ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – November 24, 2004

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 appeals filed by Gordon Volume, Gerry and Janet Whiteside, Barbara Petrie, Barbara Fehr, David Drader, and Linda Vongrad with respect to *Environmental Protection and Enhancement Act* Approval No. 198159-00-00 and *Water Act* Approval No. 0019839-00-00 issued to the Word of Life Tabernacle by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: *Volume et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Word of Life Tabernacle* (24 November 2004), Appeal Nos. 03-127-137-D (A.E.A.B.).

BEFORE: Dr. Frederick C. Fisher, Q.C., Chair.

WRITTEN SUBMISSIONS:

Appellants: Mr. Gordon Volume, Mr. Gerry and Ms. Janet Whiteside, Ms. Barbara Petrie, Ms. Barbara Fehr, Mr. David Drader, and Ms. Linda Vongrad.

Approval Holder: Word of Life Tabernacle, represented by Mr. Mervin Goldsney.

Director: Mr. Park Powell, Director, Central Region, Regional Services, Alberta Environment, represented by Mr. William McDonald, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued two approvals to the Word of Life Tabernacle for the construction of storm water management works and the construction, operation, and reclamation of a storm outfall structure at SW 5-52-22-W4M and SE 6-52-22-W4M in Strathcona County, Alberta.

Six appellants submitted Notices of Appeal with respect to the two approvals, and five of these appellants submitted Stay applications. The Board granted the Stays.

Prior to the hearing scheduled for January 23, 2004, the Word of Life Tabernacle notified the Board that it had sold the property to which the approvals pertained. The Board cancelled the hearing.

The Board was subsequently notified that Alberta Environment did, in fact, cancel the approvals as requested by the Word of Life Tabernacle.

After reviewing the arguments and issues presented by the parties, the Board determined the appeals were now moot and therefore, dismissed the appeals.

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I. BACKGROUND

[1] On August 29, 2003, the Director, Northern Region, Regional Services, Alberta Environment (the "Director"), issued Approval No. 00198139-00-00 (the "Water Management Approval") under the *Water Act*, R.S.A. 2000, c. W-3, to the Word of Life Tabernacle (the "Approval Holder"), for the construction of storm water management works at SW 5-52-22-W4M and SE 6-52-22-W4M in Strathcona County, Alberta. On September 4, 2003, the Director issued Approval No. 198159-00-00 (the "Storm Outfall Approval")[1] under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ("EPEA") to the Approval Holder for the construction, operation, and reclamation of a storm outfall structure.

[2] On September 16 and 17, 2003, the Environmental Appeals Board (the "Board") received Notices of Appeal from Mr. Gordon Volume (Appeal Nos. 03-127 and 03-128), Mr. Gerry and Ms. Janet Whiteside (Appeal Nos. 03-129 and 03-130), Ms. Barbara Petrie (Appeal Nos. 03-131 and 03-132), Ms. Barbara Fehr (Appeal Nos. 03-133 and 03-134), and Ms. Linda Vongrad (Appeal Nos. 03-136 and 03-137), appealing both Approvals. The Board also received a Notice of Appeal from Mr. David Drader, appealing the Storm Outfall Approval (Appeal No. 03-135) (collectively, the "Appellants"). Ms. Vongrad also requested the Board grant a Stay of the Approvals.

[3] The Board wrote to the Approval Holder and the Director notifying them of the appeals and wrote to the Appellants acknowledging receipt of their Notices of Appeal. The Board requested the Director provide a copy of the records (the "Record") relating to these appeals.

[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.

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[1] The Water Management Approval and the Storm Outfall Approval, collectively, will be referred to as the "Approvals."

[5] On September 18, 2003, the Board requested Ms. Vongrad answer specific questions with respect to her Stay application.[2]

[6] On September 19, 2003, the Board received a request for a Stay from Ms. Barbara Petrie, and on September 22, 2003, the Board received Stay requests from Mr. Gordon Volume, Ms. Barbara Fehr, and Mr. Gerry and Ms. Janet Whiteside. Each of the Appellants was requested to answer the same questions as Ms. Vongrad, substituting Ms. Vongrad's name with their own.

[7] The Appellants provided their responses between September 29 and October 1, 2003. The Approval Holder responded on November 1, 2003, and the Director responded on November 5, 2003. The Appellants provided final comments between November 12 and 14, 2003.

[8] On November 12, 2003, the Board asked the Approval Holder whether it was, in fact, in the process of selling the land associated with these appeals, and if this was correct, "…whether, as a result of the sale of the land, the Word of Life Tabernacle intends to make a request to Alberta Environment to cancel the Approvals or whether they intend to transfer the approvals to a new purchaser."

