

FILE NO	SDAB 2016-005
CONTRAVENTION:	Unauthorized Developments and Uses on the Lands
APPEAL:	An appeal from stop order dated September 23, 2016 by Dunvegan Gardens (AB) Ltd. Dunvegan Gardens (Fort McMurray) Ltd. Bradley Friesen and Terri Friesen Grandma's Attic Ltd.
LAND USE DESIGNATION:	Small Holdings
LEGAL DESCRIPTION:	Lot 6, Plan 992 0950 Lot 13, Block 1, Plan 062 6798 Lot 14, Block 1, Plan 062 6798 Lot 5, Plan 992 0950
CIVIC ADDRESS:	116 Garden Lane, Fort McMurray Alberta 128 Garden Lane, Fort McMurray, Alberta

S. Soutter, Clerk for the Subdivision and Development Appeal Board  
G. Stewart-Palmer, Shores Jardine LLP, Counsel for the Subdivision and Development Appeal Board

**PRESENT:**

**For the Appellants:**

R. Noce, Q.C., Miller Thompson LLP

S. Hawes, Miller Thompson LLP

B. Friesen, Appellant

**For the Respondent:**

J. Agrios, Q.C., Kennedy Agrios LLP

B. McMurdo, Regional Municipality of Wood Buffalo

C. Booth, Regional Municipality of Wood Buffalo

- [1] This appeal concerns the appeal of a stop order issued by the Regional Municipality of Wood Buffalo (the “Municipality”) on September 23, 2016. The stop order was appealed by Dunvegan Gardens (AB) Ltd., Dunvegan Gardens (Fort McMurray) Ltd., Bradley Friesen and Terri Friesen, and Grandma’s Attic Ltd. (collectively the “Appellants”).
- [2] At the start of the merit hearing, the Chair requested confirmation from all parties in attendance that there was no opposition to the composition of the Board hearing the appeal. None of the persons in attendance had any objection to the members of the Board hearing the appeal.
- [3] At the beginning of the hearing on February 16, 2017, the Board marked the exhibits as set out at the end of this decision. In the course of the hearing, Exhibits 12, 13, 14 and 15 were submitted and marked. There was no objection to the marking of these exhibits.

**Preliminary Hearings – Setting Hearing Dates**

- [4] There were two preliminary hearings in this matter. On November 3, 2016, the Board held a preliminary hearing to set the dates for the hearing. The Board issued a written decision setting a date for the merit hearing in relation to the November 3, 2016 preliminary hearing.
- [5] The Board convened a second preliminary hearing on December 19, 2016 to deal with scheduling following a request for postponement. The Board issued a written decision setting a date for the merit hearing in relation to the December 19, 2016 preliminary hearing.
- [6] This decision deals with the merits of the appeal which was heard in its entirety on February 16, 2017.
- [7] The Board outlined to the parties the process to be followed at the hearing. There was no objection to the process.

**Preliminary Matters on February 16, 2017**

- [8] As a preliminary matter, Mr. Noce advised that the firm representing the Municipality had been involved in drafting a 2011 decision of the Board. That decision was in relation to a stop order appeal by one of the Appellants to this appeal. The Appellants in the current appeal had no objection to counsel for the Municipality continuing to act, despite her firm's previous assistance to the Board. However, the Appellants would object if counsel raised any issue about interpreting the 2011 Board decision.
- [9] Ms. Agrios advised that a lawyer from her office had acted for the Board in 2011 in relation to a stop order concerning Dunvegan Gardens. She contacted counsel for the Board, counsel for the Appellants and Mr. Thorne, who is representing a number of affected neighbors. All advised that they did not have any objection to her appearing for the Municipality. She stated that the Appellants' stipulation was new to her, but that she did not have any concerns with that stipulation.
- [10] As a second preliminary matter, Mr. Noce placed an objection on the record that neither of the two individuals who would be speaking for the Municipality (Mr. McMurdo or Mr. Booth) were on site on July 11 or July 13, 2016 and neither were authors of the stop order. The Appellants objected to their evidence on the basis they have no personal knowledge about what was done in relation to the inspection or the issuance of the stop order. The Appellants' written submissions contained the following objections:
- a. The lack of reports or notes from the site inspection. The Appellants objected to the Municipality's evidence and submitted that the Board should place no weight on the Municipality's evidence because there was no report or notes taken in the site inspection;
  - b. The stop order was not created contemporaneously with the inspections. The Appellants argued that the Board should place no weight on the stop order because it was not created contemporaneously with the inspections;
  - c. The stop order does not identify where the alleged breaches occurred. The Appellants argued it was vague and uncertain and the Board should overturn it on this basis.
- [11] Ms. Agrios responded that the Board can accept hearsay evidence and decide what weight to put on that evidence. One of the two employees who did the site inspection and issued to the stop order is no longer with the Municipality and the other is on short term disability leave.

**SUMMARY OF EVIDENCE AND ARGUMENT:**

- [12] The following is a brief summary of the oral and written evidence presented to the Board.

### Municipality

[13] The Municipality urged the Board to remember that this was a stop order appeal and not an appeal related to the refusal of a development permit. The authority for issuing a stop order is section 645 of the MGA. A stop order can be issued for a development not in accordance with the MGA, the Land Use Bylaw or the conditions of the development permit. Under both the MGA and the Land Use Bylaw, development requires a permit, with only limited exceptions. In July of 2016, the Municipality did two inspections. There were a number of developments without development permits, so the stop order was issued. There are seven items that the Municipality identified as developments without permits:

1. Unauthorized commercial landscaping;
2. Unauthorized commercial landscaping material stockpiling;
3. Unauthorized retaining walls;
4. Unauthorized sale of goods;
5. Unauthorized farm animals;
6. Unauthorized park; and
7. Unauthorized electrical panels.

[14] On behalf of the Municipality, Mr. McMurdo went through each item.

### Unauthorized Commercial Landscaping

[15] Mr. McMurdo referenced the July 13, 2016 photographs 8, 25 and 27 and photographs 70, 75 and 77 as evidence in support of the stop order. He stated that the 2011 decision of the Board provided a list of equipment allowed to remain on site. The photographs he identified showed landscaping (a Contractor General Use) and equipment which was not authorized by the previous Board decision.

### Unauthorized Commercial Landscaping Material Stockpiling

[16] The Appellants have multiple bins of different materials used for commercial pursuits as identified in the photographs. In 2014, the Board granted a development permit for Intensive Agriculture -Sod Farm and Tree Farm, but stockpiling was not permitted as part of that decision.

### Unauthorized Retaining Wall

[17] The bins in which the stockpiled materials are contained have been defined by the Municipality as a retaining wall. Anything over one metre requires an engineering report. Although no development permit is required, anything over one metre in height is subject to a Safety Code review. These are shown in the July 13, 2016 photographs #3, 5, 8, 12, 25, and 27.

#### Unauthorized Sale of Goods

- [18] The July 13, 2016 photographs 29, 30, 33, 35 and 37 to 44 show the sale of goods. The only retail that is approved is that of a market garden to be used for the selling of fruits and vegetables. Mr. McMurdo stated that the photographs show the sale of various objects including children's toys, candies, etc. which are not within the scope of permitted sales for market gardens.

#### Unauthorized Farm Animals

- [19] Mr. McMurdo referenced the July 13, 2016 photographs 1, 12 and 34-36, showing various animals on site which do not have approval.

#### Unauthorized Park

- [20] The Appellants submitted an application for a park in July 2016. The information submitted included requests for approval for picnic tables, tether balls, croquet, and snow-shoeing in the winter. Also included was a pedal bike track and a jumping pillow. Mr. McMurdo referenced the July 13, 2016 photographs 10, 13, 14, 17, 19, 20, and 21. The development permit application had deficiencies which have not been remedied to date.

