

**ROCKY VIEW COUNTY
SUBDIVISION AND DEVELOPMENT APPEAL BOARD**

Board Order No.: 2020-SDAB-013

File No.: 04222018 PRDP20201265

Appeal by: Todd Slaney (Horizon Excavating Ltd)

Hearing Dates: 2020 October 28
2020 November 18

Decision Date: 2020 December 03

Board Members: Wendy Metzger, Interim Vice-Chair
Tricia Fehr
Hazel George

DEVELOPMENT APPEAL DECISION

INTRODUCTION

[1] This is an appeal to the Rocky View County Subdivision and Development Appeal Board (the Board) from a decision of the Rocky View County Development Authority issued September 25, 2020. In this decision, the Development Authority refused a development permit application for single-lot regrading and placement of clean topsoil, for agricultural purposes at 272013 Inverlake Road (NE-22-24-27-W4M) (the Lands).

[2] Upon notice being given, this appeal was heard on October 28, 2020 and November 18, 2020 in Council Chambers of Rocky View County's County Hall, located at 262075 Rocky View Point, Rocky View County, Alberta.

DECISION

[3] The appeal is allowed in part and the decision of the Development Authority is overturned. A development permit shall be issued subject to the following conditions:

Description:

1. That single-lot regrading and placement of clean topsoil, for agricultural purposes, over a total area of approximately 54,600 sq. m (13.49 acres) may take place on the Lands, in accordance with the submitted Site Plan, cover report, supporting documents, and conditions of this permit including the following:
 - i. Topsoil depth up to 0.30 metres (1.00 foot)
 - ii. Topsoil volume up to 17,000.00 cubic metres (600,349 cubic feet)

Prior to Issuance:

2. That prior to issuance of this permit, the Applicant/Owner shall submit an Irrevocable Letter of Credit or Refundable Security, in the amount of \$20,000, to be deposited with the County to ensure that conditions of this permit are met. If conditions of this permit are not met, the County may use the funds, enter onto the described land, and carry out the work necessary to meet the conditions.
3. That prior to issuance of this permit, the Applicant/Owner must submit a weed management plan (WMP) that outlines steps to curtail the foxtail on the Lands before and after the clean topsoil is placed. At a minimum, the WMP must
 - i. include a herbicide selective to foxtail that will be sprayed before the clean topsoil is placed;
 - ii. include no ripping up of the surface before the clean topsoil is placed;
 - iii. include which crops will be planted after the clean topsoil is placed; and
 - iv. be approved by the County's Agricultural Services department.
4. That prior to issuance of this permit, the Applicant/Owner shall submit a detailed site-specific Stormwater Implementation Plan (SSIP) for the subject lands, in accordance with County Servicing Standards. The report shall be stamped by a qualified professional and should address the following:
 - i. The report shall include both pre- and post-development site grading in the vicinity of the work, and shall confirm post-development site run-off characteristics;
 - ii. The report shall evaluate possible impacts the proposed placement of topsoil will have on adjacent lands and adjacent County and Provincial road right of ways. The report shall provide mitigating measures, if necessary, for any impacts the work may have on adjacent lands; and
 - iii. The report shall provide erosion and sedimentation control measures for the proposed activities.
5. That prior to issuance of this permit, the Applicant/Owner shall contact County Road Operations with haul details for materials and equipment needed during construction/site development to confirm if Road Use Agreements will be required for any hauling along the County road system and to confirm the presence of County road ban restrictions.
 - i. Written confirmation shall be received from County Road Operations confirming the status of this condition. Any required agreement or permits shall be obtained unless otherwise noted by County Road Operations.
6. That prior to issuance of this permit, the Applicant/Owner shall submit written confirmation that the existing wetlands onsite shall not be impacted by the proposed development, to the satisfaction of the County.
 - i. That should the wetlands be directly impacted by the proposed development, the Applicant/Owner shall submit a Biophysical Impact Assessment (BIA) conducted by a qualified professional that assesses the existing wetland and the impacts as well as provides recommendations on mitigation and compensation measures to address the impacts.

7. That prior to the issuance of this permit, the Applicant/Owner shall submit a construction management plan addressing noise mitigation measures, traffic accommodation, sedimentation and dust control, management of stormwater during construction, erosion and weed control, construction practices, waste management, firefighting procedures, evacuation plan, hazardous material containment and all other relevant construction management details, in accordance with County Servicing Standards.

