



Environmental Appeal Board

APPEAL NO. 96/19 - HEALTH

In the matter of an appeal under section 5 of the *Health Act*, R.S.B.C. 1979, c. 161

BETWEEN: Fernand and Jocelyne Houle **Appellants**

AND: Environmental Health Officer **Respondent**

BEFORE: A Panel of the Environmental Appeal Board
Carol Martin, Panel Chair

DATE OF HEARING: November 18, 1996

PLACE OF HEARING: Richmond, BC

APPEARING: For Appellant: Frank Hay

For Respondent: Bill Koberstein

APPEAL

This was an appeal against the July 24, 1996 decision of the Environmental Health Officer (the "EHO") to refuse to issue a permit for a sewage holding tank for Lot 161, LD 36, Twp. 24, Section 22, Plan 32595 - 43770 Loch Road, Lake Erroch, BC (the "Lot").

The Environmental Appeal Board has the authority to hear this appeal under section 11 of the *Environmental Management Act* and section 5 of the *Health Act*. The Appeal Board, or a Panel of it, may, after hearing all evidence, decide to vary, rescind or uphold a decision of the EHO.

Mr. and Mrs. Houle seek a permit to install a holding tank on the Lot.

BACKGROUND

Mr. and Mrs. Houle have owned the Lot since 1989. Created by subdivision in 1968, the 10,400 sq. ft. waterfront property has been used by a series of owners who have been unable to find an approvable way to dispose of household sewage on the site. The Lot is located 40 km east of Mission on the edge of Loch Erroch in a residential area referred to as North Lake Erroch.

In 1975 the Lot was described as having a water table "at eleven and one-half inches from the natural ground surface" and the "high water mark of the lake was within 100 feet from the proposed septic field". As well, the Lot is flooded from time to time in the winter by lake water.

An application submitted by a previous owner in 1979 was denied because there was less than four feet of soil to the ground water table and because the proposed system was located less than 100 feet from the high water mark of the lake contrary to the Sewage Disposal Regulation, BC Reg 577/75. In his rejection letter, Mr. Bill Koberstein, the then EHO, stated that "... the lot, as it now exists, does not meet the minimum requirements for a standard system or the minimum requirements for an alternate system." He added that he had no option but to use the standards of the day in reviewing the application.

A subsequent owner, attempting to raise the ground level, spread approximately 3 feet of gravel on the Lot. As well, sometime prior to July of 1982 a travel trailer was placed on the Lot and an illegal holding tank was installed beneath it.

In July, 1982, the then Medical Health Officer for the Central Fraser Valley Health Unit in Mission wrote to the Regional District Building Inspector informing him that the parcel had been "repeatedly rejected for sewage disposal due to high water table and total flooding or saturation of the lot during winter months." The letter goes on to say that the Health Unit had informed the owner that it "would not object to his utilizing the lot for a recreational travel trailer for several weeks of the summer on the condition that such a unit was equipped with a proper holding tank that could be properly emptied and disposed of [sic] at a camping dump station," but that no approval had been given for the recently installed "large holding tank beneath a mobile home that is connected to hydro and is skirted." The Medical Health Officer advised the Building Inspector, by way of the letter, that no approvals for such an installation had been given by the Ministry.

The current owners, Mr. and Mrs. Houle, have used the Lot only seasonally for several years. When considering whether to use the Lot for a retirement home, Mr. Houle discussed the history of the Lot and options for sewage disposal on it with the local Health Unit. After reviewing the file with the Houles, the EHO advised them that, before a sewage holding tank could be approved for the Lot, a Regional District bylaw would have to be enacted regulating holding tanks for sewage disposal in their area.

On June 13, 1996, Mr. Houle made an application for a permit to construct and install a 2625 gallon sewage holding tank. The application did not include a proposal for pump-out frequency, for location of effluent disposal or for a service contract with a registered sewage pump and haul company. Nor was there a local Regional District bylaw in place for holding tanks.

After considering the application, Mr. Strelzki, the EHO, denied the permit based on his interpretation of section 7 of the Sewage Disposal Regulation, BC Reg 411/85, as amended (the "Regulation"), and its requirement that the public health be safeguarded. He expressed concerns that based on his experience the public's health could not be safeguarded through the use of holding tanks, especially without the Regional District's authority to regulate them, as suggested by Ministry policy. He stated a general fear that the use of holding tanks could be abused over time, resulting in effluent flowing onto land or into a water body.

In a letter dated July 24, 1996, the EHO informed the Houles of his decision to reject their application for a holding tank, noting that the application could be

considered for approval only after the Regional District enacts a bylaw which would "provide a remedy should the public health be jeopardized at some time in the future." The EHO also stated that the existing un-approved holding tank under the trailer could not be used to establish a precedent.

On August 22, 1996, the Houles appealed the EHO's decision to the Environmental Appeal Board. The stated grounds for appeal are summarized as follows:

- the Lot was "created by a duly constituted sub-division years ago";
- the Health Unit allows holding tanks under certain circumstances;
- the Lot cannot meet the requirements for a conventional or an alternate sewage disposal system;
- rejection reduces the Lot to an uninhabitable state contrary to the intended and permitted residential use; and
- other holding tanks have been permitted by the Health Unit along Lake Erroch, establishing precedent for their approval even without a Regional District bylaw being in place.

