



Province of  
British Columbia

# Environmental Appeal Board

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## **APPEAL NOS. 2004-WAT-003(a) and 2004-WAT-004(a)**

In the matter of an appeal under section 40 of the *Water Act*, R.S.B.C. 1996, c. 483.

**BETWEEN:** Joanne McClusky  
Terry and Joyce Mulligan **APPELLANTS**

**AND:** Assistant Regional Water Manager **RESPONDENT**

**AND:** Daniel Point Projects Ltd.  
Sunshine Coast Regional District **THIRD PARTIES**

**AND:** Ralph James  
Peter J. Nelson **PARTICIPANTS**

**BEFORE:** A Panel of the Environmental Appeal Board  
Alan Andison, Chair

**DATE:** Conducted by way of written submissions  
concluding on May 14, 2004

**APPEARING:** For the Appellants: Joanne McClusky, Counsel  
For the Respondent: Alec Drysdale  
For the Third Parties:  
Daniel Point Projects Ltd.: Les Allan  
Sunshine Coast Regional  
District: Christopher S. Murdy, Counsel

## **STAY DECISION**

### **APPLICATIONS**

On March 8, 2004, Alec Drysdale, Assistant Regional Water Manager (the "Regional Manager"), Land and Water British Columbia Inc. ("Land and Water B.C."), issued two separate decisions authorizing the transfers of appurtenancy of two conditional water licences ("CWL's"). As part of the transfers, CWL 119342 and CWL 119338 were issued to the Sunshine Coast Regional District (the "Regional District") in substitution for CWL 62623 and CWL 17526, respectively, which were previously held by the Garden Bay Waterworks District. Together, CWL's 119342 and 119338 authorize the diversion of a maximum of 11,315,000 gallons per year of water from

Hotel Lake, located near Pender Harbour, British Columbia. The water may be used for the purpose of waterworks.

On March 31, 2004, Joanne McClusky and Terry and Joyce Mulligan appealed the Regional Manager's decisions on behalf of the Area "A" Quality Water Association ("AAQWA"). The Appellants also requested a stay of the decisions, pending a decision on the merits of the appeals.

This decision addresses the Appellants' applications for a stay of the Regional Manager's decisions. These applications were conducted by way of written submissions.

## **BACKGROUND**

The Regional District supplies water to many local homes and other users through the Regional District's waterworks system. The Regional District holds several water licences that permit it to divert water from Hotel Lake for the purpose of supplying the waterworks system. The Regional District holds CWL 119333, which it held prior to the transfer CWL's 119342 and 119338. CWL 119333 authorizes the diversion of 10,950,000 gallons per year of water from Hotel Lake for waterworks purposes.

In addition, the Regional District now holds CWL's 119342 and 119338, which are the subject of the present appeals. CWL 119342 authorizes the diversion of 4,015,000 gallons per year of water from Hotel Lake during the year, and has a precedence date of March 24, 1972. CWL 119338 authorizes the diversion of 7,300,000 gallons per year of water from Hotel Lake during the year, and has a precedence date of March 15, 1946. The authorized diversion works are described in both licences as "diversion structure, pump, pipe, tanks and distribution system." The licences state that the construction of the works has been completed, and the water is being beneficially used. The licenses also state that the land upon which the water is to be used, and to which the licenses are appurtenant is "all the lands within the boundaries of" the Regional District. Appurtenancy refers to the attachment of a water licence to specific lands.

In its submissions on these stay applications, the Regional District advised that existing demand for water by users of its waterworks system exceeds the maximum amount that is authorized under CWL 119333. Specifically, the Regional District states that existing users of its water supply system consume approximately 13,500,000 gallons per year. Moreover, the Regional District projects that demand for water from its system will increase in the future, due to in-fill developments on existing properties as well as new developments contemplated in the Regional District's Official Community Plan.