#### Unauthorized Electrical Panels

- [21] Mr. McMurdo stated that the Appellants have indicated the unauthorized electrical panels have been removed, but the Municipality has not had an opportunity to inspect them.
- [22] In response to questions from the Board, Mr. McMurdo could not specifically identify what products are in the bins, but stated generally that there was road crush, gravel, aggregate, mulch, top soil and a variety of landscaping materials. Mr. McMurdo confirmed that he had not taken any measurements of the walls but believed that they were in excess of one metre.
- [23] Mr. McMurdo had no listing of the number of animals on site, but confirmed that the animals were on 116 Garden Lane and 128 Garden Lane.
- [24] Mr. McMurdo could not comment as to whether the bins were those as approved by the Municipality following the 2011 inspection referenced in Exhibit 9, Mr. Thorne's materials at page 956. Mr. McMurdo confirmed that the Municipality had not done any lateral load measurements for the retaining walls.
- [25] Mr. McMurdo was not certain whether the goods identified were being stored or were for sale. He did not have the listing of deficiencies for the development permit application for the park.
- [26] Mr. McMurdo provided a list of permits which have been approved for the subject properties, of which the most relevant ones are:
- a. 2006 development permit (2006-0140) for an accessory building (greenhouse);

- b. 2008 development permit (2008-138R) for an accessory building (greenhouse);
- c. 2011 development permit for an accessory building; and
- d. 2014 development permit (2014-018) approved by the Board for Intensive Agriculture - Sod Farm and Tree Farm).

[27] In addition, there were various permits for special events including an Easter Egg Hunt.

#### Municipality's Summary

- [28] Many of the submissions by the individuals were not relevant. The sole question before the Board is whether there are unauthorized uses which are those without development permits. The Appellants did not dispute the accuracy of the photographs submitted by the Municipality. The Board heard from Mr. Friesen's customers and neighbors. Their statements support the fact that there are ongoing developments which the Municipality submits are operating without permits. Commercial landscaping is ongoing on the site. The Municipality referenced the difference in operations between the Prairie Creek Laydown Yard (Exhibit 14) and the size of the operations at 128 Garden Lane (Exhibit 15).
- [29] The Municipality urged the Board to review the photographs provided in support of the stop order, in addition to the evidence from the Appellants' customers and employees as found in the Appellants' rebuttal materials. Those letters reference buying trees and shrubs, which is what occurs in a landscaping business. In 2011, the Board confirmed there was to be no stockpiling on site, although the photographs show evidence of stock piles.
- [30] The question of whether permits could be issued is a separate issue from whether there were permits in place at the time of the issuance of the stop order. Although there was evidence of a haul permit being issued, there was no development permit for stockpiling. The bins, whether they are retaining walls or not, are a development requiring a permit. The retail use is not approved. There is no approval for a Greenhouse which is a separate use class under the Land Use Bylaw. The Appellants cannot obtain a permit for a Greenhouse use because it is neither a permitted nor discretionary use in the Small Holdings District.
- [31] The three development permits issued are for accessory building - greenhouse, and are not for a greenhouse use. The 2006 development permit (2006-0140) restricts what is to occur to the production of bedding plants, nursery and vegetables. The 2008 permit (2008-138R) is also for a greenhouse building and not the use of Greenhouse. Although the Appellants referred to the letter at page 128 of their submissions (exhibit 8, Appellants' materials), this letter was not stamped as approved by the Municipality. It is not part of the Municipality's approval.
- [32] Estoppel does not apply where someone carries on a use without enforcement or a development permit. Just because the Appellants have been allowed to operate without a development permit for some time does not mean they are allowed to keep going nor does this engage the principles of estoppel.
- [33] The Municipality confirmed that bee-keeping is not part of the stop order. The Municipality is not trying to stop legal uses on the property. The legal market garden and the legal Intensive

Agriculture -Sod Farm and Tree Farm can continue. This stop order has nothing to do with whether the Appellants are a good or bad business or a good citizen. The question is whether they have permits. There is evidence of unauthorized developments on the site.

- [34] The Municipality argues that the Appellants have a “General Retail Store” use, and are selling products other than those permitted under the approved development permits. The Municipality’s position is that the Appellants are selling more than locally grown vegetables and fruits and that Development Permit 2006-0140 permits only the sale of “Bedding Plants, Nursery and Vegetables”. The evidence submitted by the Appellants as part of their rebuttal includes customer information which confirms that there is a landscaping business occurring and that there are general retail items on sale at the store. That evidence also confirms that there are animals on site that the customers visit and that there is a park and other amenities available for the customers. The evidence supports the fact that what is occurring on the site is a garden centre, which is beyond the scope of what has been approved as a market garden. The Municipality urged the Board to uphold the stop order.

#### Appellants

- [35] The Appellants stated that the definition of Small Holdings is relevant as it will characterize what is appropriate in the area.
- [36] The Appellants argued that the Municipality knew about the uses for a significant period of time and did nothing about it. Further, the Municipality failed to provide a full report. Although the Municipality had suggested that the Board can draw reasonable inferences from the photographs, without notes or details of what was inspected on site, the photographs are of little weight. The Appellants argued that the Municipality presented no evidence to support its position. The Municipality had no evidence of:
- a. the height of the retaining walls;
  - b. the pressures on the lateral walls; and
  - c. what items were for sale.
- [37] The Appellants argued that it took two to three months from the inspection to the issuance of the stop order. Since the individuals who did the site inspection were not called by the Municipality, it is possible that Mr. Friesen may have provided an explanation and the inspectors had approved what was on site. No details were linked to the stop order. The Appellants argued that the stop order is vague and uncertain because there is no connection in time and no reliability because there are no notes to support this stop order.
- [38] The Appellants stated that there is no commercial landscaping operating on site. The Appellants would have no objection if the SDAB wishes to uphold this element of the stop order. All of the uses relate to the Market Garden and the equipment on site has been approved by the Municipality. If the Municipality wants to inspect it, it can.
- [39] The same position goes for the material stockpiling. Any stockpiling on site is for the Market Garden. The photographs showing the bulk bins are related to the Market Garden. If the Board

wants to indicate that there can be no commercial stockpiling, the Appellants had no objection to that position.

- [40] The Appellants' position is that what the Municipality characterizes as "retaining walls" are bins. The Municipality has presented no evidence of the height of the bins. The Appellants disagreed with the position of the Municipality that the Board could look at the height of the bins and the height of the equipment and draw a conclusion that it was more than one metre. The Appellants argued that there was no evidence to support the conclusion. Moreover, the Appellants took the position that the bins were the same ones as approved in 2011 and 2012 by the Municipality as part of the "vehicles and equipment ... necessary to the operation of the Market Garden" (see Exhibit 8, Appellants' materials, page 116 and 191, and Exhibit 9, Mr. Thorne's materials pages 952, 954 and 956). In 2011, the issue of commercial landscaping was before the Board. The Municipality's report to the SDAB properly identified that the Appellants were operating a garden centre greenhouse and the Municipality is estopped from saying otherwise. (see Exhibit 9, Mr. Thorne's materials, page 180)
- [41] In regard to the animals, the Appellants take the position that under the Small Holdings District, the Appellants are allowed to have animals on site. Further, there is no specific evidence as to the nature and number of animals on site. The Municipality failed to establish what or where the breach is. Further the Land Use Bylaw allows for the use. The Board must make a decision whether there is sufficient evidence to establish the breach or whether the zoning permits the use.
- [42] In regard to the park, the Appellants argued that there is no evidence about an improper use. The Appellants recognize that they need a permit and have submitted an application. The Municipality has not told the Appellants what the deficiencies are. Although there is no permit for a park, the Appellants can operate a park-like atmosphere without charging a fee.
- [43] The Appellants provided argument in relation to the legal principle of estoppel. They argued that the Municipality is estopped from raising any allegation in regard to a breach. The Appellants argued that the Municipality has been aware of the uses for some time. The Municipality's knowledge prevents it from later saying that there is a breach. The Appellants argued that the legal principle of estoppel applies to:
- a. The retaining wall and storage bins. These are the same bins which are identified in 2012 and approved by the Municipality in 2011 and 2012.
  - b. This also applies to the sale of goods, which has been ongoing for several years.



