

REGIONAL SUBDIVISION AND DEVELOPMENT APPEAL BOARD

July 24th, 2020

Notice of the Decision of the Regional Subdivision and Development Appeal Board

**RE: Borgel et al. v. SDAB (County of Paintearth No. 18) et al.
Court of Appeal File No. 1803-0191AC**

SUMMARY OF APPEAL

Appeals filed in respect of Development Permits DP1714 through DP1787 for the placement and construction of 10 of 74 wind turbines for the Halkirk 2 Wind Project, approved August 28, 2017, were referred back to the Regional Subdivision and Development Appeal Board to be reheard and dealt with in accordance with the direction of the Alberta Court of Appeal in *Borgel v. Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192.

A Preliminary Hearing took place June 8, 2020 at 2 PM at County of Paintearth Council Chambers Office: #1 Crowfoot Crossing Twp Rd 374 & Hwy 12.

Notice of the Preliminary Hearing was provided to interested parties on May 26, 2020. Notice was advertised in the East Central Review on May 27, 2020 and June 3, 2020. Notice was advertised in the Castor Advance on June 4, 2020. Notice was posted on the County of Paintearth and Palliser Regional Planning Website on May 28, 2020.

A Merits Hearing took place on July 16, 2020 and July 17, 2020 at 10 AM at County of Paintearth Council Chambers Office: #1 Crowfoot Crossing Twp Rd 374 & Hwy 12.

Notice of the Merits Hearing was provided to interested parties on June 22, 2020. Notice was advertised in the East Central Review on June 24, 2020, July 2, 2020, and July 8, 2020. Notice was advertised in the Castor Advance on June 25, 2020, July 2, 2020 and July 9, 2020. Notice was posted on the County of Paintearth and Palliser Regional Planning Website on June 22, 2020.

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PRELIMINARY MATTERS

PURPOSE OF PRELIMINARY HEARING

The purpose of the Preliminary Hearing was to review procedural matters and to make key decisions regarding the Merits Hearing.

At the start of the hearing on June 8th, 2020, the Appellant, the Applicant, the Development Authority and affected parties were given the opportunity to raise objections to the Panel Members assigned to the hearing. No objections were raised. An overview of the Preliminary Hearing procedure was outlined and an opportunity for objection was given to the Appellant, the Applicant, the Development Authority and affected parties. No objections were raised to the proposed procedure.

The procedural matters which were discussed included the adjournment and scheduling of the Merits Hearing, the record for rehearing, setting filing dates for written submissions, the format of written & oral submissions, addressing para. 45(1) & 45(2) of the Court of Appeal Decision and the hearing procedures for the Merits Hearing, including recording.

SUMMARY OF PROCEDURAL MATTERS & DECISIONS

Adjournment & Scheduling of the Merits Hearing

After submissions and discussion concerning the scope of the Merits Hearing and the potential impact on the other matters on the Agenda, the following dates for the Merits Hearing were tentatively agreed upon.

July 16, 2020 commencing at 10:00 AM; and

July 17, 2020 commencing at 10:00 AM

The Board subsequently directed the Merits Hearing would be adjourned to the above dates.

Record for Rehearing

It was proposed that the submission of certain records central to the Appeals be put before the Board prior to other written submissions. This would aid all parties when making their submissions and allow all parties to refer to these records in their written submissions. Many of these records are very large and it would not be efficient to have each party submitting the

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same large records in their respective written submissions. Discussion around what records should be submitted took place.

The following records were agreed upon as forming the SDAB Package and the Development Authority will electronically submit the following records by June 10th, 2020 with the Clerk:

- Development Permit Applications in their entirety
- Actual Development Permits (Body Only) for 10 Turbines under appeal
- Notices of Appeal
- AUC Decisions (6)
- SDAB Decision, dated June 15, 2018
- Court of Appeal decision, dated May 8, 2020
- Minutes from the Municipal Planning Commission
- External Referrals not included in the Development Applications
- County Map (1 with landowner names and 1 without landowner names) with location of 10 Turbines under appeal noted thereon

Setting Filing Dates for Written Submissions/Oral Submissions

The following dates for filing written submissions were tentatively agreed upon:

- a. Appellants and affected parties in support of the Appeals – June 18, 2020
- b. Respondents and affected parties opposed to the Appeals – July 2, 2020
- c. Appellants Rebuttal – July 9, 2020

The Board subsequently directed the above filing dates for written submissions.

Submissions were made by Mr. McElhanney and Mr. Terry Vockeroth on why oral submissions should be heard from all parties. It was determined that oral submissions would be received by the Board as long as the submissions did not become overly repetitive. Anyone wanting to make oral submissions who is represented by counsel will be limited to five minutes for their presentation. There will be no time limit on oral submissions by counsel or those individuals not represented by counsel.

The requirement in the Procedural Guidelines to provide written authorization to speak on behalf of another individual is waived. Oral indication of same will be sufficient.

Format of Written Submissions

All written submissions are to be submitted electronically and must be numbered sequentially and, where appropriate, separated by tabs.

