BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NOS. 2002-HEA-030(a), 031(a), 032(a)

In the matter of an appeal under section 8 (4) of the *Health Act*, R.S.B.C. 1996, c. 179.

BETWEEN:	Christine and Dan Webb Waco and Kim Wallace Alex and Clover Quesnel Gordon and Carol Webb Kevin King	**APPELLANTS**
AND:	Environmental Health Officer	**RESPONDENT**
AND:	No. 3 V.C. Ventures Ltd.	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Panel Chair Fred Henton, Member David Ormerod, Member	
DATE OF HEARING:	Conducted by way of written submissions concluding on February 27, 2003	
APPEARING:	For the Appellants: Christine and Dan Webb Kim Wallace For the Respondent: Gary Gibson For the Third Party: Craig Beveridge, Counsel	

COSTS DECISION

APPLICATIONS

Christine and Dan Webb, Waco and Kim Wallace, Alex and Clover Quesnel, Gordon and Carol Webb, and Kevin King (the "Appellants") filed joint appeals against the September 23, 2002 decision of Erwin Dyck, an Environmental Health Officer ("EHO") with the Vancouver Island Health Authority, to issue 3 sewage disposal permits for 3 lots on Gillie Road in Saanich, owned by No. 3 V.C. Ventures Ltd. (the "Permit Holder").

The Board conducted an oral hearing of the appeals on January 23, 2003, which concluded in writing on January 30, 2003. On February 12, 2003, the Board allowed the appeals, in part (*Webb et al. v. Environmental Health Officer*, Appeal Nos. 2002-HEA-030/031/032) (unreported). After that decision was issued, the

Appellants applied for costs against the Permit Holder, and "damages" against the Vancouver Island Health Authority. Those applications are the subject of this decision.

The Board has the authority to make orders requiring a party to pay all or part of the costs of another party in connection with the appeal pursuant to section 11(14.2) of the *Environment Management Act*, R.S.B.C. 1996, c. 118 (the "*Act*").

The Appellants seek an order for costs against the Permit Holder in the amount of $2,989.09. The Appellants also request "damages" against the Vancouver Island Health Authority, to compensate Christine and Dan Webb for the anticipated costs associated with connecting to the municipal water supply.

BACKGROUND

The 3 properties for which the permits were issued have municipal addresses of 4156, 4158, and 4160 Gillie Road, and are legally described, respectively, as Lots 1, 2, and 3, Block 5, Section 1, Lake District, Plan 1719 (the "Lots"). The Appellants all live within one or two blocks of the Lots.

On July 31, 2002, Alan Pitts submitted permit applications on behalf of the Permit Holder.

On September 23, 2002, the EHO approved the permit applications, subject to certain conditions.

Installation of the systems began within one day after the permits were issued, and was completed by approximately the end of October 2002. On November 14, 2002, the EHO authorized backfilling and use of the systems, subject to permanent power connections being installed. The Board was advised during the appeal process that no building permits had been issued for the Lots.

On October 16, 2002, the Board received the Appellants' joint Notice of Appeal against the issuance of the permits. In general, the Appellants appealed on the basis that the systems would create a public health and environmental hazard, and did not comply with certain provisions of the *Health Act*, the *Sewage Disposal Regulation*, B.C. Reg. 411/85 (the "*Regulation*"), and relevant policies. The Appellants raised five specific grounds for appeal, one being that the owner did not post notice that the permits had been issued, contrary to section 3.3 of the *Regulation*.

The Appellants sought an order rescinding the permits, and an order that the Vancouver Island Health Authority cease approving sewage disposal systems on lands that do not meet certain policy guidelines and requirements of the *Regulation*.

The EHO and the Permit Holder requested that the Board uphold the decision to issue the permits, and dismiss the appeals. The EHO submitted that the systems complied with the *Health Act* and the *Regulation*, and would protect public health.