In particular, the Third Party, Daniel Point Projects Ltd. (the "Developer") proposes to build a number of homes on land that it owns within the Regional District's boundaries. The Developer plans to supply those homes with water from the

Regional District's waterworks system. In its submissions on these stay applications, the Developer states that it must satisfy the Regional District that the new homes will have a water supply before it can obtain a permit to begin development.

Before the Regional District obtained the licences that were previously held by the Garden Bay Waterworks District, it applied for a new water licence. Specifically, on May 15, 2003, the Regional District applied for a licence that would authorize the diversion of an additional 14,000,000 gallons of water per year from Hotel Lake.

Land and Water B.C. referred the Regional District's licence application to existing licensees on Hotel Lake, and consulted with local residents and community associations about the proposed licence. Many licensees and local residents expressed strong opposition to the proposed licence.

In his consideration of the Regional District's application, the Regional Manager also considered several reports prepared by Jacques Whitford Environmental Limited and Hugh H. Harris & Associates Inc. Consulting Engineers on behalf of the Developer, which discussed the potential effects of the proposed licence.

In a letter dated November 19, 2003, the Regional Manager advised the Regional District that more detailed hydrological studies would be required "to substantiate the availability of water in Hotel Lake, and the impact further withdrawal of water from the lake" before the new licence could be issued. He also advised that the application would be "parked" pending the completion of a more comprehensive study.

In January 2004, the Regional District applied to transfer the appurtenancy of the licenses that are the subject of these appeals. It should be noted that, in its submissions on the stay applications, the Regional District advised that it has resolved to withdraw its application for a new licence if the appeals are dismissed.

The Regional Manager has the authority to transfer the appurtenancy of a licence under section 19 of the *Water Act*, as follows:

### **Transfer of appurtenancy**

- 19** (1) On the application of the holder of a licence, approval or permit and on compliance by the holder and by the proposed transferee with the comptroller's or the regional water manager's directions as to giving notice, the comptroller or the regional water manager, on the terms he or she considers proper, may
- (a) transfer all or part of the rights and obligations granted and imposed under the licence, approval or permit from the holder to the proposed transferee, and

(b) issue a new licence, approval or permit to the transferee or transferor, or both, and determine the appurtenancy of the licence, approval or permit.

The Regional Manager did not notify the existing licensees on Hotel Lake of the Regional District's application to transfer the appurtenancy of the licences.

On February 27, 2004, Brian Croft sent a letter via email to Glen Davidson, Manager of Water Licensing and Dam Safety with Land and Water B.C., concerning the proposed transfer. Mr. Croft stated that he is a property owner and a water licence holder on Hotel Lake. Mr. Croft also stated that he had recently learned of the application to transfer the "dormant and unused" licences to the Regional District, and that he objected to the transfers. He questioned why Land and Water B.C. had not advised licensees of the proposed transfer, and he requested that the licenses held by the Garden Bay Waterworks District be "revoked" for non-use.

In a reply dated March 5, 2003, Mr. Davidson stated that applications for transfers of licenses are "not generally referred to other licensees" because a transfer "does not allocate additional quantity [sic] of water." He also stated that Land and Water B.C. staff "have not come across any evidence to suggest that the Garden Bay Water Works (Hotel Lake) water licences were never used."

On March 8, 2004, the Regional Manager issued his decisions authorizing the transfers of appurtenancy, and issuing CWL's 119342 and 119338 in substitution for CWL's 62623 and 17526, respectively. His decisions resulted in no changes to the maximum quantities of water that may be diverted from Hotel Lake under those licences.

On March 31, 2004, Ms. McClusky filed a Notice of Appeal of the Regional Manager's decisions with the Board. She advised that she was appealing on behalf of the AAQWA, and she attached a list of the names and addresses of the members of the AAQWA. That list states that the AAQWA consists of owners of waterfront property on Hotel Lake and licenced and unlicensed water users drawing water directly from Hotel Lake. Many, but not all, of the people on that list have signed next to their names to indicate that they authorized Ms. McClusky to act on their behalf regarding the stay applications and the appeals of the Regional Manager's decisions. Her Notice of Appeal was also accompanied by a letter requesting a stay of the decisions.

