



BOARD DECISION

RFR 2014-03 / LA13018

In Consideration of a Request for Board Review filed under the *Agricultural Operation Practices Act* in relation to Decision Summary LA13018

Folsom Dairy Ltd.

September 26, 2014

Background

On August 8, 2014, NRCB Approval Officer Carina Weisbach issued Decision Summary LA13018 regarding Folsom Dairy Ltd.'s confined feeding operation (CFO) located at SE 19-04-27 W4M in Cardston County. Folsom Dairy Ltd. applied to expand its existing dairy operation by increasing livestock numbers from 238 to 600 milking cows (plus associated dries and replacements), construct a new earthen liquid manure storage (EMS) and expand its existing dairy barn. In Decision Summary LA13018 the Approval Officer denied Folsom Dairy Ltd.'s application.

In Decision Summary LA13018 the Approval Officer listed the factors considered in her decision-making, including her determination that the proposed development met the *Agricultural Operation Practices Act (AOPA)* groundwater protection and nutrient management requirements. Nevertheless, the application was denied as she determined that the proposed development did not meet *AOPA*'s minimum distance setback (MDS) requirement, was inconsistent with the land use provisions of Cardston County's municipal development plan (MDP) and land use bylaw (LUB), had the potential to pose a negative effect on the community (due to inconsistency with urban fringe setback requirements) and was not considered to be an "appropriate use of land" due to its inconsistency with the MDP.

Pursuant to Section 20(5) of the *Agricultural Operation Practices Act (AOPA)*, on August 29, 2014 a Request for Board Review of Decision Summary LA13018 was filed by Mr. Chad Folsom on behalf of Folsom Dairy Ltd., meeting the 10-day filing deadline established by the *AOPA*. The Request for Board Review asked the Board to reverse the Approval Officer's decision.

Mr. Folsom stated that he had obtained a missing waiver needed to satisfy *AOPA*'s MDS and had letters of support from the Village of Hill Spring and Cardston County waiving the 1.6 km urban fringe area. Folsom Dairy Ltd. asked the Board to consider this new information in making its decision to review the application.

Following receipt of the Request for Board Review, all people found by the Approval Officer to be directly affected parties were provided with a copy of the request and were advised that adversely interested parties had an opportunity to file a response submission. A deadline of September 9, 2014 was provided in the Board's notice; however this deadline was extended for those parties who received the notice late, given unforeseen delays with mail delivery. Response submissions were submitted by the following ten directly affected parties: (1) Monty Gibb; (2) Martha Paridaen; (3) Scott Young; (4) Jesse McCollister; (5) Fred Rice on behalf of the United Irrigation District; (6) Robert Wynder; (7) Gail Workman; (8) Ellen Brooks and Linda Smith; (9) Peter Whitford; and (10) Michael and Jami Gibb.

The Board met on September 11, 16, 24 and 25, 2014 to deliberate on the filed Request for Board Review (RFR).

Jurisdiction

The Board's authority for granting a review of an Approval Officer's decision is found in Section 25(1) of the *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 considered the following information in arriving at its decision:

- Decision Summary LA13018 dated August 8, 2014 and its companion technical document;
- Request for Board Review filed by Chad Folsom of Folsom Dairy Ltd., dated August 29, 2014;
- Responses to the Board's September 2, 2014 notice of filed Request for Board Review as submitted by:
 - Monty Gibb, September 5, 2014 email
 - Martha Paridaen, September 6, 2014 email with attached May 9, 2014 letter
 - Scott Young, September 8, 2014 email
 - Jesse McCollister, September 8, 2014 email
 - Fred Rice (United Irrigation District), September 9, 2014 email with attached September 5, 2014 letter
 - Robert Wynder, September 9, 2014 email
 - Gail Workman, September 8, 2014 fax
 - Ellen Brooks and Linda Smith, September 16, 2014 email
 - Peter Whitford, September 19, 2014 email
 - Michael and Jami Gibb, September 22, 2014 email
- Portions of the public record maintained by the Approval Officer; and,
- Portions of Cardston County's MDP and LUB as available on the County's website.

Board Deliberations

Having regard for the materials referenced above the Board has determined that several issues merit consideration at a hearing.

