

Case Name:

Whiteley v. Guelph (City)

**IN THE MATTER OF subsection 51(39) of
the Planning Act, R.S.O. 1990, c.**

P.13, as amended

Appellant: Hugh Whiteley

Subject: Proposed Plan of Subdivision

Property Address/Description: 1897 Gordon Street

Municipality: City of Guelph

**IN THE MATTER OF subsection 17(24) of
the Planning Act, R.S.O. 1990, c.**

P.13, as amended

Appellant: Hugh Whiteley

Subject: Proposed Official Plan Amendment No. 46

Municipality: City of Guelph

**IN THE MATTER OF subsection 34(19) of
the Planning Act, R.S.O. 1990, c.**

P.13, as amended

Appellant: Hugh Whiteley

Subject: By-law No. (2011)-19234

Municipality: City of Guelph

**IN THE MATTER OF subsection 51(53) of
the Planning Act, R.S.O. 1990, c.**

P.13, as amended

Motion By: Thomasfield Homes Limited

Purpose of Motion: Request for an Order Dismissing the Appeal

Appellant: Hugh Whiteley

Property Address/Description: 1897 Gordon Street

Municipality: City of Guelph

**IN THE MATTER OF subsection 17(45) of
the Planning Act, R.S.O. 1990, C.**

P.13, as amended

Motion Request By: Thomasfield Homes Limited

Purpose of Motion: Request for an Order Dismissing the Appeal

Appellant: Hugh Whiteley

Subject: Proposed Official Plan Amendment No. 46

Municipality: City of Guelph

**IN THE MATTER OF subsection 34(25) of
the Planning Act, R.S.O. 1990, c.
P.13, as amended**

Motion by: Thomasfield Homes Limited

Purpose of Motion: Request for an Order Dismissing the Appeal

Appellant: Hugh Whiteley

Subject: By-law No. (2011)-19234

Municipality: City of Guelph

[2012] O.M.B.D. No. 379

Municipal File No.: 23T-08505, OMB

Case No.: PL110916, OMB File No.:

PL110916, OMB File No.: PL110917, OMB File No.: PL110918

Ontario Municipal Board

Panel: J.V. Zuidema, Vice-Chair

Decision: May 14, 2012.

(21 paras.)

Appearances:

Thomasfield Homes Limited: R. Mullin, counsel, A. Anderson (student-at-law), counsel.

Hugh Whiteley: J. Croome, counsel.

City of Guelph: S. Smith, counsel, S. Worsfold, counsel.

D Four Guelph Developments Ltd.: S. Zakem, counsel.

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

1 Thomasfield Homes Limited ("Thomasfield") brings a Motion to Dismiss the appeal of Hugh Whiteley ("the Appellant"). The Motion is supported by the City of Guelph ("the City") as well as a neighbouring developer, D Four Guelph Developments Ltd. ("D Four"). Thomasfield has filed an

application for approval of a draft plan of subdivision to develop its property at 1897 Gordon Street in the City of Guelph in Wellington County ("the subject property") and proposes the development of a subdivision with a minimum of 205 residential units consisting of single detached, townhouse and apartment dwellings. Through the materials filed with this Board, Thomasfield is proposing 209 residential units which include 21 single detached homes, 36 townhouse units and 152 apartment units. The draft plan of subdivision also includes blocks for stormwater management, open space and future development.

2 Further, Thomasfield has also submitted an application for an Official Plan Amendment (City of Guelph OPA No. 46) to amend the City of Guelph Official Plan to redesignate the subject property from General Residential to High Density Residential ("OPA No. 46").

3 Finally Thomasfield has submitted an application for a Zoning By-law Amendment (Zoning By-law No. (2011-19234) to amend Zoning By-law No. (1995)-14864, as amended, and rezone the subject property from Agricultural (A) Zone to Specialized Single Detached residential (R.1C-18) Zone, Specialized Cluster Townhouse (R.3A-45) Zone, Specialized General Apartment (R.4A-41) Zone, Specialized General Apartment (R.4A-42) Zone, Specialized General Apartment (R.4A-43) Zone and Conservation Land (P.1) Zone ("ZBA").

4 Council for the City of Guelph granted the applications. Hugh Whitely appealed these decisions, pursuant to subsections 51(39), 17(24) and 34(19) of the *Planning Act*, stating the following reasons:

* The City should be required to complete a Secondary Plan on the lands surrounding the subject property to refine the allocation of land uses, the limits of developable land, and the configuration of roads/ services. Without a Secondary Plan on the surrounding lands there is no context to consider the proposal.

* The Applicant should be required to conduct a more detailed Environmental Impact Study that includes: landscape, habitat, linkage and groundwater recharge function for the southern portion of the subject property. This should be done in the context of the subject property being within the Paris Moraine ridge.

