



County of Thorhild No. 7

Box 10
Thorhild, Alberta T0A 3J0
www.thorhildcounty.com

Ph: (780) 398-3741 Fax: (780) 398-3748
Toll Free: 1-877-398-3777

October 7, 2011

Robert Beaverford
52547 Range Road 223
SHERWOOD PARK, Alberta
T8A 4P7

Dear Sir:

RE: Subdivision and Development Appeal Board Hearing
Development Permit 1624 – SML 900112 on NE 36-63-19-4

Please be advised the Subdivision and Development Appeal Board (SDAB) met on Friday, October 7, 2011 and has made a decision as follows:

Resolution 33-11

Moved by Wayne Crosswell that the Subdivision and Development Appeal Board is denying Development Permit 1624 applied by Robert Beaverford for gravel extraction under SML 900112 located on NE 36-63-19-4 as per the following Reasons for Decision.

REASONS FOR DECISION

OF SEPTEMBER 22, 1011

A. Introduction

The Appellant applied to the County of Thorhild (the "County") for a development permit for gravel extraction on NE 36-63-19 W4M (the "Lands"). The Lands border the northwest shore of Long Lake. The County refused the development permit. The Appellant has appealed the refusal of the development permit.

B. Preliminary Objections

At the outset of the hearing, Robert Farmer, legal counsel for the Appellant raised an objection to Wayne Croswell sitting on this hearing. He referenced statements made by Mr. Croswell, including Facebook postings, from 2010 with respect to another proposed gravel pit in the vicinity of this proposed gravel pit. He referred the Board to the decision in *Beier v. Vermillion* and suggested that Councillor Croswell's comments gave rise to a reasonable apprehension of bias.

Kelsey Becker-Brookes, legal counsel for the Long Lake Cottage Owners Association (the "Association"), then objected to Charles Newell sitting on this hearing. She advised the Board that Mr. Newell had made comments in which he voiced his support for gravel pits in the area. She then asked Kathleen Bruce, who is President of the Association, to provide the Board with particulars of these comments. Ms. Bruce advised that Mr. Newell had attended a meeting of the Association. At that time, Ms. Bruce indicated that Mr. Newell made comments to the effect that the Cottage owners will have to get used to the fact that there will be gravel pits in the area. She suggested that from these comments it could be inferred Mr. Newell was biased in favour of gravel pits in the area.

Shari Boyd, legal counsel for the County, advised the Board that the County did not take a position with respect to either objection.

With respect to Mr. Croswell, the evidence was that he raised a number of questions in relation to another proposed gravel pit in the area. There was no evidence before the Board that Councillor Croswell had made any comments or taken a position with respect to this proposed gravel pit. In light of this, the Board is of the view that it does not have evidence before it that would give rise to a reasonable apprehension of bias with respect to this appeal.

Similarly, with respect to Mr. Newell, the information that was provided to the Board was to the effect that Mr. Newell made general comments regarding gravel pit development in the area. There was no information presented to the Board that Mr. Newell had

made any comments or taken a position with respect to this proposed gravel pit. As such, the Board again is of the view that it does not have sufficient evidence before it to conclude that there is a reasonable apprehension of bias with respect to this appeal.

In light of the foregoing, the Board determined that the appeal should proceed with both Mr. Crosswell and Mr. Newell.

C. Summary of Hearing on the Merits

The Board first heard a report from Bill Kostiw, on behalf of the County. His written report is on file. The County recommended refusing the development.

