
ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Preliminary Meeting – December 14, 2001

Date of Decision – December 28, 2001

IN THE MATTER OF Sections 84, 85, 87, and 89 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 and section 115 of the *Water Act*, S.A. 1996, c. W-3.5;

-and-

IN THE MATTER OF an appeal and Stay filed by Ms. Elke Blodgett with respect to *Water Act* Approval No. 00150792-00-00 issued by the Director, Northeast Boreal Region, Regional Services, Alberta Environment to the Genstar Development Company.

Cite as: *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Genstar Development Company*

**PRELIMINARY MEETING
BEFORE**

William A. Tilleman, Q.C.
John P. Ogilvie
Ron Hierath

Appearances:

Appellant: Ms. Elke Blodgett, represented by Mr. John Shaw.¹

Director: Mr. Patrick Marriott, Alberta Environment, represented by Mr. Randy Didrikson and Ms. Gloria Hammermeister, Alberta Justice.

Approval Holder: Genstar Development Company, represented by Mr. Dennis Thomas, Q.C., Fraser Milner Casgrain.

Board Staff: Mr. Gilbert Van Nes, General Counsel and Settlement Officer, and Ms. Valerie Higgins, Acting Registrar of Appeals.

Witnesses:

Appellant: Ms. Elke Blodgett, Mr. R.A. (Bob) Russell, Mr. William S. Talyor, Dr. James R. Butler, and Dr. Stuart R. Loomis.

Director: Mr. Pat Marriott, Mr. Dale Adams and Ms. Patricia Stevenson, Alberta Environment.

Approval Holder: Mr. Jim Pennell, Genstar Development Company, and Mr. Dave Klippenstein, UMA

¹

At the preliminary meeting, the following discussion took place:

Mr. Shaw: "For the record, I remain an employee of Alberta Environment, but I am currently on vacation prior to retiring as of the 4th of January. ..."

Chairman: "...The fact that you still work for Alberta Environment is something that you might want to talk to your friends about. I do not know how that works when a current employee also appears as an agent for someone challenging a decision. That is between you and the Department. Mr. Thomas, any concerns over that. And then also Mr. Didrikson."

Mr. Didrikson: "No, sir."

Chairman: "Mr. Didrikson, you do not have any comment."

Mr. Thomas: "Well, I do actually find it, given that this Board, the decisions go to the Minister and I think under the legislation this Board really is related to the Minister. This man is an employee of the Ministry. I think I take exception to it. I do not know quite what the Board can do about it, but I find it quite unusual and I do take exception to it on behalf of my client."

Chairman: "Ok. Well, the decision on the stay and the decision on directly affected is one that does not go to the Minister. This one will stay with us. The merits of course does and by the time he – so you have told us that by January 1st you will no longer work for the department."

Mr. Shaw: "My last day for pay and benefits is January 4th."

Engineering Ltd.

EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Water Act* to the Genstar Development Company authorizing the placement of earth fill material on two parcels of land in the flood plains of the Sturgeon River and in the flood plains of Big Lake, in the City of St. Albert. The area where the fill material is being placed is proposed to become part of a new housing development.

Ms. Elke Blodgett filed a Notice of Appeal objecting to the decision of the Director to reject her Statement of Concern and, in essence, objecting to the issuance of the Approval. The Notice of Appeal argued that Ms. Blodgett was directly affected and that her Statement of Concern should have been taken into account. Ms. Blodgett asked for the Approval to be cancelled and asked for a Stay pending the resolution of the appeal.

The Board initially requested and received written submission on the questions of Ms. Blodgett's directly affected status and her request for a Stay. Following a review of these submissions, the Board decided to hold a preliminary meeting to hear further submissions from the parties.

The Board is of the view that Ms. Blodgett is not directly affected within the meaning of the *Water Act*. While Ms. Blodgett frequently uses the areas adjacent to the areas to be filled, the Board does not find that this provides a sufficient basis to find that she is directly affected. In the Board's view, the key difference between this case and the *Bildson* case, which Ms. Blodgett relies upon, is that the fill activity that is authorized under this Approval is taking place on private, as opposed to public land.

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I. BACKGROUND

[1] On August 3, 2001, Approval No. 00150792-00-00 (the “Approval”) was issued to Genstar Development Company (the “Approval Holder”) under the *Water Act*, S.A. 1996, c.W-3.5, by the Director, Northeast Boreal Region, Regional Services, Alberta Environment (the “Director”). The Approval states that the Approval Holder is authorized to place earth fill material in the flood plains of the Sturgeon River² on Parcel A 3032RS and River Lots 20 and 21 in the St. Albert Settlement (N 1/2 32-053-25-W4M) near St. Albert, Alberta.

[2] On August 14, 2001, the Environmental Appeal Board (the “Board”) received a Notice of Appeal from Ms. Elke Blodgett (the “Appellant”). The Appellant advised that she had attempted to file a Statement of Concern in relation to the Approval, but that the Director had rejected it on the basis that, in his opinion, she was not directly affected. The Notice of Appeal objected to the decision of the Director to reject her Statement of Concern and, in essence, objected to the issuance of the Approval. The Notice of Appeal argued that the Appellant was directly affected and that her Statement of Concern should have been taken into account. The Appellant asks for the Approval to be cancelled. In her Notice of Appeal, the Appellant also asks for a Stay pending the resolution of the appeal.