In a letter dated April 5, 2004, Ms. McClusky advised the Board that she and Terry and Joyce Mulligan will be the "official appellants" representing the other appellants. Ms. McClusky also advised that she owns land on Hotel Lake, and that the Mulligans own land on Hotel Lake and draw water from the Lake as unlicensed water users.

By a letter dated April 6, 2004, the Board requested that the Regional Manager provide addresses for any individuals who may be "objectors" as defined in the

*Water Act*. In response, on April 22, 2004, the Regional Manager provided a list of 10 water licensees on Hotel Lake.

By a letter dated April 26, 2004, the Board invited those 10 licensees to participate in the appeals as Participants, and asked them to respond by May 18, 2004. Of those contacted, Ralph James and Peter Nelson accepted Participant status. They provided no submissions regarding the stay applications.

The Regional Manager and both of the Third Parties oppose the stay applications.

## **ISSUE**

The sole issue arising from these applications is whether the Panel should grant a stay of the Regional Manager's decisions pending a decision on the merits of the appeals.

Section 40(7) of the *Water Act* grants the Board the authority to order a stay:

**40** (7) An appeal does not act as a stay or suspend the operation of the order being appealed unless the appeal board orders otherwise.

In *North Fraser Harbour Commission et al. v. Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997) (unreported), the Board concluded that the test set out in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) applies to applications for stays before the Board. That test requires an applicant to demonstrate the following:

- (1) There is a serious issue to be tried;
- (2) Irreparable harm will result if the stay is not granted; and
- (3) The balance of convenience favours granting the stay.

The onus is on the applicant to demonstrate good and sufficient reasons why a stay should be granted under this test.

The Panel will address each aspect of the *RJR MacDonald* test as it applies to these applications.

## DISCUSSION AND ANALYSIS

### Serious Issue

In *RJR MacDonald*, the Court stated that, as a general rule, unless the case is frivolous or vexatious or is a pure question of law, the inquiry as to whether a stay should be granted should proceed to the next stage of the test.

The Appellants submit that the appeals raise two serious issues to be tried. One is that the Appellants should have been notified by the Regional Manager of the application to transfer licences. Another is that the transfer will cause decreased water levels in Hotel Lake, which will have serious environmental and economic consequences, and will result in irreparable harm to the Lake and the Appellants' interests.

The Regional Manager maintains that water licenses under appeal are not new licences, and were issued under the principle that the water was available and there are no serious environmental or economic consequences from the water use. He advised that he will not re-visit a past decision to issue a licence unless there is new scientific evidence that warrants a reconsideration of the licence. The Regional Manager submits that, in the present case, the Appellants have provided no scientific evidence to support their assertion that the transfer of the licences will have serious environmental or economic consequences.

The Regional District submits that the Appellants have raised issues of administrative fairness, but that there is insufficient evidence to support their claims regarding the effects of the licence transfers.

The Developer submits that the appeals raise no serious issue to be tried. It submits that the transfers authorize no new diversion of water from Hotel Lake, and the Appellants have failed to establish that the transfers will cause the environmental or other impacts that are asserted by the Appellants. The Developer further submits that there is no evidence that any person's rights will be injuriously affected by the transfers.

In determining whether the appeal raises serious issues, the Panel has considered the parties' submissions on this point as well as the Appellants' grounds for appeal. Their grounds for appeal against the Regional Manager's decisions are summarized as follows. The Appellants maintain that the transfer of the licenses should have been treated the same as the issuance of new licences would have been, and should have been subject to greater due diligence by the Regional Manager regarding the potential effects of the "new" water use authorized by the licenses. The Appellants argue that the Garden Bay Waterworks District did not use the licenses, and that the diversion of over 11,000,000 gallons of water per year from Hotel Lake will cause harm to the environment, including the aquatic habitat and organisms within Hotel Lake, as well as downstream fish and fish habitat. The Appellants argue that the Regional Manager erred by assuming that the licences

were in use, and by ignoring environmental changes that have occurred since the licences were issued in 1946 and 1972. The Appellants also argue that the Regional Manager's decisions will have negative effects on the Appellants' economic interests, and that he should have notified licensees and landowners on Hotel Lake of the proposed transfer.

