In the Court of Appeal of Alberta

Citation: Grow North Inc. v. Alberta (Natural Resources Conservation Board), 2011 ABCA 236

Date: 20110729
Docket: 1103-0133-AC
Registry: Edmonton

Between:

Grow North Inc.

Applicant

- and -

Natural Resources Conservation Board

Respondent

- and -

Mackenzie County

Respondent by Order

Reasons for Decision of
The Honourable Mr. Justice Ronald Berger

Application for Leave to Appeal

Reasons for Decision
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[1] This is an application for leave to appeal a decision of the Natural Resources Conservation Board ("the NRCB") dated April 11, 2011. Section 31(1) of the ***Natural Resources Conservation Board Act***, RSA 2000, c. N-3 says that an appeal lies from the NRCB to this Court on a question of law or jurisdiction. Section 27(1) of the ***Agricultural Operation Practices Act***, ("the ***AOPA***") RSA 2000, c. A-7 (as amended) is to a like effect. The test for leave is whether, having regard to the standard of review, the issues raise serious, arguable points: ***Bengston v. Alberta (Natural Resources Conservation Board)***, 2003 ABCA 173, 330 A.R. 81; ***Committee for Lone Pine v. Alberta (Natural Resources Conservation Board)***, 2003 ABCA 180, [2003] A.J. No. 704.

[2] On December 10, 2010, an approval officer for the NRCB granted Grow North's application to construct and operate a confined feeding operation ("CFO") on some property located in Mackenzie County. Section 20(1) of the ***AOPA*** states, in part:

> "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, or
> >
> > (b) there is no inconsistency with the municipal development plan land use provisions and the requirements are met or a variance may be granted under section 17 and compliance with the variance meets the requirements of the regulations, the approval officer.
> >
> > ...
> >
> > (ix) must consider the effects on the environment, the economy and the community and the appropriate use of land."

[3] The approval officer concluded that:

> a. The proposed CFO exceeded the minimum distance separation requirement imposed by the *Agricultural Operation Practices Act* regulations, Alta. Reg. 257/2001 - Standards and Administration Regulation (page 11);

b. The proposed CFO is consistent with Inter-Municipal Development Plan adopted jointly by Mackenzie County (the 'County') and the Town of High Level in 2009 (pages 19 and 21); and

c. The proposed CFO is not inconsistent with the County's Municipal Development Plan (pages 22 and 24).

[4] A review was sought by affected parties. Section 25(7)(c) of the ***AOPA*** provides that the NRCB may, in reviewing an approval officer's decision, "make any ... disposition ... that the Board considers to be appropriate." In January 2011, a full hearing was directed before the NRCB which took place on March 1, 2011. Section 25(4)(g) of the ***AOPA*** reads as follows:

> "25(4) In conducting a review the Board
> ...
> (g) must have regard to, but is not bound by, the municipal development plan,"

[5] The NRCB's decision issued on April 11, 2011. It ruled that Grow North's application to build and construct the CFO should be denied because it was inconsistent with the MDP which imposes setback requirements for the purpose of ensuring that CFOs are located proximate to compatible land uses. Section 4.2.9 a) of the MDP provides:

> "4.2.9 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;"

[6] In addition, the *Standards and Administration Regulation*, A.R. 257/2001, under the ***AOPA***, consistent with the imposition of setback requirements to mitigate nuisances from CFOs, confers upon municipalities the status of an affected party when the CFO is or is to be located within the following distances from the boundary of certain parcels of land:

> "(i) ½ a mile of a confined feeding operation that contains or is to contain 500 or fewer animal units;

> (ii) one mile of a confined feeding operation that contains or is to contain 501 or more animal units but fewer than 1001 animal units;
>
> (iii) 1.5 miles of a confined feeding operation that contains or is to contain 1001 or more animal units but fewer than 5001 animal units;"

[7] In support of its application for leave to appeal to this Court, Grow North contends that the NRCB erred in law in its interpretation of the interaction between the ***AOPA***, the ***Municipal Government Act***, ("the ***MGA***") RSA 2000, c. M-26, and the Municipal Development Plan for Mackenzie County ("the MDP").

[8] In support of its first argument, the Applicant cites s. 20 of the ***AOPA*** and argues that the opinion of the approval officer is dispositive and cannot be overturned by the review panel on the basis that the panel disagrees with the approval officer's opinion. That ground of appeal ignores ss. 25(4)(b), (e), (f) and (k) of the ***AOPA***, all of which are strongly suggestive of a full *de novo* hearing before the NRCB:

> "25(4) In conducting a review the Board
> ...
>
> (b) must give the directly affected parties a reasonable opportunity to review information relevant to the review,
>
> ...
>
> (e) in the case of an approval or an amendment of an approval, may hold hearings,
>
> (f) may make, or require the applicant to make, inquiries and investigations and prepare studies and reports,
>
> ...
>
> (k) must, in the case of an approval, consider the effects on the environment, the economy and the community and the appropriate use of land."

