

Environmental Appeal Board

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DECISION NOS. 2006-WAT-003(a); 2006-WAT-004(a); 2006-WAT-005(b)

In the matter of an appeal under section 92 of the *Water Act*, R.S.B.C., 1996, c. 483.

BETWEEN:	David Avren	APPELLANT																						
AND:	Estate of Tom Bradbury	APPELLANT																						
AND:	Mary Desmond on behalf of Glen Ellen Bentley	APPELLANT																						
AND:	Regional Water Manager	RESPONDENT																						
AND:	Teresa Elaine Erb	THIRD PARTY																						
AND:	Bud and Colleen Dovey Vladi and Shirley Vagels Douglas J. Grant	PARTICIPANTS																						
BEFORE:	A Panel of the Environmental Appeal Board Robert Wickett, Chair Bruce Devitt, Member David Thomas, Member																							
DATE:	March 6, 7, 8, 2007																							
PLACE:	Victoria BC																							
APPEARING:	<table border="0"><tr><td>For the Appellants:</td><td></td></tr><tr><td>David Avren</td><td>David Avren</td></tr><tr><td>Estate of Tom Bradbury</td><td>Gregory Damant</td></tr><tr><td>Mary Desmond on behalf</td><td></td></tr><tr><td>Glen Ellen Bentley</td><td>Mary Desmond</td></tr><tr><td>For the Respondent:</td><td>Livia Meret, Counsel</td></tr><tr><td>For the Third Party:</td><td>Greg Harney, Counsel</td></tr><tr><td>For the Participants:</td><td></td></tr><tr><td>Bud and Colleen Dovey</td><td>Bud Dovey</td></tr><tr><td>Vladi and Shirley Vagels</td><td>Vladi Vagels</td></tr><tr><td>Douglas J. Grant</td><td>Douglas J. Grant</td></tr></table>		For the Appellants:		David Avren	David Avren	Estate of Tom Bradbury	Gregory Damant	Mary Desmond on behalf		Glen Ellen Bentley	Mary Desmond	For the Respondent:	Livia Meret, Counsel	For the Third Party:	Greg Harney, Counsel	For the Participants:		Bud and Colleen Dovey	Bud Dovey	Vladi and Shirley Vagels	Vladi Vagels	Douglas J. Grant	Douglas J. Grant
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APPEALS

The Appellants separately appeal the March 1, 2006 decision of Ron Creber, Regional Water Manager, Ministry of Environment, granting conditional water

licence no. 120469 (the "Licence") to Teresa Erb (the "Applicant"). The Licence permits the construction of a dugout and dam, the diversion of water from Oasis Creek, and the storage of water in the dugout. The dugout is to be located on land owned by the Applicant near Shawnigan Lake on Vancouver Island, British Columbia.

The authority for the Environmental Appeal Board (the "Board") to hear this appeal is found in section 93 of the *Environmental Management Act* and section 92 of the *Water Act*. Pursuant to section 92(8) of the *Water Act*, the Board may:

- (a) send the matter back to the comptroller, regional water manager or engineer, with directions,
- (b) confirm, reverse or vary the order being appealed, or
- (c) make any order that the person whose order is appealed could have made, and that the board considers appropriate in the circumstances.

Mr. Avren and Ms. Desmond ask the Board to reverse the decision granting the Licence. The estate of Mr. Bradbury requests that the Board vary the Licence by adding additional clauses to it.

BACKGROUND

The Licence authorizes a diversion of water from Oasis Creek (also known as Oasis Brook) and the construction of a dam and dugout. In their appeal submissions, the parties sometimes referred to the proposed dugout as Oasis Lake Dugout. The Licence authorizes the storage of 200,000 cubic metres of water per year in the dugout. The stated purpose of the Licence is "land improvement (water ski pond)."

Oasis Lake Dugout is to be located just south of Shawnigan Lake and will, if approved, result in a water ski pond of approximately 10 hectares. Shawnigan Creek flows past the proposed location of the dugout before it drains into Shawnigan Lake. Currently, Oasis Creek flows across the Applicant's land and then drains into Shawnigan Creek.

On or about February 22, 2005, Richard Horwood, agent for the Applicant, submitted her application for the Licence on Oasis Creek. The application proposed works including a dugout/pond and dam to be constructed on private land owned by the Applicant. The dugout was to be filled based on a gravity feed from Oasis Creek.¹

¹ A related application for approval under the *Water Act* for the short term use of water from Shawnigan Creek to allow for a one-time filling of the dugout had not been decided by officials in the Ministry of Environment when these appeals were heard.

When these appeals were heard, the Applicant's land was zoned for "Primary Agriculture" and was used for pasture and a residence. Based on documents and testimony presented to the Board, it is apparent that the Applicant seeks to develop the land around the proposed dugout for the construction of homes. The Regional Water Manager provided the Board with copies of documents pertaining to the Applicant's applications to the Agricultural Land Commission and the Cowichan Valley Regional District. Apparently, the Applicant provided those documents to the Regional Water Manager in support of the application for the Licence. The merits of the Applicant's plans to develop her private land are beyond the Board's jurisdiction in hearing appeals under the *Water Act*. In this case, the Board only has jurisdiction to consider the merits of the Regional Water Manager's decision to issue the Licence under the *Water Act*.

