

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – February 23, 2010

IN THE MATTER OF sections 91, 92, 95, and 101 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by Rod Dyrholm with respect to *Environmental Protection and Enhancement Act* Approval No. 19060-01-00 issued to the Resort Development Funding Corporation by the Director, Central Region, Environmental Management, Alberta Environment.

Cite as: Reconsideration Decision: *Dyrholm v. Director, Central Region, Environmental Management, Alberta Environment*, re: *Resort Development Funding Corporation* (23 February 2010), Appeal No. 09-003-RD (A.E.A.B.).

BOARD PANEL:

Mr. Gordon Thompson, Panel Chair;
Mr. Jim Barlishen, Board Member; and
Dr. Dan Johnson, Board Member.

SUBMISSIONS BY:

Appellant: Mr. Rod Dyrholm.

Director: Mr. Robert Pole, Director, Central Region,
Environmental Management, Alberta
Environment, represented by Mr. Andrew
Bachelder, Alberta Justice.

Approval Holder: Resort Development Funding Corporation,
represented by Mr. Ryan Rodier, Osler, Hoskin
& Harcourt LLP.

EXECUTIVE SUMMARY

Alberta Environment issued an approval under the *Environmental Protection and Enhancement Act* to the Resort Development Funding Corporation. This approval renewed the previous approval authorizing the construction, operation, and reclamation of a waterworks system for the Gleniffer Lake Resort in Red Deer County, Alberta. The waterworks system provides potable water to the Resort.

The Environmental Appeals Board received Notices of Appeal from Ms. Joan and Mr. Rod Dyrholm appealing the approval. The Board dismissed the appeals because the Dyrholms were not directly affected by the approval.

Mr. Dyrholm filed a reconsideration request of the Board's decision. The Board denied the request because the additional information provided by Mr. Dyrholm was available at the time of the original submission. The other arguments brought forward had been raised and considered in the Board's original decision. Based on the information provided, the Board found no basis to reconsider its decision.

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I. BACKGROUND

[1] On May 1, 2009, the Director, Central Region, Environmental Management, Alberta Environment (the “Director”), issued Approval No. 19060-01-00 (the “Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, (“EPEA”), to Resort Development Funding Corporation (the “Approval Holder”) authorizing the construction, operation, and reclamation of a waterworks system for the Gleniffer Lake Resort (the “Resort”) in Red Deer County, Alberta. The waterworks system supplies potable water to the Resort.

[2] On June 11, 2009, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Ms. Joan Dyrholm and Mr. Rod Dyrholm (the “Appellant”) appealing the Approval.

[3] On June 29, 2009, the Approval Holder raised a motion to dismiss the appeals on the grounds the Dyrholms were not directly affected, the Notices of Appeal raised issues that were not properly before the Board, and the appeals were frivolous, vexatious, and without merit. The Board received submissions on the motions, and on November 19, 2009, the Board issued its decision dismissing the appeals, because the Dyrholms were not directly affected.¹

[4] On November 25, 2009, the Board received a reconsideration request from the Appellant. Response submissions were received from the Approval Holder and the Director on December 11, 2009, and the Appellant provided his rebuttal submission on December 22, 2009.

II. SUBMISSIONS

A. Appellant

[5] The Appellant provided a copy of a Sales and Adjoining Lands Agreement (the “Agreement”) between himself and the Approval Holder, signed in May 1998. The Appellant stated the Agreement gives the Appellant rights to the Approval Holder’s water, and therefore, he is directly affected.

¹ See: *Dyrholm v. Director, Central Region, Environmental Management, Alberta Environment, re: Resort Development Funding Corporation* (19 November 2009), Appeal Nos. 09-002-003-D (A.E.A.B.) (the “Decision”).

[6] The Appellant argued the appeal should be granted because the five year timeframe for the Approval Holder to conduct studies is too long. The Appellant stated the usage of the Resort has changed from seasonal recreational vehicle use to year round occupancy of permanent houses, thereby putting a strain on the waterworks system. The Appellant stated he has letters from Resort residents expressing concerns about the waterworks system. The Appellant argued the changes have occurred without sustainability studies and without upgrades to the waterworks system, creating concerns regarding public safety for the Resort's residents and the Appellant if he connects to the waterworks system.

B. Approval Holder

[7] The Approval Holder submitted the reconsideration request does not allege a substantial error in law, so the Board must determine if substantial new evidence was provided by the Appellant that was not available at the time the preliminary motions submissions were received.

