

HEALTH SERVICES APPEAL AND REVIEW BOARD

PRESENT:

Beth Downing, Designated Vice-Chair
James Beamish, Board Member
Carla Whillier, Board Member

Heard August 10, 2017 in Toronto, Ontario

IN THE MATTER OF AN APPEAL UNDER SECTION 13 of the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7, as amended

B E T W E E N:

**HARJEET SINGH DUSANJH, JASBIR SINGH DUSANJH AND RIVER VALLEY
PARK INC.**

Appellants

and

KARA FLANNIGAN, PUBLIC HEALTH INSPECTOR, ALGOMA PUBLIC HEALTH

Respondent

Appearances:

The Appellants: Harjeet Singh Dusanjh and Jasbir Singh Dusanjh
Agent for the Appellants: Ian Gardner
The Respondent: Kara Flannigan, Public Health Inspector

DECISION AND REASONS

I. DECISION

1. This is an appeal from an Order dated June 8, 2017 made by Kara Flannigan, a Public Health Inspector of Algoma Public Health (APH) pursuant to section 13 of the *Health*

Protection and Promotion Act (HPPA) ordering the Appellants to close the mobile home park known as River Valley Park (RVP) by August 31, 2017, to ensure it is vacated by the closing date, to maintain provision of all services, such as but not limited to electricity, water and sewage disposal until the park is closed, and to ensure residents are protected from exposure to the sewage. The Order is to remain in effect until the park is closed and vacant.

2. The basis for the Order is that the on-site domestic sewage treatment and effluent disposal system for RVP has failed, putting residents and visitors of RVP, and other persons downstream from RVP, at risk of contracting disease as a result of exposure to sewage contamination, and therefore constitutes a health hazard within the meaning of the *HPPA*.
3. It is the decision of the Health Services Appeal and Review Board (the Appeal Board) to confirm the Order.

II. BACKGROUND

4. An oral hearing was held on August 10, 2017. Harjeet Dusanjh testified for the Appellants and Kara Flannigan (APH), Kira Fry (Ministry of Environment and Climate Change or MOECC) and Jonathon Boumo (APH) testified for the Respondent. The following background, based on the documents filed by the parties and the testimony of the witnesses, is largely uncontested unless otherwise indicated.
5. The Appellants bought RVP in 2014. The existing sewage system was constructed in 1985 by a previous owner, apparently as part of a provincial program that included the construction of an on-site sewage system and effluent disposal field. Information from the MOECC indicates there is a long history of problems with the sewage system at RVP. Mr. Dusanjh testified that upon purchase in 2014, his lawyer advised that all necessary work had been done.
6. In August 2014, Ms. Fry, Senior Environmental Officer with MOECC, performed an inspection at RVP and found that the sewage system had been altered and was not

working. Ms. Fry testified that blowers had been removed and the previous system had been dismantled such that all that was left was essentially sewage tanks leading to a leaching bed. As a result, in September 2014, the MOECC ordered the Appellants to retain a qualified person to assess the system and submit an action plan to bring the facility into compliance under the *Ontario Water Resources Act* by August 28, 2015. The Appellants did not comply with this Order.

7. In October 2015, the MOECC issued another Order extending the deadline to retain a qualified person to October 29, 2015, and extending the deadline to submit the action plan to December 18, 2015. The Appellants did not comply with this extended Order.
8. In December 2015, as a result of a complaint, MOECC made an on-site visit and found the “domestic subsurface sewage treatment works at the [RVP] has failed, and as a result, waste water is flowing over land from the break-outs of the new section of the tile field. This waste water has damaged the access roadway that leads to the lower section of residential trailer unit. The waste water is flowing to a ditched area beyond the roadway that flows toward the Root River...this waste water also had a noticeable septic odour”. It was also noted that the tanks were full of solid septic waste and in need of servicing.
9. As a result, the MOECC issued an Order requiring certain interim measures to be implemented by February 2016, including routine inspections for breakouts of sewage or accumulation of solids, regular maintenance of the sewage works, and a written service agreement with a waste management system approved for hauling domestic sewage.
10. In addition, also in December 2015, MOECC issued an Order requiring the Appellants to submit a completed Environmental Compliance Approval (ECA) application for the domestic sewage works that have failed/been altered by May 11, 2016.
11. The Appellants retained Kresin Engineering Corporation (Kresin) to evaluate the sewage system. In a report dated September 23, 2016, Kresin concluded, in part:

1. The treatment system is in poor condition and is not functioning as designed as pumps and blowers are not functional.
 2. The level of treatment being provided is not that which is [sic] would be expected from a Class 6 sewage system.
 3. Disposal field B is inadequately sized to accommodate the volume of effluent discharged from the treatment system.
12. In March 2016, the MOECC received another complaint regarding a sewage overflow from the sewage collection system at RVP. An MOECC Order was issued regarding the necessary work/repairs.
13. In April 2016, the Respondent was contacted for the first time by the MOECC regarding the malfunctioning sewage system at RVP. The Respondent attended the site on April 5, 2016 and observed evidence of sewage on the road. Accordingly, the Respondent issued an Order dated April 12, 2016 under the *HPPA* to close the road and to move a play structure from the area of contamination to protect people from the risk of disease from sewage. The Respondent later rescinded the order in May 2016 when she observed no sewage.
14. In February 2017, the MOECC received another complaint regarding sewage across the road at RVP. MOECC again notified the Respondent, who performed a site visit on February 13, 2017. Again, she observed evidence of sewage on the road. Accordingly, she issued an Order dated February 17, 2017 under the *HPPA* to close the road until sewage is no longer discharged to the surface and/or repairs are completed to the malfunctioning sewage disposal system.
15. In addition, the Respondent sent a letter with the Order of February 13, 2017 to the Appellants, advising:

...

We have confirmed from the local [MOECC] office that you are not in compliance with their orders and have not provided detailed plans and applications to repair or replace the failed septic system.

Pumping out the system is a temporary solution to prevent sewage contamination of the Park. [RVP] must have a properly operating sewage disposal system to remain open. [APH] must be notified of your plans to repair the sewage disposal system or to close the park by March 3, 2017.

16. On March 3, 2017, Kresin provided the MOECC an action plan to address outstanding compliance issues as follows:
 1. Begin pumping sewage and reporting in accordance with MOECC PO Order.
Completion date: in process and on-going;
 2. Conduct surface water and/or hydrogeological assessment by March 22, 2017;
 3. Complete design and design report (incl. drawings) by April 7, 2017;
 4. MOECC ECA Application by April 14, 2017;
 5. MOECC Approvals review time by April 21, 2017;
 6. Construct new on-site sewage system (incl. decommissioning existing system and commissioning new system) by 2 months from receipt of MOECC approval**
** construction timeline may be revised to reflect treatment and/or disposal system manufacturer delivery times as well as potential unknown site conditions that may be encountered.
17. This action plan was incorporated into an MOECC order of March 14, 2017 and a copy of this action plan of March 3, 2017 was also provided to the Respondent.
18. The Respondent indicated in written submissions that on March 7, 2017, notices were posted on the mailboxes of RVP residents notifying them that RVP cannot continue to operate without a functioning sewage system, that Orders had been issued to protect people and the environment, and that updates would be provided to the residents.
19. Because Kresin indicated to MOECC the need for an assimilative site capacity study of the receiving water (the Root River) to establish minimum sewage treatment requirements before completing the ECA application, the MOECC gave 6 more weeks for this to be

completed by June 22, 2017. The Order was amended accordingly in an order of April 20, 2017.

20. On June 8, 2017, the Respondent issued the Order under appeal. The reasons stated in the Order are:

- I attended the site on April 5, 2016 and again on January 20, 2017.
- Sewage was breaking out of the malfunctioning sewage disposal system onto the road and was flowing towards the river.
- Vehicular traffic, pedestrians and family pets routinely use the contaminated section of road.
- Vehicular traffic contaminates more of the property.
- Exposure to sewage contamination puts people and pets at risk of contracting diseases.
- Sewage contamination of the property and waterways damages healthy environments.
- The failed sewage system has not been replaced as ordered by the Ministry of Environment and Climate.
- An engineer report May 2017 confirms the sewage system has failed.
- [The Appellants] were notified by letter February 17, 2017 that the sewage system must be repaired or the park may have to close and a notice was posted to the residents.

