

ALBERTA PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – May 30, 2018

IN THE MATTER OF sections 121, 124, and 125 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 211, 213, 228, and 235 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an application filed by the Director, Alberta Environment and Parks, for the Public Lands Appeal Board to reconsider its Report and Recommendations for 16-0023, an appeal filed by Inshore Developments Ltd. with respect to the Director's refusal of application for Department Licence of Occupation DLO 140225.

Cite as: Reconsideration Decision: *Inshore Developments Ltd. v. Director, Alberta Environment and Parks* (30 May 2018), Appeal No. 16-0023-RD (A.P.L.A.B.).

BEFORE:

Mr. Gordon McClure, Panel Chair;
Ms. A.J. Fox, Board Member; and
Ms. Meg Barker, Board Member.

SUBMISSIONS BY:

Appellant: Inshore Developments Ltd., represented by Mr.
W. Norval Horner.

Director: Mr. Jon Murray, Director, Team Lead,
Approvals and Disposition Services, Provincial
Approvals Section, represented by Mr. Larry
Nelson, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Inshore Developments Ltd. (the Appellant) submitted an application for a Department Licence of Occupation (DLO). Alberta Environment and Parks (AEP) refused the application. The Board held a written hearing and determined AEP had improperly sub-delegated its authority to the field staff, who made the actual decision. The Board found the decision resulted in an error in the determination of a material fact on the face of the record. In its Report and Recommendations (the Report), the Board recommended the Minister reverse the Director's decision and grant the DLO applied for by the Appellant.

AEP applied to the Board for a reconsideration of its Report. The Board received written submissions from the Appellant and AEP (the Parties). The Board found the Parties had not been provided the opportunity to submit arguments on the issue of whether AEP had improperly sub-delegated its authority to field staff. The Board acknowledges that by not seeking additional submissions, it committed a procedural error and unintentionally denied procedural fairness to both Parties.

Therefore, the Board will seek submissions from the Parties and reconsider its Report to the Minister, who will make the final decision regarding the appeal.

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I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the “Board”) at the request of the Team Lead, Approvals and Disposition Services, Alberta Environment and Parks (the “Director”), for the Board to reconsider and vary its Report and Recommendations¹ (the “Report”) provided to the Minister of Alberta Environment and Parks (the “Minister”) with respect to Appeal No. 16-0023.

II. BACKGROUND

[2] The Board received a Notice of Appeal on October 30, 2016, from Inshore Developments Ltd. (the “Appellant”) appealing the Director’s decision to refuse to issue a Department Licence of Occupation (“DLO”). The Board held a written hearing of the appeal on May 9, 2017.

[3] Based on the submissions provided, the Board concluded the Director had not made a decision regarding the Appellant’s DLO application and instead improperly sub-delegated his authority to field staff. It appeared the field staff made the decision to refuse to issue the DLO (the “Decision”). The Board found the Decision resulted in an error in the determination of a material fact on the face of the Record.² The Board recommended the Minister reverse the Director’s decision and grant the DLO applied for by the Appellant. The Minister agreed and issued Ministerial Order 30/2017 on June 13, 2017.

[4] In a letter dated July 17, 2017, the Director requested the Board reconsider its Report. In response to this request, the Board asked for and received written submissions from the Director and the Appellant (collectively, the “Parties”) on this request.

¹ See: *Inshore Developments Ltd. v. Director, Alberta Environment and Parks*, Appeal No. 16-0023-R (A.P.L.A.B.).

² The “Record” includes all of the documents the Director used in making his decision.

III. RECONSIDERATION PROCEDURE

[5] The authority to reconsider a report made by the Board is found in section 125 of the *Public Lands Act* (the “Act”)³, which states: “The appeal body may reconsider, vary or revoke any report made by it.”

[6] Under the authority of section 123(9)⁴ of the Act, the Board has developed rules and procedures for dealing with reconsideration requests. These rules and procedures are found in the Board’s Interim Appeals Procedure Rules for Complex Appeals. The relevant rules are 26.5 and 26.6.

[7] Rule 26.5 states:

“The Board will not exercise its powers under section 125 of the *Public Lands Act* in the absence of the following:

- (a) New facts, evidence or case-law that was not reasonably available at the time of the hearing. The new facts, evidence or case-law must be significant enough to have a bearing on the outcome of the decision,
- (b) A procedural defect during the hearing which prejudiced one or both of the parties,
- (c) Material errors that could reasonably change the outcome of the decision, or
- (d) Any other circumstance the Board considers reasonable and substantive.”

[8] Rule 26.6 states:

“The following are not sufficient grounds for a review:

- (a) disagreement with a decision;
- (b) failure to provide related case authority; or
- (c) present available evidence.”

³ *Public Lands Act*, R.S.A. 2000, c. P-40.

⁴ Section 123(9) provides:

“Subject to the regulations, the appeal body may establish its own rules and procedures for dealing with matters before it.”

IV. ISSUE

[9] The Board received submissions on the following issue:

“Does the reconsideration request meet the requirements of Rule 26.5?”

V. SUBMISSIONS

A. Director

[10] The Director requested the Board reconsider the Report made to the Minister. The Director argued the Report should be varied due to alleged procedural defects during the hearing that prejudiced one or both Parties. The Director submitted the Board made material errors that, if corrected, could reasonably change the Board’s recommendations.

