

1994 ABEAB 5

Appeal No. 94-003

May 24, 1994

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

-and-

IN THE MATTER OF an appeal filed by Gerald M. Ross on March 29, 1994 with respect to Approval 94-MUN-009 issued on March 7, 1994 by David Spink, Director, Environmental Protection relating to a storm sewer outfall to service the Gleneagles subdivision issued to the Mayor, Town of Cochrane.

## DECISION

Cite as: Gerald M. Ross v. Director, Alberta Environmental Protection

**BEFORE:** William A. Tilleman, Chair

David H. Marko, Vice-chair

Joan C. Copp

Max A. McCann

**REPRESENTATIONS:**

Gerald M. Ross represented by Harvey Locke

Mayor, Town of Cochrane represented by K. Hugh Ham

Director of Standards and Approvals represented by William McDonald

## **I. Background**

Mr. David Spink, Director of Standards and Approvals, ("Director") issued an approval to the Mayor of the Town of Cochrane ("Town") relating to a proposed storm sewer outfall which will service the Gleneagles subdivision in the Town and empty into the Bow River. Mr. Gerald M. Ross lives near the Town of Cochrane. On March 29, 1994, he appealed the decision to construct the storm sewer outfall. According to his evidence, he overlooks the river and is a nearby landowner downstream from the outfall, but his land is not adjacent to the Bow River.

The Board notified the Director and the Town that the appeal had been filed and that the Board would consider the matter in due course. On April 8, 1994, the Board wrote to all of the parties and asked several questions about the storm sewer outfall approval, including whether Mr. Ross would be directly affected by the storm sewer outfall.

According to the Town, the Gleneagles subdivision includes residential dwellings and a golf course located on a hillside north of the Bow River in the eastern portion of Cochrane. The development has an elevation drop of about 183 metres from its northeast corner down to the river. The Town advises that the subdivision was approved under the authority of the Gleneagles Area Structure Plan which provides for the development of approximately 900 housing units and an 18 hole golf course within a total area of 267.7 hectares. The housing development will be located on the bench lands and plateau areas of approximately 80 hectares, with the balance of the area dedicated to the golf course, municipal reserves and environmental reserves.

The drainage system for the development is designed to direct the maximum possible amount of storm water to grassed areas of the development in order to assist in the removal of silts and soil particles. The storm water will then be directed through a steel pipe with internal baffles and across a concrete pad with protruding blocks to reduce the water velocity and to aerate the water at the outfall. The result is to enhance the water quality from the outfall as it enters the Bow River.<sup>1</sup>

The Board asked the Town to outline the planning history and public consultation process for the Gleneagles subdivision. The Town advised the Board that the Gleneagles project was subjected to extensive consultation and review during the area structure plan and outline plan approval processes. In both of these processes, which were the subject of many public Town Council meetings, it was proposed to drain stormwater in the manner currently proposed. In the fall of 1993, the Town's Municipal Planning Commission approved a stripping and grading permit for this phase of the construction of Gleneagles, but that approval was subsequently overturned by the Development Appeal Board. In its ruling, that Board noted that there was a risk associated with premature grading of the subdivision (in advance of the development agreement) and determined that the grading should not proceed until after the execution of the Town's Development Agreement. Both the Municipal Planning Commission meeting and the Development Appeal Board meeting were open to the public, and members of the public did attend and make representations.

## **II. The standing issue**

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<sup>1</sup> Walker Newby Consultants Inc., December 17, 1993, Executive Summary

Before proceeding further with this appeal, the Board must first decide whether or not Mr. Ross is directly affected by the Director's decision to approve the construction of the storm sewer outfall.

Mr. Ross filed his appeal pursuant to section 84(4)(c) of the *Environmental Protection and Enhancement Act* (the "Act") which is the section setting out the time limits for filing a notice of objection. Section 84 (1)(a)(v) of the Act states that a notice of objection may be submitted:

*by the approval holder or by any person who is directly affected by the Director's decision, in a case where no notice of the application or proposed changes was provided by reason of the operation of section 69 (3).*

Thus, before proceeding with the merits of Mr. Ross' appeal, the Board must decide whether or not he is directly affected.

