

ALBERTA
ENVIRONMENTAL APPEAL BOARD

DECISION

Date of Decision: April 17, 1998

IN THE MATTER OF Section 84, 85 and 87 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. Peter N. Byers, Director, North Springbank Water Co-op Limited, Municipal District of Rocky View No. 44 with respect to Approval No. 18892-00-00 issued by the Director of Southern East Slopes and Prairie Regions, Alberta Environmental Protection to Emerald Bay Water and Sewer Co-op Ltd. c/o Aspen Homes (Alberta) Ltd.

Cite as: North Springbank Water Co-op Limited, Municipal District of Rocky View No. 44 v. Director of Southern East Slopes and Prairie Regions, Alberta Environmental Protection.

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BACKGROUND

[1] This appeal concerns Approval 18892-00-00, issued to the Emerald Bay Water and Sewer Co-op Ltd. [Emerald Bay], for the construction and operation of a Class II wastewater treatment plant and a Class I wastewater collection system and a storm drainage system [Approval]. That plant and wastewater and drainage systems will serve the "Emerald Bay Estates Development." The Approval was issued on July 31, 1997, by Mr. Peter Watson, Director of Southern East Slopes and Prairie Regions, Alberta Environmental Protection [Director]. On March 6, 1998, roughly eight months after the Director issued the Approval and seven months after the close of the thirty-day period for filing appeals to this Board,¹ the North Springbank Water Co-op Ltd. [Appellant] filed a Notice of Appeal of the Approval. The appeal concerns the Approval provisions allowing Emerald Bay to use treated effluent to irrigate a golf course. According to the Appellant, that irrigation effluent, together with other chemicals applied to the Golf Course, will "contaminat[e]" an underground aquifer that provides water to many people, including the Appellant's members.²

[2] In its Notice of Appeal, the Appellant requested that the Board either rescind the Approval or direct Emerald Bay to refrain from using treated sewage for irrigating the golf course until it could tie in to the Cochrane/Calgary sewage line or "demonstrate" that the Appellant's aquifer would "not be affected."³

¹ See section 84(4) of the *Alberta Environmental Protection and Enhancement Act* [the Act], Chap. E-13.3, as amended.

² Notice of Appeal Re: Approval No. 18892-00-00 (written addendum to Notice of Appeal form) [Notice of Appeal].

³ *Ibid.*, p. 2. The Appellant also requested that the Board "[p]rohibit the use of fertilizers, herbicides, pesticides and fungicides" on the golf course. *Ibid.* At first blush, this request does not seem to be reasonably related to an Approval for the construction and operation of a sewage treatment system. But section 7.1.9 of the Approval appears to establish an informal process for the Director's approval of the use of those chemicals on the golf course.

[3] Although the appeal was filed months after the 30-day filing deadline in the Act the Notice of Appeal did not expressly request that the Board exercise its discretion under section 84(5) of the Act to extend that deadline for the appeal.⁴ However, the notice did state that it was being filed "at this time" because of the recent completion of an engineering report. That report purportedly provides "[f]resh" evidence that the irrigation and chemical spraying on the golf course, pursuant to the Approval, would adversely affect the aquifer used by the Appellant's members.⁵

[4] On March 9, 1998, the Board wrote the Appellant a letter acknowledging receipt of the appeal. Given that the Appellant did not affirmatively request an extension of the filing deadline, the Board's letter noted that the appeal "raises a timeline issue" under sections 84(4) and (5) of the Act and requested that the Appellant and other parties provide "comments" on that issue.

[5] On March 12, 1998, Emerald Bay faxed the Board a letter requesting that the Board deny the Appellant's implied "request" for an extension of time to file its appeal.⁶ The Director also filed a letter concurring with Emerald Bay's request.⁷

[6] On March 25, 1998, the Board faxed the parties a letter indicating that it had decided not to proceed with the appeal. However, the Board immediately rescinded that letter through a second letter faxed to the parties on the same day, after the Board realized that it had mistakenly made its decision before receiving and considering the Appellant's response to the dismissal requests

⁴ As relevant here, section 84(5) of the Act provides that the Board "may, on application made . . . after the expiry of the period referred to in subsection (4), extend that period, where the Board is of the opinion that there are sufficient grounds to do so."

⁵ Notice of Appeal, pp. 1-2. On March 12, 1998, the Board received a one-page request for a Stay of the Approval, from counsel for the Appellant. Given the Board's decision on the timeliness of the Appellant's appeal, it need not address the Appellant's Stay request any further.

⁶ March 12, 1998 letter from Donald Kelly to the Board.

⁷ March 20, 1998 letter from Charlene Graham to the Board.

from Emerald Bay and the Director. The Board has since reconsidered the matter afresh, after a full review of the Appellant's March 24 and April 8, 1998 responses.