21. MOECC did receive the ECA application on June 16, 2017; however, upon review, it was noted that there was no assimilative site capacity study as required and that the application required major revision. MOECC advised the Applicants of this by letter of July 10, 2017, and recommended revision be done in consultation with its support staff.

22. On June 22, 2017, the Appellants requested this hearing to appeal the Order of APH.

23. On July 13, 2017, MOECC hand delivered a letter to the RVP residents stating that the Order to close RVP on August 31, 2017 remains in effect, that an appeal hearing is scheduled for early August, that the Appellants' recent application to the MOECC to begin updating the system has been rejected and that the current system is not being pumped as per MOECC's Order and continues to contaminate the river and environment. The letter acknowledges how stressful this situation must be for residents and refers them to a community legal clinic for support.
24. A consultation meeting was held on July 14, 2017 with the MOECC, the Appellants and Kresin. The parties have different recollections of this meeting. Mr. Dusanjh testified that at this meeting he gave the go ahead to his engineer to do the assimilative site capacity study. Ms. Fry recalls that at this meeting the engineer said, if the Appellants gave the go ahead, he would try to have something for the hearing on August 10, 2017. Nothing further was provided to indicate that the contractor performing this study had been retained or the study, which takes about 6 weeks to complete, had been started.

III. LAW

Health Protection and Promotion Act

25. The Order was made pursuant to section 13 of the *HPPA* that provides in part as follows:

Order by M.O.H. or public health inspector re health hazard

13. (1) A medical officer of health or a public health inspector, in the circumstances mentioned in subsection (2), by a written order may require a person to take or to refrain from taking any action that is specified in the order in respect of a health hazard. R.S.O. 1990, c. H.7, s. 13 (1).

Condition precedent to order

(2) A medical officer of health or a public health inspector may make an order under this section where he or she is of the opinion, upon reasonable and probable grounds,

(a) that a health hazard exists in the health unit served by him or her; and

(b) that the requirements specified in the order are necessary in order to decrease the effect of or to eliminate the health hazard. R.S.O. 1990, c. H.7, s. 13 (2).

Time

(3) In an order under this section, a medical officer of health or a public health inspector may specify the time or times when or the period or periods of time within which the person to whom the order is directed must comply with the order. R.S.O. 1990, c. H.7, s. 13 (3).

Idem

(4) An order under this section may include, but is not limited to, (a) requiring the vacating of premises;

(b) requiring the owner or occupier of premises to close the premises or a specific part of the premises;

(c) requiring the placarding of premises to give notice of an order requiring the closing of the premises;

(d) requiring the doing of work specified in the order in, on or about premises specified in the order;

(e) requiring the removal of anything that the order states is a health hazard from the premises or the environs of the premises specified in the order;

(f) requiring the cleaning or disinfecting, or both, of the premises or the thing specified in the order;

(g) requiring the destruction of the matter or thing specified in the order;

(h) prohibiting or regulating the manufacturing, processing, preparation, storage, handling, display, transportation, sale, offering for sale or distribution of any food or thing;

(i) prohibiting or regulating the use of any premises or thing. R.S.O. 1990, c. H.7, s. 13 (4).

Person directed

(5) An order under this section may be directed to a person,

(a) who owns or is the occupier of any premises but where an order is directed to the occupier, the person making the order shall deliver or cause the delivery of a copy of the order to the owner of the premises;

(b) who owns or is in charge of any substance, thing, plant or animal or any solid, liquid, gas or combination of any of them; or

(c) who is engaged in or administers an enterprise or activity,

in the health unit served by the medical officer of health or the public health inspector.
R.S.O. 1990, c. H.7, s. 13 (5).

Reasons for order

(6) An order under this section is not effective unless the reasons for the order are set out in the order. R.S.O. 1990, c. H.7, s. 13 (6).

