

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – September 23, 2009

IN THE MATTER OF sections 91, 92 and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by the Municipality of Crowsnest Pass with respect to the decision of the Director, Southern Region, Environmental Management, Alberta Environment, to refuse to issue a water licence under the *Water Act* respecting a well located at SW-16-08-05-W5M.

Cite as: Intervenor Decision: *Municipality of Crowsnest Pass v. Director, Southern Region, Environmental Management, Alberta Environment* (23 September 2009), Appeal No. 08-016-ID1 (A.E.A.B.).

BEFORE:

Mr. Eric McAvity, Q.C., Panel Chair.

SUBMISSIONS BY:

Appellant: Municipality of Crowsnest Pass, represented by Mr. Derek King, Brownlee LLP.

Director: Mr. Robert Burland, Director, Southern Region, Environmental Management, Alberta Environment, represented by Ms. Michelle Williamson, Alberta Justice.

Intervenor Applicants: Bridgegate Financial Corporation, represented by Mr. William L. Bradley; ClansWest Development Ltd., represented by Mr. Shane Stewart; and Mr. Terry Kenney.

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I. BACKGROUND

[1] On August 18, 2008, the Director, Southern Region, Environmental Management, Alberta Environment (the “Director”), refused to issue a water licence (the “Licence”) under the *Water Act*, R.S.A. 2000, c. W-3, to the Municipality of Crowsnest Pass for the proposed Sentinel well located at SW-16-08-05-W5M in the Municipality of Crowsnest Pass, Alberta. The Director refused to issue the Licence because of a possible connection between the proposed well and Crowsnest Lake, which is a surface water source subject to the South Saskatchewan River Basin moratorium. The South Saskatchewan River Basin moratorium prohibits the issuance of water licences from surface water sources.

[2] On September 19, 2008, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from the Municipality of Crowsnest Pass (the “Appellant”) appealing the Director’s decision.

[3] On September 22, 2008, the Board wrote to the Appellant and the Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records (the “Record”) relating to the appeal, and that the Parties provide available dates for a mediation meeting, preliminary motions hearing, or hearing.

[4] In consultation with the Parties, the Board scheduled a mediation meeting for January 14, 2009, in Lethbridge, Alberta.

[5] On December 22, 2008, the Appellant notified the Board that the Director and the Appellant were in discussions, and the Parties asked that the mediation meeting be adjourned. The Board granted the adjournment on January 9, 2009, advising that if no resolution was reached by June 1, 2009 that the Board would be proceeding to a hearing. The Board requested monthly status reports be provided, and the Parties were asked to provide available dates for a hearing in August 2009. The Board received monthly updates until June 2009.

[6] On June 26, 2009, the Appellant notified the Board that the issue could not be resolved through discussions with the Director, and that the appeal needed to proceed to a hearing.

[7] On August 6, 2009, in consultation with the Parties, the Board notified the Parties that the hearing would be held on October 20, 2009.

[8] The Board published a Notice of Hearing in the Crowsnest Pass Herald, Crowsnest Pass Promoter, Prairie Post West, Lethbridge Herald, Pincher Creek Echo, and Fort Macleod Gazette, and a copy of the Notice of Hearing was provided to the Municipality of Crowsnest Pass to post on its public bulletin board. The Board also issued a News Release advising of the hearing that was distributed to media agencies across the province. In response to the notice, the Board received three intervenor requests. The Board received submissions regarding the intervenor requests from the Parties on September 18, 2009.

II. SUBMISSIONS

A. Intervenor Requests

[9] The Board received intervenor requests from the Bridgegate Financial Corporation (“Bridgegate”), ClansWest Development Ltd. (“ClansWest”), and Mr. Terry Kenney.

[10] Bridgegate explained it has a project on Crowsnest Lake that has been approved by the Municipality of Crowsnest Pass, but an approval of a water licence is required in order to complete the development. ClansWest stated it was representing the Sentinel subdivision homeowners. They supported the need for the well in order to secure a consistent potable water supply for their community. Mr. Kenney explained he is a landowner in the Sentinel Industrial Park Area. He supported the need for the well because the industrial park is in need of a potable water source. Mr. Kenney stated the current water source does not provide drinking water or adequate fire protection. He stated this makes it difficult to attract new industry to the area. Mr. Kenney explained he intends to develop lands adjacent to the industrial park, but he requires a source of potable water.

B. Appellant

[11] The Appellant took no position either in response to the Director's submission or the intervenor requests.

