

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – September 6, 2001

IN THE MATTER OF Sections 84, 85, and 87 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3;

-and-

IN THE MATTER OF an appeal filed on behalf of Deneschuk Homes Ltd. with respect to Amending Approval No. 1206-01-06 issued under the *Environmental Protection and Enhancement Act* to the Town of Sylvan Lake by the Director, Approvals, Parkland Region, Regional Services, Alberta Environment.

Cite as: *Deneschuk Homes Ltd. v. Director, Approvals, Parkland Region, Regional Services, Alberta Environment, re: Town of Sylvan Lake.*

BEFORE:

William A. Tilleman, Q.C., Chairman

SUBMISSIONS:

Appellant: Deneschuk Homes Ltd represented by Mr. K. Hugh Ham.

Director: Mr. Larry Williams, Director, Approvals, Parkland Region, Regional Services, Alberta Environment represented by Mr. Randy Didrikson, of Alberta Justice.

Approval Holder: Town of Sylvan Lake represented by Ms. M. Grace Garcia Cooke of Brownlee Fryett.

EXECUTIVE SUMMARY

On May 15, 2001, Alberta Environment issued an Amending Approval to the Town of Sylvan Lake for the construction and operation of a Class I wastewater treatment plant (aerated lagoons), a Class II wastewater collection system, and a storm drainage system.

Deneschuk Homes Ltd., the Appellant, had expressed concerns to the Town of Sylvan Lake prior to the Amending Approval being issued. However, the Appellant did not file a Statement of Concern with Alberta Environment when the Application for the Amending Approval was advertised by the Town of Sylvan Lake. Once the Amending Approval was issued, the Appellant filed a Notice of Appeal.

In cases such as this, the filing of a Statement of Concern is a prerequisite to the filing of a Notice of Appeal. The Appellant has not filed a Statement of Concern, and there is no justifiable reason for waiving this requirement. The Board, therefore, dismisses the Notice of Appeal.

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I. BACKGROUND

[1] On May 15, 2001, Amending Approval No. 1206-01-06 (the “Amending Approval”) was issued to the Town of Sylvan Lake, Alberta (the “Approval Holder”) by Mr. Larry Williams, Director, Approvals, Parkland Region, Regional Service, Alberta Environment (the “Director”) under the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 (the “Act”) for the operation of a wastewater treatment plant (Class I), a wastewater collection system (Class II), and a storm drainage system.

[2] On June 21, 2001, the Environmental Appeal Board (the “Board”) received a Notice of Appeal from Deneschuk Homes Ltd. (the “Appellant”). The Appellant was concerned that the Notice of Application misstated the type of facility for which the Amending Approval was sought. The Appellant indicated that it had not filed a Statement of Concern as it misunderstood the Notice of Application as published in the *Sylvan Lake News* by the Approval Holder.

A. Procedural Background

[3] On June 22, 2001, the Board acknowledged receipt of the Notice of Appeal and requested that the Director provide a copy of the records (the “Records”) relating to this matter. The Board also advised the Approval Holder of the appeal and provided the Approval Holder and the Director with copies of the Notice of Appeal.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter has been the subject of a hearing or review under their respective legislation. Both Boards replied in the negative.

[5] On June 29, 2001 and July 6, 2001, the Director provided copies of the Record to the Board. The Director also indicated that no Statement of Concern was received by the Director in relation to this matter. Further, the Director stated that because “...the Appellant did not file a statement of concern in accordance with section 70 of the Act, it is the Department’s

position that the Appellant is ineligible to file an appeal with the Board in accordance with section 84(1) of the Act.”¹

[6] On June 29, 2001, the Board acknowledged the Director’s letter and indicated that it “...has decided to proceed to a preliminary meeting via written submissions only.” The issue to be considered by the Board was “...whether the Notice of Appeal is properly before the Board given the failure of the Appellant to file a Statement of Concern.” The Board then established a schedule to receive written submissions from the parties.

B. Submissions Of The Parties

[7] In its initial written submission, the Appellant reviews the reasoning for Notice of Application under the Act. The Appellant argues that an essential part of this reasoning is that the notice that is provided must be accurate. The Appellant states that the Notice of Application, in this case, is “deficient”.

[8] First, the Appellant argues that the dry storm water detention pond authorized by the Amending Approval was advertised as an “Amendment to an Existing Wastewater System.” The Appellant argues that a dry storm water detention pond is not part of a wastewater system within the meaning of the Act. Rather, the Appellant argues that a dry storm water detention pond is part of a storm drainage collection system within the meaning of the Act.

[9] Further, the Appellant advises that it had previously written to the Approval Holder and expressed “...concerns over the location and proposed manner of construction of a dry storm water pond adjacent to...” the Appellant’s development “...and had been advised to

¹ Section 70 of the Act provides in part that:

“(1) Where notice is provided under section 69(1) or (2), any person who is directly affected by the application or the proposed amendment, addition, deletion or change ... may submit to the Director a written statement of concern setting out the person’s concerns with respect to the application or the proposed amendment, addition, deletion or change.”