The Panel finds that the issues raised by the Appellants are neither frivolous, vexatious nor do they raise pure questions of law. The Panel finds that the appeal demands a predominantly factual inquiry and raises issues about procedural fairness and the reasonableness of the Regional Manager's decisions. Specifically, the Panel notes the Appellants' concern that the Regional Manager failed to give existing licensees notice of the proposed transfers and failed to offer them an opportunity to be heard before the decisions were issued. In addition, the Panel notes the Appellants' concern that the decisions could cause harm to the environment and the Appellants' interests if use of the licences by the Regional District results in a decrease in water levels in Hotel Lake that the Regional Manager failed to consider.

Accordingly, the Panel finds that there are serious issues to be tried.

#### Irreparable Harm

The second factor to be considered is whether the Appellants will suffer irreparable harm if the stay is denied. As stated in *RJR-MacDonald*, at page 405:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

In assessing the question of irreparable harm, the Panel is also guided by this statement from *RJR-MacDonald*:

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)).

The Appellants submit that there will be irreparable environmental and economic harm if a stay is denied. They submit that any water withdrawn from Hotel Lake can never be replaced, and no amount of money can compensate for that loss. The Appellants maintain that the sole source of water into the Lake is rainfall, and the

annual input from rainfall is less than the amount lost through evaporation, seepage, natural outflow, water licences, and outflow to support downstream fisheries. The Appellants also maintain that, prior to being transferred, the licences were held for emergency back up purposes only, and were never used. They submit that the Regional Manager erroneously believed that the licences were part of the current water use on the lake. The Appellants maintain that water diverted under CWL's 119342 and 119338 will increase the summer draw down of the lake by 0.5 metre, and delay the refilling of the lake that normally occurs in the fall, resulting in serious environmental and economic harm.

Specifically, the Appellants argue that the withdrawal of water under the licences will exacerbate reductions in the lake's water level, and will kill plant and animal life along the edges of the lake, including shallow grasses where Peamouth chub and endangered 3-Spined Stickleback breed. The Appellants submit that Hotel Lake's trout populations, which feed on Peamouth chub, will then suffer. Moreover, the Appellants submit that domestic water use already removes over one third of a metre of the best quality water from the bottom of the lake each year, and that this reduces the natural "flushing" of water, nutrients and dead plankton out of the lake, effectively shutting down the natural filters and pumps that keep the lake alive. They further submit that Hotel Creek, which drains from Hotel Lake, is a salmon-bearing stream, and was dry from June 5 to December 5, 2003, due to reduced water levels in the lake. The Appellants submit that the diversion of water under the licences will make these circumstances worse.

Furthermore, the Appellants maintain that property values will suffer, as many homes and businesses that rely on Hotel Lake will lose their source of water, and reduced water levels in the lake may cause effluent from septic systems to reach the surface of the land.

In support of those submissions, the Appellants submitted numerous documents, including affidavits signed by Nina Whittaker and Joe Harrison, which address the non-use of the licences when they were held by the Garden Bay Waterworks District. In particular, Mr. Harrison attests that he attended a meeting of the Regional District's Board of Directors on May 5, 2004, and was advised by John Rees, the Director for Area "A", that the licenses have not been used for many years and that the Garden Bay Waterworks District never had equipment that would pump water from Hotel Lake.