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Addressing para. 45(1) & 45(2) of the Court of Appeal Decision

The Board heard submissions on the interpretation of paras. 45(1) and 45(2) of the Court of Appeal decision in *Borgel v. Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192, and the scope of the Merits Hearing. The decision of the Board is that parties may include in their written submissions argument on the interpretation of paras. 45(1) and 45(2) and the scope of the Merits Hearing. The Board will consider and determine the issue of scope as part of the Merits Hearing.

Hearing Procedures for Merits Hearing Including Recording

The Merits Hearing will be recorded.

The Board has an obligation to determine a procedure for the Merits Hearing which provides the Appellants, the Applicant, the Development Authority and affected parties with the ability to fully participate in a hearing which is procedurally fair. Alberta Regulation 50/2020 permits some or a portion of the hearing to be held virtually, by teleconference or videoconference, as a result of COVID19. The Board heard submissions that videoconferencing is very inconsistent in the County.

The Board concluded a procedure which maximized personal attendance under the existing provincial public health regulations, combined with the ability to attend by teleconference and broadcasting of the hearing outside the County building, would best achieve this result.

As a result of a relaxation in the provincial public health regulations subsequent to the Preliminary Hearing, the Board will secure an appropriate venue for the Merits Hearing, which will allow parties to attend in person or by teleconference. Limits on the number of people permitted to attend the hearing in person will be as per the provincial public health regulations in place at the time and the Board's discretion. If personal attendance is limited, the Board retains the discretion to broadcast the hearing outside the building.

Public Notice of the location, along with other details, of the Merits Hearing will be posted on the County of Paintearth and Palliser Planning websites and published in the East Central Review and the Castor Advance. Personal Notice will be sent to all individuals that registered for the Preliminary Hearing, the Appellants, the Development Authority and the Applicant.

PARTIES

The Appellants

W.L. McElhaney & Alexander W. Yiu - Attended merits hearing in person

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Appellants attended either on site in the parking lot or by teleconference:

Gerald Borgel, Brenda Anderson, Dwayne Felzien, Adam Fuller, Rhonda Fuller, Donald Coulthard, Doug Potter, Lynne Potter, Terry Vockeroth, Peggy Vockeroth, and Brian Perreault

The Applicant

Gavin S. Fitch & Wilhelm Danek (Capital Power) – Attended Merits Hearing in Person

The Development Authority

Jeneane Grundberg & Todd Pawsey – Attended Merits Hearing in Person

Alifeyah Gulamhusein – Attended Merits Hearing by Teleconference

Other Parties

Attended either on site in parking lot or by teleconference

Barry Jackson, Carmen Felzien, Donna Fetaz, Gerard Fetaz, Ralph Gurnett, Katrina Smith, Stacey Fuller, Chris Blumhagen, Geraldine Coulthard, Denice Wiart, Jason Felzien

SUMMARY OF EVIDENCE, ARGUMENT AND REASONS

Introduction

1. The Appellants are eleven landowners, opposed to the development of a windfarm project in the County of Paintearth No. 18 (the “County”). The dispute arises as a result of a windfarm project proposed by the Respondent Capital Power Generation Services Inc. (“Capital Power”) located 12 km north of the town of Halkirk, Alberta.
2. Certain developments in Alberta, such as windfarms, require both municipal approval in the form of development permits from the municipality in which the project is located and provincial approval from the Alberta Utilities Commission (the “AUC”). On September 22, 2017, the County’s development authority, the Municipal Planning Commission, approved the Project and issued 74 development permits. The Appellants appealed ten of the development permits to the County of Paintearth No. 18 Subdivision and Development Appeal Board (the “Previous SDAB”).

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3. In AUC Decision 22563-D01-2018, dated April 11, 2018, the AUC granted its approval for the project, concluding the project was in the public interest under s. 17 of the Alberta Utilities Commission Act (the “AUC Decision”).
4. On June 15, 2018, the Previous SDAB dismissed the ten appeals following a preliminary procedural hearing. The decision of the Previous SDAB was appealed to the Court of Appeal of Alberta. In *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192, the Court of Appeal overturned the decision of the Previous SDAB and sent it back for a limited rehearing.
5. The County now participates in a Regional Subdivision and Development Appeal Board, the Palliser Regional Subdivision and Development Appeal Board (the “Board” or the “SDAB”), which heard the appeals on July 16 and 17, 2020, in the Council Chamber for the County of Paintearth No. 18 and by teleconference.
6. The SDAB is an independent and objective tribunal from the County and any other party.

Scope

7. The rehearing of the appeals is pursuant to the direction of the Court of Appeal in *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192 (the “Court of Appeal Decision”).
8. Paragraph 45 of the Court of Appeal Decision provides as follows:

[45] Pursuant to s 689 of the *Municipal Government Act*, the decision of the SDAB dismissing the ten appeals is cancelled and those appeals are referred back to the SDAB to be reheard and dealt with in accordance with the following directions:

1. The SDAB is to approve the development permits to the extent that the applications are consistent with and comply with the AUC approval (s 619(2) of the *MGA*); and
2. The hearing is not to address matters which the SDAB determined were already decided by the AUC (s 619(4) of the *MGA*).