Following receipt of the application for the Licence, the Regional Water Manager referred the application to the Ministry of Environment's Environmental Stewardship Division, to federal and provincial fisheries agencies, and to the Vancouver Island Health Authority's Drinking Water Officer. The Regional Water Manager also conducted a process whereby the Applicant submitted various technical and environmental reports in support of her application. This material was reviewed by the Regional Water Manager, and he directed that notice of the application be published in newspapers in the Shawnigan Lake area. That publication occurred on March 27, 2005.

On July 5, 2005, the Regional Water Manager conducted a public hearing at the Shawnigan Lake Community Centre in respect of the application for the Licence. At the public hearing, the Regional Water Manager and the Applicant's experts responded to questions posed by the Appellants, and others.

The Appellants are all owners of land situated adjacent to Shawnigan Lake. They are concerned that the construction of the water ski pond will result in the degradation of their community. They are concerned that such degradation will result from both the contamination of Shawnigan Lake from contaminants expected to flow from the water ski pond, and from a decline in land value resulting from the construction of houses around the water ski pond.

Following the public meeting, the Regional Water Manager required the submission of further information and reports to deal with some of the questions and concerns raised by the Appellants and others at the public hearing. Those additional reports also addressed various technical concerns and questions raised by the Regional Water Manager.

On March 1, 2006, the Regional Water Manager issued the Licence, having satisfied himself that the Applicant had fulfilled the statutory and regulatory requirements necessary for the granting of the Licence. As noted above, the stated purpose of the Licence is "land improvement (water ski pond)". "Land improvement purpose" is defined in section 1 of the *Water Act* as:

"land improvement purpose" means the diversion or impounding of water to protect property, to facilitate the development of a park or

the reclamation, drainage or other improvement of land or to carry out a project of a similar nature;

The issuance of a conditional water licence by the Regional Water Manager may be appealed to the Board. Section 92 of the *Water Act* provides as follows:

92 (1) Subject to subsections (2) and (3), an order of the comptroller, the regional water manager or an engineer may be appealed to the appeal board by

(a) the person who is subject to the order;

(b) an owner whose land or is likely to be physically affected by the order, or

(c) a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

On March 31, 2006, Ms. Desmond filed an appeal of the Regional Water Manager's order on behalf of the Shawnigan Lake Watershed Watch Association ("SLWWA"). The Regional Water Manager challenged the standing of Ms. Desmond and the SLWWA to appeal the Licence and the Board agreed in part. It decided that Ms. Desmond could appeal as agent for her mother, Ms. Bentley, who owns land on or near Shawnigan Lake. The Board amended Ms. Desmond's Notice of Appeal and replaced Ms. Desmond's name with that of Ms. Bentley to indicate that Ms. Desmond was appealing the order on behalf of Ms. Bentley. The Board denied the standing of the SLWWA (see *Mary Desmond v. Regional Water Manager*, Appeal No. 2006-WAT-005(a), July 5, 2006)(unreported)).

The estate of Tom Bradbury and David Avren also appealed the issuance of the Licence. The Applicant and the Respondent concede that they have standing to appeal.

Ms. Desmond was self-represented at the appeal, but her Notice of Appeal was filed by her previous solicitors, Woodward and Company. Ms. Desmond's Notice of Appeal states that she appeals on three grounds, which are as follows:

- Inadequate consultation of the community of Shawnigan Lake,
- The Regional Water Manager failed to consider the adverse health impacts to the Shawnigan Lake community residents,
- The Regional Water Manager did not give proper consideration to the adverse environmental impacts to Shawnigan Creek and Shawnigan Lake.

In its Notice of Appeal, the estate of Mr. Bradbury requested that two clauses be added to the Licence. Those clauses are aimed at prohibiting drawing water from Shawnigan Creek, and filtering and testing the outflow of the dugout.

Mr. Avren takes issue with the Regional Water Manager's jurisdiction to issue the Licence. He maintains that the Applicant's proposed use of the Licence (a water ski lake) does not fit within the definition of "land improvement purpose" in section 1 of

the *Water Act*. In his Notice of Appeal he characterizes his grounds for appeal as follows:

The Regional Water Manager erred in law and exceeded his jurisdiction by issuing a Conditional Licence for recreational purposes, in that a "recreational purpose" is not a purpose for which a licence may be issued under the Water Act. The true purpose of the Conditional Licence and the application therefore is creation of a water-skiing lake, being a recreational purpose.

The Participants are objectors under the *Water Act*. The Board offered them, and they accepted, participant status in the appeals, as persons who may be affected by the Board's decision.

The appeal hearing proceeded in an unusual manner. At the commencement of the appeal hearing, Mr. Avren advised the Panel that he intended to make a legal argument only and that he required no evidence in support of his submission. He indicated that he wished to provide the Panel with his written submission and authorities at the outset of the appeal and he wished to be excused from further attendance at the appeal. The Panel advised Mr. Avren that he could be excused from further attendance but that he would be subject to any findings of fact made by the Panel during the hearing of the appeals.

