
ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – June 14, 2002

IN THE MATTER OF Sections 91, 92, 95, 97, and 101 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-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: Reconsideration Request: *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Blodgett.*

**RECONSIDERATION HEARING
BEFORE:**

Dr. M. Anne Naeth, Panel Chair;
Dr. Curt Vos; and
Mr. Ron Hierath.

PARTIES:

Appellant: Ms. Elke Blodgett.

Director: Mr. Patrick Marriott, Director, Northeast
Boreal Region, Regional Services, Alberta
Environment, represented by Mr. Randy
Didrikson, Alberta Justice.

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

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, Alberta. 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. Ms. Blodgett argued, in her Notice of Appeal, that she 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 submissions 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. The Board decided that Ms. Blodgett was not directly affected within the meaning of the *Water Act*.

Ms. Blodgett then filed a request for the Board to reconsider her directly affected status. After a careful review of the file and the original decision, the Board did not find any compelling evidence or arguments in favour of a reconsideration, and thus, Ms. Blodgett's request for reconsideration was denied.

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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*, R.S.A. 2000, c.W-3,¹ 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 River on Parcel A 3032RS and River Lots 20 and 21 in the St. Albert Settlement (N 1/2 32-53-25-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 against the Approval, but the Director 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 to the subsequent issuance of the Approval. In the Notice of Appeal, the Appellant argued that she was directly affected and that her Statement of Concern should have been taken into account. The Appellant asked for the Approval to be cancelled and 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 asked the Director to provide the Board with a copy of his records of the Approval (the “Record”). The Board also asked for a submission from the Appellant regarding the 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 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. On August 22, 2001, the Board received the submission from the Appellant on the Stay.

¹ On January 1, 2002, the *Water Act*, S.A. 1996, c.W-3.5 was replaced by the *Water Act*, R.S.A. 2000, c.W-3.

[6] On September 25, 2001, the Board wrote to the Parties² 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 Parties on the Appellant's directly affected status. The Board requested submissions from the other Parties on the Stay.

[7] On November 2, 2001, following receipt of those submissions, the Board wrote to the Parties and advised it would like to receive more information regarding her directly affected status and the Stay request. Therefore, the Board requested 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."

[8] In consultation with the Parties, the Board scheduled and convened a half-day preliminary meeting on December 14, 2001. The Decision was provided to the Parties on December 28, 2001.³ In this Decision, the Board determined that the Appellant was not directly affected by the project as approved by the Director.

[9] The Appellant submitted a request to the Board on March 8, 2002, to reconsider its decision regarding her standing as a directly affected person. She submitted that the Board had "erred in fact and in law" by denying her directly affected status. The basis for her arguments was that the Approval had "...much broader ramifications, on both local ecosystems and human activity, than was acknowledged by the Board." She also argued that the Board should have found her directly affected because the Approval related to public lands (the Crown owns the bed and shores of all naturally occurring, permanent water bodies), not just private lands as stated by the Board, and the impact would be felt on public lands. The Appellant submitted that the Board failed to consider cumulative effects and the future approvals that

² The "Parties" to this appeal are Ms. Blodgett, the Director, and the Approval Holder.

³ *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Genstar Development Company* (December 28, 2001), E.A.B. Appeal No. 01-074-D (the "Decision").

would be required for the site. The Appellant also argued that the Board erred by stating that the municipal approval process would more properly deal with most of her concerns.⁴

[10] The Board acknowledged her request on March 13, 2002, and set a schedule for written submissions by all Parties.

II. SUMMARY OF SUBMISSIONS

[11] The Board received additional comments from the Appellant on March 25, 2002. She submitted that there is a public interest element that should be considered in determining if she is directly affected. She submitted four arguments:

1. The Board made its decision based on legal and factual errors;
2. The total effect of the project on areas of public interest should be considered, i.e. the effects on the entire ecosystem;
3. As she did not have legal counsel at the hearing, the Board should be “more open” to reconsidering the matter; and
4. Inclusion of the word “otherwise” in previous decisions regarding directly affected persons infers broader options for the Board to find someone directly affected.