[9] On November 17, 2003, the Approval Holder notified the Board that its property was for sale. It stated it was willing to halt the proceedings, but it "…would like to retain our right to reactivate this process if we choose to do so…" and to retain the right for the next owner if they want to reactivate the process.

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[2] The Appellant was asked to answer the following questions:

"1. What are the serious concerns of Ms. Vongrad that should be heard by the Board?

2. Would Ms. Vongrad suffer irreparable harm if the Stay is refused?

3. Would Ms. Vongrad suffer greater harm if the Stay was refused pending a decision of the Board than the Word of Life Tabernacle would suffer from the granting of a Stay?

4. Would the overall public interest warrant a Stay?

5. Is Ms. Vongrad directly affected by Alberta Environment's decision to issue Approval No. 00198139-00-00 and Approval No. 198159-00-00 to the Word of Life Tabernacle? This question is asked because the Board can only grant a Stay where it is requested by someone who is directly affected."

[10] The Board notified the Parties on November 18, 2003, that it had decided to grant a Stay of both Approvals, and asked the Parties to respond to the Approval Holder's request to have the proceedings halted by putting the appeals in abeyance.

[11] On November 20 and 21, 2003, the Board received responses from Mr. Gordon Volume, Ms. Barbara Petrie, Ms. Barbara Fehr, Ms. Linda Vongrad, and Mr. Gerry and Ms. Janet Whiteside, all requesting the appeals not be put into abeyance. Ms. Petrie notified the Board that the Approval Holder had withdrawn its re-zoning application from the County of Strathcona.

[12] On November 24, 2003, the Director provided his response, stating he did not take a position with respect to placing the appeals into abeyance.

[13] On November 26, 2003, the Board notified the Parties that:

> "…the Board is of the view, particularly given that a stay has been granted, which the Board does not issue lightly, that the need for certainty is the overriding interest in this matter. Certainty will benefit the Appellants and it will also benefit the Approval Holder in their attempt to sell the land if they chose to undertake that course of action."

The Board stated its intention to proceed with the appeals as soon as possible.

[14] A hearing was scheduled for January 23, 2004.

[15] On January 9, 2004, the Approval Holder notified the Board that it had sold the property in question, and the "…new owner and we have no interest in proceeding with the development for which we required approval and permits. Please take whatever steps are necessary to halt this appeal process. We relinquish all rights and privileges that were ours under Water Act Approval No. 00198139-00-00."

[16] On January 12, 2004, the Board notified the Approval Holder to contact Alberta Environment directly to deal with the Approvals.

[17] On January 15, 2004, the Director notified the Board that he had cancelled the Approvals, and on the same day, the Board notified the Parties the hearing was cancelled. The Board further stated:

> "…it is the Board's understanding that Ms. Vongrad's concerns with respect to the ditch that is affecting her property may be as a result of work that was done in relation to the Approvals, but prior to the Approvals being issued. As the Hearing has been cancelled, as a result of the cancellation of the Approvals by the Director, Alberta Environment, the Board does not have jurisdiction to deal with this issue. However, the Board understands … that Ms. Vongrad has been in contact with Alberta Environment and that Alberta Environment is addressing Ms. Vongrad's concerns."

[18] The Board must determine whether the circumstances of these appeals warrant the appeals to proceed or whether the issues are now moot and the appeals should be dismissed.

II. SUBMISSIONS

[19] Ms. Barbara Fehr argued the Approval Holder is not interested in building on the site as it has placed the property up for sale. She questioned why the Approval Holder had not stopped the appeal process. Ms. Fehr stated that she hoped "…the sale of this property will alleviate my concerns and should another application or transfer arise I would like my concerns addressed."[3]

[20] Ms. Petrie stated the Approval Holder's property has been put up for sale, and therefore the appeals should be granted and the Approvals reversed. She stated this, along with the sale of the property, would alleviate all of the neighbouring landowners' concerns, but if another application or transfer of the Approvals occurs, she would like her concerns addressed.[4]

[21] Mr. Gordon Volume stated the sale of the Approval Holder's property would alleviate his concerns regarding the project, but if another application or transfer arises, he would like his concerns addressed.[5]

[22] Mr. and Ms. Whiteside acknowledged the Approval Holder's property has been put up for sale, and therefore, they see no reason why their appeals should not be granted and the Approvals reversed, thereby alleviating all concerns of the local landowners. However, they

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3 Ms. Barbara Fehr's submission, dated November 11, 2003.

4 See: Ms. Barbara Petrie's submission, dated November 12, 2003.

5 See: Mr. Gordon Volume's submission, dated November 10, 2003.

further stated that should another application or transfer arise, they would like their concerns addressed through the appeal process.[6]

[23] Ms. Linda Vongrad realized the Approval Holder had put its property up for sale, but "…the drainage issue needs to be settled, it has been going on since 1997," and therefore, she would like to have the Approval Holder comply with the letter issued to it in 1997 by Alberta Environment prior to the sale of the land in order to protect her property. She further stated that she hoped the sale of the property would alleviate her concerns, but if another application or transfer arises, she would like her concerns addressed.

