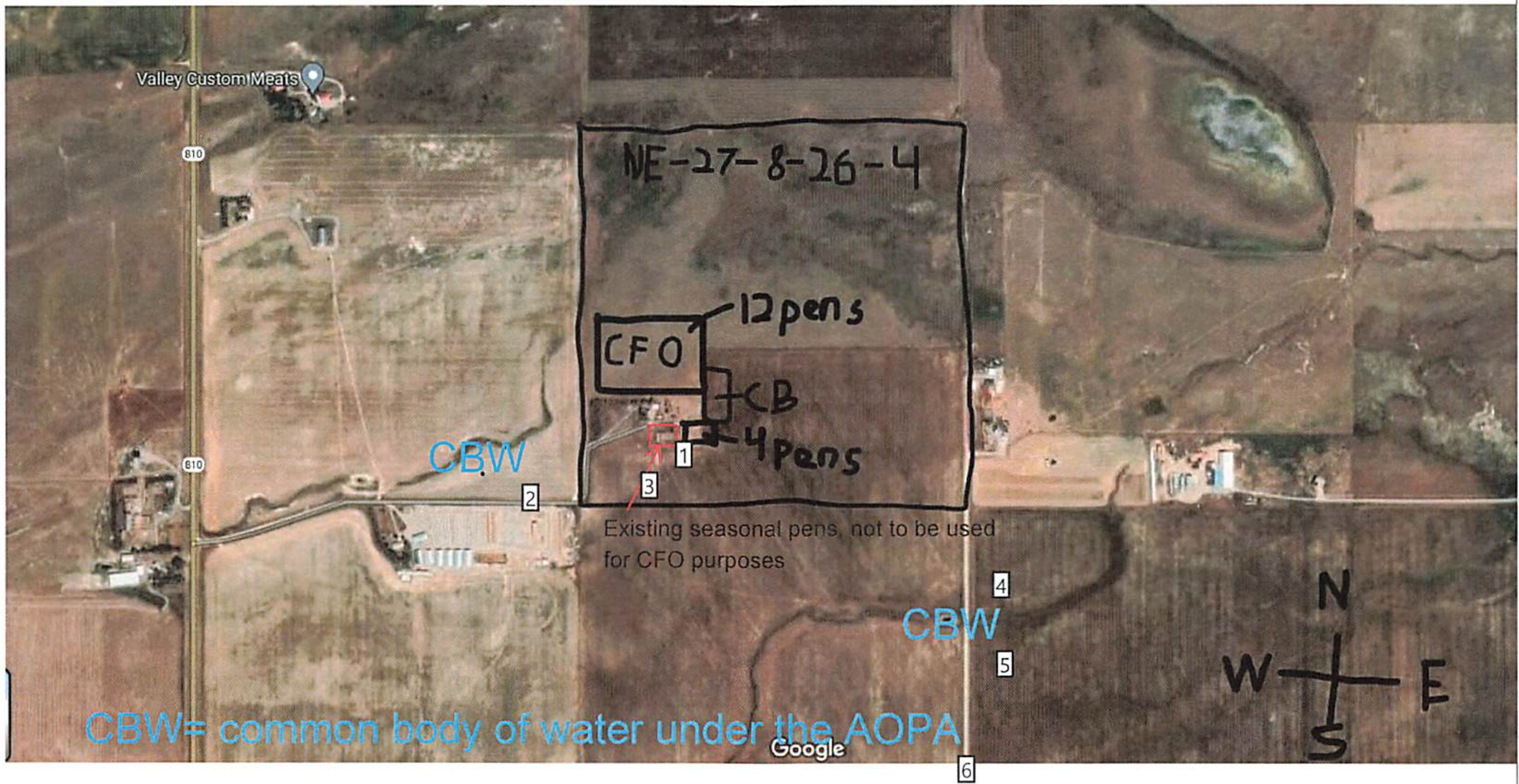
[2] AO note: Application is for a new CFO. There is an existing CFO on an adjacent quarter but under different ownership. Application is for a maximum capacity of 2000 beef finishers.

Page: 2

Number: 1 Author: jsonnenberg Subject: Line Date: 3/29/2022 10:26:32 AM

Number: 2 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 9:33:29 AM -07'00'

AO note: Application is for a new CFO. There is an existing CFO on an adjacent quarter but under different ownership. Application is for a maximum capacity of 2000 beef finishers.


Valley Custom Meats
810
810
NE-27-8-26-4
12pens
CFO
CB
4pens
CBW
CBW
1
2
3
4
5
6
Existing seasonal pens, not to be used
for CFO purposes
N
W
E
S
CBW= common body of water under the AOPA
Google

Page: 3

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CBW

Number: 3 Author: jsonnenberg Subject: Line Date: 3/4/2022 11:08:04 AM -07'00'

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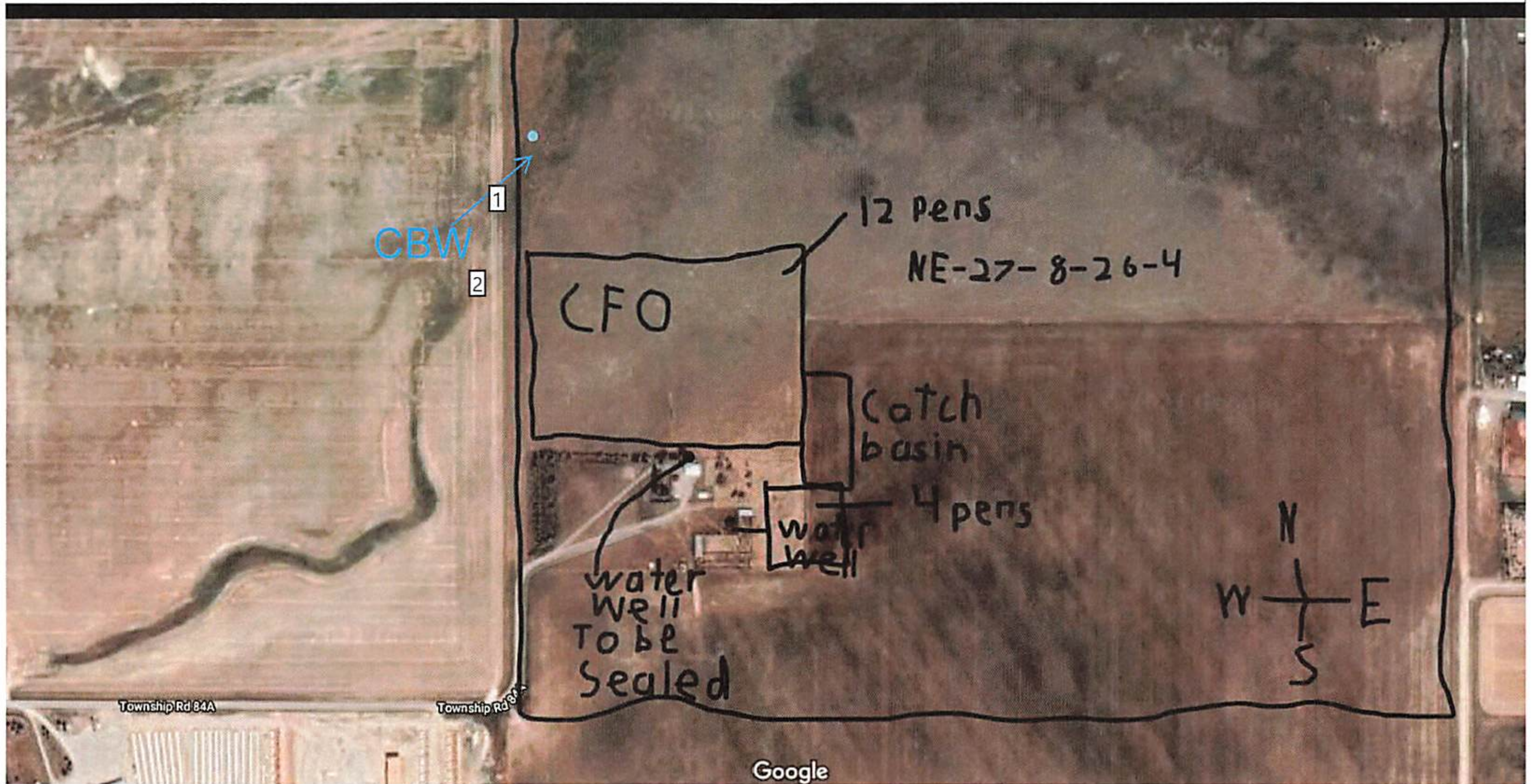
Existing seasonal pens, not to be used
for CFO purposes

Number: 5 Author: jsonnenberg Subject: Typewritten Text Date: 3/29/2022 10:35:20 AM

CBW

Number: 6 Author: jsonnenberg Subject: Typewritten Text Date: 3/29/2022 10:35:45 AM

CBW= common body of water under the AOPA



12 pens
NE-27-8-26-4
CBW
1
2
CFO
Catch basin
4 pens
water well
water Well To be Sealed
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Township Rd 84A
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Page: 4

Number: 1 Author: jsonnenberg Subject: Line Date: 3/29/2022 10:28:10 AM

Number: 2 Author: jsonnenberg Subject: Typewritten Text Date: 3/29/2022 10:37:47 AM

CBW

NRCB USE ONLY

ALL SIGNATURES IN FILE ☒ YES ☐ NO

DATES OF APPROVAL OFFICER SITE VISITS

November 3, 2021	

CORRESPONDENCE WITH MUNICIPALITIES AND REFERRAL AGENCIES

Date deeming letters sent: January 5, 2022

Municipality: MD of Willow Creek

☒ letter sent ☒ response received ☒ written/email ☐ verbal ☐ no comments received

Alberta Health Services:

☒ letter sent ☒ response received ☒ written/email ☐ verbal ☐ no comments received

Alberta Environment and Parks: ☐ N/A

☒ letter sent ☒ response received ☒ written/email ☐ verbal ☐ no comments received

Alberta Transportation: ☐ N/A

☒ letter sent ☒ response received ☒ written/email ☐ verbal ☐ no comments received

Alberta Regulatory Services: ☒ N/A

☐ letter sent ☐ response received ☐ written/email ☐ verbal ☐ no comments received

Other: ____________________ ☐ N/A

☐ letter sent ☐ response received ☐ written/email ☐ verbal ☐ no comments received

Other: ____________________ ☐ N/A

☐ letter sent ☐ response received ☐ written/email ☐ verbal ☐ no comments received

Page: 5

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November 3, 2021

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January 5, 2022

Number: 4 Author: jsonnenberg Subject: Typewritten Text Date: 2/25/2022 9:45:13 AM -07'00'

MD of Willow Creek

Number: 5 Author: jsonnenberg Subject: Typewritten Text Date: 2/25/2022 9:45:16 AM -07'00'

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Comments from page 5 continued on next page

NRCB USE ONLY

ALL SIGNATURES IN FILE ☒ YES ☐ NO

DATES OF APPROVAL OFFICER SITE VISITS

November 3, 2021	

CORRESPONDENCE WITH MUNICIPALITIES AND REFERRAL AGENCIES

Date deeming letters sent: January 5, 2022

Municipality: MD of Willow Creek

☒ letter sent ☒ response received ☒ written/email ☐ verbal ☐ no comments received

Alberta Health Services:

☒ letter sent ☒ response received ☒ written/email ☐ verbal ☐ no comments received

Alberta Environment and Parks: ☐ N/A

☒ letter sent ☒ response received ☒ written/email ☐ verbal ☐ no comments received

Alberta Transportation: ☐ N/A

☒ letter sent ☒ response received ☒ written/email ☐ verbal ☐ no comments received

Alberta Regulatory Services: ☒ N/A

☐ letter sent ☐ response received ☐ written/email ☐ verbal ☐ no comments received

Other: ____________________ ☐ N/A

☐ letter sent ☐ response received ☐ written/email ☐ verbal ☐ no comments received

Other: ____________________ ☐ N/A

☐ letter sent ☐ response received ☐ written/email ☐ verbal ☐ no comments received

DECLARATION AND ACKNOWLEDGMENT OF APPLICANT CONCERNING *WATER ACT* LICENCE

issued by Alberta Environment and Parks (AEP) for a confined feeding operation (CFO)

Date and sign one of the following four options

PTION 1: Applying through the NRCB for both the AOPA permit and the *Water Act* licence

I **DO** want my water licence application coupled to my AOPA permit application.

igned this ____ day of ________________, 20____.

____
Signature of Applicant or Agent

PTION 2: Processing the AOPA permit and *Water Act* licence separately

- I (we) acknowledge that the CFO will need a new water licence from AEP under the *Water Act* for the development or activity proposed in this AOPA application.
- I (we) request that the NRCB process the AOPA application **independently of** AEP's processing of the CFO's application for a water licence.
- In making this request, I (we) recognize that, if this AOPA application is granted by the NRCB, the NRCB's decision will not be considered by AEP as improving or enhancing the CFO's eligibility for a water licence under the *Water Act*.
- I (we) acknowledge that any construction or actions to populate the CFO with livestock pursuant to an AOPA permit in the absence of a *Water Act* licence will **not** be relevant to AEP's consideration of whether to grant the *Water Act* licence application.
- I (we) acknowledge that any such construction or livestock populating will be at the CFO's sole risk if the *Water Act* licence application is denied or if the operation of the CFO is otherwise deemed to be in violation of the *Water Act*. This risk includes being required to depopulate the CFO and/or to cease further construction, or to remove "works" or "undertakings" (as defined in the *Water Act*).
- **AS RELEVANT:** I (we) acknowledge that the CFO is located in the South Saskatchewan River Basin and that, pursuant to the *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order* [Alta. Reg. 171/2007], this basin is currently closed to new surface water allocations.

gned this ____ day of ________________, 20____.

____
Signature of Applicant or Agent

TION 3: Additional water licence not required

- I (we) declare that the CFO will not need a new licence from AEP under the *Water Act* for the development or activity proposed in this AOPA application.

gned this ____ day of ________________, 20____.

____
Signature of Applicant or Agent

TION 4: Uncertain if *Water Act* licence is needed; acknowledgement of risk (for existing CFOs only)

- At this time, I (we) do not know whether a new water licence is needed from AEP under the *Water Act* for the development or activity proposed in this AOPA application.
- If a new *Water Act* licence is needed, I (we) request that the NRCB process the AOPA application **independently of** AEP's processing of the CFO's application for a water licence.
- In making this request, I (we) recognize that, if this AOPA application is granted by the NRCB, the NRCB's decision will not be considered by AEP as improving or enhancing the CFO's eligibility for a water licence under the *Water Act*.
- I (we) acknowledge that any construction or actions to populate the CFO with additional livestock pursuant to an AOPA permit in the absence of a *Water Act* licence will **not** be relevant to AEP's consideration of whether to grant my *Water Act* licence application, if a new water licence is needed.
- I (we) acknowledge that any such construction or livestock increase will be at the CFO's sole risk if the *Water Act* licence application is denied or if the operation of the CFO is otherwise deemed to be in violation of the *Water Act*. This risk includes being required to depopulate the CFO and/or to cease further construction, or to remove "works" or "undertakings" (as defined in the *Water Act*).
- **AS RELEVANT:** I (we) acknowledge that the CFO is located in the South Saskatchewan River Basin and that, pursuant to the *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order* [Alta. Reg. 171/2007], this basin is currently closed to new surface water allocations.

ned this 3rd day of November, 2021.

[signature]
Signature of Applicant or Agent

Note: see DS LA21037 for discussion. ~~Application is for a new CFO~~ [1]

Page: 6

Number: 1 Author: jsonnenberg Subject: Typewritten Text Date: 2/25/2022 9:49:09 AM -07'00'

Note: see DS LA21037 for discussion. Application is for a new CFO

NRCB Natural Resources Conservation Board

Part 2 — Technical Requirements

Application under the *Agricultural Operation Practices Act* for a confined feeding operation, manure collection area, and/or manure storage facility(ies)

GENERAL ENVIRONMENTAL INFORMATION

(complete this section for the worst case of the existing facility which is the closest to water bodies or water wells and for each of the proposed facilities)

Facility description / name *(as indicated on site plan)*

Existing: ______ **Proposed 1:** Pens

Proposed 2: Catch Basin **Proposed 3:** ______

Facility and environmental risk information		Existing	Proposed 1	Proposed 2	Proposed 3	NRCB USE ONLY: Meets requirements	NRCB USE ONLY: Comments
Flood plain information	What is the elevation of the floor of the lowest manure storage or collection facility above the 1:25 year flood plain or the highest known flood level?	☐ >1 m ☐ ≤ 1 m	☒ >1 m ☐ ≤ 1 m	☒ >1 m ☐ ≤ 1 m	☐ > 1 m ☐ ≤ 1 m	☒ YES ☐ NO ☐ YES with exemption [1]	Not located in a flood plain
Surface water information	How many springs are within 100 m of the manure storage facility or manure collection area?		0	0		☒ YES ☐ NO ☐ YES with exemption [4]	No springs observed [2] [3]
	How many water wells are within 100 m of the manure storage facility or manure collection area?		0	0		☐ YES ☐ NO ☒ YES with exemption [6]	1 well located within 100 m* [5]
	What is the shortest distance from the manure collection or storage facility to a surface water body? (e.g., lake, creek, slough, seasonal)		1/2 mile	1/2 mile		☒ YES ☐ NO ☐ YES with exemption [8]	50 m**
Groundwater information	What is the depth to the water table?		15 ft	15 ft		☒ YES ☐ NO ☐ YES with exemption [10]	4.2m, see attached engineering report [7] [9]
	What is the depth to the groundwater resource/aquifer you draw water from?		30 ft	30 ft		☒ YES ☐ NO ☐ YES with exemption	6.1 m Well ID103530 [11]

Additional information (attach supporting information, e.g. borehole logs, records, etc. you consider relevant to your application)

*two wells located within 100 m. Applicant has committed to decommissioning the well nearest the pens. If the NRCB board was to overturn my decision, a condition should be included requiring decommissioning of this well prior to construction. **unnamed drainage 50 m. Only conveys water during extreme flood events, CBW under AOPA.

Page: 7

Number: 1 Author: jsonnenberg Subject: Typewritten Text Date: 2/25/2022 9:53:19 AM -07'00'

X

Number: 2 Author: jsonnenberg Subject: Typewritten Text Date: 3/23/2022 1:52:39 PM

Not located in a flood plain

Number: 3 Author: jsonnenberg Subject: Typewritten Text Date: 2/25/2022 9:53:42 AM -07'00'

No springs observed

Number: 4 Author: jsonnenberg Subject: Typewritten Text Date: 2/25/2022 9:53:32 AM -07'00'

X

Number: 5 Author: jsonnenberg Subject: Typewritten Text Date: 2/25/2022 9:54:09 AM -07'00'

1 well located within 100 m*

Number: 6 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 11:01:55 AM -07'00'

X

Number: 7 Author: jsonnenberg Subject: Typewritten Text Date: 3/2/2022 12:57:55 PM -07'00'

50 m**

Number: 8 Author: jsonnenberg Subject: Typewritten Text Date: 2/25/2022 10:46:12 AM -07'00'

X

Number: 9 Author: jsonnenberg Subject: Typewritten Text Date: 3/2/2022 2:46:43 PM -07'00'

4.2m, see attached
engineering report

Number: 10 Author: jsonnenberg Subject: Typewritten Text Date: 3/2/2022 2:46:55 PM -07'00'

X

Number: 11 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 10:58:38 AM -07'00'

6.1 m Well ID103530

Number: 12 Author: jsonnenberg Subject: Typewritten Text Date: 3/23/2022 1:59:09 PM

*two wells located within 100 m. Applicant has committed to decommissioning the well nearest the pens. If the NRCB board was to overturn my decision, a condition should be included requiring decommissioning of this well prior to construction.

Number: 13 Author: jsonnenberg Subject: Typewritten Text Date: 3/29/2022 10:29:37 AM

**unnamed drainage 50 m. Only conveys water during extreme flood events, CBW under AOPA.

NRCB USE ONLY

ENVIRONMENTAL RISK SCREENING INFORMATION

Well IDs: ID103528[3] ID103529[2] ID103530[1]

ID9681624[5] Well ID103530 most representative and indicates UGR at 6.1 m depth[4]

Surface water related concerns from directly affected parties or referral agencies: ☒ YES[6] ☐ NO

Groundwater related concerns from directly affected parties or referral agencies: ☒ YES[7] ☐ NO

Water wells ☐ N/A

If applicable, exemption for 100 m distance requirements applied: ☒ YES[8] ☐ NO Condition required: ☒ YES[9] ☐ NO

Surface water ☒ N/A[10]

If applicable, exemption for 30 m distance requirements applied: ☐ YES ☐ NO Condition required: ☐ YES ☒ NO[11]

ERST for **proposed** facilities

Facility	Groundwater score	Surface water score	File number
Proposed facilities meet AOPA requirements with a water well exemption. This exemption is discussed in decision summary LA21037[12]			

ERST for **existing** facilities

Facility	Groundwater score	Surface water score	File number
Application is for a new CFO, no existing facilities[13]			

Page: 8

Number: 1 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 11:11:36 AM -07'00'

ID103530

Number: 2 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 11:11:27 AM -07'00'

ID103529

Number: 3 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 11:11:19 AM -07'00'

ID103528

Number: 4 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 11:12:56 AM -07'00'

Well ID103530 most representative and indicates UGR at 6.1 m depth

Number: 5 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 11:11:58 AM -07'00'

ID9681624

Number: 6 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 11:12:01 AM -07'00'

X

Number: 7 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 11:12:07 AM -07'00'

X

Number: 8 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 11:12:10 AM -07'00'

X

Number: 9 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 11:12:14 AM -07'00'

X

Number: 10 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 11:12:16 AM -07'00'

X

Number: 11 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 11:48:02 AM -07'00'

X

Number: 12 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:31:49 PM -07'00'

Proposed facilities meet AOPA requirements with a water well exemption. This
exemption is discussed in decision summary LA21037

Number: 13 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 11:48:16 AM -07'00'

Application is for a new CFO, no existing facilities

NRCB USE ONLY
Groundwater or surface water related comments:

Concerns have been raised concerning the potential for contamination of groundwater and surface water near the CFO. The CFO meets all AOPA technical requirements aside from being too close to one water well (the second on site would be decommissioned). The exemption that could be granted for this well is discussed in Decision Summary LA21037. Even though the site theoretically poses a low risk to groundwater and surface water, If the NRCB board was to direct me to issue a permit, i would recommend additional conditions in the Approval to address some specific landscape attributes and to further minimize the chance of a risk being posed to the environment. These conditions are discussed further in Decision Summary LA21037.

1

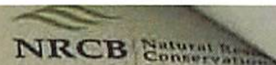
The applicant has also committed to protecting the well that is not being decommissioned. The applicant would maintain the well as up gradient from any manure storage and has committed to maintaining at absolute minimum at least 20 m between the well and any manure storage.

Number: 1 Author: jsonnenberg Subject: Typewritten Text Date: 3/29/2022 10:30:17 AM

Concerns have been raised concerning the potential for contamination of groundwater and surface water near the CFO. The CFO meets all AOPA technical requirements aside from being too close to one water well (the second on site would be decommissioned). The exemption that could be granted for this well is discussed in Decision Summary LA21037. Even though the site theoretically poses a low risk to groundwater and surface water, If the NRCB board was to direct me to issue a permit, i would recommend additional conditions in the Approval to address some specific landscape attributes and to further minimize the chance of a risk being posed to the environment. These conditions are discussed further in Decision Summary LA21037.

The applicant has also committed to protecting the well that is not being decommissioned. The applicant would maintain the well as up gradient from any manure storage and has committed to maintaining at absolute minimum at least 20 m between the well and any manure storage.

Part 2 — Technical Requirements



Application under the *Agricultural Operation Practices Act* for a confined feeding operation, manure collection area, and/or manure storage facility(ies)

DISTANCE OF ANY MANURE STORAGE FACILITY (EXISTING OR PROPOSED) TO NEIGHBOURING RESIDENCES

			NRCB USE ONLY				
Neighbour name(s)	**Legal land description**	**Distance (m)**	**Zoning (LUB) category**	**MDS category (1-4)**	**Distance (m)**	**Waiver attached (if required)**	**Meets regulations**
Martin vanhuigenbos	SW-27-8-26-4	490(m)	RG*	1	510 m	Yes**	Yes
Erik oskam	NW-27-8-26-4	280(m)	RG	1	750 m	NA	Yes
Jan Pieter Loeltson	NW-26-8-26	600(m)	RG	1	555 m	NA	Yes

*Rural General

**meets MDS [illegible] waiver ensures that a survey to nearest residence will not be required.

LAND BASE FOR MANURE AND COMPOST APPLICATION (complete only if an increase in livestock or manure production will occur)

				NRCB USE ONLY	
Name of land owner(s)*	**Legal land description**	**Usable area** (ha)**	**Soil zone *****	**Usable area (ha)**	**Agreement attached (if required)**
Adrian vanhuigenbos	NE-27-8-26-4	145 acres	DB	See below	
NRCB note: applicant also submitted numerous spreading agreements, attached below					
			Total		

* If you are **not** the registered landowner, you must attach copies of land use agreements signed by all landowners.

** Available manure spreading area (excluding setback areas from residences, common bodies of water, water wells, etc. as identified in Agdex 096-5 Manure Spreading Regulations)

*** Brown, dark brown, black, grey wooded, or irrigated

Additional information (attach any additional information as required)

Number: 1 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:26:08 PM -07'00'

**

Number: 2 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:25:54 PM -07'00'

Yes

Number: 3 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:25:36 PM -07'00'

Yes

Number: 4 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:25:48 PM -07'00'

510 m

Number: 5 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:23:45 PM -07'00'

RG*

Number: 6 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:24:24 PM -07'00'

1

Number: 7 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:29:55 PM -07'00'

Yes

Number: 8 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:27:42 PM -07'00'

NA

Number: 9 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:27:27 PM -07'00'

1

Number: 10 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:27:39 PM -07'00'

750 m

Number: 11 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:23:48 PM -07'00'

RG

Number: 12 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:31:09 PM -07'00'

Yes

Number: 13 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:30:07 PM -07'00'

NA

Number: 14 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:30:01 PM -07'00'

555 m

Number: 15 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:30:04 PM -07'00'

1

Number: 16 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:23:51 PM -07'00'

RG

Number: 17 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:24:10 PM -07'00'

*Rural General

Number: 18 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 12:27:24 PM -07'00'

**meets MDS but waiver ensures that a survey to nearest residence will not be required.

Comments from page 10 continued on next page

Part 2 — Technical Requirements

NRCB Natural Resources Conservation

Application under the *Agricultural Operation Practices Act* for a confined feeding operation, manure collection area, and/or manure storage facility(ies)

DISTANCE OF ANY MANURE STORAGE FACILITY (EXISTING OR PROPOSED) TO NEIGHBOURING RESIDENCES

Neighbour name(s)	Legal land description	Distance (m)	NRCB USE ONLY: Zoning (LUB) category	NRCB USE ONLY: MDS category (1-4)	NRCB USE ONLY: Distance (m)	NRCB USE ONLY: Waiver attached (if required)	NRCB USE ONLY: Meets regulations
Martin vanhuigenbos	SW-27-8-26-4	490(m)	RG*	1	510 m	Yes**	Yes
Erik oskam	NW-27-8-26-4	780(m)	RG	1	750 m	NA	Yes
Jan Pieter Loeltson	NW-26-8-26	600(m)	RG	1	555 m	NA	Yes

*Rural General

**meets MDS but waiver ensures that a survey to nearest residence will not be required.

LAND BASE FOR MANURE AND COMPOST APPLICATION (complete only if an increase in livestock or manure production will occur)

Name of land owner(s)*	Legal land description	Usable area** (ha)	Soil zone ***	NRCB USE ONLY: Usable area (ha)	NRCB USE ONLY: Agreement attached (if required)
Adrian vanhuigenbos	NE-27-8-26-4	145 acres	DB	See below	
					19
NRCB note: applicant also submitted numerous spreading agreements, attached below					
			Total		

* If you are **not** the registered landowner, you must attach copies of land use agreements signed by all landowners.

** Available manure spreading area (excluding setback areas from residences, common bodies of water, water wells, etc. as identified in Agdex 096-5 Manure Spreading Regulations)

*** Brown, dark brown, black, grey wooded, or irrigated

Additional information (attach any additional information as required)

Number: 19 Author: jsonnenberg Subject: Typewritten Text Date: 3/29/2022 10:39:00 AM

See below

NRCB | Natural Resources Conservation Board

Minimum Distance Separation (MDS) Waiver (declaration)

Applicant information

NRCB application number: ______

Operator/operation name: Adin A & D Cattle

Address: Box 2468 Postal Code: T0L 0Z0

Legal land location of confined feeding operation: NE 27-8-26-4

I have requested the residence owner(s) named below to waive the required minimum distance separation (MDS) to their residence for the *Agricultural Operation Practices Act* (AOPA) permit application identified above. In making this request, I have provided the owner(s) with an opportunity to review my permit application and a copy of the Natural Resources Conservation Board (NRCB) Fact Sheet "Minimum Distance Separation (MDS) Waivers" available on the NRCB website at www.nrcb.ca. I have also explained:

- The MDS requirement set out in section 3 of the Standards and Administration Regulation of AOPA. I have advised the owner(s) that section 3(6)(a) of the Standards and Administration Regulation allows this requirement to be waived by the owners of residences, if they agree in writing to grant a waiver;
- That my proposed development does not meet the required MDS to the owner's residence; and,
- That this waiver applies only to this application as described. An increase in livestock capacity, annual manure production, level of odour production, change to the site plan or change to a facility that would increase the MDS would require a new waiver.

Following is a summary of the proposed development:

- The current scope of my confined feeding operation (CFO), including the type, number, and category of livestock, if any, is:

______

______

- My application for a new AOPA permit proposes the following changes to the existing livestock category, type and/or capacity at my CFO:

2000 Finishers

______

- The proposed new CFO facility(ies), or changes to the existing CFO facilities, including manure storage, manure storage volume and any other pertinent details, if any, are (attach a site layout plan if available):

12 pens Catch Basin

______

I the applicant understand that the waiver is not valid unless ALL registered owners of the residence sign this document.

Permit Applicant: [signature] Date: Nov 13, 2021

Signature

Residence owner(s) to initial: [redacted] [redacted]

https://outlook.live.com/mail/0/sentitems/id/AQMkADAwATNiZmYAZC0wOTdiLWYyMgA3LTAwAi0wMAoARgAAA%2FX3vsW0ystOkQOJvUjqNqcHAG...

Minimum Distance Separation (MDS) Waiver

Residence owner(s) information

ALL Names on land title: 5 star Cattle

Legal land location of residence(s): SW-27-8-26-4

Telephone number(s)[1]: [redacted] Email address(es)[1]: [redacted]

Address(es)[1] and Postal code(s)[1]: [redacted] Fort Macleod, Alberta TOL 0Z0

[1] ***Please note that personal contact information is for NRCB use ONLY and not publicly released***

I am/we are the legal landowner(s) of a residence(s) located at the above noted legal land location/address:

- I/we have read the NRCB Fact Sheet "Minimum Distance Separation (MDS) Waivers";
- I/we have discussed this application with the applicant and understand its potential impacts to our residence(s);
- I/we understand that the application **does not** meet the MDS requirement to my/our residence(s), under the *Agricultural Operation Practices Act* (AOPA);
- **I/we understand that this waiver is not valid unless signed by ALL parties identified on the land title as owners;**
- **I/we are not obligated to waive the MDS requirement to our residence(s).**
- I/we understand that if I/we choose to waive the MDS requirement, I/we can revoke the waiver, by providing written notice to the NRCB approval officer, as set out in the "Minimum Distance Separation (MDS) Waivers" Fact Sheet; and
- I/we understand that this waiver is a public document.

Having considered my/our rights, I/we hereby waive the MDS requirement to my/our residence, with respect to **application number** ______________________.

[redacted]

Signatures of all residence owner(s) on title

Martin VanHuigenbos

Printed names of all residence owner(s) on title

Date: Nov 3, 2021

Manure Spreading Agreement

This agreement is between A & D cattle, manure producer, and

James Feyter manure receiver.

Length of agreement: This agreement is valid for a time period of 2022 (minimum of one year).

Legal land location	Soil type[1]	Acres suitable for manure spreading[2]
N ½-23-8-26-W4		270
NE-16-8-26-W4		160

[1] Soil type choices: Dark brown and brown, Grey wooded, Black, Irrigated.

[2] Land within required setbacks from water bodies, water wells, residences, etc. is not to be included.

Other comments:

Manure producer (Confined Feeding Operation) Legal Land Location NE-27-8-26-4

Nov 17, 2021	[signature]	Adrian	A & D Cattle
Date of signing	Signature	Print name	Corporate name (if appl)

Manure Receiver – Landowner(s)[3]

Nov 23/2021	[redacted]	James Feyter	Serene holdings Ltd.
Date of signing	Signature	Print name	Corporate name (if appl)

Date of signing	Signature	Print name	Corporate name (if appl)

[3] All registered owners of land, or authorized signing authorities must sign.

Manure Spreading Agreement

This agreement is between H &D Cattle, manure producer, and

H &D Cattle manure receiver.

Length of agreement: This agreement is valid for a time period of 2022 (minimum of one year).

Legal land location	Soil type[1]	Acres suitable for manure spreading[2]
NE-27-8-26-4		140

[1] Soil type choices: Dark brown and brown, Grey wooded, Black, Irrigated.

[2] Land within required setbacks from water bodies, water wells, residences, etc. is not to be included.

Other comments:

Manure producer (Confined Feeding Operation) Legal Land Location NE-27-8-26-4

Nov 17, 2021	ND	Adrian	H &D cattle
Date of signing	Signature	Print name	Corporate name (if appl)

Manure Receiver – Landowner(s)[3]

Nov 17, 2021	ND	Adrian	H &D cattle
Date of signing	Signature	Print name	Corporate name (if appl)
Date of signing	Signature	Print name	Corporate name (if appl)

[3] All registered owners of land, or authorized signing authorities must sign.

This agreement is between A & D Cattle, manure producer, and

Gerrit van Haigenbos manure receiver.

Length of agreement: This agreement is valid for a time period of 2022 (minimum of one year).

Legal land location	Soil type[1]	Acres suitable for manure spreading[2]
NW-27-8-26-4		160

[1] Soil type choices: Dark brown and brown, Grey wooded, Black, Irrigated.

[2] Land within required setbacks from water bodies, water wells, residences, etc. is not to be included.

Other comments:

Manure producer (Confined Feeding Operation) Legal Land Location NE-27-8-26-4

Nov 17, 2021	[signature]	Adrian	A&D Cattle
Date of signing	Signature	Print name	Corporate name (if appl)

Manure Receiver – Landowner(s)[3]

Nov 20-21	[redacted]	Gerrit Van Haigenbos	Mountain View Ltd
Date of signing	Signature	Print name	Corporate name (if appl)
Date of signing	Signature	Print name	Corporate name (if appl)

[3] All registered owners of land, or authorized signing authorities must sign.

