Environmental Appeal Board

APPEAL NO. 98-HEA-12(a)

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

BETWEEN:	Friends of Cortes Island Larry Cohen Comox-Strathcona Regional District British Columbia Shellfish Growers Association	**APPELLANTS**
AND:	Environmental Health Officer	**RESPONDENT**
AND:	Triple R Developments Ltd.	**PERMIT HOLDER**
BEFORE:	A Panel of the Environmental Appeal Board Toby Vigod, Panel Chair	
DATE OF HEARING:	Conducted by way or written submissions concluding on July 10, 1998	
PLACE OF HEARING:	Victoria, B.C.	
APPEARING:	For the Appellants:	Hubert Havelaar Larry Cohen Bruce Williams
	For the Respondent:	Greg Vos
	For the Permit Holder:	Bruce D. Ledingham

PRELIMINARY ISSUE OF JURISDICTION

On March 23, 1995, Triple R Development Ltd. ("Triple R") was issued Sewage Disposal Permit 113/94 (the "Original Permit") for a package treatment plant located on Lot 307, Sayward Land District, Except Parts in Plans 12035, 15458 and 18122 (Red Granite Point, Cortes Island).

The permitted system, consisting of a collection system, a Clargester Model 4 package treatment plant and an absorption field incorporating a pressure distribution system, was to service a resort development consisting of eleven motel units and a caretaker's unit.

Cortes Island Seafood Association appealed the issuance of the Original Permit to the Board.

On June 29, 1995, the Board heard the appeal and on August 30, 1995, the Board issued its decision upholding the issuance of the Original Permit.

Triple R did not construct the permitted sewage disposal system and on March 23, 1996, one year after its issuance, the Original Permit expired.

On March 14, 1998, Triple R applied for a new permit and was issued permit 15/98 (the "New Permit") on May 22, 1998.

The issuance of the New Permit was appealed by the British Columbia Shellfish Growers Association ("BCSGA"), the Friends of Cortes Island ("FCI"), Larry Cohen and the Comox-Strathcona Regional District (the "District").

By letter dated June 18, 1998, the Board invited each of the Appellants to make submissions on the issue of whether the Board had jurisdiction over the matter as it had previously ruled on the same matter. The Board further requested each of the Appellants to make submissions on how the New Permit differed from the Original Permit. The Respondent and Triple R were provided with the opportunity to respond to the Appellants' submissions.

Submissions on this issue were received from all parties except BCSGA.

RELEVANT LEGISLATION

The right to appeal a sewage disposal permit is provided under section 8 of the *Health Act*. Section 8(4) states:

> 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 established under section 11 of the Environment Management Act within 30 days of the ruling.

ISSUE

There is no dispute that the Appellants are persons aggrieved or that they filed their appeal within 30 days of the ruling.

The sole issue to be decided at this time is whether the Board has jurisdiction to hear this appeal when, in a previous appeal, it has dealt with a sewage disposal permit issued to the same permit holder for the same property.

DISCUSSION AND ANALYSIS

Each of the Appellants submits that the Board has jurisdiction to hear this appeal. There are two basic arguments provided by the Appellants in support of their submission. First, the Appellants argue that this appeal deals with a new permit and, therefore, it is a different matter than was before the Board in the previous appeal. Second, the Appellants argue that there are new issues with regard to the issuance of the New Permit that will be brought before the Board in this appeal.

With respect to the first argument, the Appellants all submit that the permit now under appeal is a completely new permit. According to the Sewage Disposal Regulation, a permit to construct a sewage disposal system is only valid for one

year. Therefore, once a permit expires a new application must be filed and a new permit issued before a person can install a sewage disposal system.

The Appellants all argue that the legislation does not provide for a renewal or extension of a permit and, therefore, the New Permit cannot be characterised as a continuation of the Original Permit. When the New Permit was issued it became an appealable decision as set out in section 8(4) of the *Health Act*.

The District argues that the reasoning behind the one-year expiration time period is to ensure that things that may change over time, such as technologies, regulations and site conditions, can be taken into consideration before issuing a new permit.

The District further argues that for the Board to deny jurisdiction based on the fact that a separate permit had already been adjudicated upon would deny aggrieved parties the opportunity to bring forward new information and have a decision rendered on the basis of that new information.