[11] The Director argued the Board erred by failing to determine the correct standard of review and failed to give deference to the Director by substituting its own findings regarding the distance of the grebe colony and the use of the Protective Notation.⁵

[12] By not considering the *Wildlife Act*⁶ and the *Wildlife Regulation*,⁷ the Director argued the Board’s conclusion that the Director’s use of the classification “endangered” to describe the status of the Western Grebe was an error.

[13] The Director argued the Board erred by concluding the Director sub-delegated his authority. The Director submitted he properly relied on the wording of the Decision Rationale⁸ provided by field staff as recognition of the Director’s limited expertise in wildlife matters and the role of staff members within Alberta Parks and Environment (“AEP”). The Director stated there was no evidence to support a conclusion the Director did not “put his mind” to his decision.

[14] The Director submitted that, even if he did make an error of fact on the face of the Record, the Board failed to continue its analysis to determine whether the error was material.

[15] The Director argued the Board relied on incorrect precedents and authorities.

⁵ A Protective Notation places a land use restriction on the land, usually owing to specific natural features.

⁶ *Wildlife Act*, R.S.A. 2000, c. W-10.

⁷ *Wildlife Regulation*, A.R. 143/1997.

⁸ The Decision Rationale is the document that outlines why the decision to refuse the DLO application was made.

[16] The Director submitted his decision to refuse to issue the DLO was within the range of reasonable outcomes. The Director stated the Board reversed the onus of proof and required the Director to meet the burden of establishing the Director's decision was reasonable.

[17] The Director said the Board considered materials that should have been inadmissible, which is a breach of procedural fairness.

[18] The Director submitted the Board erred in finding the Director's alleged error was an error of material fact on the face of the Record, since a breach of the duty of procedural fairness is a question of law, not a question of fact. The Director argued the Board did not conduct an analysis to determine if the Director's alleged breach of procedural fairness was, at law, unfair.

[19] The Director submitted the Board considered arguments not raised by the Appellant, and the Director was not given notification or opportunity to respond to the Board's decision to consider arguments not raised by the Appellant.

B. Appellant

[20] The Appellant submitted the Report should not be varied as the Director was attempting to re-argue matters that had already been argued in the written submissions for the original hearing.

[21] The Appellant argued the Director's submission contained allegations of fact not supported by the Record.

[22] The Appellant stated the issue of whether the Western Grebe is properly described as endangered as opposed to threatened is not the significant matter - the point is the Director relied on the field staff's decision exclusively and did not direct his mind to the issues.

[23] The Appellant submitted the Board based its decision on grounds raised by the Appellant, and the Director had ample opportunity to address them.

[24] The Appellant explained that when the Notice of Appeal was filed, the Appellant did not have access to the Record and had no way of knowing about the Director's lack of participation in the decision-making process.

[25] The Appellant argued failing to consider relevant factors and taking irrelevant factors into account can result in errors of fact so serious they amount to errors in law.

[26] The Appellant noted it raised the issue of procedural fairness in its initial submission, but did not name it as such.

[27] The Appellant submitted the Board's role is not solely to adjudicate between two sides in a dispute - the Board has the duty to further the public interest and advance the legislative intent of its enabling statute, which includes an onus on the Board to ensure the bodies whose decisions it reviews act lawfully.

[28] The Appellant stated the Director cannot argue the Board does not have the proper materials to substitute its decision when the Director has purported to provide all the documents he used in making his decision in the Record.

[29] The Appellant submitted the Record clearly shows the Director did not exercise his discretion or use his experience as he failed to make the decision, thus, any presumption of regularity is rebutted and any need for deference removed. While the Board owes some deference to the decision-maker, the Legislature did not intend "unlimited" deference or it would not have created the right of appeal.

[30] The Appellant submitted the Director raised procedural defects in the hearing which were raised earlier as preliminary motions. The Board dealt with these issues carefully in its Report, and its analysis and decision did not refer to any of the disputed materials. There was no "breach of procedural fairness" as alleged by the Director.

VI. ANALYSIS

[31] After reviewing the submissions from the Parties, the Board determined the basis for its findings in the Report were not fully argued by the Parties. The Appellant had alluded to specific errors made by the Director when he made his decision to refuse to issue the DLO. The Board based its recommendations on these errors even though the Parties were not provided the opportunity to submit arguments or input, specifically on the issue of whether the Director had improperly sub-delegated his authority to field staff. The Board reached its conclusions without first receiving argument or input from the Parties, thereby denying procedural fairness to the Parties.

[32] The Board has reviewed the principles of procedural fairness in making its reconsideration decision. In *Baker v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada considered the importance of procedural fairness:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.”⁹

[33] In order to provide the Parties with the procedural fairness as defined by the Supreme Court in *Baker*, the Board should have requested further submissions from the Parties regarding the issue of sub-delegation of authority before it reached its final conclusion. By not doing so, the Board acknowledges it committed a procedural error and unintentionally denied procedural fairness to both Parties.

[34] Therefore, the Board will reconsider its Report.

VII. CONCLUSION

[35] Pursuant to Rule 26.5 of the Board’s Interim Appeal Rules and Procedures for Complex Appeals, the Board has the authority to reconsider its Report. As there was a procedural defect during the hearing which prejudiced one or more of the Parties, the Board will reconsider the Report and request submissions from the Parties regarding the issues not previously addressed.

Dated on May 17, 2018, at Edmonton, Alberta.


Gordon McClure
Chair


A.J. Fox
Board Member


Meg Barker
Board Member

⁹ 1999 CarswellNat 1124 at paragraph 28.