
ALBERTA
ENVIRONMENTAL APPEAL BOARD

Discontinuance of Proceedings

Date of Discontinuance of Proceedings - October 18, 2000

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

-and-

IN THE MATTER OF appeals filed by the Village of Duchess, the Canadian Imperial Bank of Commerce and Shell Canada Limited with respect to a Notice of Designation as a Contaminated Site 03/97, Lots 1-6, Block 1, Plan 1868BA, issued by Mr. J.C. Lack, Director, Chemicals Assessment and Management, Alberta Environmental Protection.

Cite as: Village of Duchess *et al.* v. Director, Chemicals Assessment and Management, Alberta Environmental Protection.

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BACKGROUND

[1] On June 3, 6 and 12, 1997, the Environmental Appeal Board (the “Board”) received Notices of Appeal from the Village of Duchess, the Canadian Imperial Bank of Commerce (the “CIBC”) and Shell Canada Limited (“Shell Canada”) respectively. The appeals were filed with respect to a Notice of Designation as a Contaminated Site 03/97, including Lots 1-6, Block 1, Plan 1868BA and adjacent affected land, issued by Mr. J.C. Lack, Director, Chemicals Assessment and Management, Alberta Environmental Protection (the “Director”). On July 10, 1997, the Board also received a letter from Mr. Alan Harvie on behalf of Mr. Ed and Ms. Tammy Asuchak that were not appealing the designation, but requested standing to appear before the Board in any hearing pertaining to the appeals filed.

[2] The Board acknowledged receipt of the Notices of Appeal from the Village of Duchess, the CIBC and Shell Canada on June 3, 6 and 13, 1997 respectively, and at that time requested a copy of all correspondence, documents, and materials relative to the appeals from the Director.

[3] On June 4, 6 and 16, 1997, according to standard practice, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under their respective Boards’ legislation. Replies were subsequently received from the NRCB and the AEUB stating that they did not hold any hearing or review under their respective legislation.

[4] On June 13, 1997, copies of the documents requested by the Board were provided by the Director and forwarded to the Appellants on June 16, 1997. In this same letter, the Board requested written representations from the parties, asking if they would like to participate in a mediation under section 11 of the Environmental Appeal Board Regulation, AR 114/93, in the event

the Board would proceed with the appeals, and if there were any other persons who may have an interest in these appeals.

[5] On July 15, 1997, in consultation with the parties, a mediation was scheduled for July 18, 1997, then rescheduled to August 27, 1997 in Calgary, Alberta, to allow the Asuchaks to be present. A Notice of Mediation and Public Hearing was subsequently placed in the July 16 and 28, 1997, editions of the Calgary Herald.

[6] On August 20, 1997, the Director advised the Board that he met with the Appellants in an attempt to pursue informal mediation and would also be meeting with the Asuchaks.

[7] On August 21, 1997, legal counsel for the Asuchaks requested that the Asuchaks be officially declared a “party” pursuant to the Environmental Appeal Board Regulation¹. In consultation with the other parties, the Board granted the request for party status on August 26, 1997.

PROCEDURAL MATTERS/MEDIATION MEETING

[8] According to standard practice, the Board called a mediation in an attempt to facilitate a resolution of these appeals, or failing that, to make procedural arrangements for an oral hearing. In conducting the meeting, presiding Board member, Dr. John Ogilvie reviewed the appeal and mediation process and explained the purpose of the mediation. He then circulated copies of the “Participants’ Agreement to Mediate” which all parties signed.

[9] On August 28, 1997, the Board wrote to the parties, providing them with the information they agreed to at the mediation and advised them that the Director would be submitting a status report to the Board by October 15, 1997.

¹ 1 (f) “party” means
(i) the person who files a notice of objection that results in an appeal,
(ii) the person whose decision is the subject of the notice of objection, and
(iii) any other person the Board decides should be a party to the appeal.

[10] On September 4 and 5, 1997, the Director and the Asuchaks respectively, wrote to the Board requesting a *without prejudice* technical review of the information concerning the Duchess contaminated site.

[11] On October 15, 1997, legal counsel for the Asuchaks wrote to the Board stating:
“The Asuchak’s have taken the position that the mediation has been unsuccessful and they do not see any further purpose in continuing with it. Accordingly, we ask that you please set the matter down for a hearing.”

[12] On December 2, 1997, in consultation with the parties, the Board scheduled a hearing for January 29, 1998 in Calgary, Alberta which was adjourned due to a scheduling conflict with the Village of Duchess as indicated in their letter of December 4, 1997. In that same letter, legal counsel for the Village of Duchess requested that the hearing be adjourned by stating:

“... I would propose adjourning the hearing date to a spring date in order to permit my client time to consider the rezoning of the land and, in the event that the Village decides to proceed with the rezoning, sufficient time for my client to undertake the rezoning process and have Alberta Environment reassess the situation in the commercial use context.”

Responding to the December 4, 1997 letter, the Board was advised by counsel for the Asuchaks that they did not support the rezoning. In consultation with the parties, on February 17, 1998, the Board rescheduled the hearing for April 21, 1998 in Calgary, Alberta, however, on April 2, 1998 received a letter from legal counsel for the CIBC requesting an adjournment on the grounds that the Director did not expand the group of potentially responsible parties (previous owners who operated a garage at the site) and that the issue of rezoning was still outstanding. Legal counsel for the Village of Duchess also wrote to the Board on April 2, 1998, requesting the hearing be adjourned stating:

“On the basis that the Village of Duchess has now commenced the rezoning process in relation to this property, we propose adjourning the EAB hearing currently scheduled for April 21, 1998 until the rezoning process has concluded and, in the event that the property is rezoned to the [sic] commercial, the status of the property, as commercial property, is determined by Alberta Environmental Protection.”

