



# Environmental Appeal Board

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## APPEAL NO. 2001-HEA-004(a)

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

<b>BETWEEN:</b>	Mark Burgert	<b>APPELLANT</b>
<b>AND:</b>	Environmental Health Officer	<b>RESPONDENT</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Alan Anderson, Chair	

### APPLICATION

Dan Glover, the Environmental Health Officer (the "EHO") with Coast Garibaldi Community Health Services Society, made an application to the Board requesting that it consider whether it has jurisdiction to hear the above noted appeal.

Mark Burgert filed a Notice of Appeal against the February 14, 2001 letter of the EHO regarding a sewage disposal system for his property on Lot 4, DL 1500, Plan 13241 NWD, Group 1, which is located at 12234 Scotchfir Road in Powell River, B.C.

All parties have had an opportunity to respond to this application, which has been conducted in writing.

### BACKGROUND

On May 5, 2000, the EHO ordered Mr. Burgert to cease using the existing sewage disposal system on the property because it was malfunctioning. In particular, he stated:

I have noted saturated soil conditions to be present in what appears to be the sewage disposal field area during two recent inspections. On one of these occasions, effluent was noted to be ponding on the surface of the ground; a test pit dug on the second occasion revealed the water table within the apparent disposal field to be at approximately eight to ten inches (8 – 10") from the ground surface. It is evident that these conditions prevent the effective treatment of sewage effluent, thereby allowing a potential health hazard to exist.

Therefore, I hereby exercise my authority under section 63 of the *Health Act* and make the following Orders:

- 1) You must ensure that no sewage wastes or sewage effluent is allowed to discharge from the house located on this property, effective immediately. This order will remain in effect until written approval to operate a sewage disposal system is received from a public health officer employed by the Coast Garibaldi Health Services Society. This will preclude the occupation of this house.
- 2) In order to facilitate the approval process, you must make application for a permit to construct, repair, or alter a sewage disposal system on this property.

On November 6, 2000, Mr. Burgert submitted an application to the EHO for an approval to repair the conventional septic tank sewage disposal system under section 3 of the *Sewage Disposal Regulation* (the "*Regulation*"). Mr. Burgert applied for a conventional septic tank system consisting of a fiberglass septic tank with a 200 ft length of 4" diameter PVC drainage pipe located on the site proposed in the application.

On February 14, 2001, the EHO sent a letter to Mr. Burgert indicating that his property had been assessed throughout the previous several months by the EHO. The letter also provided Mr. Burgert with comments to assist in providing direction in resolving the malfunctioning sewage system. Specifically, this letter indicated that

1. The proposed disposal field area appears to have several constraints. These include:
  - The former disposal field area was in constant use for many years up until it's failure. A quantity of sewage solids was allowed to enter the disposal field and seriously diminish the ability of the disposal area to receive and attenuate effluent. This area would be less than ideal to use for a new disposal area.
  - It appears that approximately 18 inches of fill material would be required throughout the proposed area in order to allow for some levelling, and to ensure the minimum required soil depth throughout the area.
  - The property line locations are unclear; these boundaries are important because of the minimal space available in the rear of the lot.
  - If the area proposed were used as a disposal field site, a package treatment plant would be required, and the effluent would need to be delivered by an effluent pump. A 'small pipe pressurized' disposal field may also be the most adaptable to this area, and should be considered.

The EHO further wrote that, as an alternative, the area to the side of the driveway should be investigated as a potential disposal field site, with the possibility that multiple field sites could be used to eliminate the need for a package treatment

plant. Finally, the EHO advised Mr. Burgert that he would be required to install an interceptor drain regardless of the sewage disposal location or design chosen, and that "test pits and perc holes" should be dug during the wet season to assess the suitability of the site.

On March 7, 2001, Mr. Burgert filed a Notice of Appeal with respect to the February 14, 2001 letter from the EHO, which he submits was a decision to refuse his application. He also appealed the May 5, 2000 order to cease using the existing sewage disposal system. However, the Board rejected the appeal of that order because it lacks the jurisdiction to hear such appeals.

On April 11, 2001, the EHO wrote to the Board and advised that Mr. Burgert had not provided all of the necessary information required for the permit application to be decided. In this letter, the EHO submits that his February 14, 2001 letter to Mr. Burgert was an attempt to request the information required, and to provide Mr. Burgert with several considerations to help correct his system. He submits that, at no point in the letter, was a decision intended or offered. In addition, the EHO submits that under these circumstances, the Board is without jurisdiction to accept Mr. Burgert's appeal.

On April 17, 2001, the Board wrote to Mr. Burgert advising him of the EHO's April 11, 2001 letter, and asked for submissions from both parties regarding the Board's jurisdiction.

## **ISSUE**

The issue raised in this application is whether the EHO's letter, dated February 14, 2001, is a decision that may be appealed to the Board.

## **Relevant Legislation**

The *Sewage Disposal Regulation*, B.C. Reg. 411/85 provides as follows:

### **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 or section 3.01.
- (2) Application for a permit under this section must be made in a manner and form satisfactory to the Ministry of Health with all relevant details completed by the applicant.
- (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, ...

- 7 (2) Where a sewage disposal system, constructed or installed prior to December 20, 1985 is in need of repair or alteration and the appropriate work cannot reasonably be effected in accordance with this regulation, the medical health officer or public health inspector may issue a permit to repair or alter under section 3 if the sewage disposal system, when repaired or altered in accordance with the conditions contained in the permit, will not constitute a health hazard.

The *Health Act* provides as follows:

- 8 (4) If a person is aggrieved by the issue or the refusal of a permit for a sewage disposal system under a regulation made under subsection (2)(m), the person may appeal that ruling to the Environmental Appeal Board...

