



Environmental Appeal Board

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APPEAL NO. 2001-HEA-012(a)

In the matter of an appeal under section 8 of the *Health Act*, R.S.B.C. 1996, c.179.

BETWEEN: Gina and Armin Mäerkl **APPELLANTS**
AND: Environmental Health Officer **RESPONDENT**
AND: C. Derek Hood **PERMIT HOLDER**
BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Chair

PLACE OF HEARING: Conducted by way of written submissions
concluding on September 10, 2001

APPEARING: For the Appellants: Armin Maerkl
For the Respondent: Dwayne Stroh
For the Permit Holder: David Perry, Counsel

PRELIMINARY APPLICATIONS

This is the appeal of a Sewage Disposal Permit (the "Permit") that was issued to the Permit Holder on July 20, 2001, for a property on Denman Island, B.C. The Appellants live on a property that is adjacent to the Permit Holder's property and have appealed the Permit. The hearing of this matter is currently scheduled to commence on September 25, 2001, in Courtenay, B.C.

By letter dated September 5, 2001, the Appellants applied for an adjournment of that hearing. Further, by a letter dated September 4, 2001, the Respondent applied to have a site visit during the course of the hearing and to have the venue moved to Denman Island. Finally, by letter dated September 6, 2001, the Board asked for submissions from the parties on the number of days that would be required to hear this matter.

The Board has now received submissions from all parties with respect to those applications.

ADJOURNMENT APPLICATION

By letters dated September 5 and 10, 2001, the Appellants submit that the hearing should be adjourned as they require additional time to prepare for the hearing. They submit that they have been requesting specific information regarding the permit for some time prior to the issuance of the permit and that they have only recently received some of that information. In particular, they note that they have not been provided information regarding, "breakout to a skidder trail and setback to a gully."

The Appellants further submit that the Permit Holder has failed to provide information on how the new approved permit complies with the December 7, 2000 decision of this Board (*Gina and Armin Mäerkl v. Environmental Health Officer*, Appeal No. 2000HEA-018) (unreported) respecting the same property. The Appellants also note that they have just learned about an existing septic tank on the property that now needs to be filled in.

The Appellants state that once they have received and reviewed the above noted information they will require approximately 6 weeks to adequately prepare for the hearing.

Finally, the Appellants submit that the matter should be adjourned to the peak of the wet season so that the site can be viewed at that time, if necessary. They also submit that this would allow them to provide evidence to the Board, on the impact of recently constructed ditches on the ephemeral flow on the property during the wet season.

By letter dated September 7, 2001, the Respondent advises that he does not object to the request for an adjournment. However, he notes that any further delay of the hearing will result in the Permit Holder having to wait until May 2002 to begin construction on the sewage system. He advises that this is a result of one of the conditions of the permit which only allows construction when the soils are completely dry between May and October.

The Permit Holder opposes the adjournment application, as it will result in the loss of this year's dry season for the construction of the system. The Permit Holder submits that he has already lost one year due to the previous appeal and order for further investigations by the Board. Accordingly, an adjournment would result in a two-year delay in construction if the appeal is unsuccessful.

The Permit Holder also advises that he resides in Japan and has arranged to be in Canada for the hearing scheduled on September 25, 2001. He submits that an adjournment would preclude his attendance at the hearing, which would be a breach of his right to be heard at the appeal.

The Board has considered all of the submissions and has concluded that the hearing should proceed as scheduled on September 25, 2001. The Board has considered the Appellants' concern that they have not had adequate time to prepare for the hearing. The Board notes that the permit was issued on July 20, 2001, and the

Appellants filed their Notice of Appeal on August 2, 2001. This has given the Appellants 7 weeks to prepare for the hearing. The Appellants themselves have noted that approximately 6 weeks would be sufficient time for them to prepare for the hearing. In addition, there are still 2 weeks before the hearing is scheduled to commence. Under these circumstances, the Board is satisfied that the Appellants have had sufficient time to prepare for the hearing.