Mr. Avren accepted that direction, tendered his submission, and left the hearing room.

The other two Appellants then presented their respective cases.

Following the evidence of Ms. Desmond and the estate of Mr. Bradbury, counsel for the Applicant made a "no evidence" motion. Specifically, counsel requested that the appeals of Ms. Desmond (on behalf of Ms. Bentley) and the estate of Mr. Bradbury be dismissed for lack of evidence. The Regional Water Manager took no position with respect to the no evidence motion. The Panel offered the Appellants an opportunity to make submissions on the motion.

At the conclusion of submissions on the no evidence motion, the Panel granted the no evidence motion and dismissed the appeals of Ms. Bentley and the estate of Mr. Bradbury. Oral reasons were delivered by the Panel, and those reasons are repeated below, with modification and expansion, in this decision.

Following the Panel's decision on the no evidence motion, the Regional Water Manager, the Applicant and the Participants in attendance made their submissions with respect to the remaining appeal, that of Mr. Avren. The Applicant filed a written summary of her submissions with the Panel. The hearing was then closed.

After the appeal had completed, Mr. Avren received a copy of the written submissions tendered by the Applicant in reply to his appeal. Mr. Avren then sought and, with the consent of the Regional Water Manager and Applicant, was granted the right to file a reply to the Applicant's submissions.

ISSUES

This decision addresses the following:

1. The Panel's written reasons for dismissing the appeals of Ms. Bentley and the estate of Mr. Bradbury.
2. Whether the Regional Water Manager had jurisdiction to issue the Licence on the basis that it is for a "land improvement purpose" within the meaning of section 1 of the *Water Act*.

RELEVANT LEGISLATION

The Licence was issued by the Regional Water Manager pursuant to section 2 of the *Water Act*. Section 2 provides:

- 2 (1) The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.

Section 5 of the *Water Act* provides:

- 5 A licence entitles its holders to do the following in a manner provided in the licence:
 - (a) divert and use beneficially, for the purpose and during or within the time stipulated, the quantity of water specified in the licence;
 - (b) store water;
 - (c) construct, maintain and operate the works authorized under the licence necessary for the proper diversion, storage, carriage, distribution and use of the water or the power produced from it;
 - (d) alter or improve a stream or channel for any purpose;
 - (e) construct fences, screens and fish or game guards across streams for the purpose of conserving fish or wildlife.

With respect to the granting of a conditional or final licence to divert or use water, the Regional Water Manager is governed by section 13 of the *Water Act*, which provides:

- 13 The comptroller or regional water manager must ensure that every licence issued on or after June 21, 1995
 - (a) specifies the date of precedence of the licence;
 - (b) is for the diversion, extraction, use or storage of water, or for any combination of those things, for one, 2 or 3 of the purposes defined in

section 1 and the purpose is or the purposes are specified in the licence;
and

(c) specifies as the appurtenancy of the licence an appurtenancy that

- i) is located entirely in British Columbia,
- ii) consists of a land, a mine or an undertaking or any combination of those things, and
- iii) is adequately described in the licence.

Regarding section 13(b) above, the “purposes defined in section 1” of the *Water Act* for granting a licence include the following:

“land improvement purpose” means the diversion or impounding of water to protect property, to facilitate the development of a park or the reclamation, drainage or other improvement of land or to carry out a project of a similar nature;

DISCUSSION & ANALYSIS

1. The Panel’s written reasons for granting the no evidence motion and dismissing the appeals of Ms. Bentley and the estate of Mr. Bradbury.

As stated above, once these Appellants completed the presentation of their evidence, the Applicant made no evidence motions in respect of both appeals. The Panel granted the no evidence motions and dismissed the appeals, giving its reasons orally. A summary of the appeals and evidence of these two Appellants, as well as a written version of the Panel’s reasons for granting the no evidence motions, is set out below.

Ms. Desmond’s appeal submissions

Ms. Desmond’s Statement of Points provides some particulars relevant to the appeal, framed as concern for the downstream Shawnigan Lake owners. It also refers to concerns with respect to lack of consultation and health impacts. In particular, the Statement of Points indicates that, “there is a potential of parasites entering Shawnigan Lake” from Oasis Lake Dugout and that this has not been properly addressed by the Regional Water Manager.

The Statement of Points also notes that there is no mention in the Licence for requirements related to spill over into Shawnigan Creek. The Statement of Points asserts that, absent environmental monitoring requirements, there is a danger of direct contamination of Shawnigan Lake by Oasis Lake Dugout.

Ms. Desmond testified that the Applicant’s current proposal for the condominium development called for 22 units to be constructed around the water ski pond. She also noted that a revised proposal provides for an additional number of units to be constructed around the pond.

In reply to questions, Ms. Desmond conceded that the proposal to construct a condominium development was not before this Panel and, in fact, had not even been considered or approved by the appropriate regulatory authorities.

Ms. Desmond then referred to an engineering report submitted by Thurber Engineering on behalf of the Applicant. She testified that Thurber Engineering had stated that the Applicant will be required to maintain the dugout on an ongoing basis.

