

**In the matter of the Environmental Assessment Act  
S.B.C. 2002, c.43  
(Act)**

and

**In the matter of a  
Substantially Started Determination  
under Section 18(5) of the Act**

for the  
**Jumbo Glacier Resort Project**

of  
**Glacier Resorts Ltd.**

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**Reasons for Minister's Determination**

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On June 18, 2015, pursuant to Section 18(5) of the Act, I, the Minister of Environment, determined that the Jumbo Glacier Resort project has not been substantially started.

## 1. NATURE AND SCOPE OF THIS DETERMINATION

This determination is about whether the Jumbo Glacier Resort project was, in my reasonable opinion, substantially started by October 12<sup>th</sup>, 2014 as required by the *Environmental Assessment Act* (Act).

Every environmental assessment certificate (EAC) has a deadline by which the project must be substantially started in the reasonable opinion of the Minister. That deadline is usually five years and can be extended, on one occasion only, for an additional five years to a maximum of 10 years.

If I determine the project was substantially started, then the EAC, including any conditions, remains in effect for the life of the project. If I determine that the project had not been substantially started, then the EAC will be deemed to have expired on October 12, 2014.

## 2. BACKGROUND

The Jumbo Glacier Resort project is a year-round ski resort development in the Jumbo Creek valley, 55 km west of Invermere. At full build-out, the project would include an estimated 104 hectare resort base area consisting of a hotel with 6,250 bed units (which includes 750 bed units for staff accommodation), condominium vacation homes, and associated amenities. The Controlled Recreation Area, which includes areas licenced for ski runs and connecting territory, encompasses approximately 5,925 hectares and includes lift-serviced access to several nearby glaciers at an elevation of up to 3,400 metres.

An extensive process was undertaken by the Environmental Assessment Office (EAO) to ensure that Glacier Resorts Ltd (GRL), the holder of the EAC, and the Ktunaxa Nation Council (KNC) and Shuswap Indian Band had an opportunity to provide their views on whether the project was substantially started.

In a letter dated October 3, 2014, GRL, KNC and the Shuswap Indian Band were invited to provide EAO with any information they considered relevant to the making of the substantially started determination. Submissions were received from all three. Following receipt of these submissions, GRL, KNC and the Shuswap Indian Band were also given an opportunity to respond to each other's submissions. GRL and KNC provided submissions in response.

On December 11, 2014, EAO advised that the determination process would be delayed until a compliance determination could be made on whether the construction of two buildings (the day lodge and the service building) are "completely outside of the avalanche hazard area" as required by Condition 36 of the EAC. EAO concluded it would prudent to wait until there was greater clarity on the compliance status before proceeding further with the substantially started determination.

On March 21, 2015, GRL provided EAO Compliance and Enforcement with an engineering avalanche risk assessment. On April 24, 2015, EAO Compliance and Enforcement concluded its investigation and determined that the day lodge and the service building were not in compliance with Condition 36. An order was issued requiring GRL to cease construction on the day lodge and service building locations to minimize the extent of the non-compliances. GRL had stopped any construction as of October 12, 2014 but the order prevents GRL from recommencing construction at those building locations.

Shortly thereafter, the substantial start determination process resumed.

To assist in my determination, EAO prepared a report. GRL, KNC and Shuswap Indian Band were given an opportunity to review a draft version of the report for accuracy and to confirm that it accurately reflected their views on the impact of the compliance determination on the substantially started determination.

The report was provided to me on June 5, 2015, along with the submissions made by GRL, KNC and the Shuswap Indian Band.

In addition to the process outlined above, EAO Compliance and Enforcement staff conducted an inspection on October 13, 2014 to document all construction activity completed by end of day October 12, 2014. The report from this inspection was made available to GRL, KNC and the Shuswap Indian Band.

All the submissions by GRL, KNC and the Shuswap Indian Band are available on the EAO website.

I also had an opportunity to personally visit the site on October 11, 2014 to familiarize myself with it and see first-hand the progress that was made on the project.

### **3. SUBSTANTIALLY STARTED DECISIONS GENERALLY**

The Act requires that the holder of the EAC must have “substantially started the project”. “Project” is defined as any activity that has or may have adverse effects or the construction, operation, modification, dismantling or abandonment of a physical work, but the term “substantially started” itself is not defined.

It is worth emphasizing that the Act does not require that a project be operational nor does it require the project to be substantially “completed” or “constructed”. Also, because the Act includes the word “substantially”, the project must obviously be more than merely started.

There is no specific formula to determine if a project is substantially started and the practice of EAO is to consider each project on a case by case basis in its particular context. This makes sense given the wide range of projects reviewed under the Act.

