BRITISH COLUMBIA

Environmental Appeal Board

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DECISION NO. EAB-WSA-20-A011(a)

In the matter of an appeal under the *Water Sustainability Act*, S.B.C. 2014, c. 15

BETWEEN:	Denis Lefebvre	**APPELLANT (APPLICANT)**
AND:	Assistant Water Manager	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Darrell Le Houillier, Chair	
DATE:	Conducted by way of written submissions concluding on May 20, 2021	
APPEARING:	For the Appellant: Aman Oberoi, Counsel For the Respondent: Self-represented	

STAY APPLICATION DECISION

BACKGROUND

[1] Mr. Lefebvre (the "Appellant") owns a corporation which, in turn, owns the Eldorado Mobile Home Park (the "Park") in Merritt, British Columbia. The Park is home to 54 mobile home residents and borders the Nicola River. The Park is protected from flood waters by a roughly 300-metre-long dike that runs along or near the stream channel of the Nicola River.

[2] On the other side of the Nicola River from the Park, two properties are protected by a berm, which the Appellant understands was not built with a proper permit.

[3] The area on both sides of the Nicola River in and around the Park have flooded in recent years, most notably in 2007 and 2017. An evacuation order related to an anticipated flood event was also issued, affecting the Park, in 2018. The Appellant is concerned that the berm build across the river from the Park will exacerbate flooding affecting the Park. The Appellant says he needed to build a berm to protect the Park as a result.

[4] In June 2020, the Appellant topped part of the dike protecting the Park with gravel, creating a berm. The Appellant does not expect the gravel berm to flow into

the Nicola River because he intends to cover the berm with plastic that will separate the gravel from water. The Appellant understands that the dike is unregulated.

[5] On November 17, 2020, Ms. Meldrum (the "Respondent"), who is an engineer and assistant water manager appointed under the *Water Sustainability Act*, S.B.C. 2014, c. 15 (the "*Act*"), issued an order ("the "Order") to the Appellant. The Order states that the Appellant had made changes in and about the Nicola River, in violation of the *Act*. To remedy those changes, the Order requires the Appellant to:

- remove the fill placed in June 2020;
- by January 21, 2021, provide a design and workplan for the construction of a new flood deployment pathway (meeting certain specified requirements);
- undertake and complete the works within 90 days of their approval;
- submit drawings and photographs to, and provide assurances to, the Respondent that the constructed work "substantially complies in all material respects" with the approved design and workplan; and
- retain a copy of the Order, available for inspection, while the work is being done.

[6] The Respondent says the Order requires removal of the gravel berm that tops part of the dike, but it does not require removal of the dike. According to the Respondent, the dike is regulated under the *Dike Maintenance Act*, R.S.B.C. 1996, c. 95 (the "*Dike Maintenance Act*"), but the gravel berm was placed on the channel and banks of the Nicola River without the required authorization under the *Act*.

[7] The Appellant appealed the Order to the Environmental Appeal Board (the "Board"). The Appellant's position is that he has the right, under the common law, to preserve the Park from periodic flooding, without harming anyone else. This right is particularly important, given the increased risk the Park faces because of the berms built on the opposite side of the river.

[8] The Appellant wishes to assess whether the berms built on the opposite side of the river from the Park have been the subject of orders, and if so, whether the orders have been complied with. The Appellant is concerned about possibly differential treatment between property owners, and he wishes to confirm whether the berms on the opposite side of the river pose an increased risk of flooding to the Park, as he suspects.

[9] The Respondent's position is that the Appellant's construction or enhancement of the berm is unauthorized and is in violation of the *Act* and the *Dike Maintenance Act*, as well as a restrictive covenant on the property. Furthermore, the Respondent denies that the Appellant has a common law right to protect the Park from flooding, as he described it. The Respondent also says the Appellant lacks the expertise required to know whether capping the berm with plastic would mitigate the risk to the stream and stream channel from gravel deposition. Further, the Respondent says the activities done on other properties are irrelevant to whether the Appellant should have to abide by the Order, and to the risk of flooding faced by the Park. The Respondent also argues that the management of the Park has allowed buildings to be placed too close to the Nicola River channel (including on the dike), and that this prevents better flood protection measures from being in place.

[10] The Appellant requests a stay of the Order, pending a final decision in this appeal. Along with the application, he provided submissions and evidence in support. The Board provided the Respondent the opportunity to make submissions with respect to the stay application. She did so, providing evidence and argument. The Board then provided the Appellant with the opportunity to respond, but he did not do so.

ISSUE

[11] Should the Board grant a stay of the Order, pending a final decision in this appeal?

RELEVANT LEGISLATION AND LEGAL TEST

[12] Section 25 of the *Administrative Tribunals* Act, S.B.C. 2004, c. 45 (the "*ATA*") allows the Board to order a stay. Section 25 provides that an appeal does not operate as a stay of a decision under appeal unless the Board orders otherwise.[1]

[13] As described in the Board's *Practice and Procedure Manual*, the Board decides stay applications using the test described in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 DLR (4th) 385 (SCC) [*RJR-Macdonald*]. This was the test referenced by both parties in their submissions. The test involves three prongs:

- whether the appeal raises a serious issue;
- whether the applicant for a stay will likely suffer irreparable harm if a stay is refused; and
- whether the harm that the applicant will suffer if a stay is refused exceeds any harm that may occur if a stay is granted (the "balance of convenience") test.