[12] The Director provided his submission on April 3, 2002. The Director submitted “...there is nothing in Ms. Blodgett’s letters of March 8 and 25, 2002 that points to new evidence or to a substantial error in law that would have affected the Board’s decision. Her complaint appears to be that she does not agree with the Board’s conclusion that she was not directly affected by the activity permitted in the Approval.” According to the Director, the Appellant “...failed to show that there are exceptional and compelling reasons for the Board to reconsider its decision.” The Director stated, “...Ms. Blodgett is merely attempting to reargue her case a second time. It is submitted that a reconsideration of the Board’s decision would result in delays and would not be in the public interest.” The Director supported his position by comparing the issues raised by the Appellant in her reconsideration request to the Decision.⁵

⁴ Appellant’s Request for Reconsideration, dated March 8, 2002.

⁵ Director’s Submission, dated April 3, 2002.

[13] The Approval Holder filed its submission with the Board on April 3, 2002. The Approval Holder submitted that the Appellant had failed to meet the test for reconsideration, and thus, the Board should not consider the request. The Approval Holder stated that "...the onus is on the party requesting the reconsideration to convince the Board that there are exceptional and compelling reasons..." to grant the request. The Approval Holder stated "...a request for reconsideration ought only to be granted when there was in the original decision a substantial error of law or where there is new evidence not reasonably available at the time of the original decision." The Approval Holder submitted that the Appellant's arguments were just attempts to reargue the directly affected issue, and she did not provide any arguments to show there was a substantial error in law. According to the Approval Holder, the Appellant did not raise any new facts that would affect the Board's Decision regarding her directly affected status.⁶

[14] The Board received the Appellant's rebuttal submission on April 10, 2002. In response to the Approval Holder's and the Director's submissions, the Appellant stated that she never claimed to be introducing new evidence. Instead, her request was based on error in fact and in law. She continued:

"...the Environmental Appeal Board (EAB) was set up to encourage the participation of all Albertans in the decision-making process regarding environmental issues. The process was designed to permit ordinary people to bring their cases forward, in their own manner, even when limited by lack of legal expertise or funding, without having to involve high-priced lawyers or the courts.

Legislation states that the people of Alberta have the responsibility and obligation to protect their environment. My appeal to the Board on an issue that concerns me greatly is thus more than my right: it is my duty. It is what I am supposed to do, under the law. I am simply doing what I feel is the right thing to do."

III. DISCUSSION

[15] Under section 101 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"),⁷ the Board can reconsider a decision made by it. Section 101 states:

⁶ Approval Holder's Submission, dated April 3, 2002.

⁷ On January 1, 2002, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 replaced the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3.

“Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it.”

[16] The Board has stated in previous decisions that its power to reconsider “...is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider.”⁸ The Board uses its discretion to reconsider a decision with caution. The power to reconsider is the exception to the general rule that decisions of the Board are intended to be final. However, the Board does realize there are specific circumstances that warrant reconsidering a decision, but it is not intended as a tool for parties to reargue the same issues a second time.

[17] The onus is on the party making the request to convince the Board that there are exceptional and compelling reasons to reconsider the decision.⁹ The factors that the Board will consider in deciding whether there are exceptional and compelling reasons to reconsider its decision include: the public interest, delays, the need for finality, whether there was a substantial error of law that would change the result, and whether there is new evidence not reasonably available at the time of the previous decision.¹⁰

[18] A substantial error in law may be a sufficient ground for reconsideration. An example of when a substantial error in law has been made is when a new decision from the courts reveals an error. Generally, a party’s failure to cite an existing authority will not be a ground to reopen a matter, but new decisions not reasonably available for the original proceedings can provide an exception. It is important for the parties to realize that to justify a reconsideration, the decision of the courts must demonstrate an error in law that, once corrected, would change the original result. The evidence does not have to, on the grounds of probability,

⁸ *Whitefish Lake First Nation Request for Reconsideration, re: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment, re: Tri Link Resources Ltd.* (September 28, 2000), E.A.B. Appeal No. 99-009-RD.

⁹ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation* (April 17, 2001), E.A.B. Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

¹⁰ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation* (April 17, 2001), E.A.B. Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

result in a change of the original decision, but there must be a reasonable possibility that the decision could be altered.¹¹

[19] The applicant must differentiate between two types of new evidence. Evidence that has been acquired since the decision was made but was available at the time of the hearing is not relevant for purposes of reconsideration. However, information that was not available at the time the decision was made or was not practically obtainable by the parties would be relevant for purposes of reconsideration.¹²

[20] One of the major factors the Board considered in determining that the Appellant was not directly affected by the Approval was the fact that the impacts of the project would be on private land, not public land. The Board found that "...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."¹³ The Board continued by stating the "...Appellant has testified that she does not go on the land that is the subject of the Approval. As a result, she cannot be directly affected by the work conducted under the Approval."