On April 9, 1998, after careful consideration of the responses from the parties, the Board granted an adjournment of the hearing and requested status reports by April 24, 1998.

[13] On April 21 and 24, 1998, legal counsel for the Asuchaks and the Village of Duchessex wrote to the Board advising that a public hearing took place on April 20, 1998 regarding the proposed amendment to the Village of Duchessex' land use bylaw to change the land use designation for the Asuchaks' property from residential to commercial. On May 19, 1998, the Village of Duchessex advised the Board that a council meeting was scheduled on May 25, 1998 to discuss rezoning the Asuchaks' property. On May 27, 1998, legal counsel for the Asuchaks responded by stating:

“The Village did not discuss the rezoning of the Asuchak's property in any meaningful sense at their regular Council meeting on May 25, 1998 as was advised in Ms. Klauer's May 19, 1998 letter. All that happened was Council agreed to postpone second reading of the rezoning bylaw to an unknown date. It seems to our clients that the Village is purposefully delaying proceeding with the amendment to their land use bylaw. Accordingly, we request that the appeal dates be set forthwith.”

[14] On June 3, and further reiterated on June 23, 1998, the Director wrote to the Board requesting a delay in scheduling the hearing events to allow for the rezoning issue to be dealt with by the Village of Duchessex, to ensure ample time for the Director to undertake additional sampling and investigative work on the land in question and to determine the results of the testing. On July 2, 1998, the Board granted the request for adjournment pending the results of the sampling and investigation by the Director. Subsequently, the Director's findings were submitted to the Board on August 28, 1998.

[15] On September 15, 1998, the Board wrote to the parties advising them a hearing would take place on November 23, 1998. On September 24, 1998, legal counsel for Shell Canada Limited requested an adjournment due to a scheduling conflict. In consultation with the parties, the Board granted the requests in their letter of September 28, 1998. In their letter of September 28, 1998, after consultations with the parties, the Board rescheduled the hearing for March 22, 1999 and confirmed the pre-hearing deadlines. On November 20, 1998, the Board provided Notices of Hearing to Ms.

Linda Lauber and Ms. Marion Shantz, current Directors for the Duchess Garage Limited and Mr. Douglas H. Morishita, as person responsible for the Duchess property.

[16] In response to the Board's letter of November 16, 1998, whereby the parties were notified of pre-hearing deadlines, the Director, in their letters of January 7 and 8 and 15, 1999, advised the Board that the Director would be prepared to reconsider the designation as a contaminated site, however, prior to making his reconsideration decision, he requested the parties have an opportunity to provide their input for consideration. In the same letter, the Director asked the Board for a two week extension to the filing dates for the hearing, and on January 25 and February 17, 1999, requested extensions due to personal circumstances and to allow information to be gathered from the Asuchaks.

[17] In their letter of February 19, 1999, the Asuchaks requested an adjournment to the March 22, 1999 hearing due to a potential change in their legal counsel, and in consultation with the parties, on February 24, 1999, the Board granted the request. In the same letter, the Board provided a schedule to the parties, outlining dates to file various written materials.

[18] On March 31, 1999, the Director requested an extension to filing deadlines as the Director was currently reviewing representations by the parties with respect to the reconsideration decision in relation to the Duchess designation. On April 15, 1999, postponement of a hearing was requested by legal counsel for the Asuchaks as some of the parties to the appeal were in discussions to obtain a resolution of the appeals. Further to this extension, the Director requested additional extensions to July 9, August 9, September 10, October 15 and November 30, 1999 to allow discussion/negotiations to continue. On December 10, 1999, the Director submitted a status report to the Board advising that the discussions between the parties reached an impasse, outlined possible options, and further advised that a mediated settlement would be the only approach that would produce any useful benefit for the parties involved.

[19] On May 19, 2000, by copy of a letter sent from the Director to the Village of Duchess, the Board was advised that Notice of Designation 03/97 was cancelled by the Director on the grounds that (1) the site was zoned for commercial use and has been returned to ownership by the Village, (2) the contamination remaining on site did not constitute a significant adverse effect to the environment, and (3) the contamination that extends off the site appeared to be confined to the municipal roadway.

[20] The Board wrote to counsel for the Appellants on May 19, 2000, acknowledging receipt of the Director's letter, and requested the parties advise as to what their intentions were respecting their appeals. On May 23, 2000, legal counsel for the Village of Duchess wrote to the Board stating:

“It is the Village's position that as this designation has now been removed, the issue forming the basis for the Village's appeal to the AEB [sic] is now moot. Accordingly, it is the Village's intention to withdraw their appeal.”

On May 29, 2000, legal counsel for Shell Canada wrote to the Board stating:

“In response to your letter dated May 19, 2000, and further to the letter of May 19, 2000 from Alberta Environment, on the understanding that the contaminated site designation in the above-referenced matter has been cancelled, and that there will be no appeal from the cancellation, Shell Canada Limited withdraws its appeal presently filed with the Environmental Appeal Board.”

And lastly, on July 4, 2000, legal counsel for the CIBC wrote to the Board in a letter stating:

“Further to our recent telephone conversation I write to confirm my advice that CIBC will have withdrawn its appeal filed with the Environmental Appeal Board. It was done so on the understanding that the contaminated site designation in the above-referenced matter has been cancelled.”

DECISION

[21] Pursuant to section 87(7) of the *Environmental Protection and Enhancement Act*, and based on the letters from the Village of Duchess, Shell Canada and the CIBC, on May 23, 29 and July 4, 2000, respectively, the Board hereby discontinues its proceedings in Appeal No's. 97-021, 022 and 025 and will be closing its files.

Dated October 18, 2000, at Edmonton, Alberta.

Dr. William A. Tilleman