Section 619

9. The relevant subsections of s. 619 of the *Municipal Government Act* (the “MGA”) provide as follows:

619(1) A licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC prevails, in accordance with this section, over any statutory plan, land use bylaw, subdivision decision or development decision by a subdivision authority, development authority, subdivision and development appeal board, or the Municipal Government Board or any other authorization under this Part.

(2) When an application is received by a municipality for a statutory plan amendment, land use bylaw amendment, subdivision approval, development permit or other authorization under this Part and the application is consistent with a licence, permit,

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approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC, the municipality must approve the application to the extent that it complies with the licence, permit, approval or other authorization granted under subsection (1).

....

619(4) If a municipality that is considering an application under subsection (2) holds a hearing, the hearing may not address matters already decided by the NRCB, ERCB, AER, AEUB or AUC except as necessary to determine whether an amendment to a statutory plan or land use bylaw is required.

Previous SDAB Decision

10. The Previous SDAB concluded that in the AUC Decision, the AUC considered and decided the following issues:
 - Consultation – paragraph 59
 - Agricultural impacts – paragraphs 69 – 71
 - Impacts on water – paragraphs 90 – 92
 - Impacts in rural residential land use, visual impacts and property values – paragraphs 113 – 117
 - Noise – paragraph 182
 - Health, including lights, noise, shadow flicker, air pressure changes and annoyances – paragraph 226
 - Environmental impacts including migratory birds – paragraphs 242 - 285
 - Safety – paragraph 297
 - Decommissioning and reclamation - paragraph 310.
11. In addition, the Previous SDAB concluded that in the AUC Decision, the AUC expressly considered and decided the following:

“...Transport Canada Aerodrome Standards and Recommended Practices (TP312) and the impact of the proposed development on the Fetaz’s aerodrome and aerial spraying. The AUC expressly considered the impact of the proposed development on the Fetaz’s aerodrome and aerial spraying and imposed a condition to mitigate the concern.”
12. As per the Court of Appeal Decision, the hearing was not to address the above matters which the SDAB determined were already decided by the AUC.

Scope of the Rehearing

13. The Appellants submissions on the scope of the rehearing can be summarized as follows:
 - The SDAB is required to assess the development permits for the ten turbines under appeal against the County’s Municipal Development Plan (“MDP”) and Land Use Bylaw (“LUB”)

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because the Board cannot ignore the additional wording in s. 619(4) “as necessary to determine whether an amendment to a statutory plan or land use bylaw is required”.

- This additional wording means the SDAB can address matters already decided by the AUC for the purpose of determining consistency and compliance with the MDP and LUB in order to determine whether an amendment to a statutory plan or LUB is required.
- Section 687(3) of the MGA requires the SDAB in hearing an appeal, to comply with the County’s statutory plans and LUB, subject only to the SDAB’s variance power. Section 619 does not preclude the SDAB’s obligation to assess the development permits as against the MDP and LUB.
- There are residual issues at the local planning level that need to be addressed and the SDAB’s authority is unfettered by issues not addressed by the provincial body.
- Any areas of inconsistency or non-compliance with the MDP and LUB give the SDAB the power to impose additional or more onerous conditions.
- There are seven broad areas where the development permit applications are inconsistent or non-compliant with the MDP and the LUB: Environmentally Sensitive Areas, floodplains, setbacks from aerodromes, setbacks under the LUB, safety, remediation and bonds, road use.

14. Capital Power’s submissions on the scope of the rehearing can be summarized as follows:

- Capital Power disagrees with the Appellants’ position that additional conditions are required to make the development permits consistent with the MDP and LUB because the development permits are already consistent with the MDP and LUB, or the Municipal Planning Commission would not have approved the development permits. If the development permits are inconsistent with the MDP and LUB, the inconsistencies are minor or not material.
- However, even if there were inconsistencies with the MDP and LUB, pursuant to s. 619 of the MGA the AUC Decision prevails. The whole point of s. 619(1) is to direct that the AUC Decision prevails over a local planning decision and, therefore, according to s. 619(2) the SDAB must approve the development permits because the development permits are consistent with the AUC approval.
- As the locations of the turbines have been approved by the AUC, they cannot be altered by the Board; the SDAB has no power to alter turbine locations and setbacks for any reason.
- On the issue of consistency, which is the starting point, the exact same project went before the SDAB as went before the AUC. There is no difference in what the AUC approved and what Capital Power applied to the County to be approved. The Board must approve and uphold the development permits.
- The Appellants have provided no examples of how the development permits do not comply with the AUC approval.
- If the Board works its way through ss. 619(2), (3), (4) etc., it is clear s. 619(4) is referring to an application under s. 619(2) to amend a statutory plan or LUB. (EAS)
- The SDAB is not an appeal from the AUC.

15. The County’s submissions on the scope of the rehearing can be summarized as follows:

- There is no matter before the Board that has not been addressed by the AUC Decision and the SDAB’s jurisdiction is determined by the AUC Decision.