- [44] The Appellants' position is that everything on site is in compliance with the permits issued as well as with the Land Use Bylaw and statutory plans of the Municipality. The Appellants urge the Board to reject the stop order on the basis of the Municipality's poor handling of the procedural manners in relation to the stop order. The fact that the stop order affects the Appellants' livelihood means that the Board should not be relying upon inference to make a determination of breach. Due to the procedural failings, including the failures in the inspection process and the failure to provide relevant evidence, means that the elements of the stop order should not be upheld.
- [45] Mr. Friesen stated that other garden centres, including Greenland, Lawlish and Kuhlmanns, all in the Edmonton area, are all similar, but that he pays more taxes than they do. He stated that he had a 15,000 person petition in support of letting him stay where he is located. He did not have a copy of the entire petition with him, but in response to a Board request, he indicated he would provide it. In relation to the petition, the Municipality had no objection to the Board accepting a copy of the petition but argued that it was not relevant. Mr. Friesen added that he had maintained Garden Lane, a public road, for a period of time.
- [46] In response to questions, Mr. Friesen confirmed that he had not appealed the Board's 2011 decision in relation to the Intensive Agriculture -Sod Farm and Tree Farm development permit. Mr. Friesen also confirmed that they were not disputing the accuracy of the photographs which had been submitted by the Municipality.
- [47] He confirmed that there were eleven bins on site but he did not have the dimensions or the height. He indicated that all of the animals on site are registered with the Municipality. This includes the chicken, sheep, pigs, and rabbits. He takes in birds that people do not want. He also has fish inside the shop. Mr. Friesen stated that he does not operate a petting zoo. He stated that if school groups come, they can interact with the animals.
- [48] He confirmed that there is no development permit for the park. He confirmed that the July 13, 2016 photographs 21 and 23 show a jumping pillow. Mr. Friesen confirmed that there are approximately 6-8 pedal bikes on the property. He also confirmed that there are goods other than fruits and vegetables for sale at the store. Mr. Friesen confirmed that there was no significant change in his operations between July 2016, and September 2016.
- [49] In response to Board questions, Mr. Friesen indicated that he sells eggs from the chickens on site, which is typical of a market garden. He does not charge for petting the animals. Mr. Friesen stated that he has installed no permanent structures for the park. The Appellants' position is that it has no issue with respect to the commercial landscaping or the materials stockpiling because it is not undertaking those operations. Its position is that it had approval from 2011 and 2012 regarding the storage bins which were allowed, and are attached to the market garden. The sale of goods is attached to the greenhouse use which is part of the accessory building (greenhouse) development permit. The Appellants' position is that they asked for a larger greenhouse and for the related sales (see Page 126 of its materials).

- [50] The Appellants confirmed it has no permit for the park, although an application has been submitted and is presently in the process of being reviewed. The electrical panels have been removed and the Municipality is able to inspect.
- [51] Mr. Friesen stated that he had ten to twelve people employed on the two properties during peak season and five people during off-peak season.
- [52] Mr. Friesen was not certain whether his rebuttal materials came from employees or customers of Dunvegan Gardens.

#### Appellants' Summary

- [53] The Appellants argued that the Municipality cannot both object to the evidence of the individuals who spoke before the Board, and then rely upon it. The Board must determine if they accept the statements put in by those who spoke in favour of the appeal. Lay people do not always accurately describe developments. The temporary employees who work off-site are working on locations at job sites and not at the Dunvegan Gardens' site.
- [54] There has been a greenhouse use in place since the 1970s. Issue estoppel does exist and the criteria have been satisfied. The Municipality is trying to collaterally attack previous decisions. Intensive Agriculture is a discretionary use and permits greenhouses. The fact that the greenhouse has been in place since the 1970s raises issue estoppel.
- [55] In regard to the retaining walls, they were approved since 2011 and 2012 and they cannot be attacked at this time. The question of the intention of the Small Holdings District has never been answered by the Board and this may be a time where the Board may want to make that decision. It needs to be answered to deal with the question of the animals on site.

#### Those Speaking in Favour of the Appeal

- [56] The Board heard from persons speaking in favour of the appeal. After the first speaker, the Municipality objected to the evidence on the basis that the speaker was not affected. Due to the large number of registered speakers, the Board decided that rather than caucus after each speaker to determine their status as affected or not, it would hear the evidence from the various speakers who had registered to present to the Board. The Board, in its written decision, would identify whether the speakers were affected parties and whether the Board would be considering their evidence. If the Board determined that the speaker was not affected, it would not consider the evidence.

#### Joel Beatson

- [57] Mr. Beatson is a member of the Alberta Greenhouse Growers Association as well as Landscape Alberta. He supported the Appellants because the cessation of operations by Dunvegan Gardens would affect their (Association) membership. He stated that there is no definition for garden centre and that all garden centres grow plants and have retail operations. Giftware sales are key and product lines expand.

Jason Kachur

- [58] Mr. Kachur raises bees on the Appellants' lands. He is the only commercial beekeeper in the Municipality. He currently has 16 hives on the land. He legally sells the honey and beeswax candles from his operations. Without Dunvegan Gardens, he would have to exterminate approximately one million bees and his business.

Frances Jean

- [59] Ms. Jean is a customer of Dunvegan Gardens and they are a customer of her business. There are inconsistencies in the information provided by the Municipality. She questioned why the Municipality would tax the Appellants if they are operating an illegal business and why the Municipality would contract with them.

Chris Diprose

- [60] Mr. Diprose is an employee of Dunvegan Gardens who would be unemployed if the business were shut down. Dunvegan Gardens employs 24 full time workers and 100 seasonal workers. The greenhouse is one operation and the landscaping is another.

William Leonard

- [61] Mr. Leonard is an employee of Dunvegan Gardens. If it closes he will lose his job. Dunvegan Gardens provides information about what being on a farm is like.

Rick Kirschner

- [62] Mr. Kirschner is the executive director of a charity with KAOS Radio who works in partnership with Dunvegan Gardens. Mr. Kirschner spoke about the social good demonstrated by Dunvegan Gardens.

Michael Bayot

- [63] Mr. Bayot is an employee of Dunvegan Gardens. He provided an overview of the history of the operations of Dunvegan Gardens and spoke of other greenhouse operations in Alberta.

Phil Osborne

- [64] Mr. Osborne has known both the Friesens and the Thornes for several years. He was in favour of there being a resolution to this problem.

Gord Gallant

- [65] Mr. Gallant is a supplier to Dunvegan Gardens. He lives in St. Albert and sells retail goods to garden centres including Dunvegan Gardens. If Dunvegan Gardens is shut down, it will affect his income. He sells approximately \$25,000 to \$30,000 of goods to Dunvegan Gardens.

Tanya Brittain

- [66] Ms. Brittain runs a local preschool. She takes her students on field trips to Dunvegan Gardens for the corn maze, and other events.

Tony Piche

- [67] Mr. Piche lives in Draper. He supports Dunvegan Gardens and shops there. He is unhappy with the Municipality.

Dave Friesen

- [68] Mr. Friesen is Mr. Brad Friesen's uncle. He spoke in favour of the operation and shared the family's experience creating its operations.

Ramona Morrison

- [69] Ms. Morrison partners with Brad Friesen in fundraising for various activities. She would like the matter resolved.

Scott Fry

- [70] Mr. Fry is an employee of Dunvegan Gardens who will lose his job if Dunvegan Gardens ceases operations. Dunvegan Gardens did road maintenance on Garden Lane in the mid 2000s.

Hayley Russell

- [71] Ms. Russell and her father work at Dunvegan Gardens. If Dunvegan Gardens ceases operations, they will lose their jobs and her dad won't be able to support their family.

Mohammad Dogar

- [72] Mr. Dogar is a community worker who supports Dunvegan Gardens.

Gus Gianis

- [73] Mr. Gianis is a long term customer. He spoke in favour of the work that Dunvegan Gardens had done for him with regard to lawn maintenance.