[9] In addition, the remedial discretion of the NRCB resonates in s. 25(7) of the ***AOPA***:

> "25(7) On holding a review the Board may
>
> (a) grant an approval, registration or authorization or an amendment of an approval, registration or

> authorization on any terms and conditions that the Board considers appropriate, including the terms and conditions that a municipality could impose if the municipality were issuing a development permit,
>
> (b) refuse to grant an approval, registration or authorization or an amendment of an approval, registration or authorization, or
>
> (c) make any other disposition of the application that the Board considers to be appropriate."

[10] It follows that the first proffered ground of appeal falls short of the requisite threshold for an arguable appeal.

[11] The second issue is whether s. 20 pertains to inconsistency between the application and the MDP or whether the reference to "inconsistency" in s. 20 of the ***AOPA*** has to do with a conflict between the ***AOPA*** and the MDP.

[12] The third argument is that the MDP does not use mandatory or prohibitory language. In other words, minimum distance separation is not a condition precedent because there is no prohibition. The Applicant contends that if there is no absolute prohibition, any alleged inconsistency, even if made out, does not *ipso facto* result in rejection of the proposal.

[13] Similarly, the Applicant points out in reliance upon s. 25(4)(g) of the ***AOPA*** that the NRCB failed to appreciate that it "must have regard to, but is not bound by a municipal development plan." [emphasis added] The argument here is that the NRCB ruling prefers the development plan over the provincial statute which the Applicant says is a violation of s. 13 of the ***MGA***. Section 13 provides:

> "If there is an inconsistency between a bylaw and this or another enactment, the bylaw is of no effect to the extent of the inconsistency."

[14] In this latter regard, the question is whether or not the NRCB in fact considered itself bound by the MDP or whether the language employed in its decision can reasonably be read to have considered the plethora of factors referred to in the legislation and cited in its reasons.

[15] The latter three submissions do not warrant leave. The NRCB's decision is thorough and carefully crafted. It takes account of the approval officer's opinion and, read in its entirety, discloses no arguable misapprehension of the material factual underpinnings nor of the legislative and regulatory imperatives. I take account of the following:

- The NRCB appreciated that Grow North's application was to construct and operate four feedlot barns that would collectively house a total of 5,000 beef finishers and further that the proposed CFO was part of a larger planned project that would include bio-digesters, electrical generation facilities, an abattoir, a packing plant and an ethanol plant.

- The NRCB was mindful of issues raised by interested parties including noise, odour, water use, surface water quality, animal welfare, siting, setback, road use and property value issues.

- The NRCB was cognizant that it was incumbent upon it to consider the development's consistency with the provisions of the MDP and in particular s. 4.2.9. The actual distance of the proposed CFO is 1350 metres from a multi-lot country residential subdivision.

- The NRCB understood that it would be called upon to exercise its authority under s. 25(4)(g) of the ***AOPA*** having regard to, but not be bound by, the municipal development plan. The NRCB stated: "In essence this provision provides the Board with the discretion to override the provisions of an MDP in the siting of a confined feeding operation." (NRCB Decision 2011-03/ FA10003 dated April 11, 2011). The NRCB held that:

  > "Grow North did not provide a compelling argument for the Board to override the MDP provisions on this site. The determining factor for the Board, in this case, was based on the proximity of the existing country residential subdivision in the IDP area north of the Town of High Level and that this development appeared to represent an orderly progression of non-agricultural development between the Town and the airport. Accordingly, the Board will not exercise its discretion to approve the Grow North application for a CFO at the proposed site."

- At the end of the day, the NRCB was under no misapprehension that its review was limited to the question of the consistency of Grow North's proposal for a confined feeding operation with the provisions contained within the MDP and the Inter-municipal Development Plan. The NRCB held: "The Board therefore concludes that the proposed CFO, to be located within this area, is inconsistent with Section 4.2.9(a) of the MDP. In this case, given this inconsistency, the Approval Officer should have denied Grow North's application." (NRCB Decision 2011-03/ FA10003 dated April 11, 2011)

[16] In my opinion, the issues raised by the Applicant are questions of mixed law and fact, none of which rises to the requisite threshold of an inextricable question of law. Moreover, the impugned decision of the NRCB in this case falls within a range of acceptable outcomes applying a standard of review of reasonableness. The proposed appeal does not, in my opinion, have a reasonable chance of success. I would add only that I would reach the same conclusion were I persuaded that the standard of review were correctness.

[17] For these reasons, the application is dismissed with costs to be agreed upon or taxed in favour of Mackenzie County, the Respondent added by order dated June 22, 2011.

Application heard on July 12, 2011

Reasons filed at Edmonton, Alberta
this 29th day of July, 2011

Berger J.A.

Appearances:

E.R. Feehan
for the Applicant

W.Y. Kennedy
for the Respondent - Natural Resources Conservation Board

B.A. Sjolie, Q.C.
M.J. Cooper
for the Respondent - Mackenzie County