The Board then heard from the following individuals in support of the appeal: Rodney Boyko, Lisa Ball and Robert Farmer (legal counsel):

1. Rodney Boyko provided the Board with maps and other documents that are on file. He reviewed the location of the proposed gravel pit in relation to other gravel pits. He further submitted that the proposed gravel pit was consistent with the Municipal Development Plan (the "MDP") and consistent with other approved land uses in the area.
2. Lisa Ball provided an overview of the proposed development. She noted the following:
 - (a) The proposed gravel pit is adjacent to other previously approved and much larger gravel pits.
 - (b) A line of site analysis that indicated that the proposed gravel pit would not be visible from the lake or from the cottages due to elevation changes. The elevation changes would also decrease noise.
 - (c) The Lands are not good agricultural land and the Province considers the Lands to be non-agricultural.
 - (d) The Conservation and Reclamation Business Plan (the "CRB Plan") is designed to mitigate impacts of the development. The Province has approved the CRB Plan.
 - (e) The deepest test hole was 25 feet. All of the test holes were dry. As such, the gravel pit will not impact on groundwater. There will be no runoff from the gravel pit and a Water Act approval is not required. In order to mine below 25 feet, further approvals would be necessary.

- (f) Athabasca County has already approved the portion of the grave pit that will be within Athabasca County. With respect to the portion of the development that is located within Athabasca County, the trees have already been hauled out. A crusher will be moved in shortly and it is expected that operations will start this fall.
- (g) The disturbance will be for two to three years.
- (h) The reclamation will be to a three-to-one slope.
- (i) There is a five metre setback to avoid disturbance of tree roots.
- (j) The haul road is a LOC in Athabasca County.
- (k) Mitigation measures have been put in place for dust control onsite and on the haul road. There are also weed control requirements.
- (l) Stock piles will act as noise buffers.
- (m) The proposed gravel pit is 3.4 km away from the Long Lake Hamlet.

3. Robert Farmer reviewed the relevant legislative framework:

- (a) Under the Land Use Bylaw (the "LUB"), the lands are zoned Agricultural. Gravel extraction is a discretionary use. As the lands are not good agricultural lands, it is not contrary to the Agricultural general purpose for a gravel pit to be developed on these lands. In particular, he noted that non-agricultural development is to be encouraged on lower capability Agricultural land. He also noted that the required access was being provided and that all services would be provided as well.
- (b) With respect to the MDP, one of the goals/objectives is for economic growth. He also referenced the preservation of good agricultural land and again noted that the Lands are not good agricultural land. Although the MDP designates the Lands as recreational, the agricultural policies still apply as no recreational development has occurred. The agricultural policies specifically indicate that industrial/commercial development is to be encouraged on poor agricultural lands.
- (c) The Long Lake Policy Paper (the "Policy Paper") is not part of the LUB. Further, it is not a statutory plan or a land use policy as defined in the MGA. As such, the Board is not bound to follow it. The LUB and MDP cannot be circumvented by the Policy Paper. There is no evidence that the Policy Paper that was before the Board was the one that was adopted by Council as the 1986 Resolution does not have any attachments. Further, the Policy Paper does not define the study area. In this regard, he referred to the DC District in the LUB, which covers the area around the Long Lake Hamlet. It is the only portion of the LUB that specifically

references the Policy Paper. In his view, if Council's intention was to have the Policy Paper apply to the Lands, then the Lands would have been included in the DC District. With respect to the Background Report, there is no indication that it was ever adopted by Council.

- (d) Pursuant to Section 620 of the *Municipal Government Act* (the "MGA"), any conditions imposed must be consistent with the conditions imposed in the Surface Materials Lease (the "SML").

In terms of the planning considerations, Mr. Farmer noted that the neighbouring developments are two other gravel pits and that the nearest residences are 3.4 km away.

The Board then heard from the following representatives of the Association, which is opposed to the proposed development: Kelsey Becker-Brookes (legal counsel), Kathleen Bruce, Richard Lehmann, Marina Lehmann, and Mitchell Patrick:

1. Kelsey Becker-Brookes indicated that the Association agrees that gravel extraction is a discretionary use. As such, the question is whether or not the use is appropriate for the Lands. In order to assess this, the Board must look at the cumulative impacts of all gravel pits in the area on neighbouring properties.

Ms. Becker-Brookes then reviewed some of the other gravel pits in the area. She noted that one of them is under appeal and will be dealt with by the Court of Appeal. She pointed out to the Board that based on the Court of Appeal decision granting leave, the Board must consider the Policy Paper as well as the impacts on the aquifer and water table.