Victor Hawes

- [74] Mr. Hawes lives on Riverbend Close. It was nice to go to Dunvegan Gardens to see the animals in a natural environment.

Frank Creasey

- [75] Mr. Creasey is a member of Fort McMurray Tourism. He supports Dunvegan Gardens as Dunvegan Gardens has positive tourism qualities.

Jim Rogers

- [76] Mr. Rogers stated he lives in Draper and is the president of the Waterways Residents' Association. He supports Dunvegan Gardens.

**Those speaking against the appeal**

Andrew Thorne

- [77] Mr. Thorne lives adjacent to one of the properties which is the subject of the stop order. He spoke on behalf of those individuals set out in Exhibit 3.
- [78] The Small Holdings District is a residential district which allows market gardens but does not allow a garden centre, which is a retail industrial use. The Board decision in 2011 required all on-site equipment to be used for a market garden. Any other equipment was to be removed from the site (see Exhibit 9, Mr. Thorne's materials, pages 172, 184). The market garden approval allows only the sale of fruits and vegetables but not a garden centre. He referred the Board to the approximately 1,800 photographs in his materials (Exhibit 9, Mr. Thorne's materials). He stated that dump trucks are constantly coming and going on Garden Lane which creates a nuisance. He argued that the petition is irrelevant to the question before the Board.
- [79] The bins have no business being on the list because they are not used to grow fruits and vegetables (see Exhibit 9, Mr. Thorne's materials page 158). In response to the argument about estoppel, the case found on page 981 of his materials (*Black Diamond (Town) v. 1058671 Alberta Ltd. Inc.*, 2015 ABCA 169) sets out the test for estoppel.
- [80] On questioning he confirmed that some of the photographs he has submitted are from 2016 and that all are dated.

**DECISION**

- [81] The Board makes the following decision in regard to the stop order.
- [82] The Board revokes items 1, 2 and 3 of the stop order: Unauthorized Commercial Landscaping, Unauthorized Commercial Landscaping and Materials Stockpiling and Unauthorized Retaining Wall.

- [83] The Board confirms item 4 of the stop order - Unauthorized Sale of Goods, but varies the time set out at page 5 of the stop order as follows. The Appellants have one year from the date of this decision to obtain a development permit to permit the General Retail Store, which will require a rezoning. If the Appellants do not obtain a development permit within the time specified in this paragraph, they are to cease the sale of any unauthorized goods and remove those goods from being available for sale at the end of the one year period.
- [84] The Board confirms item 5 of the stop order order – Unauthorized Farm Animals, but varies it as follows. To the extent that the animals are licensed by the Municipality, the stop order is cancelled in relation to those animals. The Appellants are able to keep those animals licensed by the Municipality without a development permit. For those animals which are licensed, the Appellants must not use them for commercial purposes, which means that they cannot sell eggs or other by-products of the animals, nor can the Appellants charge to see the animals. The stop order continues to apply to any animal not licensed with the Municipality. The stop order is varied to specifically exclude the fish and the bees on site from the provisions of the stop order.
- [85] The Board confirms item 6 of the stop order – Unauthorized Park, but varies the time set out at page 5 of the stop order as follows. The Appellants must obtain a development permit for the park within three months from the date of the decision. If the Appellants do not obtain a development permit within the time specified in this paragraph, they are to remove those features at the end of the three month period. The Appellants must cease the use of the park until they have obtained a development permit.
- [86] The Board confirms item 7 of the stop order – Unauthorized Electrical Panels. The Board directs that the Municipality has two weeks from the date of issuance of this decision to inspect the site to ensure that the electrical panels have been removed.

### **FINDINGS OF FACT**

- [87] The Board makes the following findings of fact.
- [88] The following speakers are affected by the stop order:
- a. Jason Kachur;
  - b. Chris Diprose;
  - c. William Leonard;
  - d. Michael Bayot;
  - e. Scott Fry;
  - f. Hayley Russell; and
  - g. Andrew Thorne.

- [89] The following speakers are not affected by the stop order:

- a. Joel Beatson;
- b. Frances Jean;
- c. Rick Kirschner;
- d. Phil Osborne;
- e. Gord Gallant;
- f. Tanya Brittain;
- g. Tony Piche;
- h. Dave Friesen;
- i. Ramona Morrison;
- j. Mohammad Dogar;
- k. Gus Gianis;
- l. Victor Hawes;
- m. Frank Creasey; and
- n. Jim Rogers.

- [90] Mr. McMurdo's oral evidence, the stop order and the Municipality's supporting photographs are relevant to the issues before the Board.
- [91] The Municipality has not established that there is unauthorized commercial landscaping, unauthorized commercial landscaping materials stockpiling or unauthorized retaining walls.
- [92] The Appellants have animals on the site. As of the date of the hearing, the Appellants do not have a development permit for the "keeping of animals".
- [93] The Appellants have a park development on the site. As of the date of the hearing, the Appellants do not have a development permit for the park.
- [94] The Appellants are selling general retail goods, including children's toys, candy, knick-knacks, etc. on the site. The sale of these goods goes beyond the approved uses of bedding plants, nursery, vegetables and fruits.

### **REASONS FOR THE DECISION:**

#### **Preliminary matters**

- [95] The Board heard the Appellants' preliminary arguments in relation to the Municipality's evidence. The Appellants had the following objections:
  - a. the Board should not hear from the Municipality because Mr. McMurdo did not conduct the site inspection;
  - b. the Board should place no weight upon the evidence because there was no report or notes taken in the site inspection; and
  - c. the Board should place no weight on the stop order because it was not created contemporaneously with the inspection;

- d. the Board should overturn the stop order because it does not identify where the alleged breaches occurred.

#### Objection 1

- [96] Mr. Noce placed an objection on the record that neither of the two individuals who would be speaking for the Municipality (Mr. McMurdo or Mr. Booth) was on site on July 11 or July 13, 2016 and neither were authors of the stop order. The Appellants objected to their evidence on the basis they have no personal knowledge about what was done in relation to the inspection or the issuance of the stop order. Ms. Agrios responded that the Board can accept hearsay evidence and decide what weight to put on that evidence. One of the two employees who did the site inspection and issued the stop order is no longer with the Municipality and the other is on short term disability leave.
- [97] Section 629 of the MGA permits the Board to accept any evidence it considers proper, whether admissible in a court or not, and the Board is not bound by the laws of evidence. The Board finds that the evidence given by Mr. McMurdo is relevant to the issues before this Board. Moreover, his evidence was supported by the Municipality's photographs. The Appellants did not take issue with the accuracy of the photographs.
- [98] The Board accepts the evidence of Mr. McMurdo as relevant, although he did not conduct the site inspection.

#### Objection 2

- [99] The Appellants' written materials included an objection to the Board accepting the Municipality's materials because there were no notes or report of the inspections. Although Mr. Noce stated that there may have been a conversation between the municipal inspectors and Mr. Friesen, when Mr. Friesen gave evidence, he did not indicate that there had been any such discussions. The Board is not bound by the strict rules of evidence and finds the stop order and the Municipality's supporting photographs relevant to the issues before the Board. The Appellants were able to test the evidence by questioning the municipal representatives on the evidence.
- [100] The Board finds that this meets the obligation of procedural fairness and accepts this evidence.



### Objection 3

- [101] The Appellants' written materials included an objection to the Board placing weight on the stop order because it was not created contemporaneously with the inspection. During the hearing, Mr. Friesen was asked if there had been any change in his property between the date of the inspection and the date of the stop order. He confirmed that there was none. In light of this statement, the Board does not accept this objection to putting weight on the stop order.

### Objection 4

- [102] The Appellants' written materials included an objection to the Board placing weight on the stop order because it does not identify where the alleged breaches occurred. The Board notes that the Municipality's written submissions included maps identifying where the impugned activities were occurring. During the hearing, those providing evidence did not have any question about where the activities were being carried out. The Board was able to identify, using both the oral testimony and the written submissions, where the activities were being carried out.
- [103] Therefore, the Board does not accept this objection to putting weight on the stop order.

