

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: April 07, 2017

CASE NO(S): F1150006

PROCEEDING COMMENCED UNDER subsection 8(2) of Ontario Regulation 586/06 of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended

Referred by:	Town of Leamington
Objector:	Krause Fisheries Inc.
Objector:	Dorothy and Kathleen Lesperance
Objector:	Sophie and Bahji Macksoud
Objector:	Mike Makhlouf
Subject:	To permit local improvements, including the construction of a sanitary sewer along Pelee Drive from Bevel Line Road (County Road 33) at Seacliff Drive East to the entrance of Point Pelee, and for new sanitary sewer connections to each property
Municipality:	Town of Leamington
OMB Case No.:	F1150006
OMB File No.:	F1150006
OMB Case Name:	Lesperance v. Leamington (Town)

Heard: May 2016 and January 2017 in Leamington, Ontario

APPEARANCES:

Parties

Counsel/Representative*

Town of Leamington	R. Orton
Krause Fisheries Inc.	W. Jakob P. Hrastovec
Sophie Macksoud	B. Macksoud*
Dorothy and Kathleen Lesperance	K. Lesperance*

Mike Makhlouf

Self-represented

DECISION DELIVERED BY J. V. ZUIDEMA AND ORDER OF THE BOARD

BACKGROUND

[1] The Municipality of Leamington (“Municipality”) applied to the Ontario Municipal Board (“OMB”) for approval to undertake the construction of a sanitary sewer along Pelee Drive from Bevel Line Road (County Road 33) at Seacliff Drive East to the entrance of Point Pelee, and new sanitary sewer connections to each property along this stretch of road.

[2] The Municipality noted that it had been awarded federal and provincial government funding for 50% of the total project cost up to a maximum of \$4 million.

[3] Four objections were received under subsection 8(1) of Ontario Regulation (“O.Reg.”) 586/06 of the *Municipal Act, 2001*, with respect to local improvement charges for the construction of this infrastructure.

[4] Ms. Sophie Macksoud, (“Macksoud objection”) an objector, was represented by Mr. Bahij Macksoud as her representative. In her objection filed with this Board, she cited the following reasons:

- a. A neighbouring two-kilometre section is the location of the "Bennie Properties" was given a reduced rate even though potentially a development with several hundred homes may be built on it. The expenses for the sewer should be distributed equitably.
- b. The project has an inflated project cost as it is the same price as other similar roadworks but the overall cost is not reduced when taking into consideration grant money.
- c. The project will place 25% of the financial cost of the project on 5% of the population benefitting from the road works.

[5] Mr. Paul Krause, principal and owner of Krause Fisheries Inc. (“Krause objection”) was another objector. Materials filed with the Board reveal that the Krause objection was based on the following reasons:

- a. The charge is excessive and inequitable as is the method by which it was assessed, namely by equivalent residential unit. No justification was given as to why it is assessed as the equivalent of 10 residential units.
- b. The property is a vacant industrial building, formerly used as a fishery processing plant that is located on a protected wetland area on which development is restricted. The project will have little to no benefit to their property.
- c. The property's market value is not much more than the assessed value suggesting that the assessment is grossly unfair.

[6] Ms. Dorothy Lesperance and Ms. Kathleen Lesperance (“Lesperance objection”) were represented by Ms. K. Lesperance as agent. The Lesperance objection contained in the Board’s file stated the following reasons:

- a. Their property is not a typical residential home as it is a seasonal home used only during the summer months. Assessing it at the price of a full time family home is not fair.
- b. Phases 3 and 4 are mostly cottages and cannot be developed because of its proximity to the lake and farms.
- c. Previous road work damaged the existing roads into Point Pelee Park and is unacceptable.

[7] Finally, Mr. Mike Makhlouf, owner and operator of a local eating establishment known as Freddy's (“Makhlouf objection”) stated the following in his reasons to the Board:

- a. Freddy's was charged an unfair rate as compared to other businesses in the area.

