

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Report and Recommendations

Date of Hearing - August 18, 1997

Date of Report and Recommendations - August 22, 1997

IN THE MATTER OF Sections 84, 85, 86, 87, 89, 91, 92 and 93 of the *Environmental Protection and Enhancement Act* (S.A. 1992, ch. E-13.3 as amended);

-and-

IN THE MATTER OF an appeal filed by Mr. Nazmin Nurani and Ms. Zeini Virji-Nurani, with respect to the refusal of Application No. BC 97-0003 for a Universal Beverage Container Depot by the Director of Action on Waste, Alberta Environmental Protection.

Cite as: Nurani and Virji-Nurani v. Director of Action on Waste, Alberta Environmental Protection.

HEARING BEFORE

Dr. John P. Ogilvie, Vice-Chair
Dr. Ted W. Best
Mr. Ron Peiluck

APPEARANCES

Appellant:

Mr. Nazmin Nurani represented by Ms. Jennifer Klimek of Kuckertz & Associates, Mr. Rob Strynadka, City of Edmonton

Other Parties:

Ms. Joanne Esbaugh, Environmental Law Section, Alberta Justice, representing the Director of Action on Waste; Ms. Jean Eve Mark and Ms. Betty Teichroeb, Action on Waste Branch, Alberta Environmental Protection

BACKGROUND

On July 7, 1997, Mr. Nazmin Nurani and Ms. Zeini Virji-Nurani, (the Appellants) separately filed a Notice of Appeal with the Environmental Appeal Board (the Board) with respect to the failure of Mr. Jerry Lack, Director of Chemicals Assessment and Management Division, to approve Application No. BC 97-0003 for a Universal Beverage Container Depot. The Application submitted by the Appellants was for a new depot at Block 6, Lot 7, Plan 822-0320 (54 Street & 56 Avenue), Edmonton, Alberta.

The Board wrote to the Appellants on July 7, 1997, acknowledging receipt of their appeals and by copy of that letter requested all related correspondence, documents and materials from the Department of Environmental Protection (the Department).

All requested correspondence was received from the Department on July 25, 1997 and a copy was sent to all parties with notification that a mediation meeting would be held on July 31, 1997.

THE MEDIATION MEETING

The mediation meeting was held on July 31, 1997, in Edmonton, Alberta. The facilitator from the Board was Mr. Max McCann.

According to the Board's standard practice, the Board called the mediation in an attempt to mediate or to facilitate the resolution of these appeals or, failing that, to make arrangements for the oral hearing. The Board invited representatives from each party to participate.

In conducting the mediation, Mr. McCann provided a review of the appeal and mediation process and explained the purpose of the mediation meeting. He then circulated copies of the "Participants' Agreement to Mediate". In reviewing the document, all parties presented a willingness to enter into mediation, signed the agreement and the mediation continued.

As no resolution was reached at the mediation meeting, a hearing date was set for August 18, 1997, in Edmonton, Alberta.

THE HEARING

On July 31, 1997, the Board wrote to all parties advising that a hearing date had been set and included a Notice of Hearing which was published in the Edmonton Journal on August 3, 1997. The parties were asked to provide the names of any other parties that might be interested in making a presentation to the Board. Written submissions were requested and received. On August 18, 1997, the hearing took place at the Board office.

At the beginning of the hearing, the Vice-Chair, following the Board's standard procedure, asked whether any parties, in addition to the Appellant and the Department, wished to participate in the hearing and make a statement. No requests were received.

THE ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether or not the Director erred in refusing to issue an approval in response to Application No. BC 97-0003 for a Universal Beverage Container Depot. More specifically, as the Board stated in a previous bottle depot Report and Recommendations¹:

1. Did the Director follow the intent of the legislation as set forth in section 2 of the Act² in denying to issue the approval?
2. Did the Director have available to him sufficient accurate information to permit him to make a proper decision?
3. Do the standards applied by the Director to allow him to refuse the application for the new Universal Bottle Depot properly reflect the intent of the Act?