C. Director

[12] The Director argued the intervenor requests were unrelated to the issue of whether the water in question is surface water or groundwater, and any intervention would delay and unnecessarily complicate the appeal. The Director stated it appeared the intervenor applicants would not be submitting evidence or argument related to the appeal.

[13] The Director stated the issue before the Board does not include the issues of water allocation for Crowsnest Pass or the need for water to be supplied to the proposed subdivisions. The Director noted the South Saskatchewan River Basin closure and the moratorium on new allocations of surface water is a government policy. The Director argued the intervenor requests focused on water allocation and challenged the South Saskatchewan River Basin policy decision, both of which are not before the Board. The Director stated the issue is a highly scientific and technical one, and it did not appear the intervenor applicants would have any new or additional evidence or arguments directly related to the appeal or that would be different from the Appellant.

[14] The Director opposed the intervenor requests, because it would result in duplication of the evidence or would allow irrelevant evidence which would lead to delays in the hearing.

III. ANALYSIS

A. Legislation

[15] Under section 95 of *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), the Board can determine who can make representations before it. Section 95(6) states:

“Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations.”

[16] Section 9 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the “Regulation”), requires the Board to determine whether a person submitting a request to make representation should be allowed to do so at the hearing. Section 9(2) and (3) of the Regulation provides:

- “(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject of the notice of appeal and shall give the person written notice of that decision.
- (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission.”

[17] The test for determining intervenor status is stated in the Board’s Rules of Practice. Rule 14 states:

“As a general rule, those persons or groups wishing to intervene must meet the following tests:

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
- the intervention will not repeat or duplicate evidence presented by other parties....”

B. Application

[18] The intervenor requests clearly support the Appellant in this appeal. All of the intervenor applicants want a secure water supply available to them to allow for growth in the area, both residential and industrial. However, with the South Saskatchewan River Basin closed to new surface water licences, the availability of water may limit such growth.

[19] The closing of the river basin was a policy decision made by Government of Alberta. It is not a decision that is before the Board and it cannot be altered by the Board. What is at issue in this appeal is whether the water in the Sentinel well is groundwater or surface water. If it is surface water, then the moratorium prohibiting new surface water licences would apply. The assessment of whether it is surface water is anticipated to be based on scientific analyses and technical information.

[20] Based on the information provided by the intervenor applicants, none of them presented any indication of their ability to provide evidence directly related to the issue of this appeal. Their concerns are more remotely related to the issue, because if the water is actually surface water, no licence can be given and their proposed plans to develop the area would be limited.

[21] The Board appreciates the concerns expressed by the intervenor applicants. Because the Board has some reservations as to the relevance of the evidence, the intervenor applicants will be allowed to participate in the hearing process by submitting a written submission of their evidence and arguments. To ensure the process remains fair to all of the Parties, the Board will allow each of the intervenor applicants to present an overview of their submissions at the start of the hearing immediately following the opening comments of the Parties. Each of the intervenors will be allotted 5 minutes, and the Director will be allotted 10 minutes, in total, to cross-examine all of the intervenors.

[22] Submissions that relate to other concerns other than the issue before the Board, which is determining whether the proposed well is connected to Crowsnest Lake and is, therefore, surface water, will not be considered by the Board. Because the time allotted to the intervenors to provide their oral presentations is limited, the Board recommends they use their time wisely and focus on the issue of the appeal. They should not duplicate the evidence of the Parties or raise concerns that are not relevant to the appeal. They will not be allowed to cross-examine the Parties, provide rebuttal evidence, or present closing arguments.

IV. DECISION

[23] Based on the submissions provided, the Board will allow Bridgegate Financial Corporation, ClansWest Development Ltd., and Mr. Terry Kenney to participate as intervenors in the hearing. They will be required to submit their written submissions to the Board by October 2, 2009, and the intervenors will be allowed 5 minutes each at the start of the hearing to speak to their submissions. They will be subject to cross-examination by the Director. The intervenors will not be allowed to cross-examine the Parties or participate further in the hearing. Any intervenor that does not provide a written submission detailing their evidence and arguments by the due date of October 2, 2009, will not be permitted to speak at the hearing.

[24] The hearing will be held in Lethbridge, Alberta, on October 20, 2009.

Dated on September 23, 2009, at Edmonton, Alberta.

“original signed by”

Eric O. McAvity, Q.C.
Board Member and Panel Chair