



## **BOARD DECISION**

### **RFR 2009-02 / RA08048**

In Consideration of a Request for Board Review filed under the *Agricultural Operation Practices Act* in relation to Approval RA08048.

Rosehill Farms Inc.

May 29, 2009

## **Background**

On April 20, 2009, NRCB Approval Officer Sandi Roberts issued Decision Summary RA08048 in relation to Rosehill Farms Inc. Decision Summary RA08048 denied an application to increase the capacity of their existing 200 milking cow dairy to 400 milking cows. The operation is located at SE 35-40-27-W4 in Lacombe County.

Pursuant to Section 20(5) of the *Agricultural Operation Practices Act (AOPA)*, a Request for Board Review was filed by Keith Wilson, legal counsel on behalf of Bert Tenbrinke and Rosehill Farms Inc., on May 11, 2009. Mr. Wilson's request met the 10-day filing deadline established by *AOPA*. Following receipt of the Request for Board Review, all directly affected parties were provided with a copy of the request, as well as a notice of their opportunity to file a rebuttal.

Rebuttal submissions were filed by:

- Nick Riebeek, legal counsel on behalf of the Town of Lacombe
- Shane King, legal counsel on behalf of Lawrence and Shirley Henderson, Frank and Bev Brunner, Bruce Henderson and Steven and Ann Marie Henderson.

Bruce Henderson also filed a submission which has been appended to Shane King's submission as he represents Mr. Henderson. All the parties who filed rebuttal submissions were listed as directly affected parties in the Approval Officer's Decision and met the May 20, 2009 filing deadline.

## **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 Request for Board Review.

## **Documents Considered**

The Board carefully considered the following information in arriving at its decision:

- Decision Summary RA08048, dated April 20, 2009
- Request for Board Review filed by Keith Wilson, dated May 11, 2009
- Rebuttal submission of Nick Riebeek, dated May 20, 2009
- Rebuttal submission of Shane King, dated May 20, 2009, including Bruce Henderson's submission dated May 18, 2009

## **Board Deliberations**

The Approval Officer's decision stated the reasons for denying the application were that the application was "*not consistent with the land use provisions of the Lacombe County MDP and the Lacombe IDP*" and that the effects of this expansion on the community would be unacceptable. In Mr. Wilson's Request for Board Review, he recognized that *AOPA* instructs the Approval Officer to deny the application where there is an inconsistency between the application and a Municipal Development Plan (MDP). He further noted that the application's inconsistency with the MDP does not preclude the operator from expanding his CFO but rather that, according to *AOPA*, the Board has the jurisdiction to override the County's MDP, and therefore overturn the Approval Officer's decision.

Mr. Wilson recognized that, should an application that is inconsistent with an MDP be approved, it must be done at the Board level, rather than an Approval Officer level. Therefore, it was his submission that, as this application was denied due, in part, to the inconsistency with County's MDP, the operator "*has an automatic right to have a Board review.*" He further asserted that a review would be the operator's only avenue for redress as any argument made to the Approval Officer would be futile as the Approval Officer has no authority to grant the approval.

Mr. Wilson's Request for Board Review continued on to state that it is not clear to him whether the application is, in fact, inconsistent with the County MDP. He asserted that the emphasis appears to be on the Town of Lacombe's planning documents, rather than the MDP, and that *AOPA* states that the Town of Lacombe's planning documents are not those which are to be considered when determining an application's inconsistency. He also believed the terms within these documents are vague and felt the Board could benefit in having a further perspective pertaining to the interpretation of these documents.

Mr. Wilson requested the opportunity to set out to the Board reasons as to why this application should not be bound by the MDP even if there is an inconsistency found, and felt there is no indication of the analysis in the Approval Officer's decision that support her finding that the effects of the expansion to the community would be unacceptable. He further stated that it was his view that the operator is entitled to know what factors are taken into consideration by the Approval Officer when the application is thought to have an unacceptable effect on the community.

Mr. Wilson asserted that these issues would be best resolved by the Board granting a written review as opposed to an oral hearing. He concluded his Request for Board Review by stating that the dairy expansion “*is vital to the future viability*” of the operator’s family farming business.