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- The SDAB cannot even embark on consideration of an issue already decided by the AUC, such as tower location; consistent and compliant means the SDAB cannot even embark on the inquiry.
- In the ordinary course, the SDAB could consider all these matters in the context of the MDP and LUB and impose conditions but here the AUC has already decided those issues.
- The AUC could approve a use not listed as a permitted or discretionary use in the LUB and that is why mandatory LUB amendment provisions have been included in s. 619.
- As per the *Enmax* decision, the AUC can properly look at local planning issues within their mandate. It is wrong to say the SDAB has to consider planning documents because the AUC cannot.
- The Appellants need to show the matter was not addressed by the AUC, as determined by the Previous SDAB, and is not consistent with the AUC Decision.
- With respect to the interplay between s. 619 and s. 687(3) of the MGA, when interpreting legislation it is a rule of statutory interpretation that the specific overrules the general. Section 687 is the general rule, but is prescribed by s. 619 when there is a provincial approval.
- There is no authority to prescribe more onerous conditions where a matter has been addressed by the AUC. In order to determine if a matter has been addressed by the AUC, the Board needs to take a pragmatic approach.
- The MDP and LUB are not matters; they are part of the regulatory framework through which particular matters are addressed and the fact the AUC did not consider a matter in the context of these planning documents does not mean the AUC did not address it.
- The AUC dealt with and made a decision with respect to the location of every single tower under appeal.
- All of the issues brought forward at the local level were also brought forward at the provincial level therefore there is a complete overlap between the proceedings before the AUC and the SDAB, whereas, the Appellants seem to assume there will always be something residual.

Board's Decision on Scope

16. The SDAB's authority on this rehearing of the Appeals is prescribed in both the matters to be considered during the hearing and the issues to be determined by the Board. The SDAB is required not only to follow the relevant provisions of the MGA, including s. 687(3) and s. 619(1), (2) and (4), but to do so in the context of the direction of the Court of Appeal. There is very little judicial authority on the interpretation and practical application of s. 619 to guide the Board.
17. The starting point has to be the Court of Appeal Decision. The SDAB is required to approve the development permits to the extent the applications are consistent with and comply with the AUC approval and, in doing so, the hearing is not to address any matters which were already decided by the AUC.
18. In the Court of Appeal Decision, the Court of Appeal confirmed the purpose of s. 619 of the MGA is to reduce regulatory burdens and increase administrative efficiency and consistency. Section 619 achieves this by granting paramountcy to decisions of certain provincial bodies, in order to ensure projects are not blocked at the municipal level for issues already considered and approved at the provincial level.

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19. It is a legislative policy decision to make AUC approvals prevail over planning decisions. The SDAB does not have the ability to disregard this decision.
20. Where the AUC has approved a project that also requires planning approval at the municipal level, the project may not be altered or impeded in any way by the planning authority in respect of matters that have already been addressed by the AUC. The only area where the planning authority retains any discretion is in respect of planning considerations and issues that have not been addressed by the AUC.
21. The AUC's mandate is to consider whether the construction and operation of a project, in this case a wind farm, is in the public interest, having regard to the social and economic effects of the development and the effects of the development on the environment.
22. The AUC has heard many wind farm applications. The AUC's mandate overlaps significantly with the SDAB's responsibility when considering a development permit application to address proper planning considerations such as the orderly, economical, and beneficial use and development of land, and maintenance of the physical environment (s. 617 of the MGA).
23. Many of the issues already considered by the AUC are also proper planning considerations, which would normally be considered by the SDAB, such as the environment, safety, land use, visual impacts, noise and health impacts. Section 619 of the MGA acknowledges and addresses this commonality in review by providing that AUC approval prevails.
24. The Appellants argue the overlap is not complete because the SDAB retains the discretion, or the obligation, when s. 687(3) and s. 619(4) of the MGA are read together, to assess the development permit applications against the local planning documents.
25. The County and Capital Power argue that, in this case, there is complete overlap between the AUC approval and the development permit applications and the SDAB's analysis ends there; there are no matters remaining that the AUC did not consider and the development permit applications are entirely consistent with the AUC Decision.
26. Section 619(2) is clear that the SDAB must approve an application for a development permit if the application is consistent with the AUC approval and must approve the development permit to the extent it complies with the AUC approval. The SDAB cannot deny the development permit for reasons already considered and either rejected or addressed by the AUC.
27. The SDAB does not have the power to amend a statutory plan or LUB and the SDAB does not have the power to determine whether an amendment to the MDP or LUB is required. That is not the issue before the Board on a development permit appeal and was not part of the Court of Appeal's direction concerning the rehearing.
28. The Board accepts the County's argument that in the case of the interplay between s. 687(3) and s. 619 of the MGA, the specific provision overrules the general provision. While in the usual course the SDAB is required by s. 687(3) to comply with the MDP and the LUB, subject only to its variance power, which would require evaluating the development permit applications as against the MDP

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and the LUB, where s. 619 is engaged and there is an AUC approval which overlaps with the development permit applications, the pertinent inquiry becomes consistency and compliance with the AUC approval.