[8] The Approval Holder argued the Appellant did not meet his onus of demonstrating the evidence was new or unavailable, because the Agreement was available and obtainable when the Appellant filed his Notice of Appeal and his standing submission. The Approval Holder noted the Agreement was signed by the Appellant and dated May 1998. The Approval Holder explained the interest in the Agreement referred to by the Appellant is a contingent interest² that the Appellant has repudiated in litigation.

[9] The Approval Holder stated the other reasons the Appellant provided relate to issues and information already in the Board's record. The Approval Holder stated the Appellant raised the issue of the five-year timeframe to implement the "source to tap" risk assessment in his rebuttal submission for the original motions, and the issues of the Resort's usage, letters from Resort residents, and the lack of sustainability studies and upgrades were raised in the Appellant's Notice of Appeal. The Approval Holder stated this information was not substantial new evidence, and it was available at the time the preliminary motions submissions were provided.

² A "contingent interest" is an interest "which depends for its effect upon an event which may or may not

C. Director

[10] The Director explained the Appellant alleged the Agreement contains evidence that shows the Appellant has water rights in relation to the water used by the Approval Holder, and therefore is directly affected by the Approval. The Director noted the Agreement is dated May 1998. He stated the Appellant, as a signatory to the Agreement, was aware of the existence of the Agreement for over 11 years. The Director stated the Agreement was available when the Board requested submissions on whether the Appellant was directly affected, but it was not mentioned until the reconsideration request. The Director argued this evidence was clearly available but not utilized by the Appellant, and therefore, the Board should reject the evidence.

[11] The Director stated the Appellant raised the issue of too much time being provided for the Approval Holder to complete its risk assessment study in the Appellant's directly affected submission. Therefore, it is not new evidence.

[12] The Director explained the issues of the Resort's change to year-round occupancy, letters from Resort residents, and health concerns regarding the drinking water were already raised in the Notice of Appeal. The Director added that if the Resort residents' letters were gathered after the submission for directly affected status, then the Appellant has the onus to show these letters create compelling and exceptional reasons for the Board to reconsider its decision. The Director noted the Board extended the Appellant the opportunity to provide supplemental materials, but no other evidence or documents were provided. The Director explained that even if the letters were provided, they would not meet the deadline for the submission of Statements of Concern, and the Appellant is not authorized to represent the residents.

[13] The Director argued the Appellant failed to submit any exceptional or compelling reasons that would necessitate the Board to reconsider its decision. The Director stated the evidence relied on by the Appellant was already submitted or was available to the Appellant or was not utilized.

[14] The Director submitted the Appellant failed to meet the test to justify a reconsideration. The Director requested the reconsideration request be dismissed.

D. Rebuttal Submission

[15] The Appellant argued the Approval Holder is benefitting from the Agreement, because it is allowed to irrigate using effluent within the 30 metre setback from neighbouring lands. The Appellant stated he has rights to the Approval Holder's water if pollution of his current water supply occurs and, therefore, he is directly affected.

[16] The Appellant added the "source to tap" study would benefit if there is input from interested parties to address all the issues that have resulted from changing the usage of the Resort to year-round occupancy and to units with permanent basements. The Appellant stated incorrect information has been provided to approving authorities in the past, so affected, interested parties should contribute to the study.

[17] The Appellant explained some of the incorrect information included: providing a tampered plan for the water diversion licence which was the only plan that showed water diversion to the Appellant's land; not correcting an expert who stated there were no permanent residences or basements in the resort community; and water diversion to the Appellant's lands. The Appellant explained there has never been an agreement to maintain his slough, because the area was only wet during certain times of the year and was farmed. The Appellant stated the pipe from the Resort was not shown on the plans submitted for the Approval or the plan delivered to the Appellant prior to signing the Agreement. He noted the pipe appeared only after the Agreement was signed.

[18] The Appellant stated there may be health issues involved. The Appellant explained it appears the authorities which grant approvals for the development are isolated from each other. He stated letters to the municipality from Resort residents noting concerns with the waterworks system were not shared with the Director.

[19] The Appellant stated the Approval Holder has contravened its Approval and licences many times without any negative consequences. The Appellant provided examples including: the Approval Holder was required to decommission the pipe linking the effluent pond to the Appellant's land, but no penalty was assessed; and the Approval Holder was pumping down its ponds onto the Appellant's land for four years; now Alberta Environment admits that the Approval Holder was acting in contravention of its water diversion licence.