The EAO User Guide provides the following general questions as guidance:

- Has there been a significant investment of time, effort, and resources to physically develop one or more main project elements?
- Does the activity amount to a significant or important step to develop the overall project, or is the activity considered ancillary, secondary, or temporary?
- Would the proponent have undertaken the activity regardless of the project?

Although the Act does not define substantially started, the Supreme Court of British Columbia provided assistance in its interpretation in a recent court case<sup>1</sup> as follows:

- The definition of project is intended to address primarily physical activities affecting the land environmentally, as contrasted with bureaucratic activities, for example, which do not.
- The decision maker should focus less on the permits which have been granted and the money expended, and more on what has taken place physically at the site.
- Temporary structures at the site, if they will soon be removed, followed by remediation, are less important to consider than structures which will be in place for the duration of the project.
- To have been substantially started, the project needs to be started in its essentials in a real and tangible way.

#### **4. APPLICATION TO THIS SUBSTANTIALLY STARTED DETERMINATION**

Before beginning my consideration, I want to stress that my role here is limited only to the question of whether the project has been substantially started and not in any way to reassess the merits of the project. I recognize that there are strongly held views both for and against this project, but these views are entirely irrelevant to the question of whether the project is substantially started.

##### **(a) Physical Works Undertaken**

Based on the guidance from the courts, it is clear that I should focus on what physically took place on the site after October 12, 2004, but before October 12, 2014. Because it occurred within this period, the timing of construction was not an issue for this project.

GRL identified the following nine physical works undertaken:

1. The first floor slab and foundation preparations for the day lodge at the resort base;
2. The first floor slab of the service building at the resort base;
3. The foundation anchors for the departure station of a quad chairlift;
4. A seasonal bridge to span Karnak Creek within the resort base area;
5. A temporary bridge at kilometre 15.8 of the Jumbo Forest Service Road;
6. The permanent bridge at kilometre 15.8 of the Jumbo Forest Service Road;

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<sup>1</sup> Taku River Tlingit First Nation v. British Columbia (Minister of Environment), 2014 BCSC 1278

7. A well to provide potable water to the resort has been drilled and tested;
8. Clearing and grading of approximately 250 metres of construction access road within the resort base to allow access to the day lodge, service building and the lift base foundation locations from the Jumbo Forest Service Road; and,
9. Improvements to site specific locations along approximately 4 km of the existing Jumbo Forest Service Road, including brushing, installation of culverts and ditch maintenance.

KNC raised a number of issues regarding why the partial construction of the service building and the day lodge should not be considered in my determination. They challenged the quality of the construction and questioned whether the structures were located outside of the tenure area. They also stated that the project was not in compliance with conditions of its EAC, including Condition 36, which requires that:

“The proponent will ensure that the proposed residential and commercial structures will be located completely outside the avalanche hazard area”.

Of these issues, I have concluded that only the compliance with Condition 36 of the EAC has any significant bearing in this determination.

On the quality of the construction, GRL provided evidence from professional engineers attesting to its design and soundness. In light of that information, I do not think it is appropriate for me to consider this issue further. I also accept the information provided by Mountain Resort Branch that the development was within the tenure boundaries.

Unlike Condition 36, the non-compliance with the other conditions found by EAO Compliance and Enforcement and mentioned by KNC in their submissions does not have a direct linkage to the physical works constructed. Non-compliance with conditions other than Condition 36 does not raise the possibility that existing physical structures will need to be removed, or that they will contribute to a lesser degree to the overall completion of the project. Accordingly, non-compliance with conditions other than Condition 36 is not a factor in my determination. While I want to stress that I do not in any way condone non-compliance, it must also be recognized that it is not unusual for a project to need to address issues of non-compliance, during the course of its development.

As noted above, EAO Compliance and Enforcement conducted an investigation and determined that the day lodge and the service building were not in compliance with Condition 36.

GRL was ordered to cease construction at both the day lodge and the service building until the order is rescinded or the construction is in accordance with the certificate (construction could be brought into compliance with the certificate by an approved amendment to the certificate; alternatively, GRL could, subject to obtaining any necessary approvals, remove or abandon the current structures). EAO Compliance and Enforcement did not proceed with further enforcement because there was no immediate risk to the environment or human safety. As noted above, construction had stopped as of October 12, 2014.

The determination of non-compliance was based largely on an expert report prepared by Dynamic Avalanche Consulting, provided by GRL in response to EAO's request of December 11, 2014. The report concluded that:

- "The Service Building is mostly located within the Red Zone (high risk) for which the CAA [Canadian Avalanche Association] (2002) guidelines recommend construction of new buildings not normally permitted. This recommendation is intended to apply to occupied structures, either temporarily or permanently occupied."
- "The Day Lodge is located mostly within the Blue Zone (moderate risk), for which the CAA (2002) guidelines recommend: Construction of new buildings, such as industrial plants and temporarily occupied structures, possibly permitted with specified conditions. Conditions may include structures reinforced for avalanche forces, construction of avalanche defences and requirement for evacuation plans or a combination of these."