[3] On August 15, 2001, the Board acknowledged the Notice of Appeal and request for a Stay. In the same letter the Board also asked the Director to provide the Board with a copy of his records with respect to the Approval (the “Record”). With respect to the Stay, the Board also asked for a submission from the Appellant.³

² At the preliminary meeting, there was some discussion as to whether “in the flood plain of the Sturgeon River” was an accurate description of the project. The Director indicated that “the flood plain of the Sturgeon River” in his mind could include the entire Sturgeon River system, including Big Lake. In layman’s terms, the Board agrees that the project could have better been described as also being within the flood plain of Big Lake.

³ Specifically, the Board asked for the Appellant to provide comments on the four questions that the Board has previously considered with respect to requests for a Stay. These four questions are:

- “1. What is the serious concern that the Appellants have that should be heard by the Board?
2. Would the Appellants suffer irreparable harm if the stay is refused?
3. Would the Appellants suffer greater harm for the refusal of a stay pending a decision of the Board on the appeal than the Approval Holder would suffer from the granting of a stay; and
4. Would the overall public interest warrant a stay?”

[4] According to standard practice, on August 15, 2001 the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective Board's Legislation. Both Boards responded in the negative.

[5] On August 21, 2001, the Board received the Record from the Director and subsequently provided copies of the Record to the other parties.

[6] On August 22, 2001, the Board received the submission for the Appellant with respect to the Stay.

[7] On September 25, 2001, the Board wrote to the parties advising that it had reviewed the Appellant's request for a Stay and had determined that, subject to the issue of standing (whether the Appellant is directly affected) the Appellant had presented a *prima facie* case for a Stay. The Board, therefore, requested submissions from all the parties on the Appellant's directly affected status. The Board also requested submissions from the other parties on the Stay.

[8] On November 2, 2001, following receipt of those submissions, the Board wrote to the parties and advised that the Board would like to receive more information and therefore, the Board would like to schedule a half-day preliminary meeting on the issue of the Appellant's directly affected status and the Stay request. The Board requested that the parties "...bring maps and other visual aids to provide a better understanding of the scope of the Approval."

[9] In consultation with the parties, the Board scheduled and convened a half-day preliminary meeting on December 14, 2001 at the Board's office in Edmonton, Alberta.

II. SUMMARY OF EVIDENCE

[10] At the opening of the preliminary meeting, the Board permitted the Approval Holder and the Appellant to submit and review a number of maps, photographs, and other visual aids to assist the Board in understanding the scope of the Approval. Both the Approval Holder and the Appellant provided a brief overview of the area in which the fill activity is to occur.

A. Overview by the Approval Holder

[11] The Approval Holder submitted a total of 11 figures.⁴ Figure 1, the Site Plan, is an overlay on an aerial photo showing the proposed fill areas in relation to the “flood way line” and the “1:100 year flood line”. The fill areas authorized by the Approval are essentially found in two locations (between the flood way line and the 1:100 year flood line – which is also known as the “Flood Fringe”). The first is to the west (the “West Fill Area”) comprising approximately 6.82 ha (two parts of 3.03 ha and 3.79 ha) and the second to the east (the “East Fill Area”) comprising approximately 1.86 ha.⁵

[12] Figure 1, the Site Plan, also showed a cluster of trees – referred to during the preliminary meeting as the White Pine Forest – directly to the east of the West Fill Area.

[13] Figure 4, the Land Ownership map, appears to indicate that the West Fill Area is located entirely on Parcel A Plan 3032 R.S. which is owned by the Approval Holder. Figure 4 also appears to indicate that the East Fill Area is located entirely on R.L. 20 and R.L. 21, which are also owned by the Approval Holder. It would appear to the Board that all of the fill work authorized by the Approval will take place on land privately owned by the Approval Holder. As is discussed below, it is this important fact that distinguishes this case from *Bildson*.⁶

[14] As best as the Board is able to determine, the vast majority of the White Pine Forest would be located principally on Lot H 6525 N.Y., which is also owned by the Approval Holder and which is located immediately east of Parcel A Plan 3032 R.S. A small part of the White Pine Forest is located on Parcel A Plan 3032 R.S. and the remainder is located immediately to the south located on Parcel B Plan 3032 R.S., which is owned by the City of St. Albert. A public road (Hogan Road) forms the boundary between Parcel A Plan 3032 R.S. and Parcel B Plan 3032 R.S. on the west and Lot H 6525 N.Y. on the east. In response to a question from the Chairman, the Approval Holder confirmed that the majority of the White Pine Forest is

⁴ Exhibit #1.

⁵ Evidence was subsequently provided by the Director that fill below the flood way line is generally not permitted, that an approval is required under the *Water Act* for fill in the Flood Fringe, and that no approval is required under the *Water Act* for fill above the 1:100 year flood line.