29. The SDAB will only be entitled to consider compliance with the statutory plans and LUB for matters that have not been addressed by the AUC and are not consistent and compliant with the AUC approval. It would be an exercise in futility to assess the development permit applications against the statutory plans and LUB on matters already addressed by the AUC and consistent and compliant with the AUC approval as the SDAB retains no discretion in that regard.
30. Moreover, we note the Court of Appeal expressly directed “the hearing is not to address matters which the SDAB determined were already decided by the AUC”. The Court of Appeal did not include the additional words found in s. 619(4), “as necessary to determine whether an amendment to a statutory plan or land use bylaw is required”. The exception does not apply in this rehearing.
31. For a matter to have been considered by the AUC, it does not require the AUC to have considered all of the evidence or submissions or planning documents the municipality would consider in assessing the planning merits of a project. Adducing new evidence at the SDAB hearing, or making different or novel arguments based on the same evidence at the SDAB hearing, does not mean the AUC did not address the matter at the AUC hearing. This is exactly the duplication of proceedings s. 619 is intended to avoid.
32. The Board acknowledges the AUC’s mandate is significantly broader than that of the SDAB and the SDAB is effectively bound by the AUC being satisfied with the evidence before it. Local planning issues are subsumed in the AUC’s broad jurisdiction.
33. It is also clear the AUC is not required to comply with the local statutory plans and LUB (although the AUC can take them into consideration) and can make decisions that are inconsistent with the local statutory plans and LUB. While planning documents are a relevant consideration for the AUC, they are not binding in the way they would be on the SDAB pursuant to s. 687(3) of the MGA (when s. 619 is not in play).
34. For the foregoing reasons, in assessing the development permit applications in this rehearing, the Board concludes the SDAB’s role is not to assess the development permit applications against the MDP or LUB, but to assess them against the AUC Decision for consistency and compliance. This interpretation is required in order to give effect to s. 619(1).
35. The SDAB will only be entitled to consider compliance with the statutory plans and LUB for matters which have not be addressed by the AUC and are not consistent and compliant with the AUC approval. It would be an exercise in futility to assess the development permit applications against the statutory plans and LUB on matters already addressed by the AUC and consistent and compliant with the AUC approval as the SDAB retains no discretion to refuse them.
36. If the development permit applications are consistent with the AUC approval, the SDAB has to approve the development permit applications.

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37. Can the SDAB approve the development permits and impose more onerous or additional conditions? The Board concludes the SDAB can only impose more onerous or additional conditions if the matter was not dealt with by the AUC and the condition properly addresses an area of inconsistency or non-compliance with the AUC approval which related to proper planning and development considerations.
38. There is no authority for the SDAB to prescribe more onerous or additional conditions where a matter has been addressed by the AUC or which would conflict with the AUC Decision. By precluding a hearing on matters already decided by the AUC, the legislature clearly intended to preclude the municipality from imposing more onerous requirements than the AUC.

Merits Hearing

39. The SDAB heard submissions from counsel for the Appellants, Capital Power and the County, as well as many passionate and articulate Appellants and affected parties.
40. The SDAD heard oral submissions from the following individuals, many of which were also represented by counsel:

Dwayne Felzien
Terry Vockeroth
Brian Perreault
Ronda Fuller
Don Coulthard
Lynn Potter
Doug Potter
Brenda Anderson
Katrina Smith
Gerald Fetaz
Glenn Grenier
Donna Fetaz
Carmen Felzien
Chris Bloomhagan
Ralph Gurnett
Stacy Fuller
Geraldine Coulthard
Barry Jackson
Denice Wiart
Jason Felzien

41. Submissions in favour of the appeals addressed setbacks from the Fetaz's aerodrome as per Transportation Canada TP1247, setbacks from floodplains, setbacks from environmentally significant or sensitive areas, reclamation bonds, impacts on view, impacts on health and safety, impacts on property value, impacts on relationships between neighbours, emergency response, traffic, impacts on wildlife and vegetation, and impacts on groundwater and wells.