[14] The Appellant, who has applied for the stay, bears the onus of proof in this application.

POSITIONS OF THE PARTIES

The Appellant's Position

[15] The Appellant asserts that not granting the stay would result in irreparable harm to the property, health, and safety of himself and the residents of the Park. This harm relates to the risk of flooding of the Nicola River, and the increase in that risk because of the berms built on the opposite side of the Nicola River. The Appellant says that removal of the 1.2-metre dike/berm structure would remove what protection the Park enjoys from seasonal flooding of the Nicola River.

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[1] Section 25 of the *ATA* appears in Part 4 of that Act. Section 105(4) of the Act provides that Division 1 of Part 8 of the *Environmental Management Act*, S.B.C. 2003, c.53 (the "*Environmental Management Act*") applies to appeals brought under the *Act*. Division 1 of Part 8 of the *Environmental Management Act* contains section 93.1, which provides that Part 4 of the *ATA* applies to the Board (subject to some exemptions not relevant to this decision).

[16] In support of this position, the Appellant included statements from many residents of the Park, describing the risk of financial and psychological harm, as well as risk to their well-being, if the berm protecting the Park is removed. The statements were written in response to a form letter sent to residents, requesting statements to be provided in response to an order "… to remove the dike … [which] will put the residents of [the Park] at risk of flooding."

[17] The Appellant argues that granting the stay will not cause any significant hardship to any of the parties. He is willing to protect the river from deposition of gravel by placing plastic atop the berm protecting the Park.

[18] The Appellant provided photographs and various documents to support his position.

The Respondent's Position

[19] The Respondent notes that the berm protecting the Park is made of unconsolidated gravel. That gravel rests atop a regulated dike that is not subject to the Order. The Respondent argues that the dike would continue to provide flood protection even with the removal of the gravel berm atop the dike. According to the Respondent, the dike is 1.2-meters tall and spans roughly 300 metres. The unconsolidated berm is another 0.6-meters tall and only extends roughly 80 metres along the north end of the Park.

[20] The Respondent argues there is no serious issue to be tried in this case, and that accordingly, a stay is not appropriate. In support of this position, the Respondent argues that the Appellant's application (and appeal) are based on conflation of the regulated dike and the berm at issue in the Order. The Respondent also argues that the other premise underlying the Appellant's argument, that the Park suffers an increased risk of flooding because of other berms in the area, is untrue.

[21] The Respondent adds that the Board lacks the authority to make a decision pertaining to a dike regulated under the *Dike Maintenance Act*, including an approval or denial of an application to construct or alter a dike. The Respondent notes that she has the jurisdiction to order offending works in or about a stream to be removed, as she did in the Order in this case. The Respondent argues that such an order is "*de facto*, reasonable" and the stay application should be denied on that basis alone. The Appellant's premises are unfounded.

[22] The Respondent also argues that the Appellant is not at risk of irreparable harm if the Order stands. The Appellant says that the berm does not provide any flood protection; that already exists because of the presence of the dike. The Respondent argues that, if a flood were to top the dike, the unconsolidated gravel would actually risk damaging the dike, the Park, neighbouring properties, and/or the stream channel (including aquatic habitat for various fish) if flood waters or heavy rains move it. The berm would also impede the ability to put proper, temporary flood protection measures in place. The Respondent says the Appellant placed the gravel with one day's work using a machine; the gravel could be removed in a cost-effective way. The Respondent argues that damage to the stream would be even more likely if a plastic sheet were used to cap the berm, and any damage to the stream would be difficult if not impossible to repair.

[23] The Respondent adds that, if the Order is overturned, the Appellant always has the option of suing for damages, to recover the costs associated with removing the berm.

[24] With respect to the balance of convenience, the Respondent argues that the Order strikes the appropriate balance, and that the risk of harm to the environment and the Park is greater if the berm is left in place than if the berm is removed. The Respondent acknowledges the concerns expressed by residents of the Park, but argues that those concerns are not based on an accurate understanding of relevant technical considerations or the legislative framework surrounding flood protection.

[25] The Respondent provided photographs and various documents in support of her position.

DECISION AND REASONS

Does the appeal raise a serious issue?

[26] The court in *RJR-Macdonald* indicated that the "serious issue" component of the test has a low threshold. There are no specific requirements related to the determination on this question.

[27] In the circumstances of this case, I am satisfied that there is a serious issue to be tried. The appeal considers whether the berm that the Appellant built on top of the dike should be removed. The Appellant went to some trouble and expense to install the berm, whereas the Respondent says the berm poses a threat to property, the dike, the stream channel, and aquatic habitat. The question is not frivolous or vexatious and will have appreciable consequences for the Appellant, and potentially for values that are protected by the *Act*. Given the low threshold related to this question, I conclude that the appeal raises a serious issue.