⁶ *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (October 19, 1998), EAB No. 98-230-D. See discussion at paragraphs 50 and 51.

located on land privately owned by the Approval Holder, since the late 1970s, with a small portion located on land owned by the City of St. Albert. To access this land could require permission from the Approval Holder or the City of St. Albert as appropriate.

[15] In Figure 2, the proposed Development Concept, the area on which the White Pine Forest is located, appears to be dedicated to park and environmental reserve.

[16] Based on a review of the Site Plan (which is an overlay on an aerial photo) in Figure 1, it would appear that both the West Fill Area and the East Fill Area appear to be on currently cultivated land. This view is supported by the photographs provided to the Board in Figures 7, 8, 9, and 10.

B. Overview by the Appellant

[17] During her overview, the Appellant indicated that she generally agreed with the information contained in the figures presented by the Approval Holder.⁷ The Appellant provided a number of additional maps and other overheads to supplement the information provided by the Approval Holder.⁸ The additional overview information provided by the Appellant included a number of area structure plans and other municipal plans.

[18] The Appellant indicated that a portion of the area adjacent to the West Fill Area has locally been known as the “drowned forest” and provided pictures which showed the West Fill Area flooded during a 1997 flooding incident. She indicated that the fill in both the West Fill Area and East Fill Area will be located very close (within feet) of the floodway line.

[19] She also identified that there was a drainage course that was not indicated on the maps provided by the Approval Holder. It would appear that the drainage course – which currently drains into Big Lake – would be blocked by the West Fill Area. The Appellant also emphasized that the fill authorized by the Approval was not the only fill that would be added to the area – that the fill would continue well back beyond the 1:100 year flood line and that this was also a significant concern with respect to the drainage course.

⁷ Specifically, the Appellant referred to the maps and figures prepared by the Approval Holder as “excellent”, subject to some additional information being provided.

[20] Finally, the Appellant provided a map of a municipal plan on which she drew a green line. She indicated that the green line represented a realignment of Meadowview Drive, which was supposed to represent the boundary of the natural parkland that was set aside by the City of St. Albert. She indicated that the realigned Meadowview Drive was supposed to be a buffer between the parkland and development in the area. She expressed concern that this was “...an encroachment onto our parkland by this fill and this housing development that is taking away our Redwillow Park.”

C. The Appellant’s Detailed Presentation

[21] The Appellant provided a detailed description of her use of the area, starting back in 1966 when she first moved into the area. She indicated that she was a mother, grandmother, artist, educator and naturalist who placed great value on the area – the lake was the source of her rest and peace, a place to sit in silence and watch, and a source of solace from strife. She indicated that she frequently brought other people to the area, that she often collected mushrooms, berries and other plants from the area, and that it served as the inspiration for her art. She indicated that she did not claim any type of property interest in the area. Rather, she claimed that the proposed fill activity was an interference with her use of a public resource that she has been using for more than 30 years. She indicated that she had expected to be able to use this area and the rest of Red Willow Park for the remainder of her life and that the proposed fill activity would result in a fundamental change to her way of life.

[22] The Appellant also indicated that she was concerned about potential financial implications from the proposed project. She indicated that she has a limited income and that she was concerned about the potential for municipal taxes to increase in the event that the City of St. Albert was sued as a result of permitting construction in a flood plain. She advised that she was aware of a current \$3 million dollar lawsuit against the City of St. Albert that resulted from a similar project.

[23] In support of her application for a Stay, the Appellant states that the impact of the proposed fill activity is not fully understood. Further, she expresses that it will prejudice a

⁸ Exhibit #2.

number of pending policy decisions including the designation of the area as a “provincial park” under the Special Places 2000 program, the development of a natural areas policy by the City of St. Albert, and the development of a Red Willow Park Master Plan. The Appellant also expressed concern that other developers in St. Albert had proceeded to undertake development work immediately upon receiving an Approval and that they did not obtain the necessary municipal approvals prior to undertaking the work.

[24] During cross-examination by the Director, the Appellant confirmed that her residence was located between 0.9 miles and 1.2 miles from the proposed fill areas⁹ and that her interest in this matter is not economic or financial in nature. She indicated that it was a personal stake as an educator and artist. Further, she confirmed that her principle environmental concern was the cumulative effects of placing fill within the Flood Fringe. The Appellant stated that bit by bit, the Flood Fringe is being filled in and forcing the water out and that this will affect all of St. Albert.

[25] During cross-examination by the Approval Holder, the Appellant confirmed that she did not go on to the lands included in the Approval.¹⁰

⁹ See Exhibit 1, Figure 3.

¹⁰ Mr. Thomas: “Do you understand and accept that the area of land that will be covered by the west fill area is owned by Genstar?”

Ms. Blodgett: “I understand it is owned by Genstar.”

Mr. Thomas: “And are you aware that the land is being leased by a farm family in the area, the Bolkenfores?”

Ms. Blodgett: “No. I have not paid any attention.

Mr. Thomas: “You are aware that it has been actively farmed?”

Ms. Blodgett: “Yes. It is farmed there. You can see where they are farming activities when they are not under water.”

Mr. Thomas: “And have you ever gone on that land?”

