

SUBMISSION

Submission of the Objecting Party:
Allan and Margaret Akins

Re: **Development Permit DX 2020-21**
Horticultural Mix Plant Permit Approvals
Berger Peat Moss Ltd.
22054 Oakwood Road 64N, NW 1/4 section 23-11-4 EPM,
in the Rural Municipality of Springfield

Planner's Comprehensive Report

Date: May 5, 2021

Purpose

1. The purpose of this document is to consolidate and refine the two (2) planning briefs provided to the R.M. of Springfield and Council in September and October 2020 related to the Issue, outlined below.
2. To provide additional information sourced since the original briefs were remitted.

Background

3. Jennifer Lim MCIP RPP was hired by Allan and Margaret Akins in September 2020 to provide an independent review of how, as a land use planner, Ms. Lim would determine the land use related to Berger's Horticultural Mix Plant located at 22054 Oakwood Rd. in the Rural Municipality of Springfield.
4. Ms. Lim prepared a brief and presented at a delegation in September 2020, to which Council made a prepared statement informing that there would be no resolve to the area resident's concerns as the Municipality had determined the Horticultural Mix Plant was a permitted use under the Zoning By-law.
5. Ms. Lim prepared a second brief and remitted it by email to Municipal Administration and Council for their review and consideration in October 2020. A meeting was arranged with the CAO and Development Officer. Information from that meeting was to be presented to Council in late October.
6. A second meeting with the CAO, Development Officer, Mayor Fell, and Councillor Fuhl occurred in November 2020. Information was received and a follow-up of the meeting was documented by shared email. The area resident's concerns were not resolved, as the Municipality did not move from its position that the Horticultural Mix Plant was a permitted use.
7. Along with other area residents, the Akins formed the Springfield Taxpayers Rights Corporation in December 2020 to continue to pursue their efforts to address their concerns.
8. In January 2021, an email was submitted to the CAO, the Development Officer, Council, and planners at the Provincial Planning Office in Beausejour notifying that as per Zoning By-law Policy 7.0(4), a Conditional Use hearing was required. The Municipality did not confirm that a Conditional Use would be required.

9. Ms. Lim's services have been retained by the Akins' to conduct continued follow-up with respect to the Issue to source information in answer to the following inquiries:
 - a. What were the Development Officer's roles and responsibilities when reviewing the permit application; and,
 - b. Whether the Development Officer would have had different credentials than a Land Use Planner.

The Area

10. The Subject Land, 22054 Oakwood Road 64N, NW 1/4 section 23-11-4 EPM as described under CT#3011172, includes roughly 80-acres of land zoned for Agricultural General ("AG") use, located in the north-western section of the Municipality.
11. The Municipality's Land Use Zoning Map, Figure 1, is attached under Appendix A, and the Subject Land is identified with an "X".
12. The Subject Lands are designated "Agricultural Preserve" Area. The Municipality's Land Use Development Plan Map is attached under Appendix B, and the Subject Land is identified with an "X".
13. The Subject Land contains existing stables and arenas from a former equestrian boarding/stable use. A Google Map Satellite image is attached as Appendix C and the Subject Land is identified with an "X".
14. The properties surrounding the Subject Land are zoned AG and Rural Residential ("RR").
15. The Subject Land is classified as Group 1 Soil, Dryland Agricultural Capability Groupings, Class 3. Manitoba Agriculture Maps are attached under Appendix D.
16. The Subject Land is serviced by the Day Area aquifer. The map, prepared by Friesen Drillers is attached as Appendix E.