GRL advised EAO that it is "committed to implementing all of the recommendations in the Dynamic Avalanche Consulting report with respect to the day lodge and service building. Mitigation efforts for the day lodge will include structural reinforcement as necessary, a comprehensive avalanche control and safety plan (with frequent avalanche control via explosives and the implementation of reliable, all-weather systems such as Gazex), and an evacuation plan for both employees and the general public. Likewise, the service building will be converted to a structurally reinforced storage building that will not be accessed during winter". Unless these commitments are incorporated into an environmental assessment certificate, they are not legally binding and GRL's ability to implement them is dependent on obtaining an amendment to the certificate and possibly other authorizations.

The first question for me to consider is what, if any, impact does EAO's determination that the service building and day lodge are out of compliance with Condition 36 have on the substantially started determination. GRL suggested that the referenced compliance matters are administrative in nature and should have no bearing on the substantially started decision. They point out that neither the EAO User Guide nor the courts identify compliance as a matter relevant to the substantially started determination. KNC, on the other hand, argued that the non-compliance with Condition 36 should be a key consideration.

In my opinion, the question of the impact of non-compliance should be addressed as a matter of weight.

Given GRL's intention to apply for amendments to the EAC that, if approved, would allow completion of the day lodge and completion of a structure at the location of the service building, there is a possibility that these structures will remain in their current locations and contribute to the overall development of the project. On the other hand, if environmental or safety issues arise in the course of reviewing an amendment, and the EAC is not amended to allow completion of these facilities, it is possible that they will need to be repurposed (e.g. as storage, summer view platform) or abandoned. The

possible need to develop a service building and day lodge at another location, suggest a lower weighting may be accorded to the current structures

I have concluded that both the service building and day lodge should be credited towards the substantially started determination to some degree because they are works, albeit imperfect works, that have been constructed as part of the overall project.

However, it is not reasonable to count them to the full extent I would have if they were compliant, particularly given it is not certain that an amendment to the EAC will be granted.

With respect to service building, the impact of the non-compliance, as noted by the KNC, is significant since it is clear that the building cannot be used for its intended purpose because it is located in a red zone. It is possible that the building may have some use as a structurally reinforced storage building that will not be accessed during winter. However, that was not its original and approved purpose. Accordingly, the weight I apply to the commencement of the construction of this structure is considerably less than it would be if it had been a service building that was compliant with the EAC.

Similarly, the weight I attribute to the day lodge construction is somewhat less than I would attribute to it had it been fully compliant as of October 12<sup>th</sup>, 2014. It is possible that the day lodge, with proper mitigation measures and an amendment to the EAC, could be used for its intended purpose. I also note that it is only partially in the blue zone.

Although the service building and the day lodge were the focus of most of the submissions, there were also other activities that should be considered. There was less controversy regarding these aspects of the project. They are also overall less significant to the project than the beginning of construction of the service building and the day lodge.

Foundation anchors for a quad chairlift have been constructed. No issues were raised with respect to this work and I find that the partial construction of the quad chairlift should be given full weight in this determination.

A temporary seasonal bridge spanning Karnak Creek within the resort base area was purchased and installed. It was removed for the winter of 2014/15, but GRL intends to re-install the bridge for next year's use. As a temporary structure it has less weight than a permanent structure, but I conclude it should be afforded some weight in this determination.

GRL constructed both a temporary bridge and a permanent bridge at kilometre 15.8 of the Jumbo Forest Service Road. Once the permanent bridge was in place, GRL removed the temporary bridge. I have counted both the permanent bridge and the temporary bridge as contributing to the start of the project; however, I have not counted these works the same as if they were the final and permanent access solution for the resort. Permanent access to the resort is ultimately to be by way of a new access road on the north side of Jumbo Creek. While the alignment of this new road has been approved,

construction has not yet begun. While the majority of the cost of the bridge at kilometre 15.8 work was borne by the municipality and not by GRL, the bridge is an element of the overall project and I have not discounted it based on who paid for the work.

GRL constructed approximately 250 metres of new roadway within the resort base to allow access to the day lodge and service building. Improvements to the Jumbo Forest Service Road were undertaken with regards to sediment and erosion control.

GRL drilled and tested a well to provide potable water to the resort for Phase 1.

GRL purchased a platter lift. The lift is to be located at the Project site but is not yet installed. I do not give any weight to this element given the need to focus determinations on what has taken place physically at the site.