Serene Holdings Ltd

N½-23-8-26-W4 270 acre

NE-16-8-26-W4 160 acre.

James Feyter

Manure Spreading Agreement

This agreement is between A$D Cattle LTD., manure producer, and

Steven + Evelyn Joosse. manure receiver.

Length of agreement: This agreement is valid for a time period of 1 year (minimum of one year).

Legal land location	Soil type[1]	Acres suitable for manure spreading[2]
NE 26-8-33 W4	Dark Brown and Brown	130

[1] Soil type choices: Dark brown and brown, Grey wooded, Black, Irrigated.

[2] Land within required setbacks from water bodies, water wells, residences, etc. is not to be included.

Other comments:

Manure producer (Confined Feeding Operation) Legal Land Location NE 27-8-26-4

Mar. 16, 2022	[signature]	Adrian	A$D Cattle LTD.
Date of signing	Signature	Print name	Corporate name(if appl)

Manure Receiver – Landowner(s)[3]

Mar 15/22	[signature]	Steven Joosse	—
Date of signing	Signature	Print name	Corporate name(if appl)

Date of signing	Signature	Print name	Corporate name(if appl)

[3] All registered owners of land, or authorized signing authorities must sign.

Part 2 — Technical Requirements

NRCB | Natural Resources Conservation Board

Application under the *Agricultural Operation Practices Act* for a confined feeding operation, manure collection area, and/or manure storage facility(ies)

NRCB USE ONLY

MINIMUM DISTANCE SEPARATION

Methods used to determine distance (if applicable): measurement from aerial photo [1]

Margin of error (if applicable): ______

Requirements (m): Category 1: 490 m [2] Category 2: 653 m [5] Category 3: 816 m [4] Category 4: 1306 m [3]

Technology factor: ☐ YES ☒ NO [6]

Expansion factor: ☐ YES ☒ NO [7]

MDS related concerns from directly affected parties or referral agencies: ☐ YES ☒ NO

LAND BASE FOR MANURE AND COMPOST APPLICATION

Land base required: 618 acres brown/ dark brown

Land base listed: ______

Area not suitable: Non cultivated areas, and setbacks to water, homes, etc

Available area: 648 acres dark brown

Requirement met: ☒ YES ☐ NO

Land spreading agreements required: ☒ YES ☐ NO

Manure management plan: ☐ YES ☒ NO

If yes, plan is attached: ☐

PLANS

Submitted and attached construction plans: ☒ YES ☐ NO

Submitted aerial photos: ☒ YES ☐ NO

Submitted photos: ☐ YES ☒ NO

GRANDFATHERING

Already completed: ☐ YES ☐ NO ☒ N/A

If already completed, see ______

Page: 18

Number: 1 Author: jsonnenberg Subject: Typewritten Text Date: 2/25/2022 9:51:40 AM -07'00'

measurement from aerial photo

Number: 2 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 3:40:35 PM -07'00'

490 m

Number: 3 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 3:40:56 PM -07'00'

1306 m

Number: 4 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 3:40:51 PM -07'00'

816 m

Number: 5 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 3:40:41 PM -07'00'

653 m

Number: 6 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 3:41:32 PM -07'00'

X

Number: 7 Author: jsonnenberg Subject: Typewritten Text Date: 3/4/2022 3:41:35 PM -07'00'

X

Name
Address
Legal Land
Location

MDS Spreadsheet based on 2006 AOPA Regulations

Category of Livestock	Type of Livestock	Factor A	Technology Factor	MU	LSU Factor	Number of Animals	LSU
Feedlot Animals	Beef Cows/Finishers (900+ lbs)	0.700	0.700	0.910	0.4459	2,000	891.8
	Beef Feeders (450 - 900 lbs)	0.700	0.700	0.500	0.2450		-
	Beef Feeder Calves (<550 lbs)	0.700	0.700	0.275	0.1348		-
	Horses - PMU	0.650	0.700	1.000	0.4550		-
	Horses - Feeders > 750 lbs	0.650	0.700	1.000	0.4550		-
	Horses - Foals < 750 lbs	0.650	0.700	0.300	0.1365		-
	Mules	0.600	0.700	1.000	0.4200		-
	Donkeys	0.600	0.700	0.670	0.2814		-
	Bison	0.600	0.700	1.000	0.4200		-
	Other						-
Dairy (*count lactating cows only)	Free Stall – Lactating Cows with all associated dries, heifers, and calves*	0.800	1.100	2.000	1.7600		-
	Free Stall – Lactating Cows with Dry Cows only*	0.800	1.100	1.640	1.4432		-
	Free Stall – Lactating Cows only	0.800	1.100	1.400	1.2320		-
	Tie Stall – Lactating Cows only	0.800	1.000	1.400	1.1200		-
	Loose Housing – Lactating Cows only	0.800	1.000	1.400	1.1200		-
	Dry Cow	0.800	0.700	1.000	0.5600		-
	Replacements – Bred Heifers (Breeding to Calving)	0.800	0.700	0.875	0.4900		-
	Replacements - Growing Heifers (350 lbs to breeding)	0.800	0.700	0.525	0.2940		-
	Calves (< 350 lbs)	0.800	0.700	0.200	0.1120		-
	Other						-
Swine Liquid (*count sows only)	Farrow to finish *	2.000	1.100	1.780	3.9160		-
	Farrow to wean *	2.000	1.100	0.670	1.4740		-
	Farrow only *	2.000	1.100	0.530	1.1660		-
	Feeders/Boars	2.000	1.100	0.200	0.4400		-
	Growers/Roasters	2.000	1.100	0.118	0.2600		-
	Weaners	2.000	1.100	0.055	0.1210		-
	Other						-
Swine Solid (*Count sows only)	Farrow to finish *	2.000	0.800	1.780	2.8480		-
	Farrow to wean *	2.000	0.800	0.670	1.0720		-
	Farrow only *	2.000	0.800	0.530	0.8480		-
	Feeders/Boars	2.000	0.800	0.200	0.3200		-
	Growers/Roasters	2.000	0.800	0.118	0.1888		-
	Weaners	2.000	0.800	0.055	0.0880		-
	Other						-
Poultry	Chicken - Breeders - Solid	1.000	0.700	0.010	0.0070		-
	Chicken - Layers - Liquid (includes associated pullets)	2.000	1.100	0.008	0.0176		-
	Chicken - Layers - (Belt Cage)	2.000	0.700	0.008	0.0112		-
	Chicken - Layers - (Deep Pit)	2.000	0.700	0.008	0.0112		-
	Chicken - Pullets/Broilers	1.000	0.700	0.002	0.0014		-
	Turkey - Toms/Breeders	1.000	0.700	0.020	0.0140		-
	Turkey - Hens (light)	1.000	0.700	0.013	0.0091		-
	Turkey - Broilers	1.000	0.700	0.010	0.0070		-
	Ducks	1.000	0.700	0.010	0.0070		-
	Geese	1.000	0.700	0.020	0.0140		-
	Other						-
Sheep and Goats	Sheep - Ewes/Rams	0.600	0.700	0.200	0.0840		-
	Sheep - Ewes with lambs	0.600	0.700	0.250	0.1050		-
	Sheep - Lambs	0.600	0.700	0.050	0.0210		-
	Sheep - Feeders	0.600	0.700	0.100	0.0420		-
	Goats - Meat/Milk (per Ewe)	0.700	0.700	0.170	0.0833		-
	Goats - Nannies/Billies	0.700	0.700	0.140	0.0686		-
	Goats - Feeders	0.700	0.700	0.077	0.0377		-
	Other						-
Cervid	Elk	0.600	0.700	0.600	0.2520		-
	Deer	0.600	0.700	0.200	0.0840		-
	Other						-
Wild Boar	Feeders	2.000	0.800	0.140	0.2240		-
	Sow (farrowing)	2.000	0.800	0.371	0.5936		-
	Other						-
					Total		891.8

For New Operations

Dispersion Factor 1

Category	Odour Objective	Distance	
		Feet	Metres
1	41.04	1,607	490
2	54.72	2,143	653
3	68.4	2,678	816
4	109.44	4,286	1,306

For Expanding Operations

Dispersion Factor 1
Expansion Factor 0.77

Category	Odour Objective	Distance	
		Feet	Metres
1	41.04	1,237	377
2	54.72	1,650	503
3	68.40	2,062	629
4	109.44	3,300	1,006

Name 0
Address 0
Legal Land
Location 0

Landbase Requirements (hectares) based on 2006 AOPA requirements

Category of Livestock	Type of Livestock	Number of Animals	Dark Brown & Brown (ha)	Grey Wooded (ha)	Black (ha)	Irrigated (ha)
Feedlot Animals	Cows/Finishers (900+ lbs)	2000.0	250.0	208.0	156.0	124.0
	Feeders (450 - 900 lbs)	0.0	0.0	0.0	0.0	0.0
	Feeder Calves (<550 lbs)	0.0	0.0	0.0	0.0	0.0
	Horses - PMU	0.0	0.0	0.0	0.0	0.0
	Horses - Feeders > 750 lbs	0.0	0.0	0.0	0.0	0.0
	Horses - Foals < 750 lbs	0.0	0.0	0.0	0.0	0.0
	Mules	0.0	0.0	0.0	0.0	0.0
	Donkeys	0.0	0.0	0.0	0.0	0.0
	Bison	0.0	0.0	0.0	0.0	0.0
	Other	0.0				
Dairy (*count lactating cows only)	Free Stall – Lactating Cows with all associated dries, heifers, and calves*	0.0	0.0	0.0	0.0	0.0
	Free Stall – Lactating Cows with Dry Cows only *	0.0	0.0	0.0	0.0	0.0
	Free Stall – Lactating Cows only*	0.0	0.0	0.0	0.0	0.0
	Tie Stall – Lactating Cows only	0.0	0.0	0.0	0.0	0.0
	Loose Housing – Lactating Cows only	0.0	0.0	0.0	0.0	0.0
	Dry Cow (Solid manure)	0.0	0.0	0.0	0.0	0.0
	Dry Cow (Liquid manure)	0.0	0.0	0.0	0.0	0.0
	Replacements – Bred Heifers (Breeding to Calving)	0.0	0.0	0.0	0.0	0.0
	Replacements - Growing Heifers (350 lbs to breeding)	0.0	0.0	0.0	0.0	0.0
	Calves (< 350 lbs)	0.0	0.0	0.0	0.0	0.0
	Other	0.0				
Swine Liquid (*count sows only)	Farrow to finish *	0.0	0.0	0.0	0.0	0.0
	Farrow to wean *	0.0	0.0	0.0	0.0	0.0
	Farrow only *	0.0	0.0	0.0	0.0	0.0
	Feeders/Boars	0.0	0.0	0.0	0.0	0.0
	Growers/Roasters	0.0	0.0	0.0	0.0	0.0
	Weaners	0.0	0.0	0.0	0.0	0.0
	Other	0.0				
Swine Solid (*Count sows only)	Farrow to finish *	0.0	0.0	0.0	0.0	0.0
	Farrow to wean *	0.0	0.0	0.0	0.0	0.0
	Farrow only *	0.0	0.0	0.0	0.0	0.0
	Feeders/Boars	0.0	0.0	0.0	0.0	0.0
	Growers/Roasters	0.0	0.0	0.0	0.0	0.0
	Weaners	0.0	0.0	0.0	0.0	0.0
		0.0				
Poultry	Chicken - Breeders - Solid	0.0	0.0	0.0	0.0	0.0
	Chicken - Layers - Liquid (includes associated pullets)	0.0	0.0	0.0	0.0	0.0
	Chicken - Layers - (Belt Cage)	0.0	0.0	0.0	0.0	0.0
	Chicken - Layers - (Deep Pit)	0.0	0.0	0.0	0.0	0.0
	Chicken - Pullets/Broilers	0.0	0.0	0.0	0.0	0.0
	Turkey - Toms/Breeders	0.0	0.0	0.0	0.0	0.0
	Turkey - Hens (light)	0.0	0.0	0.0	0.0	0.0
	Turkey - Broilers	0.0	0.0	0.0	0.0	0.0
	Ducks	0.0	0.0	0.0	0.0	0.0
	Geese	0.0	0.0	0.0	0.0	0.0
	Other	0.0				
Goats and Sheep	Sheep - Ewes/Rams	0.0	0.0	0.0	0.0	0.0
	Sheep - Ewes with lambs	0.0	0.0	0.0	0.0	0.0
	Sheep - Lambs	0.0	0.0	0.0	0.0	0.0
	Sheep - Feeders	0.0	0.0	0.0	0.0	0.0
	Goats - Meat/Milk (per Ewe)	0.0	0.0	0.0	0.0	0.0
	Goats - Nannies/Billies	0.0	0.0	0.0	0.0	0.0
	Goats - Feeders	0.0	0.0	0.0	0.0	0.0
	Other	0.0				
Cervid	Elk	0.0	0.0	0.0	0.0	0.0
	Deer	0.0	0.0	0.0	0.0	0.0
	Other	0.0				
Wild Boar	Feeders	0.0	0.0	0.0	0.0	0.0
	Sow (farrowing)	0.0	0.0	0.0	0.0	0.0
	Other	0.0				
	Total Hectares		250	208.0	156.0	124.0
	Total Acres		618	514.0	385.5	306.4

Part 2 – Technical Requirements

NRCB Natural Resources Conservation Board

Application under the *Agricultural Operation Practices Act* for a confined feeding operation, manure collection area and/or manure storage facility(ies)

RUNOFF CONTROL CATCH BASIN: Naturally occurring protective layer

(complete a copy of this section for ***EACH proposed*** *runoff control catch basin with a naturally occurring protective layer)*

Facility description / name *(as indicated on site plan)*
1. ~~Ru~~ catch Basin
2. ____
3. ____

Determination of runoff area

Provide a plan and show how you calculated the area contributing to runoff for each catch basin

Catch basin capacity

	Length (m)	Width (m)	Total depth (m)	Depth below ground level (m)	Slope run:rise – Inside end walls	Slope run:rise – Inside side walls	Slope run:rise – Outside walls	NRCB USE ONLY – Calculated storage capacity (excl. 0.5 m freeboard) (m³)
1.	200	120	1.6 ~~[illegible]~~	~~[illegible]~~ 1.6* [1]	3/1	3/1	3/1	
2.	AO note: Catch basin dimension to be 61 m x 38 m x 1.6 m deep							
3.								
						TOTAL CAPACITY		

[2] *engineer report says 1.2 m deepest. Condition would be required if a permit was issued

Naturally occurring protective layer details

		Provide details (as required)	
Thickness of naturally occurring protective layer	0.5 (m)	VH 11-21	
Soil texture	See attached report ____ % sand	____ % silt	____ % clay
Hydraulic conductivity - naturally occurring protective layer	Depth and type of soil tested:	Hydraulic conductivity (cm/s): 1.5 E-07	Describe test standard used: In situ

Catch Basin – Design and management requirements can be found in Technical Guideline Agdex 096-101

If soil info differs per facility include additional soils page.

NRCB USE ONLY

Requirements met: ☒ YES ☐ NO
Condition required: ☒ YES ☐ NO
Report attached: ☒ YES ☐ NO

Page: 21

Number: 1 Author: jsonnenberg Subject: Typewritten Text Date: 3/23/2022 9:19:08 AM

*

Number: 2 Author: jsonnenberg Subject: Typewritten Text Date: 3/23/2022 9:20:24 AM

*engineer report says 1.2 m deepest. Condition would be required if a permit was issued

Catch Basin Storage Volume Calculator

Construction Dimensions of Catch Basin			
* Only cells in blue can be changed.			
Overall Dimensions of Catch Basin			Catch Basin Dimensions
Total Length*4	61.0	m	200 ft
Total Width*4	38.0	m	125 ft
Total Depth*4	1.6	m	5 ft
Design Capacity Depth	*1.10*	m	4 ft
End Slope*4	3	run:rise	3 run:rise
Side Slope*4	3	run:rise	3 run:rise
Length of Bottom	51.4	m	169 ft
Width of Bottom	28.4	m	93 ft
Capacity @ top of Bank	*2,998*	*m³*	*Capacity @tob 105,860 ft³ 659,387 Imp. Gal.*
Design Capacity of Catch Basin (freeboard level)			Design Capacity (freeboard level)
Length (design capacity depth)	58.0	m	190 ft
Width (design capacity depth)	35.0	m	115 ft
Total Depth	*1.6*	m	5 ft
Design Capacity Depth	1.10	m	4 ft
End Slope	3	run:rise	3 run:rise
Side Slope	3	run:rise	3 run:rise
Design Capacity (freeboard level)	1,911	m³	67,500 ft³ 420,445 Imp. Gal.
level)	*2,030*	*m²*	*21,851 ft²*

CFO Name 1	
Land Location 1	

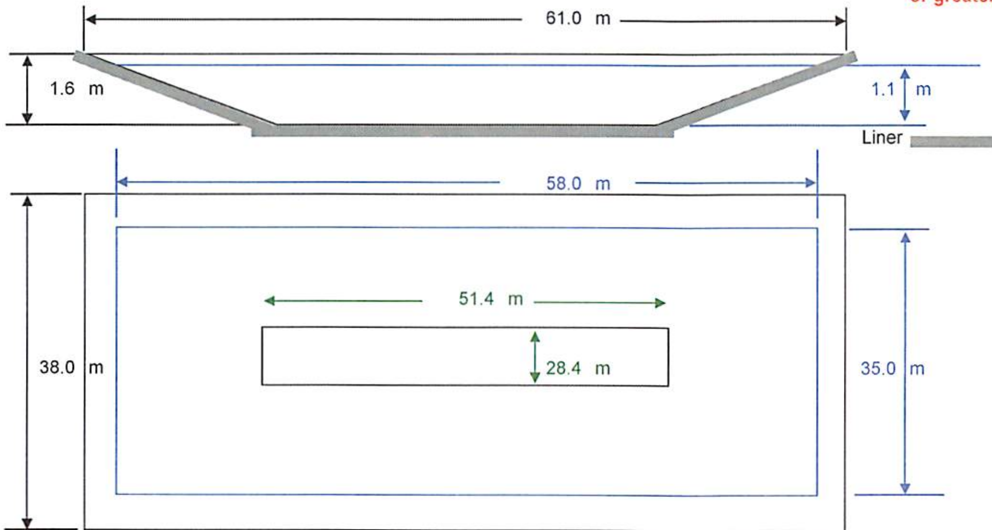
Paved Runoff Catchment Area(s)			
Area 2	Length (m)	Width (m)	Area (m²)
1			0.0
2			0.0
3			0.0
4			0.0
5			0.0
		Total Area (m²)	0

Unpaved Runoff Catchment Area(s)			
Area 2	Length (m)	Width (m)	Area (m²)
6	200	150	30,000.0
7	20	30	600.0
8	20	30	600.0
9	20	30	600.0
10	20	30	600.0
		Total Area (m²)	32,400

Rainfall (Select Town 3)	
Fort Macleod 90	
AOPA Design Rainfall	90 mm

Minimum Catchbasin Storage Volume Required	
1,895 m³ **	66935.4193 ft³
	416929.549 Imp. Gal.

** Design capacity of catch basin should be equal to or greater than, minimum storage volume required.



Lines in Black - Overall catch basin dimensions
Lines in Blue - Design capacity depth dimensions (excludes freeboard)

NTS - Not To Scale

RUNOFF CONTROL CATCH BASIN: Naturally occurring protective layer (cont.)

NRCB USE ONLY

Catch basin calculator. Total volume @ freeboard level: 1911 m3 Runoff capacity requirements met: ☒ YES ☐ NO

Calculation of the volume attached: ☒ YES ☐ NO See above

Depth to water table: 4.2 m Requirements met: ☒ YES ☐ NO

Depth to uppermost groundwater resource: 6.1 m Requirements met: ☒ YES ☐ NO

ERST completed: ☐ See ERST page for details

Protective layer specification comments (e.g. sand lenses; layering uniform or irregular; number and location of boreholes):

See attached report. If a permit was to be issued, a condition should be attached to ensure the catch basin is constructed in accordance with the engineering report as attached.

Leakage detection system required: ☐ YES ☒ NO If yes, please explain.

SOLID MANURE, COMPOST, & COMPOSTING MATERIALS: Barns, feedlots, & storage facilities - Naturally occurring protective layer

*(complete a copy of this section for **EACH** barn, feedlot, and storage facility for solid manure, composting materials, or compost with a naturally occurring protective layer for the liner)*

Facility description / name *(as indicated on site plan)*

1. 12 pens 40 x 50(m) each pen
2. 4 pens 20 m ☒ 30 m each pen

Manure storage capacity

	Length (m)	Width (m)	Depth below ground level (m)	NRCB USE ONLY Estimated storage capacity (m³)
1.	40 (m)	50 (m) each pen	~~1.6m~~ 0	Meets AOPA 9 month storage requirements
2.	20	30 each pen	0	
			TOTAL CAPACITY	

☐ I plan to use a short-term solid manure storage (STMS) as part of my manure storage and handling plan for this CFO. (The AOPA requirements for STMS are set out in the NRCB Short-Term Solid Manure Storage Requirements Fact Sheet.

Surface water control systems

Describe the run-on and runoff control system

Slope into catch Basin

Naturally occurring protective layer details

Thickness of naturally occurring protective layer	3.7 (m)	Provide details (as required) Bore hole VHS-21	
Soil texture	See attached report ___% sand	___% silt	___% clay
Hydraulic conductivity - naturally occurring protective layer	Depth and type of soil tested	Hydraulic conductivity (cm/s) 2.3E-07	Describe test standard used Situ

Additional information *(attach copies of soil test reports)*

See attached

NRCB USE ONLY

Requirements met: ☒ YES ☐ NO
Condition required: ☒ YES ☐ NO
Report attached: ☒ YES ☐ NO

Page: 24

Number: 1	Author: jsonnenberg	Subject: Line	Date: 12/1/2021 2:07:09 PM -07'00'

SOLID MANURE, COMPOST, & COMPOSTING MATERIALS: Barns, feedlots, & storage facilities - Naturally occurring protective layer (cont.)

NRCB USE ONLY

Nine month manure storage volume requirements met: ☒ YES ☐ YES With STMS ☐ NO

Depth to water table: 4.2 m Requirements met: ☒ YES ☐ NO

Depth to uppermost groundwater resource: 6.1 m Requirements met: ☒ YES ☐ NO

ERST completed: ☒ see ERST page for details

Surface water control systems

Requirements met: ☒ YES ☐ NO Details/comments:

Applicant has committed to sloping all pens into a catch basin

Naturally occurring protective layer details

Layer specification comments (e.g. sand lenses; layering uniform or irregular; number and location of boreholes):

See attached report. Though the site meets AOPA technical requirements, due to inconsistency among boreholes and the depth of UGR a condition should be included in the approval requiring additional inspection of the catch basin walls and floor for potential porous layers if the NRCB board was to direct a permit be issued.

14 October 2021

3102 – 12 Avenue South
Lethbridge, Alberta T1H 5V1
T: +1 403 327-7474
www.woodplc.com

Wood File: BX30697

A & D Cattle
Box 2468
Fort Macleod, AB T0L 0Z0

Attention: Adrian Van Huigenbos:

Re: **Geotechnical Review and Evaluation**
NRCB Permitting of Proposed Pens & Catch Basin
NW-27-008-26-W4M, near Fort Macleod, Alberta

As requested, Wood Environment & Infrastructure Solutions (Wood) has carried out a geotechnical review and evaluation of the above-captioned site relative to the required protection of the groundwater resource, as required by the Agricultural Operation Practices Act, AB Reg. 267/2001 (hereinafter referred to as "AOPA"). This letter describes site soil conditions to support a permit application related to an area of proposed new cattle pens to be located just north of the existing farmyard, with a new catch basin to be located just east of the proposed pen area (refer to Figure 1, attached).

In order to demonstrate the suitability of the naturally existing soils for consideration as a naturally occurring protective layer to the groundwater, ten boreholes were advanced at the site on September 1, 2021, followed by three additional confirmatory boreholes in the proposed catch basin area in October, 2021. The boreholes were advanced at the approximate locations denoted as VH1-21 to VH13-21 on Figure 1, attached.

The boreholes were advanced by a truck-mounted drill rig owned and operated by Chilako Drilling Services and extended to depths ranging between 3.0 m and 4.5 m below existing grades. The boreholes were logged by Larry Delong of Chilako Drilling Services.

In general, the natural mineral soils encountered within the boreholes comprised of a thin surficial layer of lacustrine or eolian deposits of sand, silt and or clay loam, which was underlain by stiff medium plastic clay till. Toward the north and east, the clay was observed to be underlain by sandier soils, including sand and gravel below about 3.5 m depth at boreholes VH9-21 to VH11-21, with sand and gravel becoming shallower further north of the proposed development area, in the area of VH8-21. Groundwater was encountered in the area of the proposed catch basin (borehole VH9-21) below about 4.2 m depth.

A sample of soil collected from the screened zone of borehole VH5-21 was subjected to laboratory grain size (i.e., hydrometer) analyses. The results (attached) indicate a textural breakdown of approximately 24% sand, 54% silt, and 22% clay.

To measure the *in situ* permeability of the subsurface soils, 50 mm diameter PVC monitoring wells were constructed in borehole VH5-21 (proposed pen area) and borehole VH11-21 (proposed catch basin area). Test well VH5-21 was screened from 2.1 m to 3.7 m depth while test well VH11-21 was screened from 1.2m to 2.0m depth. It is noted that the length of screen at VH11-21 was constrained by both the anticipated depth of catch basin, and by the presence of the more permeable underlying soils.

wood.

Well saturation of the 50 mm diameter monitoring wells was carried out by filling the monitoring well to the top for several consecutive days. After several days, the average 24-hour water drop at VH5-21 was about 1.52 m, while the average 24-hour water drop at VH11-21 was about 0.4 m.

To calculate the permeability of the screened portion of the clay till strata at the test well locations, a modified falling head test (as outlined in the USBR Engineering Geology Field Manual Volume 2 [2001]) was used. The input variables and output data are outlined on the attached In Situ Permeability Test reports. The results of the permeability testing indicate an *in situ* hydraulic conductivity, k_s, of 2.3×10^{-7} cm/s at VH5-21, and a hydraulic conductivity, k_s, of 1.5×10^{-7} cm/s at VH11-21.

Using the measured permeability of the clay stratum, the 1.6 m of clay screened at VH5-21 is estimated to represent the equivalent of approximately 7 m of naturally occurring materials having a hydraulic conductivity of 1×10^{-6} cm/s (the reference standard in AOPA). At VH11-21, the 0.8 m of clay screened is estimated to represent the equivalent of approximately 5.3 m of naturally occurring materials having a hydraulic conductivity of 1×10^{-6} cm/s. This represents natural material protection in excess of the minimum requirements outlined by the AOPA for solid manure storage (minimum 2 m, Section 9.5-c) and for catch basins (minimum 5 m, Section 9.5-b).

Conclusion

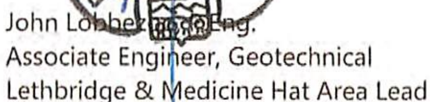
Based on the results of the current investigation, permeability testing, and our understanding of the site and proposed development at the site, it is Wood's opinion that the naturally occurring materials at the site satisfy the AOPA requirements for permitting the proposed pens and catch basin at this location.

It is noted that the depth of the proposed catch basin is constrained by the progression to more coarse-grained soils at increasing depth. Accordingly, the catch basin depth must be limited to 1.2 m below existing grade, and should not extend further north or east of the limits indicated on Figure 1.

We trust that this report satisfies your present requirements. Should you have any questions, please contact the undersigned at your convenience.

Yours truly,

Wood Environment and Infrastructure Solutions,
A Division of Wood Canada Limited



14 October 2021

John Lobbezoo, P.Eng.
Associate Engineer, Geotechnical
Lethbridge & Medicine Hat Area Lead

Co-authored by:
James Le, EIT
Geotechnical Services

PERMIT TO PRACTICE
WOOD ENVIRONMENT & INFRASTRUCTURE SOLUTIONS
RM SIGNATURE:
RM APEGA ID #: 11450
DATE: 14 October 2021
PERMIT NUMBER: P004546
The Association of Professional Engineers and Geoscientists of Alberta (APEGA)

Attachments
- Figure 1 Borehole Locations
- In Situ Permeability Test Calculations
- Hydrometer Test
- Soil Profile and Parent Material Description, Chilako Drilling Services

Figure 1
Borehole Locations
Proposed Pens & Catch Basin
A&D Cattle
Wood File: BX30697
October, 2021
Legend
Feature 1
Feature 2
NE-27-008-26-W4M
VH8-21
VH2-21
VH1-21
PROPOSED PEN AREA
VH5-21
VH6-21
VH9-21
VH13-21
PROPOSED
CATCH BASIN
VH11-21
VH12-21
VH10-21
Google Earth
© 2021 Google
Image © 2021 CNES / Airbus
LA21037 TD Page 28 of 85
N
200 m

VH5-21

wood.

In Situ Permeability Test

Modified Falling Head Permeability Equation

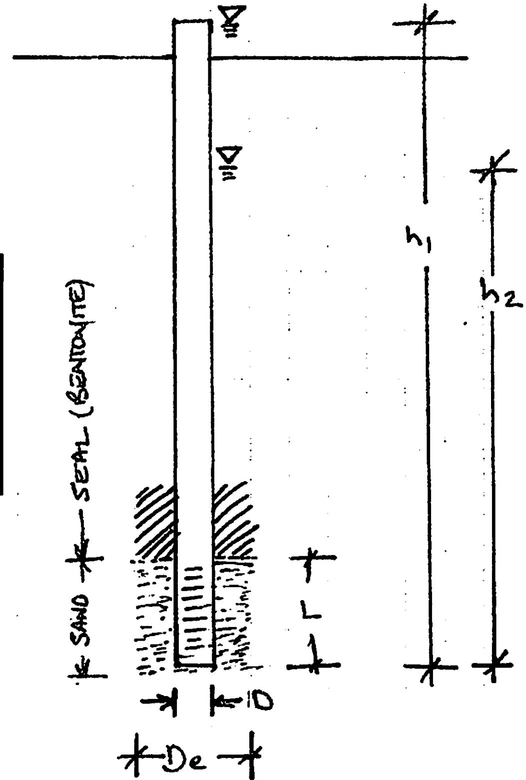
$$K_s = \frac{r^2}{2\ell\Delta t}\left[\frac{\sinh^{-1}\frac{\ell}{r_e}}{2}\ln\left[\frac{2H_1-\ell}{2H_2-\ell}\right]-\ln\left[\frac{2H_1H_2-\ell H_2}{2H_1H_2-\ell H_1}\right]\right]$$

taken from USBR Engineering Geology Field Manual Volume 2 (2001)

VH5-21 - A & D Cattle
Wood File: BX30697

INPUT VARIABLES

Terms	Value	Definition
D	0.0520	diameter of standpipe (m)
De	0.1500	diameter of borehole (m)
L	1.60	length of sand section (m)
h1	4.30	initial height of water above base of hole (m)
h2	2.78	final height of water above base of hole (m)
t	24.0	time of test (h)



k_s =	2.3E-07 cm/sec

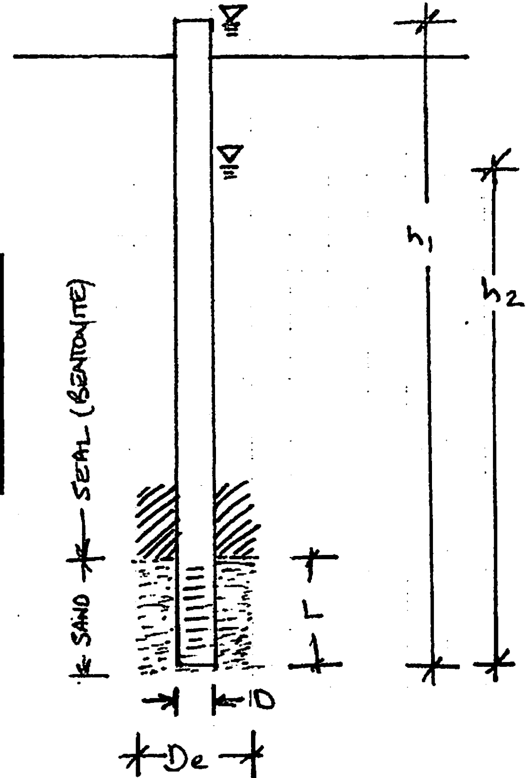
VH11-21

In Situ Permeability Test

Modified Falling Head Permeability Equation

$$K_s = \frac{r^2}{2\ell\Delta t}\left[\frac{\sinh^{-1}\frac{\ell}{r_e}}{2}\ln\left[\frac{2H_1-\ell}{2H_2-\ell}\right]-\ln\left[\frac{2H_1H_2-\ell H_2}{2H_1H_2-\ell H_1}\right]\right]$$

taken from USBR Engineering Geology Field Manual Volume 2 (2001)



VH11-21 - A & D Cattle

Wood File: BX30697

INPUT VARIABLES

Terms	Value	Definition
D	0.0520	diameter of standpipe (m)
De	0.1500	diameter of borehole (m)
L	0.80	length of sand section (m)
h1	2.30	initial height of water above base of hole (m)
h2	1.90	final height of water above base of hole (m)
t	24.0	time of test (h)

k_s = 1.5E-07 cm/sec

TO: A & D Cattle
Fort Macleod, AB

HYDROMETER TEST

ATTENTION: **Adrian Van Huigenbos**

COBBLES	GRAVEL		SAND			SILT	CLAY
	Coarse	Fine	C	M	F		

8" 4" 2" 1" 1/2" #4 #10 #20 #40 #60 #100 #200

Percent Passing: 100, 90, 80, 70, 60, 50, 40, 30, 20, 10, 0

200 100 50 25 12.5 4.75 2.0 0.85 .425 0.25 0.15 .075 0.002

Grain Size (mm)

Remarks:

Summary						
D10 =	--	mm	**Gravel**	0	%
D30 =	0.0030	mm	**Sand**	24	%
D60 =	0.0256	mm	**Silt**	54	%
Cu =	--		**Clay**	22	%
Cc =	--				