Ms. Desmond also testified that the Department of Fisheries and Oceans ("DFO") had expressed concerns about the impact of the water ski pond upon Shawnigan Creek. She referred the Board to a letter from the DFO dated March 2, 2006, expressing concerns about mitigation of environmental impacts on Shawnigan Lake. Ms. Desmond also acknowledged that she had seen a subsequent water monitoring agreement whereby the Applicant agrees to test and monitor the water ski pond and Shawnigan Creek, but Ms. Desmond stated that she considers that the proposed term of three years is inadequate and that water monitoring should be carried on indefinitely. She conceded that the proposed water monitoring tests appear to be comprehensive.

Ms. Desmond expressed uncertainty about what will happen if there is an adverse environmental impact, and who will accept responsibility if there is an environmental problem. She acknowledged that the Vancouver Island Health Authority is responsible for water quality issues, but she is concerned that this is not dealt with in the Licence.

She then submitted that, in light of her concern about water quality and water quality monitoring, the Licence ought to be cancelled until such time as environmental conditions are placed upon the Licence. She submitted that the Vancouver Island Health Authority ought to be directed to conduct independent assessments in the meantime.

Finally, Ms. Desmond submitted that climate change and over-industrialization were overarching concerns, and that they had a cumulative effect on the well being of the watershed. In her view, the water ski pond should not be added to the list of environmental concerns facing Shawnigan Lake.

Appeal submissions of the estate of Mr. Bradbury

Gregory Damant, architect, appeared as the sole witness and spokesperson on behalf of the estate of Mr. Bradbury. Mr. Damant made it clear that the basis for the Bradbury appeal is that additional conditions ought to have been imposed in the Licence. First, Mr. Damant states that there is a lack of clarity and specificity in the Licence with respect to the diversion of Shawnigan Creek for use in the water ski pond, and that his concern was with respect to the use of ground water wells that may be hydrogeologically linked to the Shawnigan Lake.

Mr. Damant's second point was a concern with respect to the lack of provisions in the Licence for preventing harm to the Shawnigan Lake residents.

With respect to his first point, Mr. Damant asserted that, in the absence of permanent limits on drawing water from Shawnigan Creek, future users of the water ski pond will be tempted to use the creek as a source of water and to flush the pond. He also testified that he believed that the lack of a hydrologic connection between deep wells for Oasis Creek and Shawnigan Lake has not been established. He testified that he was not sure if there is a connection between the two or not, but there should be further investigation. He believes that further investigative work should determine if there is a connection, and it is, therefore, premature to grant the Licence.

With respect to his second point, Mr. Damant testified that the water ski pond will be connected by the Shawnigan Creek outlet to Shawnigan Lake, and that it could be breached during a storm. He believes that any pollutants from the water ski pond could end up in Shawnigan Lake unless treated. He asserted, therefore, that the Licence ought to include a term that minimum water purity standards be maintained. He conceded that the Applicant had designed a containment structure that will not spill, but he testified that it will require maintenance to keep it that way. He testified that he is concerned that maintenance will not be kept up by the Applicant as it will be too expensive. He is concerned that the Licence lacks conditions that would protect against future neglect of maintenance responsibilities.

In cross-examination, Mr. Damant conceded that an application for the use of water from Shawnigan Creek is before the Regional Water Manager, and no decision has yet been made.

Applicant's submissions on the application to dismiss the appeals of Ms. Bentley and the estate of Mr. Bradbury for lack of evidence

The Applicant submitted that the Board's authority under section 92 of the *Water Act* is to consider a decision that has already been made following extensive public exposure. She concedes that the Board has the ability to consider the decision to issue the Licence anew, but says the standard of review is correctness. She submits that the Regional Water Manager's decision is presumed to be correct and that the Appellants must demonstrate some basis on which the decision was not correct.

The Applicant submitted that the evidence of Ms. Desmond and Mr. Damant contains nothing with respect to an error made by the Regional Water Manager. The Applicant says that the evidence amounted to no more than a complaint about what could go wrong.

In summary, the Applicant submitted that the evidence of Ms. Desmond and Mr. Damant amounted only to submissions with respect to their concerns about the Licence. The Applicant says that they tendered no evidence with respect to the nature of a correct decision, or with respect to any errors made by the Regional Water Manager.

Appellant's submissions on the application to dismiss the appeals of Ms. Bentley and the estate of Mr. Bradbury for lack of evidence

Neither Appellant made submissions with respect to the no evidence motion. They indicated that they had nothing more to contribute other than what they already said. Ms. Desmond submitted that the nature of the development proposed around the Oasis Lake Dugout had changed so markedly that the Licence should be reapplied for.

The Panel's reasons for granting the no evidence motions and dismissing the appeals of Ms. Bentley and the estate of Mr. Bradbury (given orally at the hearing)

The Board's jurisdiction on these appeals is found in section 92(8) of the *Water Act*. It reads as follows:

92 (8) On an appeal, the appeal board may

- (a) send the matter back to the comptroller, regional water manager or engineer, with directions,
- (b) confirm, reverse or vary the order being appealed, or
- (c) make any order that the person whose order is appealed could have made and that the board considers appropriate in the circumstances.