Ms. Blodgett: “I have walked the wetlands borderline and I have been on Meadowview Drive. You can see it quite clearly from Meadowview Drive. I have not been on the land.”

Mr. Thomas: “So you have never been walking on the west fill area?”

Ms. Blodgett: “No.”

Mr. Thomas: “And can I take you to the east fill area. Which, again it is my information that the land is owned by Genstar and leased to the City for a tree nursery?”

Ms. Blodgett: “I understand from the application for an approval that river lot 20 is owned by Genstar, but 21 is not. Maybe it has been bought in the meantime.”

[26] In a response to a question from the Board, the Appellant further confirmed that she did not go onto the lands included in the Approval.¹¹ The Appellant also confirmed that the fill area was currently under agricultural production, which in the Board's view would likely indicate to someone walking in the area that the land is privately owned.¹² With respect to the White Pine Forest, in response to questions from the Chairman, the Appellant indicated that she used what she referred to as an "established trail system" to walk through the White Pine Forest and again confirmed that she did not go on to the areas that were proposed to be filled, but remained the treed area.¹³ As stated previously, the Board notes that based on the information provided by the Approval Holder there appears to be a public road (Hogan Road) that runs near or through the White Pine Forest.

Mr. Thomas: "Just assuming that that is the situation, that the City leases that area, the east fill area for a tree nursery – have you ever gone to the City and gotten permission to walk around their tree nursery?"

Ms. Blodgett: "I have not gone to the tree nursery. I walk along the shoreline.

Mr. Thomas: "Ok."

Ms. Blodgett: "And, I walk down Hogan Road. There is public access."

¹¹ Dr. Ogilvie: "You indicated to one of the questions, I believe, that you had not visited the areas that are marked on the map to be filled – that you had not visited those areas."

Ms. Blodgett: "I have not walked on the actual property, but there are trails going through the forest that are leading everywhere – well used, well established trails that everybody uses that goes bird watching, but I had not walked on the fields. There is no point walking on the fields. I walked around the outskirts where it is permitted."

¹² Mr. Hierath: "The area is now under agricultural production and generally from your remarks it appeared that was in a natural state and I am not sure I understand."

Ms. Blodgett: "All right. If I might elaborate. It is in about a pristine shape as you can expect in an urban setting. There are still animals grazing there. You can watch herds of deer walking through there and feeding. It is not untouched. I am not claiming that. But it has not been cultivated very deep down and so there is a possibility for this land to be restored to a more natural state. It is still bush country, you know."

¹³ The Chairman: "... Do you take students to the fill area?"

Ms. Blodgett: "No. I have never taken students on the fill area."

The Chairman: "Ok."

Ms. Blodgett: "I have not walked it. It is boring to walk in that particular area."

The Chairman: "But you have taken students to the treed area to explain to them the fill area."

Ms. Blodgett: "No. I have not done that yet. I took a group of people over recently who were interested – environmentalists and other people just to show them where it was, but we stayed on the road allowance to show them that area."

D. The Director

[27] The Director outlined how he processed the application for the Approval. In response to his referrals of the application, he was advised that there would be minimal impact on fisheries and wildlife as a result of the activity proposed under the Approval.¹⁴ The Director indicated that under the Canada/Alberta Flood Reduction Program, he was required to take into account the cumulative impacts of the fill on Sturgeon River system including Big Lake. The Director indicated that the impacts on the Sturgeon River system including Big Lake would be 1.5 mm, which in the Director's view was insignificant.¹⁵

[28] With respect to Statements of Concern, the Director indicated that the most reliable indicator of whether a Statement of Concern filer is directly affected, is if he owns property directly adjacent to the proposed activity. The Director stated that where a Statement of Concern filer does not own property directly adjacent to the proposed activity it is necessary to look at other boarder-based criteria.

[29] With respect to the Appellant, the Director indicates that the principle reason that he refused to accept the Appellant's Statement of Concern was the location of her residence. He indicated that beyond this, he did not get into a point by point debate regarding her directly affected status and that it is his usual practice not to do so. He also stated, that with respect to the Appellant, following the filing of her initial Statement of Concern, he gave her an additional opportunity to provide information, but she did not follow up.

[30] During cross-examination, the Appellant asked the Director if he had accepted any other Statements of Concern from any other individuals with respect to this matter. The Director indicated that he had accepted a Statement of Concern from Mr. Deryk Norton. When asked to locate Mr. Deryk Norton's residence, the Director indicated that it was approximately 2.5 to 3.5 miles from the fill areas. When asked why the Director accepted this Statement of Concern, but not the Statement of Concern from the Appellant, the Director indicated that Mr.

¹⁴ See Director's Record #12 and #14.

¹⁵ See Director's Record #20.

Norton owned property "...abutting the flood plain..." and that he could possibly be directly impacted because of the elevation of his property.

[31] Finally, with respect to the issue of the drainage course blocked by the West Fill Area that was of concern to the Appellant, the Director indicate that this would be the subject matter of further approval processes under the *Water Act* and the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 ("EPEA"). When questioned about what will happen in the interim, prior to such other approval processes being carried out, the Director indicated that he did not consider the blockage significant because, in his view, any backup of water would only occur on the Approval Holder's own lands.