The Issue

17. Administration of the RM of Springfield Zoning By-law No. 08-01 (the "Zoning By-law") has not been conducted in accordance with Section 7.0 Use Class Definitions, Clause 4, which states, *"where a specific use does not conform to the wording of any Use Class definition or generally conforms to the wording of two or more Use Class definitions, the Development Officer may deem that the use conforms to and is included in that Use Class which he/she considers to be the most appropriate in character and purpose. In such a case, this use shall be considered a conditional use, whether or not the Use Class is listed as either a permitted use or conditional use within the applicable Zoning District"* with respect to the development of a 44,062 sq. ft. Group F Div. 3 Building (Agricultural Peat Moss Operation) (the "Development"), for Berger Peat Moss Ltd. (the "Proponent").
18. The Development is located at 22054 Oakwood Road 64N, NW 1/4 section 23-11-4 EPM as described under CT#3011172, (the "Subject Land") in the Rural Municipality of Springfield (the "Municipality"). The relevant provisions of the Municipal By-laws and Provincial Acts are attached under Appendix F.

19. Concerns were raised by the Objecting Party when a proposed amendment to the R.M. of Springfield's Zoning By-Law 08-01 was passed by resolution of Council. As per Council Resolution No. 19-195 (the "Proposed Amendment"), attached under Appendix G, carried by Council unanimously (6-0) on April 25, 2019, the proposed amendment would change the definition of "Agricultural Activities" to include "peat moss".
20. Per the Zoning By-law, "Peat Moss" means a mass of partially carbonized plant tissue ranging in consistency from a turf to a slime that is commonly used as a fertilizer, stable litter or fuel or for making charcoal (definition 104).
21. The Zoning By-law references peat moss under the "Natural Resources" (7.6(3)) definition, which means "a development for the on-site removal, extraction, washing, crushing, mixing and primary processing of raw material found on or under the site, or accessible from the site. Typical uses in this class include gravel pits, sandpits, and stripping of topsoil and peat moss".
22. The Zoning By-law's Operative and Interpretive clause 5(a) states, "*Unless the context clearly indicates the contrary, where a regulation involves two or more items, conditions, provisions or events connected by the conjunctions and, or, or either-or, the conjunctions shall be interpreted as follows:*
 - a) *and indicates that all the connected items, conditions, provisions or events shall apply.*"
23. Therefore, it leads one to understand that, in order to be deemed a Natural Resource use, there must be all components present:
 - a. On-site removal;
 - b. Extraction;
 - c. Washing;
 - d. Crushing;
 - e. Mixing; and,
 - f. Primary Processing.
24. However, as typical Natural Resource Uses listed include gravel pits, sandpits, and stripping of topsoil and peat moss, and as the listed examples don't necessarily have all six (6) components to create a Natural Resource use, it would be more appropriate to read that the word "and" under the Natural Resource use is actually meant to be interpreted as "and/or".
25. In this circumstance, as "peat moss" is specifically listed and further defined within the Zoning By-law, one could make the conclusion that peat moss is a Natural Resource Use and need not necessarily be extracted on-site. This would make the use a Conditional Use in the AG Zone and subject to Section 54 of the Zoning By-law. There is also question as to whether the definition was meant to be read as "the stripping of topsoil and (the stripping) of peat moss" or as "peat moss" which is defined within the zoning by-law as, "a mass of partially carbonized plant tissue ranging in consistency from a turf to a slime that is commonly used as a fertilizer, stable litter or fuel or for making charcoal" (104).
26. As the Development does not propose on-site removal / extraction of Peat Moss, the Development Officer determined the Development was a Permitted Use as an 'Agricultural

Activities' / 'Agri-Business' / 'Agricultural Support Industry' / 'Agricultural Product Storage' Use in the Agricultural General Zone (the "AG Zone"). See Appendix H.

27. If we are to agree that the splitting the harvesting of peat moss from the processing and packaging of peat moss as separate and distinct uses, then the packaging and processing of peat moss places the land use under the "Light Industrial" (7.4(4)) definition, as the Primary (Main) use, which means
- a. "processing and manufacturing uses, provided that they do not create unusual fire, explosion or safety hazards, noise in excess of average intensity of street and traffic noise in the area in question; they do not emit smoke, dust, dirt, toxic or offensive odours or gas and there is no production of heat or glare perceptible from any adjacent site. Typical uses include commercial manufacturing and research facilities".