SUMMARY OF THE EVIDENCE

The Appellants

Mr. Nazmin Nurani

Mr. Nurani testified under affirmation that he and his wife, Ms. Zeini Virji-Nurani, are the principals in Roper Bottle Depot Ltd., the applicant for the approval. He will be responsible for the administration of the business and his wife for the day-to-day operations. Mr. Nurani stated that he was planning to have a full service recycling depot that would accept such items as newsprint, cardboard, used oil and filters, and light industrial wastes. As soon as the business opens, used oil and filters, cardboard and newspapers will be accepted. Other wastes will be accepted as the market

¹ *Castledowns Bottle Depot Ltd, v. Acting Director of Action on Waste Division, Alberta Environmental Protection, March 3, 1997, page 3.*

² *Environmental Protection and Enhancement Act, Statutes of Alberta, 1992, Chapter E-13.3 as amended.*

for their products develops and the company arranges recycling techniques. He noted that at this point in time he was not able to be specific as to just what and how much recycling, other than beverage containers, his company would perform.

Mr. Nurani went on to describe the process he used in selecting the site. He worked closely with the City of Edmonton, Planning and Development Department, to determine the best combination of suitably zoned land available and areas indicating the highest population growth. His research indicated that the part of Edmonton south of the North Saskatchewan River was showing the greatest population growth. Of that area, he selected the area east of 50 Street and south of Whitemud Freeway as the target market area. Moreover, the part of Edmonton south of the North Saskatchewan River has a population of 244,874 according to the May 14, 1995, census conducted by Statistics Canada. He noted that, based on the 40,000 population per Bottle Depot guideline used by the Department, the south side should support six bottle depots and that there are only five existing at present. The site at the corner of 54 Street and 56 Avenue was selected on the basis of the nearest appropriately zoned land to the market area.

The site is an undeveloped lot with gas and power available with an area of 0.847 ha. Mr. Nurani noted that this area provides ample space for expansion as the company's recycling business expands and diversifies. He reiterated that the company will become a "full service" recycling depot handling and recycling residential and light industrial wastes.

Mr. Rob Strynadka

Mr. Nurani called Mr. Strynadka as an expert witness on the pattern of transportation flows in the south east part of Edmonton. Mr. Strynadka is supervisor of Transportation Monitoring in the Transportation Branch of the City of Edmonton. He said that he had been employed by the City of Edmonton in Transportation for 20 years. He referred to a map of the south east sector of the City of Edmonton (Exhibit 11)³ which shows the annual average weekday number of vehicles that use

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Exhibit No. 11 - City of Edmonton Map - 1996 Traffic Flow.

the main traffic arteries in the area. The annual weekday average for 50 Street is 26,700 vehicles north of Whitemud and 26,500 vehicles south of that freeway. For Whitemud, the count is 50,700 west of 50 Street reducing to 29,500 at 34 Street. These counts are for vehicles going in both directions on the route in question. The data collection process is done by electronic means and does not provide any indication of where the vehicle is going or where it came from. It merely indicates how heavy the traffic is on the route under examination.

The Department

Ms. Jean Eve Mark, Head of Action on Waste and Ms. Betty Teichroeb, Action on Waste Branch

Ms. Esbaugh presented the two Department witnesses as a panel. Ms. Mark reviewed the history of used beverage container collection in Alberta since its inception in 1972 with the coming into effect of the *Beverage Container Act*. This Act and its associated Regulations were revised in April of 1972 and again in January 1989. In 1993 the Act was incorporated into the *Environmental Protection and Enhancement Act*. She noted that the current Beverage Container Recycling Regulation provides the Director, in section 18⁴, with the right to establish guidelines covering the operation of bottle depots and to limit the number of depots in Alberta. In 1993 guidelines were established to provide a convenient, efficient collection service to the public. The number and location of depots was also limited in an attempt to ensure that there would be just sufficient depots in operation to handle the volume of returned beverage containers and that depots would not

⁴ Section 18 of the Regulation states:

The Director may

- (a) establish guidelines governing the operation of depots, including but not limited to the general operation and administration of depots including the hours that they must remain open to receive empty containers;
- (b) limit the number of depots in all or any part of Alberta.

adversely affect the economics of other depots.

