



Environmental Appeal Board

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APPEAL NO. 2002-HEA-006(b) to 009(b)

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

BETWEEN: Frank Del Puppo **APPELLANTS**
Roy Leakey
Helena McKay
Doug Pearse

AND: Environmental Health Officer **RESPONDENT**

AND: King Coho Resort Ltd. **THIRD PARTY**

BEFORE: A Panel of the Environmental Appeal Board
Don Cummings, Panel Chair

DATE OF HEARING: Conducted by way of written submissions
concluding on June 5, 2002

APPEARING: For the Appellants: Frank Del Puppo, Roy Leakey,
Helena McKay, Doug Pearse
For the Respondent: Dwayne Stroh
For the Third Party: Brian G. Taylor

APPEALS

Four appeals were filed against the February 7, 2002, decision of Dwayne Stroh, Environmental Health Officer (the "EHO"), Vancouver Island Health Authority, to issue a permit to construct a sewage disposal system on a 0.65 hectare (1.6 acre) strata lot described as Lot 1, D.L. 224, Plan VIP 69162, Comox Land District (the "Property"). The appeals were heard together.

The Environmental Appeal Board has authority to hear these appeals under section 11 of the *Environment Management Act* and section 8(4) of the *Health Act*. The Board, or a panel of it, after hearing all the evidence, may decide to vary, rescind or confirm the decision of the EHO. The Appellants seek an order rescinding the decision of the EHO.

BACKGROUND

The Property is owned by King Coho¹ Resort Ltd. ("King Coho"), and is located adjacent to the Little River, near Comox, B.C. The Little River flows into the Strait

¹ In several documents submitted to the Panel, "Coho" is also spelled as "Cohoe."

of Georgia near the Property. The Property and adjacent land (Lot 2) owned by King Coho have been used as a resort for a number of years. In recent years, King Coho has begun implementing plans to develop condominiums at the resort.

The Board has heard two previous appeals concerning permits held by King Coho. In both cases, the Board upheld the issuance of the permits, subject to certain conditions.

One appeal concerned the issuance of Permit #5/96 under the *Health Act* for a package treatment plant to service a proposed 20-bedroom condominium complex – the first phase of a planned three-phase development (*Roy Leakey v. Environmental Health Officer*, (Appeal No. 96/21, February 21, 1997) (unreported). At that time, the resort consisted of a 33-unit recreational vehicle (“RV”) park, with food and fishing tackle sales and boat rentals. The Board upheld the permit subject to conditions being added to require that all existing septic systems on that property be de-commissioned and all other uses except the condominium complex be removed, and to ensure that the disposal field was protected from flooding by the Little River.

The second appeal concerned the issuance of a Permit PE-13155 under the *Waste Management Act*, authorizing the discharge of sewage effluent from a secondary treatment plant into the Strait of Georgia (*Little River Environmental Protection Society and Little River Enhancement Society v. Deputy Director of Waste Management*, (Appeal No. 97-WAS-03(b), August 12, 1997) (unreported). In its submissions in that appeal, King Coho indicated that it intended to use the *Waste Management Act* permit once the resort outgrew the sewage volumes allowed under the *Health Act* permit (5,000 Imperial gallons per day (“lgpd”)). The parties’ submissions in the present appeals indicate that King Coho has not yet utilized the *Waste Management Act* permit.

On February 9, 2001, King Coho submitted an application for a permit to construct a sewage disposal system to service a six-unit residential condominium on the Property – the second phase of the planned development. However, no permit was issued based on this application. King Coho subsequently submitted a revised permit application.

On March 15, 2001, the EHO wrote to King Coho expressing the need for a hydrogeological assessment of the proposed sewage disposal system.

On December 3, 2001, EBA Engineering Consultants Ltd. (“EBA”) submitted a report to King Coho on its assessment of in ground disposal of septic effluent on the Property. It concluded that pre-treated effluent passing through a modified absorption field, as described in its report, would have a low environmental risk.