The Appellants also provided reports by Dr. John Field and Dr. Brian Guy to support their assertion that there are errors and deficiencies in the reports by Jacques Whitford Environmental Limited and Hugh H. Harris & Associates Inc. Consulting Engineers, which were considered by the Regional Manager when the Regional District applied for the new water licence on Hotel Lake.

The Regional Manager submits that the Appellants' claims of adverse effects are based on the assumption that the lake is in an annual deficit situation. The Regional Manager maintains that there is no acceptable scientific evidence establishing that the lake is in an annual deficit, or surplus, condition. The Regional Manager maintains that the transfers of appurtenancies in this case do not allow more water to be withdrawn from the lake than was already licenced.



The Regional District submits that the transfers have minimal impacts, because they are not new licences. Furthermore, the Regional District maintains that any water withdrawn under the licences will be replaced by rain, and water that is not withdrawn will evaporate or flow elsewhere. It submits that the water in the lake is not a fixed resource that will be depleted and never replaced; rather, water levels go up and down naturally.

The Developer submits that the amount of water authorized for withdrawal under the transferred licences was previously approved by the relevant government agencies many years ago, and was confirmed by the reports prepared by Jacques Whitford Environmental Limited and Hugh H. Harris & Associates Inc. Consulting Engineers. The Developer further submits that the Appellants have failed to provide any acceptable scientific evidence that irreparable harm will be done to their interests or the environment if a stay is denied and water is used under the transferred licences.

In support of those submissions, the Developer refers to the following findings in the Board's decision in *Albert Peterson v. Regional Water Manager* (Appeal No. 97-WAT-06(a), September 11, 1997) (unreported) (hereinafter *Peterson*):

The Board finds that Mr. Petersen has failed to demonstrate irreparable harm to his own interest or to the public interest will result if a stay is not granted. Mr. Petersen has not produced any evidence showing that his concerns for the aquifer, the natural features, his property, or his water rights will be realized if he does not receive a stay. He refers to the possibility of a number of changes to the aquifer by the interception of spring and ground-water and by the construction of the storm sewer system. However, he does not produce any evidence indicating what the harm to the aquifer actually will be and why it will be irreparable. Rather, he alleges matters without explanation or supporting facts... However, the Board notes that generally the presence of unresolved issues does not constitute irreparable harm. The fact that unresolved issues exist is one reason why the case will be heard by the Board in a full appeal on the merits. It is not grounds for granting a stay.

[underlining added in Developer's submissions]

### *Panel's findings*

The Panel notes that much of the parties' submissions address the merits of the decision to transfer the licences, including whether the transfers result in a "new" withdrawal of water from the lake, and the potential long-term effects of that "new" withdrawal on the environment and the interests of the Appellants as landowners and users of water from the lake. For example, most of the matters addressed in the reports of Dr. Field, Dr. Guy, Jacques Whitford Environmental Limited, and Hugh H. Harris & Associates Inc. Consulting Engineers address the potential effects

of a new withdrawal of water from Hotel Lake. Furthermore, the Panel finds that there is conflicting evidence concerning whether the Garden Bay Waterworks District had equipment to pump water from Hotel Lake. For example, the licences state that the works are constructed, but the affidavits submitted by the Appellants indicate that the works were not constructed or have become inoperable. There is also conflicting evidence concerning the potential short-term and long-term effects of the withdrawal of water under the licences.

The Panel finds that those matters go to the merits of the appeals, and are not matters that should, or can properly, be decided in the course of considering this preliminary stay application. Moreover, the Panel finds that the resolution of the conflicting evidence regarding those matters should be addressed when the Board hears the merits of the appeals, because that will allow the parties to make full submissions on those points, and the authors of the reports may testify and be cross-examined on their evidence.

With that in mind, the Panel finds that the Appellants have raised the possibility of irreparable harm to their interests and the environment if a stay is denied and water is withdrawn from Hotel Lake in accordance with the transferred licences prior to a decision on the merits of the appeals. For example, there may be harm to fish and fish habitat if water levels in the lake decline more than they usually do during the summer months. If that occurred, the harm would likely be irreparable because it would be difficult to quantify that harm in monetary terms and it is uncertain whether damages could be recovered.