[32] The Chairman questioned the Director about a letter received from the City of St. Albert in response to the referral process undertaken by the Director. In their response, the City of St. Albert indicated that if the project was to proceed the City would require that (1) the Director confirm that the proposed fill activity will not have an impact on the watercourse in the event of a 1:100 year flooding event, (2) that the type of fill used and its compaction "...should be addressed to lessen the negative effects of long term soil consolidation and settlement...", and (3) that the fill should be designed to take groundwater concerns into account and prevent "... flood risks to underground infrastructure..."¹⁶ The Director responded that the first condition was met by the Approval. He indicated that the second condition was partially met by the Approval, but that the concern should also be addressed by any municipal approvals. Finally, he indicated that the third condition was beyond his authority under the *Water Act*, and that this should be dealt with in any municipal approvals.

[33] The Chairman also questioned the Director with respect to the "Policy on Acceptance of Statements of Concern (1997)" that he applied in relation to the issue of directly affected. The Director stated that Alberta Environment had developed a policy in relation to EPEA to apply a broad and liberal view of directly affected when considering whether to accept Statements of Concern. Specifically the policy states:

¹⁶ Director's Record #15.

“...considerable judgement will have to be exercised in determining what constitutes a valid Statement of Concern and where there is any doubt the concern should be considered a Statement of Concern.”

[34] The Director stated that this policy was also applied to Statements of Concern filed under the *Water Act*. The Chairman commended the Director and Alberta Environment for the board application of this policy. The Board notes that in its view, the decision with respect to the directly affected status of the Appellant in this case, is a challenging judgement call. The Board found the Director’s knowledgeable and forthright evidence in this regard was of particular assistance and so was the 1997 policy decision by then Assistant Deputy Minister, Mr. Al Schulz.

[35] The Chairman also expressed concern that the letter that the Director sent to the Appellant when the Statement of Concern was not accepted did not indicate that the Appellant potentially had a right to appeal.¹⁷ The Board is of the view that in situations where a difficult judgement call is to be made, it may be appropriate to advise a person whose Statement of Concern has been rejected that they may have a right to appeal.

E. The Approval Holder’s Detailed Presentation

[36] The Approval Holder confirmed that the proposed fill activity is located on private land owned by the Approval Holder, and that this land has been under agricultural cultivation since the early 1940s. The Approval Holder indicated that the area known as the White Pine Forest is to be protected in the final design of the area. The Approval Holder indicated that there are no approved or designated trails on its privately owned land. Further, the Approval Holder indicated they have been actively trying to prohibit access to their land by posting no trespassing signs and constructing an “end dump” at the entrance to a pipeline right-of-way that crosses the land.

[37] With respect to the concern that the Appellant had expressed regarding other developers commencing development once the *Water Act* approval had been obtained, but before

¹⁷ Compare the letter from the Director to Mr. Deryk Norton (Director’s Record #5) with the letter from the Director to the Appellant (Director’s Record #4).

any municipal approvals had been obtained, the Approval Holder confirmed that it is their policy that all the required municipal approvals would be in place prior to development commencing.

[38] During cross-examination, the Appellant mainly posed questions to the Approval Holder regard municipal planning issues, such as the relationship between the development and the Red Willow Park Master Plan. The Approval Holder indicated that many of the plans referred to by the Appellant were not statutory plans or alternatively were in the process of being reconsidered by the City of St. Albert. The Appellant seemed principally concerned with municipal development issues.

F. Closing Comments

[39] In her closing comments, the Appellant argued that she had been continually using the area for over three decades and that as a result she should have some sort of “prescriptive use”.

[40] The Appellant argued that the proposed fill activities are inconsistent with a number of municipal plans, such as the Red Willow Park Master Plan and the overall plan for protecting continuous natural areas in St. Albert.

[41] The Appellant argued that the directly affected test should not be generalized, that the proposed fill activity affects all the citizens of St. Albert and affects them more so than other Albertans.¹⁸ The Appellant also argued that as a senior citizen on a fixed income she would be impacted in a greater way than other citizens of the City of St. Albert if the municipality incurred any liability as a result of this development.

[42] Finally, the Appellant argued that the strict application of the directly affected test as stated in *Kostuch*¹⁹ was inappropriate and that a broad application of the approach taken in

¹⁸ The specific example that the Appellant used was comparing the effect of the proposed fill activity on the citizens of St. Albert with the citizens of Lethbridge.

¹⁹ *Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection* (1995), 17

*Bildson*²⁰ was more appropriate to these circumstances. For the reasons discussed below, the Board finds the Appellant's reference to *Bildson* inapposite to her case.²¹

[43] Upon hearing the evidence before it and the closing arguments of the Appellant, the Board advised that it did not need to receive final arguments from the Director and the Approval Holder.