On February 12, 2003, the Board confirmed the EHO's decision to issue the permits, subject to amendments requiring the Permit Holder to register a covenant on each of the Lots to make the owners responsible for regular system inspection

and maintenance. However, the Board found that the Permit Holder breached section 3.3 of the *Regulation* by failing to post notice of the permits, which had been conceded by counsel for the Permit Holder. The Board's findings on the issue of notice were as follows:

> The Panel finds that the Permit Holder failed to post notice of the permits on the Lots, contrary to section 3.3 of the *Regulation*. The Panel further finds that, but for the notice provided by the EHO, the Appellants' rights to appeal the permits within 30 days of issuance may have been prejudiced, as they were in the previous cases noted by the Appellants. The Panel also notes that it is the owner of the Lots, and not the EHO, who is responsible for posting notice that the permits were issued. Although the Appellants were not prejudiced by the failure to post the notices in this case, and the failure to provide notice does not affect the Panel's determination that the systems will protect the public health, the Panel is satisfied, on a balance of probabilities, that there has been a breach of section 3.3 of the *Regulation*.
>
> Further, even though this failure to comply with the *Regulation* may not have prejudiced the Appellants, it may well have prejudiced other affected persons. There may be other neighbours who would have appealed the permits had they known about its existence. Had that been so, new information could have been brought forward that may have influenced the Panel's decision in respect of the effectiveness of the systems to protect public health. However, without the permits having been posted, the Panel can only speculate on what might have been.
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> The Panel also notes that the requirement to post is clearly outlined in the permits. The Permit Holder has completed all other responsibilities under the permits and appears to be a sophisticated developer. The failure to post cannot be attributed to being an accidental oversight. Rather, it appears to have been an intentional attempt to avoid the appeal process. The appeal process exists to protect the rights of applicants for permits and other affected persons. The Permit Holder in this case is willing to accept all of the benefits of the permits and has endeavoured to avoid its responsibilities by denying its neighbours their statutory right of appeal. The Panel finds this to be unacceptable.
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> For these reasons, the Panel finds that this ground of appeal succeeds.
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> However, the Panel is faced with a difficult situation in determining an appropriate remedy in this case. While section 3(6) of the *Regulation* provides that "A violation of a condition of a permit issued under this section operates to confer a right upon the grantor to cancel it," the Panel has been advised that the EHO is of the view that he has no authority to cancel a permit for failure to post notice under section 3.3. The Panel does not agree. The EHO should have exercised his authority under section 3(6) immediately when he became aware of the failure to post notices. Instead, he chose to advise Ms. Webb, whom he knew was concerned about the issuance of permits for the Lots, that the permits

had been issued. Although the EHO's efforts to provide notice are commendable, they are not an adequate substitute for posting notices on the Lots as required by the *Regulation*. It is not the EHO's responsibility to give notice when permits are issued, and where proper notice is not given he should have rescinded the permits.

In addition, the Panel notes that the systems have been installed and the EHO has issued approvals for use in this case. The Panel has determined that cancelling the permits at this time would result in substantial cost and inconvenience to the Permit Holder. Further, and more importantly, the Panel is satisfied that the systems as designed will protect the public health. Cancellation of the permits so that they can be re-issued, posted, and then appealed would serve no good purpose under the circumstances. However, the Panel is very concerned with the Permit Holder's flagrant disregard for the posting requirement in this case. Therefore, the Panel considers that this is an appropriate case for awarding costs against No. 3 V.C. Ventures, as the owner of the Lots, and in favour of the Appellants.

Section 11(14.2) of the *Act* authorizes the Board to require a party to pay all or part of the costs of another party in connection with the appeal:

> **11** (14.2) In addition to the powers referred to in subsection (2) but subject to the regulations, the appeal board may make orders for payment as follows:
>
> (a) requiring a party to pay all or part of the costs of another party in connection with the appeal, as determined by the appeal board;

The Board's policy on costs is stated in the *Environmental Appeal Board Procedure Manual*, starting at page 44. It states:

> …A party seeking costs under this section may make a submission to the panel hearing the appeal with respect to an award of costs at the conclusion of the hearing.
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> The panel will not make an order for costs unless a party requests that it be awarded costs. However, the panel may, on its own initiative, ask a party whether it seeks costs.
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> …
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> The panel will not order a party to pay costs unless it has first given that party an opportunity to make submissions on this issue. If the panel orders that all or part of a parties costs be paid, the panel may ask for submissions with respect to the amount of costs incurred.

The Panel notes that the parties did not make submissions on the issue of costs at the appeal hearing. Consequently, in accordance with the principles of natural justice and the Board's policies outlined above, the Panel requests that the Appellants advise the Board whether they seek an

award of costs, and if so, what those costs should be. The Panel will then hear from the Permit Holder in respect of that submission.

On February 19, 2003, the Board received the Appellants' application for their costs associated with the appeal hearing, which they estimate at $2,989.09. The Appellants, Christine and Dan Webb, also seek damages from the Vancouver Island Health Authority to compensate them for the cost of connecting to the municipal water supply, which they anticipate to be between $2,175.00 and $2,375.00. They express concern about the potential contamination of their domestic well by the permitted sewage disposal systems.