The Board has, therefore, the jurisdiction to hear the matter anew or, if it chooses, to conduct an appeal on the record. In this regard, the Board is not bound to accept the correctness of the decision under appeal, and it has the jurisdiction to substitute its own order for that of the Regional Water Manager, even if the Regional Water Manager's order is not wrong in law.

Having said that, the Appellants bear the burden of evidence in an appeal. It is not open to an appellant to simply state its objection to an order, sit down and require the respondent to justify the order as though no order had ever been made.

At the commencement of the appeal hearing, the Panel advised Ms. Desmond that she would be required to give evidence under oath and that the Panel expected her to describe the basis of her appeal and make reference to any documents in support of her position. The Panel takes the view that an appellant's obligation in proceedings such as these is to lead some evidence that either the order made was wrong in law or fact, or that the process leading to the order was flawed in some way. The Board does not necessarily require the appellant to always demonstrate that the decision was wrong in law or fact, but if the appellant is not going to assert that there is some legal flaw in the decision or lead evidence that the Board could consider as sufficient to conclude that the Regional Water Manager should have made another decision based on the facts, then the appellant must at least lead some evidence that the process which lead to the decision was flawed in some way.

Were it otherwise, respondents could be subjected to frivolous appeals and put to the expense and bother of defending an appeal without any indication that there

was a flaw in the process or in the decision itself. Simply put, it is not enough to come to this Board with the mere complaint that the appellant does not like the decision that was made.

With this test in mind, the Panel turns to the application to dismiss the appeals of Ms. Bentley and the estate of Mr. Bradbury due to lack of evidence.

Ms. Desmond, on behalf of Ms. Bentley, and Mr. Damant, on behalf of the estate of Mr. Bradbury, have each raised two arguments in their appeals.

Ms. Desmond asserts that:

1. the proposed plan for the development changed from the date of the original application and therefore a new licence application should be made; and,
2. the Licence is lacking any conditions requiring monitoring of quality or quantity of water in the water ski pond.

As to the first point, there is nothing in the evidence to suggest that the Licence is materially different from the original application. The original application contemplated the construction of 22 residential units as an adjunct to the construction of the water ski pond, and that is all that was considered in the plan when the appeals were heard. Building additional houses was not part of the plan when the appeals were heard, had not been approved when the appeals were heard, and is not a matter properly before the Board.

As to the second point, quite ignoring the fact that apparently a water quality monitoring agreement has been negotiated or is about to be negotiated, there is nothing in the *Water Act* requiring water quality monitoring as a condition of a licence. An interesting legal question arises as to whether it is required. In fact, water quality is regulated under various other water management statutes, each with its own regulatory mechanism. However, prior to addressing the legal question of the Regional Water Manager's authority to regulate water quality under the *Water Act*, there must be some evidence that Oasis Lake Dugout could become contaminated and that it is possible for that contaminated water to discharge into Shawnigan Lake and thereby affect the riparian rights of Ms. Desmond. No such evidence was tendered. The Panel has expanded on this point in its discussion of the appeal by the estate of Mr. Bradbury.

Regarding Ms. Desmond, there is nothing in her evidence or her submissions that establishes that there was a legal error, the order [Licence] was wrong in fact, or that there was a flaw in the process leading to the decision. Her appeal must, therefore, be dismissed. The no evidence motion is granted.

With respect to the appeal by Mr. Bradbury's estate, the estate's first argument is that there is lack of clarity and specificity with respect to Shawnigan Creek for use in Oasis Lake Dugout and the related use of wells potentially hydrologically linked to Shawnigan Lake. Its second argument is that the Licence lacks provision of mechanisms for "apprehension of harm" to Shawnigan Lake residents.

As to the first point, the Licence does not authorize a diversion of water from Shawnigan Creek. This complaint contemplates future events which cannot be the foundation of an appeal here. If the Applicant wishes to use Shawnigan Creek to access and or divert water, she must obtain another licence. If the Applicant pursues her application for that licence, the parties will have the benefit of another *Water Act* process, including an appeal to the Board.

As to the second point, the estate's primary submission is that there should be conditions requiring that any overflow discharging from Oasis Lake Dugout to Shawnigan Creek be fit for human consumption. Mr. Damant expressed the concern that the water licence does not now protect against unexpected floods or spills from Oasis Lake Dugout which will eventually end up in Shawnigan Creek and, therefore, Shawnigan Lake.

Leaving aside (again), the legal question as to whether the Regional Water Manager could take water quality issues into consideration in granting this Licence, there must be a factual foundation to the argument. Specifically, to pass muster on a no evidence motion, there must be some evidence, capable of belief, that the water from Oasis Lake Dugout could become contaminated beyond the levels already present in Shawnigan Lake, and that there is an appreciable risk that a flood from the Oasis Lake Dugout could flood and discharge appreciable or large volumes of water into Shawnigan Lake.

To establish this point, the Panel would have expected to see some evidence about the nature of the Oasis Lake Dugout's containment structure and the predictions of hydrologists about water volumes during normal, 50-year or 100-year flood conditions. Without that evidence, there is nothing upon which the Panel could base a finding that there is an appreciable risk to the downstream owners that the Regional Water Manager should have considered in granting the Licence. That evidence is not before the Panel. There is only the very able submission of Mr. Damant expressing concerns that these things might occur. That is not enough in a quasi-judicial proceeding such as this. This is not the forum to express concerns or to pose questions. This is not a public hearing whereby the Appellants raise concerns and receive answers from the Respondent.