In the rebuttal submission submitted by Nick Riebeek, legal counsel on behalf of the Town of Lacombe, he stated that the Town is opposed to the Request for Board Review of Rosehill Farms. In relation to Mr. Wilson’s view that the operator should have an automatic right to a Board review when an application is denied on the grounds of it being inconsistent with the MDP, Mr. Riebeek stated that the legislation does not state that a right to an automatic review exists. He also stated that the Approval Officer adequately addressed the effects of the proposed expansion on the community. He also submitted that, should the Board decide to conduct a review, it should be in the form of an oral hearing.

Mr. King’s submission (on behalf of the Hendersons, et al) stated that he was of the view that the Request for Board Review should be dismissed as the Approval Officer adequately addressed the issues raised. He also submitted that the Approval Officer found the application to be inconsistent with the MDP and therefore the Approval Officer’s decision should be upheld on the basis of that inconsistency. He concluded that the Approval Officer reviewed the impacts on the community in detail and that the expansion would have a detrimental effect on the town, is not consistent with the MDP or IDP and is not an appropriate use of land.

Bruce Henderson, a directly affected party, also filed a submission on his own, in addition to being represented by legal counsel. He stated that this is the second time that Rosehill Farms had applied for an expansion and been denied. He believed that the concerns of the area landowners have grown significantly since the operation was initially built and stated that the Board should value the citizens’ interests over and above the proposed expansion of Rosehill Farms.

The Board met on May 25, 2009 to deliberate on the Request for Board Review filed on behalf of Rosehill Farms Inc. Notably, the Board recognizes its broader jurisdiction under *AOPA*. While the Approval Officer must deny an application if it is inconsistent with the MDP land use provisions, the Board has broader powers, since under Section 25(4)(g) of *AOPA*, the Board must have regard to, but is not bound by, the MDP.

In its deliberations, the Board determined that adequate grounds were raised to warrant a review to consider the issues relating to the application’s consistency with the MDP and associated planning documents. The Board also found merit in considering whether it would be appropriate to allow the proposed expansion, regardless of whether there is an inconsistency. The Board is further interested in understanding whether the proposed expansion would cause unacceptable community impacts and whether it represents an appropriate use of the land. The Board concludes that the Approval Officer’s decision provided incomplete justification for the conclusion that the application’s effects on the community would be unacceptable.

## **Decisions**

As a result of the Board’s deliberations, they have determined that a review will be granted to consider the issues outlined above. The review will take the form of an oral hearing which the Board expects to be completed in one day, however, as a precaution two days will be set aside for the hearing. The Board is proposing hearing dates during the week of July 6, 2009 with written

submissions to be filed by those who wish to participate in the hearing process two weeks in advance. NRCB staff will be contacting those parties who filed submissions with respect to any conflicts this timing may present and an appropriate venue in Lacombe will be chosen to hold the hearing. Other parties listed as directly affected in the Approval Officer's decision may participate in the hearing if they wish and are asked to notify NRCB review staff to provide their contact information. They will also be subject to the same filing deadlines.

The Board would like written submissions to address the following questions set for review:

1. Is the Rosehill application inconsistent with the Lacombe County Municipal Development Plan?
2. If the Board concludes there is an inconsistency, is this a proper case for the Board to approve the proposed CFO expansion?
3. Would the proposed Rosehill expansion cause unacceptable impacts on the community and does it represent an appropriate use of the land?

As the main issue focuses on the Municipal Development Plan and the County's adoption of the Intermunicipal Development Plan, the Board feels that the participation of Lacombe County at the hearing and in the review process is essential and therefore requests the presence of Lacombe County at the hearing.

DATED at CALGARY, ALBERTA, this 29<sup>th</sup> day of May, 2009.

*Original signed by:*

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**Vern Hartwell, Chair**

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Copies of the *Agricultural Operation Practices Act* can be obtained from the Queen's Printer at [www.qp.gov.ab.ca](http://www.qp.gov.ab.ca) or through the NRCB website.