However, for the purposes of this stay decision, the Panel is unable to conclude on a balance of probabilities, based on the evidence currently before the Panel, that there will be irreparable harm to the Appellants' interests and the environment if a stay is denied. The Panel recognizes that there are unresolved questions of fact that may be decided in the Appellants' favour once the merits of the appeals are considered by the Board. However, the Panel agrees with the Board's findings in *Peterson* that "generally the presence of unresolved issues does not constitute irreparable harm. The fact that unresolved issues exist is one reason why the case will be heard by the Board in a full appeal on the merits."

For these reasons, the Panel finds that the Appellants have not established that there will be irreparable harm to their interests if a stay is denied.

#### Balance of Convenience

The balance of convenience test requires the Panel to determine which of the parties will suffer greater harm from the granting of, or refusal to grant the stay applications pending a determination of the appeals on their merits.

The Appellants submit that a stay would force the Developer to consider stopping any sales of lots in its development until the Regional District is able to provide a reliable source of water that will not harm the lake. The Appellants submit that any

inconvenience to the Regional District and the Developer would be strictly financial, while the harm to the lake, downstream fish, and the Appellants would be disastrous and irreparable.

In addition, the Appellants maintain that the Regional District is considering spending \$150,000 to install a 700-metre pipe to connect its waterworks on Hotel Lake with those of the Garden Bay Waterworks District, so that the Regional District could purchase water from the latter on an interim basis, until a detailed scientific analysis of the lake is completed. The Appellants submit, therefore, that a stay would cause no prejudice to the Regional District or the Developer. In support of those submissions, the Appellants rely on the affidavit of Mr. Harrison, in which he states that Mr. Rees informed him that the Regional District's Infrastructure Committee was going to make those recommendations to the full Board of Directors at a meeting scheduled for May 15, 2004.

Finally, the Appellants submit that a stay would protect prospective purchasers of lots in the development from building homes without being aware that there is no water for them to use.

The Regional Manager submits that granting a stay will likely have a negative effect on economic activities within the Regional District.

The Regional District submits that the balance of convenience favours denying the stay applications. It maintains that demand for water from its waterworks system already exceeds the maximum amount that it can withdraw under CWL 119333, which authorizes the diversion of 10,950,000 gallons per year, because current demand is almost 14,000,000 gallons per year without taking into account new developments. The Regional District submits that the transferred licences provide additional water so that it will no longer be out of compliance with CWL 119333. Without the transferred licences, the Regional District will be unable to serve its existing customers without exceeding CWL 119333, and will be unable to approve any new developments within the Regional District's boundaries, all of which would create inconvenience. In addition, the Regional District submits that a stay would effectively remove existing rights under the transferred licences, which would change the status quo.

The Developer submits that the balance of convenience favours denying the stay applications. The Developer argues that the Appellants have provided no evidence that its or the public's interest in the environment will suffer any harm if a stay is denied. Conversely, the Developer submits that it will suffer irreparable financial harm if a stay is granted. Specifically, the Developer submits that it will be forced into bankruptcy if a stay is granted, as it will be unable to sell any homes if potable water is not available. The Developer submits that it had to prove that water would be available to the development before it could obtain a development permit, and the licence transfers allowed it to make that assurance. The Developer notes that it is required to provide any potential purchaser with a disclosure statement containing, among other things, a disclosure of the services to be provided, including water supply. It submits, therefore, that the Appellants are wrong to

suggest that the Developer would, or even could, sell lots to prospective purchasers in the absence of an assured water supply. In addition, the Developer submits that the obligation to provide water passes to the Regional District once the homes are sold, and it is unlikely that the Regional District would provide water to the development if the Regional District risked being unable to fulfill its obligation to provide water to the residents.