The EHO opposes the application for damages against the Vancouver Island Health Authority. In support of his submissions, the EHO provided the Board with a legal opinion which concludes that the EHO was without jurisdiction to cancel the permits when he became aware that the notices were not posted. However, the Panel will not address that issue further, because the Board ruled on it in the decision on the merits of the appeals.

The Permit Holder opposes the application for costs against it.

ISSUES

The issues before the Panel are:

1. Whether costs should be awarded against the Permit Holder in favour of the Appellants for a breach of the notice requirements in section 3.3 of the *Regulation*.

2. Whether damages should be awarded against the Vancouver Island Health Authority in favour of the Appellants as compensation for connecting to the municipal water supply.

RELEVANT LEGISLATION

Section 11(14.2) of the *Act* empowers the Board to make orders for costs:

11 (14.2) In addition to the powers referred to in subsection (2) but subject to the regulations, the appeal board may make orders for payment as follows:

(a) requiring a party to pay all or part of the costs of another party in connection with the appeal, as determined by the appeal board;

The relevant sections in the *Regulation* are as follows:

Notification Requirements

3.2 A person who is issued a permit under section 3 or 3.01 to construct, install, alter or repair a sewage disposal system

(a) must post a notice in accordance with section 3.3, and

Posted Notice

3.3 (1) The notice required under section 3.2 (a) must be in the form specified in Schedule 5 and must include

(a) a site map showing the location of the sewage disposal system that is to be constructed, installed, altered or repaired, and

(b) the conditions that apply to the permit.

(2) The notice required under section 3.2 (a) must

(a) be posted in a conspicuous place on the parcel for which the permit is issued,

(b) be posted not more than 3 days from the date the permit is issued, and

(c) remain posted for 30 days after the date the permit is issued.

Schedule 5

[en. B.C. Reg. 317/94.]

Permit to Construct, Install, Alter or Repair

Pursuant to this application and the Sewage Disposal Regulation, permission is hereby granted to construct, install, alter or repair the sewage disposal system on this property. *This permit may be cancelled if variations are made to these plans and specifications.*

Conditions of
Permit:.....

.....

.....

.....

.....

.....

Date Permit Valid..... Signature of Public Health
Inspector/EHO.....