### **Analysis**

- [104] The Board notes that its jurisdiction is found in section 687(3) of the MGA. In making this decision, the Board has examined the provisions of the Municipality's Municipal Development Plan and the Highway 69/Clearwater Valley Area Structure Plan. The Board notes that the Draper Area Structure Plan is not yet approved. As a result, the Board has not considered its terms, as they are not yet in force. The Board has examined the provisions of the statutory plans submitted by the parties but note that they are silent on the issue of whether the impugned uses are occurring on the site, or whether the Appellants have development approval for those uses. As a result, the Board has given them little weight in its deliberations.
- [105] The Board has also considered the oral and written submissions made by the Appellants, the Development Authority and the persons who have made oral submissions and were found to be affected, as set out below.

### **Who Is Affected?**

- [106] The Board is aware that under section 687(1)(d), the Board must hear from persons affected by the order. The Board heard from a number of speakers and the Municipality raised an objection to their evidence being accepted by the Board on the basis that they were not affected. The Municipality did not object to the evidence of Mr. Kachur, who raises bees on 116 Garden Lane.

[107] Due to the challenge to the status of the speakers raised by the Municipality, the Board must first determine whether the speakers are affected, and if so, which ones.

[108] The Board finds that the following speakers are affected by the stop order:

- a. Jason Kachur;
- b. Chris Deprose;
- c. William Leornard;
- d. Michael Bayot;
- e. Scott Fry;
- f. Hayley Russell; and
- g. Andrew Thorne.

**Speakers (a) through (f) from paragraph 91**

[109] The Board finds that the speakers set out in paragraph [108] (b) to (f) are affected persons because they are employees of the Appellants. If the Appellants cease operations or change operations significantly as a result of the stop order, these speakers will lose their jobs. The Board finds that this makes them affected by the stop order. The Board received their evidence and considered it during its deliberations. The Board finds Mr. Kachur affected because he has his bees on the site and therefore is directly affected by item 5 of the stop order.

**Speaker (g) from paragraph 91**

[110] Mr. Thorne lives adjacent to one of the properties which is the subject of the stop order. Under section 687(1)(c), the Board must hear from any other person who was given notice of the hearing and who wishes to be heard, or a person acting on behalf of that person. The Board finds that Mr. Thorne falls under the provisions of section 687(1)(c). The Board also finds Mr. Thorne affected as he lives adjacent to the properties where impugned activities are occurring. The Board considered Mr. Thorne's submissions during its deliberations. Mr. Thorne's comments were also made on behalf of other landowners in the vicinity. The Board accepts his comments on their behalf as well.

**All Other Speakers**

[111] The Board finds the following speakers are not affected by the stop order:

- a. Joel Beatson;
- b. Frances Jean;
- c. Rick Kirschner;
- d. Phil Osborne;
- e. Gord Gallant;
- f. Tanya Brittain;
- g. Tony Piche;
- h. Dave Friesen;

- i. Ramona Morrison;
- j. Mohammad Dogar;
- k. Gus Gianis;
- l. Victor Hawes;
- m. Frank Creasey; and
- n. Jim Rogers.

[112] The Board thanks these people for their interest in the hearing and for taking the time to come to the hearing and to speak at the hearing. However, the Board finds that the speakers referenced in paragraph [111] do not have a sufficient connection to the site or to the impugned activities to make them affected. Therefore, the Board did not take their comments into consideration during its deliberations.

### **Merits of the Appeal**

[113] The Appellants appeal the stop order issued by the Municipality on September 23, 2016 in relation to seven activities which the Municipality claims are developments without permits. The Board will address them individually.

#### **1. Unauthorized Commercial Landscaping**

[114] The Municipality argued that photographs 8, 25 and 27 from July 13, 2016 show a number of bins with various materials including mulch, soil, landscaping materials which illustrate the commercial application of the material. Photographs 70, 75, 77 and 79 from July 13, 2016 show significant packaged materials stored and sold on the premises. The Municipality argued the photographs were evidence of Contactor General use, which is not a discretionary use in the Small Holdings district. In 2011, the Municipality issued a stop order, which the SDAB upheld. Through the SDAB decision, the Municipality was able to go onto the site and identify the equipment that was used for the approved use of Market Garden and a number of machinery for the Market Garden. However, Mr. McMurdo was not on site, and was not able to provide any further details regarding the impugned use than the photographs. He was unable to state whether the materials identified in the July 13, 2016 photographs 70 and 75 were for use in the Market Garden.

[115] The Board notes that the Appellants denied operating a commercial landscaping business on the site. They had no objection to the Board upholding the stop order in relation to item 1 because of that fact. They argued that the equipment on site was approved by the Municipality in 2011 and 2012. Their position was that everything on site relates to the Market Garden.

[116] The Board examined the photographs submitted by Mr. Thorne which show pictures of trucks along what appears to be Garden Lane.

[117] “Contractor, General” is defined under the Land Use Bylaw as follows:

CONTRACTOR, GENERAL means development used for industrial service support and construction. Typical uses include oilfield support services, laboratories, cleaning and maintenance contractors, building construction, landscaping, concrete, electrical, excavation, drilling, heating, plumbing, paving, road construction, sewer or similar services of a construction nature which require on-site storage space for materials, construction equipment or vehicles normally associated with the contractor service. Any sales, display, office or technical support service areas shall be accessory to the principal general contractor use.

- [118] For the Board to uphold the stop order in relation to item 1, the Board must accept that the Municipality has established that there is commercial landscaping (which falls under a “General Contractor”) use occurring on the site. On the basis of the evidence submitted, the Board does not find that the Municipality has established that there is a “General Contractor” use occurring on the site.
- [119] In regard to photographs 70, 75, 77 and 79 from July 13, 2016, the Board finds they are not sufficient to establish that there is a General Contractor use, namely commercial landscaping occurring. Other than the photographs, which are not particularly clear or detailed, the Municipality could not provide a description of the materials in the bags, or on the pallets. There was no information as to the number of bags or pallets, or any other details assist the Board in determining if commercial landscaping was occurring. The photographs submitted by Mr. Thorne (Exhibit 9, for example at pages 119-124) do show trucks on Garden Lane, but they are insufficient to evidence a commercial landscaping operation on the site. There is nothing in the photographs linking specifically the Appellants to the trucks. In the absence of better or more specific evidence, the Board is not convinced that the evidence submitted to it supports a conclusion that the Appellants are operating a commercial landscaping operation. The bins are addressed below.
- [120] Therefore, the Board revokes item 1 of the stop order.

2. Unauthorized Commercial Landscaping Materials Stockpiling

3. Unauthorized Retaining Wall

- [121] These two items are related, so the Board will be addressing them together.
- [122] The Municipality relied upon the July 8, 2016 photographs 10, 13 and 14 and the July 13, 2016 photographs 3, 8, 25 and 27 in support of its position that there was unauthorized commercial landscaping materials stockpiling and unauthorized retaining walls on the site. The Appellants’ position (see Exhibit 8, Appellants’ materials, pages 10-11) was that the July 8, 2016 photographs depict soil used to repair and re-landscape burned out areas of the site following the wildfire. The photographs from July 13, 2016 show bulk bins used to hold coal, sand, gravel, mulch and topsoil used in the market garden and to maintain the parking lot and the binds has passed inspection on several occasions (See Exhibit 8, Appellants’ materials, Tab 12). As indicated above, Mr. McMurdo was not on site, and was not able to clarify for the board whether the materials in the bins or the stockpiles would be used in the Market Garden or what they would be used for.