The Board is directed by *AOPA* to 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 Board must consider each of these questions in accordance with the provisions of s. 25(1) of the *AOPA*. These provisions require that the Board consider whether the issues advanced at the RFR stage warrant consideration at a Board hearing. The Folsom Dairy Ltd. RFR raised three issues.

Issue 1 – Whether the applicant satisfied the minimum distance separation (MDS) requirement.

In asking for a Board review, Folsom Dairy Ltd. does not question the Approval Officer's calculation, but submits that it has now collected waivers from all residents within the calculated MDS. The Board understands that should this be the case there is merit in visiting whether the application now meets the *Standards and Administration Regulation* MDS requirement.

Issue 2 - Whether the proposed expansion is consistent with the setback provisions included in Cardston County's municipal development plan.

Decision Summary LA13018 concludes that the Folsom Dairy expansion application “*is inconsistent with the land use provisions of Cardston County’s municipal development plan (MDP) and associated land use bylaw.*” In reaching this decision the Approval Officer considered a number of factors, including the relationship of the land use bylaw to the MDP and the interpretation of various provisions in both the MDP and land use bylaw. Folsom Dairy has provided letters from both Cardston County and the Village of Hill Spring purportedly waiving any MDP prohibition. In concluding that the broader question identified merits consideration at a hearing, the Board also finds that there are several included components to this issue. The Board is prepared to consider submissions on:

- a. the interpretation of language contained in both the MDP and land use bylaw to determine whether the expansion is indeed prohibited;
- b. whether the municipal development plan incorporates the relevant provisions of the land use bylaw (*AOPA* provisions direct the Board to consider the MDP rather than other municipal instruments); and
- c. what process is required for Cardston County to waive provisions in its MDP and what role does the Village of Hill Spring have in that process.

While all parties are invited to make submissions on these issues, the Board would appreciate receiving direct submissions from Cardston County and the Village of Hill Spring at the hearing. The Board will ask that its staff contact the municipal authorities.

Issue 3 - Whether the Board should exercise its authority to approve the expansion notwithstanding an inconsistency with the MDP.

While an approval officer must deny an application if it is inconsistent with a municipal development plan [*AOPA* s.25(1)(a)], the Board in conducting a review of an approval officer's decision “*must have regard to, but is not bound by, the municipal development plan*” [*AOPA* s.25(4)(g)]. The Folsom Dairy RFR includes various arguments as to why the Board should approve their expansion, notwithstanding the inconsistency with Cardston County's MDP. Essentially, these elements of the RFR and virtually all of the submissions made by directly affected parties in response to the RFR notice address potential effects on the environment, the economy and the community and the appropriate use of land.

AOPA s.25(4)(k) directs that the Board, in the case of an approval, “*must consider the effects on the environment, the economy and the community and the appropriate use of land.*” Further the subsection (h) of that section states that the Board “*may consider matters that would normally be considered if a development permit were being issued.*” Taken together, the Board interprets these sub-sections as useful guideposts in determining whether to approve an

application notwithstanding inconsistencies with the MDP. The Board believes that the essence of subsection (k) is mandating that the Board put its mind to considerations that would have regard to municipal planning considerations. As is common with many planning considerations these provisions provide for making a decision after balancing a number of factors that will include both positive and adverse effects.

The Board accepts that this issue must be considered at a hearing, and expects that hearing participants will provide submissions on various components of subsection (k) being the effects on the environment, the economy and the community and the appropriate use of land as well as argument as to how the Board should balance those components in reaching a decision.

Directly affected parties that filed a submission in response to the Board RFR notice raised a number of issues that may be relevant to any Board consideration of the third issue, but did not directly address either of the first two issues identified above. Accordingly, the Board must also consider one further issue.

Issue 4 - Whether the submissions of directly affected parties raise issues beyond those raised in the RFR submitted by Folsom Dairy Ltd. that warrant consideration should the RFR proceed to a hearing.

