



BOARD DECISION

2017-08 / FA17001

Review of Decision Summary FA17001

Danny Friesen and Tara Warkentin

August 14, 2017

Background

This report provides the Board's decision following its written hearing review of Decision Summary FA17001.

On June 5, 2017, NRCB Approval Officer Randy Bjorklund issued Decision Summary FA17001 regarding a registration application by Danny Friesen and Tara Warkentin (Friesen and Warkentin). The application was to construct and operate an 11,000 chicken layer confined feeding operation (CFO). The proposed CFO is located at River Lot 6, Range 6 in the Fort Vermilion Settlement in Mackenzie County (the County), and approximately 2 kilometres south of the Hamlet of Fort Vermilion (the Hamlet). The proposed construction included the addition of an interior wall in the livestock housing area of a barn being used for the existing 3,000 chicken layer operation. The approval officer denied Friesen and Warkentin's application, as he determined that the proposed development is inconsistent with the County's municipal development plan (MDP).

On June 22, 2017, a Request for NRCB Board Review of Decision Summary FA17001 was filed by Friesen and Warkentin. On July 19, 2017, in Board Decision RFR 2017-07, the Board determined that a review was warranted to consider whether the Board should exercise its authority to approve the CFO. The Board directed that the review be conducted as a written hearing. Also on July 19, 2017, a panel was appointed to conduct the review, consisting of Vern Hartwell (panel chair), Glenn Selland, and L. Page Stuart.

Documents Considered

The Board's record was complete on August 8, 2017 and included:

- the approval officer's public file material
- the Mackenzie County municipal development plan (MDP)
- Decision Summary FA17001
- the Request for Board Review filed by Friesen and Warkentin, dated June 22, 2017
- response submissions to the filed Request for Board Review as submitted by:
 - Mackenzie County dated July 6, 2017
- hearing submissions filed by:
 - Friesen and Warkentin
 - 2 emails dated July 7, 2017
 - email dated July 31, 2017

- Dolores Dachuk, dated July 29, 2017
- Tallcree Tribal Government, dated July 31, 2017

- hearing reply submissions filed by:
 - Friesen and Warkentin, dated August 8, 2017
 - Mackenzie County, dated August 8, 2017
 - Tallcree Tribal Government, dated August 8, 2017

In its July 19, 2017 RFR decision cover letter, the Board provided details on how to electronically access copies of the hearing submissions filed with the Board. With the exception of the MDP, all of the above materials were made available to parties. The MDP can be accessed on the County's website.

Issue

Whether the Board should exercise its authority to approve the Friesen and Warkentin CFO, notwithstanding an inconsistency with the MDP.

Jurisdiction

Section 22(1) of the *Agricultural Operation Practices Act* (AOPA) directs an NRCB approval officer to deny a registration application if there is an inconsistency with a municipal development plan's land use provisions. The approval officer denied the Friesen and Warkentin application because it did not meet the MDP's 3.2 km setback to both the Hamlet of Fort Vermilion and the Tallcree First Nation Indian Reserve.

Section 4.2.9(a) of the MDP provides:

Applications to the NRCB for the establishment or expansion of CFOs shall not be supported by the County unless they are compatible with adjacent land uses, do not generate adverse health or environmental effects, follow the Agricultural Operations and Practices Act (AOPA) guidelines, and meet or exceed the following separation distances:

a) 3.2 kilometres (km) from an adjacent municipality, Hamlet, Indian Reserve or a multi-lot country residential subdivision;

This hearing engages section 25(4)(g) of AOPA, where, on review, the Board may consider approving a CFO application, notwithstanding inconsistency with a municipal development plan.

In previous reviews, the Board determined that a reasonable approach to assessing this issue requires that it have regard for matters that would normally be considered if a municipal development permit were being issued; consider the effects on the environment, the economy, and the community; and the appropriate use of land. Such assessment will generally include:

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

Board Decision

For the reasons that follow, the Board is prepared to exercise its authority to approve the Friesen and Warkentin CFO, notwithstanding an inconsistency with the MDP.