- [123] The Board finds that the Municipality has not established that there is unauthorized commercial landscaping materials stockpiling or unauthorized retaining walls for the following reasons.
- [124] In regard to the photographs taken on July 8, 2016, the Board does not find that they show commercial stockpiling. The Board notes the burned trees in the background of those photographs. The Board accepts the Appellants' explanation that these photographs show the soil used by the Appellants following the wildfire. The Board finds these photographs do not establish an unauthorized commercial landscaping stockpile.
- [125] In relation to the July 13, 2016 photographs, the Board notes that in June 2011, the Municipality issued a stop order against Dunvegan Gardens (AB) Ltd., one of the Appellants in this appeal. That stop order was issued on the basis that Dunvegan Gardens (AB) Ltd. was carrying out Landscaping, without a development permit, and that there were more vehicles than authorized on the site. Dunvegan Gardens (AB) Ltd. and Brad Friesen appealed the stop order to the SDAB, which heard the appeal and issued its decision September 2, 2011. (see Exhibit 9, Mr. Thorne's materials, pages 170-174, 183-188). Its decision stated at page 2:

The Appellant is ordered to cease all activity related to the commercial landscaping business and to remove all commercial equipment... and materials... from the site by 4 p.m. on September 15, 2011, provided that equipment and materials used for the market garden business as determined and confirmed in writing by the Municipality may remain on the Site.

- [126] In its reasons, the Board indicated all equipment used for commercial landscaping had to be removed. However, an exception would be for equipment used for the market garden business (which had a development permit) that the Municipality confirmed in writing is for use in the market garden business.
- [127] On September 20, 2011, the Municipality conducted an inspection to determine which vehicles and equipment could remain on site. The Municipality issued a letter dated October 11, 2011 (see Exhibit 8, Appellants' materials, page 166 and Exhibit 9, Mr. Thorne's materials, page 952) setting out the list of vehicles and equipment the Municipality concluded were necessary to the operation of the Market Garden. Of note is #23 of that list: "Stockpile – used for customers, gardens on site, and the beautification of the property– photo on page 24 of attachment." Photograph 24 in the Appellants' materials is indecipherable as is page 231 of Exhibit 8 which also references the stock pile. However, Exhibit 9, Mr. Thorne's materials at page 954 includes a letter dated May 18, 2012 from the Municipality to Dunvegan Gardens. That letter references an April 3, 2012 site inspection and again lists the vehicles and equipment that the Municipality agreed was needed to conduct the Market Garden operations. Again, #23 of that list includes the same description as the letter from October 11, 2011. It also lists as item 16 – "Light Bulk Storage – used to store and sell minor quantities for the market garden clients" and references the photograph at page 17. The photograph relating to that item is found at Exhibit 9, Mr. Thorne's materials, page 956. That photograph is entitled "Light Bulk Storage – used for market

garden” and shows what looks to be the same bins as shown in the Municipality’s July 13, 2016 photographs, #3, 8, 25 and 27.

[128] There was no evidence presented by the Municipality which established that the “Light Bulk Storage” accepted by it in 2011 and 2012 was different from what is shown on the July 13, 2016 photographs, #3, 8, 25 and 27. In the absence of evidence establishing that there is a development beyond what was accepted as part of the approved Market Garden use in 2011 and 2012, the Board finds the Municipality has not established there is unauthorized development. Although the Appellants have argued that the legal principle of issue estoppel applies, the Board finds that it is not necessary to make that decision and therefore does not decide whether issue estoppel applies. The Board does note that issue estoppel requires the same parties and notes the differences in parties between the 2011 stop order and the 2016 stop order.

[129] “Retaining wall” is defined under the Land Use Bylaw as follows:

RETAINING WALL means a structure constructed to withstand lateral pressure in order to hold back earth, loose rock, or similar materials, but does not include a foundation wall (Bylaw No. 04/012)

[130] The Municipality originally argued that the “bins” on site which hold the stockpiled materials are “retaining walls” and that any retaining wall over one metre in height requires an engineering report and is subject to a Safety Code review. The “retaining walls” are shown in the July 13, 2016 photographs #3, 5, 8, 12, 25, and 27. In its summary, the Municipality argued that the bins, whether they are retaining walls or not, are a development requiring a permit. The Appellants argued that these structures are not retaining walls, and in any event, have been previously approved by the Municipality, so the Municipality is estopped from asserting they cannot stay.

[131] The Stop Order states:

Site visits... confirmed the unauthorized development of retaining walls without building permits and contrary to s. 74.4 of the LUB....

[132] Section 74.4 of the Land Use Bylaw states:

Any retaining wall over 1.0 m in height must be designed and inspected after construction by a professional engineer. The land owner shall provide to the municipality the design and inspection report, both bearing the seal and signature of a professional engineer.

- [133] In deciding whether these bins are “retaining walls” under the Land Use Bylaw, the Board has reviewed the definition. A “retaining wall” is a structure constructed to withstand lateral pressure in order to hold back earth, loose rock, or similar materials. The Board is aware that typically retaining walls hold back earth from moving, and are often located near a slope. The photographs show that these bins are not located near a slope. Rather they are freestanding, and the evidence before the Board was that they are used to hold materials (like mulch, etc.) used for the market garden.
- [134] The Board finds that these bins do not meet the definition of “retaining wall”. Their function is storage, and not to hold back earth from movement. Because they do not meet the definition of “retaining wall”, the Board finds section 74.4 of the Land Use Bylaw not to be applicable.
- [135] The Board notes that the stop order references “retaining walls without **building permits**” (emphasis added). This Board deals only with the Land Use Bylaw, and not the *Safety Codes Act*. The bins may be structures requiring building permits, but this Board has no jurisdiction to consider infractions of the *Building Code* or to make determinations of whether the bins do not have building permits or any remedy to flow from that.
- [136] As a result of the above conclusion, the Board does not need to address the question of whether the principle of issue estoppel applies.

#### 4. Unauthorized Sale of Goods

- [137] “Retail Store, General” is defined under the Land Use Bylaw as follows:

RETAIL STORE, GENERAL means development used for the retail sale of consumer goods from within an enclosed building, but does not include a liquor store. This type of retail store may include food preparation and consumption areas with a maximum capacity of twelve persons.

- [138] The Municipality argues that the Appellants have a “General Retail Store” use, and are selling products other than those permitted under the approved development permits. The Municipality’s position is that the Appellants are selling more than locally grown vegetables and fruits and that Development Permit 2006-0140 permits only the sale of “Bedding Plants, Nursery and Vegetables”. Mr. Thorne’s position is that the Appellants have approval for a “market garden”, which limit the use to the growing and selling of vegetables and fruits, but does not give the Appellants the ability to sell bedding plants, etc. The Appellants argue that they have been approved as a garden centre greenhouse and the Municipality is estopped from asserting otherwise due to the 2014 SDAB decision.
- [139] The Board notes that what is being addressed under item 4 of the stop order are the general retail sales. The Board notes that the Appellants have development approval for Intensive Agriculture – Sod Farm and Tree Farm. The discussion under this item does not affect that approval.