## DISCUSSION AND ANALYSIS

### **Whether the EHO's letter, dated February 14, 2001, is a decision that may be appealed to the Board.**

The EHO submits that Mr. Burgert has not provided the EHO with sufficient information to complete the permit application process, and as such, no decision can be made. Consequently, the letter of February 14, 2001 served only to outline suggestions for resolving the malfunctioning sewage system, and to reiterate to Mr. Burgert the need to provide the EHO with more information to allow him to make a decision about the permit application.

In an April 23, 2001 letter to the Board, Mr. Burgert stated that prior to the February 14, 2001 letter, no requests were made by the EHO for additional information to complete the application. He also stated that, when he contacted Mr. Weston, the Chief EHO to whom his file had been transferred, he was told to consider the February 14, 2001 letter as a written Rejection Report as described in the Coast Garibaldi Health Services "Sewage System Permitting Procedure." He also stated that he was advised of his avenue of appeal to the Board. It is his submission that this letter constitutes a decision rejecting his permit application for a conventional septic tank system, for which he has an avenue of appeal to the Board.

In a letter dated May 14, 2001, the EHO restated his position that there had been neither an approval nor rejection of the permit application because Mr. Burgert's application remained incomplete. He maintained that his office would consider the application once the required information had been provided. He further stated that he does not consider the letter of February 14, 2001 to be a written Rejection Report. He submitted that the remark made by Mr. Weston was made during a lengthy telephone conversation, and was apparently taken out of context. In addition, he submits that Mr. Weston advised Mr. Burgert that he was required to

"provide at least 7 backhoe-dug test pits on the proposed site and to flag the property lines to enable an assessment to be completed."

The Board notes that the February 14, 2001 letter provided Mr. Burgert with comments and suggestions to assist him in resolving the problems with the malfunctioning sewage disposal system. The letter made several suggestions regarding alternatives to the proposed disposal site. In particular, it suggested installation of a package treatment plant on the proposed site, and, alternatively, suggested investigating alternative disposal sites on the property. It also stated that Mr. Burgert would be required to install an interceptor drain regardless of the sewage disposal location or design chosen.

Section 8(4) of the *Health Act* indicates that a refusal of a permit is a "ruling" which can be appealed to the Board. The Board notes that "ruling" is defined in Black's Law Dictionary (7<sup>th</sup> ed.) 1999 as "[t]he outcome of a court's decision either on some point of law or on the case as a whole." In the context of an administrative decision by an EHO, this definition suggests that a "ruling" may be a decision rejecting a permit application as a whole, or rejecting it based upon a specific point or on several points.

The Board has reviewed the Sewage System Permitting Procedure which was referred to by both parties. This policy was designed to assist applicants in investigating and choosing an appropriate sewage disposal system. It indicates that the EHO would conduct a site inspection to determine the suitability of the site chosen for the disposal system. If the site were found to be unsuitable, the applicant would receive a written Rejection Report from the EHO, a decision that can be appealed to the Board.

Mr. Glover indicated that the property had been assessed throughout the winter of 2000/2001 which culminated in the February 14, 2001 letter. In an initial telephone call by Mr. Burgert to the EHO on that date, Mr. Burgert was informed that his application had been transferred to Mr. Weston. Mr. Burgert contacted Mr. Weston the following day, and it was during that conversation that the statement regarding the written Rejection Report was made.

On review of the application to repair the septic tank sewage disposal system and the subsequent submissions from Mr. Burgert, it is clear to the Board that he is requesting a permit under section 7(2) of the *Regulation* to repair a septic tank system, specifically as described in his November 6, 2000 application to repair. Although the February 14, 2001 letter from the EHO does not clearly state that Mr. Burgert's application was being rejected, it advises that the chosen site for the system is unacceptable, and, in the alternative, that a package treatment plant system will be required on the property.

The Board considers the EHO's February 14, 2001 letter to be a rejection of Mr. Burgert's November 6, 2000 application. In effect, by stating those specific concerns regarding the system Mr. Burgert was applying for and the site he had chosen for the disposal field, the EHO was effectively rejecting the permit application as filed by Mr. Burgert. Although the EHO did not explicitly state that

the permit application was being rejected, the specific concerns he expressed clearly indicate that he did not find the proposed system to be suitable. Accordingly, the Board has concluded that there has been an application and a rejection of a sewage disposal permit under the *Regulation*, and that the Board has jurisdiction to hear the appeal.

However, the Board further finds that the February 14, 2001 letter was a rejection specifically of Mr. Burgert's November 6, 2000 application, rather than a rejection of any alternative systems for the property. The Board accepts the evidence of the EHO that it was his intent to continue working with Mr. Burgert by providing "considerations to help correct the system." Under these circumstances, the Board is limiting the scope of the hearing, and is not prepared to hear any evidence with respect to or considering any system other than the one that Mr. Burgert has applied for in his November 6, 2000 application. Given the narrow scope of the appeal, this is a matter that can be heard by written submissions. Accordingly, the oral hearing scheduled for July 5, 2001 is cancelled.

This matter will now proceed by written submissions. Mr. Burgert will provide written submissions to the Board and to the Respondent by June 27, 2001. The Respondent will then reply by July 18, 2001. Mr. Burgert will then have until July 25, 2001 to provide any rebuttal submissions. The parties are reminded to ensure the written submissions they submit to the Board are also sent to each other.

The parties are also reminded that the appeal is limited to the terms of the November 6, 2000 application to repair a sewage disposal system, and the question of whether that system will not constitute a health hazard as required by section 7(2) of the *Regulation*.

The Board will review the comments and responses and may then direct questions to the parties for further comment.

Please note that failure to meet the aforementioned time restrictions may result in the loss of opportunity to submit arguments.

Alan Andison, Chair  
Environmental Appeal Board

June 7, 2001