Section 84(1) of the Act provides in part that:

A notice of appeal may be submitted to the Board by the following persons in the following circumstances: (a) where the Director ... (ii) makes an amendment, addition or deletion pursuant to an application under section 67(1)(a) ... a notice of appeal may be submitted (iv) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 70 and is directly affected by the Director’s decision, in a case where notice of the application or proposed changes was provided under section 69(1) or (2)”

watch for the advertisement of the application; which he [the Appellant] did.” The Appellant indicates that it “...was not until after the fact that Mr. Dennis [the Appellant] realized the error....”

[10] The Appellant also argues that regardless of the fact that the Appellant was “...misled, the principle adopted by the Board in protecting the statutory scheme of advertising cannot then depend on whether a given individual was, or was not, in error in his understanding of the advertisement.” The Appellant argues that the standard that the Board should be “...objective at both sides; not objective for one side and subjective for the other.” The Appellant also argues that the Notice of Application does not comply with the Act and the regulations thereunder.

[11] The Appellant attaches a copy of the Notice of Application to their initial submission. As stated by the Appellant, the title on the Notice of Application is “Amendment to an Existing Wastewater System.” Further, the Notice of Application states:

“In accordance with the Environmental Protection and Enhancement Act, Town of Sylvan Lake has applied to Alberta Environment for an amendment to an existing wastewater approval for the relocation of a *dry storm water detention pond* previously approved for the Sylvan Lake Subdivision (Laebon Developments Ltd.). This operation is located adjacent to the Willow Springs Subdivision. The new location of the *dry storm water detention pond* will be located in the NE corner of the subdivision and north of Wildrose Drive. Controlled discharge from the pond will be to an existing drainage channel at pre-development flow rates. The operation is located in NW of Section 32 Township 38 Range 1 West of the 5th Meridian (in the Sylvan Lake area).” (Emphasis added.)

[12] In his written submission, the Director argues that the Notice of Appeal is not properly before the Board because the Appellant did not file a Statement of Concern, which is a prerequisite to being able to file a proper Notice of Appeal. The Director notes that in the *O’Neill*² case the Board “...speculated that it might even allow such an appeal where a statement of concern had not be filed ‘due to an extremely unusual case (e.g. a directly affected party being hospitalized) where a person’s intent to file is otherwise established in advance. But those circumstances are highly fact specific, (and) exceptionally rare...’.” Further, the Director

² *O’Neill v. Regional Director, Parkland Region, Alberta Environmental Protection re: Town of Olds* (March 12, 1999), E.A.B. Appeal No. 98-250-D, at paragraph 14.

argues that there are no "...‘extremely unique circumstances’ which would justify exercising the Board’s discretion to allow this Notice of Appeal to stand....”

[13] In response to the argument that the Appellant was misled, the Director argues that the body of the Notice of Application "...clearly stated the nature of the activity (‘the relocation of a dry storm water detention pond previously approved for the Sylvan Lake Subdivision (Laebon Developments Ltd.)’), and precisely described where the dry storm water detention pond would be relocated (‘the NE corner of the subdivision and north of Wildrose Drive’).” Further, with respect to the title on the Notice of Application, the Director explains that the Amending Approval amends an approval that "...primarily addresses wastewater systems which incidentally include storm collection systems.”

[14] In the Approval Holder’s written submission, the Approval Holder also argues that the Notice of Appeal is not properly before the Board because it had not filed a Statement of Concern as is required under section 84(1)(a) of the Act. The Approval Holders also states that the Notice of Application clearly describes the activity proposed in the Amending Approval and that the Notice of Application "...comprehensively complies..." with the Act and the regulations thereunder. Finally, the Approval Holder argues that because of the prior knowledge of the Appellant of the proposed amendment, the requirement to file the Statement of Concern ought to be strictly construed against it.

[15] In the rebuttal submission, the Appellant reiterates the position that the Notice of Application is deficient and that effective notice is a prerequisite to the proper functioning of the legislative scheme contemplated under the Act. The Appellant argues that there is a crucial distinction between a wastewater system and a storm drainage system and that "...the failure to properly advertise the amendment gives rise to a real potential for miscommunication.” Further, the Appellant argued "...that the Board’s objective standard in respect of notice must, to be consistent and effective, be objective in respect of the form and contents of notice.” Finally, the Appellant argues that the exception in *O’Neill* has been met.

II. ISSUES

[16] The issue to decide in this decision is whether the Notice of Appeal is properly before the Board given the failure of the Appellant to file a Statement of Concern.