III. ANALYSIS

[44] There are two issues before the Board. The first is the question of the Appellant's standing – whether the Appellant is directly affected within the meaning of section 115(1)(a)(i)²² of the *Water Act*. The second is the application for a Stay by the Appellant. The outcome on the second issue is dependent on the first because in order for the Board to consider the application for the Stay, the Appellant must have standing. As a result, the Board will first consider the Appellant's standing and then turn to the matter of the Stay.

A. Directly Affected

[45] The *Water Act*, like EPEA, requires that for a person (other than the person with respect to whom a decision has been made) to file a valid Notice of Appeal, they must be directly affected by the Director's decision.

C.E.L.R. (N.S.) 246.

²⁰ *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (October 19, 1998), EAB No. 98-230-D

²¹ *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (October 19, 1998), EAB No. 98-230-D. See discussion at paragraphs 50 and 51.

²² Section 115(1)(a)(i) of the *Water Act* provides:

“115(1) A notice of appeal under this Act may be submitted to the Environmental Appeal Board by the following persons in the following circumstances:

(a) if the Director issues or amends an approval, a notice of appeal may be submitted

(i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 109 *who is directly affected by the Director's decision*, if notice of the application or proposed changes was previously provided under section 108” (Emphasis added.)

1. The Starting Point

[46] The starting point for the Board's consideration of directly affected is found in the case of *Wessley*,²³ which states that standing must be determined on a case by case basis, taking into account the particular facts and circumstances of each appeal. It is a factual test.²⁴

[47] The principle test for directly affected is discussed in *Kostuch*.²⁵

“Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. This first issue is a question of fact, i.e. the extent of the causal connection between the approval and how much it affects a person's interest. This is an important point: the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible effect, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. ‘Directly’ means the person claiming to be ‘affected’ must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.

Second, a person will be more readily found to be ‘directly affected’ if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person's interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic.”²⁶ (Emphasis added.)

Kostuch goes on to say:

“The determination of whether a person is directly affected is a multi-step process. First, the person must demonstrate a personal interest in the action taken by the Director. Assuming the interest is specific and detailed, a related question to be asked is whether that interest is a personal (or private) interest, advanced by one individual or similar interests shared by the community at large.”²⁷

²³ *Fred J. Wessley v. Director, Alberta Environmental Protection* (February 2, 1994), EAB Appeal No. 94-001.

²⁴ See *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection, re: Smoky River Coal Limited* (October 19, 1998), EAB No. 98-230-D.

²⁵ *Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection* (1995), 17 C.E.L.R. (N.S.) 246.

²⁶ *Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35. These passages are cited with approval in *Kostuch v. Director, Air and Water Approvals Division, Environmental Protection* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25.

²⁷ *Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection* (1995), 17

2. The Position of the Appellant

[48] The evidence that has been presented to the Board with respect to the importance of the Big Lake area to Ms. Blodgett has been powerful. In over 800 appeals, it may very well be that Ms. Blodgett has been the most eloquent and moving in presenting a case that she is personally and emotionally directly affected by the decision of the Director. The Board has no doubts whatsoever about her commitment and the importance to her of protecting the environment generally and in protecting Big Lake in particular. The Board commends her for this work. The Board also has no doubt that Ms. Blodgett regularly and consistently uses Big Lake area and that the natural environment in general and the Big Lake area in particular is the inspiration for Ms. Blodgett's artistic endeavours. We wish more Albertans had her love and commitment to the environment.

[49] However, at law, the Board does not accept that, in this case, this is sufficient for her to be directly affected by the Director's decision to issue this Approval within the meaning of section 115(1)(a)(i) of the *Water Act*.

3. *Bildson*

[50] The Board notes that the Appellant relies on *Bildson*.²⁸ In *Bildson*, the Director argued that Mr. Bildson was not directly affected by the Smoky River Coal mine, located near Grande Cache, because his home was in Grande Prairie. Mr. Bildson stated that he regularly made direct and personal use of public land in the Caw Ridge area, immediately adjacent to the mine. The evidence presented by Mr. Bildson included that he drank the water from watercourse located directly downstream of the mine. The Board accepted Mr. Bildson's argument over the strong objections of industry and government.

[51] However, in determining that Mr. Bildson was directly affected, and therefore had standing, the Board stated:

C.E.L.R. (N.S.) 246 at paragraphs 38.

²⁸ *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection, re: Smoky River Coal Limited* (October 19, 1998), EAB No. 98-230-D.

“...in *Kostuch*, the Board denied the appellant standing based on her failure to prove as a *factual* matter that her hunting and recreational uses of public resources would be injured by the approved cement plant. ... The Board has denied standing to appellants in several other cases based upon the appellants’ failure to prove, as a factual matter, that the public resources which they used for recreation or aesthetic enjoyment, would be harmed by the projects of concern....

What is ‘extremely significant’ is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant’s use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing.”²⁹

Mr. and Mrs. Bildson were constantly on Crown land.

