

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: October 03, 2016

CASE NO(S): PL160537

PROCEEDING COMMENCED UNDER subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Waterloo Standard Condominium Corporation #402
Subject: Minor Variance
Variance from By-law No.: 150-85
Property Address/Description: 311 George St. North
Municipality: City of Cambridge
Municipal File No.: A-10/16
OMB Case No.: PL160537
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OMB Case Name: Waterloo Standard Condominium Corporation v. Cambridge (City)

Board Rule 107 states:

107. Effective Date of Board Decision A Board decision is effective on the date that the decision or order is issued in hard copy, unless it states otherwise.

Pursuant to Board Rule 107, this decision takes effect on the date that it is e-mailed by Board administrative staff to the clerk of the municipality where the property is located.

Heard: September 7, 2016 in Cambridge, Ontario

APPEARANCES:

Parties

Counsel*/Representative

Waterloo Standard
Condominium
Corporation No. 402

D. N. Fanstone

City of Cambridge

K. Yerxa*

Region of Waterloo

F. McCrea*

DECISION DELIVERED BY ANNE MILCHBERG AND ORDER OF THE BOARD

[1] Waterloo Standard Condominium Corporation No. 402 (“Applicant” and “Appellant”) has appealed the decision of the Committee of Adjustment (“CoA”) to deny a minor variance application for the property at 311 George Street North, Cambridge (“the Subject Lands”). In refusing relief from City of Cambridge Zoning By-law No. 150-85 (the “ZBL”), the CoA refused to allow the Applicant to utilize a private well that was dug on the lands on 2015.

[2] The variance sought was an exemption from s.2.1.22 of the ZBL, which does not permit a private well within the City where municipal water is available, with limited exceptions (none of which are applicable to this request).

[3] The Subject Lands contain a low-rise, 94 unit condominium community built between 1987 and 2002 on 8.9 hectares of land abutting the Grand River. Over time, twenty two private sprinkler systems fed by the municipal water supply were installed by residents to serve private areas, but common area landscaped spaces in the community have not been irrigated to date.

[4] In an effort to irrigate the common area landscape, the Applicant had a private well drilled at the eastern end of the Subject Lands in April, 2015. After drilling occurred, the Applicant was made aware that the well did not comply with the City’s ZBL and with the City’s and Region’s Official Plans (OPs). Though advised by the City and the Region that they would not support use of the private well, the Applicant decided anyway to apply for relief to the CoA.

[5] Donald Fanstone, a resident at the condominium complex and a member of its board of directors, appeared on behalf of the Applicant, and in favour of the well. The City of Cambridge (“City”) and the Region of Waterloo (“Region”) both appeared in opposition to the well.

[6] John Vos of the City's Planning Department and Carolyn Crozier of the Region provided qualified, expert opinion in land use planning matters. Both examined the proposal against the four tests of the *Planning Act*. Eric Hodgins, Manager of Hydrogeology and Source Water for the Region, provided expert hydro-geological opinion evidence on Regional water supply and quality policies and on the potential risks and consequences of digging private wells in "Urban Areas". (The Subject Lands are identified as being in an "Urban Area" in both the Regional and City OPs.)

[7] No expert witnesses appeared in support of the Application.

[8] With the consent of the City and Region, the Board allowed Mr. Fanstone to give testimony on behalf of the Applicant and also to cross-examine the City's and Region's witnesses, given the limitation of his resources at hand.

ANALYSIS AND DISPOSITION

[9] Mr. Fanstone testified that he considered the CoA's refusal of the variance to be an unfair means of forcing residents to pay for water "to irrigate their property when the [ground] supply is freely available". It was his view that the use of groundwater for irrigation was a more responsible approach to watering landscape plants, and that using treated drinking water for this purpose was wasteful and not in the public interest.