The Developer submits that it is already heavily invested, financially and otherwise, in the successful and responsible development of its lands. The Developer maintains that it has paid for numerous upgrades to local roads, fire hydrant systems, and the Regional District's water supply system, and has dedicated parkland, all of which provide benefits to the local community at large and not just the needs of purchasers of lots in its development. For example, the Developer says that it has installed filtration and chlorination equipment, as well as a new back-up pump and pump house, at the Hotel Lake pumping station.

The Panel has reviewed all of the submissions and has concluded that the potential harm to the interests of the Regional District and the Developer, if a stay is granted, outweighs the potential harm to the Appellants' interests if a stay is denied.

The Panel notes that a stay is an extraordinary remedy which must be based on a strong *prima facie* case, and the Appellants have the onus in this case, as the applicants for a stay, to provide clear evidence to justify granting such a remedy. While the Appellants have raised the possibility of irreparable harm if a stay is denied, the Panel has already found that the Appellants have not established there will be irreparable harm to the Appellants' economic interests, or their interests in the environment, if a stay is denied. In addition, the Panel notes that there is no evidence that new homes in the development will actually be occupied and drawing water from the Regional District's Hotel Lake system before the merits of the appeals are decided. The Panel also finds that there is no evidence that a stay is necessary to prevent an immediate threat to the environment. A stay would not address the Appellants' concerns that there is already excessive draw down of the lake during the summer and that Hotel Creek is dry during the summer and fall. If the transferred licences do represent a "new" water use, as asserted by the Appellants, a stay would have no impact on any other water uses that may have contributed to the conditions in Hotel Lake and Hotel Creek in previous years.

Conversely, the Panel finds that if a stay is granted, the Regional District and the Developer will suffer significant inconvenience and may suffer economic harm, some of which would be irreparable. Specifically, the Regional District would be unable to serve the needs of existing water users without exceeding the maximum water allocation under CWL 119333, and may be unable to approve any new developments, all of which could cause inconvenience and economic harm to the Regional District. Even if the Regional District approves an interim arrangement to purchase water from the Garden Bay Waterworks District if a stay is granted, as suggested in Mr. Harrison's affidavit, the Regional District would incur significant

expenses to do so, including the cost of installing pipes and purchasing the water needed to serve existing and new demand for water.

In addition, the Panel notes that a stay would suspend the water rights that already exist under the transferred licences, which would result in *prima facie* harm to the Regional District's rights as the holder of the licences.

With regard to the Developer, the Panel finds that the losses it may suffer, should a stay be granted, are strictly financial in nature. The Panel also finds that a stay would result in delay to the Developer's completion of the development and sale of the lots, perhaps for several months, should the Regional District be unable to assure adequate water supplies. Such a delay would undoubtedly inconvenience the Developer, and could cause it to suffer economic hardship.

Finally, with regard to the Appellants' submission that a stay would protect prospective purchasers of lots who may be unaware of the situation with the water supply, the Panel notes that the appeals remain outstanding and it appears that the Developer would be obligated to disclose to prospective buyers that the outstanding appeals may affect the availability of water to the development.

In summary, based on the evidence, the Panel finds that granting a stay would only result in the Regional District being unable to withdraw enough water to meet the demands of current users without being out of compliance with its licence, and would delay the completion of the Developer's project. On the other hand, denying a stay would lead to no immediate threats to the environment, and would allow the Regional District to withdraw enough water to meet existing water demand.

Considering all of the above, the Panel finds that the balance of convenience weighs in favour of denying a stay of the Regional Manager's decisions.

**DECISION**

In making this decision, the Panel of the Environmental Appeal Board has carefully considered all of the evidence before it, whether or not specifically reiterated here.

For the reasons provided above, the Panel finds that the Appellants' applications for a stay of the Regional Manager's decisions are denied.



Alan Andison, Chair  
Environmental Appeal Board

June 16, 2004