Ms. Teichroeb is responsible for examining applications for new depots. She described the steps she takes in this process. When the Branch determines that an application is complete, she visits the proposed site. She notes the surrounding businesses and whether these will tend to attract potential customers who might use the depot. She determines the distance to the nearest established depot both on a direct point-to-point basis and by the most direct route when driving. She notes if any of the adjacent businesses might be adversely affected by the operation of the depot, for example, the arrival and pick up of containers by large trucks. She also determines the space available for parking and, if the building to be used is standing, the ease of access and general convenience of the location.

Ms. Teichroeb said that she examines the targeted market area for the proposed depot both from the point of view of population and access to the depot for the residents of the area. For population statistics she relies on the Planning Department of the City of Edmonton and on census data released by Statistics Canada. She looks at potential growth in the target area always with a view to ensure that there is a potential of a population of at least 40,000 available to use the proposed depot. She stated that her view of the application indicated that there is insufficient population in the area to support another depot having regard to the fact that there are already three depots in the area. She said that the economic effect of approving the application would be negative on both the proposed depot and the existing depots and that the establishment of a new depot would not increase the number of beverage containers recycled. She, therefore, recommended to the Director that the application be refused.

Under cross-examination, Ms. Teichroeb stated that the main focus of her examination was on the beverage container recycling portion of Mr. Nurani's application. She said that this is because the Branch's⁵ mandate is the approval of beverage container recycling depots and not on other types of approvals. She said that the effect of other types of recycling may be considered but more from the

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point of view of determining that the costs involved do not interfere with the beverage recycling operation. Ms. Mark noted that when applying for a beverage recycling depot, that part of the business must be shown to be profitable and that other recycling operations must not depend upon it nor must the beverage recycling operation depend on other operations to be profitable.

Ms. Teichroeb said that she looks at the population of Edmonton as a whole as well as the population of the target market area in assessing a beverage container depot application. She does this because people tend to use a depot that is conveniently located to other businesses or stores that are scheduled to be visited during the particular trip. She said that people do not normally make a special trip to drop off empty beverage containers.

Under cross-examination by the Board, Ms. Mark and Ms. Teichroeb admitted that they did not receive financial statements of operating bottle depots and therefore had no specific datum point from which to measure the economic effect of a new depot. Their judgement of these economic effects was based more or less on their estimate of the reduction in beverage container receipts that an operating depot would suffer as a result of the new depot.

SUMMARY OF THE ARGUMENTS

The Appellant

Ms. Klimek based her argument largely on the premise that the Director failed to recognize the full purpose of the Act as defined in section 2, particularly parts (a), (b) and (f)⁶. She argues that the

⁶ Section 2 of the Act states:

The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;

Director focussed his attention on the economics of the proposed depot and its economic effect on other depots in south Edmonton and neglected to consider the effect the Roper depot could have on the environment as a result of its plans to provide full service recycling. She noted that the Roper proposal is in line with the target set in 1989 by the Canadian Council of Ministers of the Environment that the amount of waste generated be reduced by 50 percent. It is also in line with the long range plans of the City of Edmonton to reduce the amount of waste which must be taken to the landfill for disposal.

She quoted a previous Report and Recommendations of the Board, which was approved by the Minister.⁷

“The Director can impose reasonable guidelines and restrictions on the beverage container market in which the department is the regulator, but this does not mean that the Director can single out any particular rule or guideline if the result or effect is one that does not achieve all the purposes of the Act.”