The Appellants also argue that the new application and New Permit differ from the original application and Original Permit. They argue that there is new evidence and information regarding the proposed development that was not available when the Original Permit was issued and was considered by the Board.

For instance, the Appellant, FCI, maintains that Triple R's intention to further develop the 38 acres of land was not available or not generally known to the public at the time of the earlier permit issuance. FCI argues that the architectural drawings of the proposed development, which were not available at the time of the issuance of the Original Permit, raise serious questions about the accuracy of certain information contained in the New Permit application.

The Appellant, Mr. Cohen, submits that Original Permit application describes the project as a "hotel/motel" whereas the New Permit application describes the project as a "resort". Mr. Cohen argues that this changes the information category of the application and therefore, requires a new assessment of the sewage disposal capacity required for such a development. He further argues that the New Permit is for a sewage disposal system, which is too small for the safe disposal of sewage from the development.

The District also submits that a site investigation was not carried out by the applicant prior to the New Permit being issued. The District argues that the Sewage Disposal Regulation requires that a site investigation be carried out prior to a permit being issued. The District submits that although this was done for the Original Permit, there is no indication that it was done prior to the issuance of the New Permit. The District maintains that it is inappropriate to rely on information from the first application when this is an entirely new application.

Finally, the District and FCI submit that the area in question has been designated by the local government as a "Development Permit Area". It was not given this designation until after the issuance of the Original Permit. The District maintains that this designation, which provides certain directives with respect to the approval

of sewage disposal systems, should have a strongly persuasive effect on the EHO when determining whether or not to issue a sewage disposal permit.

Both the Respondent and Triple R assert that the new application and New Permit are identical to the original application and Original Permit and that the new application does not indicate any changes to the original plans of the development. They further submit that all of the issues currently being raised by the Appellants were before the Board in the previous appeal.

The Respondent submits that the new application does not provide any changes to the original plans for sewage flow. The Respondent submits that the Board dealt with sewage flow in the previous appeal and found that the sewage flow of 2064 gallons per day complied with the Sewage Disposal Regulation.

With respect to the classification of the development in the permit application, Triple R states that the property has always been described as a "resort/motel" which is the same as "motel/hotel". There is no category under the *Health Act* for a "resort" so it was placed under the "motel/hotel" classification.

The Respondent also maintains that a larger lot size would not negatively impact the issuance of the New Permit. The issuance of this permit is dependent on the ability of the property to receive sewage from the proposed development without any expected harm to public health or the environment.

Neither the Respondent nor Triple R made submissions with respect to the need for a new site investigation or the designation of the area as a "Development Permit Area".

The Board has considered all of the submissions and has concluded that it has the jurisdiction to hear this appeal.

The Board finds that the appeal before it meets the requirements of section 8(4) of the *Health Act* in that a permit has been issued, there is no dispute that the Appellants are persons aggrieved and the appeal was filed within 30 days of the issuance of the New Permit.

The Board is satisfied that a new permit resulting from a fresh application is subject to all the requirements of the Sewage Disposal Regulation and the *Health Act*. This includes the statutory right of appeal. The Board has no authority to waive this statutory right of appeal.

Additionally, the Board is not satisfied that it should restrict the matter under appeal because a similar permit was the subject of a previous appeal by a different appellant. The Sewage Disposal Regulation provides that a permit shall expire after one year. The reason for this is that changes may occur to the physical site, to the regulation regime and the technological standards.

In this case, over 18 months have elapsed since the Original Permit expired. During that time changes may have occurred to the physical site.

Further, there are new appellants who have appealed this permit that were not before the Board during the previous hearing and there are new standards in place regarding the overall planning of the area.

Given all of the above the Board is satisfied that a new hearing on the merits is justified.

DECISION

The Board finds that this is a new permit, that the parties are different in this appeal and that, although many of the issues are similar, there are a number of new issues which require findings on their merits.

The Board further finds there is no legal reason for dismissing the appeal at this juncture.

Accordingly, the Board will convene a hearing on the merits of the Appellants' appeal. The appeals have been consolidated and will be heard together.

Toby Vigod, Chair
Environmental Appeal Board

July 22, 1998