

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – November 24, 2003

IN THE MATTER OF sections 91, 92, and 95 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 filed by Bill and Linda Biggart with respect to Approval No. 00076694-00-00 issued under the *Water Act* to the Town of Innisfail by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: *Biggart v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (24 November 2003), Appeal No. 03-039-D (A.E.A.B.).

BEFORE: Dr. Steve E. Hrudehy, Board Member.

PARTIES:

Appellants: Mr. Bill and Ms. Linda Biggart.

Approval Holder: Town of Innisfail.

Director: Mr. Ken Looten, Director, Central Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued an approval on March 3, 2000, to the Town of Innisfail (the Town) authorizing the construction of flood control works at Dodd's Lake at NW 28-35-28-W4M near Innisfail, Alberta.

On July 22, 2003, the Board received a Notice of Appeal from Mr. Bill and Ms. Linda Biggart appealing the approval, along with a number of other appeals relating to the approval. The time period in which an appeal may be filed with the Board with respect to an approval is 7 days, unless the Board finds there is sufficient reason for extending this filing period. In this case, the Notice of Appeal was filed in excess of three years after the expiry of the appeal period. The Board requested that the Biggarts provide reasons as to why the Board should extend the time limit for filing the appeal.

After reviewing the reasons provided, the Board found the Biggarts did not present sufficient reasons to demonstrate that special circumstances existed to warrant an extension of the time limit. Therefore, the Board dismissed the appeal.

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I. BACKGROUND

[1] On March 3, 2000, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 00076694-00-00 (the “Approval”) under the *Water Act*, S.A. 1996, c. W-3.5 (now the *Water Act*, R.S.A. 2000, c. W-3), to the Town of Innisfail (the “Approval Holder”), for the purpose of constructing flood control works at NW 28-35-28-W4M at Dodd’s Lake near Innisfail, Alberta.

[2] On July 22, 2003, the Environmental Appeal Board (the “Board”) received a Notice of Appeal from Mr. Bill and Ms. Linda Biggart (the “Appellants”) appealing the Approval.

[3] On July 25, 2003, the Board wrote to the Appellants, the Approval Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal. The Board requested that the Director provide the Board with a copy of the records (the “Record”) relating to this appeal.

[4] According to standard practice, 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] In the Board’s letter of August 14, 2003, the Board advised the Appellants that it appeared that the Notice of Appeal had been filed significantly outside the time limit prescribed in the *Water Act*. The Board’s letter stated:

“The normal time limit prescribed in the *Water Act* for filing such an appeal of an Approval is 7 days. As the original Approval was issued on March 3, 2000, the Notice of Appeal filed by Mr. and Ms. Biggart appears to be significantly outside the time limit prescribed in the *Water Act*. Mr. and Ms. Biggart are requested to advise the Board if they wish to request an extension of time to appeal? Please indicate to the Board the reasons for the extension of time to appeal and provide an explanation as to why the appeal was filed outside of the 7-day time limit. The granting of the extension of time is at the discretion of the Board and is not routinely granted. You are requested to provide this information in writing to the Environmental Appeal Board by August 26, 2003.” (Emphasis deleted.)

[6] On August 28, 2003, the Board received a letter from the Appellants stating their reasons why an extension should be granted.

[7] After reviewing the reasons provided by the Appellant, the Board notified the Parties on September 18, 2003, that the Board was not prepared to grant an extension of time to appeal and dismissed the appeal for filing the Notice of Appeal late.

II. ANALYSIS

A. Statutory Background

[8] Section 116(1) of the *Water Act* provides:

“A Notice of Appeal must be submitted to the Environmental Appeal Board

- (a) not later than 7 days after
 - (i) receipt of a copy of a water management order or enforcement order, or
 - (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from, or
- (b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from.”

Therefore, in the case of an approval issued under the *Water Act*, the normal time limit for filing a Notice of Appeal is 7 days.

[9] The Board has the authority to extend the filing time if there are sufficient grounds to do so. Section 116(2) of the *Water Act* states:

“The Environmental Appeal Board may, on application made before or after the expiry of the period referred to in subsection (1), extend that period, if the Board is of the opinion that there are sufficient grounds to do so.”

B. Application

[10] After reviewing the Appellants' submission, the Board has determined the appeal must be dismissed based on two grounds – the need for certainty in the appeal process and for failing to meet the onus in applying for an extension.

[11] The legislation has provided the Board with some flexibility to allow for late filed appeals in certain circumstances, but the Board uses this authority in only limited situations.¹ The onus is on the Appellants to demonstrate to the Board that the time limit should be extended to allow the appeal. Of particular concern in this case is that the Appellants filed their Notice of Appeal more than 40 months after the Approval was issued and 27 months after construction of the structure was completed.