- [140] The Board finds that the Appellants are selling general retail goods, including children's toys, candy, knick-knacks, etc. (see Exhibit 10, July 13, 2016 photographs 29, 30, 33, 35, 37-44 and for example, Exhibit 11, Appellants' Rebuttal, pages 16, 17, 24). The Board finds that these goods go beyond the approved uses of bedding plants, nursery, vegetables and fruits.
- [141] The Board must review the terms of the previously issued development permits to determine if they authorize the sale of the above goods which are general retail in nature. Development Permit 2006-0140 lists "Accessory Building (Greenhouse)" as the approved development. The supporting information (Municipality's materials, page 6D-10) state that permission is sought to construct a greenhouse for the production of bedding plants, nursery and vegetables. This permit does not authorize General Retail Store use. Development Permit 2008-138R lists "Market Garden - Accessory Building" as the approved development. Given the description of the use as "accessory building", this permit does not authorize General Retail Store use. The SDAB Order in 2014 (SDAB-2014-018) granted development permits 2014-00162 to 2014-00165 for Intensive Agriculture (Sod Farm Tree Farm) for the site.
- [142] The Appellants argue that they have development approval for a "greenhouse", relying upon the Board's Order in SDAB 2014-018. In that decision, the Board found that "there has been a greenhouse or similar use on the property since at least the 1970s", which was based upon the submissions that the developer operated a "greenhouse and market garden from the property" and "there has been agricultural uses on the property as far back as the 1970s". The Board in 2014 did not reference the use "Greenhouse/Plant Nursery", instead referring to "greenhouse". "Greenhouse/Plant Nursery" is a defined term in the Land Use Bylaw and means "development for the growing, acclimatizing, propagating, harvesting, displaying and selling of bedding, household, and ornamental plants and may include accessory uses related to the storing, displaying and selling of gardening, nursery and related products". "Greenhouse/Plant Nursery" is neither permitted nor discretionary in the Small Holdings District. The issue before the Board in 2014 was the question of an Intensive Agriculture - Sod Farm and Tree Farm use. Since the issue of whether the Board in 2014 did not have to determine the scope of the development permits issued to the Appellants, this Board finds that the issue which is before this Board was not squarely before that Board and that statement does not bind this Board.
- [143] In addition, the Appellants argued that they had an approved "Greenhouse" based upon the materials submitted to the Municipality in 2008 in support of their development permit application for 2008-0138R (see Exhibit 8, Appellants' materials, page 126). The Board understands this document to be a statement of the Appellants intentions for future development on the Site. However, the Board notes that this page was not stamped by the Municipality (as compared to Exhibit 8, page 112) nor does it indicate any Municipal acceptance of the contents of that letter.



- [144] The Board understands that Mr. Friesen might have believed that he had development approval for the sale of goods. However, the Board has to base its decision on the evidence before it. Based on the permits which have been submitted to this Board (2006-1040, 2008-138R and 2014-00162 to 2014-00165), the Board finds that the Appellants do not have a development permit for Greenhouse/Plant Nursery”, nor do they have a permit for “General Retail Store”. The Board also finds that these 2 uses (General Retail Store and Greenhouse/Plant Nursery) are neither permitted nor discretionary in the Small Holdings District. Although Mr. Thorne argued that the Appellants are approved for a “Market Garden”, and are thus restricted to the sale of vegetables and fruit, the Board also finds that the Appellants have development approval for the sale of “Bedding Plants, Nursery and Vegetables”. Thus, the Appellants have development approval for the sale of bedding plants, nursery, vegetables, and fruit. The Board finds that the sale of goods other than bedding plants, nursery, vegetables and fruit goes beyond the approved use for the site.
- [145] As the Board understands that Mr. Friesen believed he had development approval for the sale of goods, it upholds the stop order on this point, but varies the time for compliance. The Board grants the Appellants a one year period from the date of issuance of this decision to obtain a development permit for General Retail Store use. As that use is neither permitted nor discretionary in the Small Holdings District, the Site will have to be redistricted. The Board is of the view that one year is a sufficient time to obtain a redistricting which would allow the General Retail Store use. If the Appellants do not obtain a development permit by the time specified in this paragraph, they must cease the General Retail Store use at the end of that one year period.

#### 5. Unauthorized Farm Animals

- [146] Section 120.4 of the Land Use Bylaw provides that “keeping of animals” is a discretionary use (as per section 76.7 of the Land Use Bylaw), which is to be approved by the Planning Commission. Section 76.7 states:

76.7 No livestock, fowl or fur-bearing animals, other than domestic pets, shall be permitted in any residential districts, except for horses, donkeys, goats, llamas, alpacas, and other similar such animals, kept as pets and/or for personal enjoyment, at Saprae Creek, Conklin, Janvier, Anzac and **deleted (Bylaw No 01/043)** whereby parcels greater than 0.809 are permitted a maximum of (3) three horses, conditional upon the horses being confined within a fence constructed to the satisfaction of the Development Officer. **Deleted (Bylaw No. 00/011)**

- [147] The wording of section 76.7 of the Land Use Bylaw is not clear, and the Board must interpret the restrictions contained within it. Section 120.4 suggests that the keeping of animals is a discretionary use in the Small Holdings District, provided that the “keeping of animals” complies with section 76.7. The Board reads section 76.7 as being divisible into two sections. The first deals with the general rule relating to no animals in residential districts, except for domestic pets. The second permits the keeping of larger animals in Sapræ Creek, Conklin, Janvier and Anzac with limitations on the number of animals and the size of the parcel. The below reflects what the Board understand the intention of section 76.7 to be.

No livestock, fowl or fur-bearing animals, other than domestic pets, shall be permitted in any residential districts,

except for horses, donkeys, goats, llamas, alpacas, and other similar such animals, kept as pets and/or for personal enjoyment, at Sapræ Creek, Conklin, Janvier, Anzac and ... whereby parcels greater than 0.809 are permitted a maximum of (3) three horses, conditional upon the horses being confined within a fence constructed to the satisfaction of the Development Officer. ...

- [148] The Appellants have suggested that the nature of the Small Holdings District needs to be addressed by the Board in order to determine this question of the keeping of animals by the Appellants. The Board does not believe that an extensive discussion regarding the full scope of the Small Holdings District is required to answer this issue. Section 76.7 clearly indicates that no “livestock, fowl or fur-bearing animals” are permitted in a residential district (except as authorized). Section 120.1 of the Small Holdings District sets out the purpose of the District:

The purpose of this district is to provide large lot acreages intended for residential, small scale agricultural pursuits and other compatible uses on land ... .

- [149] The permitted uses include Single Detached Dwelling, Manufactured/Modular Home and Home Occupation, in addition to other uses. No agricultural uses are permitted uses, although they are discretionary in the District. The Board is not required to describe the nature of the Small Holdings District. It need only determine if the district is “residential”. In light of the language of section 120.1 and the list of permitted uses, the Board finds that the Small Holdings District includes residential for the purposes of section 76.7. The Board is not addressing the question of the nature of the Small Holdings District for any other purpose because it is not required to answer this question for the purpose of this hearing.
- [150] The Board notes that section 76.7 addresses livestock, fowl or fur-bearing animals. Therefore, the Board varies the stop order to specifically exclude the fish kept by the Appellants from the stop order provisions.
- [151] The Board finds that there is no evidence that the Appellants have a development permit for “keeping of animals”. The question is whether the animals are “domestic pets”. The

photographs submitted by the Municipality (Exhibit 10, photographs July 8, 2016 #1 and 12, July 13, 2016, #1, 4, 5, 34, and 36) show animals on the site. The Appellants' rebuttal materials (Exhibit 11) include letters from customers or persons who have attended at the site to visit and pet the animals. These letters reference chickens, pigs and rabbits (Rebuttal, page 5), guinea pigs (Rebuttal, page 7), a fish pond (Rebuttal, page 11) and birds (Rebuttal, page 22). Mr. Friesen acknowledged these animals on site, but argued that they were all "registered" with the Municipality as domestic pets. He also indicated that he sold the eggs from the chickens at the store. Although Mr. Friesen stated that the animals were "registered" with the Municipality, the Board finds that he meant "licensed" by the Municipality.

- [152] The Board notes there is no definition of "livestock, fowl or fur-bearing animals" in the Land Use Bylaw. The Board interprets "fowl" in accordance with its ordinary meaning and finds that "fowl" includes chickens, roosters, ducks, etc. The Board interprets "livestock" to include pigs and sheep.
- [153] The Board notes that Mr. Friesen has stated that he has "registered" all of the animals on site as domestic pets. Mr. Friesen stated he sells the eggs from the chickens. In addition, the Board notes at Exhibit 9, Mr. Thorne's materials, page 824, there is evidence that the Appellants charge for the "Guided Tour in Farm Animals" – see item 1 (School Fieldtrip Program) and item 2 (Fall Blast Program). The Board does not agree that one makes a profit from a domestic pet.
- [154] The Board varies the stop order as follows. To the extent that the animals are licensed by the Municipality, the stop order is cancelled in relation to those animals. The Appellants are able to keep those licensed animals without a development permit because they are domestic pets. For those animals which are licensed, the Appellants must not use them for commercial purposes. This means the Appellants cannot sell eggs or other by-products of the animals, nor can the Appellants charge to see them. The stop order continues to apply to any animal not licensed with the Municipality.
- [155] The Board also heard from Mr. Kachur who indicated that he keeps his beehives on the site. The Board is choosing at this time not to vary the stop order to include Mr. Kachur's bees because the Board is concerned that including the bees into the stop order may create difficulty for their ongoing placement on the lands and Mr. Kachur made a compelling case regarding the need for bees in our ecosystem. However, the Board notes that it is possible to obtain a development permit for the keeping of bees, and urges Mr. Kachur to legitimize this use by obtaining a development permit.