For the reasons expressed above, the no evidence motion regarding the appeal of Mr. Bradbury's estate is granted and its appeal is also dismissed.

2. Whether the Regional Water Manager had jurisdiction to issue the Licence on the basis that it is for a "land improvement purpose" within the meaning of section 1 of the *Water Act*.

Mr. Avren's submissions

Mr. Avren argues that a water ski pond is not a "land improvement purpose" as defined in section 1 of the *Water Act*, and therefore, no water licence may issue in respect of the same. Mr. Avren submits that the Licence must be wholly set aside as it is not authorized by the *Water Act*.

Mr. Avren quotes from section 13 of the *Water Act*, which provides:

- 13** The comptroller or regional water manager must ensure that every licence issued on or after June 21, 1995 ... (b) is for the diversion, extraction and use or storage of water, or for any combination of those things, for one, 2 or 3 of the purposes defined in section 1 and the purpose is or the purposes are specified in the licence.

The Licence states at clause (d):

(d) the purpose for which this Licence is issued is land improvement (water ski pond).

Section 1 of the *Water Act* defines "land improvement purpose" as:

... the diversion or impounding of water to protect property, to facilitate the development of a park or the reclamation, drainage or other improvement of land or to carry out a project of a similar nature.

Mr. Avren submits that a water ski lake or pond is excluded by the definition of "land improvement purpose" which, he submits, must aim at the protection, reclamation, drainage or improvement of land, not primarily its loss and submergence for a water ski pond or otherwise. In this regard, Mr. Avren submits that a land improvement purpose has as its theme and object the better establishment and use of land (not water) by the protection, reclamation, drainage or improvement of land, whether for a park or otherwise.

Mr. Avren submits that there is no basis to assert that this water ski pond is "to facilitate the development of a park", using those words in their common ordinary meaning.

Mr. Avren submits that the purpose of the Licence is not to facilitate the development of a park, or to protect property or to reclaim, drain or otherwise improve land or to carry out a project of a similar nature, and therefore, it has no statutory authorization and must be cancelled.

Mr. Avren submits that the use of the words "other improvement of land or projects of a similar nature" in the definition of "land improvement purpose" are not open-ended. He submits that those words must be interpreted to take their meaning from the words that qualify them, i.e. drainage, reclamation and protection.

Mr. Avren submits that the purpose of this Licence is not the reclamation, protection or improvement of land but rather the flooding of land so that a new body of water (the dugout) can be used for water skiing. He argues that there is no improvement whatsoever to the land.

He submits that if the definition of "land improvement purpose" is so wide as to include a water ski pond which increases the value of the surrounding land, as is asserted by the Applicant, then the definition would become meaningless. He submits that this is so because all uses of water relate to the use of land in some way, and that virtually all uses of water would qualify as "land improvements" because they would add utility or value to occupants of the land. Mr. Avren

submits that, if this wide definition is adopted, then all of the other water use definitions in the *Water Act* would become redundant. He submits that such an outcome would have large ramifications, as applications that formerly had to be for mining, irrigation, power, water works or other purposes set out in section 1 would, henceforth, be justifiable as a "land improvement" purpose. This would affect the fees and rentals payable pursuant to the *Water Act*. This, he says, is evidence that the legislature intended a restrictive definition of "land improvement purpose" and that, if a water ski pond is not specifically referred to, then it cannot be authorized.

Regional Water Manager's submissions

The Regional Water Manager submits that the diversion or impounding of water authorized in the Licence is for the improvement of land, or to carry out a project of a similar nature. He submits that "other improvement of land", as it appears in section 1, and "project of a similar nature", are sufficiently broad in scope to incorporate the proposed development.

The Regional Water Manager submits that the development of a water ski lake presupposes an improvement to land that is a valuable addition to the land, intended to enhance its value, beauty or utility or to adapt it to other purposes.

In the alternative, the Regional Water Manager submits that, if the application was misdescribed as a "land improvement purpose", then the Board has authority pursuant to section 12(1)(b) of the *Water Act* to amend the application so as to reflect an application for an "industrial purpose". Section 1 of the *Water Act* provides the definition for "industrial purpose" as follows:

"industrial purpose" means any use of water in British Columbia designated by regulation as a use for industrial purpose, but does not include

- (a) the use of water for any of the other purposes defined in this section, or
- (b) the carriage or supply by a person of water to or for use by any other person;

The Regional Water Manager notes that, pursuant to item 1(c) in Part 1 of Schedule A of the *Water Regulation*, B.C. Reg. 204/88, "industrial purpose associated with agriculture" includes "ponds... watering golf courses, ornamental gardens, parks or similar properties".

The Regional Water Manager submits, therefore, that the subject application could have been based on an "industrial purpose" and the Licence should be sustained on that basis.

The Regional Water Manager also submits that, because the Applicant's proposal includes an agricultural component (raising native aquatic plants for habitat restoration), the Licence could be sustained as an agricultural purpose component of "industrial use."