1. Certainty

[12] One of the purposes of having deadlines incorporated into legislation is to bring some element of certainty to the regulatory process. In this case, the *Water Act* requires an applicant for an approval to go through an application process. This process provides for a technical and scientific review of the application and a public notice process, which seeks out concerns (statements of concern) of anyone who may be directly affected by the proposed approval. Once a decision is made to issue, or for that matter not to issue, the approval, then there is an appeal period in which the applicant for the approval or anyone who is directly affected (and who filed a statement of concern) can file an appeal. The time limit in which an

¹ See: *Town of Valleyview v. Director, Northern Region, Regional Services, Alberta Environment* (1 August 2003), Appeal No. 03-009-D (A.E.A.B.); Preliminary Motions: *Hanson et al. v. Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (29 November 2002), Appeal Nos. 01-123-131, 02-001, 02-050-058-D (A.E.A.B.); *Dyck v. Director, Southern Region, Regional Services, Alberta Environment re: Coyote Cove Golf Course Inc.* (14 February 2003), Appeal No. 02-137-D (A.E.A.B.); *Shennan et al. v. Director, Central Region, Regional Services, Alberta Environment re: Parkbridge Communities Inc.* (13 February 2003), Appeal Nos. 02-066 and 068-D (A.E.A.B.); *Seabolt Watershed Association v. Director, Central Region, Regional Services, Alberta Environment re: Mountain Creeks Ranch Inc.* (14 February 2003), Appeal No. 02-085-D (A.E.A.B.); *Seniuk v. Director, Enforcement and Monitoring, Parkland Region, Regional Services, Alberta Environment* (4 June 2002), Appeal No. 01-112-D (A.E.A.B.); *Warner et al. v. Director, Central Region, Regional Services, Alberta Environment re: AAA Cattle Company Ltd.* (15 June 2002), Appeal Nos. 01-113 and 01-115-D (A.E.A.B.); *Municipal District of Rocky View No. 44 v. Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (25 June 2002), Appeal No. 02-006-D (A.E.A.B.); and *Proft v. Director, Licensing and Permitting Standards Branch, Environmental Assurance, Environmental Operations Division, Alberta Environment re: Her Majesty the Queen in Right of Alberta* (1 October 2001), Appeal No. 01-037-D (A.E.A.B.).

appeal must be filed is stipulated so that all parties – the applicant, the people who are directly affected, and the regulator – know when the process is complete.

[13] Once this process is complete, the approval can be acted upon and all of the parties can move forward on that basis - the approval holder can carry on with their business affairs, making decisions based on the known terms and conditions of the approval. If no time limits were placed on the appeal period, the applicant for an approval would never know when it could proceed with its project, as there would always be the possibility of an appeal that could result in changes to the approval.

[14] The time lines included in the legislation, and the certainty that they create, balance the interests of all the parties. The Approval Holder constructed the structure based on the certainty provided by the expiration of the appeal period and no appeals being filed during that time.

[15] Therefore, taking into consideration the importance of providing a reasonable level of certainty in any decision made by the Director, the Appellants have not presented sufficient reasons to justify allowing the appeal to proceed at this late date, and therefore the appeal must be dismissed.

2. Extension of Time

[16] The second consideration the Board examined was whether the Appellant had provided sufficient reasons to grant an extension of time to file an appeal. To allow an extension of time, the Appellants must be able to show that extenuating or special circumstances existed that prevented them from filing within the legislated timeframe.

[17] The Appellants were asked to provide reasons why an extension of time should be allowed for them to file a Notice of Appeal. The Appellants' response did not provide direct reasons other than to state adjacent landowners were not informed prior to the installation of the

structure and no notice was posted at the site.² They stated that the structure was installed before approval was obtained from the Department of Fisheries and Oceans. Although the Approval Holder must obtain all of the required approvals prior to the start of a project, this Board does not have jurisdiction to hear matters that are under the authority of federal departments and agencies.

[18] The project allowed under the Approval has been operational for over two years. The Appellants have not requested the structure be removed but rather the construction and drawdown not occur between May 1 and July 1.

[19] However, the fact remains, and the Appellants do admit, that the structure is built and has been operative since 2002, more than two years before this appeal was filed. The Appellants had the opportunity to appeal the Approval at the time it was issued, including any terms and conditions placed on the Approval Holder. The Appellants stated in the chronology they included in their submission, that notice of the application for the Approval was published in the local newspaper. Even though the Appellants argued that the notice in the newspaper was small and inconspicuous, this standing alone does not provide sufficient reasons for the Board to grant an extension to file an appeal 40 months later.

[20] The Approval allows for the *construction* of a flood control structure, and according to the Appellants' submission, the structure has been in place since April 2001. The Board does not have any remedies available to it to address the Appellants' concerns. The Board cannot stop the project from proceeding because it is already in place. It cannot change the terms of the Approval as it was built and has been operating under the terms and conditions of the Approval, and if the Board arbitrarily changed a condition, it would bring unjustifiable uncertainty into the regulatory process.

[21] Thus, based on the above observations, the Appellants have not provided the Board with the evidence of the special circumstances required to grant an extension of time to file an appeal, and the appeal must therefore be dismissed.

3. Stay Application

² See: Appellants' submission, received August 26, 2003.

[22] The Appellants provided a submission on a Stay application even though no application for a Stay regarding the Approval was made to the Board. As stated above, the Board has determined the appeal must be dismissed, and therefore, the Board will not consider the information provided by the Appellants regarding the Stay.

III. CONCLUSION

[23] The Board finds that the statutory prerequisites for filing a Notice of Appeal have not been met as the appeal was filed out of time and no special circumstances exist to extend the appeal deadline. The Board is of the opinion that certainty requires that the appeal timelines be adhered to, unless special circumstances exist to warrant an extension. Therefore, pursuant to section 95(5) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, the Board dismisses the appeal.

Dated on November 24, 2003, at Edmonton, Alberta.

Dr. Steve E. Hrudehy
Board Member