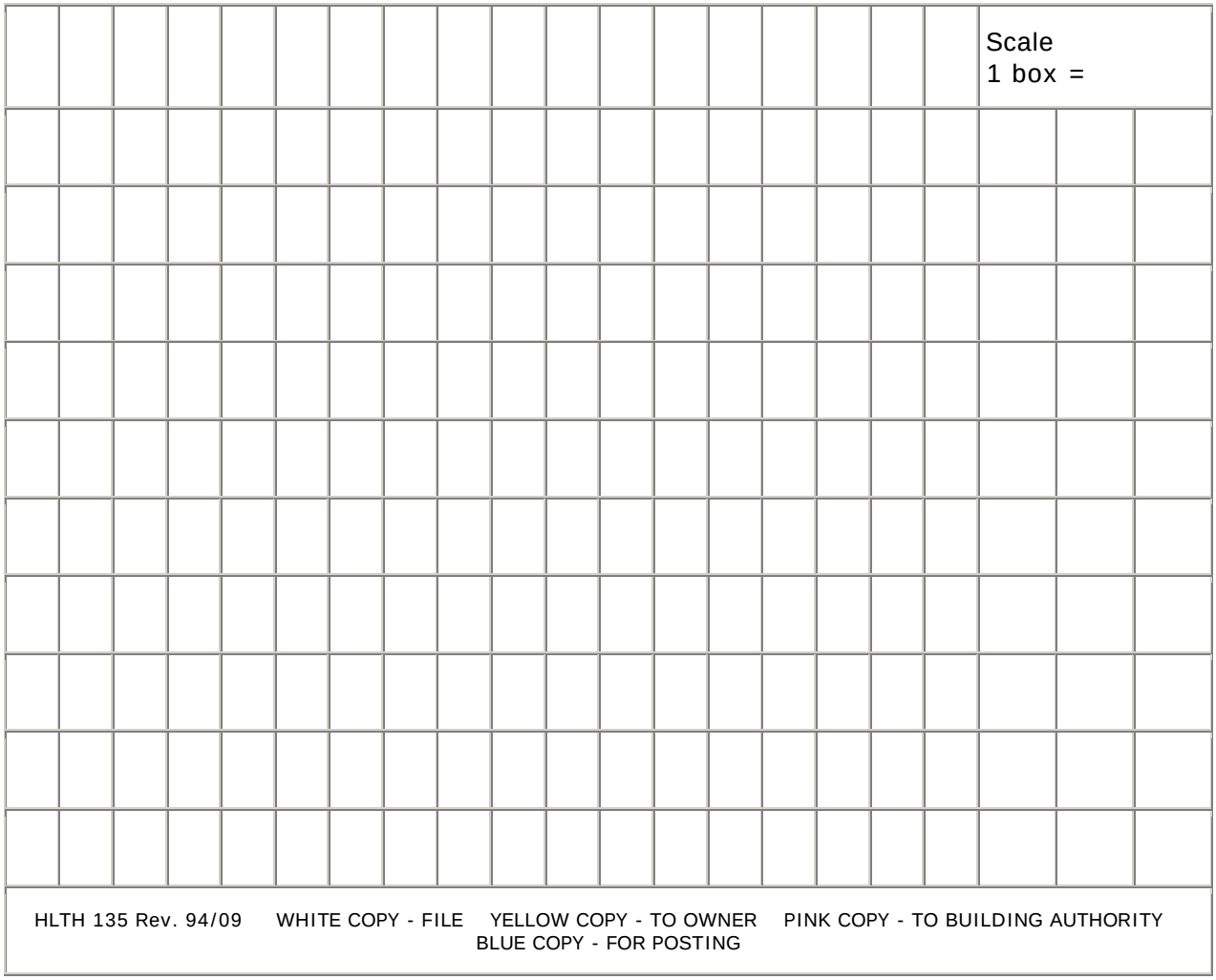
NOTICE

This notice must be posted in a conspicuous place on the parcel for which the permit is issued not more than 3 days after the date the permit is issued and must remain posted for 30 consecutive days from the date the permit is issued.

Persons who consider themselves aggrieved by a decision made under the Sewage Disposal Regulation are eligible to file an appeal under section 8 (4) of the *Health Act*.

A Notice of Appeal must be delivered by hand, facsimile or registered mail to the Chair of the Environmental Appeal Board, Parliament Buildings, Victoria, B.C. V8V 1X4 within 30 days of the issuance of the permit. Please contact your local Health Unit for information on appeal procedures.

SITE MAP



DISCUSSION

1. Whether costs should be awarded against the Permit Holder in favour of the Appellants for a breach of the notice requirements in section 3.3 of the *Regulation.*

The Appellants submit that the Permit Holder should pay their appeal costs of $2,989.09. The Appellants provided an itemized list of costs including: filing fees; photocopying and photograph expenses related to their submission binder; a gratuity for a professional report; lost gross wages for Dan Webb, Christine Webb, Kim Wallace and Gordon Webb for the day of the hearing; the cost of a hearing transcript; and payment at $20 per hour for 50 hours spent on research,

developing their Statement of Points, meetings, phone calls and preparation for the hearing.

The EHO submits that the Appellants' application for costs is, in general, inappropriate.

The Permit Holder maintains that the Panel has no jurisdiction "to impose a punishment under the guise of costs, based on an inference which is unsupported by the evidence." It offers five arguments to support its position:

a. There is no evidence to support the Panel's finding that the failure to post was intentional;

b. The Panel committed a breach of procedural fairness in drawing an adverse inference without giving the Permit Holder the opportunity to submit evidence;

c. The new evidence would have been contrary to the Panel's findings, if the opportunity to submit it had been provided at the hearing;

d. The Panel has no jurisdiction to award costs as a penalty or remedy for non-compliance with section 3.3 of the *Regulation*; and

e. Any award of costs should reflect apportionment based on the degree of success at the hearing.

The Appellants and the EHO did not respond to these specific arguments.

The Panel has addressed each of the Permit Holder's arguments, below.

a) <u>No evidence to support the Panel's finding of fact</u>

The Permit Holder argues that there is no evidence to support the Panel's finding of fact that the Permit Holder was a "sophisticated developer" and that its failure to post the notice was an "intentional attempt to avoid the appeal process."

The Permit Holder submits that when the Panel questioned its counsel during the hearing about the contravention of section 3.3 of the *Regulation*, he stated that he was not aware of any reason for the failure to post the notices.