26. “Health hazard” is defined in the *HPPA* as:

- (a) a condition of a premises,
- (b) a substance, thing, plant or animal other than man, or
- (c) a solid, liquid, gas or combination of any of them,

that has or that is likely to have an adverse effect on the health of any person; (“risque pour la santé”)

IV. JURISDICTION OF THE APPEAL BOARD

27. Following a hearing under section 44 of the *HPPA*, the Appeal Board may by order confirm, alter or rescind the order and for such purposes the Appeal Board may substitute its opinion for that of the Respondent.

28. This hearing before the Appeal Board is a hearing *de novo*, a fresh look at the matter in dispute. Subject to the requirements found in the governing legislation and regulations, and based on the evidence, the Appeal Board has the power to make its own findings, reach its own conclusions, and make a new decision in the matter under appeal. In doing so, it is the role of the Appeal Board to determine the appropriate weight to give to the evidence.

V. ISSUES

29. There are two issues on this appeal:

1. Did the public health inspector have reasonable and probable grounds upon which to form the opinion that a health hazard existed?
2. Did the public health inspector have reasonable and probable grounds upon which to form the opinion that the requirements in the Order, including the requirement to close RVP by August 31, 2017, were necessary to decrease the effect of or to eliminate the health hazard?

VI. ANALYSIS AND REASONS

Did the public health inspector have reasonable and probable grounds upon which to form the opinion that a health hazard existed?

30. At the hearing, the Appellants raised questions about the seriousness and/or existence of the health hazard identified by the Respondent. The Appellants provided photos of RVP taken in the summer time in which no sewage is visible. They disagreed that the photos taken in February 2017 show evidence of sewage breaking through the ground surface. They submitted there were no tests done or expert reports provided to confirm that there was contamination of the property or the adjacent river. They questioned why now, after 32 years that this system has been in existence, there are concerns about polluting the river. They submitted that they were mitigating the impact of the failed system by contracting a hauler to regularly remove loads of sewage.
31. The Respondent testified about the grounds upon which she based her opinion that a health hazard existed. Summarizing, she stated that the sewage system was not functioning, as confirmed by the MOECC and the Appellants' own engineer. Although periodic pumping helped somewhat, there had not been continuous compliance with the MOECC pump out orders. Further, pumping out was not a permanent solution because, in her estimation based on the information in the engineer's report, the pump outs only dealt with 20% of the sewage. The balance, therefore, was escaping, both through continued seasonal discharge to the surface, and the rest of the year through ongoing movement through the soil downstream. She indicated that this inadequately treated sewage contains bacteria, such as E. Coli, that can cause disease in people.

32. Regarding the summer photos provided by the Appellants, she stated that when the ground is not frozen, the sewage passes through the porous soil under the road and so it is not visible on the surface. It continues, however, to travel downstream, for example to the adjacent river. Regarding the Appellants' allegation that sewage is not visible in the February 2017 photos, Ms. Fry testified that the slush over the road adjacent to a sewage bed, in spite of sub-zero temperatures, indicates leakage, as does little or no snow over a sewage bed. The Respondent stated that tests to establish contamination were not necessary because the information from the MOECC and the Appellants' own engineer indicates that the sewage system has failed. In addition, she noted that she is a certified building inspector for sewage systems and therefore no further expert reports were needed.
33. The Appeal Board finds there were reasonable and probable grounds for the Respondent to form the opinion that a health hazard existed, and continues to exist, due to the failed sewage system at RVP for the reasons that follow.
34. The uncontroverted evidence is that the sewage system for treating and removing domestic waste from RVP has failed. As stated by Kresin, the Appellants' own engineering firm, in its report of May 2017, the "plants are currently not functioning as designed and many components have been removed and/or are not functional.". As further stated in this report:

The existing sewage treatment system is not functioning as designed and is therefore not adequately treating sewage prior to its introduction to the disposal field. In addition to this, effluent has been observed to break out from the disposal field resulting in the MOECC issuing Orders to the Owner.