On January 18, 2002, King Coho submitted an application for a permit to construct a sewage disposal system to service the six-unit residential condominium and ten RV sites. The proposed system includes two NPS conventional package treatment plants (models CA20W and CA10W with a combined treatment capacity of 3,000 lgpd), and pressure distribution to a disposal field containing 141 metres of 32

millimetre pipe suspended in a "proprietary [sic] infiltrator unit" lying over a 200 millimetre bed of ASTM C-33 sand in a 900 millimetre wide trench.

The application includes engineering drawings of the proposed system, prepared by McElhanney Consulting Services Ltd. The application indicates that the depth of soil on the site is over four feet, and the depth to the water table is approximately six feet. The soil is described as sand, and the site is described as having a slope of less than five percent. The application also indicates that the distance from the proposed disposal field is over 100 feet from both a breakout point and a stream.

The application also indicates that "current usage" is 3,600 Imperial gallons of sewage per day from two 2-bedroom units, 12 RV sites, 12 tent sites, and a laundry facility. The "proposed usage" is described as 3,000 Imperial gallons of sewage per day from three 3-bedroom units, three 2-bedroom units, five full-time RV sites, and five part-time RV sites. The application further states that two 2-bedroom units, 12 tent sites, two RV sites, and a laundry facility are to be decommissioned.

On February 5, 2002, Murray M. Sexton, P.Eng., a Public Health engineer with the Central Vancouver Island Health Region, submitted his review of the EBA report to the EHO. Mr. Sexton concluded:

I would consider EBA's assumptions and calculations to be reasonable except for the possible error in their velocity calculation... which would affect their reported travel time (13 days would be reduced to 8.5 days) to Little River.

On February 7, 2002, the EHO issued Permit #10/01 (the "Permit") based on King Coho's second application.

On February 13, 2002, Mr. Stroh met with approximately 15 concerned residents and Barbara Price, Regional District Area Director, to address the residents' concerns about the permitted sewage disposal system.

On March 5, 2002, each of the Appellants submitted a Notice of Appeal requesting that the Board cancel the Permit. The Appellants' Notices of Appeal are identical except for the names and addresses of each Appellant. Their grounds for appeal are summarized as follows:

1. 3,000 gallons of sewage flow per day is too high for the area to sustain;
2. King Coho has received "preferential treatment" because it has not been required to provide a land-based backup disposal field and covenants;
3. a report by EBA acknowledges that conditions affecting the environmental assessment of the site can vary with time, and EBA has included a limitation of liability clause that protects it against third party claims arising from the presence of contaminants or hazardous wastes at the site;
4. the Waste Management Agreement between King Coho and The Owners, Strata Plan V1S4843, should be fulfilled; and

5. conditions in previous permits under the *Health Act* and *Waste Management Act* have not been carried over to this Permit.

On March 14, 2002, the EHO asked the Board to reject the appeals on the grounds that the Appellants were not "aggrieved" by the issuance of the Permit and, therefore, lacked standing to appeal.

On April 12, 2002, a Panel of the Environmental Appeal Board ruled that the Appellants had standing to appeal the issuance of the Permit. The Panel also ruled that the appeals would be heard by way of written submissions (*Frank Del Puppo, Roy Leakey, Helena McKay, Doug Pearse v. Environmental Health Officer* (Environmental Appeal Board, Appeal No. 2002-HEA-006(a) to 009(a), April 12, 2002) (unreported)).

ISSUES

The Panel has characterized the issues to be addressed in the appeals as follows:

1. Whether there is a need for a reserve absorption field.
2. Whether the Permit should include sewage flow from the first phase of development.
3. Whether effluent will breakout and impact the public health and local shellfish.
4. Whether the EBA report adequately addresses the public health issues associated with the proposed sewage disposal system.
5. Whether the Waste Management Agreement between King Coho and The Owners, Strata Plan V1S4843, should be fulfilled.
6. Whether conditions in previous permits under the *Health Act* and *Waste Management Act* should have been carried over to this Permit.