The Board also notes the Appellants' concern that they have not had fair disclosure of information to prepare for the hearing. The Board notes that this is the second appeal by the Appellants of a system on the same property. As the Appellants have been through this process previously, the Board is satisfied that the Appellants are sufficiently familiar with the property and the proposed system to prepare for the appeal. In addition, the Respondent has provided the Appellant with a substantial package of documentation regarding the proposed system, and the property, including a certified survey of the property, on August 17, 2001. Therefore, the Board is satisfied that the Appellants have had adequate disclosure of information through both this appeal and the previous appeal to address their grounds of appeal.

The Board is also not prepared to adjourn this matter so that further testing of the site can be carried out during the coming wet season. The site appears to have been tested during the winter months of 2000 and 2001. Adjourning this matter in the hope that the coming wet season may be wetter than the previous wet season is hypothetical. The Board is not prepared to adjourn the hearing for that reason.

In addition, the Board is satisfied that the Permit Holder may be prejudiced by a further delay in these proceedings. In particular, the Permit Holder may lose another year of the enjoyment of his property should the appeal be unsuccessful. Additionally, the Board is concerned that the Permit Holder not be prejudiced by his inability to attend the hearing due to an adjournment of the proceedings.

For all of the above reasons, the Board has concluded that the hearing will proceed as scheduled on September 25, 2001. The application for an adjournment is denied.

The Board notes that the Appellants have filed several letters with the Board in relation to this appeal. The Board is unclear as to whether the Appellants' intend to file a further Statement of Points with the Board. If the Appellants intend to file a Statement of Points they are requested to do so by **September 14, 2001**. The Permit Holder and the Respondent will then have until **September 18, 2001**, to file Statements of Points with the Board and the other parties.

SITE VISIT

By letter dated September 4, 2001, the Respondent requested that the hearing panel conduct a site visit of the subject property, "to ensure a clear picture and understanding of this lot." The Permit Holder has provided no submissions in respect of the application for a site visit.

The Appellants object to a site visit. They submit that the site is currently dry. Therefore, they submit a site visit would not give the hearing panel a fair understanding of what the site is like during the winter months. Additionally, the Appellants submit that access to the site is problematic, making it extremely difficult to view the entire property.

The Board is not satisfied that a visit to the site will assist the hearing panel in properly understanding the site. The Board is satisfied that the parties through oral, photographic and other evidence can adequately describe the site to the hearing panel. Accordingly, the Board is not prepared to order a site visit of the property, particularly, if it may lead to a concern by any of the parties that the hearing panel may be unduly influenced by such a visit.

VENUE

By letter dated September 4, 2001, the Respondent requested that the hearing be moved from Courtenay to Denman Island. He made this request to accommodate the large number of witnesses from Denman Island that the Appellants suggested they would be calling.

The Permit Holder takes no position on this application.

The Appellants object to the application. They submit that the venue does not need to be moved to Denman Island for the purpose of a site visit as such a visit would be prejudicial. The Appellants have provided no comment with respect to the need to hold the hearing on Denman Island to accommodate their witnesses.

The Board is not satisfied that a change of venue is necessary under the circumstances. As the Board has ruled that there will be no site visit there is no need for the hearing to take place on Denman Island for that reason. Further, the Appellants object to the hearing being held on Denman Island, even though it is their witnesses that the Respondent wished to accommodate by making this application.

Accordingly, the application to move the venue from Courtenay to Denman Island is denied.

HEARING DAYS

By letter dated September 6, 2001, the Board requested submissions from the parties on the number of days that each party anticipated would be necessary to conclude the hearing. The Respondent and the Permit Holder both advise that the hearing can be concluded in one day. The Appellants state that they anticipate that the hearing could be completed in one to three days depending on the information provided by the Respondent.

Based on the above, the Board is satisfied that the hearing will likely be completed in one day. However, as there is some possibility that the hearing could extend beyond one day the Board is setting the matter down for a second day on

September 26, 2001. This will ensure that the hearing completes without the need for the parties and the Board to have to return to Courtenay at a later date.

DECISION

The application for an adjournment of these proceedings is denied. The applications for a site visit and a change of venue are also denied.

The hearing of this matter will proceed as scheduled in Courtenay, B.C. on September 25, 2001, and is now scheduled for an additional day on September 26, 2001.

Alan Andison
Chair

September 11, 2001