[21] The Appellant had argued that the Approval was inconsistent with the municipal plans, but these issues related to land use in a municipal context, an area this Board does not have jurisdiction over. She also expressed concerns as a taxpayer of modest means. The Board found her concern of a potential lawsuit that may result from improper construction techniques that may be used to carry out the work under the Approval too speculative to find her directly affected.¹⁴

¹¹ *Laidlaw Environmental Services (Ryley) Ltd. Request for Reconsideration, re: Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (April 7, 1998), E.A.B. Appeal No. 96-059.

¹² Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation* (April 17, 2001), E.A.B. Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

¹³ *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Genstar Development Company* (December 28, 2001), E.A.B. Appeal No. 01-074-D, at paragraph 53.

¹⁴ *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Genstar Development Company* (December 28, 2001), E.A.B. Appeal No. 01-074-D, at paragraphs 56-60.

[22] The Appellant had tried to argue that she had acquired "...an easement through prescription." The Board found that the elements were not present as she did not have notorious use of the land, the Approval Holder had been trying to keep individuals from using the lands, and section 60(3) of the *Law of Property Act*, R.S.A. 2000, c. L-7, prevents the creation of an easement by prescription.¹⁵

[23] The Appellant did not present any evidence to indicate that ownership of the land has changed since the Decision was made. The Decision was based on the fact that the project will be completed on private land, and the effects will be primarily on private land. No evidence was presented that changes these facts.

[24] The Board admits that it incorrectly referred to "white pine" in the decision rather than "white spruce." However, the Board believes that the original panel did consider the evidence as presented by the Appellant and did make its decision based on the evidence regarding the white spruce forest. The fact that it was more of a clerical error than a decisional error does not justify a reconsideration of the Decision.

[25] In her submission dated March 25, 2002, the Appellant stated that the total effect of the activities on the area of public interest should be considered. The Board does take the public interest factor into account in all of its decisions of this nature.

[26] With respect to the issue of not having a lawyer present, the Board is more interested in the substance of a presentation than the legal avenue from which it is presented. The Appellant was given a fair opportunity to present her issues to the original panel and in her written submissions for her reconsideration request. She presented her case very well and the Board clearly understands her position and her concerns. As the Board has always maintained that legal counsel is not required, this cannot be a reason to grant a reconsideration.

¹⁵ *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Genstar Development Company* (December 28, 2001), E.A.B. Appeal No. 01-074-D, at paragraph 62. Also see: paragraph 48.

[27] In its Decision, the Board acknowledged the Appellant's eloquent and moving presentation of her case.¹⁶ Her concern for this area and the environment in general was also evident in her submissions requesting reconsideration.

[28] The Appellant expressed concern that the granting of an Approval under the *Water Act* "...may prejudice the outcome of the later municipal approval process."¹⁷ The Board did consider this argument in its Decision.¹⁸ As stated in the Decision, "...it is not within the Board's jurisdiction to ensure compliance with another regulatory scheme."¹⁹

[29] The Appellant is trying to reargue the same issues addressed in the Decision in her request for reconsideration. This is the exact situation that the test for reconsideration is designed to avoid. There are no exceptional or compelling reasons to allow a reconsideration. A party cannot make a request for reconsideration because they are dissatisfied with the result. The Appellant has not provided any new evidence that was not available at the time of the hearing, and she has not presented any substantial error in law, which would constitute exceptional or compelling reasons in favour of a reconsideration.

IV. DECISION

[30] The Board finds that Ms. Blodgett did not provide any compelling evidence or arguments for a reconsideration of her directly affected status and thus denies her request for reconsideration.

Dated on June 14, 2002, at Edmonton, Alberta.

"original signed by"

Dr. M. Anne Naeth

¹⁶ *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Genstar Development Company* (December 28, 2001), E.A.B. Appeal No. 01-074-D, at paragraph 48.

¹⁷ Appellant's Letter, dated March 8, 2002.

¹⁸ *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Genstar Development Company* (December 28, 2001), E.A.B. Appeal No. 01-074-D, at paragraphs 56-59.

¹⁹ *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Genstar Development Company* (December 28, 2001), E.A.B. Appeal No. 01-074-D, at paragraph 59.

“original signed by”
Dr. Curt Vos

“original signed by”
Mr. Ron Hierath