[10] Furthermore, Mr. Fanstone felt that there was inequity in the City's and Region's opposition to the Applicant's proposed private well. In certain limited instances, he noted, private wells had been permitted in rural areas in Waterloo Region. In his view, private wells ought to be permitted in Urban Areas too.

[11] It was his submission that installing a backflow valve to prevent ground water from mixing with the municipal water supply would mitigate what he thought to be the single risk associated with the private well.

[12] The Board found Mr. Fanstone's testimony to be well organized, articulate and thoughtful, and found his cross-examination of the other witnesses to be incisive yet respectful. However, the evidence that Mr. Fanstone gave did not have an expert technical foundation, imperative in matters of hydrogeology. Nor did Mr. Fanstone analyze the requested variance and its appeal against the four tests of the *Planning Act* that a minor variance must meet (s.45.(1)). As for his cross-examination of the other witnesses, it served to provide both the Board and Mr. Fanstone with sound technical and policy reasons as to why the private well should not be permitted.

1. Is the Variance Minor?

[13] Variances can be deemed "minor" if they have no adverse impacts.

[14] Compelling evidence on the issue of impact came from Mr. Hodgins, the Region's hydrogeologist, who testified that there are significant risks associated with the proposed private well.

[15] To provide background, Mr. Hodgins testified that the Region is the largest municipality in Ontario to rely almost entirely on groundwater for its water supply. The Region depends on 120 publicly-managed artesian wells and on one surface intake, and has established a system of well-head protection areas ("WHPAs") to ensure that there are no problematic land uses or interfering private wells in these zones.

[16] Evidence was given that the puncturing of new private "straws" (well shafts) into the earth could easily intersect with and disrupt contaminated ground layers, causing preferential pathways for contamination of the water table. In addition, the private removal of water in an unpredictable and uncontrolled manner could have an impact on the supply patterns of the water source that the entire Region depends on.

[17] Mr. Hodgins noted that the proposed private well was only 800 metres away from two municipal artesian wells, presenting a real risk to the public wells. In his professional opinion, allowing the proposed well could quite potentially contaminate the

water table, not a “minor” impact. The backflow valve remedy that Mr. Fanstone spoke of would do nothing to mitigate the risk of disrupting contaminated layers of soil.

[18] No hydrogeological studies had been undertaken by the Applicant on or around the Subject Lands to prove that the proposed private well would not cause water quality problems or negatively affect supply. Mr. Fanstone conceded under cross-examination that he had not considered the prospect of new private wells disrupting any existing ground contamination.

[19] Even if such studies had been proffered, Mr. Hodgins testified, the Region would likely oppose this and all other applications for private wells in any Urban Area in the Region. Though Mr. Hodgins recognized that Board decisions are not intended to serve as precedents, he feared that even one allowance of a private well in an Urban Area would encourage others to seek similar permissions, magnifying the potential risk to municipal water quality and quantity.

[20] The parties all agreed that private wells had been permitted in rural areas many years ago, and Mr. Fanstone cited a private well – now being decommissioned - at Saginaw Golf Course in defense of the Applicant’s proposal. Mr. Hodgins’ response was that in the early to mid-2000s, the Region started to look at prohibiting private wells as a means of providing more certainty about the quality and quantity of water for the Region’s population.

[21] It was Mr. Hodgins’ evidence that the Region, as water supplier, had an obligation under the Province’s *Clean Water Act* to develop and implement policies to protect public health, control water quality and quantity, and to mitigate associated risks. Accordingly, the Regional and City OPs were amended to contain protective policies, including a hierarchy of servicing that mandates the use of municipally-supplied water over that from private wells. These policies do not permit private wells but for a few exceptions. Following suit, the City’s ZBL was amended in 2005, to severely restrict the instances in which private wells could be allowed.

[22] Mr. Hodgins' evidence was uncontroverted, and accepted by the Board.