### **III. Submissions by the parties**

On April 21, 1994, Mr. Ross' counsel responded to this question. He claimed that Mr. Ross was directly affected because the project would directly impact on the enjoyment of his land and the nature of the community. Mr. Ross expressed further concerns about the water quality of the Bow River, that he overlooked the River, and that he used the Bow River for recreation. He also raised the issue of having a water well that might be impacted by the storm sewer outfall.

The Town responded to the Board's question on April 22, 1994 by stating that it did not believe that the appellant would be directly affected by the project. The Town based its position on the distance between Mr. Ross' property and the proposed location of the storm sewer outfall which, according to their evidence, is nearly 2500 metres. Further, the Town pointed out that Mr. Ross' property is approximately 283 metres above the elevation of the Bow River.

The Director responded to the directly affected question on May 3, 1994. The Director referred to a recent case *Canadian Union Public of Public Employees et al. v. Waste Management Canada Inc.*<sup>2</sup> In that case, the court dealt with an appeal taken under the *Public Health Act* to the Public Health Advisory and Appeal Board. Mr. Justice Agrios decided the applicants were not directly affected because none of them could show that they had an interest that was more specific or direct than that of the general community. Having brought this case to the Board's attention, the Director did not take a formal position regarding Mr. Ross' standing.

Mr. Ross' written response dated April 21, 1994, raised an earlier decision of this Board, *Fred J. Wessley v. Director, Environmental Protection* wherein the Board stated that the test of which persons are directly affected is "flexible...depend[ing] on the

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<sup>2</sup> Unreported decision of Mr. Justice Agrios in Action No. 9303-21182, delivered Feb. 9, 1994.

circumstances of each case". Mr. Ross also raised an earlier decision of the Natural Resources Conservation Board ("NRCB"), *Three Sisters Golf Resort Inc., Prehearing Decision [91-O3]*. In that case, it adopted a "closeness test" which would:

*examine whether or not there exists an uninterrupted chain of cause and effect between the proposed project and the individual or group of individuals requesting costs. Without such a chain, a direct effect would not occur.*

As Mr. Ross points out, the NRCB went on to say:

*In the case of individuals living within the vicinity of a proposed project, the demonstration of a change of causality that could lead to direct effects on them would normally be easy to accomplish.*

It is the submission of Mr. Ross that his geographic proximity should satisfy any test of "directly affected" required or established by this Board.

#### IV. Discussion by the Board

There are critical distinctions to be made between the NRCB's *Three Sisters* directly affected test raised by Mr. Ross and the appeal before this Board. First, the directly affected test in the NRCB legislation<sup>3</sup> deals with whether or not one, or perhaps several, parties are entitled to funding before a Board that exercises general public interest jurisdiction.<sup>4</sup> Our Board, however, is primarily adjudicatory in nature. In our Act, "directly affected" must be read in light of the standing to invoke the appeal process, not the funding criteria to review projects.

Mr. Ross raised the decision in *Fred J. Wessley v. Director, Alberta Environmental Protection* where the Board determined that the circumstances of each case are important. When the Board asked Mr. Ross to provide greater detail and to explain how the storm sewer outfall directly affected him, he responded by stating that the proposed Gleneagles subdivision "is a major project for this small town. It will change the rural nature of the area to an urban and golf course use". Mr. Ross submitted that the storm sewer outfall project would directly impact his enjoyment of his land and the nature of the community. The critical distinction which must be made is whether or not Mr. Ross is merely affected or *directly affected* by the proposed storm sewer outfall.

In order for a non-approval holder to have standing to appeal to this Board, one must be *directly* affected by the decision made by the Director and by the specific activity approved by the Director. In the case of Mr. Ross, he not only refers to the specific activity which forms the basis of the decision to approve (the storm sewer outfall), but he goes beyond the specific approval for the outfall and raises questions about the proposed Gleneagles subdivision. Clearly, the subdivision which is proposed is a major project for a

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<sup>3</sup> Natural Resources Conservation Board Act, R.S.A. 1980, Ch. N-5.5, s. 10(1). This subsection reads: Individuals or groups of individuals who, in the opinion of the Board, are or may be directly affected by a reviewable project are eligible to apply for funding under this section.