RELEVANT LEGISLATION AND POLICIES

The *Sewage Disposal Regulation*, B.C. Reg. 411/85 (the "*Regulation*") sets out the general permitting sections, which are produced below.

Permits to construct systems

- 3 (1) No person shall construct, install, alter or repair a sewage disposal system or cause it to be constructed, installed, altered or repaired unless he holds a permit issued under this section
 - ...
 - (3) No permit shall be issued under this section
 - (a) in the case of construction or installation, until site investigation tests set out in or required by Schedule 1 have been carried out to the

satisfaction of the medical health officer or public health inspector, and either of them is satisfied that, having regard to the provisions of that schedule, the construction, installation and ultimate use of the system will not contravene the Act or this regulation, and

(b) where one sewage disposal system ... serves more than one building in a strata plan under the *Condominium Act*, until acceptance of responsibility for operation and maintenance of it has been accepted in writing

...

(ii) in the case of a strata plan, by the strata corporation in which the common property of that plan is vested.

...

(5) The grantor of a permit issued under this section may impose conditions additional to those set out in subsection (4).

Standards for systems

6 Subject to section 7, no sewage disposal system constructed after the date of this regulation which involves the use of ...a package treatment plant is permitted unless the system conforms with the standards of construction, capacity, design, installation, location, absorption, operation and use set out

...

(b) for conventional package treatment plant systems, in Schedule 3, and...

Alternate methods

7 (1) Where a medical health officer or public health inspector is satisfied that it is impossible for a person to comply with

...

(b) in the case of a conventional package treatment plant system, sections 11, 12 or 18 of Schedule 3,

but that the person can comply with all other provisions of the appropriate schedule, he may issue a permit to construct under section 3, containing conditions that he considers appropriate to meet the omitted standards having regard to safeguarding public health.

Schedule 3

18 The conventional absorption field shall be constructed in the following manner:

...

(d) drainage pipe is placed on the coarse gravel at the centre line of the trench,

...

(f) cover the gravel with untreated building paper,

...

DISCUSSION AND ANALYSIS

1. Whether there is a need for a reserve absorption field.

The jurisdiction over sewage disposal in the province is shared between two Ministries: the Ministry of Water, Land and Air Protection and the Ministry of Health Services. By virtue of section 2(1)(b) of the *Conditional Exemption Regulation*, B.C. Reg. 201/94 to the *Waste Management Act*, daily sewage flows of less than 22.7 m³/day (5,000 Igpd), that are not discharged to a surface watercourse or to a surface water body, fall under the jurisdiction of the *Health Act* and the *Regulation*.

King Coho, under Permit PE-13155 issued by the Waste Management Branch, is permitted to discharge a maximum of 100 m³/day (approximately 22,000 Igpd) of treated effluent to the Strait of Georgia through a 400 metre long outfall to a depth of 30 metres below mean low water. The parties' submissions in the present applications indicate that King Coho has not yet utilized the *Waste Management Act* permit.

Three of the Appellants contend that King Coho should be required to set aside land for a reserve absorption field. The Appellant, Frank Del Puppo, questioned why he was required to provide an area for reserve absorption fields when he subdivided his property and King Coho is not required to do so.

The EHO submits that as a condition of subdividing, Mr. Del Puppo was bound by the *On-Site Sewage Disposal Standards for Subdivision Assessment* adopted by the Upper Island, Central Vancouver Island, and Coast-Garibaldi Health Units. The *On-Site Sewage Disposal Standards* require, as a condition to subdividing a property, that an area be set aside to accommodate a primary and reserve absorption field, and that the area be protected by a restrictive covenant registered against the land title. The Property is not being subdivided and, therefore, the standards do not apply. Instead, King Coho is bound only by the *Regulation*. This position is supported by a May 1998 Notice of Public Hearing, included with Appellant Helen McKay's submission, showing that an application had been made to rezone (not subdivide) the Property to permit a higher residential density. The Panel agrees with the EHO that the *On-Site Sewage Disposal Standards for Subdivision Assessment* do not apply to King Coho.