Project No: **BX30697**
Hole No: **VH5-21**
Depth (m): **2.5-3.5m**

Sample: --
Date: October 5, 2021
Tech: TMW

CHILAKO DRILLING SERVICES LTD

Box 942 Coaldale, Alberta, T1M 1M8
(403) 345-3710

SOIL PROFILE AND PARENT MATERIAL DESCRIPTION

Site Location: NE27-8-26W4, A&D Cattle Date: 1-Sep-21

Hole #	Location	Depth	Texture	Moisture	Geological	Sample	Remarks
VH1-21	0323822	0-0.15	FSCL	D	Eol		
	5505909	0.15-1.0	FSL	D	Eol		
		1.0-1.7	CL	D	Till		Stiff, med plastic, yellow brown
		1.7-2.0	CL	D	Till		Stiff, med plastic, yellow brown
		2.0-3.0	CL	M	Till		Mixed with some gravel
VH2-21	0323738	0-0.15	CL-FSCL	D	Topsoil		
	5505914	0.15-0.5	CL-FSCL	D	Lac		
		0.5-1.1	CL-SiCL	D	Lac		Stiff, med plastic, olive brown
		1.1-1.6	CL	D	Till		Stiff, med plastic, yellow brown
		1.6-3.0	CL	M	Till		Stiff, med plastic, brown, trace sand streaks
VH3-21	0323642	0-0.15	FSL	D	Topsoil		
	5505919	0.15-1.5	FSL	D	Eol	1.0-1.5	
		1.5-1.9	CL-SiCL	M	Lac		Stiff, med plastic, olive brown
		1.9-3.0	CL	M	Till		Stiff, med plastic, brown
VH4-21	0323633	0-0.15	FSL	D	Topsoil		
	5505848	0.15-0.4	SiL	D	Eol		
		0.4-1.0	SiCL	D	Lac		Stiff, med plastic, olive brown
		1.0-1.5	CL	D	Till		Stiff, med plastic, gray brown
		1.5-3.0	CL	SM	Till		Stiff, med plastic, yellow brown, trace gravel
VH5-21	0323708	0-0.15	SiCL	D	Topsoil		
	5505848	0.15-1.6	SiCL	D	Lac		V. firm, med plastic, olive brown
	toe of hill	1.6-3.7	CL	SM	Till	2.5-3.2	Stiff, med plastic, yellow brown, a few stones
							50mm H.C. well installed to 3.7m BGL
							Screen: 3.7-2.2m
							Sand: 3.7-2.1m
							Bentonite: 2.1-0.0m
							Stickup: 0.6m
							Hole Diameter: 0.15m
VH6-21	0323820	0-0.15	SiCL	D	Topsoil		
	5505837	0.15-1.1	SiCL	D	Lac		V. firm, med plastic, light brown
		1.1-1.6	CL	D	Till		Stiff, med plastic, brown
		1.6-3.0	CL	M	Till		Stiff, med plastic, brown, trace gravel
VH7-21	0323687	0-0.15	FSL	D	Topsoil		
	5506098	0.15-0.5	FSL	D	Eol		
	proposed	0.5-1.2	FSCL	D	Lac		
	catch	1.2-1.6	CL	M	Till		
	basin	1.6-3.0	S+Gr	VM	Till		Coarse gravel, some clay

SOIL PROFILE AND PARENT MATERIAL DESCRIPTION (CONTINUED)

Hole #	Location	Depth	Texture	Moisture	Geological	Sample	Remarks
VH8-21	0323883	0-0.15	FSL	D	Topsoil		
	5505987	0.15-1.2	SiCL	D	Lac		
	proposed	1.2-1.7	CL	D	Till		Mixed with gravel
	catch basin	1.7-3.0	S+Gr	M	Till		Coarse gravel
VH9-21	0323871	0-0.15	FSCL	D	Topsoil		
	5505834	0.15-0.9	SiCL	D	Lac		
	proposed	0.9-1.5	CL	D	Till		
	catch	1.5-3.1	CL	M	Till		Stiff, med plastic, some gravel
	basin	3.1-3.6	FSL-FSCL	VM-Sat	Till		
		3.6-4.5	CL*S+Gr	M	Till		CL mixed with sand and gravel
							25mm WTW installed to 4.5m (1ft of water)
VH10-21	0323833	0-0.15	SiCL	D	Topsoil		
	5505680	0.15-0.75	SiCL	D	Lac		Stiff, med plastic, varved
	proposed	0.75-1.9	CL	M	Till		Stiff, med plastic, brown
	catch	1.9-3.1	FSL	M	Till		
	basin	3.1-3.9	FSL-FSCL	VM	Till		
		3.9-4.5	S+Gr	Sat	Till		Some clay
VH11-21	0323871	0-0.15	CL-FSCL	SM	Topsoil		
	5505797	0.15-1.2	CL	SM	Lac		
		1.2-1.6	CL	SM	Till		Sand lensing, some gravel
		1.6-2.1	CL	SM	Till	1.6-2.1	Stiff, med plastic, brown, trace gravel
		2.1-3.6	SCL	SM	TIll		Some sand & gravel mixed with clay
		3.6-4.5	S&Gr	M	Till		Mixed with clay
							50mm H.C. well installed to 1.9m BGS
							Bentonite: 4.5-2.0m
							Screen: 1.9-1.3m
							Sand: 2.0-1.2m
							Bentonite: 1.2-0.0m
							Stickup: 0.3m
							Hole Diameter: 0.15m
VH12-21	0323897	0-0.15	FSCL	SM	Topsoil		
	5505797	0.15-0.4	FSCL	SM	Lac		
		0.4-2.3	CL	SM	Till		Stiff, med plastic, brown
		2.3-2.5	FSCL	M	Till		Trace gravel
		2.5-3.0	FSL	M	Till		
VH13-21	0323901	0-0.15	SiCL	SM	Topsoil		
	5505833	0.15-0.6	SiCL	SM	Lac		
		0.6-2.2	CL	SM	Till		Stiff, med plastic, trace gravel
		2.2-2.6	FSCL	M	Till		
		2.6-3.0	FSL	M	Till		

Legend:

L	Loam
C	Clay
S	Sand
Gr.	Gravel
Si	Silt
F	Fine (sand)
VF	Very Fine (sand)

BOARD DECISION

RFR 2018-11 / RA18016

In Consideration of Requests for Board Review filed under the *Agricultural Operation Practices Act* in relation to Decision Summary RA18016

500016 Alberta Ltd.

September 21, 2018

Background

On July 31, 2018, NRCB approval officer Lynn Stone issued Decision Summary RA18016 in relation to the confined feeding operation (CFO) proposed by 500016 Alberta Ltd. at NE 34-43-26 W4M in Ponoka County (County). 500016 Alberta Ltd. sought approval for a new 400 milking cow dairy (plus associated dries and replacements). The proposed CFO includes the construction of a new dairy barn, heifer barn, and a concrete liquid manure storage tank. The approval officer considered this application in Decision Summary RA18016 and issued an approval with conditions.

Pursuant to section 20(5) of the *Agricultural Operation Practices Act* (AOPA), Requests for Board Review (RFRs) of Decision Summary RA18016 were filed by directly affected parties Debra Stott, Shelly Wright, and Blake and Rose Butterfield. All RFRs were filed within the 10-day filing deadline established by AOPA.

Following receipt of the RFRs, all parties were provided with copies of the requests, and notified of the Board's intent to meet and deliberate on this matter. Directly affected parties with an adverse interest to the matters raised in the RFRs were provided the opportunity to make a rebuttal submission in response. The Board did not receive any submissions that met the September 4, 2018 filing deadline.

The Board convened to deliberate on the RFRs on September 7, 2018.

Jurisdiction

The Board's authority for granting a review of an approval officer's decision is found in section 25(1) of AOPA, which states:

> *25(1) The Board must, within 10 working days of receiving an application under section 20(5), 22(4) or 23(3) and within 10 working days of the Board's determination under section 20(8) that a person or organization is a directly affected party,*
>
> *(a) dismiss the application for review, if in the opinion of the Board, the issues raised in the application for review were adequately dealt with by the approval officer or the issues raised are of little merit, or*
>
> *(b) schedule a review.*

The Board considers that a party requesting a review has the onus of demonstrating that there are sufficient grounds to merit review of the approval officer's decision. Section 14 of the *Board Administrative Procedures Regulation* describes the information that must be included in each RFR.

Documents Considered

The Board considered the following information:

- Decision Summary RA18016, dated July 31, 2018
- Approval RA18016
- Technical Document RA18016

- RFRs filed by:
  - Debra Stott
  - Shelly Wright
  - Blake and Rose Butterfield
- Ponoka County Municipal Development Plan
- Portions of the public file material maintained by the approval officer.

Board Deliberations

The Board met on September 7, 2018 to deliberate on the RFRs.

In its deliberations, the Board considered each RFR filed by the directly affected parties and the various issues raised. The Board must dismiss an application for review if, in its opinion, the issues raised in the RFR were adequately dealt with by the approval officer or the issues are of little merit. The issues raised in the RFRs include odour, dust, noise, traffic, and water quantity and quality. In addition, the RFRs raised issues related to the timing of the approval officer's decision in relation to potential amendments to the County's municipal development plan (MDP), whether the CFO is consistent with the County's current MDP, and the potential to limit the location of future residences on their property resulting from a provision of the current MDP.

Nuisance and Environmental Effects

In Decision Summary RA18016, the approval officer considered the issues raised by the directly affected parties related to odour, dust, noise, traffic, and water quantity and quality. The Board understands that the RFRs, like the statements of concern to the approval officer, raise concerns about the direct effects from the proposed CFO, as well as the cumulative nuisance and environmental effects associated with confined feeding operations. AOPA provides a province wide regulatory framework to manage CFO effects within agricultural communities. It does so by establishing regulatory siting, construction and operating standards that apply in relation to each application and operation. That said, and as noted by the approval officer, the Board has consistently stated that cumulative effects are not within its regulatory mandate. Approval officers and the Board must, however, ensure approvals issued under AOPA are consistent with regional plans under the *Alberta Land Stewardship Act* (ALSA). Under ALSA, cumulative effects are considered and provide for protection to surface water, groundwater and air quality. Cumulative effects under ALSA are not related to the concentration of any particular industry but rather the cumulative impact of all human activity on the landscape. Further, ALSA does not explicitly deal with cumulative effects resulting from nuisance impacts. To date, regional plans have been adopted by Cabinet for the Lower Athabasca and South Saskatchewan River basins. Ponoka County will be covered by the Red Deer River basin regional plan; this plan is in the development stage and currently not in effect.

AOPA responds to potential environmental effects through a point source regulatory approach. AOPA regulatory standards require manure collection and storage facilities to be constructed and operated in a manner that will protect surface and groundwater. AOPA regulations also include manure spreading provisions that recognize the value and importance of livestock manure as a fertilizer, and that provide protection to the environment. Manure spreading regulations reduce environmental risk through soil nutrient limits and spreading setbacks from common bodies of water.

The Board has reviewed the relevant components of the approval officer's public file material, as well as her analysis in Appendix B of Decision Summary RA18016, and finds that the approval officer adequately considered nuisance issues, and issues related to water quality and water quantity.

Cumulative effects associated with the number or concentration of confined feeding operations within any given area are not a relevant consideration under AOPA, and as such this issue is not under consideration by the Board and does not merit review.

MDP Issues

The RFRs raised three issues related to the County's MDP:

1. the timing of the approval officer's decision in relation to potential amendments to the County's MDP,
2. whether the CFO is consistent with the current MDP, and
3. the potential to limit the location of future residences on their property resulting from a provision of the current MDP.

<u>Should the approval officer have waited for Ponoka County's MDP amendments?</u>

Both the Debra Stott and Shelley Wright RFRs assert that the approval officer acted inappropriately or in bad faith by issuing the RA18016 approval while the County was in the process of reviewing its MDP. Debra Stott's RFR indicated that some of the proposed amendments to the County's MDP may create a CFO exclusion zone that, if adopted, would include the proposed CFO site in the NE 34-43-26 W4M. The approval officer record includes a letter to the approval officer from Ponoka County dated June 26, 2018 asking that the approval officer defer her decision until "our planning review process is complete". The approval officer record also includes the County's May 4, 2018 letter to the Minister of Agriculture and Forestry asking for "a 90 day moratorium on further applications within this area to allow us the time necessary to complete our work." The Board notes that the approval officer record includes a letter from the Minister declining the County's request that the NRCB not issue decisions for a 90 day period.

The Board does not find bad faith in the approval officer's choice to issue a decision when the County was in the process of reviewing its MDP. The NRCB's written policy and past Board decisions both direct the use of the MDP in place at the time the approval officer decision is issued. Furthermore, the approval officer issued her decision during the early stages of Ponoka County's review process. The Board notes that the County's website shows a public information meeting for the MDP amendments slated for October 2, 2018, a full nine weeks after the approval office issued her decision. The Board finds that the approval officer's choice to issue her decision using the MDP under force at the time is entirely consistent with standing NRCB policy, was done in the ordinary course of business, and does not warrant Board review.

<u>Is the CFO location consistent with the current Ponoka County MDP?</u>

The Shelley Wright RFR asserts that the approval officer failed to consider two water bodies (Lake Pofianga and McFadden/Sigistrom Lake) as lakes, with the result that the approval officer failed to find that the CFO was inconsistent with the MDP. Section 2.5 of the MDP states:

> The County requests the NRCB not to allow CFO's closer than two miles to any lake <u>unless the regulators</u> are convinced that the manure management system is fail-safe and there is no reasonable risk of contamination of the lake. [emphasis added]

The approval officer determined that the water bodies were not lakes as they were not listed as lakes on either the County map or the relevant land titles, nor did the County identify any lakes in their

response to the approval officer. The Board notes that the approval officer's conclusion is further supported by the County's June 26 letter to the approval officer which stated that "the CFO meets the current municipal setbacks" and "is consistent with our existing Municipal Development Plan." That said, the Board finds that it is not necessary to determine whether the lakes referred to in the RFRs as Lake Pofianga or McFadden/Sigistrom Lake should be considered as lakes within the intended meaning of section 2.5. The Board interprets the "unless" provision in the section to establish a setback requirement only when the NRCB determines there is a reasonable risk of contamination to the lake. Having regard for the approval officer's comprehensive consideration of the planned facilities and the included approval conditions, the Board finds that the proposed manure management facilities associated with the CFO meet all regulations under AOPA; and, there is no reasonable risk of contamination to either water body. Further, the Board finds no evidence submitted or suggested in the RFRs that contradict this finding.

Although not required for this decision, the Board notes that the distance of the proposed CFO facilities to Lake Pofianga and McFadden/Sigistrom Lake substantially exceed the AOPA calculated minimum distance separation to even the most sensitive receptor residence. The purpose of the AOPA minimum distance separation is to establish a calculated setback from manure storage facilities to residences in order to manage nuisances associated with CFOs. The CFO facilities are approximately 3000 m from Lake Pofianga and 2700 m from McFadden/Sigistrom Lake. By way of reference, the calculated minimum distance separation for the proposed CFO to residences ranges from 449 m to a rural residence to 1198 m to residences in large-scale country residential, rural hamlet, village, town or city. 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.

<u>Future Residential Development</u>

Finally, the Board considered issues raised in the RFRs related to the potential of approving this CFO to limit the development of future residences on their property resulting from MDP section 2.7 that states "the county will protect existing CFOs by not normally issuing a development permit for a new residence within the Minimum Separation Distance of an existing or approved CFO….". This section may limit a neighbouring landowner's ability to obtain a development permit from the County in the future. AOPA establishes that minimum separation distance is calculated to residences that exist at the time a proponent files his initial application with the NRCB. The Board finds that this issue has no merit in the context of a NRCB review under AOPA as residential development applications rest exclusively with the planning and development jurisdiction of the County.

Decision

As a result of the Board's deliberations, the Board finds that the issues raised in the filed Requests for Review either have no merit, or were adequately considered by the approval officer, and therefore does not direct any matters to a hearing. The RFRs are denied.

DATED at EDMONTON, ALBERTA, this 21st day of September, 2018.

Original signed by:

______________________________	______________________________
Peter Woloshyn	Sandi Roberts
______________________________	______________________________
Keith Leggat	Daniel Heaney

Contact the Natural Resources Conservation Board at the following offices. Dial 310.0000 to be connected toll free.

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NRCB Response Line: 1.866.383.6722
Email: info@nrcb.ca
Web Address: www.nrcb.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.

NRCB Natural Resources Conservation Board

Decision Summary LA21033

This document summarizes my reasons for denying Approval LA21033 under the *Agricultural Operation Practices Act* (AOPA). Additional reasons are in Technical Document LA21033. All decision documents and the full application are available on the Natural Resources Conservation Board (NRCB) website at www.nrcb.ca under Confined Feeding Operations (CFO)/CFO Search. My decision is based on the act and its regulations, the policies of the NRCB, the information contained in the application, and all other materials in the application file.

Under AOPA this type of application would require an approval. For additional information on NRCB permits please refer to www.nrcb.ca.

1. Background

On June 14, 2021, Double H Feeders Ltd. submitted a Part 1 application to the NRCB to expand an existing poultry CFO by constructing two barns (87 m x 23 m each) and increasing chicken broiler numbers by 65,000 to a total of 120,000 birds.

The Part 2 application was submitted on September 13, 2021. On September 21, 2021, I deemed the application complete.

a. Location

The existing CFO is located at NE 22-9-22 W4M in Lethbridge County, roughly 1.8 km northeast of the Town of Coalhurst, Alberta. The terrain is sloping to the east. The closest common body of water is a drainage ditch that is connected to two neighboring quarter sections northeast and immediately east of the CFO. The proposed barns would be located to the south of the existing barns.

b. Existing permits

As the CFO existed on January 1, 2002, the CFO is considered to be grandfathered with a deemed approval under section 18.1 of AOPA. That deemed permit includes Lethbridge County Permit 98-189, issued December 29, 1998. This municipal permit allowed the conversion of a hog operation into a 50,000 chicken broiler CFO. The determination of the CFO's deemed permit status under section 18.1 of AOPA is explained in Appendix D, attached.

2. Notices to affected parties

Under section 19 of AOPA, the NRCB notifies (or directs the applicant to notify) all parties that are "affected" by an approval application. Section 5 of AOPA's Part 2 Matters Regulation defines "affected parties" as:

- In the case where part of a CFO is located, or is to be located, within 100 m of a bank of a river, stream or canal, a person or municipality entitled to divert water from that body within 10 miles downstream

- the municipality where the CFO is located or is to be located
- any other municipality whose boundary is within a specified distance from the CFO, depending on the size of the CFO
- all persons who own or reside on land within a specified distance from the CFO, depending on the size of the CFO

For this size of CFO the specified distance is ½ mile. (The NRCB refers to this distance as the "affected party radius" or "notification radius.")

A copy of the application was sent to Lethbridge County, which is the municipality where the CFO is located.

The NRCB gave notice of the application by public advertisement in the Sunny South News on September 21, 2021. The full application was also posted on the NRCB website. As a courtesy, twenty six letters were sent to people identified by Lethbridge County as owning or residing on land within the affected party radius.

3. Notice to other persons or organizations

Under section 19 of AOPA, the NRCB may also notify persons and organizations the approval officer considers appropriate. This includes sending applications to referral agencies which have a potential regulatory interest under their respective legislation.

Referral letters and a copy of the complete application were emailed to, Alberta Health Services (AHS), Alberta Environment and Parks (AEP), Alberta Transportation, and the Lethbridge Northern Irrigation District (LNID).

The NRCB received a response from Jeff Gutsell, hydrogeologist with AEP; Alan Harrold, general manager of the LNID; and Leah Olson, Development and planning technologist with Alberta Transportation. No response was received from AHS.

Mr. Gutsell commented that AEP has not received an application from Double H for a water license under the Water Act and that there is no documentation about the source of water for this CFO. He continued to state that Double H has the potential to access water from the LNID and requested proof of adequate water availability prior to expanding this CFO. Because water needs for CFOs are not part of the NRCB's mandate and jurisdiction, I will not further discuss this issue. However, a copy of AEP's response has been forwarded to the applicant for his information and action.

Mr. Harrold stated in his response that Double H would require a water conveyance agreement to cover the demand for water. He also pointed out that manure storage and application is not permitted within 30 m of any canal or drain and that no effluent must enter the district works. Because water needs for CFOs are not part of the NRCB's mandate and jurisdiction, I will not further discuss this issue. However, a copy of the LNID's response has been forwarded to notify the applicant of this requirement.

Ms. Olson stated in her response that Alberta Transportation would consider this development to be an ancillary development and that her department has no concerns with this application.

4. Alberta Land Stewardship Act (ALSA) regional plan

Section 20(10) of AOPA requires that an approval officer must ensure the application complies with any applicable ALSA regional plan.

As required by section 4(1) of the South Saskatchewan Regional Plan (SSRP), I considered that document's Strategic Plan and Implementation Plan and determined that the application is consistent with those plans. In addition, there are no notices or orders under the Regulatory Details portion of the SSRP that apply to this application.

5. Municipal Development Plan (MDP) consistency

I have determined that the proposed expansion is inconsistent with the land use provisions of Lethbridge County's municipal development plan. The reasons and a more detailed discussion of the county's planning requirements can be found in Appendix A, below.

Because of this inconsistency, in accordance with section 20(1)(a) of AOPA I must deny the application.

6. AOPA requirements

Despite the MDP inconsistency I continued to review the technical aspects of the application against the technical requirements set out in the regulations. The proposed expansion would:

- Meet the required AOPA setbacks from all nearby residences (AOPA setbacks are known as the "minimum distance separation" requirements, or MDS)
- Meet the required AOPA setbacks from water wells, springs, and common bodies of water
- Have sufficient means to control surface runoff from the CFO facilities
- Meet AOPA's nutrient management requirements regarding the land application of manure with the nutrient management plan provided
- Meet AOPA groundwater protection requirements for the design liners for manure storage facilities and manure collection areas

7. Responses from municipality and other directly affected parties

Directly affected parties are entitled to a reasonable opportunity to provide evidence and written submissions relevant to the application, and are entitled to request an NRCB Board review of the approval officer's decision. Not all affected parties are "directly affected" under AOPA.

Municipalities that are affected parties are identified by the act as "directly affected." Lethbridge County is an affected party (and directly affected) because the proposed expansion is located within its boundaries.

Ms. Hilary Janzen, a senior planner with Lethbridge County, provided a written response on behalf of Lethbridge County. Ms. Janzen pointed out that the CFO is located within the identified exclusion zone as noted in the MDP but did not otherwise answer if the application is consistent with Lethbridge County's land use provisions of the MDP. She continued to state that this area is governed by the intermunicipal development plan (IDP) between Lethbridge County and the Town of Coalhurst which supersedes the MDP according to the *Municipal Government Act*. She

also stated that an approval should include a condition that requires the decommissioning of chicken barns that are located on the NW 22-9-22 W4 owned by the applicant. The application's consistency with Lethbridge County's MDP is addressed in Appendix A, attached.

Apart from municipalities, any member of the public may request to be considered "directly affected." The NRCB received responses from four individuals.

All of the four people who submitted responses own or reside on land within the 0.5 mile notification radius for affected persons. Because of their location within this radius, and because they submitted a response, they qualify for directly affected party status. (See NRCB Operational Policy 2016-7: Approvals, part 6.2)

The directly affected parties raised concerns regarding runoff, odor, manure spreading practices, and land value. These concerns are addressed in Appendix B.

8. Environmental risk of CFO facilities

As part of my review of this application, I assessed the risk to the environment posed by the CFO's existing manure storage facilities and manure collection areas. I used the NRCB's environmental risk screening tool (ERST) to assist in my assessment of risk to surface water and groundwater (see NRCB Operational Policy 2016-7: Approvals, part 8.13). The tool provides for a numeric scoring of risks, which can fall within a low, moderate, or high risk range. (A complete description of this tool is available under CFO/Groundwater and Surface Water Protection on the NRCB website at www.nrcb.ca.)

The assessment found that the existing and proposed poultry barns pose a low potential risk to groundwater and surface water.

9. Other factors

While I am denying this application due to inconsistency with the MDP land use provisions, I will consider other factors under section 20(1)(b) of AOPA in the event this decision is overturned following a Board review.

AOPA requires me to consider matters that would normally be considered if a development permit were being issued. The NRCB interprets this to include aspects such as property line and road setbacks related to the site of the CFO. (Grow North, RFR 2011-01 at page 2). Approval officers are limited to what matters they can consider though as their regulatory authority is limited. Accordingly, I considered the property line setbacks required by Lethbridge County's land use bylaw (LUB). I note that the application would meet those setbacks. This conclusion is supported by comments from the county.

AOPA requires me to consider the effects a proposed CFO or CFO expansion has on natural resources administered by provincial departments. To this end, I referred the application to AEP. Based on the response from the AEP representative whom I have corresponded with for this application, I am not aware of any statements of concerns for this CFO that were submitted under section 73 of the Environmental Protection and Enhancement Act or section 109 of the Water Act in respect of the subject of this application.

I am not aware of any written decisions before the Environmental Appeals Board in respect of the subject-matter of this application (hhttp://www.eab.gov.ab.ca/status.htm, accessed October

29, 2021). Further, I am not aware of any written decision before a director under the Water Act.

Finally, I considered the effects of the proposed expansion on the environment, the economy, and the community, and the appropriate use of land.

Because the application meets all of AOPA's technical requirements, I presume that the effects on the environment are acceptable.

Consistent with NRCB policy (Approvals Policy 8.7.3), if the application is consistent with the MDP and with the LUB then the proposed development is presumed to have an acceptable effect on the economy and community. In my view, this presumption of acceptability is rebutted because of my determination that the application is not consistent with the MDP or the LUB in addition to the location of the CFO as discussed in Appendix A, attached.

I also presumed that the proposed expansion is not an appropriate use of land because of the inconsistency with the land use provisions of the municipal development plan (See NRCB Operational Policy 2016-7: Approvals, part 8.7.3.).

10. Conclusion

I am denying the application for the reasons stated above.

For information, the deemed permit determination outlined in Appendix D survives this denial decision. Under section 18.1(4) of AOPA, the terms and conditions of the deemed permit (including municipal development permit #98-189) will continue to apply.

November 25, 2021

Carina Weisbach
Approval Officer

Appendices:

A. Consistency with the municipal development plan
B. Determining directly affected party status and concerns raised
C. Conditions if an approval would be issued
D. Determination of deemed permit status

APPENDIX A: Consistency with the municipal development plan

Under section 20 of AOPA, an approval officer may only approve an application for an approval or amendment of an approval if the approval officer holds the opinion that the application is consistent with the "land use provisions" of the applicable municipal development plan (MDP).

Double H's CFO is located in Lethbridge County and is therefore subject to that county's MDP. Lethbridge County adopted the latest revision to this plan on December 5, 2019, under Bylaw #19-043.

In this case, my opinion is that Double H's application is not consistent with the land use provisions of the MDP.

Relevant to this determination are the following sections of the MDP:

Section 6.6 Confined Feeding Operations, in subsection 6.6.3:

> a) Urban Fringe: "*The County shall exclude the development of CFOs in the Urban Fringe land use districts."*
>
> d) NRCB
> IV) CFOs "*shall not be approved in the areas shown and designated on Figure 11B as exclusion areas*".

The existing CFO is within the urban fringe zoning category, and is within this area as shown on Map 11B. I interpret 'shall exclude development of CFOs' in (a) as prohibiting not only the establishment of new CFOs, but also the development in the sense of expanding the existing CFO facilities or increasing permitted livestock numbers. With that, the application is not consistent with this section of the MDP.

> *d) NRCB*
> *VI) The NRCB should consider the requirements and regulations as stipulated in the Lethbridge County Land Use Bylaw and Animal Control Bylaw, including the exclusion of confined feeding operations on parcels less than the specified sizes as specified in those bylaws.*

In my view, this section – as well section 6.6.3(a)'s reference to land use districts – provides a clear intent to adopt provisions from the land use bylaw (LUB). Following the NRCB Operational Policy 2016-7: *Approvals*, part 8.2.3, I therefore also considered land use provisions in Lethbridge County's Land Use Bylaw #1404 (consolidated to Bylaw 19-044 and Bylaw 19-032 (maps)). Under those bylaws, the subject land is currently zoned Rural Urban Fringe. CFOs are listed as a prohibited use under this zoning category.

Section 6.9.2 "Special Planning Areas" of Lethbridge County's MDP identifies Objectives of special planning areas. Double H's CFO is located in special planning Area A (Figure 14). The MDP states in part:

> As the Town of Coalhurst and the City of Lethbridge increase development pressures in Area A, this area will become a distinct development node due to

limited access from the trade corridor and existing highway, as such, agricultural pursuits in this region may become financially and operationally challenging. CFO feeding operations will be discouraged in this area given the residential and commercial growth potential in this area.

In my opinion, for the above reasons, the application is not consistent with Lethbridge County's municipal development plan land use provisions. Under section 20(1)(a) of AOPA, if there is an inconsistency, the approval officer must deny the application.

In NRCB Operational Policy 2016-7: *Approvals*, part 8.2.3, approval officers are also to consider land use provisions in statutory plans, such as intermunicipal development plans, if the MDP cross-references them.

The Lethbridge County MDP does not mention the Lethbridge County-Town of Coalhurst IDP specifically, though the IDP was originally enacted (in 2014) prior to the most recent MDP revisions (2018, 2019). Lethbridge County and the Town of Coalhurst adopted the last amendment of its IDP in February 2021 under Bylaw # 20-023 and #421-20 (Bylaw # 1434 (Lethbridge County), #375-14 (Town of Coalhurst)).

In my view, the MDP cross-references IDPs generally but not sufficiently to be read as a cross-reference to this particular IDP. Section 6.10 of Lethbridge County's MDP discusses the contexts and policies in respect to the plans with the urban and rural municipalities within its borders, and mentions specifically the IDP between the City of Lethbridge and the County, and the challenges in respect to the development of the rural urban fringe between the two municipalities. Section 6.10.3(a) continues to discuss that the county shall "create, and respect through its decision making" IDPs with all the municipalities within Lethbridge County (see also Map 15). There is no specific cross-reference to the County of Lethbridge-Town of Coalhurst IDP.

Ms. Jansen, with Lethbridge County, rightfully stated in her response to this application, that the MDP is superseded by the IDP in the planning hierarchy as set out in the *Municipal Government Act*, to the extent of any conflict. However, the application to the NRCB to expand a CFO is processed under AOPA, not under the MGA. AOPA expressly singles out MDP land use provisions.

For these reasons, I did not consider land use provisions in the IDP. My analysis ends with the finding that the application is inconsistent with the land use provisions of the MDP.

APPENDIX B: Determining directly affected party status and concerns raised

The following individuals qualify for directly affected party status because they submitted a response to the application and they own or reside on land within the "affected party radius," as specified in section 5(c) of the Agricultural Operation, Part 2 Matters Regulation:

Mellissa Schmid
NW 23-9-22 W4

Bryan Clifton
NW 23-9-22 W4

A.W Bedster and spouse
SW 23-9-22 W4

See NRCB Operational Policy 2016-7 – Approvals, part 6.2.

The directly affected parties raised the following concerns:

- runoff from manure spreading lands and manure spreading practice,
- changing a watercourse,
- odor,
- reduced property value, and
- reduced quality of life.

Because this application will be denied, I need not discuss these concerns any further. However, as stated in section 9 above, the concerns relating to water that are under AEP's jurisdiction have been forwarded to AEP for their information.

I would also like to point out that if a person or party has concerns regarding manure collection or storage facilities, manure spreading or other CFO related issues, those concerns can be reported to the NRCB's 24 hour response line (1-866-383-6722). The call will be followed up on by an NRCB inspector. Neighbours and concerned parties can also call any NRCB office during regular business hours if they have questions about permit conditions or ongoing AOPA operational requirements.

APPENDIX C: Potential conditions if a permit is to be issued

If following a review hearing the Board overturns this decision and directs that a permit be issued, I would recommend that the conditions discussed below be considered. This would also include carrying forward a number of conditions from Development permit 98-189 (see sections 2 and 3 of this appendix).

1. Potential new conditions

a. Construction Deadline

I would recommend a condition setting out a reasonable construction completion deadline for the proposed work. Double H Feeders has proposed to complete construction of the proposed new poultry barns by January 1, 2026. This time-frame is considered to be reasonable for the proposed scope of work.

b. Post-construction inspection and review

The NRCB's general practice is to include conditions in new permits to ensure that the new or expanded facilities are constructed according to the required design specifications. Accordingly, it is recommended that a permit include conditions requiring:

I. Double H Feeders to provide written proof from a qualified third party professional that the concrete used for the manure collection and storage area meets the required specifications as laid out in Agdex 096-93 – Category D.

II. The inspection of approved facilities prior to livestock or manure being allowed to be placed in them.

2. Conditions to be potentially carried forward from Development permit 98-189

If an approval was issued, I would recommend carrying forward the terms and conditions in development permit 98-189, as noted below.

Pursuant to section 23 of AOPA (approval officer amendments), I would delete conditions # 2, and 4 from development permit 98-189 or only carry them forward in parts. My reasons are as follows:

Condition 2 – Land Area for Manure Utilization - states:" *Maintenance of and/or access to approximately 350 acres of cultivated dryland or 148 acres cultivated, irrigated for manure utilization. Manure must not be applied to snow and/or frozen ground. Manure be incorporated within 48 h of land spreading, with consideration for neighboring residences, including a separation distance from such residences.*"

This condition consists of several parts.
The first part that determined the available land base for manure spreading is redundant and will be replaced by AOPA and its regulations that require a minimum of 963.7 acres of dryland or 483.3 acres of irrigated land for manure spreading, or alternatively, a nutrient management plan.

The second part, no spreading on frozen or snow covered ground, would also be redundant if a permit is issued since one of the standard conditions in a permit state*:" The permit holder shall comply with the requirements of the Agricultural Operation Practices Act (AOPA) and the regulations passed pursuant to that act."* This would include section 24(5)(b) of the Standards and Administration Regulation.

The third part requires the incorporation of manure within 48 hours of land spreading. This part of condition 2 would be carried forward (as per NRCB's Approval Policy 2016-1: Amending Municipal Permit Conditions) because it is more stringent than AOPA which allows application of manure on forage lands or directly seeded crops without incorporation.

The fourth part requires consideration for neighboring residences, including a separation distance from such residences during manure spreading. These terms are rather vague, subjective, and difficult to enforce. It is therefore more practical to follow the requirements of AOPA and its regulations (sections 24(5) Standards and Administration Regulation). This part of the condition would therefore be deleted and not carried forward.

Condition 4 – Dead Bird Disposal - states:" *Dead bird disposal is by burial. The burial pit shall only be used for dead birds. The burial pit must be fenced to exclude predators from having access to and removing dead birds from the pit, particularly during winter months. Dead birds must be covered on a regular basis during months the soil is not frozen. Acceptable storage of dead birds must be provided until sufficient quantities are attained for burial*."

The disposal of deads is regulated directly by AF's Regulatory Services Branch under the Animal Health Act. Given AF's regulatory role, concurrent oversight of dead animal disposal by the NRCB would be inefficient and might lead to inconsistency with AF's requirements. Therefore, I would delete this condition.

APPENDIX D: Determination of grandfathered permit status

Double H claims that its CFO is grandfathered (that is, it has a “deemed” permit) under section 18.1 of AOPA. I am treating that as a request for a determination of grandfathered permit status. Under section 11(1) of the Administrative Procedures Regulation under AOPA, because I am cross-appointed as an NRCB inspector, I conducted an investigation into the deemed permit status of the CFO.