With respect to the legislative framework, she essentially agreed with Mr. Farmer's submissions on the LUB. With respect to the MDP, she submitted that the area is used for recreational development. She noted that the objectives are to maintain the existing natural environment and that industrial development is not consistent with these objectives.

With respect to the Policy Paper, she submitted that based on various maps that Ms. Bruce had, it is clear that the Lands are within the study area. She drew the Board's attention to a number of provisions in the Policy Paper, the most significant of which is a prohibition against natural resource extraction in the study area.

2. Kathleen Bruce, the President for the Association as well as a resident and property owner in the Long Lake Hamlet reviewed the Policy Paper and Background Report. She indicated that the study area was an area within 1.6 km of Long Lake. She noted that the Policy Paper had been adopted by Council in 1986 and that it specifically prohibits gravel extraction in the study area.

Ms. Bruce then reviewed the Regional Ground Water Assessment prepared in July 1998 and revised in July 1999. She provided a copy to the Board, which is on file. She submitted that the Milan Aquifer is under the area in which the proposed development will be located. She raised a concern about contamination in the aquifer. She acknowledged that she did not know exactly where the aquifer was, but thought it was in the general area.

3. Richard Lehmann, a property owner in the Long Lake Hamlet, submitted that the area is used for recreation. He raised concerns about noise, dust and impacts on the environment, wildlife, the land and aquifer. Mr. Lehmann submitted that the studies in support of this development were inadequate. He submitted that the Appellant needs to spend more time addressing impacts and obtaining proper studies.
4. Marina Lehmann and Mitchell Patrick raised concerns similar to those of the other Association representative.

In rebuttal, Lisa Ball referred the Board to various portions of the Ground Water Assessment. She submitted that the Lands are not within the area that is at risk of contamination. She noted that the Ground Water Assessment is over 10 years old. She submitted that the proposed development would not impact on the aquifer. She also addressed concerns about reclamation. She indicated that re-vegetation is expected to occur quite quickly. The Appellant is prepared to replace trails that have been removed. She also noted that some of the recreational activities, such as quading, have caused damage to the environment. She suggested that noise from quads and boats will supersede any noise from the gravel pit. Robert Farmer made similar observations with respect to the Ground Water Assessment. He noted that there was no dewatering associated with the proposed gravel pit.

D. Post Hearing Objection

After the conclusion of the hearing, the Board received a letter dated September 30, 2011 from Kelsey Becker-Brookes. The letter objected to Board members, Doug Harris and William Kowal, taking part in the deliberations. It alleged that based on observations of conduct of these members during the course of the hearing, the Association was questioning "the impartiality of these two members and the fairness of

the hearing". The Board considered this objection. The Board notes that these objections were not raised during the course of the hearing. Had these objections been raised during the course of the hearing, the Board then could have heard submissions from all parties on the objections and then made a determination with respect to the objections at that time. Instead, the objections were not raised until over a week after the conclusion of the hearing. While the Board has concerns about the manner in which the objections were raised, the Board nevertheless proceeded to consider them based on the information contained in the letter. In this regard, the Board found the information contained in the letter to be vague and unspecific. As well, one of the allegations contained in the letter was later retracted, which casts some doubt on the reliability of the letter. While the Association may subjectively believe that Messrs. Harris and Kowal were not impartial, the Board is of the view that the hearing was conducted fairly and that the information contained in the letter is insufficient for a reasonable person to conclude that Messrs. Harris and Kowal were not impartial. As such, the Board decided not to remove either of Messrs. Harris or Kowal.

E. Decision

The Board upholds the decision of the Municipal Planning Commission and denies the development.

F. Reasons

The Board first reviewed the relevant legislation. The Lands are zoned Agricultural. The proposed gravel pit is a discretionary use in the Agricultural district. As such, the Board has discretion to determine whether or not the proposed gravel pit is appropriate for the Lands. In exercising, this discretion, the Board considered the MDP. The Board accepts that while the MDP designates the Lands as recreation, as the Lands have not been developed from recreational use, the agricultural policies apply. While these policies do not prohibit the proposed development, they do not necessarily support it either.