The Applicant's submissions

The Applicant submits that the *Water Act* should be interpreted in accordance with the following principles:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the object of the Act, and the intention of Parliament.

[*Rizzo and Rizzo Shoes Ltd.* (1998), 1 S.C.R. 27 at 21, citing with approval Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) at page 87]

The Applicant submits that the construction of the water ski pond fits within the definition of "land improvement purpose" as it is designed to mean the "diversion or impounding of water ... to facilitate ... other improvement of land". The Applicant submits that the construction of the water ski pond will improve her land by creating increased utility for its occupants and a higher land value. The Applicant submits that the water is not being improved, but the utility and monetary value of the land will increase.

In the alternative, the Applicant submits that the water ski pond fits within the definition of a "project of a similar nature". She submits that the definition of "project of a similar nature" is broader than "other land improvement". She submits that both of those phrases are separated by the word "or" and are thus of independent meaning. She submits that they cannot be read as referring to the same improvement. The Applicant submits, therefore, that even if the water ski pond is not an "improvement of land", it is similar enough within the broader definition of "project of a similar nature" to be within the jurisdiction of the *Water Act*.

The Applicant also refers to the purposive analysis with respect to statutory interpretation. Specifically, "to achieve a sound interpretation of the legislative text, interpreters must identify and take into account the purpose of the legislation." She submits that the definition of "land improvement purpose" must be read as broadly and inclusively as the text will allow when interpreting the context of the *Water Act*. This is because the *Water Act* is an all encompassing code, and that anyone diverting or otherwise using water without a licence is subject to prosecution.

The Panel's findings

The primary question that arises on this appeal relates to the definition of "land improvement purpose" in section 1 of the *Water Act*. This question arises because the Licence was granted pursuant to section 13 of the *Water Act*, which provides that the Licence must be for one, two or three of the purposes defined in section 1.

Section 1 of the *Water Act* provides definitions for "conservation purpose", "domestic purpose", "industrial purpose", "land improvement purpose", "mineral

trading purpose", "mining purpose", "river improvement purpose" and "water works purpose". The Licence is purported to be granted for a "land improvement purpose", and the issue is whether a water ski pond is within that statutory definition.

The Panel begins by noting that the parties agree that the water ski pond constitutes an impoundment of water, as required by the definition of "land improvement purpose". They also agree that, within the context of the definition, a water ski pond does not have as its primary purpose to protect property, or to facilitate the development of a park or to reclaim or drain land. The Applicant and the Regional Water Manager assert that the water ski pond is a "land improvement" purpose because it is an "other improvement of land."

The Panel has considered what land the legislature was referring to when it used the term "other improvement of land". Did the legislature intend "land" to refer only to the land immediately impacted by the impoundment of water, or did it intend it to refer to the surrounding land or, perhaps, the land owned by an applicant.

Mr. Avren has, without expressly stating it, adopted the first definition of "land" cited above. This is because his submission is that the "land" in question will be flooded by the water ski pond, and therefore, cannot be improved in any way. In fact, he submits that the land will be destroyed by the water ski pond, and therefore, the water ski pond cannot constitute an "improvement of land"; in fact, it is the opposite.

The Regional Water Manager and the Applicant have adopted, again without expressly stating it, the second definition cited above, as they submit that the water ski pond will improve the land surrounding the water ski pond, owned by the Applicant. They assert that the surrounding land is currently subject to flooding. They submit that, with the Licence, the surrounding land will be more effectively drained, and therefore, less subject to flooding. Consequently, it will have a higher utility and value for real estate development. More fundamentally, they assert that the water ski lake will create an attraction which will add value to the Applicant's land as a housing development, much in the same way that golf courses are thought to increase the value of surrounding housing developments.

To determine the intent of the legislature in this regard, the Panel must read the *Water Act* in its entirety, and it must read it harmoniously and in accordance with the purpose of the legislature in enacting it.

Further regard must be had to the "golden rule." This rule of statutory interpretation provides the words of a statute must be read in their ordinary and grammatical sense unless that would lead to some absurdity or inconsistency, in which case the grammatical and ordinary sense of the word may be modified so as to avoid the absurdity and inconsistency but no further (*Grey v. Pearson* (1857) 29, L.T.O.S. 67 at 71 (H.L.)).

"Land" is not a defined term in the *Water Act*. It is, however, used throughout the statute in a variety of contexts. For example, section 7 of the *Water Act* provides that:

- 7 A licence for any one, 2 or 3 of the purposes defined in section 1 may be issued by the comptroller or the regional water manager to any of the following:

(a) an owner of **land** or a mine;

[emphasis added]

Likewise, sections 28 and 30 authorize persons to enter upon "land" for the purposes of accessing and constructing works authorized by the *Water Act*.

The Panel finds that the legislature did not intend a restrictive interpretation with respect to the word "land". It is used in a variety of contexts and refers to land over which water flows, land adjacent to stored or flowing water and, in section 7, the legislature is clearly referring to any land, either over which water flows or is contiguous to water. For example, it is common for a downstream owner of land to acquire a *Water Act* licence with respect to water flowing over adjacent land. Clearly, the legislature did not intend "land" to be interpreted to mean only the land directly over which water flows, is stored or impounded.