Therefore, the Permit Holder submits that there was no evidence given during the hearing as to the Permit Holder's intentions with respect to the posting requirement. It asserts that "judicial review is warranted when a decision-making body does not base its decision on evidence, or where the decision appears patently unreasonable in relation to the evidence submitted" (Dussault & Borgeat, *Administrative Law – A Treatise*, 2nd ed, vol. 4, p. 236).

Panel's findings

The Panel has reviewed its reasons and has concluded that it did not make a finding of fact that the failure to post the notice was an "intentional attempt to avoid the appeal process." The Panel found that the failure to post "appeared" to be intentional. The Panel was not making a conclusive finding on the Permit Holder's intentions rather, the Panel was commenting based on circumstantial facts.

Specifically, the Panel noted that the Permit Holder complied with all other requirements on the face of the Permit. This included placing easements on title and complying with all construction requirements. The only requirement that was not complied with was the one that required that the Permit be posted. Under those circumstances, the Panel quite rightly concluded that the failure to post "appeared" to be intentional.

In addition, the Permit Holder's compliance with all other terms of the Permit in a timely manner appeared to indicate that the Permit Holders was a sophisticated developer. Accordingly, the Panel is satisfied that there was sufficient evidence to make the findings that it made.

b) Drawing an adverse inference constituted a breach of procedural fairness

The Permit Holder argues that the Board breached procedural fairness by drawing an adverse inference about the Permit Holder's conduct without giving the Permit Holder an opportunity to adduce evidence concerning its reasons for failing to post notices. It submits that the Board failed to recognize that an adverse inference may only be drawn in limited circumstances. While a trier of fact may draw an adverse inference where the issue may be determinative of the case and the opponent's evidence is sufficiently compelling to call for a reply, such an inference is always open to explanation by other circumstances. In support of these propositions, the Permit Holder cites *Jacobsen v. Nike Canada Ltd.*, (1996), 19 B.C.L.R. (3d) 63 (S.C.).

The Permit Holder submits that it did not refuse to call evidence on the issue of notice. Rather, the Permit Holder decided not to incur the "extraordinary expense" of returning to Canada for the hearing because the only issue on which evidence could be given was the posting issue, which was determined to be non-substantive because the failure to post could not result in setting aside the permits. According to the Permit Holder, the Board did not ask the Permit Holder's counsel to adduce evidence on this issue. Therefore, the Permit Holder maintains that the Board deprived the Permit Holder of the right to a fair hearing by drawing an adverse inference without giving the Permit Holder's counsel an opportunity to put forward evidence.

Panel's findings

The Permit Holder contends that a trier of fact, such as the Board, may draw an adverse inference where the issue may be determinative of the case and the opponent's evidence is sufficiently compelling to call for a reply, but the inference is open to explanation by other circumstances. In this case, the failure to post notices breached a mandatory requirement of the *Regulation*, and was a breach of natural justice that is sufficient to warrant cancellation of the permits regardless of the Permit Holder's compliance with the technical terms of the permits and other requirements of the *Act* and *Regulation*. As such, the notice issue could have been determinative of the appeals.

Furthermore, the Permit Holder had notice of the Appellants' grounds for appeal, and was afforded every opportunity to attend the hearing and adduce evidence respecting each ground of appeal, including the Appellants' submission that the

failure to post was grounds to cancel the Permit. During the appeal hearing, the Appellants provided witnesses who testified about the absence of posted notices, and the Board specifically invited counsel for the Permit Holder to explain why the Permit Holder did not post the required notices. Counsel for the Permit Holder simply replied that he did not know the reason. The Appellants' evidence was sufficiently compelling to call for a reply, yet the Permit Holder provided none. The Permit Holder chose not to attend the hearing or provide evidence concerning its reasons for failing to post the required notices.

Additionally, the Panel found that the failure to post "appeared" to be intentional in the circumstances, based on the evidence that was available at the time. Considering the whole of the facts and evidence that were presented during the appeal hearing, and the Permit Holder's failure to offer an explanation for its omission, the Panel finds that an adverse inference was not open to an alternative explanation by other circumstances.

Accordingly, the Panel concludes that it reasonably drew the inferences that it did from the evidence before it. Arriving at such findings under these circumstances do not constitute a breach of procedural fairness. A party cannot rely on its own omission as a defence to adverse findings against it.

c) New evidence would have been contrary to the Panel's findings

The Permit Holder argues that, if it had been given the opportunity at the hearing, it would have provided evidence that would have been contrary to the Panel's findings. It submits that "the law is clear that no adverse inference may be drawn if a party offers a 'reasonable explanation' or there is a reasonable justification for the failure to call evidence at the time" (*Jacobsen*, *supra; Sunnyside Nursing Home v. Builders Contract Management Ltd.*, [1985] 4 W.W.R. 97 (Sask. Q.B.).