Mr. Del Puppo also contends that King Coho will rely on a "pump and haul" as a backup and asks "Why is there one rule for me and a different one for them [King Coho]?" The Appellant Doug Pearse suggests that the Panel "amend the Health Permit to include the requirement for a dedicated reserve field."

The sewage disposal system includes two NPS package treatment plants that are included in a list of approved package treatment plants for use in the Comox Valley, which the EHO submitted as an exhibit. Although not expressly stated, the application was approved under section 7(1) of the *Regulation* and the EHO applied Schedule 3, which relates to conventional package treatment plant systems. Section 7(1) allows the EHO discretion to consider other types of absorption fields if a conventional absorption field cannot be constructed to meet section 18 of Schedule 3.

There is nothing in either the *Act* or the *Regulation* that compels the EHO to require King Coho to construct a reserve field or provide a back-up system. There is no policy or protocol, as is the case for *Innovative Designs and Technologies New to B.C.* for example, that requires a reserve field area be set aside. The EHO has discretionary powers and can, if he so chooses, add conditions to the Permit such as provision of a reserve absorption field area if he believes the public health is at risk. Given the EBA report and the Public Health Engineer's review, the EHO does not consider the public health to be at risk, and the Panel agrees.

The Panel also agrees with the EHO that although not required or deemed necessary, King Coho has a backup system by virtue of an approved sewage outfall under Permit PE-13155. The EHO also has, as he states, "legal authority to issue an Order under Section 63 of the Health Act, ordering the owner to pump and haul their sewage..." until such time as King Coho can safely dispose of sewage effluent. Whether this would be by means of another package treatment plant system or the marine outfall (pursuant to a *Waste Management Act* permit) is not at issue in this appeal.

For the above reasons, the Panel finds that a reserve field is not required under the Permit.

2. Whether the Permit should include sewage flow from the first phase of development.

The Appellant Roy Leakey asks, "why is Phase 1 not being required to be hooked up to this system?", whereas his co-appellant, Mr. Pearse, is of the opinion that the Phase 1 condominium unit will be connected to the Phase 2 sewage disposal system. This confusion arose from a statement made by the EHO in his April 4, 2002, letter to the Board in which he wrote:

The sewage disposal permit as issued is only for Lot 1. This Permit requires all existing and proposed usage to be treated and disposed of in the new system.

In his May 15, 2002, submission, the EHO explains that, "The existing condo (Phase 1) sewage disposal system was constructed under Permit #99/89... and was amended under sewage disposal permit #206/96.... This system was never in question regarding its legal status or its functionality." The EHO never intended that the Phase 1 development be connected to the Phase 2 sewage disposal system.

The Panel finds that there is nothing in either the *Act* or the *Regulation* that prevents King Coho from developing the Property in stages and constructing several

separate systems. King Coho can apply for as many permits as are required to run its operation. Further, the EHO can issue those permits as long as the daily sewage flows into each system are less than 5,000 Igpd and King Coho can meet all of the requirements set out in the *Regulation*, as well as any additional requirements the EHO believes are necessary to protect the public health. Accordingly, the Panel finds that the Permit does not need to include sewage from the first phase of the development.

3. Whether effluent will breakout and impact the public health and local shellfish.

Mr. Leakey contends that the aquifer underlying the Property breaks out onto the beach at low tide and that "King Coho has not conducted a beach shellfish-monitoring program." EBA concluded that, "The Little River is the closest potential breakout point for septic effluent." Further, EBA concluded that, "As the proposed septic effluent will first be treated in a package plant, EBA considers that the local soils will adequately treat the septic effluent." Adequate treatment is contingent upon construction of the absorption field as specified by EBA in the report, which has been followed.