THE BOARD'S ANALYSIS

[7] The Appellant raises several related arguments in support of its position that the Board should reject the other parties' dismissal requests. Each of these arguments is addressed below.

[8] The Appellant argues, first, that its deadline for filing an appeal "has not yet begun to run" because the Director's issuance of the Approval was conditional and Emerald Bay has not yet fulfilled the condition.⁸ The first of these two claims is unsupported by the Approval requirements to which the Appellant cites, because those requirements are not phrased as conditions which must be satisfied before the Approval takes effect. The first page of the Approval further contradicts the Appellant's interpretation, by stating that the Approval's "effective date" was July 31, 1997. Given this effective date, the Appellant clearly missed the deadline in section 84(4) of the Act for filing its appeal of the Approval.

[9] The Appellant argues, in the alternative, that the Board should exercise its discretion under section 84(5) of the Act to allow the Appellant to file its appeal after the statutory deadline. According to the Appellant sections 2.1.4 and 2.1.5 of the Approval, regarding pursuing a tie-in to the Calgary-Cochrane wastewater pipeline, are "mandatory" in nature and Emerald Bay has not acted in "good faith" to comply with those requirements. The Appellant claims that it reasonably relied on the "mandatory" nature of those provisions as a reason for delaying filing its appeal.⁹

⁸ March 24, 1998 letter from Michael Laffin to the Board, p. 3.

⁹ *Ibid.*, pp. 1-4.

[10] The Board need not decide whether Emerald Bay has violated these Approval sections, and the consequences of any possible violation, because those sections in no way *guarantee* a tie-in or even make that result likely. They simply require Emerald Bay to "discuss" the "feasibility" of a tie-in and "report" back to the Director on the "status" of those discussions. Given that the primary focus of the Approval is the construction and operation of a wastewater treatment plant, rather than a tie-in, it was unreasonable for the Appellant to forego filing a timely appeal simply because there was a *chance* that a tie-in might result and preclude the need for the construction of a wastewater treatment plant.¹⁰ In one of its letters, the Appellant states that it was "hopeful" a tie-in would occur "since it would vitiate the need for an appeal."¹¹ Once again, however, the mere "hope" that an appeal would ultimately be unnecessary is insufficient grounds for not filing a timely appeal.

[11] The Appellant alleges, in support of its "bad faith" claim, that Emerald Bay purchased and installed a wastewater treatment plant long before concluding tie-in discussions and submitting a status report on those discussions. If true, this allegation is further grounds for the Board to refuse to exercise its discretion to allow the Appellant's late appeal. If Emerald Bay was truly not serious about pursuing a tie-in alternative from the start of its discussions, there was no reasonable basis for the Appellant to await the outcome of those discussions prior to filing its appeal. Under the Appellant's own view of Emerald Bay's intent, the outcome of those discussions was a foregone conclusion. Notably, the Appellant does not claim that it only recently learned of the conduct-- Emerald Bay's purchase and installation of the plant--supposedly giving rise to the Appellant's "bad faith" claim.¹²

¹⁰ The Board does not mean to suggest that an appeal should proceed regardless of the status of those discussions. If the Appellant had filed a timely appeal, and further discussions made a tie-in likely, there might have been good reason for the Board to Stay the appeal pending the conclusion of those discussions. However, the possibility that tie-in discussions might have resulted in a Stay of the appeal does not mitigate the Appellant's failure to file a timely appeal in the first place.

¹¹ March 13, 1998 letter from Michael Laffin to the Board, p. 2.

¹² The Appellant's letters are vague as to when the Appellant first learned of Emerald Bay's purchase of the

wastewater treatment plant, although that date appears to have been as early as October 1997. See March 13, 1998 from Michael Laffin to the Board, p. 2 (bottom par.). However, according to its own evidence, the Appellant apparently decided to proceed with an appeal at least by November 26, 1997. See November 26, 1997 letter from Peter Byers to the Director, p.2 (copy attached to the March 19, 1998 letter from Michael Laffin to the Board). Even if the Appellant had reasonably delayed filing an appeal until that date, there is no valid reason why the Appellant waited an *additional* three-and-a-half months after deciding to file its appeal to actually file it.

[12] The Board notes further that, regardless of whether Emerald Bay seriously pursued the tie-in alternative, the Appellant has not even shown that Emerald Bay's purchase and installation of the wastewater plant violated the terms of the Approval. The Appellant points to the prohibition, in section 2.1.6 of the Approval, of the "commence[ment of] installation" of the plant before April 1, 1998.¹³ But the Appellant fails to note that, under sections 2.1.6 and 2.1.7 of the Approval, the Director can set an earlier installation deadline upon the "written request" of Emerald Bay. The developer suggests that its partial installation was properly cleared by the Director.¹⁴ The Appellant has not attempted to refute this position.¹⁵

[13] The Appellant argues that its appeal should be permitted at this late date for the additional reason that there is "new" or "'fresh'" evidence regarding the propriety of the Approval.¹⁶ This evidence is an engineering report of a "drilling and testing" program addressing whether part of the project authorized by the Approval will pollute the Appellant's aquifer. The Appellant apparently commissioned the report on or after late November 1997.¹⁷

¹³ *Ibid.*, p. 2.