2. Does the Proposed Variance Maintain the General Intent and Purpose of the Region's and City's Official Plans ("OPs")?

[23] The Subject Lands are identified as "Urban Area" in both the Regional and City OPs. Ms. Crozier gave evidence that the Region's OP does not permit the use of private wells in Urban Area designations, and Mr. Vos gave very similar evidence with respect to the City's OP. These policies flow from the Region's obligation to protect public health, to control water quality and quantity, and to mitigate associated risks. This evidence was uncontroverted.

[24] Mr. Fanstone testified that he and his condominium association fully understand that the proposal lacks conformity to both OPs. Simply stated, they do not agree with the OP policies disallowing private wells in Urban Areas and are seeking approval from this Board notwithstanding.

[25] It is the Board's finding that the proposed variance does not meet the general intent and purpose of either the Regional or City OP.

3. Does the Proposal Maintain the General Intent and Purpose of the Zoning By-law?

[26] ZBL regulation 2.1.22 (also known as ZBL No. 266-05), enacted in 2005, does not permit a private well within the City where municipal water is available, with limited exceptions:

2.1.22 Private Wells

1. Notwithstanding the provisions of this by-law, a private well shall not be permitted as primary or accessory structure on any lands within the limits of the City of Cambridge where a municipal water distribution system is available within the road right-of-way abutting the property except as follows:

- (a) well which legally existed on the date of the adoption of this by-law;
- (b) well which is installed for the purposes of environmental site remediation, water monitoring or site-de-watering;
- (c) property used for non-residential purposes which, prior to the adoption of this by-law, relies upon a legally, existing private well for purposes other than human consumption such as irrigation, cooling, heating or manufacturing purposes;
- (d) property located in an area that is permitted under the Cambridge Official Plan or Zoning By-law to be on private water service;

2. Any well which is not being used shall be decommissioned in accordance with Regulation 903 of the Ontario Water Resources Act, and any amendments thereto.

[Exhibit 1, Tab C-5].

[27] The Subject Lands are located within the City, and there is already a municipal water distribution system on the property. Uncontroverted evidence was provided by Mr. Vos that the proposed private well does not meet any of the exceptions in s. 2.1.22.

[28] It is the view of this Board that the proposal does not fall within the general intent and purpose of the ZBL because allowing a use which is expressly not permitted is not an adjustment or tweak of the ZBL. This ZBL control implements the near-prohibition on private wells found in the Regional and City OPs, intended to protect municipal water quality and quantity.

4. Is the Proposal Desirable for the Appropriate Development of the Land?

[29] As noted by all four witnesses, the lands were developed with 92 residential condominium units a number of years ago, and the purpose of the proposed private well is simply to provide ground water irrigation for the condominium's on-site common landscaped areas.

[30] All the witnesses agreed that there is on-site municipal water service, which could be used to irrigate the landscape. However, the Applicant's position is that it does not want to irrigate with municipal water, and it considers the use of treated water a waste of resources (public water and the Applicant's money).

[31] In the Board's view, the Applicant's interest (saving on municipal water bills by irrigating directly from a ground source) has to be weighed against the greater public interest. The Board does not find the proposed private well to be appropriate or in the public interest given the un-quantified but real risk it poses to the ground water quality and supply that serves the entire Region.

PROVINCIAL POLICY STATEMENT, 2014 ("PPS")

[32] The uncontroverted evidence of Mr. Vos and Ms. Crozier was that allowing the proposed private well would not be consistent with s. 1.6.1.1 (dealing with planning for sewage and water services) and s. 2.2.1 of the PPS (dealing with protection of water quality and quantity). The Board concurs.

DECISION

[33] For a variance application to fail, all that is required is that one test under s. 45(1) of the *Planning Act* is not met. In this case, the Board finds that none of the four tests have been satisfied, and, additionally, that the proposal is not consistent with the PPS.

ORDER

[34] Accordingly, the Board orders that the appeal is dismissed and the variance is not authorized.

"Anne Milchberg"

ANNE MILCHBERG
MEMBER

If there is an attachment referred to in this document,
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Ontario Municipal Board

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