There is nothing in the *Water Act* which would give effect to Mr. Avren's restrictive reading of the word "land" in the defined term "land improvement purpose." The Panel finds that the legislature intended to give the Regional Water Manager sufficient latitude to grant a *Water Act* licence in circumstances where it has been determined by the Regional Water Manager (or by the Board, on appeal) that the purpose of the licence is for "other improvement of land", whether that land is the very land intended to be flooded by the impoundment (as is the case here), or whether it is other land owned by the applicant, whether immediately contiguous to the impoundment or not.

Having reached that conclusion, the Panel turns to the final question, which is whether the water ski pond constitutes an "improvement" of the land owned by the Applicant and forming the object of the application for a *Water Act* licence. On this point, it is the Panel's opinion that whether the "improvement" is recreational or industrial in nature is irrelevant.

The purpose of the Licence is to create a water ski pond (an amenity much like a golf course) to thereby increase the value of the Applicants' land as a housing development. There is evidence before the Panel that another benefit to the Applicant's land is that the water ski pond will improve drainage, thereby facilitating the construction of houses on the land.

The question is: do these benefits to the Applicant constitute an "improvement" of land sufficient to bring it within the definition of "other improvement of land" and thereby justify the Licence?

With respect to the definition of "improvement", the Panel notes the Oxford dictionary definition as follows:

noun **1** an instance of improving or being improved. **2** the action of improving or being improved. **3** a thing that makes something better or is better than something else.

The Panel is of the opinion that the inquiry to determine whether the water ski lake is an "improvement" does not permit the Regional Water Manager or the Board to impose its subjective opinion about whether the land is "improved". If the water ski pond increases the utility of the land to the Applicant and, thereby, makes it "better" for the Applicant, it is an improvement and, therefore, serves as a valid purpose grounding the grant of a licence under the *Water Act*. The fact that others would not consider a water ski pond to be an improvement of land is of no relevance.

Although the Regional Water Manager will not impose his or her own subjective opinion about whether the land is "improved", the Regional Water Manager is still required to objectively evaluate whether the proposed use will improve the utility of the land to the applicant. An applicant is not entitled to define for himself or herself what is an improvement; rather, he or she must demonstrate to the satisfaction of the Regional Water Manager that the proposed use of water will add utility to the applicant in his or her use, or proposed use, of the land.

In considering whether a gravel pit (wherein gravel is removed from the land and crushed) constituted an improvement in the context of builders' lien legislation, Halvorsen J. of the Court of Queens Bench in Saskatchewan had this to say:

What is and what is not an improvement to land must often be assessed through the eyes of the owner, because what others might perceive as an eyesore the owner might, for economic reasons, see as beneficial. It appears that the word "improvement" as used in the Act is somewhat of a misnomer, in that the included definition itself suggests that enhancement is not always necessary.

[*Hansen v. CNR* [1982] 2 WWR 237 at 243]

The Panel acknowledges that, in the case before us, "improvement" must constitute some form of enhancement, but it adopts the rationale of Halvorsen J. (cited above) that the "enhancement" or "making better of the land" should be assessed through the eyes of the Applicant.

The Panel finds that this interpretation is consistent with the scheme and purpose of the *Water Act* and does not render any of the other defined "purposes" redundant as asserted by Mr. Avren. The *Water Act* is concerned with the use and management of water and, in this regard, the various purposes for which the use of water may be licenced are defined in the *Act*. The *Water Act* does not prohibit a secondary or ancillary benefit accruing to the licence holder. It requires only that the primary purpose for which the licence is granted (and to which the associated works must relate) be one of the enumerated purposes in section 1 of the *Water*

Act. Therefore, while it may be the case that the other “purposes” defined in the *Water Act* have the ancillary benefit of “improving the land”, it is not the primary purpose for which the licence was granted.

It is also essential to note that an assessment of “land improvement purpose” by the Regional Water Manager, as described in the preceding paragraphs, does not in any way restrict the Regional Water Manager’s duty to consider other factors relevant to the granting of a licence. The fact that an applicant may satisfy the Regional Water Manager that the proposed use is an “other improvement of land”, is only the first step in the process of obtaining a licence.

In this case, the evidence before the Panel is clear that the subject water ski pond will improve the utility and value of the Applicant’s land to the Applicant and, therefore, the Regional Water Manager had jurisdiction to proceed with his review of the application, as the Licence has, as its lawful purpose, the “other improvement of land.” This appeal is, therefore, dismissed.

DECISIONS

In making this decision, the Panel has considered all the documents and written submission by the parties, whether or not they have been specifically reiterated here.

For the reasons provided above, the Environmental Appeal Board confirms the Regional Water Manager’s decision to issue the Licence.

Mr. Avren’s appeal (2006-WAT-003) is, accordingly, dismissed.

The no evidence motions made by the Applicant were granted during the hearing, whereby the appeals of the estate of Tom Bradbury (2006-WAT-004) and the appeal of Mary Desmond on behalf of Glen Ellen Bentley (2006-WAT-005), were dismissed.

“Robert Wickett”

Robert Wickett, Panel Chair
Environmental Appeal Board

June 29, 2007