* There should be no development on the southern and western portions of the subject property (specifically Lots 1 to 21, Block 25, and Part of Blocks 22 and 24). These lands should be preserved as a natural heritage area in keeping with the existing natural heritage overlay. This would also preserve significant portions of the Paris Moraine.

* With respect to the conditions of draft approval, conditions 13, 15 and 25 should be more detailed.

* The development should be modified to include appropriate parkland dedication instead of the cash-in-lieu provision in condition 52.

5 Thomasfield's Motion seeks to dismiss the appeals against the OPA, ZBA and Draft Plan of Subdivision. Thomasfield argues that no planning evidence has been filed by the Appellant in response and this is a fatal flaw which must result in the dismissal of his appeals. Further Thomasfield argues that with respect to the issues raised by the Appellant to support his appeals, those issues belong to the Appellant and no one else. Mr. Whiteley is the sole Appellant. To be specific and as one example, the Appellant raises the lack of a secondary plan for the area whereas Thomasfield contends that the City has clarified this issue for the Appellant on numerous occasions in the past. The City has stated that Thomasfield's applications conform to the South Guelph Secondary Plan as well as the South Guelph District Centre Study.

6 Subsections 17(45), 34(25) and 51(53) of the *Planning Act* mirror each other in language save and except for minor nuances in language of subsection (a)(i) and subsections (a)(i), (ii) and (iv) are those upon which Thomasfield relies and under which authority suggests this Board ought to dismiss the appeals. For ease of reference, subsections 17(45)(a)(i) to (iv) read as follows:

17(45) Despite the *Statutory Powers Procedure Act* and subsection (44), the Municipal Board may dismiss all or part of an appeal without holding a hearing on its own initiative or on the motion of any party if,

- (a) it is of the opinion that,
 - (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the plan or part of the plan that is the subject of the appeal could be approved or refused by the Board,
 - (ii) the appeal is not made in good faith or is frivolous or vexatious,
 - (iii) the appeal is made only for the purpose of delay, or
 - (iv) the appellant has persistently and without reasonable grounds

commenced before the Board proceedings that constitute an abuse of process;

7 In the alternative, Thomasfield suggests that certain portions of the appeal should be dismissed should the Board find those are not worthy of adjudication and the remainder should proceed on the basis of a focussed issues list. It also seeks costs on a substantial indemnity basis.

Appeal not in good faith, is frivolous and vexatious --(a)(ii):

8 With respect to the argument that the appeal is not made in good faith, is frivolous or vexatious, the Board does not accept this argument. Thomasfield contends that because the Appellant has had minimal involvement in the public consultation process and lives approximately 9 km from the subject property, his appeal should be viewed as not made in good faith, frivolous or vexatious. Concerning the criticism that the Appellant has had minimal involvement in the public consultation process, the *Planning Act* through the provisions of Bill 51 requires appellants to either make submissions, oral or written during the public meeting process or to Council before a decision is made. There is no qualifier attached on the quality or frequency. As long as an Appellant has met the threshold articulated under the legislation, that individual has the right to file an appeal. In this case, there is no allegation that the Appellant did not meet the threshold. The fact that he lives 9 km from the site may be used to assess the credibility of his evidence but I do not view it as establishing his appeal was made in bad faith or was vexatious and/or frivolous.

9 Therefore the Motion is not successful on this ground.

Appeal is abuse of process --(a)(iv):

10 With respect to the argument that the Appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process, again the Board does not accept this argument. Thomasfield states in its Notice of Motion that the "appeal appears to be one in a series of appeals being launched by the Appellant for motives unknown..." and that the Appellant is "taking on the role of defender of the public interest, a role best suited to the approval authorities." The Board finds these arguments speculative at best. One cannot argue that the Appellant's motives are unknown and then state in the next breath that the Appellant wants to take on the role of defender of the public interest, which suggests a motive.

11 Thomasfield provided and referenced a decision of this Board differently constituted, wherein the Board dismissed the same Appellant's appeal against another development proposal in the same City. The decision was not pursuant to a Motion to Dismiss but rather, the dismissal of the appeal on its merits. That case, while in the same municipality, dealt with a different property. Aside from this Appellant, residents from the 146 Downey Road Ad Hoc Committee were parties to the matter. In other words, there was community interest and involvement. The case was provided to address a line of argument raised by the Appellant (namely the applicability of OPA 42) which was unsuccessful and the suggestion that the same argument was being raised at this hearing. The

conclusion intimated that the Appellant has a propensity to raise fruitless grounds for appeal leaving the applicant and municipality to incur costs needlessly. This Appellant was unsuccessful in that appeal following a full hearing on the merits. That determination cannot be used as the sole basis to negate his statutory right of appeal as abuse of process.