The EHO, in his April 4, 2002, letter of rebuttal wrote:

The engineered study [the EBA report] concludes that the effluent entering the subsurface will emerge into the Little River and not the marine beaches. The disposal field is greater than 150 feet away from this river, exceeding the regulatory requirement of 100 feet. There would be no purpose in monitoring the shellfish as it is physically impossible for the groundwater flows from this system to exit onto the beach. These findings were concurred with by the Regional Public Health Engineer, Murray Sexton.

The Panel has reviewed both the EBA report and Mr. Sexton's report and agrees with the EHO. The Panel finds that effluent will not breakout and impact the public health and local shellfish.

4. Whether the EBA report adequately addresses the public health issues associated with the proposed sewage disposal system.

In their grounds for appeal, the Appellants state that the report by EBA acknowledges that conditions affecting the environmental assessment of the site can vary with time, and that the report contains a limitation of liability clause that protects EBA against third party claims arising from the presence of contaminants or hazardous wastes at the site.

The Panel notes that EBA's work program set out in its April 24, 2001, letter to King Coho did not include an investigation of contaminated sites. Instead, the study, and subsequent report, focused on the issue of sewage effluent and whether the public health will be at risk if the Permit was approved. EBA concluded that the risk to public health is low.

The Panel recognizes that earth science, in general, is an interpretive science whereby conclusions are drawn from a reasonable number of samples and tests. The Panel recognizes that, "what is called for is a balancing of probabilities and a scale of protection reasonably related to the nature of the threat." (see *Christina Lake Development Ltd. v. British Columbia (Ministry of Health, Director)* (1996), 19 B.C.L.R. (3d) 47 (B.C.C.A.), at para. 40). In this case, the Panel is satisfied on a balance of probabilities that the public health will not be endangered by the Appellant's proposed sewage disposal system. Mr. Sexton's review of the EBA report, and the fact the Appellants submitted no evidence to the contrary, only serves to reinforce the Panel's position.

With respect to the limitation of liability clause contained within the page on General Conditions that EBA included in its report, the Panel believes that a prudent consultant should include such conditions to ensure that its client fully understands the limitations of the report. The Panel finds nothing in the General Conditions that undermines the conclusions in the report. Accordingly, this ground of appeal is rejected.

5. Whether the Waste Management Agreement between King Coho and The Owners, Strata Plan V1S4843, should be fulfilled.

The Appellants did not elaborate on which provisions of the Agreement have not been, but should be fulfilled. Therefore, the Panel is unable to evaluate this ground of appeal and, accordingly, it fails. However, the Panel notes that the EHO submitted a signed copy of the Waste Management Agreement between King Coho Resort Ltd. and the Owners, Strata Plan VIS4843, dated July 28, 1999. This signed agreement satisfies the conditions set out under section 3(3)(b) of the *Regulation*.

6. Whether conditions in previous permits under the *Health Act* and *Waste Management Act* should have been carried over to this Permit.

The Appellants submit that all conditions in previous permits should also be included in this Permit.

The EHO rebuts this assertion stating:

Each permit application when received is thoroughly assessed to ensure the Public Health is protected. Requirements of previous permits have no legal bearing on any further permits issued.

The Panel agrees with the EHO. While previous permits can serve as a guide when reviewing future applications, the EHO's discretion to apply conditions appropriate for a particular application must be based on the particular application. Accordingly, it would be inappropriate to simply apply previous permit conditions to this Permit. Therefore, this ground of appeal is rejected.

DECISION

In making its decision, the Panel of the Environmental Appeal Board has carefully considered all evidence and arguments provided during the hearing, whether or not they have been specifically reiterated here.

Under section 8(4) of the *Health Act*, the Environmental Appeal Board or a panel of it, after hearing all the evidence, may confirm, vary or rescind the ruling under appeal.

For the reasons provided above, the Panel confirms the decision of the EHO. The appeal is dismissed.

Don Cummings, Panel Chair
Environmental Appeal Board

July 16, 2002