[24] Mr. David Drader argued that since the Approval Holder's land is up for sale, the appeals must be rendered moot.[7]

III. ANALYSIS

A. Judicial Analyses of Mootness

[25] The Courts have extensively analyzed the issue of mootness. In the leading case, *Borowski* v. *Canada (Attorney General) (No. 2)*,[8] the Court stated that if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.[9] In *Borowski* the Court stated that it may decline to decide a case which raises merely a hypothetical or abstract question. In the decision, *Resurgence Asset Management LLC* v. *Canadian Airlines Corp*., [2000] A.J. No. 1028, the Alberta Court of Appeal stated an appellate court cannot order a remedy which could have no effect.[10]

[26] The Supreme Court of Canada has identified a two-step process in assessing if a moot issue should be heard. The first step is to determine whether the tangible and concrete

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6 See: Mr. Gerry and Ms. Janet Whiteside's submission, dated November 13, 2003.

7 See: Mr. David Drader's submission, dated December 5, 2003.

8 *Borowski* v. *Canada (Attorney General) (No. 2)*, [1989] 1 S.C.R. 342 ("*Borowski*").

9 *Borowski* v. *Canada (Attorney General) (No. 2)*, [1989] 1 S.C.R. 342 at paragraph 15.

10 *Resurgence Asset Management LLC* v. *Canadian Airlines Corp*., [2000] A.J. No. 1028 at paragraph 30.

dispute has disappeared and the issue is now legally or factually moot, thus making the issue academic. If the answer is yes, then it is necessary to determine if the court should exercise its discretion to hear the case. The Court stated that a case is moot when it fails to meet the live controversy test. The Court in *Borowski* stated the matter was moot as the basis of the action had disappeared and the initial relief sought was no longer applicable.[11]

[27] In *Borowski*, the Court set out a process to determine when, even though the issue may be legally or factually moot, the court should still exercise its discretion and hear the case. The three factors the courts need to consider are:

1. whether the parties retain an adversarial stake in the issues raised by the case (adversarial nature of the case);
2. whether, in the circumstances, the issues are important enough to justify the judicial resources necessary to decide the case (will the decision have some practical affect on the rights of the parties?) (judicial economy); and
3. whether the court would be departing from its traditional role in adjudicating disputes if it decided the case (proper role of the judiciary).

[28] The first step requires an assessment as to whether other issues or collateral consequences remain outstanding that could be determined if the matter was heard. In regards to the second part of the test, judicial economy, the Court identified three situations where the expenditure of judicial resources to determine a moot issue would be appropriate:

1. where the outcome of the case will have a practical effect on the rights of the parties;
2. where the circumstances giving rise to the case are of a recurring nature but brief duration, thus rendering a challenge inherently susceptible to becoming moot; and
3. where the case raises an issue of public importance where a resolution is in the public interest.

Not all three requirements have to be present, and it is up to the court to determine if the factors that are present warrant determining the matter.

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[11] In *Borowski*, the applicant was asking the Court to declare section 251 of the *Criminal Code of Canada* invalid and inoperative, but the section had been struck down prior to the Court hearing the case.

[29] The third step is for the decision-maker to recognize its proper law-making function, and pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

B. The Board's Analysis of Mootness

[30] Section 95(5)(a) of EPEA states:

> "The Board (a) may dismiss a notice of appeal if
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> (i) it considers the notice of appeal to be frivolous or vexatious or without merit, …
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> (iii) for any other reason the Board considers that the notice of appeal is not properly before it…."

[31] The Board has considered when an issue is moot in previous decisions. For example, in the *Butte Action Committee*,[12] the Board stated: "By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants' concerns because the issue found within the Approval appealed from is now abstract or hypothetical."[13]

[32] The moot issue was also discussed in *Kadutski*,[14] where the Board stated: "An appeal is moot when an appellant requests a remedy that the Board cannot possibly grant because it is impossible, not practical, or would have no real effect."[15]

C. Discussion

[33] Even though the Parties would, in all probability, argue their positions vigorously, there is nothing on which to base the arguments. The Approval Holder cannot

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[12] *Butte Action Committee and Town of Eckville* v. *Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment* re: *Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.).

[13] *Butte Action Committee and Town of Eckville* v. *Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment* re: *Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.) at paragraph 28.

[14] *Kadutski* v. *Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* re: *Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.).

[15] *Kadutski* v. *Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* re:

continue with the project, and if it does, it will be in contravention of the *Water Act* and EPEA, and would be subject to the possibility of enforcement actions proceeding against it. The same would be true for the new owner if he proceeded with the project or any other activity that requires an approval or licence under the *Water Act* or EPEA.