III. DISCUSSION

[17] This appeal was prompted by the application by the Approval Holder to amend their existing approval. The Act provides a legislative scheme by which such applications are received, advertised, statements of concerns are received, decisions are made, and appeal rights arise. More specifically:

1. Section 67(1)(a) of the Act authorizes the Director to amend an approval on the application of the Approval Holder.³
2. Section 69(1)(c) of the Act provides that when the Director receives an application to amend an approval under section 67(1)(a), the Director is required to have the applicant for the amendment (the Approval Holder) provide notice of the application.⁴ Pursuant to this requirement, the Notice of Application that has been discussed was published in the *Sylvan Lake News* on April 4, 2001. The principle purpose of this Notice of Application is to ask for Statements of Concern from parties who may be directly affected by the proposed activity.
3. Section 70(1) of the Act provides that where "...notice is provided under section 69(1) or (2), any person who is directly affected by the application or the proposed amendment, addition, deletion or change ... may submit to the Director a written statement of concern setting out the person's concerns with respect to the application or the proposed amendment, addition, deletion or change."

³ Section 67(1)(a) of the Act provides:

67(1) On application by an approval or registration holder the Director may, in accordance with the regulations, (a) amend a term or condition of, add a term or condition to or delete a term or condition from an approval ... if the Director considers it appropriate to do so.

⁴ Section 69(1)(c) of the Act provides:

69(1) Where the Director receives ... (c) an application under section 67(1)(a) to amend a term or condition of, add a term or condition to or delete a term or condition from an approval, the Director shall, in accordance with the regulations, provide or require the applicant to provide notice of the application.

4. Section 70(2) of the Act provides that such Statements of Concern must be submitted within 30 days after the last date of publication of the notice.⁵
5. Section 84(1)(a) of the Act provides in the case of an amendment to an approval, a Notice of Appeal may be submitted by any person "...who previously submitted a statement of concern in accordance with section 70...."

[18] A plain reading of these sections, including particularly section 84(1)(a), indicates that the filing of a Statement of Concern is a prerequisite to the filing of a valid Notice of Appeal. All the parties, including the Appellant, seem to agree that this is the general rule that applies.⁶ In fact, the Appellant even goes so far in the Rebuttal Submission to refer to this general rule as an "objective standard".

[19] Further, the Appellant, the Director and the Approval Holder are all in agreement that the Appellant did not file a Statement of Concern as prescribed in section 70 of the Act. Applying this general rule would lead to the conclusion that the Notice of Appeal is not properly before the Board.

[20] The point of contention between the parties, however, appears to be exceptions to these general rules. Specifically, the Appellant argues that there should be an exception when the Notice of Application is factually unclear such that the person wishing to file a Statement of Concern is misled as to the nature of the activity proposed and therefore misses his opportunity to file a Statement of Concern. The Appellant argues that the "objective standard" established by the requirement to file a Statement of Concern demands that the Notice of Application be clear as to the nature of the activity proposed.

⁵ Section 70(2) of the Act provides:

"A statement of concern must be submitted within 30 days after the last providing of the notice or within any longer period specified by the Director in the notice."

⁶ The Appellant identifies a number of cases that support this general position in its Rebuttal Submission. See: *O'Neill v. Regional Director, Parkland Region, Alberta Environmental Protection re: Town of Olds* (March 12, 1999), E.A.B. Appeal No. 98-250-D. *Metis Nation of Alberta Zone II Regional Council v. Director, Bow Region, Environmental Service, Alberta Environment, re: AEC Pipelines Ltd.* (March 20, 2001), E.A.B. Appeal No. 00-073. *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation* (March 13, 2001), E.A.B. Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011-ID. *Grant and Yule v. Director, Bow Region, Environmental Service, Alberta Environment, re: Village of Standard* (May 15, 2001), E.A.B. Appeal No. 01-015 and 016.

[21] The Appellant argues that in the case before the Board the Notice of Application was unclear in that the heading on the advertisement was “Amendment to an Existing Wastewater System”. It would appear that the Appellant was expecting an advertisement with a heading “Amendment to an Existing Storm Drainage Collection System.” In the Initial Submission the Appellant points out the different definitions of the two types of water management systems.⁷

[22] In reviewing the advertisement *as a whole*, however, it is clear to the Board that the proposed activity contemplated by the amendment is a dry storm water detention pond. Specifically, the Notice of Advertisement states:

“In accordance with the Environmental Protection and Enhancement Act, Town of Sylvan Lake has applied to Alberta Environment for an amendment to an existing wastewater approval for the relocation of a *dry storm water detention pond* previously approved for the Sylvan Lake Subdivision (Laebon Developments Ltd.). This operation is located adjacent to the Willow Springs Subdivision. The new location of the *dry storm water detention pond* will be located in the NE corner of the subdivision and north of Wildrose Drive. Controlled discharge from the pond will be to an existing drainage channel at pre-development flow rates. The operation is located in NW of Section 32 Township 38 Range 1 West of the 5th Meridian (in the Sylvan Lake area).” (Emphasis added.)