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42. Some themes became apparent from the submissions in favour of the appeals. Participants indicated they are not opposed to green energy, wind farms or the project; they simply want to see them done properly, which includes greater setbacks from non-participating residences. Participants felt the County did not heed the will of the people as expressed in the two petitions and did not follow the correct process in adopting a minimum setback distance of 750m instead of 1000m.
43. The Board recognizes submissions were received from participants concerning the project as a whole, including the impacts of wind turbines that are not under appeal. The Board did not take into consideration submissions related to wind turbines that are not under appeal.
44. The Appellants' submissions on the merits of the rehearing can be summarized as follows:
- While the development permit applications are, for the most part, consistent with the AUC Decision, that does not mean the development permit applications do not have to comply with the MDP and LUB.
 - It is the SDAB's task to go through each development permit application to check for consistency with the MDP and LUB. Any areas of inconsistency or non-compliance give the SDAB the power to impose additional or more onerous conditions.
 - Wind turbines are a discretionary use in the LUB, which gives the SDAB far more discretion to impose conditions.
 - The Appellants have identified seven broad areas where the development permit applications are inconsistent with the MDP and LUB: Environmentally Sensitive Areas, floodplains, setbacks from aerodromes, setbacks under the LUB, safety, remediation and bonds, road use.
 - The Appellants' position on the specific conditions sought by the Appellants is set out below.
45. Capital Power's submissions on the merits of the rehearing can be summarized as follows:
- There are no matters which have not already been decided by the AUC and no areas of inconsistency between the development permit applications and the AUC Decision.
 - The Board does not have the authority to change the location of the turbines approved by the AUC; that would be inconsistent with the AUC Decision.
 - The SDAB does not have the power to impose a condition requiring Capital Power or the County to indemnify affected parties in the event of non-compliance with the Development Permits or the AUC approval.
 - Enforcement is the responsibility of the municipality, not the neighbouring landowner. The SDAB has no ability to award costs and that would be essentially a costs award.
 - Capital Power's position on the specific conditions sought by the Appellants is set out below.
46. The County's submissions on the merits of the rehearing can be summarized as follows:
- There are no matters which have not already been decided by the AUC and no areas of inconsistency between the development permit applications and the AUC Decision.
 - The SDAB has no jurisdiction to order costs as the authority to do so must be expressly included in the enabling legislation.

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- Enforcement is in the discretion of the municipality and there is no obligation on municipalities to enforce municipal bylaws. Private citizens have no standing to enforcement of municipal bylaws.
 - Capital Power's commitments were made requirements in para. 323 of the AUC Decision.
 - Petitions cannot operate regarding matters under Part 17 of the MGA; residents have other opportunities for public involvement under Part 17, such as public hearings.
 - The County's position on the specific conditions sought by the Appellants is set out below.
47. Having determined the scope of the hearing as set out above, the SDAB concludes it is required to evaluate the submissions during the merits portion of the rehearing as follows:
- Was the matter raised by the affected party a matter which was already decided by the AUC, as determined by the previous SDAB? If so, the matter was not one which the SDAB could properly address, pursuant to s. 619(4) and the Court of Appeal Decision.
 - If not, was the matter a planning and development matter which demonstrated an inconsistency between the development permit applications and the AUC decision, which ought to be addressed by the SDAB, pursuant to s. 619(2)?
 - And finally, how should the SDAB address the inconsistency, keeping in mind the AUC decision prevails over any development permit decision pursuant to s. 619(1)?

Board's Decision on Merits

48. The following matters raised by the affected parties were considered and decided by the AUC:
- Consultation – paragraph 59
 - Agricultural impacts – paragraphs 69 – 71
 - Impacts on water – paragraphs 90 – 92
 - Impacts in rural residential land use, visual impacts and property values – paragraphs 113 – 117
 - Noise – paragraph 182
 - Health, including lights, noise, shadow flicker, air pressure changes and annoyances – paragraph 226
 - Environmental impacts including migratory birds – paragraphs 242 - 285
 - Safety – paragraph 297
 - Decommissioning and reclamation - paragraph 310.
 - Transport Canada Aerodrome Standards and Recommended Practices (TP312) and the impact of the proposed development on the Fetaz's aerodrome and aerial spraying.
49. As a consequence, the SDAB was precluded from addressing the above matters pursuant to s. 619(4) and the Court of Appeal Decision. Written and oral submissions on the foregoing matters were not taken into consideration by the SDAB.
50. Determining whether a matter has been considered and decided by the AUC does not require a line by line comparison of the evidence presented during the SDAB hearing to the AUC Decision;

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a matter has been decided by the AUC if the topic was the subject of consideration and a conclusion by the AUC, as demonstrated by the AUC record of proceedings and the AUC Decision.

51. Discrepancies in the details does not mean the development permit applications are not consistent with the AUC Decision. Regardless, the Appellants did not demonstrate to the Board any inconsistency between the development permit applications and the AUC Decision.
52. The Board recognizes the very real frustration of the participants with the regulatory framework applicable to wind farms in Alberta. The Board acknowledges this process has gone on for far too long and has pitted neighbour against neighbour. The legislative decision to give the AUC approval process priority over municipal jurisdiction and concerns binds the Board.
53. Concerns about the prevalence given to the AUC hearing, the confusion regarding the LUB amendments regarding setbacks, the County's handling of the petitions, the perceived lack of fair play and public consultation by Capital Power, the confusion over the effect of TP1247 and the development permit appeal process are all genuine concerns. However, these issues are not issues over which the SDAB has the jurisdiction to adjudicate, or issues which are relevant to the Board's limited rehearing.

Conditions

54. The Appellants seek the following additions and amendments to the following conditions (in italics):
 - a. (1) The development meets all setback requirements of the County of Paintearth No. 18 Land Use Bylaw 93-09 ("LUB 593-09"). *If in the opinion of the Development Authority, the setbacks are not sufficient to reduce the impact of a WECS from any road, boundary or dwelling, the Development Authority may increase the requirement from 750m to 1000m from any dwelling on lands not leased for the Halkirk 2 Project.*

Submissions

- i. The Appellants submit the development applications do not comply with the setbacks in the LUB, some turbines are located within Environmentally Significant Areas and some turbines are located within floodplains. The Respondents submit the Board does not have the authority to change the location of turbines approved by the AUC.