35. Both APH and MOECC officials have witnessed periodic sewage breakouts on the property in 2015, 2016 and 2017. The Appeal Board finds persuasive the testimony of Ms. Fry and the Respondent about these periodic sewage breakouts, as well as their view that there is ongoing downstream contamination resulting from the failed system, given their onsite observations and their expertise. In this regard, the Appeal Board notes that Ms.

Fry, as a Senior Environmental Officer, conducts inspections at commercial, industrial and residential locations to assess compliance with environmental acts and regulations including the *Ontario Water Resources Act* and its regulations. Regarding the Respondent's expertise, the Appeal Board notes that in addition to being a public health inspector, she is also a certified building inspector of sewage systems. The Appeal Board finds persuasive the Respondent's testimony that the sewage, which is inadequately treated by the failed system, contains disease causing bacteria that could be harmful to residents of RVP and persons downstream.

36. Further, regarding the impact of periodic pumping, Ms. Fry testified that the Appellants have not complied with the order to pump out weekly between March and July 2017. The Appellants were unable to provide sufficient evidence to refute this. Further, the Appeal Board notes that the Respondent indicated that the pumping was only able to redirect a small percentage of the sewage and was, thus only meant to be a temporary solution.

Did the public health inspector have reasonable and probable grounds upon which to form the opinion that the requirements in the Order, including the requirement to close RVP by August 31, 2017, were necessary to decrease the effect of or eliminate the health hazard?

37. The Appellants submitted that they had exercised "due diligence" and were not to blame for the delays in addressing the MOECC's concerns with the sewage system. They submitted they were prepared to spend the necessary funds to repair the system, but not to replace it. If RVP is closed on August 31, 2017, they will not proceed to repair the system. They expressed concern about the residents being displaced from their homes. They submitted that they require three more months to repair the system, and they would commit to weekly pump outs during those three months.
38. The Respondent submitted that given the Appellants' poor history of compliance with MOECC orders and demonstrated lack of commitment to fixing the sewage problem, and the fact that sewage is now continuously being released to the road and the river, the only way to protect the residents and others downstream is to close RVP. Once the residents have vacated, there will be no more sewage. The Respondent also expressed concern for

the residents. She indicated that notice was given in June in part in order to give residents time to make alternative arrangements before winter begins.

39. The Appeal Board finds that the Respondent had reasonable and probable grounds upon which to form the opinion that the requirements in the Order, including the requirement to close RVP by August 31, 2017, were necessary in order to decrease the effect of or to eliminate the health hazard.
40. The Appeal Board notes that the Appellants were ordered by the MOECC in September 2014 to hire an expert and submit an action plan to bring the facility into compliance by August 28, 2015. They failed to do this. The deadline was extended to December 18, 2015, and they failed to meet this deadline. In December 2015, MOECC ordered that the Appellants submit a completed ECA application for fixing the failed sewage system by May 11, 2016. The Appellants failed to meet this deadline. In February 2017, APH issued an order under the *HPPA* due to recurrence of sewage leakage over the road on RVP, and advised the Appellants that RVP may be closed if they do not provide an action plan by March 3, 2017. On March 3, 2017, an action plan was provided. An extension was given by the MOECC to obtain the required assimilative site capacity study by June 22, 2017. As of the hearing date, there is no evidence to confirm that the Appellants have agreed to pay for and proceed with this study, which is essential to completion of the ECA application. The Appeal Board notes there are many steps to be completed after this study is obtained. The Appellants did not provide any specific plan or details to indicate how a MOECC approved functioning sewage system could be delivered in three months.
41. In light of this history, the Appeal Board finds the Respondent had reasonable and probable grounds to form the opinion that the requirements in the Order, including the requirement to close RVP on August 31, 2017, are necessary to decrease the effect or to eliminate the ongoing health hazard.

42. The Appeal Board acknowledges the hardship this Order will cause for many of the RVP residents. However, this is not a basis for the Appeal Board to disregard the requirements of the *HPPA*.

VII. DECISION

43. The Appeal Board confirms the Order dated June 8, 2017. The appeal is denied.

ISSUED August 16, 2017



Beth Downing



James Beamish



Carla Whillier