Permanent:

8. That upon completion of the proposed development, the Applicant/ Owner shall submit an as-built survey, confirming that the development proposal and post grades align with the supporting technical submissions for the file.
9. That for all areas where over 1.20 m (3.93 ft.) of topsoil is placed, the Applicant/Owner shall provide a Deep Fill Report, prepared by a qualified professional, providing the compaction testing of the topsoil and general recommendations for the suitability of different types of building foundations as there is potential that future landowners could construct a structure over the filled area.
10. That the Applicant/Owner shall not screen and/or sell the excess topsoil to others without written approval from the County, as there is potential for additional off-site impacts.
11. That any material removed from the Lands shall be hauled off in a covered trailer/truck, which will prevent blowing of dust/small rocks onto the road or cause issues with other vehicles on the road.
12. That the Applicant/ Owner shall take whatever means necessary to avoid the transfer of dirt onto public roadways.
 - i. That the clean-up of any mud tracking and/or dirt that enters onto adjacent highway and/or County roads during hauling shall be the responsibility and cost of the Applicant/Owner for clean-up.
13. That the Applicant/Owner shall take effective measures to control dust in the regrading area of the Lands, so that dust originating therein shall not cause annoyance or become a nuisance to adjoining property owners and others in the vicinity.
 - i. That if at any time the removal or handling of topsoil creates a visible dust problem, the removal or handling of topsoil shall cease immediately until remedial measures are taken.
14. That the Applicant/Owner shall be responsible for rectifying any adverse effect on adjacent lands from drainage alteration.
15. That any grading areas shall have a minimum of six inches of topsoil placed on top, which shall then be spread and seeded to native vegetation, farm crop, or landscaped, to the satisfaction of the County.
16. That the topsoil shall not contain construction rubble or any hazardous substances, including but not limited to large concrete, rebar, asphalt, building materials, organic materials, or other metal.
17. That the County may draw upon the Letter of Credit, without recourse to the Applicant/Owner, to cover the costs in surface reclamation of any or all of the disturbed

areas or costs involved in actions necessary to ensure compliance with any other conditions of this permit.

18. That the entire Lands shall be maintained in a neat and orderly manner at all times to the satisfaction of the Development Authority.
19. That any plan, technical submission, agreement, matter or understanding submitted and approved as part of the application or in response to a Prior to Issuance condition, shall be implemented and adhered to in perpetuity.

Advisory:

20. That the Applicant/ Owner shall be responsible for onsite weed control and shall adhere to the regulations in the *Alberta Weed Control Act [Statutes of Alberta, 2008 Chapter W-5.1, December 2017]* at all times.
21. That the subject development shall conform to the County's Noise *Bylaw C-5773-2003* in perpetuity.
22. That any other government permits, approvals, or compliances are the sole responsibility of the Applicant/ Owner.
 - i. That the Applicant/Owner shall apply for the required Roadside Development Permit with Alberta Transportation before commencing any work.
23. That the grading activities shall be completed within twelve months from the date of issuance of this permit.
24. That if this Development Permit is not issued by **April 30, 2021** or the approved extension date, then this approval is null and void and the Development Permit shall not be issued.

Note: That the Applicant/ Owner shall be responsible for all Alberta Environment and Parks (AEP) approvals/ compensation for existing waterbodies/ riparian areas/ tributary/ stream on site that may be impacted by the proposed placement of topsoil.

BACKGROUND

[4] On May 26, 2020, Todd Slaney of Horizon Excavating Ltd (the Appellant) submitted a development permit application for a single-lot regrading and placement of clean topsoil, for agricultural purposes (proposed topsoil) on the Lands.

[5] The Lands are 6.41 hectares (15.84 acres) in size and owned by Michael & Dawn Tessemaker (the Owners).

[6] The Lands' land use designation is Agricultural Holdings District (AH) and is regulated in section 46 of the Rocky View County *Land Use Bylaw C-4841-97* (the *Land Use Bylaw*).

[7] On September 25, 2020 the Development Authority refused a development permit application for the proposed topsoil on the Lands.

[8] On September 29, 2020, the Appellant submitted an appeal of the Development Authority's decision to refuse a development permit application for the proposed topsoil on the

Lands. The Development Authority, Appellant, and adjacent landowners were notified of the hearing in accordance with the *Municipal Government Act*, RSA 2000, c M-26 (MGA) and Rocky View County Council policy C-327, *Circulation and Notification Standards*.

[9] On October 28, 2020, the Board opened a hearing at 9:00 am in accordance with the issued notice of hearing and several representatives of the Appellant were in attendance but did not wish to continue the hearing as the Owners were unexpectedly not in attendance. The Board waited 30 minutes for the Owners to appear and then adjourned the meeting to November 18, 2020 to allow for the Owners to appear. The Development Authority did not have any objections to the adjournment request.