4. *Ash*

[52] An example of the proximate causal connection between the use of the natural resource and the project under appeal is found in *Ash*.³⁰ Ms. Ash filed an appeal against an approval issued to the City of Calgary, which permitted the City to apply pesticides within 30 m of the Bow River. Ms. Ash testified that she regularly canoed on the Bow River and randomly came ashore and was therefore worried about exposure to pesticides. In finding that Ms. Ash was directly affected that Board held:

“...the facts underlying Ms. Ash’s appeal enable the establishment of a causal connection between the Approvals for spraying pesticides within 30 m of the waterways within the City of Calgary and herself. Ms. Ash visits the areas along the waterways (by foot, bicycle and canoe) and within the areas sprayed or potentially sprayed, a minimum of four times per week. She has, on three occasions in the past year, walked through recently sprayed areas and then discovered a sign, either on the opposite side of the sprayed area or lying flat and less visible. Ms. Ash has visited the Inglewood Bird Sanctuary on numerous occasions, and has undertaken painting and sketching activities in various off-trail locations in the Sanctuary as well as throughout the pesticide application areas. Ms. Ash has also provided the Board with general evidence that she teaches classes for private and public educational purposes in potentially sprayed areas.”³¹

²⁹ *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (October 19, 1998), EAB No. 98-230-D at paragraphs 32 and 33.

³⁰ *Ash and Munroe v. Director of Southern East Slopes and Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection* (November 13, 1997), EAB No. 97-031 and 97-032.

³¹ *Ash and Munroe v. Director of Southern East Slopes and Prairie Regions, Environmental Regulatory*

5. Public vs. Private Land

[53] In the Board's view, the key difference between *Bildson* and *Ash* and the case before us is the fact that the impacts that are of concern in this case *occur on private land*. In both *Bildson* and *Ash*, the impacts that Mr. Bildson and Ms. Ash were concerned about occurred on public land. In Mr. Bildson's case, he was using public land and could have been impacted by the effects of the mine on the water that he used. In Ms. Ash's case, she was concerned about being exposed to pesticides while walking on public land. These are proximate connections between the project and the use of the natural resource. In the case before us, the principle impacts that are of concern to the Appellant (the aesthetic impacts that will result from the clearing and filling of the land) are occurring on private land owned by the Approval Holder. In the Board's view, this is a fundamental difference; the owner of the land could put up a gate and the use of the land (except the view) would be over.

[54] The evidence before the Board is that land on which the fill that is being deposited pursuant to the Approval is on private land owned by the Approval Holder. The Appellant has testified that she does not go on the land that is the subject of this Approval. As a result, she can not be directly affected by the work conducted under this Approval.

[55] The same is true with respect the Appellant's concern regarding the drainage. As the Director stated, the impact of the fill on the drainage will occur solely on the privately owned land of the Approval Holder.

B. Other Arguments Regarding Directly Affected

1. Municipal Issues

[56] During the course of the preliminary meeting, the Appellant also raised a number of concerns that the Approval is not consistent with a number of municipal plans. In particular, the Appellant identified that the work proposed under the Approval is inconsistent with the current Area Structure Plan, the Red Willow Park Master Plan, and the plan for natural areas in

Service, Alberta Environmental Protection (November 13, 1997), EAB No. 97-031 and 97-032 at paragraph 24.

St. Albert. In the Board's view, these issues more properly fall under the jurisdiction of the City of St. Alberta pursuant to the *Municipal Government Act*, S.A. 1996, c.M-26.1.

[57] The Board is of the view that the Appellants concerns regarding non-compliance with municipal plans, is demonstrative of the fact that while her concerns have their foundations in protecting the environment; they really relate to land use in a municipal context. This was the same problem with the directly affected status of the appellants in *Paron*.³²

[58] In *Paron*, the appellants - Mr. Paron, Mr. Doull and Mr. Sorochan - were concerned about an approval issued to the County of Parkland for the redevelopment of a beach. These appellants had concerns about the negative impacts – such as traffic, crime, and noise - that the recreational users of the beach would have on them and their property. The Board held that these impacts were the result of land use decisions by the local municipality and did not directly relate to the approval that was under appeal before the Board. The proper forum to deal with these concerns was and always will be the local municipality.

[59] Similarly, in the Board's view, many of the concerns raised by the Appellant in this case are more properly dealt with by the municipal approval processes. The Appellant has attempted to convince the Board to intervene with the argument that there are concerns that the local approval process will not procedurally be followed. The Board is unable to assist the Appellant in this regard. First, the Approval Holder in this case has given its commitment and assurance that it will obtain all of the local approvals prior to proceeding as it is required to do by law. Second, even if the Approval Holder had not given such a commitment, it is not within the Board's jurisdiction to ensure compliance with another regulatory scheme. In the Board's view, the law is clear; a developer requires all of the appropriate approvals from all levels of government before it may proceed with a project. An approval under the *Water Act* does not grant a developer the right to override the local approval process.

2. Appellant as Taxpayer

³² *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment, re: Parkland County* (August 1, 2001), EAB No. 01-045, 046 and 047-D.