The investigation was to determine the capacity of the CFO that was constructed pursuant to a municipal development permit issued before January 1, 2002.

It is not clear when the CFO was originally permitted but it received development permit # 98-189 on December 29, 1998, from Lethbridge County, allowing a conversion from a hog CFO to a poultry CFO. This permit allowed the construction and operation of a chicken broiler CFO with 50,000 broilers.

Under section 11 of the Administrative Procedures Regulation, notice of a grandfathered permit determination is not required if the CFO was constructed pursuant to a development permit issued before January 1, 2002.

Under section 18.1(2)(c), the CFO’s deemed capacity is the capacity stated in the CFO’s development permit. Therefore, the CFO has a deemed capacity of 50,000 broiler chicken.

However the development permit does not list any facilities. I therefore determined the grandfathered footprint of this CFO using historical aerial photos:

As confirmed using aerial pictures taken between 1999 and 2003 (Valtus), the three existing broiler barns have not changed since these pictures were taken. The external measurements of the barns as listed by the applicant on page 1 of the Part 2 application (86.9 m x 11.9 m; 86.9 m x 13.4 m and; 86.9 m x 15.2 m) are confirmed.

BOARD DECISION

2022-02 / LA21033

Review of Decision Summary LA21033

Double H Feeders Ltd.

March 17, 2022

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6. BOARD DECISION 20

The Board issues this decision under the authority of the *Agricultural Operations Practices Act* (AOPA), following the Board's review of Decision Summary LA21033 via a virtual hearing held on February 10, 2022.

1. BACKGROUND

Decision Summary LA21033 (Decision Summary), was issued by an NRCB approval officer on November 25, 2021, denying an application by Double H Feeders Ltd. (Double H Feeders) to construct two barns and increase chicken broiler numbers by 65,000 to a total of 120,000. The existing confined feeding operation (CFO) is owned and operated by Double H Feeders, and is located on NE 22-09-22 W4M, approximately 1.8 km northeast of the town of Coalhurst, Alberta (Town) in Lethbridge County (County).

For ease of reference within this document, the CFO site on NW 22-09-22 W4M proposed for **decommissioning** will be identified as the "west site", and the CFO site on NE 22-09-22 W4M proposed for expansion will be identified as the "east site".

> ***Note: CFO located on NW 22-09-22 W4M (west site) and capacity confirmation:*** *The Technical Document lists the one-time capacity of the west site as 50,000 broiler chickens. Given that the east site currently has a one-time capacity of 55,000 broiler chickens (Technical Document p. 2 of 32), the application to decommission the west site and to expand the east site to house a total of 120,000 broiler chickens represents a net capacity increase of 14% or 15,000 broiler chickens.*[1]

Pursuant to section 20(5) of the *Agricultural Operation Practices Act* (AOPA), a Request for Board Review (RFR) of the Decision Summary was filed by Double H Feeders within the 10-day filing deadline of December 16, 2021, established by AOPA. Under the authority of section 18(1) of the *Natural Resources Conservation Board Act*, a division of the Board (Board) consisting of Peter Woloshyn (chair), Sandi Roberts, L. Page Stuart, and Earl Graham was established to conduct the review.

The Board met on January 5, 2022. In its Decision Report RFR 2022-01 dated January 7, 2022, the Board advised that it had reviewed the RFR, determined that a review hearing was warranted, and that a one-day virtual hearing would be held. On January 10, 2022, a letter with the hearing details was sent to parties, advising that the hearing would use the Zoom platform, and would commence at 9:00 a.m. on February 10, 2022.

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[1] The applicant asserted in both the Technical Document [p. 2 of 32] and the hearing [Hearing Transcript p. 83, 16-19] that the proposed expansion to the CFO on NE 22-09-22 W4M would result in a total increase of 5%; however, the Board notes that this calculated increase includes the capacity of a third Double H Feeders' site that is not a consideration in this application.

The Board identified the core issue for consideration at the hearing:

> ***Whether the Board should exercise its authority to approve the CFO expansion application, notwithstanding an inconsistency with the County's municipal development plan (MDP).***

The Board also identified a number of constituent elements that would contribute to its decision on that core issue (as listed on page 3 of Board Decision RFR 2022-01), and encouraged directly affected parties to consider these matters in their hearing submissions. These elements related to the following general areas:

- understanding municipal planning objectives
- the relevance of the Double H Feeders CFO located on NW 22-09-22 W4
- directly affected party concerns

Hearing submissions were received within the prescribed timelines from the Approval Officer/NRCB Field Services, Town of Coalhurst, Double H Feeders, County of Lethbridge, and Mr. Clifton. An additional filing request was made by Mr. Clifton after the January 27, 2022 hearing submission deadline, and was accepted in a preliminary decision issued by the Board on February 1, 2022. No rebuttals were received.

Parties to the review and their representatives are identified below:

Parties to the Review	Counsel/Representative
NRCB Field Services • Carina Weisbach, Approval Officer • Andy Cumming, Director, FS-Applications	Fiona Vance, Counsel
Double H Feeders Ltd.	Scott Van't Land, Operator
Lethbridge County	Hilary Janzen, Supervisor, Planning & Development
Town of Coalhurst	Diane Horvath, Town Planner
Mellissa Schmid	Mellissa Schmid
Mr. and Mrs. Bedster	Art Bedster
Mr. Clifton	Bryan Clifton

Bill Kennedy participated in the hearing as counsel for the Board. Additional staff support was provided by Laura Friend, Manager, Board Reviews; and Sylvia Kaminski and Carolyn Taylor, document management.

2. BOARD JURISDICTION

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 municipal development plans (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.

The Board has established that the following considerations are reasonable in a determination of whether a permit application is approved notwithstanding an inconsistency with the MDP presented as a CFO exclusion zone:[2]

- the municipal authority's rationale for establishing the relevant provision(s) in the municipal development plan,
- whether the relevant provision is reasonable and reflective of good planning,
- whether there is a direct link between the planning objectives and the establishment of the CFO exclusion zone, and
- whether the municipal development plan is in conflict with the AOPA objective of establishing common rules for the siting of CFOs across the province.

[2] 2011-04 Zealand Farms Ltd., 2016-01 Peters, 2017-08 Friesen & Warkentin

3. BOARD DELIBERATIONS ON THE MDP AND IDP

3.1 Hierarchy and Consideration of Municipal Statutory Planning Documents

The current *Municipal Government Act* (MGA) (Revised Statutes of Alberta 2000, Chapter M-26, current as of January 1, 2018) includes a clear hierarchy of municipal documents, where intermunicipal development plans (IDPs) prevail over conflicting provisions in municipal development plans (MDPs). In fact, IDPs are at the top of the hierarchy, while all other statutory plans relating to the area that an IDP covers must be consistent with the IDP:

> 632(4) A municipal development plan must be consistent with any intermunicipal development plan in respect of land that is identified in both the municipal development plan and the intermunicipal development plan.

Nonetheless, the MGA section 638(1) describes the case where a conflict or inconsistency between an IDP and MDP exist:

> Plans consistent
>
> 638(1) In the event of a conflict or inconsistency between
>
> (a) an intermunicipal development plan, and
> (b) a municipal development plan, an area structure plan or an area redevelopment plan
>
> in respect of the development of the land to which the intermunicipal development plan and the municipal development plan, the area structure plan or the area redevelopment plan, as the case may be, apply, the intermunicipal development plan prevails to the extent of the conflict or inconsistency.

AOPA section 20(1) provides very specific language directing approval officers to determine whether an application is consistent with the **municipal development plan** land use provisions. AOPA is silent on intermunicipal development plans, and there is no consideration of how to proceed in the case of conflict between municipal planning documents.

Views of Field Services

In its hearing submission, and during questioning at the hearing, Field Services indicated that, based on AOPA, approval officers determine whether an application is consistent with land use provisions solely based on the MDP. It was Field Services' view that it must strictly follow the language in AOPA and, as a consequence, approval officers must determine whether an application is consistent with the MDP and only the MDP. It was the view of Field Services that no other municipal planning documents may be considered.

However, an exception to this practice has developed over time, through Board decisions, that directs approval officers to consider other municipal planning documents if, and only if, "the municipal development plan [strongly] cross-references other planning documents."

In this case, the approval officer evaluated application LA21033 in relation to the County of Lethbridge MDP, and then the County's Land Use Bylaw (LUB), given there was a clear intent in the MDP to adopt provisions from the LUB.

Views of the County of Lethbridge and the Town of Coalhurst

At the request of the Board, both the County of Lethbridge and the Town of Coalhurst provided written submissions in addition to participating in the hearing. Given their consistency of views and that each submission makes multiple references to the other municipality, comments are attributed to either the Town or the County or the "municipalities".

In the case of Double H Feeders, the Board notes the municipalities' comments regarding the "paramountcy of the IDP policies", which County representative Ms. Janzen addressed at the hearing:

> *"…we follow the Municipal Government Act with regards to the hierarchy of statutory plans. As per the Municipal Government Act, the Intermunicipal Development Plan prevails over the County's Municipal Development Plan….*
>
> *…we'd always presumed that the NRCB understood that IDPs prevailed. When we would receive the applications, referral applications, they always asked if there was any other statutory documents that would impact a proposal. And so we include Intermunicipal Development Plans frequently in our comments to the approval officer….*
>
> *…[As] the county, we try very hard to ensure that we're planning and working with our adjacent urban municipalities, so Intermunicipal Development Plans are very highly ranked in the county in terms of enforcement, and we rely heavily on them…. we do hope that the NRCB will reconsider how they view those higher-level statutory documents going forward."*

When questioned about which statutory document would prevail in a situation like Double H Feeders, where the MDP lists an exclusion zone and the IDP provision is more relaxed, Ms. Janzen agreed that the IDP would prevail, as if the MDP has been amended by that IDP provision [Hearing Transcript p. 165].

Views of the Board

During closing argument, Field Services referenced the Supreme Court of Canada's decision *Rizzo & Rizzo Shoes Ltd*., 1998 1 S.C.R. 27, as a foundation for the modern approach to statutory interpretation which applies a "textual, contextual and purposive analysis of the statute or [the] provision in question". In consideration of the foregoing principle, the Board turned its mind to the hierarchy between the MDP, the IDP, and municipal land use planning documents.

Given section 638(1) of the MGA, the Board accepts that the IDP prevails over the MDP should an inconsistency between the two documents arise. The Board asserts that following the strict interpretation of AOPA and considering only the land use provisions found in municipal development plans (and not in intermunicipal development plans), has the potential to lead to an absurd outcome in the case where a conflict exists between and MDP and an IDP. Presumably it could also be the case where the MDP and IDP are generally consistent but the IDP provides more (or less) restrictive land use planning provisions related to the siting of CFOs.

Clearly, there is a need for approval officers to determine an application's consistency with planning provisions in both the MDP and IDP.

In the spirit of widely adopted statutory interpretation and common sense outcomes, the Board encourages Field Services to consider a more purposive approach to the interpretation of AOPA and its intent. It is the Board's view that AOPA intended approval officers to use what at the time was the highest order municipal planning document, the MDP. Recent changes to the MGA has changed the hierarchy of planning documents, and deference to land use provisions within the hierarchy of the municipal planning framework makes sense and is consistent with a purposive approach to interpreting AOPA. While speculative, presumably this situation exists only because AOPA has not been updated since the *Municipal Government Act* was amended in 2017 to include the revised hierarchy of municipal planning documents.

The Board suggests that in the future Field Services should also provide notice to municipalities identified in relevant IDPs.

3.2 Is the Application Consistent with the MDP?

In AOPA, section 20(1) directs approval officers to consider if an application is consistent with municipal development plan land use provisions, and to deny an approval application if it is found to be inconsistent with those provisions:

> *20(1) In considering an application for an approval or an amendment of an approval, an approval officer must consider whether the applicant meets the requirements of this Part and the regulations and whether the application is consistent with the municipal development plan land use provisions, and if in the opinion of the approval officer,*
>
> > *(a) the requirements are not met or there is an inconsistency with the municipal development plan land use provisions, the approval officer must deny the application, …*

In Decision Summary LA21033, the approval officer noted the following subsections of section 6.6 "Confined Feeding Operations", 6.6.3 "Policies" in the MDP (emphasis added):

a) Urban Fringe

    I. "The County <u>shall exclude the development of CFOs</u> in the Urban Fringe land use districts."

d) Natural Resource and Conservation Board (NRCB)

    IV. CFOs "<u>shall not be approved in the areas shown and designated on Figure 11B as exclusion areas</u>".

    VI. <u>The NRCB should consider the requirements and regulations as stipulated in the Lethbridge County Land Use Bylaw and Animal Control Bylaw</u>, including the exclusion of confined feeding operations on parcels less than the specified sizes as specified in those bylaws.

Double H Feeders' east site CFO is located in the Urban Fringe zoning category identified on Figure 11B of the MDP. The approval officer interpreted the wording "shall exclude the

development of CFOs" as prohibiting both the establishment of new CFOs and the expansion of existing CFOs in the Urban Fringe land use districts.

The approval officer also identified that the east site is located in the special planning Area A referenced in section 6.9.2 "Special Planning Areas" of the MDP:

> As the Town of Coalhurst and the City of Lethbridge increase development pressures in Area A, this area will become a distinct development node due to limited access from the trade corridor and existing highway, as such, agricultural pursuits in this region may become financially and operationally challenging. CFO feeding operations will be discouraged in this area given the residential and commercial growth potential in this area.

As discussed earlier in this decision report, the approval officer evaluated application LA21033's consistency with the MDP and not the IDP. In that determination, the approval officer accepted that MDP sections 6.6.3(a) and (d)(VI) both provide "a clear intent to adopt provisions from the [Land Use Bylaw]", which identifies that the east site is zoned "Rural Urban Fringe" where CFOs are listed as a prohibited use.

The approval officer noted that the application met AOPA's technical requirements, but concluded that the application was "not consistent with Lethbridge County's municipal development plan land use provisions", denying the application in accordance with AOPA section 20(1).

In this case, the Board accepts the rationale for establishing the CFO exclusion zone in the MDP. As noted, the "Special Planning Areas" subsection 6.9.1 identifies that Special Area A "will become a distinct development node" and that "CFO feeding operations will be discouraged in this area given the residential and commercial growth potential in this area". The Board acknowledges that this provision is reasonable and reflective of good planning and that, given the proximity to the Town of Coalhurst, the objectives outlining the plan for a "distinct development node" appear to be consistent with County's listed objectives in the MDP section 6.1.2 to "direct land development to areas that are best suited to the prospective use."

The Board accepts that the MDP's CFO exclusion zone is clearly outlined, and that it includes the CFO east site that is proposed for expansion. In any event, the conclusion that the application is inconsistent with the County's MDP is uncontested.

Given that an IDP between Coalhurst and the County exists, but was not considered by the approval officer, the Board finds it necessary to look to that document for further clarification of relevant land use provisions.

3.3 Is the Application Consistent with the IDP between the County of Lethbridge and the Town of Coalhurst?

The following sections of the IDP address the development of new and existing CFOs in the "Intermunicipal Development Plan Confined Feeding Exclusion Area" (or Plan area), where the CFO west site is located:

> Livestock Operations (Confined Feeding Operations and Minor Livestock):

4.1.5 New confined feeding operations (CFOs) are not permitted to be established within the Intermunicipal Development Plan Confined Feeding Exclusion Area as illustrated on Map 11. Any existing CFO permit holders may be allowed to expand operations within the designated CFO Exclusion Area if it is to upgrade and modernize (within the requirements of the Agricultural Operation Practices Act and Regulations), demonstrating changes will reduce negative impacts (e.g. odours) to the rural and urban residents of the area, additional environmental protection will be considered, and comments from both the County and Town are received and considered by the NRCB.

4.1.8 Both councils recognize and acknowledge that existing confined feeding operations located within the Plan area will be allowed to continue to operate under acceptable operating practices and within the requirements of the Agricultural Operation Practices Act and Regulations.

The Board notes that while it is uncontested that application LA21033 is inconsistent with the land use provisions of the MDP, it is unclear to the Board whether the application is inconsistent with the relevant land use provisions of the IDP.

Views of Field Services

The Lethbridge County-Town of Coalhurst IDP (enacted in 2014 and prior to the most recent revisions of the MDP) was not specifically cross-referenced in the MDP and therefore, as per the guidance of NRCB Approval Policy section 8.2.3, the approval officer did not consider the land use provisions in the IDP.

Under AOPA, approval officers are instructed to disregard any land use provisions respecting "tests or conditions related to the construction of or the site for a confined feeding operation…." The Board heard from Field Services that section 4.1.5 of the IDP may be interpreted as a 'test or condition'. While Field Services made the reference outside of a permit decision (at the hearing), the Board respectfully disagrees with this interpretation. In this case, section 4.1.5 of the IDP allows for the expansion of a CFO if it is being modernized and will result in a reduction of nuisance impacts. This is not a direct replacement for AOPA standards or regulations; it is clearly a recognition that newer modern facilities are more likely than not to reduce nuisance impacts, and therefore may meet the planning objectives of the IDP. The Board recognizes that the analysis and discretion required by an approval officer to determine consistency with section 4.1.5 is challenging. However, in the Board's view, to disregard section 4.1.5 because it is a 'test or condition' is an overly simplistic interpretation in evaluating the spirit and intent of section 4.1.5 in the IDP.

Views of Double H Feeders

The applicant's RFR identified that "Double H Feeders Ltd. currently operates two broiler operations in the immediate vicinity of the Town of Coalhurst". The first site was described as "aging, and becoming obsolete and inefficient" and is located on NW 22-09-22 W4M "in an area designated 'Potential Grouped Country Residential' within the current Lethbridge County-Town

of Coalhurst IDP originally enacted in 2014". It is proposed by the applicant to be decommissioned. The second site is on NE 22-09-22 W4M, the location where Double H Feeders is "proposing to consolidate [its] production", "in an area designated 'Primarily Agricultural' within the same IDP", and would "enable [Double H Feeders] to continue production with barns built to accommodate modern practices and standards of efficiency."

The RFR includes a letter written by the applicant to the Town of Coalhurst with a submission date of March 31, 2021, that requests the Town's support. Within this letter, the applicant notes that the site on NE 22-09-22 W4M proposed for expansion "is located on Twp Rd 9-4 close to Hwy 25", and is farther from the Town than the site on NW 22-09-22 W4M, which is accessed via "Rge Rd 22-3, [a road that] has increasingly been used as an alternative access road to Coalhurst and is not ideal for truck traffic". The letter asserts that production "consolidated to a single site" would "[move] the barns further away from Coalhurst, and [remove] the associated truck traffic from Rge Rd 22-2".

During the hearing, Mr. Van't Land confirmed assertions made within his RFR and provided several examples of how the new proposed barns incorporate modern technology and have the potential to reduce nuisance impacts generated from the barns themselves.

Views of the County of Lethbridge and the Town of Coalhurst

The Board notes that both municipalities defer to the IDP's specific land use provisions for Planning Area 2, rather than the MDP's more general CFO exclusion zone identified in the Urban Fringe land use district. The IDP was negotiated between the two municipalities, among other reasons, for the purposes of promoting an "orderly and efficient development pattern within the Plan area that balances the long-range interests of the County and Town." [IDP p.5]. Both CFOs fall within Planning Area 2, with the west site located within sub-planning Area G which has been "identified for the future development of additional country residential uses". This was described as a "land use strategy decision . . . based on the current fragmentation of the lands and the existence of country residential uses in the immediate area". The IDP policies 3.4.5 and 3.4.6 identify the proposed location for expansion (east site) as suited for "agricultural uses", consistent with the "unfragmented, full quarter sections of land located on the periphery" of the plan area.

With respect to the two sites, "the County views the area as a whole" and the "the Town has historically viewed the two barn locations as one entire operation . . . under the control and direction of one landowner".

Within their submissions, the municipalities assessed the expansion of the east site relative to the policy objectives of the IDP (summarized below), and noted their support was contingent on the decommissioning of the current barn on the west site:

- *The Town acknowledges the existence of existing operations within the CFO exclusion area and agreed through the adoption of the IDP that expansions of CFO operations could be supported if the purpose was to upgrade to more modern operating premises and processes.*

- *The long-term development concept promotes the development of residential uses in the location of the existing barn and the discontinuation of a use that is not compatible with additional residential development supports the long term development strategy of both the Town and the County. The existing facility, which is in close proximity to the Town Boundary would be relocated further away from the corporate limits*
- *The IDP policy states that an expansion may be considered if it is to upgrade and modernize, demonstrating changes that will reduce the negative impacts to rural and urban residents of the area. By closing the older, less efficient operation in the NW 22-9-22-W4 and consolidating that operation to the NE22-9-22-W4 they are in the County's opinion reducing the negative impacts of the operation in the NW 22-9-22W4 on the town and adjacent residential acreages. The consolidation of the operation to the NE quarter allows them to modernize and improve their operations while still meeting the MDS requirements and improving a less than desirable situation next to the Town of Coalhurst. Both the Town of Coalhurst and Lethbridge County who are the parties of the IDP, are in agreement and supportive of the consolidation of the operation to the NE22-9-22-W4.*
- *Consideration was given to the proposed location of the new barn, which was east of the Town, and it was determined that the new location would be less likely to impact urban residences with any noise, odour or dust impacts that might be emitted from the operation as the location is down-wind of the prevailing west and north winds.*
- *The "Primarily Agricultural Land Use" area is regulated by the County's agricultural policies contained with the MDP and Land Use Bylaw and other policies of the IDP (See policy 3.4.5 of the IDP). Unlike some other areas of the IDP with the Town of Coalhurst, the NE 22-9-22-W4 is not identified for future town growth or country residential development.*

The County commented that "the current Lethbridge County MDP came into effect with the exclusion zones in 2010, and the IDP with the Town of Coalhurst and the applicable CFO policies and exclusion zone affecting the subject land was adopted later in 2014. A planned 2022 MDP revision will bring both statutory plans into conformity."

Views of the Board

The Board recognizes that municipal land use planning is a process established through the *Municipal Government Act*, and includes the public input of its constituents to establish a long term vision for a municipality. Nonetheless, a key intent of AOPA is to establish common rules across the province for the siting of confined feeding operations. The Board's assessment of whether to approve an application despite its inconsistency with an MDP is one undertaken with caution. It is with this consideration in mind that the Board assessed both the land use provisions of the MDP and IDP, and the related evidence provided by parties in their written submissions and at the hearing.

In examining the IDP between the Town of Coalhurst and Lethbridge County, the Board first notes Part 4 "General Land Use Policies", 4.1 "Agricultural Practices" – "Intent" states:

> "The County and Town both recognize that it is the jurisdiction of the Natural Resources Conservation Board (NRCB) to grant approvals and regulate confined feeding operations (CFOs). However, both municipalities agree it is desirable to specifically regulate intensive agricultural

> operations for the defined Plan area in an attempt to minimize potential nuisance and conflict between land uses, especially residential, and CFOs within the Intermunicipal Development Plan boundary."

Consistent with the evidence provided by the municipalities, the Board observes that the IDP does address existing confined feeding areas located within the IDP Confined Feeding Exclusion Area (or Plan area), and that existing CFOs "will be allowed to continue to operate", and "may be allowed to expand operations within the designated CFO Exclusion Area if it is to upgrade and modernize . . ."The Board observes that the municipalities were consistent in their support for expansion of the Double H Feeders east site if it is to "upgrade and modernize", and if Double H commits to decommission the west site. Further, the Board accepts that the test to satisfy this requirement is found in the language of the IDP section 4.1.5, which includes that a CFO "[demonstrates] changes [that] will reduce negative impacts (e.g., odours) to the rural and urban residents of the area", and that "additional environmental protection will be considered".

Mr. Van't Land described how he believed the consolidation of the two CFOs at the east site would upgrade and modernize the operations and reduce negative impacts to the rural and urban residents, explaining that the primary consideration of Double H Feeders to achieve modernization would be to "[take] the existing double-decker barns and [rebuild] them as a more appropriate model that is used primarily in broiler production today".

> "The primary concern we have there is the proximity to the town of Coalhurst and the number of neighbours that we have in close proximity to those barns… [The east site] is a whole quarter [of land] surrounded by more or less whole quarters [of land], and that's a more appropriate place for that kind of development [Hearing Transcript p. 210-211] …. It seems to suit the intent as we see it of the IDP, as far as future development, that the broiler operation [currently on the West Site] be moved further away from the town of Coalhurst [Hearing Transcript p. 215]."

The Board finds that the municipalities' views are consistent with these assertions, stating that the IDP policies 3.4.5 and 3.4.6 identify the proposed location for expansion (east site) as suited for "agricultural uses", given the "unfragmented, full quarter sections of land located on the periphery" of the plan area. As well, the intent of Double H Feeders to decommission the west site and expand the east site is consistent with the municipalities' stated "long-term development concept [that] promotes the development of residential uses in the location of the existing barn and the discontinuation of a use that is not compatible with additional residential development." Further, the County confirmed that the development of the east site which is designated as "Primarily Agriculture" would not conflict with the highway commercial and light industrial node slated for the area adjacent and northeast of the east site CFO [Hearing Transcript, p. 160].

This is further supported by the municipalities' assertions that "the proposed location of the new barn . . . would be less likely to impact urban residences with any noise, odour or dust that might be emitted from the operation as the location is down-wind of the prevailing west and north winds".

With respect to reducing the net nuisance impacts through the consolidation of the barns, Mr. Van't Land described that in addition to the new more modern barn, the fans, vents, lighting, and the computer systems that operate them, will be new. He also identified that his "authorization" from the Alberta Chicken Producers requires him to participate in annual ammonia level audits, including monitoring the ammonia levels in the barn:

> "… one of the goals of the ventilation system is to keep that ammonia down to a healthy level for both the birds and the people that are in the barns. So I just wanted to say that that is something that we monitor and keep down deliberately. It's mostly for the health of the birds, but the side effect of that is there is not large amounts of ammonia coming out of the barn" [Hearing Transcript p. 198].

Directly affected party Ms. Schmid asked for clarification regarding the ammonia levels escaping the barn, expressing concerns that increasing ventilation to move air out of the barn could increase ammonia going "into the environment". Mr. Van't Land asserted that ammonia control is achieved by "managing the moisture level", and that the "interaction of the moisture and the manure and the microbes . . . generates the ammonia". He further described that by lowering the density of ammonia in the barn, the air ventilated to the outside would have a lower concentration of ammonia as well.

As described in section 4 "Directly Affected Party Concerns" of this document, the Board appreciates the concerns expressed by the directly affected parties that may experience nuisance impacts. However, AOPA's consideration of impacts is met through the application of required setbacks, as established by minimum separation requirements. As well, the Board accepts the operator's request for neighbours to "let [him] know" if they have concerns and that "if there's something that [Double H Feeders] can do to mitigate [the concern] . . . [it] will definitely do it" [Hearing Transcript p. 216]. As well, the Board accepts the County's assertion that it views the area "as a whole", and further, meets the Board's understanding that if net impacts between the two operations are reduced, the intent of the land use planning objectives have been met:

> "… an Intermunicipal Development Plan is not just the county, it is an agreement between the town and the county, we look at what's existing in the area, what are some possible best outcomes in terms of future development and planning. And so with regards to impacts, we're looking at, especially with confined feeding operations, does an existing operation if they want to expand, would it meet the minimum distance separation, which I do believe Mr. Van't Land's application does for the expansion. And then with the decommissioning, it was seen as a net benefit to the Coalhurst area given the country residential and the proximity to the town, and the fact that they would not be necessarily drastically increasing their feedlot numbers but they would have a marked improvement in terms of their – the modernization of the facility from their northwest operation to their northeast. [Hearing Transcript p. 152]"

The Board further agrees with the municipalities' assertions in their written submissions that consolidating the operations to the east site and "closing the older, less efficient operation" moves the impacts from the area slated for country residential development to an area "that is not identified for future town growth or country residential development". The Board also notes that with a denial of an expansion, there is no requirement for Double H Feeders to

abandon the west site, which would maintain the operation of older, outdated CFO facilities on land zoned for country residential.

Given that the land use provisions in the IDP are specific to expansion in the CFO exclusion zone, the Board concludes that the IDP is relevant in its determination. In reaching this conclusion the Board views the Double H Feeders application as generally consistent with IDP section 4.1.5. The Board finds that the net nuisance impacts are likely to be reduced through the decommissioning of the west barn and the expansion of the east barn. The Board notes that the net increased production is 14%; however, the Board finds that it is more likely than not that the reduced net impacts will offset the increased production. While section 4.1.5 leaves room for interpretation and judgement, the Board concludes that the abandonment of the west site in conjunction with the expansion at the east site using current technology, and Board imposed conditions, meets the planning objectives of the IDP. At a minimum, the Board finds that the Double H Feeders application meets the spirit of IDP section 4.1.5, and does not conflict with its overall planning objectives.

4. DIRECTLY AFFECTED PARTY (DAP) CONCERNS

The Board appreciates the thought, time, and effort that directly affected parties invested in their submissions about this application. The comments, hearing submissions, and hearing participation have been very helpful to the Board's understanding of potential effects on the local environment, economy, community and the appropriate use of land. The Board afforded significant deference to DAP concerns that were unrelated to the question of the application's consistency with the MDP or IDP. Deference was given since some DAP concerns could be associated with whether the proposed CFO met the modernization and nuisance mitigation objective in the IDP. Also, the approval officer did not consider DAP concerns, asserting in the decision summary "Because this application will be denied, I need not discuss these concerns any further."

What follows is a summary of the written and oral discussions and views of the Board for each.

4.1 Change to Surface Water Flow

Directly affected neighbours explained that within the past few years a drainage system has been constructed by Double H Feeders at the east site. They believe that the system could cause additional surface runoff and potential flooding of their properties.

In Decision Summary LA21033, the approval officer determined that construction of a surface water drainage system such as this is under Alberta Environment and Parks' (AEP) jurisdiction, and forwarded this concern to AEP for its information. AEP verified that an approval under the *Water Act* was not issued to authorize this activity and is currently under investigation.

Views of the Board

The Board agrees with the approval officer's determination that AEP is the appropriate authority to address this concern and recognizes that it is being managed by AEP through its ongoing compliance investigation. Therefore, the Board will not address this matter further.

4.2 Nutrient Management, Manure Application, and Contaminated Surface Water Runoff

Neighbours questioned whether Double H Feeders has access to enough land for manure application from the proposed expansion. In the Decision Summary, the approval officer commented that the expanded operation would meet AOPA's nutrient management requirements regarding land application of manure with the nutrient management plan provided. The Board notes that the nutrient management plan was verified by a certified crop advisor and is satisfied that this concern has been adequately considered by the approval officer.

Neighbours expressed concern about prolonged odours and contaminated surface runoff from manure, poultry medication residues, and barn cleaning agents. Further, manure is field applied and not incorporated.

Double H Feeders explained that it direct seeds its crops, therefore manure is not worked into the soil after it is field applied, which it believes meets AOPA requirements. It also described that animal based medications are used infrequently, and that barns are cleaned primarily by mechanical means including compressed air, thus the amount of cleaning water is minimal and mostly evaporates from the barn surfaces.

In Appendix C, point 2, of the Decision Summary, the approval officer discussed conditions to be potentially carried forward from Municipal Development Permit 98-189 if the Board decides to grant a permit for this proposal. The second condition of Permit 98-189 focuses on items which are pertinent to the topic of nutrient management and manure application. It consists of several parts:

- the amount of land that must be available for manure utilization,
- manure application on snow and/or frozen ground,
- manure incorporation with 48 hours of land spreading, and
- consideration for neighbouring residences and separation from residences for manure spreading.

The approval officer stated:

- The specific land base required for manure utilization in Permit 98-189 is redundant and should be replaced by AOPA and its regulations or a nutrient management plan.

- Regarding the requirement to not spread manure on snow and/or frozen ground, the approval officer commented that this too is redundant and should be replaced by the updated requirements of AOPA and its regulations.

Views of the Board

The Board is in agreement that land base requirements in Permit 98-189 are redundant, especially as this permit application is for an increase in the number of birds at the site, which will change the volume of manure and nutrients to be managed. The Board is also in agreement that AOPA's regulations make specific references to manure spreading on frozen ground redundant.

The approval officer suggested that the requirement in Permit 98-189 to incorporate manure within 48 hours of land spreading should be carried forward because it is more stringent than AOPA, which allows application of manure on directly seeded crops without incorporation. Double H Feeders stated it was unaware this condition was still in effect as it believes AOPA's present-day requirements are what it must follow. Double H Feeders asked the Board to consider rescinding this condition as it does not fit its current cropping practices. Neighbours asked the Board to retain the permit condition to alleviate their concerns about manure contaminated runoff and prolonged odours from manure application.

Double H Feeders did not include a request to amend its permit to remove the 48 hour manure incorporation condition in its application to expand the east site. Permit amendment applications allow directly affected parties to provide their comments about proposed amendments after receiving advance notice and prior to an approval officer issuing their

decision. No such notice on a permit amendment was given by Double H Feeders; as such the Board will not rule on the matter. Should Double H Feeders wish to continue its current practice of manure spreading on direct seeded land without incorporation, it must apply for and receive a permit amendment.

4.3 Odours, Health Concerns, and Quality of Life

Directly affected neighbours stated that there are occasions when odours from the existing poultry broiler operation at the east site, as well as from other nearby CFOs, affects their quality of life. Concerns were expressed about impacts on the health of the surrounding community due to the odours, and information was requested about CFO air quality monitoring requirements.

Double H Feeders commented it was not aware that neighbours had concerns about odours from their operation as no one has directly complained to it, nor has it been notified by the NRCB that a complaint had been lodged. It requested that neighbours let it know when odours are bothersome and it will endeavour to address the situation.

Views of the Board

AOPA does not mention or require air quality monitoring for CFOs. Instead, it employs a prescriptive regulatory framework, using tools such as minimum distance separation (MDS), in order to achieve a consistent, province-wide approach for siting CFOs. For the Double H Feeders' proposed expansion, the approval officer determined that it meets the required setbacks from all nearby residences. The Board understands that people residing beyond the MDS may intermittently experience odour impacts from the CFO, and that each individual has their own degree of tolerance for certain odours. Therefore, the Board also considers whether the potential impacts are typical of land uses for the area. During the hearing, both Lethbridge County and the Town of Coalhurst indicated that the location of the proposed expansion, on land designated as "primarily agricultural", is an appropriate use of land and meets their planning objectives.

For the above reasons, the Board has determined that odours from the proposed poultry broiler expansion should not unduly impact the health of the surrounding community or neighbours' quality of life. The Board appreciates that Double H Feeders is willing to work with neighbours to try to mitigate odour impacts. Additionally, neighbours can contact the NRCB 24 hour reporting line at 1-866-383-6722 when they believe that odours from the CFO are inappropriate for an agricultural area, and an NRCB inspector will follow up on the concern.