RELEVANT LEGISLATION

Section 7 of the Regulation allows the EHO to exercise his discretion to issue a permit for a sewage disposal system for a lot which cannot meet certain requirements of Schedules 2 or 3, but can meet "all other provisions of the appropriate schedule" to compensate for the omitted standards having regard to safeguarding public health.

Section 2 of the same Regulation requires that "no domestic sewage will reach the surface of land or discharge into a surface body of fresh water."

Chapter 6.6 of the Ministry of Health's 'On-Site Sewage Disposal Policy', dated December 1992, states that holding tanks shall be considered only for existing lots where no other system is workable, and only where:

- a local bylaw grants the municipality access and ensures maintenance, and
- the bylaw covers:
 - the frequency of pumping,
 - the charges, and
 - the point of ultimate disposal, or
- sanitary sewers will be installed and operational within one year of installation and the applicant commits to hook-up, or
- a [local] government guarantees the control, access and maintenance, servicing and ultimate disposal of waste material.

The policy further requires that:

- the applicant can provide assurance that the ultimate destination of stored sewage is covered by a Waste Management Permit in good standing, a written agreement with the Waste Management Permit holder to accept the waste and a written commitment that discharge will cease if lawful disposal of sewage cannot be demonstrated at all times, and
- safety, maintenance and warning devices can be provided based on local circumstances. [additional policies relate to the installation of holding tanks once approved].

The earlier 1982 Upper Fraser Valley Health Unit policy required that holding tanks be approved only:

- a) where there was an existing malfunctioning private sewage disposal system,
- b) where sanitary sewers will be installed and operational and the property hooked-up within 6 months of approval, and
- ...
- d) where a municipal bylaw has been approved providing for the control, access, maintenance, servicing and ultimate disposal of the waste material.

A similar policy statement issued by the Upper Fraser Valley Health Unit in 1990, regarding approval of pump-out tanks, noted increasing pressure in recent years on health officials to approve the use of pump-out tanks for various purposes, some resulting in serious problems which arose due to improper maintenance of such facilities. Other problems noted were the cost of regular pumping and potential health hazards due to improper or inadequate maintenance, although it was recognized that there were genuine situations where such facilities could prevent health hazards from occurring. The 1990 policy included only criteria (a) and (d) of the 1982 policy (above), and like it, included general requirements and design specifications and recommendations for installation and maintenance of holding tanks as approved.

Section 66 of the *Health Act* permits a Health Officer to inspect a private place for the purpose of determining the presence of a health hazard or whether the *Health Act* and Regulation are being complied with, but only with the consent of the owner or upon an order of the Supreme Court.

ISSUES

The key issue in this appeal is whether the EHO, when consulting policy in consideration of the application under section 7 of the Regulation for a holding tank for the Lot, correctly exercised his discretionary authority when he refused to issue a permit.

Secondary issues relate to whether the EHO may refuse to issue a permit when such refusal will effectively render the Lot unusable for full-time residential use (at

least at the present time), and whether the Health Unit's previous approval of one or more holding tanks in the Lake Erroch area constitutes a binding precedent.

EVIDENCE AND ARGUMENTS

The Houle's arguments:

The Houles argued that because the Lot cannot meet the basic requirements of the Regulation for a sewage disposal field, the EHO should have granted approval for a new holding tank for the Lot so that they might build a retirement home. They maintained that a permit should have been issued even without a local government holding tank bylaw in place. They argued that because the Lot is not suitable for a conventional system or package treatment system due to insufficient setback capability, high water table, frequent flooding by the lake and previous filling of the Lot, the EHO is obliged by section 7 of the Regulation to allow for an alternate system, in this case a holding tank.

Mr. Frank Hay of Can West Plastics, spokesperson for the Houles, told the Panel that due to a complaint, the Houles have been asked to remove the trailer from the Lot because local land use bylaws permit only houses as residences. He noted that, unless a sewage disposal permit can be obtained by the owners, they cannot build. In addition, Mr. Hay told the Panel that his clients would offer to register a covenant to replace the missing Regional District holding tank bylaw.

Mr. Houle confirmed that he had neglected to inquire about the status of the existing holding tank until after he had purchased the Lot. He argued that the Lot had been created legally as a residential parcel in 1969 and, since then, has been zoned residential. If the Houles can not acquire a sewage disposal permit, Mr. Houle argued that the Lot would, in effect, be 'sterilized,' at least until a public sewer is installed for the area. The Houles ask that the Health Unit amend its policy to allow holding tanks on existing lots.

The Houles also mentioned that, in accordance with the policy requirement that a holding tank only be used when a sewerage facility will be available in the near future, they were optimistic that a sewer system that was presently under consideration for the entire Lake Erroch area would be approved.

The Respondent's position:

Mr. Bill Koberstein, spokesperson for the Respondent, addressed the issue of permits for holding tanks in neighbouring properties.