⁷ Section 1(jjj) of the Act defines “storm drainage system” as

“...any system for collecting, storing and disposing of storm drainage, and includes

- (i) the sewers and pumping stations that make up the storm drainage collection system,
- (ii) the storm drainage storage, management and treatment facilities that buffer the effects of the peak runoff or improve the quality of the storm water,
- (iii) the sewers and pumping stations that transport storm drainage to the location where it is treated or disposed of, and
- (iv) the storm drainage outfall structures....”

Section 1(sss) of the Act defines “wastewater system” as

“...a system for collecting, treating and disposing of wastewater and includes

- (i) sewers and pumping stations that make up a wastewater collection system,
- (ii) sewers and pumping stations that transport untreated wastewater from a wastewater collection system to a wastewater treatment plant,
- (iii) wastewater treatment plants,
- (iv) facilities that provide storage for treated wastewater,
- (v) wastewater sludge treatment and disposal facilities,
- (vi) sewers that transport treated wastewater from a wastewater treatment plant to the place where it is disposed of, and
- (vii) treated wastewater outfall facilities, including the outfall structures to a watercourse or any appurtenances for disposal of treated wastewater to land or to wetlands....”

This appears to the Board to be the activity that is authorized by the Amending Approval. The Board is of the view that while the heading on the advertisement may not have been the most appropriate heading, the advertisement is *not* unclear. The Board is of the view that any reasonable person who reads this advertisement would understand that the proposed activity was the dry storm water detention system in question.

[23] The position of the Appellant – a developer whom the Board assumes would have dealt with such applications previously - is made even worse by the admission that it had written to the Town of Sylvan Lake and expressed concern about the project. The Appellant states that it were “... advised to watch for the advertisement of the application, which he [the Appellant] did.” If the Appellant was so concerned about the proposed activity, the Board expects that they would have read the advertisement even more *closely* than an ordinary person and, of course, to file the statement of concern if they had any doubt as to what the advertisement related.

[24] As a result, even if the Board were to accept the argument of the Appellant that an exception to the general rule exists where the Notice of Application is unclear – and the Board expresses no position on this proposition – the Notice of Application in this case was *not* unclear and as a result, such an exception – if it exists – does not apply.

[25] Alternatively, the Appellant argues that the exception to the general rule that a Statement of Concern is required to file a Notice of Appeal as discussed in the *O’Neill* case has been met. As noted by the parties, the Board has previously considered the situation where a Statement of Concern was not filed. In *O’Neill* the Board stated:

“Statements of concern are a legislated part of the appeal process. Though it is seldom seen, circumstances could arise where it may be possible for the Board to process an appeal where a statement of concern was filed late. Or perhaps an appeal could be processed even when a statement of concern has not been filed due to an extremely unusual case (e.g. a directly affected party being hospitalized) where a person's intent to file is otherwise established in advance. But those circumstances are highly fact-specific, exceptionally rare, and they do not apply to the present case.”⁸

[26] Specifically, the Appellant argue that their letter to the Town of Sylvan Lake expressing concern about the proposed dry pond “...establishes his intent to file a statement of

⁸ *O’Neill v. Regional Director, Parkland Region, Alberta Environmental Protection re: Town of Olds* (March 12, 1999), E.A.B. Appeal No. 98-250-D, at paragraph 14.

concern.” Further, the Appellant argues that use of the heading “Wastewater System” as opposed to “Storm Drainage System” constitutes an “extremely unusual circumstance”.

[27] While the Board is prepared to accept, for the sake of argument, that the Appellant intended to file a Statement of Concern, the Board is of the view that it did not take all reasonable steps to express this intent. For example, it would have been reasonable and prudent for the Appellant to copy the letter sent to the Town of Sylvan Lake to the Director to ensure that the Director was aware of the intent to file a Statement of Concern. Even if the Appellant had not considered copying the Director with the letter that was sent to the Town of Sylvan Lake, the Appellant could have immediately sent a letter to the Director expressing its concerns or doubts to ensure that the deadline for filing the statement of concern was not missed.

[28] Further, the Board does not accept that a differently worded heading on a Notice of Advertisement, on the facts of this case, constitutes an “extremely unusual circumstance” as contemplated in *O’Neill*.

IV. DECISION

[29] The Board finds that the Appellant was required to file a Statement of Concern in order to file a valid Notice of Appeal. The Appellant did not file a Statement of Concern, and there is no justifiable reason for the Board to exercise its discretion to exempt the Appellant from this requirement. Therefore, pursuant to section 87(5) of the Act, the appeal is dismissed.

Dated on September 6, 2001 at Edmonton, Alberta.

□original signed by□
William A. Tilleman, Q.C.