"Light Industrial" is not a permitted or conditional use in the AG Zone; re-zoning of the land is required. Industrial zones are located in areas designated under the Development Plan for Industrial (Employment Lands) Use. That the Development is a "Light Industrial" use is supported by a variety of factors as outlined under Appendix I.

28. As a Secondary (Accessory) use, there is a "Bulk Storage Facility", which means
- a. "a place for the outdoor storage or tank storage of large quantities of raw materials or industrial related goods such as liquids, fuels, gases, minerals, pipes, gravel, fertilizers, and grain. This Use Class does not include Anhydrous Ammonia Facilities".

A "Bulk Storage Facility" is a Conditional Use in the AG Zone.

29. The Municipality is also undertaking a Zoning By-law Review and have drafted a new Zoning By-law, available on-line, under which there is a new definition proposed, being:
- a. **Agricultural Processing Plant** means an agricultural facility specializing in operations that transform, package, sort or grade livestock or livestock products, agricultural commodities, or plant and/or plant products, excluding forest products or chemical products, into goods that are used for intermediate or final consumption, including goods for non-food use. Typical uses include peat processing plants, seed processing plants, and similar uses.
30. That the Municipality is creating this new use class definition shows the intention to ensure that peat processing plants are identified as an Agricultural Use type, despite the fact that:
- a. Peat is harvested off-site (Berger has their main harvesting site at Deer Lake) and what will occur on-site is processing and packaging, storage and shipment of a peat moss product to off-site retail locations, prior to being purchased by professional and non-professional growers who may or may not use the finished product in the horticultural sector; there is no active farming operation occurring on the Subject Lands; and therefore, the Zoning By-law definition for "Light Industrial" covers commercial manufacturing uses and has related Land Use Provisions that further regulate industrial developments; and,

- b. The Zoning By-law recognizes Peat Moss can be used for “fuel or for making charcoal”, which, if the Development Officer’s interpretation of the four definitions stands, would permit the processing of peat for fuel and charcoal in Agricultural Zones;
31. The Development Plan By-law has objectives and policies for the “Agricultural Preserve” Area, to which Zoning must adhere. See Appendix J.
 32. Since June 26, 2020, the Proposed Amendment has not been given First Reading, nor has it been brought to Public Hearing; a draft zoning by-law is under review proposing a new Use Class definition which specifically identifies the Horticultural Mix Plant as a Conditional Use; and Development Permit DX 2020-21 (the “Development Permit”) has been issued by the Municipality under a variety of Use Class definitions regardless of Zoning By-law Policy 7.0(4), which, at a bare minimum, requires the matter be considered as a Conditional Use.
 33. Regardless, the four (4) Agricultural Use Classifications employed by the Development Officer to issue the permit do not sufficiently cover the scope of the Primary Use.
 34. The Objecting Party opposes the Development Permit, as the Horticultural Mix Plant use is not permitted in the AG Zone.

Legislative Context

35. Pursuant to *the Act*, zoning by-laws adopted by a municipal council must be generally consistent with the development plan and zoning by-law, in effect in that municipality. Development Permits must be issued in accordance with provisions under the Zoning By-law.

Concerns of the Objecting Parties

36. The objecting party has a number of concerns which are as follows:
 - a. The Development Officer has Roles and Responsibilities to administer and enforce policies under the Zoning By-law. See Appendix K. The Objecting Party questions
 - i. whether the Development Officer conducted due diligence prior to issuing the Development Permit, and,
 - ii. once changes / additional information was made known, whether the Development Officer acted to review the permit to ensure development remained permitted, or if other planning approvals were required of the Proponent. For a list of additional information provided, see Appendix L.
 - b. The Development Permit was issued, based on four (4) use types identified by the Development Officer that do not adequately cover the Primary (Main) use operations for the Development. The four use types include:
 - i. **Agri-Business** means a commercial establishment that provides goods or services to the agricultural sector. Typical uses include farm equipment and machinery repair shops, bulk fuel stations, feed and fertilizer supply operations, livestock auction marts and commercial seed cleaning plants.