Discussion

Municipal development plans commonly include provisions that allow, preclude, or restrict CFO development in order to further planning objectives. However, to achieve more consistent CFO siting provisions across the province, AOPA provides the Board with the review authority to approve CFO applications, notwithstanding a municipal development plan exclusion zone provision. In the Board’s 2011 Zealand Farms decision, it stated that, “where the Board is satisfied that the MDP respects the intent of AOPA to create a level playing field for this component of the agricultural industry across the province, the Board will not interfere with the municipal land use planning mandate.”

The Board is not prepared to find that the County’s motion relaxing the setback in relation to the Friesen and Warkentin application overcomes the CFO’s inconsistency with the MDP. It has reached this conclusion as it believes that a municipal development plan provision cannot be waived or modified in relation to a single development proposal without broad public consultation. However, the Board is prepared to make a reasonable inference that the County considered section 4.2.9(a) carefully before passing the motion, and concluded that the CFO specifically had regard for the direction that, “*CFOs shall not be supported by the County unless they are compatible with adjacent land uses, do not generate adverse health or environmental effects ...*”.

Mackenzie County

The Board has reviewed the County’s MDP to identify key statements that will assist it to identify the municipal authority’s rationale for establishing section 4.2.9 in the MDP. It notes that the MDP includes various statements that support and protect agricultural pursuits as a

priority land use. There are several provisions under section 4.2 that specifically refer to confined feeding operations. The Board also notes that the County includes provisions that directly respond to CFO nuisance issues in section 4.2.9, stating “...CFOs shall not be supported by the County unless they are compatible with adjacent land uses...”

Further, the County includes a provision, often referred to as a reverse minimum distance separation, in section 4.2.11. Unlike the AOPA minimum distance separation that the NRCB applies to new or expanding CFOs, some municipalities have adopted a reverse minimum distance separation that prohibits new residential construction within the calculated AOPA setback to reduce nuisance effects from CFOs on neighbouring residences.

The MDP uses buffers to manage land use in sections 4.2.9 and 6.2.6. While the section 4.2.9 buffer focuses on CFOs, the provision in section 6.2.6 arises in the context of establishing a buffer between industrial parks and residential development hamlets. In both cases the Board accepts that the County is using the buffer as a planning tool to manage and avoid conflict from incompatible land uses.

In considering the rationale for excluding new or expanded CFOs within the 3.2 km buffer zone, the Board accepts that the County’s MDP provisions were driven by sensitivity to the common nuisance effects associated with CFOs. The magnitude of these effects may vary greatly depending on the size, type, and design of operation. The Board generally accepts that these CFO nuisance effects are appropriate considerations for a municipality in establishing a plan in accordance with section 617 of the *Municipal Government Act*. The Board is less convinced that the prohibition of CFOs as an environmental protection measure is a reasonable planning provision, given the specific regulations addressing manure storage and handling contained within AOPA.

While the AOPA minimum distance separation establishes a buffer between existing residences and proposed CFOs, it is not intended to provide a definitive answer in responding to specific municipal planning objectives. The Board supports the establishment of municipal development plan setbacks to achieve specified planning objectives, and accepts that establishing a CFO exclusion zone in proximity to hamlets and Indian reserves by the County in this MDP is consistent with those objectives. However, despite accepting an exclusion zone as an appropriate planning measure, the Board finds that it must further determine whether the 3.2 km buffer is reasonable in order to support the planning objectives in the context of this application.

Fort Vermilion is a vibrant community with a variety of services and amenities that serve Hamlet residents and the surrounding community. The MDP states that Fort Vermilion’s population is forecast to grow by 2 per cent every 5 years, reaching a population of 781 by 2031. The MDP anticipates continued growth of both the residential population and commercial development. The MDP puts a priority on measures to limit development that would take land out of agricultural use. This priority directs country residential development to designated areas where land is not well suited to agricultural production. Similarly, all County hamlets have areas designated for residential, commercial, recreational and industrial development. The Board

understands that the County is not expecting a need for significant additional lands in the Hamlet of Fort Vermilion to accommodate its growing population.