Decision

- ii. The Board recognizes that the designation of Environmentally Significant Areas and floodplains varies at the provincial and municipal level. Landowners have their own view of Environmentally Significant Areas and floodplains based on their intimate knowledge of the land. The Board accepts that none of the turbines under appeal are located within Environmentally Sensitive Areas or a floodplain

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as designated by the County in its MDP and LUB and that the AUC was not required to comply in any event.

- iii. Furthermore, the Board does not have the authority to change the location of the turbines approved by the AUC. The location of the turbines is a matter expressly dealt with by the AUC (by longitude and latitude, within 50m) and therefore not to be addressed in this rehearing.
 - iv. In addition, the SDAB is required to approve the development permits applications to the extent they are compliant with the AUC Decision and with respect to location of the turbines, the development permit applications are entirely consistent with the AUC Decision.
 - v. This means that any submissions concerning matters which impact the location of the wind turbines (setbacks, impacts on views, etc.) are not to be addressed in this rehearing and cannot be accommodated by the SDAB. The SDAB cannot move turbines from the locations approved by the AUC.
 - vi. The Board encourages Capital Power to work with non-participating residents with respect to the final location of wind turbines within the 50m area approved by the AUC as such cooperation may go a long way in addressing the concerns of adjacent landowners.
- b. (2) Capital Power obtains and conforms to any necessary Safety Codes Permits and all other *safety requirements as set forth in the County LUB 593-09*.

Submissions

- i. The Appellants submit this additional wording is required in order to address additional safety concerns with respect to the construction and operation of the wind turbines and that Capital Powers development permit applications are deficient with respect to compliance with the LUB.
- ii. The Respondents submit their commitments with respect to providing a detailed safety program will be completed once a contractor has been selected and their commitments to the AUC with respect to safety are sufficient. The additional wording is therefore unnecessary.

Decision

- iii. The project's potential safety and security impacts is a matter on which the AUC received extensive submissions and concluded the safety concerns raised could be sufficiently mitigated by the commitments made by Capital Power. Therefore, the safety and security impacts are not to be addressed in this rehearing. (paras. 297 to 301 of the AUC Decision)

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- iv. In addition, the SDAB is required to approve the development permits applications to the extent they are compliant with the AUC Decision and with respect to safety and security impacts, the development permit applications are consistent with the AUC Decision. The SDAB cannot impose more onerous conditions than the AUC.
- c. (4) The development obtains and conforms to any and all pertinent municipal, provincial, and federal regulations and requirements per Regulation 49 of the LUB 593-09 prior to any construction commencing, *including the recommended 4000m setback for location near an aerodrome as per Transport Canada TP1247E. [plus additional conditions regarding the timing of applications]*

Submissions

- i. The Appellants submit Transportation Canada document TP1247E Aviation – Land Use (“TP1247”) is a regulatory document which requires the imposition of a 4000m setback of turbines from the Fetaz’s aerodrome.
- ii. The Respondents submit the AUC heard submissions regarding the Fetaz’s aerodrome and the effect of TP1247, and dismissed an application for revision and variance to submit additional evidence with respect to the effect of TP1247. With respect to the timing of the applications to federal and provincial authorities, the SDAB does not have the jurisdiction to stipulate timelines to submit application to other agencies.

Decision

- iii. The Board heard extensive evidence on the impact of wind turbines on aerodromes and the effect of TP1247. The Previous SDAB did make specific reference to Mr. Fetaz’s submissions regarding Tower 51 (which is not under appeal) and the specific accommodations the AUC granted.
- iv. The Board is not in a position to determine the effect of TP1247 in the context of overlapping municipal, provincial and federal regulatory schemes. The AUC received extensive submissions on Fetaz’s aerodrome and refused to hear additional submissions on TP1247. The AUC approved the locations of the turbines and no accommodation was made with respect to turbines under appeal. Proximity to aerodromes has been considered. This is not a matter the Board can address.
- v. In any event, the Board does not have the authority to change the location of the turbines approved by the AUC because with respect to the location of the turbines, the development permit applications are entirely consistent with the AUC Decision.

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- vi. With respect to the timing of the applications to federal and provincial agencies, the SDAB does not have the jurisdiction to stipulate timelines to submit application to other agencies and recognizes Capital Power requires these approvals prior to construction in order to proceed with the project.
- d. (5) *The development meets all County land-use requirements as set forth in sections 19(8), 19(10), 32(1), 40, 49, 50 and 54 of the LUB 593-09.*

Submissions

- i. The Applicants submit this condition is required to ensure compliance with the LUB.
- ii. The Respondents submit these conditions are unnecessary or redundant as these provisions have either already been met or deal with the location of the turbines.