In reviewing this work, I found the costs of each item a useful but rough indicator of the significance of the physical effort undertaken; however, the expenditure of money alone is not an indicator of a substantially started project.

#### **b) Plans, Studies and Permits**

While the court has suggested that greater emphasis be placed on physical works, I do not think I am prevented from considering the building plans and design work, or environmental plans, studies and permits related to the works constructed for the project or other physical activities that are part of the project. I do think work and money undertaken to develop these plans, studies and permits has some bearing in the substantially started determination.

In this project, there was clearly work undertaken to develop plans and obtain permits, and to the extent this work and these expenditures were necessary for the completion of the physical activities and works that are part of the project and have occurred or been developed, it is a factor in assessing whether or not those activities and works constitute a substantial start. However, in my view it is a minor rather than a major consideration. I have considered this work and expenditures in assessing the substantial nature of the physical activities and works that have been completed, and credited GRL for that work.

However, because the Farnharm Glacier lodge and permanent access road on the North side of Jumbo Creek have not been constructed, I have not considered tenuring, permitting design work for that lodge and engineering work for that road in my determination.

### **5. OVERALL DETERMINATION AND CONCLUSION**

A key issue raised in the submissions was what yardstick or benchmark the activity should be measured against. In most circumstances, the elements of the project as described in the EAC and the project description are the logical and principled place to start.



In this project, I acknowledge it is not as simple as that, given the phased nature of the development and the master development process. It is important to recognize that a ski resort is developed in phases on a projected, but not binding, timeline.

KNC urged me to assess substantial determination against the full build out of the development. I do not think that is a reasonable approach given the phased nature of this type of development.

GRL, on the other hand, argued that the appropriate benchmark was the components of the project required to begin operations. I also have difficulty with this approach. I am troubled by the fact that such a benchmark is not grounded in the project as described during the environmental assessment, the master planning process or the tenuring of the project. Moreover, GRL did not point to a detailed document or plan that specifically set out its plan to achieve the start of operations. In the absence of such a plan, a start of operations threshold can be defined in many different ways. KNC, for example, argues that start of operations requires significantly more activity than put forth by GRL.

For these reasons, I think the more reasonable approach is one based on what is described as the phase 1 of the project. Phase 1 contains the following:

Lifts and Ski Areas

- Glacier Dome gondola
- Two chairlifts in Jumbo Valley
- Three glacier lifts on Glacier Dome
- Mountain top restaurant/refuge
- Glacier Dome mid-station
- Glacier Dome base day lodge
- Main resort day lodge

Services

- Tertiary sewer treatment plant
- Emergency power generation
- Water wells
- Piped propane system
- BC Hydro connection

Development

- Lodge/hotel/condominiums
- Bed and breakfast establishments
- 30 townhouse condominiums
- 25 chalets
- A heli-ski lodge location with overnight accommodation for guests will be offered to RK Heliski Panorama to provide for a base of operations in the heart of its territory

This does not mean that progress is required on every element of the phase 1 but it is a useful comparator in considering the substantial nature of work completed.

GRL also raised in its submissions a number of mitigating factors that they felt should be considered in my evaluation. While many of these factors would be relevant in determining whether an extension should be granted to the EAC, I do not think I should consider them in the context of a final substantially started threshold. Put another way, I do not think the threshold can be adjusted based on these mitigating factors. While I am sympathetic to the challenges that all projects face in proceeding to construction, it is not unusual or unique for projects to need to overcome challenges. In addition, the source of these challenges may be varied and subject to competing points of view. For these reasons, it is more appropriate to focus on the physical elements of the project as they were present on October 12, 2014.

After consideration of the submissions of GRL, KNC and the Shuswap Indian Band, the guidance from the court, EAO's report and my own observations during my site visit, and having weighed carefully the evidence before me regarding activities undertaken to develop the project as outlined above, I have determined that the project, in my reasonable opinion, had not been substantially started by October 12, 2014.

While it is clear that some construction has been started, I am not convinced that the physical activity undertaken on the various components meets the threshold of a substantially started project.

I have reached this conclusion taking into account the fact that the service building and day lodge have been determined to be non-compliant, but balancing that with the possibility that GRL may, through an amendment to its EAC, ultimately been allowed to continue to use these buildings.

I have also turned my mind to the question of whether the project would be substantially started if the service building and day lodge were fully compliant with Condition 36. I have concluded that even if these partially constructed structures were weighted fully, the work undertaken would still not be sufficient to meet the substantially started threshold.

Accordingly, the environmental assessment certificate expired on October 12, 2014.



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Honourable Mary Polak  
Minister of Environment

Signed this 18<sup>th</sup> day of June, 2015