

By-law for livestock operations?

By Glen R. Peters, Fillmore Riley

The regulation of intensive livestock operations (ILOs) has been a matter of much public scrutiny and debate in recent years. Municipalities have struggled with the competing pressures of desirable economic development versus the need for environmental controls and/or land use regulation. Not surprisingly, the issue has come up in various municipalities as to whether they can or should attempt to regulate ILOs by way of stand-alone municipal by-law. Notwithstanding recent legislative changes and court interpretations expanding upon municipal powers, there remains a significant issue as to whether such by-laws are valid, or if they, in fact, exceed a municipality's jurisdiction. Two recent decisions from the Manitoba courts have examined this issue. While, at first glance, the cases seem to suggest a different answer to the question, a closer analysis may allow for reconciliation of the reasons for decision and provide some guidance to municipalities in this area.

Before specifically analyzing the cases, I will first comment upon the substantive argument against the ability of municipalities to pass by-laws purporting to regulate ILOs. *The Planning Act of Manitoba*, and specifically section 40(2) thereof, sets out a legislative scheme for land use regulation. It specifically authorizes zoning by-laws to be passed to regulate land use. The primary argument against regulation of ILOs through municipal by-law is that such by-laws are, in effect, land-use regulation (which must be dealt with pursuant to the prescribed zoning by-law provisions contained within *The Planning Act*). This is a position that has been articulated by various representatives of the Province for some time and was argued by both parties challenging the ILO by-laws in the two Manitoba cases summarized below.

The case of *4500911 Manitoba Ltd. v. The Rural Municipality of Stuartburn* (the "Stuartburn decision") involved a challenge by a proposed developer of an ILO against a by-law of the RM of Stuartburn "to regulate intensive livestock operations." The essence of the Stuartburn by-law was that anyone seeking to establish an ILO must first apply for and receive a permit from the municipality. The by-law included requirements to be met by an applicant and it was

clear that there was a residual discretion to be exercised by the Council in respect to any application. The by-law in question was the second or third generation of an original simple by-law initiated in 1993 when concern over the location and magnitude of ILOs originally surfaced.

An important factual matter in the Stuartburn decision relates to the absence of a development plan and zoning by-law for this municipality. In 2001, the municipality initiated steps with a view towards creating a development plan and zoning by-law and a resolution was passed seeking the assistance of Community Planning Services of the Province of Manitoba. However, the process leading to a development plan and zoning by-law had not been finalized at the time that the Applicant wished to proceed with the construction of their ILO. On two occasions, the municipality requested the Minister of Intergovernmental Affairs to publish an order under section 57(1) of *The Planning Act* declaring lands in the municipality to be an interim development control area, but that the Minister twice had declined to do so. In the words of the trial judge, "Such an order would have enabled the municipality to simply refuse to issue a development permit until a development plan and zoning by-law were in place." When it could not obtain a ministerial order, the municipality purported to pass a resolution imposing a moratorium on permits for ILOs until the development plan and zoning by-law were enacted. In this context, the Applicant never did submit an application for permit to construct its ILO as it would have been pointless to do so.

Instead, it chose to challenge the interim moratorium resolutions and the by-law in the courts. The essence of the Applicant's argument was as summarized above, namely that the municipality was attempting to do via by-law that which must be done by means of a development plan and comprehensive zoning by-law under the provisions of *The Planning Act*. The municipality, in turn, argued that its by-law was a valid exercise of power delegated by the Province of Manitoba under general enabling sections 231, 232 and 233 of *The Municipal Act*.

At first instance, in the Manitoba Court of Queen's Bench, **Justice Suche** found in favour of the municipality. Specifically, she held as follows: "In considering both the purpose and nature of *The Planning Act*, as well as the specific wording of the legislation, I cannot conclude that the legislature intended that *The Planning Act* would preclude municipal regulation of land use."

The Applicant appealed this decision and the Manitoba Court of Appeal, in a judgement delivered September 26, upheld the trial judge's decision and thereby upheld the validity of the municipal by-law. In upholding the by-law, the Court of Appeal stated, "It would be astonishing if a municipality could not establish these kinds of limitations with respect to intensive livestock operations in the absence of a development plan and comprehensive zoning by-law." The Court of Appeal found the by-law to be within the general welfare authority granted under *The Municipal Act* and cited recent Supreme Court of Canada

decisions expanding municipal powers in this context. With respect to the absence of a development plan and zoning by-law, the Court specifically commented as follows:

"No doubt, it is desirable that there be an orderly process leading to a development plan and a zoning by-law. But, while that process is underway, the municipality is not powerless to deal with community issues, such as the possible proliferation of intensive livestock operations, even though the by-law has zoning implications...In my opinion, The Planning Act contemplates that a municipality may pass a by-law under its 'general welfare' authority, which would have zoning implications."

At the same time that the

Seek advice from counsel on the by-law to ensure it will be enforceable.



Stuartburn decision was in the Courts, a second decision arose from a different municipality, but considering many of the same issues. In *The RM of St. Andrews v. Penner et al* (the “St. Andrews decision”), the municipality had similarly passed a by-law regulating the development of livestock production operations. Included in the by-law was a provision requiring that an Applicant for a development or building permit for a livestock operation must first enter into a development agreement with the municipality.

Unlike the Stuartburn case, in this case the RM of St. Andrews did have a comprehensive zoning by-law passed pursuant to the land use provisions in *The Planning Act*. That by-law designated the Respondents livestock production operation to be a permitted use. In August 2001, the Respondent proceeded with a significant expansion of his operation. When the municipality advised him of his need to obtain a permit for the expansion, and to enter into a development agreement under the livestock production by-law, the Respondent initially made the application, but subsequently withdrew it on the grounds that the requirements were unlawful, that the livestock production operation was permitted under the zoning by-law, and that the effort to restrict that operation under the ILO by-law was, therefore, invalid.

Many of the same arguments made in the Stuartburn case were made by the St. Andrew’s parties. The municipality relied upon the ‘general welfare’ enabling provisions of *The Municipal Act* for its jurisdiction for the by-law. The Respondent, in turn, argued that the attempt to regulate livestock in such a manner was in effect land use regulation and that such could only be undertaken by zoning by-law under *The Planning Act*. The Respondent argued that in essence, the Applicant was seeking to amend its zoning by-law by turning a permitted use into a conditional use.

By decision rendered September 9, 2003, **Justice Jewers** of the Court of Queen’s Bench held in favour of the Respondent farm and struck down the validity of the ILO by-law. In his reasons, he recognized the broad power of municipalities to pass by-laws and the recent legislative and judicial expansions of those powers. However, he noted that *The Planning Act* contains very specific provisions for land-use and control. He stated, “Any development must comply with the adopted zoning by-law and I would take this to imply that where there is such

a by-law, as in this case, land use must be regulated in accordance with the by-law.”

The Justice added:

“A municipality may not be bound to enact a zoning by-law, but, in my opinion, where there is such a by-law, it logically follows that any further regulation of (or change in) land-use should be done through an amendment to the by-law, and not through a separate by-law passed under the general powers of the municipality. In this case, the

municipality has elected to pass a zoning by-law and any changes in that by-law should come as amendments to it.”

Commenting specifically on the Stuartburn decision, Justice Jewers stated, “I do appreciate that there are authorities such as Stuartburn in which ‘stand alone’ livestock by-laws were upheld, but that case did not involve development agreements as such and there was no zoning by-law.”

continued on page 50