[60] The Appellant presented an argument that she is more greatly impacted as a taxpayer than other taxpayers in St. Albert because she has modest means. As the Board has stated in *Boucher*,³³ the impact of a project on the municipal tax base does not provide the basis for a finding that a taxpayer is directly affected. While the Board understands that an increase in taxes will be felt more profoundly by someone of modest means such as the Appellant, the effect is too remote to be properly related to the Approval. This is particularly true in this case in that the concern expressed by the Appellant is that her taxes may go up because of a potential lawsuit that may conceivably be launched as a result of improper construction techniques that may be used to carryout the fill work under the Approval. In the Board's view this concern is too remote and too speculative for the basis for a finding that the Appellant is directly affected.

3. Easement by Prescription

[61] In closing the Appellant attempted to argue that she had acquired an "easement by prescription". An easement by prescription is a type of property right that is said to arise when a person makes notorious and prolonged use of a path or trail across another persons land.³⁴ An easement by prescription is commonly known as "squatter's rights". Presumably, the Appellant is trying to argue that she has a property right associated with the fill areas in order to support her claim for directly affected status against the private landowners.

[62] The Board does not accept that the Appellant has any form of easement by prescription in relation to the fill areas for three reasons. First, the evidence before the Board is that the Appellant does not use the land on which the fill areas are located. Notorious use of the land is an essential element of an easement by prescription. Second, the evidence before the Board is that the Approval Holder has been actively attempting to keep people from using its lands. (In order for an easement by prescription to exist, the landowner must not do anything to

³³ *Maurice Boucher v. Director, Environmental Protection* (February 2, 1994), Appeal No. 93-004.

³⁴ See *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990).

stop others from using the land.) Finally, and most persuasively, section 60(3) of the *Law of Property Act*, R.S.A. 1980, c. L-8 prevents the creation of an easement by prescription.³⁵

C. Stay Request

[63] In addition to the question of directly affected, the other matter before the Board was the application for the Stay by the Appellant. As we have stated, a pre-condition to obtaining a Stay is that the Appellant must be directly affected. In that the Board has determined that the Appellant is not directly affected, the Board need not consider the application for the Stay and dismisses the Stay request.

IV. DECISION

[64] The Board finds that the Appellant is not directly affected within the meaning of section 115(1)(a)(i) of the *Water Act* and therefore, pursuant to section 87(5)(a) of EPEA, the Board dismisses the appeal.

Dated on December 28, 2001, at Edmonton, Alberta.

- signed in original -

William A. Tilleman, Q.C.
Chairman

- signed in original -

John P. Ogilvie
Vice-Chairman

³⁵ Section 60(3) of the *Law of Property Act* provides:

“No right to access and use of light or any other easement, right in gross or profit a prendre shall be acquired by a person by prescription, and no such right is deemed to have ever been so acquired.”

See: *Condominium Plan No. 7810477 v. Condominium Plan No. 7711723* (November 14, 1997), No. 8901-014983 (Alta.Q.B.).

- signed in original -

Ron Hierath
Member

V. EXHIBIT LIST

**Preliminary Meeting
December 14, 2001, Edmonton, AB
Genstar Development Company
Approval No. 00150792-00-00/Water Act
Appeal No. 01-074**

Exhibit No.	Description
1	<ul style="list-style-type: none"> • Background Information Package – December 13, 2001. 1. Site Plan - Fill Area – Proposed Red Willow Area Structure Plan 2. Development Concept – Proposed Red Willow Area Structure Plan. 3. Distance to Blodgett Residence – Fill Area Proposed Red Willow Area Structure Plan. 4. Land Ownership – Fill Area Proposed Red Willow Area Structure Plan. 5. West Regional Arterial Road – Fill Area Proposed Red Willow Area Structure Plan. 6. Key Maps – Fill Area Proposed Red Willow Area Structure Plan. 7. Photos – Fill Area Proposed Red Willow Area Structure Plan. 8. View From West 9. View from East 10. Arial View of Old Nursery From North East 11. Ground View of Old Nursery • Maps 1. Site Plan - Fill Area – Proposed Red Willow Area Structure Plan 2. Development Concept – Proposed Red Willow Area Structure Plan. 3. Distance to Blodgett Residence – Fill Area Proposed Red Willow Area Structure Plan. 4. Land Ownership – Fill Area Proposed Red Willow Area Structure Plan. 5. West Regional Arterial Road – Fill Area Proposed Red Willow Area Structure Plan. 6. Key Maps – Fill Area Proposed Red Willow Area Structure Plan. 7. Photos – Fill Area Proposed Red Willow Area Structure Plan. <ul style="list-style-type: none"> A. View From West B. View from East C. Arial View of Old Nursery From North East

Exhibit No.	Description
	D. Ground View of Old Nursery Submitted by Genstar Development Company.
2	23 Overheads used during Ms. Elke Blodgett's presentation. Submitted by Ms. Elke Blodgett.
3	Reverting to Prior Native State: The Ability that Components of Mature Landscapes have to Recover from Severe Disruptive Disturbance given an otherwise Constant, Natural Environment. Submitted by Ms. Elke Blodgett.
4	Map – City of Edmonton 301001 1997 City Wide Photography 7200' ASL 1:5000, 97/05/12, shows Genstar ASP and 1974 Flood Line. Submitted by Ms. Elke Blodgett.
5	City of St. Albert Street Map 2000-2001. Submitted by Ms. Elke Blodgett.