Directly affected parties raised a number of issues that are within the NRCB AOPA mandate and that were considered by the Approval Officer in Decision Summary LA13018. Section 25(1) requires that the Board determine whether these issues were adequately dealt with by the Approval Officer, and if so, dismiss them from the review. In that regard the Board notes that none of the parties advanced significant questions in relation to the Approval Officer's technical consideration and findings. As an example, several submissions raised concerns concerning groundwater contamination, however none of those concerns cast doubt on the Approval Officer's technical review or conclusions drawn in Decision Summary LA13018. With one exception, the Board concludes that the issues raised in the submissions filed by the directly affected parties were adequately dealt with by the Approval Officer and do not merit reconsideration at a Board hearing.

The exception is the potential risk to surface water associated with the existing dry/heifer pens located immediately south of the UID irrigation canal. The Board believes that in the consideration of an application for an approval or an expansion, existing facilities that pose a risk to the environment must be examined as part of the application for approval. The Board would expect that if the Folsom Dairy application was not being declined for a failure to satisfy minimum separation distance requirements and the municipal development plan, the Approval Officer would have completed the assessment of the risk associated with these pens before issuing a decision. As there is the potential that the Board hearing process could result in an approval for Folsom Dairy's expansion, the Board expects to hear submissions to identify a response to any inappropriate risk associated with these pens.

Decision

As a result of the Board's deliberations, it has determined that a review is warranted in the form of an oral hearing to consider:

1. whether the applicant satisfied the minimum distance separation (MDS) requirement;
2. whether the proposed expansion is consistent with the setback provisions included in Cardston County's municipal development plan, including:

- a. the interpretation of language contained in both the MDP and land use bylaw to determine whether the expansion is indeed prohibited;
 - b. whether the MDP incorporates the relevant provisions of the land use bylaw (*AOPA* provisions direct the Board to consider the MDP rather than other municipal instruments); and
 - c. what process is required for Cardston County to waive provisions in its MDP and what role does the Village of Hill Spring have in that process;
3. whether the Board should exercise its authority to approve the expansion notwithstanding an inconsistency with the MDP having regard for matters that would normally be considered if a municipal development permit were being issued, and considering the effects on the environment, the economy and the community and the appropriate use of land; and
 4. what is the potential risk to surface water associated with the existing dry/heifer pens located immediately south of the UID irrigation canal and what response is required.

Review Process

The Board expects it will require two days to complete the hearing and proposes December 3 and 4, 2014 as hearing dates. Should these dates pose a conflict for any directly affected party who intends to file a submission and participate in the hearing, they are asked to advise Board staff. Board staff will locate a suitable venue and advise all parties of the commencement time and location for the hearing, once a venue has been secured.

Parties who wish to participate in the hearing process (Folsom Dairy Ltd., directly affected parties, the Approval Officer, Cardston County, and the Village of Hill Spring) must file a written submission by no later than October 22, 2014. Written submissions should address the reviewable issues identified above.

All submissions are to be directed to the attention of Susan Whittaker at the Edmonton offices of the NRCB. Following the submission filing date, the Board will ensure all directly affected parties are provided with copies of each other's submissions in advance of the hearing.

DATED at CALGARY, ALBERTA, this 26th day of September, 2014.

Original signed by:

Vern Hartwell

Jim Turner

Donna Tingley

Jay Nagendran

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

Edmonton Office

4th Floor, Sterling Place, 9940 - 106 Street
Edmonton, AB T5K 2N2
T (780) 422.1977 F (780) 427.0607

Calgary Office

19th Floor, 250 – 5 Street SW
Calgary, AB T2P 0R4
T (403) 297.8269 F (403) 662.3994

Fairview Office

Provincial Building, #213, 10209 - 109 Street
P.O. Box 159, Fairview, AB T0H 1L0
T (780) 835.7111 F (780) 835.3259

Lethbridge Office

Agriculture Centre, 100, 5401 - 1 Avenue S
Lethbridge, AB T1J 4V6
T (403) 381.5166 F (403) 381.5806

Morinville Office

Provincial Building, #201, 10008 - 107 Street
Morinville, AB T8R 1L3
T (780) 939.1212 F (780) 939.3194

Red Deer Office

Provincial Building, #303, 4920 - 51 Street
Red Deer, AB T4N 6K8
T (403) 340.5241 F (403) 340.5599

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.