She notes that Roper’s plans to provide a “full service” depot conforms to the purposes of the Act in that the environment is enhanced and the operation is economical. Mr. Nurani plans to accept used oil and filters, cardboard and newspapers as soon as the depot is open and plans to pilot other recycling programs. Only one other depot in south Edmonton now accepts used oil and filters, the Millwoods Depot, and it is over seven kilometers from Roper’s proposed site.

She notes that the Department complains that the proposed depot is more than three kilometers from

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- (b) the need for Alberta’s economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning; ...
 - (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions; ...

⁷ *Douglas Blatter v. Director, Action on Waste Division, Alberta Environmental Protection*, March 24, 1995, pages. 12 and 13.

its targeted market area, Millwoods, and further, it is more than three kilometers from a large unserved area west of the Calgary Trail. Ms. Klimek points out that the depot is not intended to serve the specific area west of Calgary Trail. The Department also notes that there are no other businesses nearby the proposed site to draw people to the area. Ms Klimek rebuts that nearby 50 Street carries 26,700 vehicles on a normal week day and that it is readily accessible to residents of the Millwoods area. This area has a population of 32,000 east of 50 Street and there is a projected population of 22,000 for the Meadows area. There is sufficient population in the targeted market area to support the proposed depot.

Regarding the economic effect on and competition for other existing depots, Ms. Klimek argues that none of them intervened. There has been no evidence presented regarding the economics of these businesses nor specific market details. She noted that the zoning bylaws of the City affect the location of depots and, as a result some relaxation of the guideline calling for a three kilometer separation may be required.

Ms. Klimek concluded by arguing that the Director erred in that he did not look at Roper's proposed business as a whole but concentrated on the beverage container recycling part. Mr. Nurani admits that to have the full service recycling depot he needs to have the beverage recycling portion of the business. However, it will only form a base from which to expand the recycling of other used materials. As other markets develop, the other recyclers, Mr. Nurani's competition, may well be forced to expand the services that they are offering. The result is an overall positive effect on the environment.

In conclusion, Ms. Klimek argued that the Director erred in making his decision to refuse the application in that he did not take into consideration the purpose of the Act. He stressed the economic results while ignoring the environmental benefits.

The Department

Ms. Esbaugh agrees with Ms. Klimek that the issue before the Board is whether or not the Director erred in refusing to issue the approval. Section 2(a) and (b)⁸ provides the authority for the Director to consider both environmental and economic effects. Ms. Esbaugh argues that both factors were taken into account by the Director. In addition section 18⁹ of the Beverage Container Recycling Regulation gives the Director authority to set guidelines for the establishment of Beverage Container Recycling Depots, which he has done.

Ms. Esbaugh outlined the steps taken by the Director in examining the application. First, does the application show that service will be provided for a presently unserved population? The Department claims it will not because there are other depots in the area which serve it adequately. Moreover, the Department claims that there is insufficient population growth in the market area to supply an additional depot. The area in south Edmonton exhibiting the greatest growth, according to the Department, is the area west of Calgary Trail. And the new depot is not positioned to serve that area adequately.

Second, will the additional depot divert waste from the waste stream going to the landfill? Ms. Esbaugh argues that the applicant did not show that the new depot will remove additional containers from the waste stream.

Third, is the proposed site acceptable and amenable to beverage container collection? The Department claims that, because it is a new industrial area, there are no other businesses there that might attract people to the area it is not suitably located. Further, the site is more than three kilometers from the market area that Roper is targeting and, in addition, is less than 3 km from another depot.

⁸ See Footnote 3.

⁹ See Footnote 2.

Finally, does the fact that the company plans to expand its recycling business to take in addition waste materials such as used oil and filters, cardboard and newspapers improve the situation? While the Director does take this factor into account, his main focus is on the business of recycling beverage containers. The application must meet the requirements for a beverage container depot. In the future the company may recycle other materials but the future is uncertain and the applicant gave no definite information on the plans for future recycling processes or materials to be treated. The Director cannot approve the application based on future plans.

Finally, Ms. Esbaugh reiterated that the Director did consider all factors in making his decision including the intentions expressed in the Act and in the Regulation. Therefore, the Director did not err and the Board should dismiss the appeal.