The Board finds that any nuisance effects associated with the CFO are unlikely to have any impact in relation to MDP planning objectives associated with the Hamlet of Fort Vermilion. The approval officer calculated the minimum distance separation to category 4 residences (which includes hamlets) for this CFO as 634 metres, and the distance between the CFO and the Hamlet as 2300 metres. Given that the Hamlet is more than 3 times the distance from the CFO facilities than the minimum required AOPA distance, the Board expects that any nuisance effects as far away as Fort Vermilion will be inconsequential.

Tallcree Tribal Government

The Tallcree Tribal Government's (Tallcree) submissions do not identify any specific effects that it would anticipate on the Fort Vermilion Indian Reserve No. 173B. The Tallcree do express concerns that they were not notified by the NRCB at the application stage, and that the County neither gave them notice nor initiated consultation before passing a bylaw relaxing a setback to Tallcree lands.

In its July 31, 2017 submission, the Tallcree states that proper studies and discussions need to occur regarding 5 specified issues. Each of the issues raised by the Tallcree are matters that are part of the review conducted by the approval officer. At the review stage, raising a generic concern is not particularly helpful to the Board. The Board and all parties to the review have full access to the approval officer's working file and decision summary. With this information at hand, parties raising an issue should identify specific evidence and advocate what outcomes they would like the Board to deliver. The Board has reviewed the approval officer's record and decision summary, and does not see any failure to adequately consider any of the 5 issues raised by the Tallcree. Further, the Board received no evidence on current and future land uses on the Fort Vermilion Indian Reserve No. 173B. However, given that the Tallcree reserve lands are virtually the same distance from the CFO as Fort Vermilion, the Board similarly concludes that any nuisance effects would be inconsequential.

Dolores Dachuk

Dolores Dachuk's submission seeks the denial of the Friesen and Warkentin application, as it is within the 3.2 CFO exclusion zone. Ms. Dachuk raises a number of specific effects that she asserts will directly affect her and her family if the CFO is constructed. As the Dachuk property is also located within the exclusion zone, the MDP extends a degree of protection from CFO development and the consequential nuisance effects in relation to her land. That said, the MDP provision is intended to address current and future land uses related to the hamlets and Indian reserves, rather than current agricultural uses on adjacent lands. The Board notes that the MDP would make it difficult to convert any of the land in the immediate vicinity of the CFO to a use other than agriculture.

Board

As already stated, the central question in relation to this review is not whether the 3.2 km CFO exclusion zone is appropriate to protect current and future land uses within the County, but rather whether the Board should exercise its authority to approve the Friesen and Warkentin CFO, notwithstanding an inconsistency with the MDP. In examining that question, it must be understood that the Board is only able to answer that question in relation to the current CFO application. Having regard for all of the submissions, the Board concludes that this is an instance where it is appropriate to approve the proposed application, notwithstanding the inconsistency of that application with a provision of the MDP.

The approval officer's review concluded that the proposed application would comply with AOPA requirements. The approval officer completed an environmental risk screening of the grandfathered CFO facilities and concluded that those facilities posed a low risk to groundwater and surface water. The Board notes that the approval officer undertook a complete review of the Friesen and Warkentin registration application, including setting out conditions that should form part of any registration issued. The approval officer's assessment and the conditions proposed are set out in Decision Summary FA17001.

Decision

For the reasons set out above, the Board hereby directs the approval officer to issue a registration to Friesen and Warkentin to construct and operate a confined feeding operation as described in the application, subject to the conditions related to technical matters set out by the approval officer in Decision Summary FA17001.

DATED at EDMONTON, ALBERTA, this 14th day of August, 2017.

Original signed by:

Vern Hartwell
Panel Chair

Glenn Selland
Panel Member

L. Page Stuart
Panel Member

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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 or through the NRCB website.