- ii. **Agricultural Activities** means a use of land for agricultural purposes. Typical uses include farming, pasturage, agriculture, apiculture, aquaculture, floriculture and horticulture. This Use Class does not include Livestock Operations or Natural Resource Developments.
 - iii. **Agricultural Product Storage** means the temporary storage of any agricultural product for future use, delivery or processing as per *The Environment Act*.
 - iv. **Agriculture Support Industry** means an industry, commercial service or retail business in which the major product or service being bought, sold or processed is intended mainly for, from or by farmers. Typical uses include aerial spraying companies, grain storage including grain elevators, feed mills and seed plants. This Use Class does not include Bulk Storage Facilities or Anhydrous Ammonia Facilities.
- c. Description of how the Horticultural Mix Plant does not fall within the four (4) use class definitions is detailed under Appendix M.
37. The Development is an Industrial Use class definition, "Light Industrial", not permitted in the AG Zone, therefore,
- a. The Development does not respect the reasonable expectations of neighbourhood residents to have permitted agricultural and/or permitted residential uses develop on surrounding properties.
 - b. The Development will negatively impact the quality of life of area residents surrounding the Development.
 - c. An application to make an amendment to a definition contained within the Zoning By-law would have to follow Part 5, s. 80(3) and the notice and hearing requirements of *the Act*.
 - d. An application to make an amendment to the land use map associated with the Subject Lands would have to follow Part 5, s. 80(3) and the notice and hearing requirements of *the Act*.
38. The Development is not a Permitted Use; therefore, the Development Permit should be revoked.

Reasonable Expectations of the Residents

39. The residential development along the south side of Oakwood Drive immediately west of the Subject Land has existed for over 70 years (the "Area Residents"). The residents of this development and those residing in the immediate area, while aware that future development on the Subject Land was likely, have held a reasonable belief that any such future development would be done so in compliance with the Development Plan, the Zoning By-law, and consistently with the character of the neighbourhood and their development.
40. The residents have concerns that the groundwater study provided by the Proponent to the Province does not address the concerns made in a separate report commissioned by the Municipality related to Day Area aquifer.
41. Furthermore, it is reasonable for these residents to expect that any future development be consistent with the zoning of the Subject Land already in existence, being "AG".
42. The reasonable expectations of the Area Residents ought to be considered in any Public Hearing process.

Role of Council

43. Under *the Planning Act*, the role of Council is to adopt, administer and enforce provisions of the development plan by-law, zoning by-law and all other by-laws respecting land use and development for the municipality.
44. Under *the Municipal Act*, a Council is responsible:
 - (b) for ensuring that the powers, duties and functions of the municipality are appropriately carried out;
45. As such, Council has an obligation to ensure that any Development Permit has been issued in accordance with the Zoning By-law. The Council is an elected body charged with upholding the requirements of the legislated planning process. If this Council is not satisfied in this regard then this Council should revoke the Development Permit.
46. Council has an obligation to act in a transparent way and in the interests of the community at large. The Council of the Municipality unanimously supported a Proposed Amendment, however, the legislated Zoning By-law Amendment process was not conducted.
47. The primary position of the Objecting Party remains that Council revoke the Development Permit for the Proponent on the Subject Lands and that any related activity cease and desist forthwith until such time as an appropriate by-law amendment is adopted.

Conclusion

48. In summary, any permit related to development and/or use cannot be approved by the Planning Department if the proposed Development is not generally consistent with the Zoning By-law. In the present case the Development breaches provisions under the Zoning By-law in many different ways and accordingly it cannot be said to be included in the listed Use Definitions indicated by the Development Officer. The Development Permit, therefore, must be revoked.

49. The Proposed Amendment does not respect the reasonable expectations of neighborhood residents.
50. FOR ALL OF THESE REASONS THE DEVELOPMENT PERMIT SHOULD BE IMMEDIATELY AND WITHOUT DELAY REVOKED AND ALL RELATED ACTIVITY AND DEVELOPMENT ON THE SUBJECT LAND MUST CEASE AND DESIST.