Will the applicant for the stay likely suffer irreparable harm if the stay is refused?

[28] As noted previously, the Appellant bears the burden of proof; he applied for the stay, so he must show that he will likely suffer irreparable harm if the stay is denied. He argues that he will suffer irreparable harm because the Park, which he indirectly owns, will suffer an increased risk of flooding if the stay is denied and the berm is removed.

[29] There is no dispute that flooding of the Park, if it occurred before the Board decides the merits of the appeal, would give rise to irreparable harm. The statements from residents of the Park establish these impacts for the residents. I am satisfied, given that the Appellant indirectly owns the Park, that flooding would also pose a risk of irreparable harm to him. He would face the prospect of property damage, disrupted revenue if the Park's residents became unable to pay rent and/or fees, to say nothing of the potential human impacts and how that may affect the Appellant's business.

[30] The Respondent argues that the Appellant does not face an increased risk of flooding if the stay is not granted, however. The Respondent says the Appellant has relied on two untrue premises to relate the irreparable harm he would suffer if the Park flooded to irreparable harm he says he would experience if the stay were denied.

[31] First, the Respondent says that the risk of flooding is not any greater because of the berms built in nearby properties on the Nicola River. I do not consider this to be relevant to the stay application. Whatever the source of that risk, the Park faces a risk of flooding from the Nicola River. The Appellant says that the berm mitigates that risk, at least in part, and denying the stay application would increase his risk associated with the Park flooding. The source of the risk of flooding is irrelevant.

[32] Second, the Respondent says that the berm does not provide any protection against flooding. Neither the Appellant nor the Respondent provided any expert evidence on this point. I recognize that the Respondent is an engineer and may have expertise relevant to this point; however, she has not been tendered or accepted as an expert. She has not explained what education, training or experience she has that would make her an expert in the assessment of flood protection and/or the risk of flooding.

[33] From a lay perspective, however, a review of the evidence does not support a finding that the berm would offer protection from the risk of flooding. When the Appellant was forced to stop work on the berm, it was about 80 feet-long; the waterfront of the Park is 300 feet-long. Whether the berm provides any additional protection along its length or it is likely to be washed away, as the Respondent argues, the berm offers no protection for most of the Park's waterfront. The lack of containment for potential floodwater means that the Park has no greater protection offered by the berm.

[34] It may be, as the Respondent argues, that the berm might degrade the dike's stability and offer even worse flood protection than having no berm at all. I do not need to decide that question, however. For the purposes of my analysis, it is sufficient that I have found, as a fact, that the incomplete berm offers no reduced risk of flooding to the Park.

[35] It is irrelevant for the purposes of this issue, whether the gravel from the berm poses a risk of damage to the Nicola River or its stream channel. At this point in the analysis, I must consider the risk of irreparable harm to the Appellant's interests. Balancing potential harm associated with allowing the stay application, including the risk of damage to the Nicola River, aquatic habitat, or the stream channel, will be undertaken only if I am satisfied that the Appellant faces a risk of irreparable harm if the stay application is denied.

[36] The Appellant has not argued that he faces other irreparable harm if the stay application is denied. While the Respondent made arguments about the expenses associated with removal of the berm and the Appellant's ability to potentially recover those through a lawsuit, the Appellant did not provide any persuasive evidence or argument along financial lines. The Appellant bears the burden of proof and this burden has not been met with respect to any financial harm associated with the removal of the berm.

[37] The Appellant likewise did not argue that he would suffer irreparable harm if the stay application is denied because the appeal may be rendered moot. While the

Board has previously recognized that this can amount to irreparable harm[2], I will not conclude that such harm likely exists without the Appellant having argued for it. It is not for me to guess how the Appellant intends to pursue the appeal. The Appellant had the opportunity to raise this as a potential aspect of irreparable harm and he did not do so. It is not proper for me to do so for him.

[38] Based on the foregoing, I conclude that the Appellant has not established that he will likely suffer irreparable harm if the stay application is denied. As a result, there is no reason for me to engage in an analysis on the balance of convenience.

[39] In closing, I note that the Appellant asked for the opportunity to supplement the evidence submitted if need be. The Board's Rule 16 requires that applications, including stay applications, have attached all evidence to be relied upon. It is not feasible for the Appellant to be able to repeatedly submit evidence, while allowing the Respondent to reply to each submission, while having the stay application proceed in an efficient and orderly process. The Appellant was able to control the timing of this application and took several months to file it. Consistent with Rule 16, the application is to be decided based on the evidence provided with it.

[40] For the reasons provided above, I find that the Board should not grant a stay of the Order, pending a final decision in this appeal. The Appellant's application for a stay is denied.

"Darrell Le Houillier"

Darrell Le Houillier, Chair
Environmental Appeal Board

May 31, 2021

[2] See, for example, *GFL Environmental Inc. v. British Columbia (Ministry of the Environment)*, [2020] BCEA No. 2, 2018-EMA-021(d), January 15, 2020.