

Public Health Law

Staples McDannold Stewart • November 2008

No 100 Feet Setback For Septic Systems

On November 7, 2008, the BC Supreme Court allowed an appeal under Section 102 of the Health Act and set aside a Section 63 Health Act Order that prohibited a landowner from installing a sewerage system discharge area within 100 feet of a well located on a neighbouring property.

The Court ruled that Section 42 of the Sanitary Regulations did not apply in these circumstances; and held that with the repeal of the Sewage Disposal Regulation, the current Sewerage System Regulation allowed a septic system to be installed within 100 feet of an existing well.

The Court in *Wilkinson v. Vancouver Island Health Authority* stated:

The respondent's argument, on closer examination, is not based on a statutory interpretation of the Sanitary Regulation at all. Instead, the respondent relies on the finding by Bauman, J., as he then was, in Mortensen v. Nelson, to the effect that an absorption field located within 100 feet of a well is a probable source of contamination within the meaning of s. 42. I observe that the court was not dealing there with the construction and installation of a sewage system but with the wish of Mr. Mortensen to dig a well on his property within 100 feet of the existing septic tank. The decision of the court in Mortensen was reinforced by the historical antecedents of s. 42 coupled with the historical prohibition in the then Sewage Disposal Regulation against locating a disposal system within 100 feet of a well.

I do not view Mortensen as authority for the proposition advanced by the respondent, namely that any sewerage system within 100 feet of a well is necessarily a probable source of contamination. I observe that the current Sewerage System Regulation does not contain such a prohibition. I cannot accept that was an oversight by the Lieutenant Governor in Council rather than a recognition that the science relating to effluent disposal has advanced to a point where a less blunt instrument than measurement can be used to ensure public safety.

I further observe that, under the Sewerage System Regulation, an authorized person must certify that the system has been constructed "in accordance with the standard practice". A standard practice manual was prepared for the Ministry of Health. It recognizes that sewerage systems may, in the circumstances outlined in the manual, be sited within 100 feet of a well without causing or contributing to a health hazard.

Bauman J., of course, did not have the new regulation before him in Mortensen. Finally, I observe that the authorized persons in the case at bar provided, as required by s. 8(2)(c), the assurances that the plans and specifications filed were consistent with standard practice.



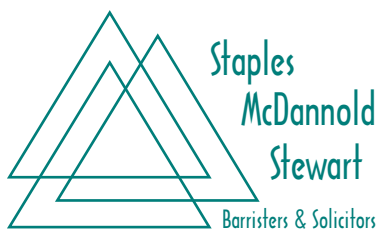
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The significance of this decision is that there is now a different standard to be applied for the installation of wells on the one hand and the installation of septic systems on the other hand. The Wilkinson decision means that so long as authorized persons certify that the septic system has been constructed in accordance with the standard practice manual, septic systems may now be lawfully installed within 100 feet of an existing well.

The Mortensen decision remains good law with respect to the installation of a well within 100 feet of an existing septic system. Section 42 of the Sanitary Regulation prohibits the installation of a well in such a location.

Whether this different approach to the installation of wells and septic systems is good policy is now up to the government to determine now that the Courts have spoken on the issue.

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