[10] When the hearing for this appeal originally opened on October 28, 2020, the Board's composition consisted of five members. The Board was unable to have the same five member composition on November 18, 2020 and therefore the Board sat with three members, as permitted by section 12(2) of the County's *Appeal and Review Panel Bylaw, C-7717-2017*. All three members who sat on November 18, 2020 were sitting when the hearing was originally opened on October 28, 2020.

SUMMARY OF EVIDENCE

[11] The Board heard verbal submissions from:

- (1) Oksana Newmen, Planner, for the Development Authority;
- (2) Sean MacLean, Supervisor Planning and Development, for the Development Authority;
- (3) Jeff Fleischer, Manager of Agricultural and Environmental Services, for the Development Authority;
- (4) Jeanette Lee, Supervisor Engineering Services, for the Development Authority;
- (5) Michael Tessemaker, the Owner;
- (6) Todd Slaney, the Appellant; and
- (7) Kent Knudson, who spoke in support of the appeal.

[12] The documents submitted as exhibits and considered by the Board are listed in the exhibit list at the end of this decision.

Development Authority's submissions

[13] Having been received prior to September 8, 2020, the development permit application for the proposed topsoil was evaluated under *Land Use Bylaw C-4841-97*.

[14] The Lands are developed with a house and accessory building on the northern portion but the majority of the Lands are undeveloped.

[15] The proposal is to place fill to enhance land for farming purposes by placing fill over 13.49 acres. This fill would cover over 54,600 square metres (or 587,709.51 square feet) of land with a depth of up to 0.61 metres (or 2.0 feet). In total, approximately 40,000 cubic metres of fill will be placed on the Lands.

[16] Photographs of the Lands were taken from Highway 9 and show the developed area, existing pond, and the grazing areas.

[17] The development permit application was first presented to the Municipal Planning Commission on July 30, 2020 and was tabled with direction to the Appellant to prepare technical studies (stormwater management and soils evaluation) by September 30, 2020.

[18] The Appellant prepared the soils evaluation which was deemed to be sufficient by the Development Authority. However, the stormwater management report was deemed incomplete.

[19] The development permit application was resubmitted to the Municipal Planning Commission on September 24, 2020. Administration recommended refusal as the depth of soil placement was considered extensive for agricultural purposes.

[20] The Municipal Planning Commission refused the development permit application on and the Development Authority continues to recommend refusal.

[21] The stormwater report has not been submitted. The Development Authority was told the Appellants were waiting on the decision of Rocky View County's Subdivision and Development Appeal Board before spending more money on the report.

[22] The two sets of comments Agricultural Services provided to the Municipal Planning Commission regarding this matter have been provided to the Subdivision and Development Appeal Board on page 7 of the agenda.

[23] The Board was provided the overland drainage plan in page 21 of the agenda.

[24] The Development Authority's engineer reviewing this file did receive the stormwater plan and provided comments but was awaiting revisions before signing off. Email correspondence between the engineer and the Appellant were not provided to the Board.

[25] Foxtail is a difficult species to control and it usually takes multiple processes to get rid of.

[26] As foxtail is an annual weed, it may require mowing, spraying, and perhaps additional soil to control. Anything greater than nine inches of topsoil does not provide agricultural benefits and could actually be counterproductive.

[27] Foxtail will likely be an ongoing issue for the Lands due to the salinity of the soil.

[28] Salt-tolerant crops like alfalfa would do a better job of controlling the foxtail than would topsoil and the grass crops that are present in the pasture. Alfalfa tends to absorb excess water which is part of what causes foxtail to grow.

[29] Mr. Fleischer has not been to the Lands; his knowledge is based on aerial photographs and familiarity with foxtail.

[30] Being an annual weed, the goal in preventing foxtail is to stop it from producing seed. For that reason, mowing or cultivation helps prevent the foxtail.

[31] There are other salt-tolerant crops besides alfalfa that could help with the foxtail issue.

[32] Agricultural Services is available to help provide advice to residents who request assistance controlling weeds.

[33] Roundup can be used on foxtail but it is a tough chemical to use because it is a non-selective herbicide and kills all plants in an area when it is used. Without replacing the destroyed species, the first thing that comes back is the weeds including foxtail. It is recommended that a user of Roundup should also use grass seed.

[34] Kerb 50 is the only product Mr. Fleischer knows that is selective for foxtail, but there may be a new similar product coming out next year.

[35] The proposal identified the fill and the crop placed on the Lands are consistent with what currently exists on the Lands so there will be no change in the imperviousness of the soil to water.