The hearing began in May 2016 but did not conclude in the allotted hearing time. As such, a follow-up session was scheduled for January 2017. The Municipality presented its case-in-chief at the first session along with Mr. Makhoul and the January session was used for the Board to hear from the remaining objectors and the Municipality's reply case.

[8] On behalf of the Municipality, I heard from the following witnesses:

- a. Mr. Allan Botham, who was qualified and accepted as an expert in civil engineering;
- b. Mr. Robert Molliconi, who was qualified and accepted as an expert in civil engineering;
- c. Ms. Danielle Truax, who was qualified and accepted as an expert in land use planning;
- d. Mr. Tim Byrne, who is the Director of the Essex Region Conservation Authority ("ERCA");
- e. Mr. Karl Tanner, qualified and accepted as an expert in land use planning; and,
- f. Ms. Shannon Belleau, the Manager of Environmental Services with the Municipality.

[9] On behalf of the Krause objection, I heard from the following witnesses:

- a. Mr. Paul Krause;
- b. Ms. Carol Wiebe, who was qualified and accepted as an expert in land use planning.

[10] On behalf of the Macksoud objection, I heard from Mr. Bahij Macksoud as a lay witness. Mr. Macksoud eloquently set out his concerns as reflected in his presentation which was marked as Exhibit 17. He was concerned with the amount being allocated and saw no advantage to combining the Bevel Line and Point Pelee Drive projects.

He believed that by combining the two projects, those properties along Bevel Line bore the lion's share of the project costs; costs, which should have been attributable to those along Point Pelee Drive. He also was of the view that the proposed improvements would benefit the Municipality at large so should not be seen as "local." As such, recovery of costs should be made through general taxation not on the benefitting property owners as the Municipality had suggested.

[11] On behalf of the Makhoulf objection, I heard from Mr. Makhoulf as a lay witness. Mr. Makhoulf attended for the first day of the hearing in May 2016 but then did not return. His concerns were that the amount allocated for his property was excessive and did not adequately take into account the seasonal nature of his business. He did acknowledge that his liquor license for his restaurant provided for a 200-seating capacity.

[12] There were no witnesses called or evidence presented on behalf of the Lesperance objection. Ms. Lesperance was in attendance during the May 2016 session and conducted a cross-examination of some witnesses but did not return for the January 2017 sitting.

[13] Of those who testified, no objector actually objected to the project itself. The concerns were only with respect to the charges attributable to each property. In fact, Messrs. Krause and Macksoud were sincere to state that they could see the benefit of the proposed infrastructure works.

[14] In the end, I prefer the evidence presented by the Municipality to determine that the objections are dismissed and the Municipality should proceed with the proposed sewer construction.

MOTION TO STRIKE BOTHAM WITNESS

[15] Before I provide my analysis concerning my decision on the objections, I provided an oral ruling with respect to an objection raised by counsel to the Krause objection on a procedural matter. Specifically, on the first day of the hearing, Mr. Hrastovec objected to the Board hearing from Mr. Botham stating that because he was an employee of the Municipality, his evidence should be seen as being biased or skewed in favour of his employer.

[16] I heard submissions from Mr. Hrastovec on this Motion to strike Mr. Botham as a witness, which Motion had been brought without notice to the other parties. I heard response submissions from the Municipality along with other interested parties.

[17] I dismissed that objection as I did not agree with the assumption suggested by counsel.

[18] To be clear, experts, employed in government offices who appear at OMB hearings and testify in their respective disciplines, are considered to be objective and impartial when providing their advice. The requirement for an expert to provide their objective opinions is central to the Board's function. The Board must make a decision which is in the public interest and complies with all operative legislation and policies. It can only do so with the benefit of unvarnished and unbiased evidence.

[19] To accept Mr. Hrastovec's contention would strike out every expert who is compensated for their preparation and evidence. Who pays the bill should not be the standard to measure the competence or credibility of a witness. In the end, the expert stands alone to support his or her opinions.

[20] As such, Mr. Hrastovec's Motion was dismissed.