12 The costs associated with an appeal can be pursued, if appropriate, through a Motion for Costs. The fact that defending against an appeal will incur costs is not a reasonable factor in my analysis to determine whether the appeal should or should not be dismissed.

13 Therefore the Motion is not granted on this specific ground.

Appeal does not disclose any apparent planning grounds -- (a)(i):

14 Thomasfield alleges that with respect to OPA 46, the Appellant has not disclosed any apparent land use planning grounds upon which the plan or part of the plan that is subject of the appeal could be approved or refused by the Board. Further with respect to the ZBA and plan of subdivision, the same is true except as it relates to the slight distinction in the semantics of 34(25)(a)(i) and 51(53)(a)(i) concerning the jurisdiction of the Board in connection with those planning instruments. With respect to this argument, the Board accepts the submissions of Thomasfield and the City.

15 There is a line of cases decided by the Board which speak to the obligations of Appellants. Specifically, it is incumbent upon persons launching an appeal to be prepared to have genuine, legitimate and authentic planning reasons and to have the evidence to support those reasons. In response to this Motion, the Appellant filed an Affidavit of Anthony Usher, a land use planner. That Affidavit was sworn February 14, 2012 whereas the Motion commenced in November 2011. It was tendered as Exhibit 20. For reasons unknown, the Appellant did not file this material in accordance with the Board's Rules but this in and of itself, does not make the Affidavit unhelpful. The delay does however underscore the failure of the Appellant to discharge his onus following the launch of an appeal.

16 The substance of the Usher Affidavit is wholly inadequate because it contains no opinions to support the appeal. It only states that Mr. Usher "can provide the appellant, Dr. Hugh Whitely, with independent planning services in this appeal, and [has] agreed to appear as an expert land use planner on Dr. Whiteley's behalf." There is no analysis or specificity provided. The Board is left wondering as to what exactly will this witness say and what are the planning grounds needed to support the appeal. It is clear from the Response materials filed in November 2011, that Mr. Usher had already been retained so why his planning opinions were not disclosed is a mystery. His scant Affidavit is not sufficient to survive an attack arising from a Motion to Dismiss.

17 The Appellant did provide an Affidavit sworn by himself as well as Gord Nielsen, an ecologist. Both Affidavits were sworn in November 2011. The Appellant's Affidavit speaks to the evidence he would provide at a hearing on the merits associated with issues of watersheds and hydrology. Mr. Nielsen's Affidavit addresses his conclusions, namely that in his view, the

Environmental Impact Study done on behalf of the Applicant did not properly address relevant policies in the City's Official Plan. Mr. Nielsen is specific in his references to those policies. The problem remains that technical evidence which would be provided by Messrs. Nielsen and Whiteley are inputs to a planning opinion. No planning opinion on behalf of the Appellant was provided. The law requires that in order to assess a Motion to Dismiss on the basis of a failure to disclose any apparent land use planning grounds in the Notice of Appeal, I need to do an analysis whereby I can determine whether the plan or part of the plan that is the subject of the appeal could be approved or refused by the Board. With no planning opinion provided to support the appeal, I am unable to do this analysis.

18 What I do have on the other hand are extensive Affidavits with volumes of exhibits filed on behalf of Thomasfield and the City setting out the lengthy process undertaken and the results arising from that process. In arriving at my decision, I cannot ignore the history and planning process carried out, which include a myriad of planning and expert reports prepared in support of the planning instruments. In the case at hand, the Appellant has raised concerns and apprehensions associated with the completeness, accuracy and reliability of the reports. Raising apprehensions is not sufficient to sustain an appeal. The Court in *Zellers v. Royal Cobourg Centres Ltd.* [2001] O.J. 3792 (Ont. Div. Ct.) stated at para. 31 that planning issues identified in a Notice of Appeal "have to be worthy of adjudication and the responsibility falls on the shoulders of the appellants to demonstrate through their conduct in pursuing the appeal, including their gathering of evidence to make their case, that the issues raised in their Notice of Appeal justifies a hearing." In this case, by failing to provide a planning opinion to support the appeal, the Appellant has not discharged this responsibility.

19 For the foregoing reasons, the Board grants the Motion to Dismiss on the ground enunciated under subsection (a)(i) only of subsections 17(45), 34(35) and 51(53) of the *Planning Act*. This basis is sufficient to warrant the dismissal of the appeal. Concerning the request for costs, should they be sought, written submissions can be made in accordance with the Board's Rules of Practice and Procedure. However, the Board reminds the parties that costs are not awarded in the ordinary course and not in accordance with traditional court standards.

20 THEREFORE THE BOARD ORDERS that the Motion to Dismiss is granted and hence, the appeal is dismissed in its entirety.

21 This is the Board's Order.

J.V. ZUIDEMA
VICE-CHAIR

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