[34] The issue before the Board is factually moot. The circumstances have changed in that the Approval applications being appealed have been withdrawn, and therefore, no longer exist. When assessing the appeals based on the second step as pronounced by the Courts, the Board does not find any grounds on which to hear the appeals.

[35] Judicial economy questions whether it is fair to have the Approval Holder be involved in an appeal of a matter that has no reasonable remedy. The Approval Holder withdrew its applications, significantly limiting expenses for all Parties concerned.

[36] Even if the Board was to make a determination in this case, it would provide little guidance for future appeals, as the issue is very fact specific. In most circumstances, and as seen by these appeals, the issue remains viable for a considerable length of time, making it possible for an appeal to be heard on the matter.

[37] Therefore, even though the Board recognizes there are cases when a moot issue may be heard, the circumstances in *this* case do not warrant the Board hearing the appeals, and as a result, the Board dismisses the appeals as being moot.

[38] In the appeals presently before the Board, the Approvals have been cancelled. The Approval Holder elected to have the Approval applications withdrawn, and the Director accepted the withdrawal. Therefore, neither the Approval Holder nor the new purchaser can proceed with the project, or any other that may require an approval, without first submitting an application to the Director. There would then be a new approval, and attached to it, a new appeal process.

[39] For the present Approvals, there are no remedies the Board could provide to the Appellants now that the Approvals no longer exist. Section 98(2) of EPEA allows the Board to recommend to the Minister the decision being appealed should be confirmed, reversed, or

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Ranger Oil Limited (28 August 2001), Appeal No. 00-055-D (A.E.A.B.) at paragraph 36.

varied. Once the Approvals were cancelled, they became a non-entity. There are no longer any terms or conditions that can be confirmed, reversed, or varied. The Board needs something tangible on which it can ground its decision. The Appellants were seeking to have the Approvals cancelled, and the acceptance by the Director of the withdrawal of the applications has essentially achieved the result asked for. The Appellants stated in their submissions the sale of the Approval Holder's property would, in all likelihood, alleviate their concerns. The property has been sold and the Approvals have been cancelled. There are no remedies that are available to the Board.

[40] The Appellants' real concerns relate to planning issues, which are a municipal consideration and therefore within the County of Strathcona's jurisdiction to determine. The Appellants have approached their county councilors, and it is through the development process that their concerns will need to be heard.

[41] The Board recognizes the issue of drainage from the Approval Holder's property has been a concern since at least 1997. It appears the ditch was constructed without an approval and the problems claimed by the Appellants still exist today. If the Board decided to allow the hearing to proceed, the only option available is to recognize the problem still exists, if the evidence shows that is the case, and to suggest to the Director that he take the necessary steps to correct or minimize the problem. Instead of having the Parties go through the time and expense of a hearing to achieve limited satisfaction for the Appellants, the Board, based on the Parties' submissions, determines the issue is moot and the appeals dismissed.

IV. OTHER MATTERS

[42] The Board wishes to make a comment regarding concerns expressed by the Appellants with drainage issues in the area. The drainage ditch and the effects on the neighbouring properties were initially brought to Alberta Environment's attention in 1997. Alberta Environment wrote to the Approval Holder on August 13, 1997, stating that action must be taken to return the drainage in the area to its natural conditions. The Appellants notified Alberta Environment that nothing had been done to correct the situation. The Appellants indicated to the Board that Alberta Environment has not responded further to these concerns,

other than for someone from Alberta Environment to dismiss the Appellants concerns. According to Ms. Vongrad, when she reported her concern to Alberta Environment that the Approval Holder was not going to fill in the ditch as required in the letter sent by Alberta Environment, she was told she "…was too small a fish to be bothered with."[16]

[43] The Board appreciates that Alberta Environment has to prioritize issues and its use of resources, however no person should be made to feel, as expressed by Ms. Vongrad, that they are a "small fish not worth bothering with."[17] Although the Board cannot order Alberta Environment to look into the issues presented by the Appellants, the Board can strongly suggest that someone from Alberta Environment investigate the matter further. It may also be useful for Alberta Environment to look into how complaints of this nature are handled, and if required, implement a policy on the procedures to follow to address such concerns.

V. CONCLUSION

[44] The Approvals that are the subject of these appeals have been cancelled as requested by the Approval Holder and agreed to by the Director. Therefore the appeals are moot as there are no valid Approvals before the Board, and pursuant to section 95(5)(a) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, the Board dismisses the appeals for being moot.

Dated on November 24, 2004, at Edmonton, Alberta.

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Dr. Frederick C. Fisher, Q.C.
Chair

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16 See: Ms. Linda Vongrad's submission, received November 14, 2003.
17 See: Ms. Linda Vongrad's submission, received November 14, 2003.