ANALYSIS AND REASONS FOR DECISION ON MERITS

[21] To return to my decision on the merits of this matter, I relied primarily on the evidence of Messrs. Botham and Molliconi to come to my conclusion. It should be noted that no expert engineering evidence was called to challenge the expert evidence of these two witnesses. Although Counsel on the Krause objection did a commendable job in cross-examination, it was not sufficient to undermine the opinions provided by these gentlemen.

[22] I also prefer the evidence of Ms. Truax over that of Ms. Wiebe. To be candid, Ms. Wiebe was quite forthright in his evidence. She explained that she had been retained on the Krause objection in the interim period between the May and January sittings. Ms. Wiebe did not hear first-hand the evidence of Ms. Truax, who was called as part of the Municipality's case-in-chief. As such, she would have had to rely on the exhibits filed at the May session along with an account of what Ms. Truax said from those on the Krause team who had been in attendance.

[23] Given these circumstances, Ms. Wiebe did her best to respond to the planning evidence called by the Municipality but to use the vernacular, she was fighting this battle with one hand tied behind her back.

[24] The essence of the concerns raised by the Krause objection can be summarized as follows: the Krause property is significantly constrained as there is a Provincially Significant Wetland ("PSW") on the property and the lands are located in a floodplain area regulated by ERCA. Ms. Wiebe could not rationalize how the Municipality could allocate 10 Equivalent Residential Units ("ERUs") given the extensive limitations to development of this property.

[25] The ERUs was a standard measure created and deployed by the engineers to evaluate each property. In a nutshell, the method took into account the potential developable area along with the extent of sewage output. Ministry of the Environment ("MOE") Guidelines were used to ascertain flow rates. It was a method to translate a

commercial or institutional property into a residential equivalent. Messrs. Botham and Molliconi explained how using the ERU methodology was preferred over a straight calculated amount made solely on the basis of frontage.

[26] Mr. Botham testified that this was a mechanism to be able to compare “apples to apples” and take into account the unique circumstances of each property such as those with irregular shapes, those with environmental constraints and those with one-sided servicing.

[27] In reviewing the details of the approach, Mr. Botham also explained that he could understand that payment from each property owner might be onerous if payment was made as one-lump sum. As such, the Municipality had provided for a deferred payment schedule so to lessen the impact to property owners.

[28] Ms. Wiebe, however, was critical of the approach used as she argued that the methodology just did not take into account the practical limitations on the Krause property. Further she referenced policies both at a provincial level and at a regional level, which discouraged development in floodplain areas given concerns of public health and safety. She stated unequivocally that the onus rested with the Municipality to establish that the property, given its restrictions, warranted 10 ERUs and she had seen nothing to substantiate that conclusion.

[29] To address this criticism, the municipality called Mr. Tanner. Mr. Tanner was in attendance when Mr. Byrne of the ERCA testified. Mr. Byrne recognized restrictions on the property but said that as long as ERCA requirements were met, development was not impossible.

[30] Mr. Tanner explained that a PSW is not an automatic freeze to development. He testified that the standard 120 metres (“m”) buffer often applied along the boundary of a PSW can be reduced if proper Environmental Impact Statements (“EIS”) are submitted. The buffer, he suggested was not a prohibition to development.

[31] Further Mr. Tanner disputed the boundary of the PSW which had been identified by Ms. Wiebe. Specifically, he indicated that red-line shown on Ex. 16 reflects the boundary of the PSW, not the green-line.

[32] Further Ms. Wiebe conceded that she had not been in attendance when the Municipality's engineering experts gave their opinions. She understood that the Municipality had allocated a deduction for the assessment cost for the Krause property given the constraints and she understood that the development envelope identified by the municipal experts after taking into account all the constrained areas was approximately 1.5 acres.

[33] Mr. Molliconi had actually calculated 11 ERUs for a 1.5 acre parcel of developable land. Ms. Wiebe did not dispute the hard calculations; she disputed the likelihood of the parcel ever getting developed. The property had been a fishery many years ago but that industry had long ceased.