It submits that procedural fairness requires the Panel to consider the affidavit of Patricia Berard, the sole director of the Permit Holder, which states as follows:

1. I am the sole director of the Permit Holder and am authorized by the said company to make this Affidavit.

2. I am not a sophisticated developer and have never carried out or been involved in a development of residential property in any way resembling the three subject lots on Gillie Road.

3. The three lots on Gillie Road were purchased by the Permit Holder and Mr. Jim Gait, after discussions with a local developer by the name of Jim Hartshorne. Mr. Hartshorne encouraged us to purchase the property. Mr. Gait was to act on our behalf in carrying out all steps necessary to complete the development and sale of the three lots. He received compensation from us for doing so.

4. After the Permit Holder purchased the three properties, Mr. Gait abandoned us and left us with the prospect of having to carry out these steps on our own. It has been a very unfortunate process.

5. As part of the process of putting the lots into a marketable status, we eventually engaged an experienced septic consultant called Drainmaster. We retained Drainmaster to carry out discussions with Capital Health Region and construction of the approved septic system on our behalf. We instructed Drainmaster to carry out all of our responsibilities and obligations with respect to the renewal of our permit.

6. When the Permit Holder purchased the three lots, there was already a permit issued. Before it was due to expire, Mr. Pitts, on behalf of the Permit Holder, attended at the offices of the Capital Health Region in Victoria to renew this existing permit. Mr. Pitts advises me that he was not told that there was a requirement to post. He advises that he was told that all we needed to do was pay the $250.00 renewal fee.

7. I was not aware of the posting requirement. I assumed that Drainmaster would carry out any such requirements on our behalf.

8. The Permit Holder paid the additional fee and left the process with Drainmaster to complete. Mr. Pitts and I left the country on a planned trip before the subject problems arose.

9. At no time, did I intentionally attempt to avoid the appeal process by not posting notice on the property.

10. At no time did I intentionally disregard the posting requirement. I had no notice of the same.

The Permit Holder submits that the new evidence establishes the reason for the Permit Holder's oversight of the posting requirement.

Panel's findings

As noted above, the Panel is satisfied that the Permit Holder was accorded procedural fairness at the hearing of the merits of these appeals. Accordingly, there is no duty on the Panel to consider new evidence such as the affidavit from Ms. Berard.

However, in considering the matter of costs, the Board asked for further submissions from the parties, and the affidavit was tendered as part of those submissions. Therefore, the Panel will consider the affidavit for the purpose of considering the costs application.

d) Panel has no jurisdiction to award costs as a penalty or remedy for non-compliance with section 3.3 of the *Regulation*

The Permit Holder argues that the Board has no jurisdiction to award costs as a penalty or remedy for non-compliance with section 3.3 of the *Regulation.* It submits that the Board's determination that the Permit Holder should be subjected to costs because of its disregard for the posting requirement is an attempt to award costs as a punitive measure. It argues that the Board's jurisdiction under section

11(14.2)(a) of the *Act* does not include authority to impose a penalty or punishment under the guise of costs.

The Permit Holder submits that the law is clear that "the purpose of 'costs' is to provide indemnification to the person who is entitled to them. They are not imposed as punishment on the person who must pay them" (Orkin, *The Law of Costs*, 2nd ed., pp. 2-24). The Permit Holder also refers the Panel to several court decision on the issue of costs, including *Shpak v. Institute of Chartered Accountants of British Columbia* [2002] B.C.J. No. 1008 (S.C.) (Q.L.) (hereinafter "*Shpak*"); and *Bell Canada v. Consumers' Association of Canada*, [1986] 1 S.C.R. 190 (hereinafter "*Bell Canada*"). In the Permit Holder's submission, it is clear from those authorities that the word "costs" in section 11(14.2) of the *Act* has the same meaning as legal costs under the *Supreme Court Rules*. The Permit Holder submits that its alleged intentional disregard for the notice requirement is not a proper consideration for an award of costs, because it would be tantamount to using costs as a form of punishment for improper conduct rather than indemnification.