<sup>4</sup> Natural Resources Conservation Board Act; section 2 reads: The purpose of this Act is to provide for an impartial process to review projects that will or may affect the natural resources of Alberta in order to determine whether, in the Board's opinion, the projects are in the public interest, having regard to the social and economic effects of the projects and the effect of the projects on the environment.

small town and it will surely change the land use. The Board agrees with Mr. Ross in this regard. However, the nature of the community and the change in land use cannot be raised by this appeal to this Board -- only the environmental appropriateness of the storm sewer outfall approval and only by those persons who are directly affected by the storm sewer outfall. Land use planning issues are generally more appropriately dealt with under the *Planning Act*.

To be directly affected under section 84(1)(a)(v), this Board feels the person who appeals must have a substantial interest in the outcome of the approval that surpasses the common interests of all residents who are affected by the approval (see the Board's earlier decision in *Maurice Boucher v. Director, Alberta Environmental Protection*). "Directly affected" depends upon the chain of causality between the specific activity approved (the storm sewer outfall) and the environmental effect upon the person who seeks to appeal the decision.

In our opinion, Mr. Ross has not established a causal connection between the storm sewer outfall and himself. He does not own land next to the Bow River. He has not raised any particular legal claim to the Bow River such as riparian rights. He does not use water downstream of the storm sewer outfall, and, although he does have a water well, the well at its lowest point is still approximately 186 vertical metres above the Bow River. Mr. Ross' property is also located at least 2400 horizontal metres from the storm sewer outfall. The Board does not see how the use and enjoyment of his own property is directly related to the storm sewer outfall, or dependent upon the water quality or quantity of the Bow River.

The Board recognizes that the water quality of the Bow River Basin is very important to all Albertans and, in particular, to downstream users of the Bow River<sup>5</sup>. However, this Board has decided that a general interest in the protection of the quality of the Bow River is not sufficient enough to appeal the approval authorizing the storm sewer outfall. An appellant must demonstrate, with some particularity, how he or she will be directly affected by the approval granted. Unfortunately, Mr. Ross has not established the causal link between the storm sewer outfall and himself. He has not established that his interest in the approval is greater than the interests of those in the general community. We note that this is not inconsistent with the recent decision of Mr. Justice Agrios in the *WMI* case.<sup>6</sup>

This is not to say Mr. Ross is not "affected" by the storm sewer outfall. He may very well *be* affected, but so are the rest of the residents who enjoy the bicycle paths or other recreational experiences offered by the Bow River and its banks. Mr. Ross has raised the potential of a hydrological connection between the Bow River and his water well should there be a "capillary" affect. It seems this affect is remote given the distance of Mr. Ross' property from the storm sewer system and the Bow River.

## V. DECISION

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<sup>5</sup> Indeed, the water quality of the Bow River is important to the surrounding community and all downstream users. The Board agrees with the Appellant that the Bow River Water Quality Task Force recommendations should be employed whenever possible. Indeed, a properly designed wetland may be a preferred alternative, where environmental impacts are expected to be significant. The Department agrees with this statement and so does the Board. The Board hopes the surrounding community will monitor the effectiveness of the approved storm sewer outfall, and if problems arise, raise these problems in the various ways provided for in the Act. Alternatively, as the Department stated, the inclusion of Term No. 1 in this Approval also allows for enforcement of Water Resources' matters.

<sup>6</sup> *Supra*, note 2.

The Board dismisses Mr. Ross' appeal because he is not directly affected by the Director's decision to approve the storm sewer outfall. In reaching this decision, the Board has carefully considered all of the submissions filed by all of the parties, whether or not their evidence was specifically referred to herein.

## **VI. Other Matters**

There are two procedural matters which deserve mention. First, Mr. Ross requested a Ministerial stay of the Director's decision on May 3, 1994, pending the completion of this appeal. The Board has not heard from the Minister but is of the opinion it does not have to await his decision. Second, the Board notes from the submission of the Department, that the approval dated March 7, 1994 was sent to the Town under cover of a letter dated March 8, 1994. Yet, the Town commented that it advertised the approval on March 1, 1994 -- one week earlier. Although the timing did not make a difference in the appeal by Mr. Ross, as he did not raise the timing issue, the Board would expect that an approval granted by the Department should precede advertising. For approvals, there is a 30 day time period, and while the Board can extend the time for filing appeals, it would rather that an appellant have the full time period to examine the approval and related material before the appeal is filed.

Dated on May 24, 1994, at Edmonton, Alberta.

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William A. Tilleman, Chair

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Joan C. Copp, Board Member

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David H. Marko, Vice-chair

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Max A. McCann, Board Member