[34] A few years ago the property was up for sale citing development potential. Mr. Krause explained that his negotiations with a First Nations in this area did not bear any fruit. He was candid to say that the negotiations had been verbal and undertaken without the benefit of lawyers. Certainly Mr. Krause does not see the possibility of development on his parcel but as Mr. Tanner stated, someone else might.

[35] Also the notion that a fishery could be re-established on the Krause property was not dismissed entirely – Ms. Wiebe simply suggested that the possibility was remote.

[36] On such matters, the Board is required to assess the public interest and in this case, it is clear that the proposed infrastructure will ameliorate an existing condition which has on occasion resulted in raw sewage entering Lake Erie.

[37] Mr. Botham's evidence on this point was not disputed. During heavy rainfalls, pollutants and other effluents made their way to the lake via out-dated roadside ditches. While this basic form of storm-water collection might have been acceptable many years ago, standards for environmental protection have improved.

[38] The need to address this circumstance was not contested.

[39] While I sympathize with the objectors, I do not agree that the works proposed are not local in nature. The proposed sewer pipes will run along the properties of the objectors. Each can connect and this, in and of itself, is an improvement and benefit for those specific properties.

[40] Further, the works are in the public interest to address a long-standing and ongoing environmental concern for the Municipality.

[41] Finally, I see no reason for me to interfere with the methodology implemented by the Municipality to allocate ERUs to individual properties. I agree with the intent to achieve fairness and equity and that this calculation was used to achieve that balance.

ORDER

[42] For the foregoing reasons and analysis, the Board disposes of the objections and determines that the proposed works are local. As such, the draft By-Law as provided by the Municipality and for ease of reference, is appended to this decision and marked as "Attachment 1" is hereby approved.

“J. V. Zuidema”

J. V. ZUIDEMA
VICE CHAIR

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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The Corporation of the Municipality of Leamington**By-law XXX-16**

Being a by-law to approve the undertaking of the construction of a sanitary sewer and installation of sanitary sewer service connections construction of a sanitary sewer along Pelee Drive from Bevel Line Road (County Road 33) at Seaciff Drive East to the entrance of Point Pelee as a local improvement

Whereas, the Municipal Council deems it necessary to construct a sanitary sewer and install sanitary sewer service connections along Pelee Drive from Bevel Line Road (County Road 33) at Seaciff Drive East to the entrance of Point Pelee (the "Work");

And Whereas the estimated cost of the sanitary sewers and sanitary sewer service connections is \$8.40 Million plus applicable taxes;

And Whereas, Section 2 of Ontario Regulation 586/06 made pursuant to the Municipal Act, 2001 authorizes a Municipality to undertake certain work as a local improvement;

And Whereas Section 5(1) of Ontario Regulation 586/06 authorizes the Municipality to pass a by-law imposing a special charge on abutting or benefiting properties to raise all or part of the cost of work being undertaken as a local improvement;

And Whereas the Municipality was successful in securing Federal and Provincial grant funds in an amount of a maximum of \$4 Million of the project cost through the New Building Canada Fund - Small Communities Fund, which grant funds will be applied to reduce the special charges;

And Whereas Section 8(1) of Ontario Regulation 586/06 authorizes a Municipality to apply to the Ontario Municipal Board for approval to undertake work as a local improvement;

And Whereas the Municipality of Leamington applied to the Ontario Municipal Board for approval to undertake the Work as a local improvement;

And Whereas the Ontario Municipal Board provided its approval to undertake the Work as a local improvement after a hearing;

Now therefore by its Council the Municipality of Leamington hereby enacts as follows:

1. That the Work be undertaken as a local improvement.
2. That debentures may be issued for paying the cost of the Work.
3. The lots upon which the special charge will be imposed and the estimated special charge for each lot are described in Schedule 'A' to this by-law.
4. The actual special charge to be imposed be established in a special charges by-law in accordance with Section 30 of Ontario Regulation 586/06 which will be enacted following a hearing by the committee of revision.

Read a first, second and third time and finally enacted this day of
, 2017.

John Paterson, Mayor

Brenda Percy, Clerk