## 6. Unauthorized Park

[156] “Park” is defined under the Land Use Bylaw as follows:

PARK means development of land for recreational activities for the general public which do not require major buildings or facilities, and includes picnic areas, playgrounds, pedestrian and bicycle paths, landscaped areas and public washrooms.

[157] The Board heard evidence from the Municipality that there was a jumping pillow as well as a pedal bike pathway. These items were set out in the July 13, 2016 photographs 10, 13, 14, 17, 19, 20, and 21. Although the Appellants did not explicitly confirm that the pedal bike was used by customers or the public, the evidence submitted by the Appellants included testimonials by a number of customers who indicated that they use the park facilities, including a corn maze (including Exhibit 10, Appellants’ Rebuttal, page 10, 11, 16). The Board finds that there is sufficient evidence to establish that the Appellants are permitting members of the public to utilize the jumping pillow, the corn maze as well as the bike park. The Board finds there is a park (as defined in the Land Use Bylaw) occurring on the site.

[158] The next question is whether there is a development permit for the development (here, the park). Mr. Friesen confirmed that he had applied for a development permit for the park in August of 2016, but had not yet received approval. In their Rebuttal, the Appellants confirm they do not have a development permit for a park. The Board accepts the Appellants’ statement that there is no permit issued as establishing that there is no development permit issued for the park.

[159] The Board upholds the stop order in relation to Point 6 (unauthorized park), but is prepared to grant an extension to the Appellants of three months from the date of the decision in order to allow them to get their permit. If the Appellants do not obtain a development permit within the time specified in this paragraph, they are to remove those features at the end of the three month period. The Appellants must cease the use of the park until they have obtained a development permit.

[160] The Board noted that there was some dispute as to whether the Municipality provided specific information to the Appellants about the deficiencies in the development permit application. The Board is of the view that granting further time for the Appellants to obtain approval will give both the Appellants and the Municipality time to work through the details. If the Appellants are able to satisfy the outstanding items, the Municipality may be able to issue a permit before the three month period expires.

[161] As an aside, the Board notes that the Appellants applied in August 2016 for a development permit. More than 40 days has passed since the application and the Appellants could have appealed the deemed refusal to this Board. Had this been done, the question regarding development approval for the park could have been resolved some time ago.

7. Unauthorized Electrical Panels

- [162] The Appellants stated that they removed the electrical panels and were prepared to allow the Municipality access to inspect the property to ensure that they had been removed. The Municipality stated that it had not had the opportunity to inspect the property to confirm the removal of the electrical panels.
- [163] In light of the above statements, the Board varies the stop order in regard to item 7. The Board directs that the Municipality has two weeks from the date of issuance of this decision to inspect the site to ensure that the electrical panels have been removed. If the Municipality determines that the unauthorized electrical panels have not been removed, the Municipality may take whatever enforcement action that it determines appropriate.
- [164] Before the close of the hearing, the Board asked the parties if they would agree that the Board could provide the decision 31 days after the end of the hearing, rather than the 15 days set out in section 687(2) due to the length of the hearing and the amount of written materials submitted for the Board's consideration. All parties agreed. The Board thanks the parties for their consideration in giving the Board sufficient time to review the materials and prepare the decision.
- [165] During the hearing, Mr. Friesen referred to the petition which had been signed by members of the community in support of the Appellants. The Board had asked for a copy of the petition to be delivered after the close of the hearing. One week after the hearing closed, Mr. Friesen delivered a copy of the petition to the Board Clerk. Counsel for the Municipality objected to the Board accepting this information after the conclusion of the hearing. Mr. Thorne had no position on the Board's acceptance of the petition. Counsel for the Appellants did not provide his position. The Board has decided not to accept the full petition as evidence. Although the Board understands that those persons who signed the petition were showing their enthusiasm and support for the Appellants, the issues before the Board revolve around whether the Appellants have development permits for the uses outlined in the stop order and the Board has focused on that aspect of the evidence.
- [166] It is so ordered.
- [167] The decision of the Subdivision and Development Appeal Board is final and binding on all parties, subject only to appeal to the Court of Appeal under Section 688 of the *Municipal Government Act*, R.S.A 2000, c. M-26

Dated at the Regional Municipality of Wood Buffalo in the Province of Alberta, this 16<sup>th</sup> day of March, 2017.

CHAIR: **David Secord**  
Dave Secord

**APPENDIX “A”****DOCUMENTS RECEIVED AND CONSIDERED BY THE SUBDIVISION AND DEVELOPMENT  
APPEAL BOARD:**

<b>Exhibit #</b>	<b>Description</b>	<b>Filing Date</b>
	<b>Subject Area Map</b>	<b>2016-10-14</b>
1.	Notice of Appeal (5 pages)	2016-10-07
2.	Stop Order Dated September 23, 2016 (30 pages)	2016-10-12
3.	Agent Authorization – Andrew Thorne (7 pages)	2016-10-31
4.	Board Decision SDAB 2016-005-P 2016-11-03 (12 pages)	2016-11-18
5.	Record of Proceedings – Conference call 2016-11-03 (3 pages)	2016-11-18
6.	Hearing Notification Dated 2016-12-30 (3 pages)	2016-12-30
7.	Record of Proceedings – Conference call 2016-12-19 (2 pages)	2016-12-30
8.	Appellants Submission (258 Pages)	2017-01-26
9.	Affected Party Submission – Andrew Thorne	2017-02-02
	- Letter of Introduction (5 Pages)	
	- Argument (1035 pages)	
	- Audio File – Draper ASP 2016-02-18	
	- Statutes – Land Use Bylaw and Municipal Government Act of Alberta	
	- Video (28 videos)	
10.	Municipality Submission	2017-02-02
11.	Appellants Rebuttal (9 pages)	2017-02-09
	- Supplementary material (114 pages)	
12.	Written Submissions received via email (22 emails)	16-02-2017
13.	Submission of Jason Kachur	16-02-2017
14.	Aerial View Prairie Creek Laydown Yard (Municipality Submission)	16-02-2017
15.	Aerial View 116 Garden Lane (6 pages)	16-02-2017

**APPENDIX “B”  
REPRESENTATIONS**

<u>PERSON APPEARING</u>	<u>CAPACITY</u>
1. J. Agrios, Q.C.	- Kennedy Agrios LLP, counsel for the Municipality
2. B. McMurdo,	- Regional Municipality of Wood Buffalo
3. R. Noce, Q.C.,	- Miller Thompson LLP, counsel for the Appellants
4. S. Hawes,	- Miller Thompson LLP, counsel for the Appellants
5. B. Friesen	- Appellant
6. Joel Beatson	- Associate
7. Jason Kachur	- Business Owner - Beekeeper
8. Frances Jean	- Resident
9. Chris Diprose	- Employee
10. William Leonard	- Employee
11. Rick Kirschner	- Resident
12. Michael Bayot	- Employee
13. Phil Osborne	- Resident
14. Gord Gallant	- Resident
15. Tanya Brittain	- Resident, Business Owner
16. Tony Piche	- Resident
17. David Friesen	- Relative
18. Ramona Morrison	- Resident
19. Scott Fry	- Employee
20. Hayley Russell	- Employee
21. Mohammed Dogar	- Resident
22. Gus Gianis	- Resident
23. Victor Hawes	- Resident
24. Frank Creasey	- Resident
25. Jim Rogers	- Resident
26. Andrew Thorne	- Adjacent Property Owner