The Board also considered the Policy Paper and the Background Report. The Policy Paper was adopted by Council. It is not part of a statutory plan, land use policy or the LUB. As such, it is not binding on the Board. Nevertheless, the Policy Paper is relevant to the Board's exercise of discretion. With respect to the study area, the Background Report refers to lands within 1.6 km of Long Lake. Further, the Policy Paper excludes specific lands within 1.6 km of Long Lake, which at the time were in Athabasca County. In light of this, the Board is of the view that it is a reasonable inference that the Policy Paper applies to the Lands. Further, while the motion adopting the Policy Paper does not have any attachments, based on the date of the Policy Paper and the date of the motion, the Board is of the view that it is a reasonable inference that the Policy Paper, dated June 10, 1986, that was submitted to the Board is the Policy Paper that was adopted by Council motion in 1986.

While the Policy Paper contains a number of policies that arguably apply to the proposed gravel paper, the most directly applicable policy states:

“No rural or resource extraction industries shall be permitted to operate within the study area”.

As noted above, the Board is not bound by the Policy Paper. Nevertheless, it is a relevant consideration for the Board take into account in exercising its discretion. The Board is of the view that before deviating from the Policy Paper, it must have evidence before it that provides a basis for doing so.

The Board also considered the effect of the granting of the SML by the Province as well as Section 620 of the MGA. In the Board's opinion, the fact that the Province approved the SML does not detract from the Board's jurisdiction under Section 687 of the MGA.

The Board then went on to consider how to exercise its discretion based on the evidence before it. The representatives of the Association did not provide evidence on which the Board could rely with respect to impacts of the proposed gravel pit; their submissions with respect to impacts were largely speculative. As such, the Board did not place significant weight on these submissions. Rather, the Board carefully reviewed the CRB Plan, and the evidence presented by the Appellant. After carefully reviewing

this evidence, the Board was of the view that the Appellant had not provided sufficient evidence in the form of reports and studies to satisfy the Board that the potential impacts of the proposed gravel pit could be adequately and appropriately addressed. In particular, concerns were raised about the impact on groundwater and the aquifer. In the absence of a hydrogeological study, the Board felt that the information presented was insufficient for the Board to make a determination that potential impacts on groundwater and the aquifer had been adequately addressed. Similarly, the Board was concerned about the lack of an environmental study to address the impacts on wildlife, vegetation, birds and fish. Again, the Board was of the view that the evidence presented by the Appellant with respect to environmental impacts of the proposed gravel pit was inadequate. In summary, in the Board's opinion, the Appellant's evidence was simply not sufficient for the Board to make a determination that it should not follow the policies with respect to resource extraction as set out in the Policy Paper.

For these reasons, the proposed development is refused.

Although the Board recognizes that it cannot direct the County to amend the MDP or LUB or to adopt certain policies, the Board notes that the status of the Policy Paper and its interaction with the MDP and LUB has been the subject of considerable debate in determining what type of development should or should not be approved within the vicinity of Long Lake. The Board notes that the Policy Paper is more than 25 years old. It would be of considerable assistance in dealing with future applications if the County took steps to address and formulate policies with respect to development in the vicinity of Long Lake and then adopted these policies either through amendments to the MDP or LUB or both.

CARRIED

IMPORTANT INFORMATION FOR APPLICANT/APPELLANT

The following information may not pertain to your specific situation.

1. When an application for a Development Permit has been approved by the Subdivision and Development Appeal board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.

2. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the Municipal Government Act, R.S.A. 2000, c. M-26.

3. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Planning Department located at 801 – 1 Street, THORHILD, Alberta.

Should you have any questions or concerns, please contact Cheryl Pasay at 780-398-2802.

Yours truly,

A handwritten signature in black ink, appearing to read 'Doug Harris', with a long horizontal flourish extending to the right.

DOUG HARRIS
Chairman
Subdivision and Development Appeal Board