He noted that a holding tank that had been approved for another lot in the area (for 2000 gallons), was to correct an existing malfunctioning system; not for a new house without an existing system.

The Panel heard evidence that the small lots along the lake were historically used for recreational purposes but that recently they were being used more as permanent residences, creating problems related to flooding, high water table, older failing systems and a potential for cross-contamination with the water table. It was noted that the Health Unit doesn't differentiate between residential and recreational uses. Also, the Respondent submitted that the Ministry has a very limited ability to

enforce maintenance of holding tanks and that there are wells on lots nearby which could be affected if a holding tank was not properly maintained.

Mr. Koberstein noted that, if precedents were binding, they would fetter the EHO's discretion. He said also that the local government bylaws assist the Ministry by ensuring proper maintenance of holding tanks and, without such assistance, a health hazard could be created.

In addition, Mr. Koberstein argued that covenants in lieu of a local government bylaw are inadequate in that the Ministry can't hold bonds or enforce contracts, and, he explained, it is for this reason that it has evolved that local governments should enact bylaws regulating holding tanks. Without such a bylaw, he explained, there has been illegal draining of tanks, high water table problems and contamination of lake water. He cited an example of a holding tank which overflowed within a year of being installed coupled with complaints of the tank being pumped onto the neighbour's property.

Mr. Koberstein commented that in order for the Health Unit to determine whether a tank is properly maintained or a health hazard exists, it may first be required to get a court order to inspect the property. Under ideal conditions, he said, local bylaws would require a contract with a pumper, access to a monitor, proper dumping of effluent and enforcement.

Finally, it was noted that the Health Unit considers the existing tank to be status quo, and that the EHO won't investigate unless there is a problem or a complaint.

In summary, the Respondent's position is that it has had unsatisfactory experiences with holding tanks, and has many concerns regarding poor maintenance and illegal draining of them which creates a potential risk to public health. Although it is not unsympathetic to the Houle's situation, the Respondent has serious concerns regarding public health that cannot be addressed without appropriate local government support via holding tank bylaws. In light of the above, holding tanks could be justified only as remedies for existing failing sewage disposal systems.

DISCUSSION

The Panel has now reviewed the legislation which the EHO has relied on in reaching his decision. The Panel finds that the EHO has relied on the wrong section of the Regulation in refusing to grant the applied for permit to construct. Section 7 of the Sewage Disposal Regulation allows the EHO to approve an alternate system if the public health can be protected. Section 7, however, only applies to alternate or modified conventional septic tank systems and conventional package treatment plant systems. It cannot be used to approve systems that are entirely unrelated to conventional septic tank or package treatment plant systems. Holding tanks are not a related system and section 7 does not apply to them.

The appropriate sections for consideration of a permit to construct a holding tank are subsection 3(1) of the Sewage Disposal Regulation and section 25 of the *Health Act*. Those sections read as follows:

Sewage Disposal Regulation

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 or section 3.01.

Health Act

25. No common sewer or system of sewerage shall be established or continued unless there is maintained with it a system of sewage purification and disposal which removes any menace to public health, and the minister may call for, and any municipal council, person or corporation shall, when requested, furnish as soon as possible, the information and data in relation to the matters under their control as the minister may deem necessary.

The result of these two sections when read together is that the EHO must be satisfied that the permitted holding tank removes any menace to public health.

In this case, the Panel is satisfied that the EHO considered the public health and concluded that it could not be protected.

Based on his experience with holding tanks, the EHO stated that he was not satisfied that approving a new holding tank for a new house on the Lot would be without risk to public health, especially without the support of a Regional District bylaw regulating holding tanks. He therefore refused to issue a permit. The Panel agrees that it was within the EHO's authority to make this decision, and that he correctly exercised his discretionary authority under the Regulation, using Ministry policy to guide him in making his decision in order to safeguard the public's health.

Although the EHO considered the wrong section of the Regulation in reaching the conclusion, he applied the correct test and any error that occurred has now been corrected by this hearing.

On the matter of the EHO rendering the Lot unusable by his decision, the Panel notes that the Houles themselves stated at the hearing that it seemed only a matter of a short time until a community sewerage system would be installed in the Lake Erroch area. At such time, the Lot would likely be usable for full time residential use without a holding tank or a disposal field.

On the issue of the precedent that may have been set by any previous approvals for holding tanks in the Lake Erroch area, whether for existing malfunctioning systems or for new systems (although the Panel does not recall any of the latter being presented), the Panel agrees that these approvals were made on a site-specific basis and cannot serve to fetter or bind the discretion of the EHO when considering applications for other lots.

DECISION

In making its decision, the Panel has carefully considered all of the relevant documented evidence and all comments made during the hearing, whether or not they have been specifically reiterated here.

After reviewing the material presented to it at the hearing as well as all relevant legislation, the Panel finds that the decision of the EHO not to approve a permit for a holding tank for the Lot is upheld and the appeal dismissed.

Carol Martin, Panel Chair
Environmental Appeal Board

February 10, 1997