Panel's Findings

The Panel notes that the word "costs", as used in section 11(14.2), is not defined in the *Act*. Subsection (a) of 11(14.2) simply provides that the Board may make an order requiring "a party to pay all or part of the costs of another party" in connection with the appeal. In *Roberts v. The College of Dental Surgeons of British Columbia* (1999), 63 B.C.L.R. (3d) 116 (C.A.), the Court of Appeal noted that the issue of costs is primarily a matter of statutory interpretation, and cited with approval the finding of Mr. Justice Hinkson in *Ridley Terminals v. Minette Bay Ship Docking Ltd.* (1990), 45 B.C.L.R. (2d) 367 (B.C.C.A.) at 372, where he stated that:

> …costs in British Columbia have a traditional meaning *unless qualified by statute* or agreement of the parties. The traditional meaning is governed by the provisions of R. 57 of the Supreme Court Rules.
>
> [emphasis added]

The Panel agrees that the purpose of a costs award is not punitive. The Panel also notes that the awarding of costs by the Board carries the same meaning as costs under the *Supreme Court Rules*. However, having made these findings, does not preclude a Panel from making an award of costs to compensate a party for out-of-pocket expenses that were, in part, brought on by the misconduct of another party.

The Panel accepts that the principle of indemnification is the "essence" of party-and-party costs, according to *The Law of Costs,* and as reflected in *Bell Canada*. However, the Panel notes that special costs may be awarded to discourage misconduct on the part of litigants. The general principle behind special cost awards and the application of Rule 57(3) is summarized in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 (B.C.C.A.). In that case, Lambert J.A. held on behalf of the Court that "the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible"…It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving reproof or rebuke." In *Heppner*

v. Schmand, [1998] B.C.J. No. 2843 (B.C.C.A.) (Q.L.), the Court described these milder forms of misconduct as behaviour from which the court seeks to "dissociate itself."

In this case, the appeal was brought in part because of the total failure of the Permit Holder to post as is required by the legislation. It is this misconduct that the Panel must consider when determining whether costs should be awarded. The fact that the *Supreme Court Rules* apply in assessing quantum does not affect this finding.

Accordingly, any award of costs that the Panel might consider in these proceedings would be solely to compensate one party for the "wrongful acts of another."

e) Any award of costs should reflect apportionment based on the degree of success at the hearing.

The Permit Holder submits that the discretion to award costs must be exercised on grounds connected to the litigation, thus any award should reflect apportionment where there has been divided success between the parties. The Permit Holder directs the Panel to the general principles governing the exercise of discretion with respect to apportionment of costs, as summarized by Low J. in K*amani v. College of Dental Surgeons of British Columbia*, [1994] B.C.J. No. 1368 at paras. 55-56 (S.C.) (Q.L.):

> **The general common rule is that costs follow the event. The successful party should recover costs. The partially successful party should recover costs on those discrete issues in which that party achieves success. Discretion with respect to costs should be exercised with these principles in mind.** The panel in the present case did not keep these principles in mind and set arbitrary rules as to the costs not realistically connected to the proceedings and their origin.
>
> [emphasis added by Permit Holder]

The Permit Holder argues that awarding costs to the Appellants in this appeal would constitute an arbitrary and capricious exercise of discretion because they were not successful on any substantive grounds of appeal. Rather, they were successful on the technical ground relating to notice, and the lack of notice did not prejudice them.

Panel's findings

The Panel disagrees with the Permit Holder's characterization of the breach of the notice requirement as a mere technicality. Posting notice of a sewage disposal permit is a mandatory statutory requirement, and an essential element of procedural fairness owed to members of the public whose health may be affected by the decision to issue a permit.

The Panel finds that the Permit Holder's breach of the Notice provision of the *Regulation* is as important as the other grounds of appeal that affect public health.

Accordingly, the Appellants' success on that ground of appeal must be given substantial consideration when considering whether costs should be awarded.

Panel's conclusion on the costs application

Section 11(14.2) of the *Act* authorizes the Board to require a party to pay all or part of the costs of another party in connection with the appeal. As noted above, the *Supreme Court Rules* guide the Board in deciding the quantum of costs to be awarded once the Board decides that an order for costs is appropriate. The Board's policy on deciding whether to order costs is stated in the *Environmental Appeal Board Procedure Manual*, starting at page 44:

> …A party seeking costs under this section may make a submission to the panel hearing the appeal with respect to an award of costs at the conclusion of the hearing.
>
> The panel will not make an order for costs unless a party requests that it be awarded costs. However, the panel may, on its own initiative, ask a party whether it seeks costs.
>
> The Board has not adopted a policy that follows the civil court practice of "loser pays the winner's costs." The Board's policy is to award costs in special circumstances. These circumstances include:
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> …
>
> (b) where the action of a party, or the failure of a party to act in a timely manner, results in prejudice to any of the other parties;
>
> …
>
> A panel of the Board is not bound to order costs when one of the above-mentioned examples occurs, nor does the panel have to find that one of the examples must have occurred to order costs.