[20] The Appellant explained he wants his appeal reconsidered because if he has to be serviced by the waterworks system, he wants to be connected to a system that produces adequate volumes of safe drinking water. He added he prefers to report his concerns now rather than after a serious problem has arisen.

III. ANALYSIS

A. Law

[21] Under section 101 of EPEA, the Board can reconsider a decision made by it. Section 101 states: "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

[22] The Board has stated in previous decisions that its power to reconsider "...is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider."³ The Board uses its discretion to reconsider a decision with caution, as the power to reconsider is the exception to the general rule that decisions of the Board are intended to be final. However, the Board does realize there are specific circumstances that warrant reconsidering a decision, but it is not intended as a tool for participants to reargue the same issues a second time.

³ *Whitefish Lake First Nation Request for Reconsideration re: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment re: Tri Link Resources Ltd.* (28 September 2000), Appeal No. 99-009-RD.

[23] The onus is on the participant making the request to convince the Board there are exceptional and compelling reasons to reconsider the decision.⁴ Information that was not available at the time the decision was made or was not practically obtainable by the parties would be relevant for purposes of reconsideration.⁵

[24] The factors the Board will consider in deciding a reconsideration request include: the public interest, delays, the need for finality, whether there was a substantial error of law that would change the result, and whether there is new evidence not reasonably available at the time of the previous decision.⁶

[25] Essentially, what the party requesting reconsideration must demonstrate is that there was an error in the Board's interpretation of the law, the process was flawed, or there was an error in fact sufficient to undermine the basis of the Board's decision. The evidence does not have to establish that it is more likely than not to result in a change of the original decision, but there must be a reasonable possibility the decision could be altered.⁷

B. Analysis

[26] The Appellant is not arguing there was an error in law or the process was flawed. The Appellant provided a document, the Agreement, which was not provided to the Board previously but which the Appellant argued demonstrates he has an interest that could be affected by the Approval.

⁴ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

⁵ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

⁶ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

⁷ *Laidlaw Environmental Services (Ryley) Ltd. Request for Reconsideration, re: Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (7 April 1998), Appeal No. 96-059 (A.E.A.B.).

[27] As stated, information that was not available at the time the decision was made or was not practically obtainable by the parties could be relevant for purposes of a reconsideration. If the material being submitted as the basis for the reconsideration was available at the time of the original decision, then it cannot be considered.

[28] The Appellant requested the Board reconsider its decision on the basis of the Agreement signed in May 1998. It is clear from the date, and the fact the Appellant was a signatory to the Agreement, that the Agreement was available at the time the initial submissions were provided to the Board. Since the Appellant had signed the document, it is apparent the Agreement was obtainable by the Appellant.

[29] The Board will undertake a reconsideration of a decision only in exceptional circumstances. The purpose of a reconsideration is not to allow participants to an appeal to provide withheld information. The Appellant did not provide any explanation to explain why the Agreement was not provided in his original submission. It perhaps may have been an oversight. Nonetheless, no exceptional or compelling justification has been provided that would enable the Board to reconsider its decision.

[30] The Board is not saying the Agreement may have resulted in a different outcome in its decision. The Board has not assessed the document to determine if the Agreement would have a reasonable possibility of altering the Board's decision, because it is clear the document was available and readily accessible by the Appellant at the time of the initial submissions and no compelling reasons were provided to explain why it was not included as part of his submission. Therefore, the Agreement cannot be used as a basis for a reconsideration.

[31] The Appellant raised other matters that he considered needed to be addressed in his reconsideration request. These other issues discussed in the Appellant's current submission were included in his previous submissions or in his Notice of Appeal. The matter of the five year time period to complete and implement a study was noted in paragraph 44 of the Decision. Health issues were noted in paragraph 16; incorrect information and modifications to the development plan were noted in paragraphs 14 and 21; and change in the usage of the Resort was noted in paragraph 44 of the Decision. These are not new arguments. All of these issues were

part of his previous submission or Notice of Appeal. Therefore, the Board had taken all of the information into consideration at the time it made its decision to dismiss the appeals.

[32] Contravention of an approval or licence is dealt with by the enforcement branch of Alberta Environment and is not an issue within the Board's jurisdiction and cannot be a basis for a reconsideration request.

IV. DECISION

[33] The Board denies the reconsideration request submitted by Mr. Rod Dyrholm.

Dated on February 23, 2010, at Edmonton, Alberta.

“original signed by”

Gordon Thompson
Board Member & Panel Chair

“original signed by”

Jim Barlishen
Board Member

“original signed by”

Dan Johnson
Board Member