¹⁴ See March 27, 1998 letter from Donald Kelly to the Board, p. 2 (noting that its partial installation of the plant was permitted "in consultation" and "fully discussed" with the Director's staff).

¹⁵ See April 8, 1998 letter from Michael Laffin to the Board (response to Donald Kelly's March 27, 1998 letter).

¹⁶ March 24, 1998 letter from Michael Laffin to the Board, p. 3; April 8, 1998 letter from Michael Laffin to the Board, p. 2.

¹⁷ March 24, 1998 letter from Michael Laffin to the Board, p. 2.

[14] The problem with this "new" evidence is that the Appellant has failed to provide sufficient reasons why it waited until such a late date to obtain it. The Appellant argues that the report "was not and could not have been available" before the thirty-day filing period expired.¹⁸ In the Board's view however; the Appellant could have commissioned the engineering study for purposes of providing its comments to the Director prior to the Director's issuance of the Approval.¹⁹ Given the plain terms of the Approval, as discussed above, at the very least the Appellant could have commissioned the report immediately after the Director issued the Approval in order to determine whether to file a timely appeal to this Board.

[15] Even if the engineering report could not have been completed within the thirty-day period for filing the appeal, the Appellant could still have filed a "protective" appeal. And, if the Appellant was truly uncertain, prior to viewing the report's conclusions, as to whether the appeal was necessary, the Appellant could have requested a Stay of the appeal pending publication of the report. In other words, the timing for completing a promptly commissioned report should not have precluded the Appellant from filing a timely appeal.

¹⁸ March 13, 1998 letter from Michael Laffin to the Board, p. 3.

¹⁹ The Appellant actually provided the Director with several other reports at that time (March 13, 1998 letter from Michael Laffin to the Board, pp. 1-2), thus, confirming the feasibility of this approach.

[16] In short, the Board is reluctant to waive the deadline in the Act for filing appeals based on evidence which, although technically "new," could have previously been obtained by the Appellant on a more timely schedule. The deadline in the Act would be meaningless if Appellants could circumvent it simply by commissioning new studies long after the deadline has passed and then arguing that those studies are "new" evidence warranting a late-filed appeal. Finally, the Appellant stresses its underlying environmental concerns as an additional reason for the Board to consider its late-filed appeal.²⁰ The Board is mindful of the importance of these concerns, but similar concerns underlie most appeals to the Board.²¹ If the Board ignored the filing deadline in this case due to environmental concerns, the Board would have to ignore the deadline for most appeals for the same reason. Yet, section 84(5) of the Act cannot reasonably be interpreted to suggest that the Legislature intended the section 84(4) appeal deadline to be routinely ignored.

[17] The Board does not mean to suggest that it will never grant extensions of the deadline for filing appeals, or even that it will extend the deadline in only "rare" or "unusual" circumstances. The point is simply that there must be "sufficient" reasons for an extension in a given case, and the Appellant has failed to provide those reasons in this instance. Although the Board does not believe the Appellant's recently-prepared report is sufficient grounds for extending the deadline for filing appeals, the report may well be relevant to the Director's future decisions regarding what further action to take with respect to the tie-in alternative which the Appellant advocates. The Director may also consider the report for purposes of determining whether any amendments to the Approval are appropriate.²²

²⁰ March 24, 1998 letter from Michael Laffin to the Board, p. 3; April 8, 1998 letter from Michael Laffin to the Board, pp. 2, 3. Emerald Bay, on the other hand, believes that the Appellant's concerns are unfounded or have been adequately addressed. See, e.g. March 19, 1998 letter from Donald Kelly to the Board (preliminary comments on the Appellant's engineering report).

²¹ The Appellant suggests that aquifer pollution is particularly troublesome because it is generally irreparable once it occurs. March 24, 1998 letter from Michael Laffin to the Board, p. 3. While aquifer pollution may be less remediable than other kinds of pollution, there are other kinds of environmental harms raised in appeals before this Board which, due to their nature or magnitude, may be equally as significant.

²² See March 20, 1998 letter from Charlene Graham to the Board, p. 2 (noting that the Director is "willing to

THE BOARD'S DECISION

[18] For the reasons given above, the appeal is dismissed. The Appellant's request for a Stay of the Approval is denied as moot.

Dated on April 17, 1998, at Edmonton, Alberta

Dr. William A. Tilleman

modify the terms of the Approval" as appropriate, to address valid concerns raised by the Appellant's report).