In the present case, the lack of notice by the Permit Holder breached a mandatory requirement of the *Regulation*. It also breached the duty of fairness owed to members of the public that may be affected by the decision to issue the permits.

However, in this case, the Panel declines to order costs in favour of the Appellants. Despite the Permit Holder's breach, the Panel finds that based on the new evidence elicited during this application, the failure to post notices was not the result of wilful misconduct by the Permit Holder. On the face of the affidavit, the Panel accepts that Ms. Berard and Mr. Pitts appear to be novices in the areas of property development. Specifically, the Panel accepts Ms. Berard's evidence that the failure to post was unintentional, and was not an attempt to avoid the appeal process.

In addition, the Panel notes that the Appellants were successful on only one of several grounds of appeal, although, as noted above, that ground of appeal was of equal significance as the other grounds of appeal.

Further, the Panel notes that the Appellants were not prejudiced by the failure to post notice, as the EHO took it upon himself to provide notice to the Appellants. As a result, the Appellants filed their appeal within the statutory limitation period. Any costs incurred by the Appellants are, therefore, identical to those they would have incurred had the Notice been properly posted. Accordingly, the Panel is not satisfied that the Appellants experienced any costs that they would not otherwise have incurred. Finally, there is no evidence that any other persons were actually prejudiced by the failure to post notice.

In these circumstances, the Panel finds that an order for costs against the Permit Holder and in favour of the Appellants is not warranted.

2. Whether damages should be awarded against the Vancouver Island Health Authority in favour of the Appellants as compensation for connecting to the municipal water supply.

The Webbs seek damages from the Vancouver Island Health Authority to compensate them for the costs associated with connecting to the municipal water supply due to their concern that the sewage disposal systems on the Lots will contaminate their domestic water well. The Webbs estimate that the connection will cost them $2,175.00 to $2,375.00.

The Appellants note that the Board was satisfied that their domestic water source will not be contaminated by the systems approved under the permits. However, they go on to state that the method for well abandonment in this case did not include grouting the outer casing, therefore they are very concerned about the potential for contamination of their domestic water source.

The Appellants note that the EHO testified that he had inspected the well site to ensure the well had been properly sealed, including making the installer dig up the field area that had been reseeded with grass seed which had begun to germinate. They argue that the pictures provided by the EHO at the hearing, which he testified had been taken less than two weeks after he inspected the well head, show no disturbance to the seeded area in the location of the well head.

The Appellants submit that the EHO is not an expert in hydrogeology, therefore, they would expect him to exercise due diligence by consulting with a specialist before issuing a permit, considering the neighbourhood's reliance on well water. They further submit that the EHO's testimony did not deal with the risks associated with placing a septic field on or near a well that had only the inside of the casing sealed, without the outside of the casing pressure grouted as recommended by Mike Feduk of the Ministry of Water, Land and Air Protection.

Finally, the Appellants submit that the EHO's approval of a contamination source "so close" to a ground water source contradicts proposed drinking water protection legislation, and general water source protection planning.

The EHO objects to the Appellants' request for damages. The EHO submits that the Appellants' costs for connecting to the community water system have not yet been incurred and are not directly associated with the appeal.

The EHO further objects to the Appellants' statements about the EHO's testimony in the hearing, on the basis that it is an attempt to re-open the appeals. The EHO submits that his statements cited by the Appellants were already accepted by the Board.

In the decision on the merits of the appeals, the Board determined that the sewage disposal systems authorized by the permits will protect public health. Accordingly, the Panel is not prepared to reconsider the question of whether the permitted systems will contaminate the Webb's well.

As the Panel has found that the systems will protect the public health, it is not prepared to consider any request for costs related to the Webb's decision to connect to the municipal water supply.

Additionally, it should be noted that the Board is without jurisdiction to award "damages" as requested by the Webbs.

Accordingly, the Appellants' request for costs or "damages" against the Vancouver Island Health Authority is denied.

DECISION

In making its decision, the Panel has carefully considered the submissions of the parties, whether or not they have been specifically reiterated here.

For the reasons provided above, the Panel finds that an order for costs in favour of the Appellants is denied.

The Appellants' application for costs is dismissed.

Alan Andison, Chair
Environmental Appeal Board

July 31, 2003