4.4 Impact on DAP Land Values

Directly affected neighbours stated that the proposed CFO expansion may reduce property values of the surrounding area.

Views of the Board

The Board has consistently stated that impact on property values is an issue that resides outside of AOPA legislation.

4.5 General Environmental Concerns and Environmental Impact Assessment (EIA)

Written submissions from neighbours included some general statements of concern relating to environmental impacts on the eco-system from CFOs.

Several references were made by one of the directly affected neighbours about an EIA, including a request from the party that they "would like disclosure from the NRCB regarding the Environmental Impact Assessment [that] outlines the long term impacts on air, water, land, and biodiversity".

Views of the Board

AOPA's Standards and Administration Regulation contains construction and operational requirements for livestock facilities that are intended to protect the environment. Before issuing permits, NRCB approval officers must ensure that all applicable requirements are met. NRCB inspectors verify that operators adhere to legislative requirements and permit conditions. If necessary, inspectors can initiate enforcement action in accordance with the NRCB Compliance and Enforcement Policy.

There are a number of EIA references in the *Natural Resources Conservation Board Act* and the Rules of Practice of the Natural Resources Conservation Board Regulation; however, those references all relate to the reviewable projects as identified in the *Natural Resources Conservation Board Act*. The Board has a distinct mandate under the AOPA legislative provisions, which is the relevant mandate to the Double H Feeders application. While AOPA does not require an EIA, the regulations effectively manage environmental risks and nuisance impacts that would be duplicative in an EIA.

5. CONSIDERATION OF PERMIT CONDITIONS

In addition to Board direction regarding permit conditions in the preceding section, the Board requires as conditions of approval the following:

1. In Decision Summary LA21033, Appendix C, the approval officer suggested potential new conditions and permit conditions that should be carried over from previous permits should the Board overturn the denial. The Board directs that the conditions outlined in Decision Summary LA21033, Appendix C, be included in the approval.

2. During the hearing, Double H Feeders stated that moving its operations from NW 22-09-22 W4M to NE 22-09-22 W4M would require a maximum time period of 5 weeks. During this time period, chicken broilers would be at both locations simultaneously. The Board directs that at no time shall the total number of chicken broilers between the two operations (NW 22-09-22 W4M and NE 22-09-22 W4M) exceed a population of 120,000.

3. Approval of the expansion at NE 22-09-22 W4M is contingent on the abandonment and return of the previous Municipal Development Permit 93-164 at NW 22-09-22 W4M. Double H Feeders consented to cancelling the permit associated with NW 22-09-22 should the application for expansion at NE 22-09-22 W4 be approved. Therefore, once the NW 22-09-22 W4M operation is fully depopulated, the CFO permit for NW 22-09-22 W4M is cancelled.

4. The County and the Town agreed that short term manure storage of solid manure on NW 22-09-22 W4M would be acceptable. While the Board is prepared to allow a degree of short term storage on NW 22 09-22 W4M, we believe that it should be more restrictive than the AOPA regulations. As such, the Board directs the approval officer to include a condition that short term storage of solid manure on NW 22-09-22 W4M (sourced only from NE 22-09-22 W4M) is allowed for a maximum cumulative time of 7 months over a 3 year period, regardless of the storage location on NW 22-09-22 W4M.

5. The Board recognizes that Double H Feeders may apply for a permit amendment to remove the existing (municipal permit imposed) 48 hour manure incorporation condition. Regardless, due to the proximity of NW 22-09-22 W4M to the Town, the Board requires that manure spread on this quarter be incorporated within 48 hours and it expects that this condition be upheld.

6. BOARD DECISION

For the reasons set out above, the Board hereby directs the approval officer to issue an approval (including Board imposed conditions) to Double H Feeders Ltd. to construct and operate a confined feeding operation as described in application LA21033.

DATED at EDMONTON, ALBERTA, this 17th day of March, 2022.

Original signed by:

______________________________	______________________________
Peter Woloshyn, Chair	Sandi Roberts
______________________________	______________________________
L. Page Stuart	Earl Graham

Love v. Flagstaff (County of) Subdivision and Development Appeal Board, 2002 ABCA 292

Date: 20021209
Dockets: 0003-0393-AC
0003-0394-AC

2002 ABCA 292 (CanLII)

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE CHIEF JUSTICE FRASER
THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MADAM JUSTICE FRUMAN

IN THE MATTER OF SECTION 688 OF THE *MUNICIPAL GOVERNMENT ACT*, S.A. 1994, c. M-26.1, AS AMENDED; AND

IN THE MATTER OF THE DECISION OF THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD OF FLAGSTAFF COUNTY DATED AUGUST 8, 2000;

BETWEEN:

APPEAL NO: 0003-0393-AC

BARRY LOVE

Appellant

- and -

THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD OF FLAGSTAFF COUNTY and FLAGSTAFF COUNTY

Respondents

IN THE MATTER OF SECTION 688 OF THE *MUNICIPAL GOVERNMENT ACT*, S.A. 1994, c. M-26.1, AS AMENDED; AND

IN THE MATTER OF THE DECISION OF THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD OF FLAGSTAFF COUNTY DATED AUGUST 8, 2000;

APPEAL NO: 0003-0394-AC

PAUL ALDERDICE

Appellant

- and -

THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD
OF FLAGSTAFF COUNTY and FLAGSTAFF COUNTY

Respondents

Appeal from the Decision of the
SUBDIVISION AND DEVELOPMENT APPEAL BOARD OF FLAGSTAFF COUNTY
Dated the 8th day of August, 2000

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE
HONOURABLE CHIEF JUSTICE FRASER
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE FRUMAN

DISSENTING REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE RUSSELL

2002 ABCA 292 (CanLII)

COUNSEL:

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2002 ABCA 292 (CanLII)

REASONS FOR JUDGMENT OF THE
HONOURABLE CHIEF JUSTICE FRASER

I. INTRODUCTION

[1] These two appeals arise out of the refusal by the Subdivision and Development Appeal Board of Flagstaff County (SDAB) to grant a residential development permit to the appellants, Barry Love (Love) and Paul Alderdice (Alderdice). These appeals were heard together with a related appeal, ***Goodrich* v. *Flagstaff (County of) Subdivision and Development Appeal Board.*** Taiwan Sugar Corporation (Taiwan Sugar) and DGH Engineering were respondents in that appeal. While not added as parties to these appeals, they have participated as respondents throughout with the consent of the parties.

[2] All three appeals were heard together because they are effectively linked to each other, concerning as they do competing development applications for lands in the County of Flagstaff (County). On one side are Love and Alderdice. Love seeks to construct a single family home on a quarter section of land he owns (Love Lands) and Alderdice, as agent for Joseph Bebee, seeks to construct a single family home on a quarter section of land owned by Bebee (Alderdice Lands). On the other side of the development divide is Taiwan Sugar which seeks to develop an intensive animal operation (IAO) on five different quarter sections in the County (IAO Lands), two quarters of which are adjacent to the Love Lands and Alderdice Lands (IAO Lands).

II. BACKGROUND FACTS

[3] The Love Lands, Alderdice Lands and IAO Lands are all zoned Agricultural (A) District under the Land Use Bylaw of Flagstaff County, Bylaw No. 03/00 (22 March 2000) (*Bylaw*). Under s.6.2.1.1 of the *Bylaw*, "all forms of extensive agriculture and forestry, including a single family dwelling or a manufactured home" are permitted uses. By contrast, an IAO is a discretionary use only: s.6.2.1.2.

[4] Love and Alderdice each applied to the development authority (DA) designated by the County under s.624(1) of the *Municipal Government Act*, R.S.A. 2000, c. M-26 (*Act*) for a development permit to build a single family residential dwelling on their respective lands – a permitted use. When the Love and Alderdice applications were filed, Taiwan Sugar had not yet applied for an IAO development permit on the IAO. By the date on which the Love and Alderdice applications were denied, Taiwan Sugar had filed an incomplete IAO application. That application was not finally complete until more than 2 ½ months after the initial filing.

[5] The DA denied both the Love and Alderdice applications on the same basis, namely that the dwelling each wished to build would be too close to a "proposed" intensive animal operation, that is the Taiwan Sugar IAO, and thus in breach of s.6.1.7.3 of the *Bylaw*.

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[6] These appeals turn therefore on the interpretation of the following critical provisions of s.6.1.7.3 of the *Bylaw* mandating a minimum setback for the siting of dwellings near an IAO:

> For the siting of a dwelling in close proximity to an intensive animal operation (whether existing or proposed), the dwelling, if a permitted use, must be located at least the minimum distance prescribed in the Code of Practice.

[7] The Code of Practice is defined in s.1.3.9 of the *Bylaw* as the Code of Practice for the Safe and Economic Handling of Animal Manures published by Alberta Agriculture, Food and Rural Development in 1995, together with the modifications to that Code, published by Alberta Agriculture, Food, and Rural Development in 1999 (collectively the *Code*). As stated in s.1 of the *Code*, it "outlines a two part approach to reduce rural conflicts through proper land use siting and animal manure management." The first method is to maintain a "minimum distance separation" (MDS) between an IAO and its neighbours as explained in s.3 of the *Code*:

> Separation between intensive livestock facilities and neighbours can compensate for normal odour production, thereby reducing potential nuisance conflicts. The MDS applies reciprocally for the siting of either the odour source (intensive livestock operation) and/or the neighbouring landowner (neighbour).

[8] The *Code* contains detailed tables prescribing the applicable MDS which varies depending on the size and type of IAO. The *Code* does not expressly address who is to be responsible for providing the required MDS buffer zone when there are competing applications for a residence and an IAO on adjacent lands. In this case, the sites Taiwan Sugar selected adjacent to the Love Lands and the Alderdice Lands are not large enough to absorb the buffer zone. In fact, given the size and type of Taiwan Sugar's IAO, were Love and Alderdice required to provide the buffer zone out of their lands, there would be nowhere on the Love Lands or the Alderdice Lands that a residence could be built.

[9] With respect to the *Bylaw* and the required MDS buffer zone, there is evidence that the County, unlike, for example, Ponoka County, elected not to impose the obligation for meeting the MDS solely on the IAO developer: Ponoka No. 3 (County) Bylaws, Land Use Bylaw No. 5-97-A, s.10.4.2 (1997). While the *Bylaw* does not expressly specify who is to provide this buffer zone – the IAO developer or neighbouring landowners – it is implicit in the *Bylaw* that an IAO developer may include the lands of adjacent landowners, in whole or in part, in determining whether it has met the required MDS. And this may be done even when it precludes adjacent landowners using the portion of their lands that falls in the MDS for future residential permitted uses. As the County's jurisdiction to enact this aspect of the *Bylaw* is not before us, this decision assumes the validity of s.6.1.7.3.

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[10] A summary of the relevant sequence of events in 2000 follows.

January 21	Taiwan Sugar approached the County regarding its plans.
March 15	Taiwan Sugar advised the County of proposed sites for the IAO.
March 23	The public was advised of the IAO sites.
April 11	Taiwan Sugar held public consultations regarding the IAO.
April 20	Love submitted a residential development permit application to the DA.
April 25	Alderdice submitted a residential development permit application to the DA.
April 27	Taiwan Sugar submitted an incomplete IAO development permit application to the DA.
May 5	Taiwan Sugar submitted further information in support of its IAO application.
May 30	Love's application was refused.
June 5	Alderdice's application was refused.
June 9	Love filed a notice of appeal with the SDAB.
June 16	Alderdice filed a notice of appeal with the SDAB.
July 17	Taiwan Sugar's IAO application was finally complete.
July 25	SDAB heard the Love and Alderdice appeals together.
August 8	SDAB denied both appeals.
September 8	Taiwan Sugar was granted a development permit for the IAO.
September	Several County residents appealed the DA's grant of the IAO permit.
November 2	Love and Alderdice were granted leave to appeal the SDAB decision.
November 27	SDAB, with slight modifications, denied the appeals on the IAO permit.

[11] The SDAB denied the Love and Alderdice appeals on the basis that the homes they wanted to build would be too close to Taiwan Sugar's "proposed" IAO. In its view, a

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"proposed" IAO under s.6.1.7.3 meant something less than an "approved" one. In deciding what that something less might be, the SDAB concluded that the steps taken by Taiwan Sugar prior to filing an IAO application coupled with the filing of a formal application made the IAO a "proposed" one on the date on which Taiwan Sugar first filed its IAO application.

[12] The SDAB then concluded that the relevant date for deciding whether a residential permitted use was sited the required distance from an IAO was not the date on which the permitted use application had been filed but the date on which the DA made its decision on the application. Accordingly, on this reasoning, since Taiwan Sugar's IAO was "proposed" on the date that the DA decided both the Love and Alderdice applications, and since neither home met the required MDS, the SDAB determined that both applications were properly refused.

III. STANDARD OF REVIEW AND ISSUES

[13] The standard of review for the interpretation of a land use bylaw by a subdivision and development appeal board is correctness: ***Harvie v. Province of Alberta*** (1981) 31 A.R. 612 (C.A.); ***Chrumka v. Calgary Development Appeal Board*** (1981) 33 A.R. 233 (C.A.); ***500630 Alberta Ltd. v. Sandy Beach (Summer Village)*** (1996), 181 A.R. 154 (C.A.).

[14] This Court granted leave to appeal the SDAB decision on the Love and Alderdice appeals on the following ground:

> Did the Subdivision and Development Appeal Board of Flagstaff County err in law in its interpretation of the word "proposed" as found in Section 6.1.7.3 of the Flagstaff County Land Use *Bylaw* No. 03/00?

[15] This question raises two distinct issues, both of which must be addressed in order to properly answer this question:

> 1. When does an IAO become "proposed" for purposes of s.6.1.7.3 of the *Bylaw*; and
>
> 2. What is the relevant date to determine whether a permitted use residential dwelling meets the MDS under the *Bylaw* – the date of filing the application or some later date?

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IV. ANALYSIS

A. WHEN DOES AN IAO BECOME "PROPOSED" UNDER S.6.1.7.3?

[16] Once an IAO has been constructed, it can no longer be "proposed" for any purpose. The question which must be answered therefore is at what stage prior to completion of an IAO does it become "proposed" for purposes of s.6.1.7.3 of the *Bylaw*.

[17] Although the *Bylaw* does not define when this "proposed" status is achieved, a number of possibilities exist ranging from the date on which the IAO is only a "twinkle in the eye" of the developer – "proposed" only in its mind and to itself – to the date on which a development permit for the IAO becomes final and binding on all parties. No one suggested that a "proposed" IAO for purposes of s.6.1.7.3 included its conception stage and thus, the time spectrum range covers the following alternative options:

1. the date a developer publicly exhibits a serious intention to develop an IAO (option 1, sometimes called the "serious intention date");

2. the date a developer files an incomplete application for an IAO development permit (option 2, sometimes called the "incomplete application date");

3. the date a developer files a complete application, that is one containing all required information to allow the DA to determine if the IAO meets the *Bylaw* (option 3, sometimes called the "complete application date");

4. the date a development permit first issues for the IAO (option 4, sometimes called the "permit issue date"); and

5. the date a development permit becomes final and binding on the parties, including, if applicable, exhaustion of all appeals (option 5, sometimes called the "permit effective date").

[18] Love and Alderdice contend that an IAO becomes "proposed" for purposes of the *Bylaw* on the date it has been approved and a permit issued (either option 4 or 5 above) or alternatively, the date on which a complete development application has been submitted (option 3). Taiwan Sugar argues that it is the date on which a reasonable person would believe that a serious intention to develop an IAO has been demonstrated by the developer (option 1) or alternatively the date on which an IAO development permit application is first filed, no matter how incomplete (option 2).

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[19] In interpreting the *Bylaw*, the purposive and contextual approach repeatedly endorsed by the Supreme Court of Canada and set out in E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87 applies:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[As cited with approval in ***Re Rizzo & Rizzo Shoes*** [1998] 1 S.C.R. 27; ***Bell ExpressVu Limited Partnership v. Rex*** (2002) 212 D.L.R. (4th) 1 (S.C.C.).]

[20] The purposive approach to statutory interpretation requires that a court assess legislation in light of its purpose since legislative intent, the object of the interpretive exercise, is directly linked to legislative purpose. As a result, as explained in R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 35:

> Other things being equal, interpretations that are consistent with or promote legislative purpose should be preferred and interpretations that defeat or undermine legislative purpose should be avoided.

[21] The contextual approach rests on a simple, but highly compelling, foundation. "The meaning of a word depends on the context in which it has been used": *Ibid* at 193. Therefore, any attempt to deduce legislative intent behind a challenged word or phrase cannot be undertaken in a vacuum. The words chosen must be assessed in the entire context in which they have been used. Thus, it must be emphasized that the issue here is not what the solitary word "proposed" means in isolation but when an IAO becomes "proposed" for purposes of s.6.1.7.3.

[22] The starting point for the analysis must be the legislative scheme of which the *Bylaw* forms a part. The *Bylaw*, enacted by the County as required by ss.639 and 639.1 of the *Act*, constitutes one piece of the legislative planning puzzle governing the development and use of lands in the County. Other relevant pieces include Part 17 of the *Act* itself, the Land Use Policies established by the Lieutenant Governor in Council pursuant to ss.622(1) of the *Act* as O/C 522/96 (*Land Use Policies*), the County's Municipal Development Plan established pursuant to s.632 of the *Act* [Flagstaff County, Bylaw No.02/00, Municipal Development Plan (12 April, 2000)] (*Plan*) and the *Code*. The presumption of coherence presumes that the legislative framework is rational, logical, coherent and internally consistent: ***Friends of Oldman River Society v. Canada (Minister of Transport)*** [1992] 1 S.C.R. 3.

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[23] It is evident from a review of Part 17 of the *Act* that its purpose, or object, is to regulate the planning and development of land in Alberta in a manner as consistent as possible with community values. In so doing, it strikes an appropriate balance between the rights of property owners and the larger public interest inherent in the planned, orderly and safe development of lands. In this regard, s.617 contains an authoritative statement of legislative purpose and relevant community values:

> 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 it is necessary for the overall greater public interest.

[24] These objectives are carried forward into both the *Plan* and the *Bylaw*. The *Plan* identifies as its goal encouraging "environmentally sound, sustainable agricultural and other forms of economic development, while conserving and enhancing the County's rural character." The *Bylaw* provides in critical part in s.1.2 that its purpose is to "regulate and control the use and development of land and buildings within the municipality to achieve the orderly and economic development of land".

[25] While the *Land Use Policies* focus on matters of public policy, not law, and are by their nature therefore general in scope, they nevertheless provide a policy framework for land use bylaws and municipal plans. Indeed, both the *Plan* and the *Bylaw* must be consistent with the *Land Use Policies*: s.622(3) of the *Act*. The *Land Use Policies* provide in s.4.0.2 which is part of the general section dealing with land use patterns that:

> Municipalities are encouraged to establish land use patterns which embody the principles of sustainable development, thereby contributing to a healthy environment, a healthy economy and a high quality of life.

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[26] These values – orderly and economic development, preservation of quality of life and the environment, respect for individual rights, and recognition of the limited extent to which the overall public interest may legitimately override individual rights – are critical components in planning law and practice in Alberta, and thus highly relevant to the interpretation of the *Bylaw*.

[27] Central to these values is the need for certainty and predictability in planning law. Although expropriation of private property is permitted for the public, not private, good in clearly defined and limited circumstances, private ownership of land remains one of the fundamental elements of our Parliamentary democracy. Without certainty, the economical development of land would be an unachievable objective. Who would invest in land with no clear indication as to the use to which it could be put? Hence the importance of land use bylaws which clearly define the specific uses for property and any limits on them.

[28] The need for predictability is equally imperative. The public must have confidence that the rules governing land use will be applied fairly and equally. This is as important to the individual landowner as it is to the corporate developer. Without this, few would wish to invest capital in an asset the value of which might tomorrow prove relatively worthless. This is not in the community's collective interest.

[29] The fundamental principle of consistency in the application of the law is a reflection of both these needs. The same factual situation should produce the same legal result. To do so requires that it be certain. The corollary of this is that if legislation is uncertain, it runs the risk of being declared void for uncertainty in whole or in part. As explained by Garrow, J.A. in ***Re Good and Jacob Y. Shantz Son and Company Ltd.*** (1911) 23 O.L.R. 544 (C.A.) at 552:

> It is a general principle of legislation, at which superior legislatures aim, and by which inferior bodies clothed with legislative powers, such as ... municipal councils ... are bound, that all laws shall be definite in form and equal and uniform in operation, in order that the subject may not fall into legislative traps or be made the subject of caprice or of favouritism – in other words, he must be able to look with reasonable effect before he leaps.

[30] There is another critical contextual feature to this interpretive exercise. The question of what constitutes a "proposed" IAO under s.6.1.7.3 arises in only one context – a conflict between an application for a residential development permit and an IAO not yet built. Typically, in the rural part of the County, potential problems would arise where a landowner seeks to develop a single family home on a quarter section since single family homes are permitted uses in every zoning category in the County but one. Thus, the conflict, if there is to

be one, will, in the majority of cases, be between a single family residential permitted use and a discretionary IAO use.

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[31] Applying the purposive and contextual analysis, I have concluded that an IAO becomes "proposed" for purposes of s.6.1.7.3 on the permit issue date (option 4). There are several reasons for this.

[32] First, to adopt an interpretation permitting an IAO to achieve "proposed" status prior to the permit issue date would run afoul of a principle firmly entrenched in the legislative planning scheme in effect in Alberta – respect for individual property rights. The *Act* explicitly recognizes the preeminence of individual rights in planning law in Alberta. While these rights are subject to a clearly circumscribed overriding exception in favour of the greater public interest, nowhere is it suggested that individual rights should be overridden for a private interest.

[33] This respect for individual property rights is a statutory affirmation of a basic common law principle. As explained by Cote, P.A. in *The Interpretation of Legislation in Canada*, *supra*, at 482:

> "Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law." To this right corresponds a principle of interpretation: encroachments on the enjoyment of property should be interpreted rigorously and strictly.

[34] Here, the scheme and object of the *Act* reveal a legislative intention not only to expressly protect individual rights but to permit those rights to be eroded only in favour of a public interest and only to the extent necessary for the overall public interest. See s.617, *supra*. It follows therefore that encroachments on individual rights, especially by private parties, should be strictly construed.

[35] Concerns about encroachments on property rights are exacerbated where, as here, the *Bylaw* permits neighbouring landowners to bear all or part of the MDS requirement. If an IAO developer acquires a site too small to accommodate the required buffer zone, then the MDS setback requirements must instead be met out of the lands of neighbouring landowners. Given the respect accorded to individual rights under the *Act* and the potentially serious sterilizing effect that these MDS setback requirements would have on neighbouring lands, it would take much clearer statutory language to strip a landowner of residential development rights, especially permitted use residential rights, in favour of a discretionary use IAO project before its permit issue date.

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[36] Further, strictly interpreting encroachments on the enjoyment of property minimizes conflict, whether that be conflict between the state (as represented by the County) and its citizens or amongst the citizens themselves. This is in keeping with one of the underlying rationales of planning law, namely to avoid pitting neighbour against neighbour by imposing on all parties clearly defined reciprocal rights and obligations. The legislative scheme here is designed to promote harmony, not create litigation. Accordingly, given the priority accorded to individual rights under Alberta planning law, where possible, planning laws should be interpreted in a manner consistent with what I would characterize as the "good neighbour policy". That includes respecting individual rights by interpreting encroachments on property rights rigorously and strictly especially where the encroachment is in favour of a private interest.

[37] Second, it must be remembered that an IAO is only a discretionary use. Thus, there is no assurance that an application for an IAO permit will ever be successful. If an IAO could become "proposed" for purposes of s.6.1.7.3 prior to its permit issue date, this would effectively freeze permitted use residential development on nearby lands falling within the MDS for what could be a lengthy period in favour of an IAO project that might never be approved. This too militates in favour of a restrictive interpretation as to when "proposed" IAO status for purposes of s.6.1.7.3 is achieved.

[38] Third, finding that an IAO achieves "proposed" status on the permit issue date also provides the required degree of certainty and predictability. This is an extremely weighty consideration since using any earlier date – the serious intention date, the incomplete application date or the complete application date – is replete with problems fatal to these possible interpretations.

[39] Taiwan Sugar contends that the serious intention date should apply. Under the test it suggests, an IAO would be "proposed" on the date by which circumstances were such that a reasonable person would believe that a developer had a serious intent to develop an IAO. In its view, a publicly announced project would meet this test. But the most critical failing of this approach would be the inability of a landowner intent on developing land nearby an announced IAO to predict whether a stated intention would ever lead to a development proposal, much less a filed application, never mind an approved one. In the meantime, the landowner's ability to develop land he or she owns for a permitted single family residential use in conjunction with their extensive farming operation would at best be compromised and at worst, prevented altogether. This cannot be.

[40] Moreover, the phrase "serious intention" is vague and subject to arbitrary application. A serious intention is not a proposal for anything unless and until steps are taken to proceed with the stated intention. To what extent would the suggested plan need to be developed? Would complete details on obvious issues such as size, site locations, and methods of resolving water and other environmental issues need to be disclosed? And to whom and at what time? And more fundamentally, how would one determine when and if the "serious

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intention" ever crystallized into a concrete proposal? Finally, if one were to accept that an IAO could reach "proposed" status before the developer even filed an application, how would one determine whether the project had been abandoned? For these reasons alone, this interpretation cannot be sustained.

[41] Nor would using either the incomplete application date or the complete application date provide the required degree of certainty. Although the filing date for each would be ascertainable, there would be no way of knowing with certainty when the project was abandoned. Under the *Bylaw*, there is no requirement mandating the DA to make a decision on an application within a specific period of time. Under s.3.4.15, if the DA does not do so within 40 days, the application shall be deemed refused after the expiry of that time period. But this is at the option of the applicant and the applicant alone as the following key part of this section makes clear:

> An application for a development permit shall, at the option of the applicant, be deemed to be refused when a decision thereon is not made by the Development Authority within forty (40) days after receipt of the application by the Development Authority.

[42] Further, there does not appear to be any ability on the part of a nearby landowner to compel the DA to make a decision following the expiry of the 40 day period or to seek an order declaring that the IAO application has been refused simply because of the lapse of the 40 day period. Instead, it appears that the extension of the 40 day period is a matter requiring only the concurrence of the DA and the applicant. What this would mean therefore is that if the DA did not make a decision on an IAO within the 40 day period because it was, for example, waiting for additional required information – never to be provided – there would be no objective means of determining when the project had been abandoned.

[43] Thus, an IAO development permit application could simply languish for an indeterminate period into the future, long after the IAO developer had abandoned any intention of proceeding with the IAO. Since nearby landowners would be precluded from developing single family permitted use housing on their lands in the interim, an interpretation which led to this result (as either the use of the incomplete application date or the complete application date would do), ought to be rejected.

[44] It is no answer to say that these problems could be avoided by a landowner's seeking an order of mandamus compelling the County to make a decision on an IAO application. The County and IAO developer might well be engaged in prolonged and protracted negotiations over conditions, additional information, plans, etc. with no end in sight, thereby precluding the securing of any such order even though ultimately the project is abandoned. Even if this were not so, it would be unreasonable, given the statutory planning regime, to impose on a landowner otherwise entitled to a residential permitted use permit an obligation to try to establish that an IAO project had in fact been abandoned. The legislation does not contemplate forcing this heavy financial and legal obligation onto the party with the least information

relating to the IAO application and the least control over it and there can be no justification for judicially imposing it on neighbouring landowners.

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[45] Fourth, the disputed words themselves and the context in which they are used in s.6.1.7.3 are consistent with the view that the required "proposed" status is achieved on the permit issue date. Under s.6.1.7.3, "proposed" is used in contradistinction to an "existing" IAO. The distinction relates to the physical state of the IAO, and not to its planning status on the relevant date. It must be remembered that even when a permit has been issued for an IAO, the IAO is "proposed" unless and until it is actually built. If the approved development is not commenced within 12 months from the date of the issue of the permit, and carried out with "reasonable diligence", the permit is deemed to be void, unless an extension is granted: s.3.6.6 of the *Bylaw*. This means that "proposed" and "approved" are not mutually exclusive terms. Accordingly, it does not follow that "proposed" must mean something less than "approved" for purposes of s.6.1.7.3.

[46] It is true that there are other sections of the *Bylaw* in which the word "proposed" refers to a development for which a development permit application has been received by the DA. But one cannot simply find the same word – proposed – in other sections of the *Bylaw* and conclude that it has the same meaning when used in s.6.1.7.3. While the word "proposed" is sprinkled throughout the *Bylaw*, it is used elsewhere in the context of a "proposed development", that is one in respect of which a development permit application has been filed. But in s.6.1.7.3, the words used are not the same, the reference instead being to an "intensive animal operation (whether existing or proposed)", and they are used in an entirely different context.

[47] Fifth, concluding that an IAO achieves "proposed" status under s.6.1.7.3 on the permit issue date best promotes one of the key objectives of the planning legislation, the orderly and economic development of land. The orderly development of land militates in favour of an interpretation of the *Bylaw* which avoids the repeated filing of unnecessary development applications, whether by an IAO developer or an adjacent landowner. Much is made of the fact that Love and Alderdice filed their permit applications shortly after the public meetings, but it is equally noteworthy that Taiwan Sugar filed its initial application, an incomplete one, shortly after the Love and Alderdice filings.

[48] If a "proposed" IAO meant one in respect of which an application had been filed, no matter how incomplete, then this would encourage the filing of inadequate IAO applications at an early stage – and possibly repeatedly – in an effort to defeat potentially competing permitted uses. In turn, this would lead to its own uncertainties and promote the same action by adjacent landowners. These landowners would be tempted to file repeated development applications to protect against the risk of an IAO being built nearby on a site inadequate to meet the MDS requirements and thereby freezing the use of their lands for residential purposes. This result cannot have been intended.

[49] Not only would this be unduly costly to the applicants (in terms of filing fees and lost time), and the County (in terms of processing of the permits), it runs counter to the philosophy

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of recent amendments to planning legislation in Alberta designed to reduce "red tape" and costs and could not help but have a negative impact on overall productivity. This is not in the wider community interest.

[50] Using the permit issue date as the date on which "proposed" status is achieved for purposes of s.6.1.7.3 avoids the prospect of multiple filings. There would be no need on the part of individual landowners to apply for residential development permits early and repeatedly to protect their legitimate permitted use rights since a permit could be successfully applied for at any time prior to an IAO's permit issue date. It would also avoid preemptive filings by an IAO developer intending to include part of its neighbours lands in the calculation of the required MDS since there would be nothing to be gained by these filings.

[51] Further, s.3.4.8 also militates against using the incomplete application date as the date on which the IAO achieves "proposed" status. Under this section, the DA may return the application to an applicant for further details and in such event, the application is "deemed to not have been submitted". To treat an IAO project as "proposed" for purposes of s.6.1.7.3 even though in the end the IAO application might be returned and treated as not submitted would be illogical.

[52] Under s.3.4.4 of the *Bylaw*, an IAO developer is mandated to provide certain required information in an IAO application. However, under s.3.4.9:

> The Development Authority may make a decision on an application for a development permit notwithstanding that any information required or requested has not been submitted.

[53] This being so, it has been argued that the DA's ability to issue a conditional IAO development approval means that "proposed" status can be achieved before the IAO developer has provided all information required under the *Bylaw*, that is on the incomplete application date. But this looks at matters the wrong way round. The point is not whether the permit issue date <u>may</u> occur before all required information is filed; it is whether the permit issue date has been achieved. Even assuming therefore that an IAO permit could be issued without all information required under this section (and quaere whether this is so), what would make the IAO project a "proposed" one for purposes of s.6.1.7.3 would not be the filing of an incomplete permit application, but rather the issuance of a development permit.

[54] It was suggested that the emphasis the County places on agriculture lends added weight to the argument that an IAO should be treated as "proposed" the moment a development application is filed, no matter how incomplete. However, this argument assumes that in a competition between a single family residential permitted use and an IAO that it is only the IAO which satisfies the emphasis on agriculture in the *Bylaw* and the *Plan*. This is clearly wrong. Section 6.2.1 of the *Bylaw* states that the purpose of the Agricultural District is to "provide land where all forms of agriculture can be carried on without interference by other, incompatible land uses." The very first permitted use is "all forms of extensive agriculture and

forestry, including a single family dwelling or a manufactured home." [Emphasis added.] The second is "single family dwellings and manufactured homes, on a sole residential parcel subdivided out of a quarter section ...." [Emphasis added.]

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[55] Why is this so? The answer lies in part in the history of Alberta. The quarter section of land with the family home has been one of the fundamental building blocks of farming life in rural Alberta. As such, it has been an integral component in the orderly and economic development of land in this province. Further, providing that a single family home is a permitted use on a farm quarter and on a parcel subdivided out of a farm quarter also recognizes the inter-generational needs of extended farm families. Had the County wanted to demolish this foundational structure, and grant IAO's preferential treatment, it was certainly free to do so. It has not. Instead, the County has expressly provided that use of land for a single family residence in conjunction with a farming operation or on a parcel subdivided out of agricultural land are permitted uses under the *Bylaw* while an IAO is merely a discretionary use.

[56] Consequently, one does not need evidence of the importance of a residence on any particular quarter section. The County's decision to make the construction of the single family home a permitted use is sufficient evidence of legislative intent whether or not this settlement pattern continues today. Thus, there is no merit to an argument premised on the assumption that an IAO on land zoned Agricultural (A) District trumps use of agricultural lands for single family homes in conjunction with an extensive farming operation. In fact, policy considerations explicitly tilt in favour of the residential permitted use.

[57] It follows that I do not agree with the proposition that an IAO is entitled to priority on the basis it benefits the community economically as a whole. So too do other forms of extensive agriculture, including the residences associated with them. This is not a case where the County has elected to exclude all forms of agriculture other than IAO's. Instead, the *Bylaw* specifically contemplates a variety of uses for land zoned Agricultural (A) District.

[58] Sixth, concluding that an IAO becomes "proposed" on the permit issue date best avoids inequitable results. The legality or merit of the County's decision to allow an IAO developer to include adjacent lands in the calculation of whether it meets the required MDS is not before us. However, Taiwan Sugar argues that if the serious intention test is not adopted, then when an IAO developer goes through the public consultation process encouraged by s.1.12 of the *Plan*, landowners near identified selected sites could easily defeat a project by filing an application for a development permit for a residence within the mandated setback area. It opposes the use of any date after the incomplete application date for the same reason, namely that this is not fair.

[59] However, there is nothing unfair or improper in neighbouring landowners filing residential permitted use applications on lands nearby a publicly disclosed IAO site. The County has set its priorities under the *Bylaw;* declared the permitted uses, including single family homes on agricultural lands; and encouraged anyone seeking a discretionary IAO permit to enter into a public consultation process. The very existence of that process reflects an

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intention that neighbouring landowners have the opportunity to consider and exercise whatever rights attach to their lands prior to the issuance of an IAO permit. In essence, the legislative scheme requires them to choose a right or lose a right.