Decision

- iii. The Board concludes this condition is not necessary as the development permit applications already complies with the LUB provisions or deals with the location of the turbines.
- iv. In any event, the Board does not have the authority to change the location of the turbines approved by the AUC because with respect to the location of the turbines, the development permit applications are entirely consistent with the AUC Decision.
- e. (6) *The development meets all relevant County natural environment policies as contained in the Municipal Development Plan, particularly section 2.0 thereto.*

Submissions

- i. The Appellants submit a condition requiring compliance with the MDP is required to address environmental and siting concerns.
- ii. The Respondents submit concerns regarding ESA's and the impact on the environment have been addressed by the AUC Decision.

Decision

- iii. The project's potential environmental impacts is a matter on which the AUC received extensive submissions and concluded the projects effects on wetlands, soils, surface water, environmentally sensitive areas, and vegetation could be mitigated to an acceptable degree using Capital Power's proposed mitigation measures. Therefore, the project's potential environmental impacts are not to be addressed in this rehearing. (paras. 239 to 242 of the AUC Decision)

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- iv. In any event, the Board does not have the authority to change the location of the turbines approved by the AUC because with respect to the location of the turbines, the development permit applications are entirely consistent with the AUC Decision.
- f. (8) Capital Power will enter into a Road Utilization and Development Agreement (“RUDA”) with the County of Paintearth prior to commencing construction and further it shall be required to pay a security bond in a sum to be determined by the County prior to the commencement of construction.

Submissions

- i. Capital Power does not oppose the proposed amendment as a security bond is a standard requirement in a Road Utilization and Development Agreement.

Decision

- ii. The Board will amend the condition as requested.
- g. (12) Capital Power successfully applies for and receives development permits for any required storage or stockpiles, sites, material laydown yards, batch plant sites, staging or other areas prior to construction.

Was Condition #6 – not disputed

- h. (13) Capital Power’s procurement process contain methods and means to allow for local corporations to submit and compete for contract work where possible.

Was Condition #7 – not disputed

- i. The Appellants seek the addition of the following conditions related to indemnification:
 - 1. In the event of non-compliance with this condition, the Appellants request that the County and/or Capital Power agree to indemnify them for any costs that may be incurred to seek enforcement of this condition; and
 - 2. In the event Capital Power fails to comply with any of the AUC conditions 8.1 to 8.17 and the Appellants are forced to file a complaint with the AUC, the Appellants request indemnification from the County and/or Capital Power for any costs incurred in connection with Capital Power’s non-compliance.

Submissions

- ii. The Appellants submit the imposition of a condition on Capital Power and/or the County to indemnify the Appellants for costs that may be incurred to ensure

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compliance with the development permit conditions and the AUC Decision, in the event the Appellants believe enforcement is required to ensure compliance.

- iii. The Respondents submit a municipality has no obligation to enforce its own bylaws and approvals and a private citizen has no status to pursue enforcement of municipal bylaws. The Board cannot oblige the County (at threat of indemnification) to enforce its bylaws, development permits or the AUC conditions.

Decision

- iv. To the extent obligations and commitments have been imposed by the AUC, the matter has been decided by the AUC and cannot be addressed by the SDAB.
- v. The Board does not have the authority to impose this condition as it cannot require the County to enforce its bylaws, development permits or the AUC conditions. Enforcement is in the discretion of the municipality.

Conclusion

55. The SDAB upholds the issuance of the following 10 Development Permits under appeal with the same seven conditions imposed by the Municipal Planning Commission:

- No. DP 1715 Turbine T002 affecting the (Legal Description) SE 9-40-15-W4M,
- No. DP 1716 Turbine T003C affecting the (Legal Description) SW 10-40-15-W4M,
- No. DP 1719 Turbine T009A affecting the (Legal Description) NW 3-40-15-W4M,
- No. DP 1724 Turbine T018B affecting (Legal Description) NW 26-39-15-W4M,
- No. DP 1735 Turbine T031B affecting the (Legal Description) NW 11-40-15-W4M,
- No. DP 1743 Turbine T047A affecting the (Legal Description) NE 30-39-14-W4M,
- No. DP 1744 Turbine T049 affecting the (Legal Description) SW 32-39-14-W4M,
- No. DP 1780 Turbine T136A affecting the (Legal Description) SW 10-40-15-W4M,
- No. DP 1780 Turbine T136A affecting the (Legal Description) SW 10-40-15-W4M,
- No. DP 1782 Turbine T142 affecting the (Legal Description) SE 9-40-15-W4M,
- No. DP 1787 Turbine T150 affecting the (Legal Description) SE 31-39-14-W4M

but allows appeal with respect to the following amendment to condition 5:

Capital Power will enter into a Road Utilization and Development Agreement (“RUDA”) with the County of Paintearth prior to commencing construction and further it shall be required to pay a security bond in a sum to be determined by the County prior to the commencement of construction.

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The decision can be appealed to the Court of Appeal on a question of law or jurisdiction. If you wish to appeal this decision you must follow the procedure found in section 688 of the Municipal Government Act which requires an application for leave to appeal to be filed and served within 30 days of this decision.

Dated at Red Deer, in the Province of Alberta this 24 day of July, 2020 and signed by the Chair on behalf of all five panel members who agree that the content of this document adequately reflects the hearing, deliberations and decision of the Board.



Karen Howley, Chair

Regional Subdivision and Development Appeal Board