[36] The majority of the water will be retained in the existing pond in the middle of the Lands and most of the water on the eastside of the Lands will be drained into the natural drainage course along Highway 9. Pre-development flow will continue along to the southwest corner of the Lands. Overall, the drainage and overland flow of water would not be impacted from pre-development patterns.

[37] The borrow pit or pond will not be filled in. There is a silt fence around the area.

[38] According to the stormwater management plan provided by the Appellant, two feet of fill will not impact the flow of the water through the waterway that flows from the north to the southeast. There are some remaining questions outstanding but a revised stormwater management report is a condition of the development permit.

[39] The Development Authority is satisfied that the \$20,000 prior-to-issuance clause is sufficient to ensure all conditions of this development permit are satisfied. If there are compliance issues in the future, there are other remediation options for the County to pursue to recoup cost to bring the Lands into compliance.

Mike Tessemaker submissions – the Owner

[40] Mr. Tessemaker hired an agrologist to do an assessment of the Lands. The agrologist's findings were different than the County's. Their assessment found that two feet of topsoil would be more beneficial to the property than nine inches.

[41] Mr. Tessemaker has tried numerous times to mow and spray the foxtail issue but the foxtail spreads. There are areas on the Lands that are low spots where water is retained, encouraging the foxtail to grow, and mowing is prevented.

[42] The proposed topsoil will help with the foxtail problem as it will level the land, preventing the water from gathering and allowing efforts to focus on mowing and spraying rather than trying to keep land dry.

[43] There are a substantial number of alkali areas on the Lands. The two feet of topsoil would be used to level off the Lands in order to give a fresh start on the mowing and spraying.

[44] Plans are in place for a custom seeder to come to the Lands with a mixture of alfalfa and hay to help control the foxtail while providing feed for the horses and goats on the Lands. Allowing only nine inches of topsoil would not allow him to get ahead of the problem of the foxtail and alkali in the soil.

[45] Another issue on the Lands is that the low spots around the barn where the horses are housed freeze in the winter, preventing the horses from being able to get to the barn where the only source of water is. It is hoped that levelling the ground will help make the Lands safer for livestock.

[46] Between what is being sought by the Owner and what the County is proposing, there is only approximately 1 foot of difference in terms of the depth of soil. The two feet will be the maximum to be used in the low areas of the Lands while other areas would only get nine inches.

[47] Mr. Tessemaker wanted to be honest in his application and said he wanted two feet but the intention is not to put two feet of topsoil across the whole Lands. The goal is to level the grounds.

[48] In the past, Mr. Tessemaker has used Roundup a number of times and rough cut mowed it with more Roundup applied afterwards to try to control the foxtail. This does not work because Mr. Tessemaker cannot get into the low spots to mow. Additionally, Mr. Tessemaker tried to use goats this year to get the low spots to control the foxtail. One of the goats ate one of the foxtail heads and lost its voice for the summer.

[49] Mr. Tessemaker estimates the foxtail covers approximately one-third of the Lands and it is growing due to how invasive a weed it is. When the Lands were bought a decade ago the foxtail was not as bad but the problem has really grown.

[50] The goal is to level the Lands in order to get the foxtail under control and prevent it from being spread it to his neighbours without having to constantly spend thousands of dollars on chemicals for spraying.

[51] Mr. Tessemaker's contractor, the Appellant, estimates 2,500 truckloads would be required in order to bring in the topsoil. The topsoil would be coming from a development east of Chestermere and would be similar to what is in place already. The soil would be transported via Highway 9. There would not be any usage of or damage to County roads through the hauling.

[52] Mr. Tessemaker has not spoken with Alberta Environment about the topsoil and its affect on the water on the Lands. The Appellant did have an overland drainage report made which was presented to the County. Administration had some questions about it and asked the Appellant's engineer to follow up but the engineer wanted first to know if the permit was to be approved since the cost of amending the report would be thousands of dollars.

[53] If this application is approved, Mr. Tessemaker and the Appellant will make sure all the drainage and impact on water flow is done properly.

[54] Mr. Tessemaker has not spoken with Alberta Transportation about the highway next to the Lands and the impact the topsoil may have on it.

[55] There is a large dugout on the Lands that was a borrow pit that the Province used for Highway 9 improvements. While Mr. Tessemaker likes the borrow pit as it is a good resource of water for the horses, when the Province put topsoil back into the borrow pit, it caused more problems on the property.

[56] Mr. Tessemaker is amenable to taking less than two feet of topsoil however he knows if he receives permission to bring in two feet of soil it will be 99% successful. If the Board only allowed him to receive nine inches he would take and make an effort to contain the problem.