[60] It must be remembered that the conflict here has arisen because the sites acquired for the IAO near the Love Lands and the Alderdice Lands do not permit the IAO developer to fully meet the MDS requirements on its own lands. One method an IAO developer can use to ensure that its project goes forward is to acquire a sufficiently large block of land to fully meet the MDS requirements without relying on neighbouring property. Thus, an IAO developer can easily eliminate any risk of its plans being defeated by competing residential permitted use applications by the simple expedient of acquiring a large enough site to satisfy the MDS requirements out of its own lands.

[61] If this imposes too great an economic cost on an IAO developer, there is another method it can use to minimize the risk of its plans being defeated by competing residential permitted use applications. That is to consult with neighbouring landowners. One consequence of this judgment is that it will provide certainty and eliminate races to file competing development applications. IAO developers, who are required to consult before applying for a permit, are not in a position to conceal an IAO proposal. The IAO developers can now reasonably anticipate that adjacent property owners whose lands may be negatively affected by the MDS requirements may well file residential permitted use applications to protect their future development rights. These applications will have priority over competing IAO applications until the permit issue date. Thus, IAO developers who have not acquired sites large enough to absorb the entire MDS out of their lands may wish to engage in economic negotiations with adjacent property owners with a view to compensating them for the loss of their future right to construct a residence.

[62] As for the proposition that an IAO developer may be required to deal with a number of landowners, there is a simple answer to this. The *Bylaw* does not prevent an IAO from being constructed on a number of contiguous quarter sections of land. A developer can either choose a number of sites physically isolated from each other or select contiguous sections of land, and deal with the consequences that flow from that voluntary choice. Additionally, it is not in the public interest to sterilize large tracts of land for residential purposes when this could be avoided by an IAO developer's building on a larger, contiguous site.

[63] This raises another related point. In urban areas, planning bylaws typically contemplate an extensive and wide range of land uses with different rules for each. For example, land for residential use might be zoned in specific locations for particular uses, such as single family homes, townhouses, and high rise apartments. The same holds true for other zoning categories such as commercial and industrial uses. But to date in rural Alberta, there has been little attempt to distinguish amongst various kinds of agricultural uses. One possible way of reducing the potential for conflict arising from the competing demands of rural landowners and IAO developers would be to limit IAO's to specific designated areas. However, the question

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whether such an approach would be beneficial falls squarely within the legislative, and not the judicial, role.

[64] Finally, I turn to why the permit issue date is to be preferred over the permit effective date. A permit does not come into effect until 14 days after its publication date (s.3.6.1), or if appealed, until expiry of all appeal periods (s.3.6.2). It could be argued that unless and until the permit comes into effect, a discretionary IAO ought not to defeat a permitted use application filed at any time before the permit becomes final. However, once an IAO permit has been issued, the equities change as between an IAO developer and adjacent landowners. At that point, a permit has been issued which is to come into full effect on expiry of certain statutory periods. Meanwhile, the neighbouring landowner has elected not to file any competing permitted use applications prior to that date. Thus, to allow a residential permitted use application filed after the permit issue date to defeat the IAO in these circumstances would not be reasonable. At this stage, the appeal process governs.

[65] Accordingly, for these reasons, I have concluded that an IAO becomes "proposed" for purposes of s.6.1.7.3 on the permit issue date. There must be a practical, fair, easily-administered and certain cut-off date and the permit issue date qualifies on all grounds. In the end, it is this interpretation which best conforms with the spirit and intent of the *Act*, the *Policies*, the *Plan* and the *Bylaw*.

B. <u>RELEVANT DATE FOR ASSESSING PERMITTED USE APPLICATIONS</u>

[66] I now turn to the second issue to be resolved. This concerns the date on which the Love and Alderdice applications ought to have been assessed for compliance with s.6.1.7.3 of the *Bylaw*. At issue here is the question of acquired rights: at the time an application for a single family residential permitted use is filed, are the rights of the applicant sufficiently concretized that those rights cannot be defeated by a later, competing discretionary use application? I have concluded that they are.

[67] Given my conclusion on this issue, it is in one sense unnecessary to have definitively decided the date by which an IAO becomes "proposed" for purposes of s.6.1.7.3. It would be enough to determine that as long as an IAO does not become "proposed" by the serious intention date (option 1), the DA is required to issue the residential permits to Love and Alderdice. However, to eliminate option 1 required an analysis of the first issue in detail. In addition, in any event, many of the interpretive factors affecting the first issue have equal application to the second.

[68] Taiwan Sugar maintains that filing an application for a permit does not crystallize any rights. It points to the line of cases concluding that permitted use applications may be defeated by changes in the law, arguing that this same principle should apply to what they characterize as a change in the facts. The argument reduces to this. If a change in the law can defeat an application for a permitted use, then it follows that a change in facts should be able to do so too.

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[69] In my view, the appropriate date for determining whether a single family permitted use application meets the required MDS is the date on which the application is filed, regardless of when that assessment might occur and a decision follow. In the case of Love and Alderdice, their respective applications preceded even the incomplete application date. Thus, even were I wrong in concluding that an IAO becomes "proposed" for purpose of s.6.1.7.3 on the permit issue date, and it were determined that the applicable date should be the complete application date or the incomplete application date, Love and Alderdice would remain entitled to the issuance of the requested single family residential development permits.

[70] I begin with the context in which this particular issue arises. Permitted uses have been a central part of the legislative planning scheme in Alberta since 1929. In 1957, the concept of a conditional (now called "discretionary") use, as opposed to a permitted use, was first introduced in Alberta: See F. Laux, *Planning Law and Practice in Alberta*, 3rd ed. (Edmonton: Juriliber, 2002) at 1-35. That distinction remains in effect today. Permitted uses are those to which an applicant is entitled as of right providing that the proposed development otherwise meets the requirements of the *Bylaw*. The "as of right" entitlement is clear from s.642(1) of the *Act*:

> When a person applies for a development permit in respect of a development [for a permitted use], the development authority must, if the application otherwise conforms to the land use Bylaw, issue a development permit with or without conditions as provided for in the land use Bylaw. [Emphasis added.]

[71] The theory underlying permitted uses has been well-explained by Laux in *Planning Law and Practice in Alberta*, *supra*, at 6-3:

> ... as a matter of good planning, within a given district, one or more uses may be identified that are so clearly appropriate in that district, and so compatible with one another that they demand no special consideration. Therefore, such uses ought to be approved as a matter of course no matter where they are located in the district, provided that the development standards set out in the Bylaw are also met.

[72] As noted, under s.642(1) of the *Act*, the development authority "must" grant a permit when a person applies for a permitted use that conforms to the *Bylaw*. The operative word is must. In these appeals, there was no suggestion that the Love and Alderdice applications for residential housing permits were turned down on any basis other than an alleged non-compliance with s.6.1.7.3. But for the alleged non-compliance with the MDS, the residential permit applications complied with the *Bylaw*: see AB 87.

[73] It is true that any permitted use acquired rights are not absolute, notwithstanding s.642(1) of the *Act*. They may well be defeated by a change in the law occurring before a decision is made on the application. Since s.643(1) of the *Act* provides that a change in a land use Bylaw does not affect the validity of a permit granted on or before the change, this has been interpreted to mean that a permit application may be defeated by a change in the law that occurs between the date of filing of the application and the final decision on the application: ***698114 Alberta Ltd. v. Banff (Town)*** (2000) 190 D.L.R. (4th) 353 (Alta. C.A.); ***Parks West Mall Ltd. v. Hinton (Town)*** (1994) 148 A.R. 297 (Q.B.); ***Bouchard v. Subdivision and Development Appeal Board (Canmore(Town))*** (2000) 261 A.R. 342 (C.A.). Thus, the law in effect at the time that the decision is made is usually the operative law.

[74] But there are exceptions even to this rule: ***Ottawa (City) v. Boyd Builders Ltd.*** [1965] S.C.R. 408; ***Smith's Field Manor Development Ltd. v. Halifax (City)*** (1988) 48 D.L.R. (4th) 144 (N.S.C.A.). Hence, it does not follow that no rights are acquired under any circumstances on filing of a permitted use application. Indeed, this Court expressly left open the question of whether a Bylaw change post-dating an application for a permitted use will defeat that permitted use: ***Bouchard***, *supra*.

[75] In any event, even assuming for the moment that a change in the law made following the filing of an application for a permitted use defeated that application, I do not agree that this reasoning applies to a change in facts relating to lands other than those which are the subject of the permitted use application.

[76] The only alleged change of fact in these appeals is that Taiwan Sugar filed an application for an IAO discretionary use after Love and Alderdice had filed their permitted use applications. Indeed, it is debatable whether this is properly characterized as a change in facts or simply a competing development application. Even assuming the former, to focus on a change in facts which occurs on another site after the filing of a permitted use application would invert the entire permitted use planning process. When an application is filed for a permitted use, the focus is to be on the facts relating to that permitted use application, not on facts arising later in relation to competing discretionary use applications on other sites.

[77] Nor is there any evident policy reason for eroding permitted use rights in these circumstances. The statutory scheme itself recognizes not only the importance of individual rights but also the superior position granted to those applying for a permitted use, as opposed to a discretionary one. Therefore, to allow a permitted use right to be defeated by a later-filed competing discretionary use would be inconsistent with the present statutory planning regime.

[78] There is another reason for not accepting this argument. Because consistency in the application of the law is an underlying principle of the rule of law, an interpretation of the *Bylaw* that permits inconsistency should be rejected. If two land development applications that are identical on their merits result in different dispositions for no defensible reason, the orderly and economic development of land would be affected. Yet this could happen if a permitted use application could be defeated by a change in facts resulting from a later-filed development

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permit application on adjacent lands. If the development authority deferred consideration of the permitted use application in one case, but not in the other, the results of the two applications would be different. A development authority ought not to be placed in the position in which the timing of its decision on an application affects the outcome or creates inconsistent rulings.

[79] Perhaps most important is that it would be inequitable for a permitted use application to be denied because of a discretionary use application filed subsequent to the permitted use application where the discretionary use application might never be approved. Where the IAO is not subsequently approved, one cannot simply unwind the past rejection of a permitted use application and restore the applicant to the position he or she was in. Indeed, if a permitted use applicant were unsuccessful on the basis of a pending, but subsequently unapproved IAO, the permitted use applicant could not make an application for another 6 months unless the DA, in the exercise of its sole discretion, agreed otherwise: s.3.4.12 of the *Bylaw*. Applicants could therefore find themselves in the position where the DA did not permit the filing of a new permitted use application prior to the expiry of the 6 month period because the DA was awaiting the filing of a new IAO application on nearby lands.

[80] These consequences, demonstrating the very real dangers of differential treatment, underscore why as between a residential permitted use applicant and a subsequent IAO discretionary use applicant, the rights of the permitted use applicant crystallize as of the date of the filing of the permitted use application. Put into the lexicon of planning law, on the date a residential permitted use application is filed in conformity with the *Bylaw*, the applicant's potential right becomes a sufficiently acquired right that it cannot be defeated by a later-filed IAO discretionary use application on the basis of the MDS requirement.

[81] Nor should there be any difficulty in ascertaining the relevant facts as of the date of filing of the residential permitted use application. After all, they must be disclosed in the application itself. In this regard, the Love and Alderdice applications were both complete on the day of filing and in compliance with the *Bylaw*. Since the subject IAO had not achieved "proposed" status under s.6.1.7.3 on the date of filing of the Love and Alderdice single family permitted use applications, the DA was required to issue the single family residential permitted use permits.

[82] Therefore, I allow the appeal, reverse the decision of the SDAB and direct the DA to issue to Love and Alderdice the permits to which they are entitled for the construction of the requested single family residential dwellings.

APPEAL HEARD on NOVEMBER 27th, 2001

REASONS FILED at EDMONTON, Alberta
this 9th day of DECEMBER, 2002

FRASER C.J.A.

I concur: ______________________
as authorized by: FRUMAN J.A.

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DISSENTING REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE RUSSELL

[83] The relevant facts, the decision below, and the applicable standard of review are as set out in the Reasons for Judgment of Fraser, C.J.A.

GROUND OF APPEAL

[84] Leave to appeal was granted on the following ground:

> Did the Subdivision and Development Appeal Board of Flagstaff County err in law in its interpretation of the word "proposed" as found in Section 6.1.7.3 of the Flagstaff County Land Use Bylaw No. 03/00 (LUB)?

[85] The appellants assert that two issues are raised by this ground of appeal: (1) the meaning of the term "proposed" in s. 6.7.1.3 of the LUB, and (2) the relevant time for determining whether an intensive animal operation (IAO) has achieved that status. Although the ground of appeal does not expressly include the second issue, no one has objected to its consideration and all parties have provided argument on it. Accordingly, I will assume that it is an element of the ground of appeal for which leave was granted.

ANALYSIS

What does "proposed" mean?

[86] Section 6.1.7.3 of the LUB prohibits construction of a residence within the minimum distance separation distance from an IAO, "either existing or proposed".

[87] The appellants submit that a "proposed" IAO is either one which has been approved but not yet constructed, or one for which a complete development application has been submitted. They argue that these definitions provide the certainty to which an applicant for a permitted use permit is entitled. In their view, the SDAB erred in holding, in effect, that the developer need only submit an incomplete application to render the development "proposed".

[88] In response, the developer contends that an IAO is "proposed" when a reasonable person would believe that a serious intention to develop has been shown.

[89] Given the significance of this term for both landowners and IAO developers, it is unfortunate that the LUB does not provide a definition.

[90] The Supreme Court recently reiterated its preferred approach to statutory interpretation in ***Bell ExpressVu Limited Partnership* v. *Rex***, 2002 SCC 42 at para. 26, (2002) 212 D.L.R. (4th) 1, citing E.A. Driedger, *Construction of Statutes,* 2nd ed (Toronto: Butterworths, 1983) at 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[91] Hence, the meaning of "proposed" must be determined in the context of s. 6.1.7.3 and the LUB as a whole, considering the scheme, object and purpose of the LUB. The object and purpose of the *Municipal Development Plan*, County of Flagstaff, Bylaw No. 02/00 (Plan) and aspects of the *Municipal Government Act*, R.S.A. 2000, c. M-26 (Act) are also relevant to this inquiry as they form part of the legislative scheme in which a development permit application will be assessed.

[92] The word "proposed" is used in s. 6.1.7.3 as an alternative to "existing". This suggests that a proposed operation is one for which construction has not yet begun.

[93] The word "proposed" is used elsewhere in the LUB in a context which indicates that it there refers to a development for which an application has been submitted, but no permit has yet been issued: s. 3.4.4, 3.4.8, 3.4.13, 3.4.14. This might suggest that the same interpretation should be given to s. 6.1.7.3. But it does not clarify the degree to which an application should be complete, for a development to be "proposed".

[94] One might expect other provisions of the LUB to assist in that regard. However, s. 3.4.4 requires an IAO application to include "all relevant information necessary to allow the Development Authority to determine if the proposed development will meet the guidelines of the Code of Practice". Section 3.4.8 provides that if the application does not contain sufficient information, the development authority may return it, in which case it is deemed not to have been received. Those provisions suggest a complete application is required. But s. 3.4.9 specifically authorizes the Development Authority to make decisions on such applications, suggesting that the development retains proposed status even though the application itself is deficient. That broad discretion permits an incomplete application to be rejected or approved. It follows that little weight can be placed on these provisions in interpreting the LUB.

[95] One of the purposes of the LUB, as set out in s. 1.2, is to regulate and control the use and development of the County's land, to ensure orderly and economic development. This objective is largely achieved by providing a system for balancing competing land uses. In striking that balance, the LUB emphasizes the import of agriculture in the Agricultural District in which IAOs may be located. The preamble to the relevant district regulations reads:

> The purpose of the Agricultural District is to provide land where all forms of agriculture can be carried on without interference by other, incompatible land

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> uses. The Development Authority may, at his discretion, refuse to issue a development permit for any land use which may limit or restrict existing or proposed agricultural operations in the vicinity.
>
> LUB s. 6.2.1

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[96] Arguably a narrow definition of the term"proposed" might undermine this purpose. Neighbouring landowners could defeat an IAO, which is planned but not yet "proposed", by rushing to obtain residential permits for land within the prescribed minimum distance separation from the IAO at the first hint of such a development. This possibility is exacerbated by the Plan's direction, in s. 1.12, that developers should seek local support for an IAO before submitting a development permit application, thus alerting neighbours to the proposal, and providing them the opportunity to take evasive action. In this case, both applications for residential development permits were filed within days following the public consultation conducted by the developer.

[97] The emphasis placed on agriculture in the LUB is consistent with the Plan, which states that:

> Agriculture and providing services to the agricultural community are regarded as the most important forms of development in Flagstaff County....
>
> [A]griculture is viewed as the priority use when affected by competing land uses in most of the County....
>
> In that agricultural activities have priority in most of the County, the intent of this Plan is that no legitimate activity related to the production of food which meets Provincial and/or municipal requirements should be curtailed solely because of the objections of nearby non-farming landowners or residents....
>
> s.1.0, Statement of Intent

The Plan also reflects the role intensive agriculture is to play in the Agricultural Use Area. It includes amongst its objectives "the rational diversification and intensification of agricultural activities": s. 1.0, Objectives. It considers the primary uses of the Agricultural Use Area to be extensive agriculture and IAOs: s. 1.3.

[98] In her Reasons for Judgment, Fraser C.J.A. contends that residential land use, in conjunction with extensive agriculture, satisfies this emphasis on agriculture. However, the development of a residence in conjunction with a farming operation is only one of two forms of residential development which are permitted uses in the area; the other is a single family dwelling on a residential parcel subdivided from a quarter section and unrelated to farming activities. Further, while rural Alberta may have developed in a pattern of quarter sections of land, each equipped with a family home, there is no evidence before this court to suggest that

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this settlement pattern remains today, in a time of ever increasing mechanization. Nor is there evidence that the ability to develop a home on each quarter section is necessary to accommodate inter-generational farm families. In any event, interpretation of a bylaw involves consideration of the object and intention of the legislative scheme, as inferred from the relevant legislation itself. I do not infer from that legislation that these policy considerations form part of its object or intention.

[99] The legislative scheme of the Act is also relevant to this inquiry. Section 617 states that one of the purposes of the Act, and bylaws thereunder, is to achieve orderly, economical and beneficial development without infringing on the rights of individuals except to the extent necessary in the overall public interest. This reflects an intention to protect the capacity of property owners to develop their land as they see fit, subject to compromise for the pubic good.

[100] While IAO developers will generally be private entities, the development of IAOs serves the public interest, as they provide an economic benefit to the community as a whole. The Plan's emphasis of the importance of agriculture is motivated, at least in part, by economics. The Plan seeks to "promote economic diversification so that all residents may enjoy optimum working and living standards" and sees "agriculture and agricultural services as continuing to be a major economic force in the community": Goal. The Plan refers to "providing an environment that will benefit the agricultural community and economy": s. 1.0, Statement of Intent. It seeks to ensure that "agriculture remains an integral and viable component of the regional economy": s. 1.0, Objectives. Indeed, given the obvious nuisance factors associated with IAOs, it is hard to imagine why an IAO would ever be tolerated by a community, if not for its potential for positive economic impact.

[101] If "proposed" status is not achieved until late in the application process, neighbouring landowners may easily defeat the project by obtaining residential development permits. However, Fraser C.J.A. suggests that potential IAO's may avoid this conflict by the simple expedient of purchasing the entire minimum distance separation (MDS) area or by negotiating rights over it. This approach suggests that incursion onto private rights is not necessary, as required in s. 617. However, MDS areas are sizable. In the current case, the IAO is spread over five quarter sections. The MDS area for each of those quarters runs onto at least the eight surrounding quarter sections. Adopting Fraser C.J.A.'s approach would require acquisition or negotiation with respect to either all or part of the 40 quarter sections which surround the parcels marked for development. The developer's ability to purchase only the specific portions of the neighbouring sections which comprise the MDS area would be dependent upon subdivision approval from the County. A larger IAO would involve an even larger MDS area. This approach would significantly impact the economic viability of any potential IAO operation, depriving the community of the economic benefits associated with the intensification of agriculture. This would be inconsistent with the Plan's emphasis on agriculture as a key economic force in the County. Accordingly, while s. 617 contemplates preservation of private interests, the greater public good weighs against an interpretation of "proposed" that would render the County economically unfriendly to IAOs.

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[102] The distinction the Act draws between permitted and discretionary uses is also relevant. These concepts are defined in both the Act and the LUB. A permitted use is one for which a permit must be granted if bylaws are complied with. As the name suggests, a discretionary use is one for which there is no imperative to grant a permit. This distinction reflects the principle underlying permitted uses:

> that, as a matter of good planning, within a given district, one or more uses may be identified that are so clearly appropriate in that district, and so compatible with one another that they demand no special consideration. Therefore, such uses ought to be approved as a matter of course no matter where they are located in the district, provided that the development standards set out in the bylaw are also met.
>
> F.A. Laux, *Planning Law and Practice in Alberta*, 3rd ed., looseleaf (Edmonton: Juriliber, 2002) at 6-3, cited with approval in ***Burnco Rock Products Ltd.*** v. ***Rockyview No. 44 (Municipal District)*** (2000), 261 A.R. 148 at para. 13 (C.A.)

[103] Most dwellings in the relevant district, including those under consideration in this matter, will be permitted uses. Extensive agriculture is also a permitted use under s. 6.2.1.1.a. However, an IAO is merely a discretionary use. While agriculture is a priority in the County, an IAO is considered distinct from extensive agriculture, and subordinate in its suitability for the district. This militates against an overly broad interpretation of "proposed".

[104] While permitted uses are given planning priority, their approval is subject to compliance with the relevant bylaws. The question of statutory interpretation raised in this appeal will determine whether the applicants' prospective residences comply with the LUB. Given that compliance with the bylaw is the central issue here, and permitted use permits are available only when bylaws are complied with, I do not place significant weight on the permitted nature of a residence. The County is entitled, through its bylaws, to place restrictions on permitted uses. It follows that inclusion of a particular type of development, in a list of permitted uses, does not mandate an interpretive approach that minimizes any restrictions the County has chosen to impose on such developments.

[105] The permitted/discretionary dichotomy, and the imperative to approve permitted uses subject to compliance with bylaws, support an interpretation of "proposed" that will provide certainty as to when that status is achieved. The greater the uncertainty on this point, the more approval of a residential development permit application might depend on an exercise of discretion by the Development Authority. This would tend to blur the distinction between a permitted use and a discretionary use.

[106] The developer equates the word "proposed" with incompleteness. It contends that a project is "proposed" when a reasonable person would have no doubt that a serious intention to develop has been displayed even though no application is filed. But such a test promotes

uncertainty. Would public consultation constitute a proposal or a mere testing of the waters? If "proposed" status may arise prior to the filing of an application, to whom must the development be proposed? How and when would serious intent be crystallized? How would any abandonment of that intent be determined?

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[107] On the other hand, the appellants' proposal, that a complete IAO development permit application must be submitted to be "proposed," cannot be rationalized with s. 3.4.9. That section provides the development authority with discretionary power to decide an application despite the absence of required or requested information. According to that section, approval may be given to an IAO development permit application, even if it is incomplete. So there is no point at which the application can be objectively determined to be complete. Hence the standard of completeness does not assist in the interpretation of the word "proposed".

[108] In contrast, the decision of the SDAB that a development becomes "proposed" once a development permit application is submitted to the County provides a more objective and tangible touchstone.

[109] In her Reasons for Judgment, Fraser C.J.A. raises the question of how one could know with certainty when a filed IAO development permit had been abandoned. Neither the LUB nor the Act provide a mechanism for neighbouring landowners to compel the Development Authority to either decide or return a development permit application. She reasons that an application might remain filed and incomplete indefinitely if the applicant does not exercise his or her option to deem the application denied. However, the Development Authority is obliged to "receive, consider and decide on all applications": LUB s. 3.4.7. While the LUB does not provide a specific time frame for carrying out this duty, the Development Authority could not fail to act indefinitely. A neighbouring landowner, wishing to obtain a residential development permit, could seek an order of mandamus compelling the Development Authority to discharge its duty to decide the application. Accordingly, if an IAO is proposed as of the date an application is filed, an unannounced abandonment of that application could not indefinitely prevent a residential development from proceeding.

[110] Fraser C.J.A. also considers the prospect of numerous, repeated, development permit applications if an IAO becomes "proposed" upon the filling of an incomplete application. In such circumstances, an IAO developer might be motivated to file an application at the earliest possible time. However, under s. 3.4.1. LUB, only owners, or agents of owners, can apply for development permits. Thus a developer must either already be a landowner, or must acquire ownership or agency status, before applying for a permit. This would deter speculative applications. Further, a developer who submits an incomplete application runs the risk that it will either be returned under s. 3.4.8 or simply refused. In the latter case, the Development Authority could decline to accept a further application for 6 months: 3.4.12. So while a developer might be motivated to move quickly to file even an incomplete application, there are limitations on the extent to which this can be done and the benefits to be achieved.

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[111] Moreover, the prospect of repeated IAO applications would only arise if an IAO permit was issued, but no development commenced within a 12 month period, resulting in the permit becoming void under s. 3.6.6 LUB. Few commercial enterprises would intentionally indefinitely postpone commencement of operations on potential revenue generating property. Further, it is unlikely that a Development Authority, answerable to an elected municipal council, would repeatedly grant permits for an unpopular IAO, construction of which was unreasonably delayed.

[112] The prospect of repeated residential development permits exists irrespective of when an IAO becomes "proposed". If an IAO is deemed to be "proposed" early in the planning process, landowners may be inclined to obtain residential development permits to ensure that, in the event an IAO project is announced in their area, they will retain the ability to develop a residence on their land. If an IAO does not become "proposed" until later in the planning process, landowners could wait until an IAO project is announced before seeking a development permit. But, in any event, if an IAO does not become proposed until it is approved, landowners may nonetheless be motivated to apply for a residential permit to block the project.

[113] Fraser C.J.A. concludes that an interpretation of the term "proposed" that might foster multiple applications for permits cannot have been intended as it could give rise to undue costs to landowners and IAO developers, increase in the County's workload, and run contrary to an intention to reduce red tape and costs.

[114] But if landowners choose to file development applications for the sole purpose of defeating the intended operation of the LUB, it is not unreasonable to expect them to bear the financial cost and inconvenience involved. If the County does experience an increased workload, it could adopt a fee structure that would discourage repeat applications.

[115] The LUB was intended to provide a scheme to prioritize residential permits and IAO permits. Regardless of how that scheme is interpreted, landowners and IAO developers are motivated to file permit applications as early as possible. From a policy perspective, it may be desirable to choose the option that minimizes administrative costs. One may even find a statutory intention to maintain costs at a reasonable level. But in the absence of evidence of any increase in administrative costs inconsistent with the intention of the legislative scheme, or evidence as to which interpretation would create the greatest cost impact, I am unwilling to attribute any weight to this factor.

[116] Fraser C.J.A. also considers the inequities of a developer being permitted to set up an IAO on a parcel of land too small to encompass the entire prescribed MDS. However, the issue before us concerns the meaning of "proposed" in the context of the objects and intention of the legislative scheme. Section 6.1.7.3 of the LUB reflects a clear choice by the Council of Flagstaff County not to require an IAO developer to purchase the entire MDS area. The validity of that provision is not before us. Nor is the fairness of the Council's choice to enact it.

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[117] Considering the context surrounding the use of "proposed" in s. 6.1.7.3, its use elsewhere in the LUB, the emphasis placed on agriculture in the District, and the significance of agriculture in area economy, as well as the need for certainty with respect to limitations on permitted uses, the appellants' arguments cannot prevail. I conclude that "proposed" in s. 6.1.7.3 refers to an IAO for which a development permit application has been submitted to the County, whether or not it is complete.

[118] It follows that, in my view, the SDAB did not err in its interpretation of "proposed".

What is the relevant time for determining whether an IAO has achieved "proposed" status?

[119] The appellants argue that the development authority should have made its decision on their residential development permit applications on the basis of facts that existed at the time those applications were filed. They submit that this approach provides the degree of certainty to which a permitted use applicant is entitled. Since the application for the IAO development permit had not been made at the time the residential applications were submitted, they maintain that should foreclose any entitlement to an IAO development permit.

[120] However, the SDAB and developer maintain that filing an application for a permit does not crystallize any rights. They suggest that a change in facts should invoke the same principle as a change in the applicable law. They rely on authorities interpreting section 643(1) of the Act. That section does not allow a change in the land use bylaw to affect the validity of a permit granted on or before the change. This has been interpreted to mean a permit application may be defeated by a change in law that occurs between the filing of the application and the final decision thereon: ***698114 Alberta Ltd.* v. *Banff (Town)*** (2000), 190 D.L.R. (4th) 353 (Alta. C.A.); ***Parks West Mall Ltd.* v. *Hinton (Town)*** (1994), 148 A.R. 297 (Q.B.); ***Bouchard* v. *Subdivision and Development Appeal Board (Canmore (Town))*** (2000), 261 A.R. 342 (C.A.); Laux, *supra*, at 9-14.

[121] Neither the Act nor the LUB expressly directs a development authority or SDAB to consider only those facts in existence at the time a development permit application is filed. Nor have the appellants pointed to any provisions from which this could be inferred. The legislative scheme is silent on the question and the appellants, in effect, ask this court to read into the scheme a right to have their applications decided as of the date of filing.

[122] In non-*Charter* cases, a court's jurisdiction to read words into a statute is limited:

> It is one thing to put in or take out words to express more clearly what the legislature did say, or must from its own words be presumed to have said by implication; it is quite another matter to amend a statute to make it say something it does not say, or to make it say what is conjectured the legislature could have said or would have said if a particular situation had been before it.

Driedger, *supra,* at 101.

[123] In ***Western Bank Ltd.* v. *Schindler***, [1977] 1 Ch. 1 at 18 (C.A.), Scarman L.J. considered the relevant distinction in the following terms:

> ... our courts do have the duty of giving effect to the intention of Parliament, if it be possible, even though the process requires a strained construction of the language used or the insertion of some words in order to do so.... The line between judicial legislation, which our law does not permit, and judicial interpretation in a way best designed to give effect to the intention of Parliament is not an easy one to draw. Suffice it to say that before our courts can imply words into a statute the statutory intention must be plain and the insertion not too big, or too much at variance with the language in fact used by the legislature.

[124] The legislative scheme does not expressly provide that a permitted use application must be assessed on the basis of facts in existence at the time of filing. Nor can such a right be implied. There may be compelling policy considerations which suggest that, had the legislators turned their minds to this issue, they would have granted the right asserted by the appellants. However, in the absence of discernable legislative intent, the grant of such a right oversteps statutory interpretation and amounts to judicial legislation.

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CONCLUSION

[125] I would dismiss the appeal.

APPEAL HEARD on NOVEMBER 27th, 2001

REASONS FILED at EDMONTON, Alberta,
this 9th day of DECEMBER, 2002

2002 ABCA 292 (CanLII)

RUSSELL J.A.

1965

*Feb. 16, 17
Mar. 18

THE CORPORATION OF THE CITY OF OTTAWA and MICHAEL C. INSTANCE, Acting Building Inspector for the said City of Ottawa and MAXWELL C. TAYLOR, Building Inspector for the said City of Ottawa (*Respondents*) .... APPELLANTS;

AND

BOYD BUILDERS LIMITED (*Applicant*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Application for building permit refused—Prima facie right to have permit granted—Municipality seeking to defeat prima facie right by enactment of rezoning by-law—Application for mandamus—Municipality failing to manifest that it was proceeding on a pre-existing clear intention to restrict lands in question and was acting in good faith in so doing.

The respondent company having been assured by officers of the appellant municipality that certain lands were zoned to permit apartment houses purchased the said lands and then immediately instructed its architects to draft plans for an apartment house and by the agency of the architects submitted an application for a building permit. The property had stood unaffected by building restrictions from July 1936 until March 1963, when, as a result of the enactment of a general zoning by-law, the lands were zoned in a category permitting the erection of apartments. Apart from certain minor modifications, the plans submitted were such as would justify the granting of a building permit and the acting building inspector admitted that if he had not been instructed by the Board of Control to refuse the permit he would have granted one.

Upon it becoming known that an application had been made a clamour was raised by surrounding residents. The Ottawa Planning Area Board met on September 18, 1963, considered the objections of the surrounding residents and recommended that the lands in question be rezoned so as to prohibit the building of apartment houses. At a meeting of Council on the following day the report of the Planning Board was considered and approved and a by-law (No. 311/63) making the recommended variations in zoning was passed. The respondent was given no notice of either the meeting of the Planning Board or of Council.

The city applied to the Ontario Municipal Board for approval of by-law 311/63 and shortly thereafter the respondent made application for a mandatory order requiring the issue of a building permit. That application was adjourned pending the hearing of the city's application to the Municipal Board. On appeal, the Court of Appeal held that the application for the mandatory order should not have been adjourned and that upon the facts the respondent had a *prima facie* right to be granted a building permit and that the municipality was

*PRESENT: Cartwright, Abbott, Martland, Judson and Spence JJ.

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not acting in good faith and impartially when it enacted by-law 311/63 thus defeating the respondent's *prima facie* right. The appellants appealed to this Court.

Held: The appeal should be dismissed.

Under the provisions of s. 30(9) of *The Planning Act*, R.S.O. 1960, c. 296, by-law 311/63 was not in effect unless and until approved by the Municipal Board. Therefore, when the respondent made application for a building permit and later when refused made application for a mandatory order that a building permit be issued, there was no valid by-law in existence prohibiting the grant of such permit. Therefore, the respondent had a *prima facie* right to the permit and upon its refusal a *prima facie* right to a mandatory order that it should be granted. This *prima facie* right might only be defeated if the municipality demonstrated that it had in existence a clear plan for zoning the neighbourhood with which it was proceeding in good faith and with dispatch.

The argument that the Courts in Ontario lacked power to grant the mandatory order on the ground that there was an alternative legal remedy, *i.e.*, the right to move to quash the by-law, or to be heard before the Board, was not accepted. Despite the provisions of s. 277(1) of *The Municipal Act*, R.S.O. 1960, c. 249, which provided a procedure for an application by way of originating motion to quash a by-law, and s. 30(9) of *The Planning Act*, the respondent having, at the date when it filed its application for a building permit, the *prima facie* right to have that permit granted, could insist upon the hearing of the application for *mandamus* that the municipality manifest that it had a clear zoning plan upon which it was proceeding in good faith and with dispatch. In the circumstances, the appellant had failed to manifest that it was proceeding on a pre-existing clear intention to restrict the lands in question and was acting in good faith in so doing.