CONSIDERATIONS OF THE BOARD

As noted above the main issue facing the Board is the question: Did the Director act reasonably in refusing to issue an approval for a new depot or did he err? Underlying this general question are three sub-questions. First, did the Director adhere to the intent of the legislation? Second, did the Director have sufficient accurate information available when he made his decision? Third, do the guidelines applied by the Director in refusing the application properly reflect the intent of the Act?

Both parties referred to section 2 of the Act as the section that expresses the purpose and intent of the Act. The Board agrees with this concept and specifically focusses on section 2(b) which provides:

Purpose of the Act

- 2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: ...
 - (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning; ...

The Appellant infers that the Director stressed the economic factors at the expense of environmental factors in making his decision to refuse the application. The Board tends to agree. The Appellant is proposing to purchase a vacant lot with an area of some 0.847 hectares, to erect a building and equip it with the equipment and office materials necessary to operate a business - the recycling of returned beverage containers as well as used oil and filters, cardboard and newspapers.

The Appellant prepared a detailed report and business plan describing the proposed operation, marketing and financing of the bottle depot. He did not give any details of his plans for further types of recycling that he expects to carry out in the future. He explained that he must get the depot established before developing detailed and costly plans for these moves.

The population and its estimated growth used by Mr. Nurani in assessing the market area were slightly higher than those the Director used in his determinations. Mr. Nurani supported his figures through building permits issued for the area and comments supplied by the City of Edmonton Planning Department. Additionally, Mr. Nurani pointed out that within the south Edmonton area there is already sufficient population for an additional depot under the Director's population guidelines. The Board believes that since Mr. Nurani and his bankers are willing to fund this venture and since a thorough business plan has been developed, this should be used as the primary evidence supporting economic viability. Regarding the effect on nearby depots, there was no evidence presented of their financial condition nor their specific market areas. The Board believes that, while the proposed Roper depot may have a negative effect upon them, that, on balance, considering the south Edmonton population, population growth in south Edmonton and the positive environmental result, the possible negative economic impact on the depots within the three kilometer guideline would not be sufficient to reject the offsetting benefits of the Roper Depot application.

CONCLUSIONS

The Board concludes that because Mr. Nurani has studied the operation of the proposed Roper depot carefully and because the establishment of this depot, with its plan to expand its business to handle

other materials than returned beverage containers, will enhance the environment. Not only will it meet the long term plans of the City of Edmonton to reduce the quantities of waste in the waste stream going to the landfill, but it will generate additional recycled materials and this is consistent with sections 2(a) and (b) of the Act. Therefore, the Board recommends that the appeal be allowed and the Approval be granted.


RECOMMENDATIONS

The Board recommends that the appeal be allowed and the Approval granted.


With respect to section 92(2) and 93 of the *Environmental Protection and Enhancement Act*, the Board recommends that copies of this Report and Recommendations be sent to the following parties:

- Ms. Jennifer Klimek, Kuckertz & Associates, representing Mr. Nazmin Nurani and Ms. Zeini Virji-Nurani
- Mr. Nazmin Nurani and Ms. Zeini Virji-Nurani
- Ms. Joanne Esbaugh, Environmental Law Section, Alberta Justice, representing the Director of Action on Waste Branch, Alberta Environmental Protection


Dated August 22, 1997, at Edmonton, Alberta.



 Dr. John P. Ogilvie, Vice-Chair



 Dr. Ted W. Best



 Mr. Ron Peiluck

ORDER

I, Ty Lund, Minister of Environmental Protection:

yes Agree with the Recommendations of the Environmental Appeal Board and order that they be implemented.

_____ Do not agree with the Recommendations of the Environmental Appeal Board and make the alternative Order set out below or attached.

Dated at Edmonton this 02 day of September 1997.

Ty Lund

Honourable Ty Lund
Minister of Environmental Protection

_____ Refer to Attachments (only if applicable)