[57] Mr. Tessemaker does not want to be a landowner who does nothing to solve their problems.

Kent Knudson submissions – in support of the appeal

[58] Mr. Knudson is the contractor working with the Owner to bring the topsoil from a development near Chestermere onto the Lands and provide grading.

[59] Mr. Knudson agrees with Mr. Tessemaker's presentation and feels he covered most of the important points.

[60] It is estimated that approximately 2,500 truckloads, totalling 23,000 cubic metres would be required to bring in two feet of fill. The planned route would be to bring the fill via Highway 1 to Highway 9 to the Lands.

Todd Slaney submissions – the Appellant

[61] Mr. Slaney is the contractor for the proposed topsoil development. The overland drainage report is 99% complete and they are just waiting for approval from the Board. There will be no overland drainage issue and the grading plan in the overland drainage plan. The drainage on the Lands will remain unaffected and there will be no impact on adjacent lands.

[62] As part of their appeal, the Appellant provided a letter from an engineer stating they are satisfied there will not be an impact on the overland drainage by the proposed topsoil.

In rebuttal – Mike Tessemaker

[63] Mr. Tessemaker spoke to the Appellant who plans to use a CAT to rip the foxtail up before placing the proposed topsoil

[64] Mr. Tessemaker feels he had a fair opportunity to present his evidence to the Board.

FINDINGS & REASONS FOR DECISION

[65] Section 10 of *Land Use Bylaw C-8000-2020* states that

All development permit applications received in a complete form prior to the effective date of this bylaw shall be processed based on 'Land Use Bylaw C-4841-97', unless the Applicant requests in writing that the application be processed based on the regulations of this bylaw.

The Board finds that

- a. the development permit application for the proposed topsoil was completed on May 26, 2020;
- b. *Land Use Bylaw C-8000-2020* came into effect on September 8, 2020; and
- c. the Applicant did not provide a written request to the Development Authority to have the development permit application assessed under *Land Use Bylaw C-8000-2020*.

The Board is satisfied that under section 10 of *Land Use Bylaw C-8000-2020* that *Land Use Bylaw C-4841-97* is the correct land use bylaw by which to assess the development permit application for the proposed topsoil.

[66] Having been satisfied that section 10 of *Land Use Bylaw C-8000-2020* is met, the Board meets its duty to determine an appeal based on the land use bylaw in effect as required in section 687(3)(a.3) of the *Municipal Government Act*.

[67] The Board finds that single lot regrading and placement of clean topsoil is a discretionary use in all land use districts in accordance with section 33.6 of the *Land Use Bylaw*.

[68] The Board finds it has the authority to make a decision on this matter pursuant to section 687(3)(d) of the *Municipal Government Act*.

[69] The Board reviewed all evidence and arguments, written and oral, submitted by the parties and focused on the most relevant evidence and arguments in outlining its reasons. The Board also considered the context of the development, sound planning considerations, the merits of the application, and all applicable legislation, plans, and policies.

[70] The Board finds that the proposed topsoil is compatible with the Lands and the surrounding agricultural parcels.

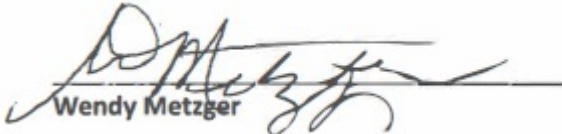
[71] The Board finds that two feet of clean topsoil is counterproductive to agricultural purposes and one foot is the maximum amount of clean topsoil that will provide an agricultural benefit for the foxtail situation occurring on the Lands.

[72] The Board heard evidence that herbicide non-selective to foxtail has previously been used on the Lands and that there are plans to rip up the Lands with a CAT before the proposed topsoil is placed. The Board finds these measures are counterproductive to curtailing foxtail and the Board has issued a prior to issuance condition requiring that a proper weed management plan be approved as a means to reduce the impact of proposed topsoil.

CONCLUSION

[73] For the reasons set out above, the appeal is allowed in part and the decision of the Development Authority is overturned. A development permit shall be issued in accordance with the conditions outlined in this decision.

Dated at Rocky View County, in the Province of Alberta on December 3, 2020.



Wendy Metzger

Interim Vice-Chair
Subdivision and Development Appeal Board

EXHIBIT LIST

Documents presented at the hearing and considered by the Board

NO.	ITEM
1.	Development Authority's Report to the Board – October 28, 2020 (41 pages)
2.	Development Authority's Report to the Board – November 18, 2020 (41 pages)
3.	Development Authority's PowerPoint presentation (6 pages)
4.	Appellant Exhibit #1 (8 pages)