Hammond v. City of Hamilton, [1954] O.R. 209; *Sun Oil Co. Ltd. v. Town of Whitby*, [1957] O.W.N. 362; *Re Markham Developments Ltd. and Township of Scarborough*, [1954] O.W.N. 81; *Bolton v. Munro et al.*, [1953] O.W.N. 53, referred to. *Kuchma v. Rural Municipality of Tache*, [1945] S.C.R. 234; *Re Howard and City of Toronto* (1928), 61 O.L.R. 563, distinguished.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from an order of Schatz J. adjourning respondent's application for a mandatory order requiring the issue of a building permit.

R. D. Jennings, Q.C., for the appellants.

G. F. Henderson, Q.C., and *K. Radnoff*, for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] dated April 23, 1964, which allowed an appeal from the order of Mr. Justice Schatz. By

[1] [1964] 2 O.R. 269, 45 D.L.R. (2d) 211.

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that latter order, Mr. Justice Schatz had adjourned, pending the hearing of the appellants' application for approval by the Ontario Municipal Board, an application by Boyd Builders Limited for a mandatory order requiring the City of Ottawa and its building inspector to issue a building permit as to certain lands on Sherwood Drive in the city upon which it was proposed to erect an apartment house.

Roach J.A., giving judgment in the Court of Appeal, upon recital of the facts some of which will be referred to hereafter, held that the application for the mandatory order should not have been adjourned and that upon the facts the applicant Boyd Builders Limited had a *prima facie* right to be granted a building permit and that the municipality was not acting in good faith and impartially when it enacted by-law 311/63 thus defeating the applicant's *prima facie* right.

An owner has a *prima facie* right to utilize his own property in whatever manner he deems fit subject only to the rights of surrounding owners, *e.g.*, nuisance, etc. This *prima facie* right may be defeated or superseded by rezoning if three prerequisites are established by the municipality, (a) a clear intent to restrict or zone existing before the application by the owner for a building permit, (b) that council has proceeded in good faith, and (c) that council has proceeded with dispatch.

Counsel for the appellants in this Court advanced a proposition which he states was fully argued in the Court of Appeal but which is not reflected in any way in the reasons of Roach J.A. giving the judgment of that Court. This argument is that the Courts in Ontario lack power to grant the mandatory order and for the following reasons. The *Municipal Act*, in s. 277(1) provided a definite procedure for an application by way of originating motion to quash a by-law. The *Planning Act* in s. 30 provides in subs. (9) for approval of a zoning by-law by the Municipal Board and that the by-law would only be effective upon such approval. Mr. Jennings argued that the by-law was not illegal on its face and it could only be quashed because of bad faith or discrimination *established in an application to quash*. Mr. Jennings further submitted that the applicant had two courses available to it. It could make an application to the Court to quash or it could allow the application for approval required by s. 30(9) of *The Planning Act* to go before the

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Municipal Board and there appear to oppose. Counsel pointed out the provisions of *The Ontario Municipal Board Act*, particularly ss. 33 to 37, 53, 56, and 92 to 95, submitted that the Legislature had selected the Municipal Board to determine exclusively whether the by-law should be brought into effect and, *inter alia*, to decide all questions of fact including good faith.

I am of the opinion that the approach of the Court of Appeal for Ontario is a sound one. Under the provisions of s. 30(9) of *The Planning Act* the by-law is not in effect unless and until approved by the Municipal Board. Therefore, when Boyd Builders Limited made application for a building permit and later when refused made application for a mandatory order that a building permit be issued, there was no valid by-law in existence prohibiting the grant of such permit. Therefore, Boyd Builders Limited had a *prima facie* right to the permit and upon its refusal a *prima facie* right to a mandatory order that it should be granted. This *prima facie* right may only be defeated if the municipality demonstrates that it has in existence a clear plan for zoning the neighbourhood with which it is proceeding in good faith and with dispatch.

I see no necessity for the applicant for the permit taking on itself the task of proceeding to quash the by-law. It may well be that the by-law applies to a very large area and, of course, the building permit would apply to only a part thereof. It may be that in so far as the balance of the area is concerned, there is a valid plan of rezoning and that so far as the owners of such balance of the area are concerned council is proceeding in good faith and with dispatch.

What the applicant seeks in these proceedings is the enforcement of his, common law right, and that common law right should be viewed as of the date of the filing of its application for a permit subject to the common law right being superseded in the fashion I have outlined by events which may occur even after the date of the filing of the application for a permit and before the application for a mandatory order.

The series of cases in Ontario included examples both where the by-law, although non-existent at the time of the application for the permit was in existence at the time of the hearing of the application for a *mandamus*, and others where the by-laws were not in existence at such later date.

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Some of the applications for *mandamus* had been granted and some have been refused. Some have been refused and the matter adjourned even when no by-law existed at the time of the hearing of the application for *mandamus: Re Marckity et al. and the Town of Fort Erie and Burger*[1]. There are other cases and frequent cases where the by-law had been enacted between the date of the application for a building permit and the date of the hearing of the application for *mandamus* which followed the refusal of the permit, and where the *mandamus* had been granted. It is true that most of these cases are decisions of single judges, *e.g.*, *Re Bridgman and City of Toronto et al.*[2], *Re Greene and City of Ottawa*[3], *Re Beaver Lumber Co. Ltd. and Township of London*[4], *Re Skyway Drive-In Theatres Ltd. and Township of London*[5], *Re Cooksville Co. Ltd. and Township of York et al.*[6] There were, however, several in the Court of Appeal. Although *Hammond v. City of Hamilton*[7] is a case where there had not yet been a by-law enacted at the time of hearing the application for *mandamus,* the proposition there enunciated and particularly that set out by Roach J. A. at p. 221, has been adopted both by single court judges and by the Court of Appeal in cases where a by-law was enacted during the intervening period: *Sun Oil Co. Ltd. v. Town of Whitby*[8], *Re Markham Developments Ltd. and Township of Scarborough*[9]. These are cases where the *prima facie* right of the applicant to have a building permit has been held by the Court not to have been superseded because the municipality has not fulfilled the three requirements outlined by Roach J. A. in *Hammond v. Hamilton, supra.*

I, therefore, am of the opinion that despite the provisions of *The Municipal Act* and *The Planning Act,* the applicant Boyd Builders Limited having, at the date when it filed its application for a building permit, the *prima facie* right to have that permit granted, could insist upon the hearing of the application for *mandamus* that the municipality manifest that it had a clear zoning plan upon which it was proceeding in good faith and with dispatch. In so far as the previous sentence puts the onus upon the municipality, I agree with counsel for the respondent that such is the effect

[1] [1951] O.W.N. 836.
[2] [1951] O.R. 489.
[3] [1951] O.W.N. 674.
[4] [1951] O.W.N. 23.
[5] [1947] O.W.N. 489.
[6] [1953] O.W.N. 849.
[7] [1954] O.R. 209.
[8] [1957] O.W.N. 362.
[9] [1954] O.W.N. 81.

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of *Sun Oil v. Whitby, supra*, and the judgment of LeBel J. in *Bolton v. Munro et al.*[1] The judgment of this Court in *Kuchma v. Rural Municipality of Tache*[2], and that of the Appellate Division in *Re Howard and City of Toronto*[3], fixing the onus upon the applicant should be confined to the situation where the applicant seeks to quash a by-law. There, the applicant is in a position of a plaintiff and has the onus, and particularly has the onus of proving bad faith. On the other hand, where the applicant seeks a *mandamus* to which he has a *prima facie* right and the municipality seeking to defeat that *prima facie* right, alleges, *inter alia,* its good faith the onus should be on it to establish such good faith. However, in the particular case, I am of the opinion that onus is quite unimportant. The facts are not in dispute. For 26 years, these lands stood without building restrictions. They had been restricted by by-law 8214 passed in 1936 and then that restriction was removed by amending by-law 8255 of the same year. The property stood unaffected by building restrictions from July 1936 to March 1963. A general zoning by-law, No. 68/63, was then enacted which provided that the lands in question here should be zoned R-5, a zoning category permitting the erection of apartments. Section 112 of that by-law provided that notwithstanding its enactment, when areas were covered by other by-laws set out in the schedule, the zoning provided by such other by-laws should remain in effect. The aforesaid by-law 8214 was set out in the schedule. That by-law, of course, must be considered in its amended form, *i.e.*, that the lands here in question were excepted therefrom by 8255, so that the result of the general zoning by-law was to zone these lands as R-5. There was produced upon the hearing of the appeal, one of the zoning maps which formed part of the said by-law 68/63 which map indicated in heavy dark print the zoning designation R-5 immediately over the lands in question.

In these circumstances, Boyd Builders Limited inquired carefully as to the restrictions covering the property and were correctly assured by municipal officers that the lands were zoned to permit apartment houses. Acting on that assurance, Boyd Builders Limited took options and have since completed the purchase of two pieces of land at a

[1] [1953] O.W.N. 53. [2] [1945] S.C.R. 234.
[3] (1928), 61 O.L.R. 563.

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total cost of about $60,000 then immediately instructed its architects to draft plans for an apartment house and by the agency of the architects, on Sepember 9, 1963, submitted an application for a building permit. Apart from certain minor modifications, these plans were such as would justify the granting of a building permit and the acting building inspector, the appellant Instance, admitted that if he had not been instructed to refuse the permit he would have granted one on September 19, 1963. He did not do so, however, because upon it becoming known that the application had been made for such permit surrounding residents raised a clamour, the Ottawa Planning Board met on September 18, 1963, considered the objections of these surrounding property owners, and recommended that the lands in question be rezoned in such a fashion as to prohibit the building of apartment houses. No notice of this meeting of the Ottawa Planning Board was given to any representative of Boyd Builders Limited and no officer of that company had knowledge of it.

At the meeting of council on the very next day, September 19, 1963, the report of this Planning Board was considered and approved and by-law 311/63 making the recommended variations in the zoning was given three readings. The meeting took place in the evening and again no notice whatsoever was given to Boyd Builders Limited of the intention to consider and rezone at such meeting, nor did any officer of Boyd Builders have any knowledge of it.

Immediately thereafter, again, on the next day, September 20, 1963, an application was forwarded to the Municipal Board for the approval of the hastily enacted by-law, 311/63. Although the City Clerk swears that he forwarded notice of such application for approval to "all owners of property in the City of Ottawa within the area affected by by-law 311/63, and within 300 feet of such area", no such notice was received by the officers of Boyd Builders Limited. An officer of Boyd Builders Limited, however, heard of the enactment of this by-law and attending the municipal offices confirmed that fact. Boyd Builders Limited, therefore, prepared its application for the issue of *mandamus*. The application is dated September 30, 1963, and is supported by the affidavits of Joseph Liff sworn on September 27, 1963, and various affidavits of Ernest B. Colbert, the president, some sworn also on that date. On October 2, 1963, both

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H. M. MacFarland, an officer in the City Clerk's department, Mr. Hastey, the City Clerk, and W. J. Robertson, the secretary of the Ottawa Planning Board, refused to permit the applicant's representative to scrutinize or take copies of the minutes of either the meeting of the Planning Board or of council.

In my view, a most telling circumstance occurred on September 19, 1963, when Mr. Colbert, the president of the respondent, conferred with the City Solicitor, Mr. Hambling, and delivered to him a letter of that date composed by his solicitor. Mr. Hambling conferred with Mr. McLean of the Building Inspector's office, and advised Mr. McLean that in his opinion a building permit could be issued. Nevertheless, Mr. McLean and Mr. Instance, the acting building inspector, refused to issue a permit because they had been instructed not to do so. Mr. Instance in the course of the cross-examination upon his affidavit, admitted that if by-law 311/63 had not been enacted on September 19th and he had not received instructions from the Board of Control to withhold issuing a building permit he would have done so on that latter date.

The relevant cases may be summarized by stating the most important *indicia* of good faith in these matters are frankness and impartiality.

With respect, upon the circumstances outlined above, I adopt the conclusion of Roach J.A. in the Court of Appeal when he said:

> When on March 22, 1963, the City passed its zoning By-law 68/63 it did not thereby prohibit the erection of an apartment building thereon; indeed it expressly permitted it. Accordingly when the appellant filed its application for the building permit it had a *prima facie* right to it. Up until then the Municipal Council had not manifested any intention of varying the then existing restrictions. In passing By-law 311/63 the Council was not acting in good faith. It passed that by-law for the express purpose of defeating appellant's *prima facie* right to the permit. It yielded to the protests of some of the other owners in the immediate neighbourhood for whom the Planning Board was "sympathetic". It passed that by-law without any opportunity having been given to the appellant, which was so vitally interested, to make any representations concerning it. Everything that was done to defeat the appellant's *prima facie* right was done behind its back for the obvious purpose of avoiding embarrassment that the appellant's protestations on its own behalf might cause. *It is difficult to think of any stronger evidence of bad faith.* (The italicizing is my own.)

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I am, therefore, of the opinion that the appellant failed to manifest that it was proceeding on a pre-existing clear intention to restrict the lands in question and was acting in good faith in so doing.

One further matter should be referred to. The interesting question was proposed that if this appeal were dismissed and therefore the building inspector, in accordance with the judgment of the Court of Appeal, were required to and did issue the necessary building permit, and if hereafter the Ontario Municipal Board approved the by-law, No. 311/63, then such approval would date back to the date of the by-law, *i.e.*, September 19, 1963, and the result would be that the building inspector had been required by the court order to grant a building permit contrary to the provisions of the city by-law and moreover such permit might well be vain as the by-law, by virtue of s. 30(1)(ii) of *The Planning Act*, R.S.O. 1960, c. 296, as amended, would not only prohibit the erection of the building but its use. There are two answers to such a submission. Firstly, it would not be expected that the Ontario Municipal Board would take such a course in light of the fact that on November 8, 1963, that board made an order directing that no further step should be taken in respect to the application for approval of the said by-law pending the final determination of Boyd Builders Limited application for a mandatory order. Therefore, one would expect the said Ontario Municipal Board to make no order approving the by-law in respect of the lands in question after the mandatory order requiring the issue of the building permit had been made by the Court of Appeal and confirmed by this Court. Secondly, the respondent here expresses willingness to stand by the position that once that mandatory order has become final its position is protected by the provisions of s. 30(7)(*b*) of *The Planning Act.*

For these reasons, and for those given by Roach J.A., I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: D. V. Hambling, Ottawa.

Solicitors for the respondent: Soloway, Wright, Houston, Galligan & McKimm, Ottawa.

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Dikranian v. Quebec (Attorney General), 2005 SCC 73 (CanLII), [2005] 3 SCR 530

Date:	2005-12-02
File number:	30243
Other citations:	144 ACWS (3d) 260 — [2005] ACS no 75 — [2005] SCJ No 75 (QL) — [2005] CarswellQue 10752 — EYB 2005-98280 — JE 2005-2231 — AZ-50345328 — 260 DLR (4th) 17 — 342 NR 1
Citation:	Dikranian v. Quebec (Attorney General), 2005 SCC 73 (CanLII), [2005] 3 SCR 530, <https://canlii.ca/t/1m3f5>, retrieved on 2022-05-24

SUPREME COURT OF CANADA

CITATION: Dikranian *v.* Quebec (Attorney General), [2005] 3 S.C.R. 530, 2005 SCC 73

DATE: 20051202
DOCKET: 30243

BETWEEN:

Harry Dikranian
Appellant
and
Attorney General of Quebec
Respondent

OFFICIAL ENGLISH TRANSLATION

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 55)	Bastarache J. (McLachlin C.J. and Binnie, LeBel, Abella and Charron JJ. concurring)
DISSENTING REASONS: (paras. 56 to 70)	Deschamps J.

Dikranian *v.* Quebec (Attorney General), [2005] 3 S.C.R. 530, 2005 SCC 73

Harry Dikranian *Appellant*

v.

Attorney General of Quebec *Respondent*

Indexed as: Dikranian *v.* Quebec (Attorney General)

Neutral citation: 2005 SCC 73.

File No.: 30243.

2005: March 10; 2005: December 2.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Abella and Charron JJ.

on appeal from the court of appeal for quebec

Contracts — Student loans — Loan repayment terms — Vested rights — Clause of student loan contract incorporating by reference legislative provisions relating to exemption from paying interest during specified period — Legislative amendments reducing and then eliminating interest exemption period — Whether student having vested right with respect to duration of exemption period applicable to payment of interest — Whether legislative amendments having effect of limiting rights conferred on student in contract with financial institution — An Act respecting financial assistance for students, R.S.Q., c. A-13.3, s. 23 — An Act to amend the Act respecting financial assistance for students and the General and Vocational Colleges Act, S.Q. 1996, c. 79, s. 5 — An Act to amend the Act respecting financial assistance for students, S.Q. 1997, c. 90, ss. 4, 5, 13.

In Quebec, the repayment terms for student loans are set out in the *Act respecting financial assistance for students*. The appellant obtained student loans between 1990 and 1996 and completed his studies in January 1998. According to the loan certificate signed by the appellant with his financial institution in 1996, the appellant had to begin repaying the principal and paying the interest on the loan upon the expiration of the exemption period. However, as a result of amendments to the *Act respecting financial assistance for students* that came into force in 1997 and 1998, the financial institution charged the appellant interest on his loan that, under the certificate, was supposed to have been paid by the government. The appellant was authorized to institute a class action against the government seeking reimbursement of the interest paid. The Superior Court and the majority of the Court of Appeal dismissed the action, concluding that the 1997 and 1998 legislative amendments covered all student loans contracted before and after the amendments came into force.

Held (Deschamps J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, Abella and Charron JJ.: In 1996, the appellant and the financial institution signed a loan certificate provided by the government, thereby turning the certificate into a contract and crystallizing the parties' rights and obligations, including the interest payment terms. The appellant thus had a vested right with respect to the duration of the exemption period applicable when the contract was signed, since his legal situation (1) was tangible and concrete, and (2) was constituted at the time of the new statute's commencement. It is presumed, in the absence of a clear indication in a statute to the contrary in light of the entire context, that the legislature did not intend to violate the principle against interference with vested rights. [32] [36-37] [43] [49] [54]

In the instant case, this vested right was not affected by the 1997 amending legislation. That legislation does not contain any transitional provision that might justify a conclusion that the legislature clearly intended to apply the new provisions so as to limit the rights of borrowers. Just because the government argues for the immediate and future application of the legislation does not mean it is authorized to interfere with rights conferred on the appellant in his contract. Moreover, the 1997 legislation does not refer to contracts that have already been entered into and therefore cannot apply to them. Finally, there is no evidence in the record that justifies imputing to the legislature an intention to interfere with vested rights. [44] [54]

Nor does s. 13 of the 1998 amending legislation, according to which the provisions of the statute apply to "juridical situations in progress" at the time of their coming into force, clearly state the legislature's intention to change the terms of contracts of loan that had already been entered into. Section 13 does not provide that the amendments apply to contracts or "contractual situations". Furthermore, the appellant's rights and obligations were

no longer "in progress", since they had been definitively concluded under the terms and conditions of the contract. In the general context of the plan, the expression "juridical situations in progress" applies to a student who has received a loan certificate but not yet signed it (nor has the financial institution done so). In light of the ambiguity of s. 13, it is necessary to apply the principle against interference with vested rights. [45-50]

The administrative grounds raised by the government do not justify disregarding the express wording of the private contract. It is perfectly normal for some students who completed their studies on the same date to be treated differently if they obtained their student loans at different times and signed different loan agreements on an informed basis. It is the very foundation of the individualized contractual right that leads to this result. [52]

Per Deschamps J. (dissenting): In declaring, in s. 13, that the 1998 amending legislation applied to "juridical situations in progress", the Quebec legislature clearly indicated that the statute applied with immediate effect to the exemption period for the payment of interest by the appellant to his financial institution. This expression applies not only to situations that are still being formed, but also to the effects of a given juridical situation. The *Act respecting financial assistance for students* thus applies to the contract between the appellant and his financial institution. An interpretation that denies that a juridical situation is still "in progress" when it has been formed, has not been extinguished and is producing effects is not consistent with the theory on which the legislature relied. Finally, the doctrine of vested rights should not be relied on to decide the instant case. Common law concepts that place a strong emphasis on this doctrine do not apply where an approach based on the immediate application of legislation and the concept of juridical situations in progress is adopted. [56-58] [64]

Cases Cited

By Bastarache J.

Applied: *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, [2004] 3 S.C.R. 257, 2004 SCC 59; **referred to:** *Venne v. Quebec (Commission de protection du territoire agricole)*, 1989 CanLII 84 (SCC), [1989] 1 S.C.R. 880; *Attorney General of Quebec v. Expropriation Tribunal*, 1986 CanLII 13 (SCC), [1986] 1 S.C.R. 732; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, 1975 CanLII 4 (SCC), [1977] 1 S.C.R. 271; *Upper Canada College v. Smith* (1920), 1920 CanLII 8 (SCC), 61 S.C.R. 413; *Acme Village School District (Board of Trustees of) v. Steele-Smith*, 1932 CanLII 40 (SCC), [1933] S.C.R. 47; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, 1933 CanLII 86 (SCC), [1933] S.C.R. 629; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *Scott v. College of Physicians and Surgeons of Saskatchewan* (1992), 1992 CanLII 2751 (SK CA), 95 D.L.R. (4th) 706; *Abbott v. Minister for Lands*, [1895] A.C. 425; *Massey-Ferguson Finance Co. of Canada v. Kluz*, 1973 CanLII 150 (SCC), [1974] S.C.R. 474; *Marchand v. Duval*, [1973] C.A. 635; *Holomis v. Dubuc* (1974), 1974 CanLII 1254 (BC SC), 56 D.L.R. (3d) 351; *Ishida v. Itterman*, 1974 CanLII 1787 (BC SC), [1975] 2 W.W.R. 142; *Township of Nepean v. Leikin* (1971), 1971 CanLII 642 (ON CA), 16 D.L.R. (3d) 113; *Location Triathlon Inc. v. Boucher-Forget*, [1994] R.J.Q. 1666.

By Deschamps J. (dissenting)

Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin, [2004] 3 S.C.R. 257, 2004 SCC 59; *Montréal (Ville) v. 9013-5286 Québec inc.*, [2002] Q.J. No. 2631 (QL); *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, 2005 SCC 51.

Statutes and Regulations Cited

Act respecting financial assistance for students, R.S.Q., c. A-13.3, ss. 15, 23, 24, 27, 28, 29, 40, 41, 62.

Act respecting the implementation of the reform of the Civil Code, S.Q. 1992, c. 57, ss. 2, 3, 4.

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Act to amend the Act respecting financial assistance for students and the General and Vocational Colleges Act, S.Q. 1996, c. 79, s. 5.

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Consumer Protection Act, R.S.Q., c. P-40.1.

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APPEAL from a judgment of the Quebec Court of Appeal (Beauregard, Rothman and Forget JJ.A.), [2004] Q.J. No. 303 (QL), affirming a judgment of Journet J., 2001 CanLII 136 (QC CS), [2002] R.J.Q. 969, [2001] Q.J. No. 6159 (QL), dismissing the appellant's action. Appeal allowed, Deschamps J. dissenting.

Leon J. Greenberg and *Guy St-Germain*, for the appellant.

Mario Normandin, for the respondent.

English version of the judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Abella and Charron JJ. delivered by

BASTARACHE J. —

1. Introduction

1 The class action giving rise to this appeal was instituted by Mr. Dikranian on behalf of approximately 70,000 students; it concerns the recovery of interest paid on student loans granted under the former *Act respecting financial assistance for students*, R.S.Q., c. A-13.3 ("*AFAS*"), and the *Regulation respecting financial assistance for students*, R.R.Q., c. A-13.3, r. 1 ("*RFAS*").

2 The problem in the case at bar stems from the fact that the loans were made under private contracts between individual financial institutions and students while the repayment terms have been set by the government in the *AFAS* and the *RFAS*. The Minister of Education ("Minister") has imposed these terms by incorporating them into a loan certificate that must be obtained to enter into a contract of loan, to which the Minister is not a direct party.

3 The instant case results from two amendments to the *AFAS* and the *RFAS* — one in 1997 and the other in 1998 — that reduced the period during which students are exempt from making interest payments and repayments on the principal. It must first be established whether, considering that the first amendment contained no transitional provisions, that amendment applied to loans that had already been granted. It will then be necessary to determine the meaning and scope of the transitional provision in the second legislative amendment, according to which the new provisions apply to "juridical situations in progress".

4 The student aid plan in place prior to the *AFAS* was based on administrative contracts (see the Web site of Quebec's Aide financière aux études, www.afe.gouv.qc.ca/english); under that plan, the government set the terms of the contract and could amend them as it saw fit at any time. Under the current plan, however, a certificate is issued in which the Minister guarantees the loan should the student default on it (*AFAS*, ss. 27, 28 and 29) (see Appendix) and pays the interest during the exemption period (*AFAS*, s. 24) (see Appendix). After the certificate is issued, the student enters into a private contract with a financial institution. Although the government dictates some of the terms of the contract by incorporating them in the certificate it issues, it is not a party to the contract. The government neither grants the loan nor approves it. The government makes parallel commitments in accordance with the *AFAS*. The issue here is whether, in the instant case, the changes to these legal obligations have had the effect of limiting the rights conferred on the student in his or her contract with the financial institution.

5 This means that there is no need for me to consider the exact nature of the legal relationship between the government and the student. The substantive issue is whether the National Assembly can alter the private law relationship between the financial institution and the student and, if so, whether the legislative amendments of 1997 and 1998 satisfy the conditions under which it may do so.

2. <u>Origin of the Case</u>

6 Student loans in Quebec are governed by the *AFAS* and the *RFAS*. The Minister issues, to a student who is entitled to it under the *RFAS*, a loan certificate authorizing the student to contract a loan with a financial institution recognized by the Minister within 90 days. The government pays the interest (*AFAS*, s. 24) and guarantees the repayment of the principal. Before 1997, the legislation exempted students who had completed their studies from paying interest on their loans for a period specified in the loan certificate.

7 On July 1, 1997 (the day the first amending statute came into force), the National Assembly reduced the period during which student borrowers were exempt from making interest payments and repayments on the principal by one month: *An Act to amend the Act respecting financial assistance for students and the General and Vocational Colleges Act*, S.Q. 1996, c. 79 ("*Amending Act, 1997*"), s. 5. For students who, like the appellant, completed their studies during the winter trimester, the date on which interest payments and repayments on the principal were to begin was brought forward from January 1, 1999 to December 1, 1998. Effective May 1, 1998 (the day the second amending statute came into force), students had to begin paying the interest as soon as they completed their studies: *An Act to amend the Act respecting financial assistance for students*, S.Q. 1997, c. 90 ("*Amending Act, 1998*"), ss. 4 and 5.

8 The appellant obtained student loans between 1990 and 1996. He signed the last loan certificate with his financial institution, the Royal Bank of Canada, on November 15, 1996. The certificate issued by the Minister stated that the appellant could borrow an additional $4,255, which, after the amounts were consolidated, increased the total of his student loans from $22,510 to $26,765. The appellant completed his studies on about January 31, 1998, in the winter trimester. According to clause 10 of the loan certificate, he had to begin repaying the principal and paying the interest on the loan upon the expiration of the exemption period, that is, on January 1, 1999.

9 Around July 21, 1998, the appellant inquired about the repayment of his loan. A Royal Bank representative informed him verbally that interest on the loan had been debited since June 1, 1998 and that the principal would be repayable as of December 1, 1998, in accordance with the directives issued by Aide financière aux étudiants. As a result of the 1997 and 1998 legislative amendments, the appellant was being charged interest on his loan that, under the certificate signed in 1996, was supposed to have been paid by the Minister.

10 On August 7, 1998, the appellant repaid the principal of the loan and paid, without prejudice, $308.53 for the interest accrued from June 1 to August 6, 1998.

11 The appellant was authorized to institute, on behalf of himself and other students forming a specific group, a class action against the respondent, the Attorney General of Quebec, seeking reimbursement of the interest paid on the loans that had been granted (*Dikranian v. Québec (Ministère de l'Éducation)*, [1999] Q.J. No. 2086 (QL) (Sup. Ct.), *per* Lévesque J.). He argued that Quebec's Ministère de l'Éducation had to pay that interest in accordance with the loan certificate issued before the legislative amendments were passed.

3. Judicial History

12 On December 13, 2001, Journet J. of the Superior Court dismissed the appellant's action. On January 27, 2004, a majority of the Court of Appeal dismissed his appeal, Rothman J.A. dissenting.

3.1 *Superior Court* (2001 CanLII 136 (QC CS), [2002] R.J.Q. 969)

13 Journet J. began by rejecting the appellant's arguments based on the provisions of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), concerning contracts of adhesion as well as his arguments relating to the *Consumer Protection Act*, R.S.Q., c. P-40.1. He found that the rights and obligations of the financial institution and the student were governed by the statute and the regulation, and not by the loan certificate. The rights and obligations were not imposed by one of the parties to the contract, as is the case with a contract of adhesion. They simply flowed from the exercise of statutory or regulatory powers. In his view, a mandatory provision of a statute or regulation cannot be nullified pursuant to the *C.C.Q.* on the ground that, because it is incorporated into a contract, it is contractual in nature. This would be [TRANSLATION] "to confuse and distort concepts of nullity that were incompatible with each other — the rules of nullity applicable to contracts on the one hand and the rules of nullity and invalidity applicable to statutes and regulations on the other" (para. 76). Journet J. was of the opinion that the loan certificate was not in itself a contract but rather a juridical act issued pursuant to an enactment governing the rights and obligations of the parties referred to therein.

14 Journet J. then addressed the question of the retroactivity of the legislation. In his view, the issue was the immediate applicability of the legislation, not its retroactive application. He noted that the two amending statutes did not state that their provisions would take effect before they came into force. He added the following:

> [TRANSLATION] Section 13 of the 1997 statute states that the new provisions of the Act are applicable to the juridical situations in progress at the time of their coming into force. This statutory provision shows that the legislature intended the new legislation to apply immediately to all existing and future loans.
>
> The Court does not see how it could conclude that the two new statutes created different juridical situations for loans made before and after their enactment. In the absence of a provision to the contrary,

every statute must apply immediately, both to contracts entered into before and to those entered into after it comes into force.

The Court notes that there cannot be multiple sets of repayment terms for students completing their studies in the same trimester unless specific legislative provisions so indicate.

The Court must favour an interpretation that results in the uniform application of one legislative scheme rather than a multiplicity of schemes.

The interpretation suggested by [the appellant] for dealing with the temporal effect of the 1996 and 1997 statutes on the [*AFAS*] leads to unfair and different treatment of students who are nonetheless in the same situation, that is, who complete their studies in the same trimester and with the same loan amount to repay. If we accept the argument of [the appellant], only some of these students, he being one of them, would have to pay less interest on their loans and would thus obtain benefits not granted to others. [Emphasis deleted; paras. 88-92.]

15 Finally, on the issue of vested rights, Journet J. noted that none of the students concerned, the appellant included, had completed their studies at the time the two statutes giving rise to the conflicting interpretations were enacted. The appellant had accordingly not taken advantage of the exemptions provided for in the original statute as of the time when the new provisions were enacted. He could not therefore claim to have vested rights.

3.2 *Court of Appeal* ([2004] Q.J. No. 303 (QL))

16 The appellant appealed from this judgment but was unsuccessful.

3.2.1 Forget J.A.

17 Forget J.A., Beauregard J.A. concurring, was of the opinion that the appeal should be dismissed. His brief reasons for judgment read as follows:

[TRANSLATION] With due respect for the opinion of Rothman J.A., I am of the view that the trial judgment was correct.

While the relationship between the student and the financial institution can be characterized as contractual, the same cannot be said of the relationship between the student and the government under the *Act respecting financial assistance for students*, which implements a public program to facilitate access to education.

The amendments introduced by the 1996 and 1997 statutes applied immediately and governed active loans.

I would dismiss the appeal with costs. [paras. 48-51]

3.2.2 Rothman J.A.

18 Rothman J.A. accepted the appellant's arguments. To begin with, he found that the loan certificate imposed obligations on the appellant that were clearly contractual in nature. He wrote the following:

While it is true, as the trial judge indicates, that the financial assistance programs created under the Act are worthy social programs designed to encourage equal accessibility to education for all Quebec students, the program of student loans contemplated in the Act did nevertheless impose contractual obligations upon

students who obtained these loans, contractual obligations which included conditions as to the repayment of the capital of the loans as well as conditions concerning the payment of interest. One of the conditions in this contract stipulated the period of the loans during which the student was to be exempt from the payment of interest.

The certificate of loan, issued by the Department and signed by the student as well as the financial institution, is in the form of a contract and the clauses setting out the conditions of the loan contain numerous references to "this contract". Any reasonable borrower or lender reading the document would consider himself bound by a contract.

And while it is true that the Department did not itself sign the document, it was the Department that issued it to the student and it was the Department that had stipulated the conditions of repayment of capital and the exempt period for the payment of interest by the student. The Department was, moreover, itself contractually involved in the loan made to the student in that it guaranteed the repayment of the capital of the loan as well as the payment of interest to the financial institution, including the payment of interest for the period during which the student was exempt from interest payment.

In sum, while the programs created under the Act can fairly be characterized as social and educational, the obligations and the rights of students under their loan agreements with the lenders were substantially contractual.

I do not wish to suggest, of course, that the *Financial Assistance for Education Expenses Act* did not govern the relationship between the lending banks and the students and the relationship between the Banks and the Government.

. . .

But that being said, once it has been concluded that the contractual rights and obligations of a student borrower and a lender bank satisfy the requirements of the statute and the regulations, we must logically look to the contract concluded and the law that then existed to determine the rights and obligations of the borrowing student.

Unless the subsequent amendments to the law are expressly stipulated to be retroactive or are retroactive by necessary implication, I can see no basis for applying provisions in the amendments in conflict with the rights of the parties under their contract and the law which was applicable when it was concluded . . . . On signing the contract of loan, the student had no reason to believe that the Government might, by simple legislative amendment, rewrite his contract with the bank and modify his interest obligation. Nor, in the absence of an intention, expressed or tacit, to impair the rights of the student under his loan contract, do I see any basis for interpreting the amendments in a manner that would have that effect. [paras. 21-27]

19 Rothman J.A. pointed out that the 1997 and 1998 amendments, if applicable, would have had the effect of retroactively reducing the interest exemption period provided in the appellant's loan certificate. Yet this would have offended the principle against the retroactivity of legislation. He stated: "I can see no necessary implication that would require this interpretation" (para. 33). He added the following:

Nor can I easily accept that the phrase "[. . . juridical situations in progress . . .]" was intended to make the 1997 and 1998 amendments applicable so as to reduce the interest exemption period provided in the previously existing statute and in the contract signed by the borrowing student and the lending bank. In my respectful opinion, once the loan was approved by the Department and the contract of loan was signed by the student and the bank, appellant's obligation to pay interest and his exemption from the payment of interest were not "[juridical situations in progress]". They were rights and obligations which were no longer "in progress". They were crystallized, finalized and definitively concluded under the terms and conditions of the contract.

> There is no suggestion in the law or the contract that the obligations of the student or the bank as regards the payment of interest by the student or the duration of the exemption period were subject to discussion or change. These were matters definitively concluded in the contract insofar as appellant and the Bank were concerned. Appellant had no right to demand that the exemption period be extended and the Bank had no right to demand that the exemption be reduced. The Government had no right to demand that its guarantee in favour of the bank be reduced. What "[juridical situations]" remained "[in progress]"? Absolutely none. [paras. 34-35]

20 Rothman J.A. then noted that, in the absence of an express or tacit intention to do so, a new law should not be read as impairing vested rights. He wrote:

> In the 1998 amendment, Sec. 13 provided that the amending provisions would apply to "[. . . juridical situations in progress at the time of their coming into force]."
>
> While it is true that when the 1998 amendment came into force, appellant had not yet ended the period of exemption provided in his contract, I find it hard to imagine that the Legislature intended, in adopting the 1998 amendment, to change the interest exemption period of a contract of loan that had previously been concluded merely on the basis that the period of exemption had not yet expired.
>
> When appellant undertook the loan, he did so under specific conditions for repayment of capital and payment of interest. There was no suggestion in the certificate of loan issued by the Department or in the contract that these conditions might be changed at any time. Nor is an interest exemption period, by its nature, of a kind that would be subject to periodic change. Appellant had every right to expect that his obligations for the repayment of capital and the payment of interest were those set out in the contract and that these conditions would be respected. Appellant fulfilled his obligations in repaying the loan and paying the interest on the loan under the terms required under his contract.
>
> In the absence of very clear terms in the amending statutes establishing that the Legislature intended to impair appellant's rights under his existing contract, I can see no reason why the Government should not respect the rights and obligations existing under that contract. If that means the payment of interest by the Government for the period of exemption in the contract, so be it. That was the basis on which the certificate was issued and the contract was signed.
>
> I would find it very difficult to interpret the words "[. . . juridical situations in progress . . .]" as evidence of an intention on the part of the Legislature to vary the terms of a loan contract that was concluded prior to the coming into force of the new law. [paras. 39-43]

4. Analysis

21 Simply put, the Court must answer the following questions: whether the version of the *AFAS* in force on November 15, 1996, when the certificate was signed, governs the interest exemption period applicable upon the completion of studies; and whether the new legislative provisions altered the terms of the contract of loan that had been entered into before they came into force.

22 As a preliminary matter, I would like to make it clear that the plan set up by the *AFAS* and the *RFAS* is a complete one. This appeal does not concern the application of either the *Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57 ("*Implementation Act*"), or the transitional provisions set out in that Act. Nor is it either helpful or necessary to refer to the rules relating to consumer protection.

4.1 *Legal Nature of the Relationship Between the Parties*

4.1.1 Contractual Relationship

23 The starting point for this analysis is the observation that there is a private law contract between the student and the financial institution, and the terms of the contract leave no doubt in this regard (arts. 1372, 1385 and 1387 *C.C.Q.*). The two parties signed the loan certificate and made specific undertakings. There is no question that the contractual relationship between the student and the financial institution has a special feature, as the Minister, who is not a signatory, has unilaterally undertaken to guarantee the loan and pay the interest for a certain time.

24 It appears that the *AFAS* implicitly recognizes the contractual relationship established between the student and the financial institution. The version of s. 15 that was in force at the time of the events that led to the dispute provided as follows:

> **15.** The Minister shall issue, to a student who is entitled to it and who is enrolled or deemed to be enrolled within the meaning of the regulation, a loan certificate authorizing him to contract a loan with a financial institution recognized by the Minister. The modalities of presentation of the certificate and payment of the loan shall be determined by regulation.

Before the amendments, the verb "contract" was also used in ss. 40, 41 and 62 of the *AFAS* and in s. 56 of the *RFAS*.

25 In short, any reasonable borrower or lender reading the document would consider himself or herself bound by a contract, as Rothman J.A. stated. It also appears that all the parties involved in this case recognize the contractual relationship between the student and the financial institution.

4.1.2 Contract of Loan: Loan Certificate

26 The contract of loan signed by the student and the financial institution on November 15, 1996 contains the following clauses:

> This contract is signed in accordance with the prescriptions of the Act respecting financial assistance for students (R.S.Q., c. A-13.3), the Regulation thereunder (A-13.3, r. 1) and the prescriptions of the Loan Guaranty Program for the Purchase of a Microcomputer, if applicable.
>
> Without restricting the scope of the above, the parties also agree to the following:
>
> LOAN UNDER THE ACT RESPECTING FINANCIAL ASSISTANCE FOR STUDENTS
>
> 5. The student is exempt from payment of interest on the principal loaned by the financial institution, under the Act respecting financial assistance for students, for the exemption period defined in section 23 of the Act, which is cited in clause 10 of this contract.
>
> . . .
>
> 10. Exemption period "means the period beginning on the date on which the borrower obtains a first loan or on which he becomes a full-time student again after having ceased to be so, and ending
>
> 1º on 1 April, for a borrower who completes or abandons his full-time studies during or at the end of the preceding summer trimester;
>
> 2º on 1 August, for a borrower who completes or abandons his full-time studies during or at the end of the preceding autumn trimester;

3° on 1 January, for a borrower who completes or abandons his full-time studies during or at the end of the preceding winter trimester" (R.S.Q., c. A-13.3, s. 23).

Under the contract of loan, the appellant, who completed his studies on January 31, 1998 (winter trimester), was therefore obliged to repay the principal and assume the interest payments on his loan as of the expiration of the exemption period, that is, on January 1, 1999.

27 The reference to the *AFAS* has the effect of incorporating the relevant provisions of the *AFAS*. Moreover, this reference relates specifically to the juridical situation that existed when the certificate was signed, that is, before the legislative amendments. Rothman J.A. shared this view:

> But that being said, once it has been concluded that the contractual rights and obligations of a student borrower and a lender bank satisfy the requirements of the statute and the regulations, we must logically look to the contract concluded and the law that then existed to determine the rights and obligations of the borrowing student. [para. 26]

28 Thus, the substantive issue is whether the rights conferred by the contract of loan can be unilaterally modified by the legislature, which is not a signatory to the contract.

4.2 *Vested Rights*

29 Before considering the question of vested rights, I would like to note that a distinction must be drawn between the principle of vested rights and the principle against retroactivity. This issue is of great importance here. The Attorney General of Quebec submits that the principle of the retroactivity of legislation is not in issue and asks the Court to apply the principle of the retrospectivity of legislation that was recently reiterated in *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, [2004] 3 S.C.R. 257, 2004 SCC 59. However, it should be noted right away that *Épiciers Unis* dealt with the application of the *Implementation Act*, ss. 2 and 3 of which indicate that "the recent reform of the *Civil Code* is based not on the principles established at common law, principles which give great importance to vested rights. Rather, it is a system essentially based on the ideas of the French jurist Paul Roubier, a system which clearly dispenses with the notion of vested rights" (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 118). This appeal does not concern a dispute resulting from the coming into force of the *C.C.Q.* We must therefore apply the *Interpretation Act*, R.S.Q., c. I-16, which gives effect to the principle of "acquired rights" in s. 12.

4.2.1 Distinctions Between Vested Rights and Retroactivity

30 Vested rights result from the crystallization of a party's rights and obligations and the possibility of enforcing them in the future. Professor Côté writes that, "[w]ithout being retroactive, a statute can affect vested rights; correspondingly, a statute can have a retroactive effect and yet not interfere with vested rights" (p. 156). In general, it will be purely prospective statutes that will threaten the future exercise of rights that were vested before their commencement: Côté, at p. 137.

31 Although the courts have in the past analysed the same question from the perspective of either the presumption against interference with vested rights or the presumption against retroactive legislation, there remains, as the submissions of the parties in the instant case demonstrate, a clear distinction between these two rules of construction: *Venne v. Quebec (Commission de protection du territoire agricole)*, 1989 CanLII 84 (SCC), [1989] 1 S.C.R. 880, at p. 906; *Attorney General of Quebec v. Expropriation Tribunal*, 1986 CanLII 13 (SCC), [1986] 1 S.C.R. 732, at pp. 741 and 744; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, 1975 CanLII 4 (SCC), [1977] 1 S.C.R. 271, at pp. 279 and 282.

4.2.2 Statement of Principle

32 The principle against interference with vested rights has long been accepted in Canadian law. It is one of the many intentions attributed to Parliament and the provincial legislatures. As E. A. Driedger states in *Construction of Statutes* (2nd ed. 1983), at p. 183, these presumptions

> were designed as protection against interference by the state with the liberty or property of the subject. Hence, it was "presumed", in the absence of a clear indication in the statute to the contrary, that Parliament did not intend prejudicially to affect the liberty or property of the subject.

This had already been accepted by Duff J. in *Upper Canada College v. Smith* (1920), 1920 CanLII 8 (SCC), 61 S.C.R. 413, at p. 417:

> . . . speaking generally it would not only be widely inconvenient but "a flagrant violation of natural justice" to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.

(See also *Acme Village School District (Board of Trustees of) v. Steele-Smith*, 1932 CanLII 40 (SCC), [1933] S.C.R. 47, at p. 51; R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 569-70.)

33 The leading case on this presumption is *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, 1933 CanLII 86 (SCC), [1933] S.C.R. 629, at p. 638, where this Court stated the principle in the following terms:

> A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main* v. *Stark* [(1890), 15 App. Cas. 384, at 388]), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

34 The principle has since been codified in interpretation statutes. The *Interpretation Act* is no exception:

> **12.** The repeal of an act or of regulations made under its authority shall not affect rights acquired . . . and the acquired rights may be exercised . . . notwithstanding such repeal.

4.2.2.1 *Rule of Construction*

35 In the past, this Court has stressed that the presumption against interference with vested rights could be applied only if the relevant legislation were ambiguous, that is, reasonably susceptible of two constructions (see *Gustavson Drilling*, at p. 282; *Acme Village School District*, at p. 51; *Venne*, at p. 907).

36 This statement must be qualified somewhat in light of this Court's recent decisions. As Professor Sullivan says, care must be taken not to get caught up in the last vestiges of the literal approach to interpreting legislation:

> In so far as this language echoes the plain meaning rule, it is misleading. The values embodied in the presumption against interfering with vested rights, namely avoiding unfairness and observing the rule of law, inform interpretation in every case, not just those in which the court purports to find ambiguity. The first effort of the court must be to determine what the legislature intended, and . . . for this purpose it must rely on all the principles of statutory interpretation, including the presumptions. [p. 576]

Since the adoption of the modern approach to statutory interpretation, this Court has stated time and time again that the "entire context" of a provision must be considered to determine if the provision is reasonably capable of multiple interpretations (see, for example, *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 29).

4.2.2.2 *Criteria for Recognizing Vested Rights*

37 Few authors have tried to define the concept of "vested rights". The appellant cites Professor Côté in support of his arguments. Côté maintains that an individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement (Côté, at pp. 160-61). This analytical approach was used by, *inter alia*, the Saskatchewan Court of Appeal in *Scott v. College of Physicians and Surgeons of Saskatchewan* (1992), 1992 CanLII 2751 (SK CA), 95 D.L.R. (4th) 706, at p. 727.

38 I am satisfied from a review of the case law of this Court and the courts of the other provinces that the analytical framework proposed by the appellant is the correct one.

39 A court cannot therefore find that a vested right exists if the juridical situation under consideration is not tangible, concrete and distinctive. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists: Côté, at p. 161. As Dickson J. (as he then was) clearly stated in *Gustavson Drilling*, at p. 283, the mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued (see also *Abbott v. Minister for Lands*, [1895] A.C. 425, at p. 431; *Attorney General of Quebec*, at p. 743; *Massey-Ferguson Finance Co. of Canada v. Kluz*, 1973 CanLII 150 (SCC), [1974] S.C.R. 474; *Scott*, at pp. 727-28). In other words, the right must be vested in a specific individual.

40 But there is more. The situation must also have materialized (Côté, at p. 163). When does a right become sufficiently concrete? This will vary depending on the juridical situation in question. I will come back to this point later. Suffice it to say for now that, just as the hopes or expectations of a person's heirs become rights the instant the person dies (see, for example, *Marchand v. Duval*, [1973] C.A. 635, at p. 637, and art. 625 *C.C.Q.*), and just as a tort or delict instantaneously gives rise to the right to compensation (see, for example, *Holomis v. Dubuc* (1974), 1974 CanLII 1254 (BC SC), 56 D.L.R. (3d) 351 (B.C.S.C.); *Ishida v. Itterman*, 1974 CanLII 1787 (BC SC), [1975] 2 W.W.R. 142 (B.C.S.C.); and arts. 1372 and 1457 *C.C.Q.*), rights and obligations resulting from a contract are usually created at the same time as the contract itself (see Côté, at p. 163).

4.2.3 <u>Application to the Legislation at Issue</u>

41 The government submits that the two amending statutes applied immediately and therefore necessarily had the effect of changing the repayment terms, since those terms concerned the future effects of the contract. According to the government, this result is justified by the rule relating to the retrospective application of legislation. It argues that repayment in accordance with the terms set out in the contract was merely an expectation. A contextual analysis favours this result, it submits, since the plan applies each year to a large number of students who, out of fairness, must be subject to the same repayment terms. The government adds that

administering loans on an individual basis would be problematic. Also, it would directly undermine the integrity of the plan, which must be uniform, and this is another indication that the legislature could not have intended that loans be administered on an individual basis.

42 The appellant submits that his situation is a tangible one governed by a private contract the administration of which is the responsibility of a financial institution, not the government. He points out that the certificate was amended in 1997 to require him to comply with the repayment terms that would be in effect at the time he had to begin repaying the loan. The appellant thus argues that the two statutes modifying the legal obligations that are assumed and must in all cases be performed by the parties are retroactive. However, since retroactivity is not specified, it cannot be imposed.

4.2.3.1 *Amending Act, 1997*

43 The basic fact remains that the appellant and the financial institution signed a loan certificate provided by the Minister, thereby turning the certificate into a contract and crystallizing the parties' rights and obligations.

44 The *Amending Act, 1997*, which shortened the interest exemption period by one month, does not contain any transitional provision that might reveal the legislature's intent. In short, there is nothing to justify a conclusion that the legislature clearly and unambiguously intended to apply the new provisions so as to limit the rights of borrowers. Moreover, it seems obvious to me that just because the government argues for the immediate and future application of the *Amending Act, 1997* does not mean it is authorized to interfere with rights conferred on the appellant in his contract. The *Amending Act, 1997* does not refer to contracts that have already been entered into and therefore cannot apply to them. Moreover, I can find no evidence in the record that justifies imputing to the legislature an intention to interfere with vested rights. Nevertheless, let us continue with the review of the amending statutes.

4.2.3.2 *Amending Act, 1998*

45 In the *Amending Act, 1998*, the legislature provided for transitional measures in s. 13. It is the second paragraph of this section that interests us:

> **13.** The provisions introduced by sections 2 and 3 of this Act are applicable in respect of the years of allocation subsequent to their coming into force.
>
> The other provisions introduced by this Act and the first regulations made thereunder are applicable to the juridical situations in progress at the time of their coming into force.

The issue is therefore what the expression "juridical situations in progress" means. The majority of the Court of Appeal, as well as Journet J. of the Superior Court, found that the expression covered all student loans contracted before and after the coming into force of the new legislation. I do not agree.

46 First of all, it is necessary to determine the true scope of this section: does it clearly state the legislature's intention to change the terms of contracts of loan entered into prior to May 1, 1998? I do not think so.

47 It will be helpful at this point to set out the legal steps for obtaining a student loan. The following passage is from the appellant's factum (at para. 101):

We would submit that there are two legal steps required for the obtaining of a Student Loan: first, the issuance of the Loan Certificate by the Minister and second, the signing of the Loan Certificate by the student and the Financial Institution to conclude a contract. The first step, by which the student obtains his Loan Certificate, creates the student's right to proceed to the second step and receive his Student Loan in accordance with the specific terms and conditions indicated on the Loan Certificate. If a change in the law were to modify the terms and conditions of student loans, this change (in the absence of clear legislative language) would not apply to modify or amend Loan Certificates already issued, as long as the student who had received it, signed it within the stipulated delay (90 days as per section 60 of the *Regulation respecting financial assistance for education expenses*, R.R.Q., c. A-13.3, R-1). In other words, by the mere receipt of his Loan Certificate, a student would have a right to sign the Loan Certificate and obtain his Student Loan in accordance with the terms and conditions of the Loan Certificate, notwithstanding a change in the governing law.

In my opinion, the appellant is correct to submit that, in the general context of the plan, the expression "juridical situations in progress" applies to a student who has received a loan certificate but not yet signed it (nor has the financial institution done so).

48 Section 13 does not provide that the amendments apply to contracts or "contractual situations". Yet it appears that in the past the Quebec legislature has drawn a distinction between "legal (juridical) situations which exist" and contractual situations which exist", as it used both expressions in the *Implementation Act* (in the *Implementation Act*, the equivalent used for the words "*en cours*" was "which exist", while in the *Amending Act, 1998* the equivalent used for the same words was "in progress"). Section 3 of the *Implementation Act* contains the expression "legal situations which exist":

> **3.** The new legislation is applicable to legal situations which exist when it comes into force.
>
> Any hitherto unfulfilled conditions for the creation or extinction of situations in the course of being created or extinguished are therefore governed by the new legislation; it also governs the future effects of existing legal situations.

Section 4 of the same statute contains the expression "contractual situations which exist":

> **4.** In contractual situations which exist when the new legislation comes into force, the former legislation subsists where supplementary rules are used to determine the extent and scope of the rights and obligations of the parties and the effects of the contract.
>
> However, the provisions of the new legislation apply to the exercise of the rights and the performance of the obligations, and to their proof, transfer, alteration or extinction.

We need not, in the instant case, define these expressions in the context of the *Implementation Act*, which, as I mentioned above, is based on the ideas of P. Roubier (see P.-A. Côté and D. Jutras, *Le droit transitoire civil: Sources annotées* (1994)). It is nonetheless significant that both expressions have been used by the Quebec legislature, which means that they must refer to different realities.

49 In the case at bar, a contract was signed and entered into before new provisions came into force. The contract continued to produce its effects notwithstanding those provisions. The rights and obligations resulting from the contract were fixed and crystallized as soon as the contract was entered into (see P. Roubier, *Le droit transitoire: conflits des lois dans le temps* (2nd ed. 1993), at pp. 315-16; H., L. and J. Mazeaud and F. Chabas, *Leçons de droit civil*, t. 1, vol. 1, *Introduction à l'étude du droit* (11th ed. 1996), No. 147). Naturally, this included the repayment terms, which are essential clauses in any contract of loan. On this point, I adopt the following words of Rothman J.A.:

> Nor can I easily accept that the phrase "[. . . juridical situations in progress . . .]" was intended to make the 1997 and 1998 amendments applicable so as to reduce the interest exemption period provided in the

previously existing statute and in the contract signed by the borrowing student and the lending bank. In my respectful opinion, once the loan was approved by the Department and the contract of loan was signed by the student and the bank, appellant's obligation to pay interest and his exemption from the payment of interest were not "[juridical situations in progress]". They were rights and obligations which were no longer "in progress". They were crystallized, finalized and definitively concluded under the terms and conditions of the contract. [para. 34]

50 In light of the ambiguity of s. 13 of the *Amending Act, 1998*, we must apply the principle against interference with vested rights.

51 The cases dealing with purely statutory rights that an individual did not exercise prior to a legislative amendment are of no help here (see *Gustavson Drilling*; *Attorney General of Quebec*; *Venne*). In the instant case, the right was provided for in legislation but was later incorporated into a private contract (between the student and the financial institution) in which the parties freely, and on an informed basis, defined their rights and obligations. It was the contract (not the legislation) that created rights and obligations for the parties as soon as it was formed (see Côté, at p. 163; *Épiciers Unis*, at para. 48; *Township of Nepean v. Leikin* (1971), 1971 CanLII 642 (ON CA), 16 D.L.R. (3d) 113 (Ont. C.A.); *Location Triathlon Inc. v. Boucher-Forget*, [1994] R.J.Q. 1666 (Sup. Ct.)). The right *not to pay more* interest than the contract specified was also acquired at that time.

52 With regard to the administrative grounds raised by the government, particularly the need for consistent and equal treatment of students who complete their studies at the same time, they cannot lead the Court to disregard the express wording of the private contract. On this point, Rothman J.A. wrote the following:

> With great respect, I do not think this is a question of treating students uniformly nor even treating all students equitably. It is rather a question of respecting the difference in contractual rights and obligations concluded prior to the amendments. I can see nothing equitable in impairing the contractual rights and obligations that were concluded prior to the amendments on the basis that all students should be treated uniformly in their conditions of loan repayment. There is nothing equitable in treating students less favourably than they were entitled to be treated under their contracts and under the law that was applicable when the contracts were concluded. [para. 46]

It is perfectly normal for some students who completed their studies on the same date to be treated differently if they obtained their student loans at different times and signed different loan agreements on an informed basis. It is the very foundation of the individualized contractual right that leads to this result. In determining the scope of the obligations of the parties to the contract, there is no reason to disregard the date the contract was entered into in favour of the date studies were completed; the government expressed its intention in the loan certificate.

5. Conclusion

53 The Quebec legislature's involvement in student loans clearly makes such loans one component of a social program designed to improve access to education. However, it is impossible to disregard the fact that the legislature intended its program to be based on private contractual obligations, even though several terms of the contract were to be imposed on students. The contract of loan between the student and the financial institution, which arises out of the loan certificate issued by the Minister, creates rights and obligations as soon as the contract is entered into. This explains the need not to interfere with vested rights.

54 I would therefore allow the appellant's action: (1) student borrowers with student loans that were active on July 1, 1997 have a vested right with respect to the duration of the exemption period applicable when the contracts were signed, as this right was not affected by the *Amending Act, 1997*; and (2) students with loans that were active on May 1, 1998 have a vested right with respect to the duration of the exemption period

applicable when the contracts were signed, as this right was not affected by the *Amending Act, 1998*. The case is remanded to the Superior Court to determine the method for making claims, the amounts owed by Quebec and the payment procedures.

55 For these reasons, the appeal is allowed and the judgments of the Court of Appeal and the Superior Court are set aside, with costs throughout.

English version of the reasons delivered by

56 DESCHAMPS J. (dissenting) — In declaring, in s. 13, that the *Act to amend the Act respecting financial assistance for students*, S.Q. 1997, c. 90 ("*AFAS*"), applied to juridical situations in progress, the Quebec legislature clearly indicated that the statute applied with immediate effect to the exemption period for the payment of interest by the appellant to his financial institution.

57 As this Court held in *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, [2004] 3 S.C.R. 257, 2004 SCC 59, common law concepts that place a strong emphasis on vested rights do not apply where an approach based on the immediate application of legislation and the concept of juridical situations in progress is adopted. Thus, the doctrine of vested rights should not be relied on to decide the instant case.

58 Bastarache J. is of the opinion that the expression "juridical situations in progress" applies only to situations that are still being formed (para. 47) and that the effects of the contract continue to be governed by the legislation in force when the contract was entered into (para. 49). I myself believe that the expression includes both situations that are being formed and the effects of a given juridical situation.

59 In using the expression "*situations juridiques en cours*" (in English "juridical situations in progress" in the *AFAS*, but "legal situations which exist" in the context of the transitional law relating to the implementation of the *Civil Code of Québec*), the Quebec legislature drew inspiration from jurist Paul Roubier's work on transitional law (*Droit civil québécois* (loose-leaf), vol. 8, at para. DT1 555, "Conflit de loi dans le temps"). Since transitional law is precisely what we are concerned with in the instant case, I consider it relevant to refer to his writings to determine the scope of the expression (P. Roubier, *Le droit transitoire: conflits des lois dans le temps* (2nd ed. 1993)):

> [TRANSLATION] The term "legal [juridical] situation" was chosen intentionally as being the most encompassing. We consider it better than "vested rights" because it is not subjective in nature . . . we also consider it better than "legal relationship" . . . which implies a direct relationship between two persons, whereas a legal situation can be unilateral and can be set up against any person whomsoever.
>
> . . .
>
> To understand the difficulties that may result from the temporal effect of a statute, one need only note that legal situations generally do not come about all at once; they develop over time, such that the new statute may come into effect at a certain point in this development . . . .
>
> However, this is where an essential distinction must be drawn as regards the development of the successive moments of a legal situation: there is a dynamic phase, which is the moment when the situation is created (and also when it is extinguished), and there is a static phase, which is the period when the situation produces its effects. [Emphasis added; pp. 181-82.]

60 If we rely on Roubier's use of the expression "legal situation", this concept encompasses at once the formation of the situation, its extinction and its effects. In light of this work, there is no reason to conclude that, when the legislature used the words "juridical situations in progress", it intended to refer to juridical situations in the process of being formed but not to juridical situations in the process of producing effects.

61 P.-A. Côté and D. Jutras (*Le droit transitoire civil: Sources annotées* (1994)), commenting on Roubier's theory, also include in the expression "legal situations which exist" not only to the dynamic phase, that is, the formation and extinction of a juridical situation, but also to the static phase, that is, its effects:

> [TRANSLATION] In Roubier's system, once a rule has been tied to a given legal situation, a distinction must be drawn based on whether the rule relates to the situation's creation or extinction or determines its effects. There are two phases in the development of legal situations: the dynamic phase, which corresponds to their formation and extinction, and the static phase, which corresponds to their effects. This distinction between the dynamic (formation and extinction) phase and the static (effects) phase of a legal situation is echoed in the second paragraph of sections 2 and 3 of the *Implementation Act*. [para. 1.048]

62 It is true that these comments relate to the *Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57 ("*Implementation Act*"), and that we do not have to interpret that statute here. However, we cannot disregard the fact that the same legislature, in the same decade, used the same expression for a concept that originated in the same legal works.

63 The Quebec Court of Appeal has also held that the expression "legal situation" includes effects:

> [TRANSLATION] Even where it is created unilaterally and there is no immediate legal relationship, the concept of "legal situation" applies to the existence of legal effects from the moment the situation arises. [Emphasis added.]
>
> (*Montréal (Ville) v. 9013-5286 Québec inc.*, [2002] Q.J. No. 2361 (QL), at para. 18)

64 Thus, when a loan certificate is issued to a student, a juridical situation (a situation that produces legal effects) is created. This situation does not cease to be "in progress" when the student and the financial institution together sign the certificate, transforming it into a contract of loan. To adopt the approach suggested by Bastarache J. would mean that the legislature has split the concept into two parts: the formation of the contract and its effects (para. 47). I cannot accept this interpretation. An interpretation that denies that a juridical situation is still "in progress" when it has been formed, has not been extinguished and is producing effects is not consistent with the theory on which the legislature relied.

65 In the case at bar, the obligation to pay interest flowed from the contract, and the interest exemption period was clearly in progress. Since the duration of this exemption period was legislated, it could be modified by legislation of immediate application.

66 It is also strange to limit the scope of the expression by referring to s. 4 of the *Implementation Act*. This section establishes a specific rule for *contractual* situations governed by the *Civil Code of Québec*, S.Q. 1991, c. 64. In such situations, new legislation applies only "to the exercise of the rights and the performance of the obligations, and to their proof, transfer, alteration or extinction". The section does not say that effects are excluded from the expression "legal situations which exist". Moreover, the *Implementation Act* deals with the

dynamic and static phases in the same way, regardless of whether the situation is a contractual situation or any other legal situation. It is thus clear that effects are included in the legal situation concept.

67 Furthermore, an interpretation according to which the transitional provision applies to "a student who has received a loan certificate but not yet signed it (nor has the financial institution done so)" is so narrow that I cannot convince myself that the legislature could have intended to limit the scope of the *AFAS* in this way. In *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2. S.C.R. 539, 2005 SCC 51, at para. 43, the Court rejected an interpretation that limited the application of new legislation to a very limited number of cases. I believe that the same principle of interpretation applies in the instant case.

68 In *Épiciers Unis Métro-Richelieu*, the Court did not hesitate to recognize the retrospectivity of a provision of the *Civil Code of Québec*. Retrospective effect is but one aspect of the concept of the immediate effect of legislation. In *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 154, Professor P.-A. Côté says the following on this subject:

> Where a new statute is declared applicable, for the future, to situations underway, we say it has immediate effect. This notion is used here to describe a situation not only where the facts contemplated by the rule are underway at the moment the law is modified (what Héron calls the general effect of the new statute), but also to describe situations where it is the legal effects of the rule which are underway (what Héron calls the retrospective effect of the statute).

It is in fact the retrospective aspect of the legislation that is in issue in the instant case. The exemption period has been modified for the future.

69 The concept of the immediate effect of legislation has been recognized by the commentators and by the courts. In its terse majority judgment in the case at bar, the Court of Appeal merely applied a concept it was familiar with. The legislature is free to enact statutory provisions that may seem harsh. It is not the place of the courts to interfere in the legislative process.

70 For these reasons, I am of the opinion that the decision of the majority of the Court of Appeal was correct. I would dismiss the appeal.

APPENDIX

An Act respecting financial assistance for students, R.S.Q., c. A-13.3

> **15.** The Minister shall issue, to a student who is entitled to it and who is enrolled or deemed to be enrolled within the meaning of the regulation, a loan certificate authorizing him to contract a loan with a financial institution recognized by the Minister. The modalities of presentation of the certificate and payment of the loan shall be determined by regulation.
>
> **23.** For the purposes of this subdivision, "period of exemption" means the period beginning on the date on which the borrower obtains a first loan, or on which he becomes a full-time student again after having ceased to be so, and ending
>
> (1) on 1 April, for a borrower who completes or abandons his full-time studies during or at the end of the preceding summer trimester;
>
> (2) on 1 August, for a borrower who completes or abandons his full-time studies during or at the end of the preceding autumn trimester;

(3) on 1 January, for a borrower who completes or abandons his full-time studies during or at the end of the preceding winter trimester.

24. The Minister shall pay to any financial institution which has made an authorized loan the interest on the balance of such loan at the rate fixed by regulation, as long as the borrower is a full-time student and during his period of exemption.

. . .

27. In the event of the death of a borrower, the Minister shall reimburse the amount of the loan to the financial institution.

28. The Minister shall reimburse to any financial institution the losses in principal and interest resulting from an authorized loan.

29. The Minister is subrogated by operation of law in the rights of a financial institution to which he makes a repayment under section 27 or 28.

40. After having been notified in accordance with the provisions of paragraph 1 of section 39, or after having been otherwise informed of a change which may affect the amount of financial assistance to be granted to a student, the Minister shall reconsider the duly completed file of the student and render his decision.

However, in no case may the decision reduce the amount of or cancel a loan which has already been contracted.

41. The Minister may, where an application is produced after the time prescribed or where the provisions of paragraph 2 of section 39 have been contravened, refuse an application, reduce the amount of or cancel the financial assistance, or demand the reimbursement of any financial assistance already paid in the form of a bursary.

However, in no case may the Minister reduce the amount of or cancel a loan which has already been contracted.

62. Any loan contracted under the Student Loans and Scholarships Act shall be deemed to have been contracted under the provisions of this Act.

. . .

An Act to amend the Act respecting financial assistance for students and the General and Vocational Colleges Act, S.Q. 1996, c. 79

5. Section 23 of the said Act is amended

(1) by replacing the word "April" in paragraph 1 by the word "March";

(2) by replacing the word "August" in paragraph 2 by the word "July";

(3) by replacing the word "January" in paragraph 3 by the word "December".

An Act to amend the Act respecting financial assistance for students, S.Q. 1997, c. 90

4. Section 23 of the said Act is replaced by the following section:

"**23.** For the purposes of this subdivision, "period of exemption" means the period beginning on the date on which the borrower obtains a first loan or on which the borrower resumes being a full-time student, and ending on the date determined in accordance with the regulations."

5. Section 24 of the said Act is amended

(1) by replacing the words “his period of exemption” in the third and fourth lines of the first paragraph by the words “the additional period ending on the date determined by the regulation”;

(2) by inserting the words “and provided the person is in a precarious financial situation within the meaning of the regulation” after the word “Minister” in the first line of subparagraph 2 of the second paragraph.

13. The provisions introduced by sections 2 and 3 of this Act are applicable in respect of the years of allocation subsequent to their coming into force.

The other provisions introduced by this Act and the first regulations made thereunder are applicable to the juridical situations in progress at the time of their coming into force.

Appeal allowed with costs, DESCHAMPS J. *dissenting.*

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May 25, 2022

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RE: NRCB DECISION RFR22022-06
LA21037 / A&D Cattle Ltd
NE 27-08-26-W4M

In reference to the above, I would like to respond to comments on Page 4, No. 6 *The Conner's raised new concerns, namely that it is inappropriate for Willow Creek to request a review on a CFO denial. They asserted that Willow Creek indicated to them that the MD would be neutral and "have nothing to say".*

On May 18th, 2022 Wade Conner had called the me at the MD office to inquire about an unrelated proposed development on his lands. At that time, I asked him if he remembered talking with anyone at the MD office regarding the NRCB Decision. He responded that it was me. I was surprised and said I had no recollection of speaking with him about the NRCB Decision. He then told me it was back in early January 2022. I then checked my notes and I noted I had written on January 13th a brief note of Wade Conner's inquiry.

In my note book, I recorded that on January 13, 2022 - Wade Conner had called me and was inquiring about a notice he had received from NRCB for an A&D Cattle application for a CFO. Wade stated he was concerned about the water. I would have advised him to submit his comments to NRCB. Wade also mentioned Five Star Cattle have temporary approaches off of TWP 84 and I advised him to contact NRCB complaint line. I did not record any statement or inquiry related to the MD's position on the A & D Cattle application.

On May 18, 2022 I asked Mr. Conner about the concerns he submitted to the NRCB (above) and said these are not comments I would have made, as the MD of Willow Creek is a directly affected party and are asked to comment on all NRCB application referrals that are forwarded to the MD. I explained the process to him that when a NRCB application referral is received, it is presented to the Municipal Planning Commission (MPC) for comments. The MPC give direction to Administration to send comments to the NRCB by a date noted on the referral letter.

I asked him if he had spoken to anyone else about A&D Cattle Ltd application. Wade informed me he had spoken with a lady at the Town of Fort Macleod office (he doesn't remember her name) and she told him the NRCB application doesn't affect them.

Therefore, I suspect Wade Conner may have confused the conversations he had with me back in January and with the lady at the Town of Fort Macleod office. Saying the MD would be neutral and have nothing to say is, in fact, not the case and not something I would have said. As I mentioned earlier, the Municipal Planning Commission reviews every NRCB application referral and submits comments.

On January 12, 2022, the NRCB A&D Cattle Ltd. application LA21037 (referral) was presented to the Municipal Planning Commission for reviewing and comments. The MPC requested Administration submit written comments to NRCB, and the letter was submitted on January 14, 2022.

Please contact me if you require additional information on the MD of Willow Creek's process for reviewing and responding to NRCB application referrals.

Thank you

Cindy Chisholm
Manager of Planning & Development