FALL 2016

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

EXCLUDING THE PUBLIC FROM MEETINGS

The Region of Niagara's CAO issued a *Trespass to Property Act* order against a resident who recorded Council meetings without permission and persisted in questioning a specific councillor even after being asked to stop.

Council was never given the opportunity to consider the notice; rather the decision to issue the order was made solely by the Chairman of the Regional Council and the CAO based on the refusal by the resident to discontinue his filming. The order prohibited the resident from entering the regional headquarters of the Region and effectively prohibited him from attending any further Regional Council meetings.

The court found that the resident's Charter rights of freedom of expression and assembly were infringed, and that he had the right under the Charter to physically attend and participate in council meetings that were open to the public, provided he did not engage in violent or threatening behaviour.

The *Municipal Act* provides a remedy under section 241 to expel a resident who is exhibiting improper behaviour; however this was not undertaken by the Region. Ultimately, the no trespass order was found to be invalid and of no force and effect.

The proper course of action in our view would have been a clear letter to the resident setting out the conduct that was not permitted, with an explanation that failure to comply would result in his being expelled pursuant to section 241. If the resident failed to comply, the Mayor then would have authority to have him expelled. By making a blanket order to effectively eliminate his rights to participate in the political process, the Region went too far. ■

NO APPEAL MEANS NO APPEAL

Section 34(19.1) of the Planning Act provides that there is no appeal in respect of a by-law that *gives effect* to official plan policies authorizing secondary suites.

We recently represented a municipality that passed a by-law amending its zoning to remove one area of the municipality from the Secondary Suite Policy Area due to servicing constraints. The amendment also added a new area of the municipality to the Secondary Suite Policy Area, subject to a holding provision. The by-law was appealed by a developer who had purchased a series of lots prior to the passage of the by-law with the intention of building homes on the lots with secondary suites within each of the dwellings.

The municipality brought a motion that the appeal was statute barred according to s. 34(19.1). The developer argued that eliminating the area from the Secondary Suite Policy Area did not *give effect*

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CUNNINGHAM, SWAN, CARTY, LITTLE & BONHAM LLP
SMITH ROBINSON BUILDING · SUITE 300 - 27 PRINCESS ST. · KINGSTON, ON K7L 1A3
TEL: 613.544.0211 · WEBSITE: WWW.CSWAN.COM

Cunningham Swan LAWYERS

COUNCIL
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Municipalities should be aware of their ability to control their own process and implement a variety of appropriate procedural and other measures when a councillor engages in improper conduct, in addition to integrity commissioner investigations. A recent resolution passed by the Council in Wawa is an example of the type of discipline a council might impose in order to regulate councillor behaviour.

Based on the recitals contained in the resolution, it appears a councillor and her husband brought a complaint against the CAO, who in turn brought a harassment complaint against both of them. The investigator found that the councillor and her husband, "did in fact harass [the] CAO in an effort to obtain a personal benefit to avoid paying municipal taxes or avoid enforcement of their municipal tax arrears."

Council found that the councillor's behavior was in breach of her oath as a councillor and against the best interests of the municipality and imposed a series of measures to address her behavior, including:

- only being permitted to communicate with staff through a single e-mail address;
- being prohibited from entering the municipal building except to pick up mail, attend meetings or with the express approval of council;
- being removed from all committees;
- not being eligible to be appointed deputy mayor.

The full text of the resolution can be found on our blog, along with a more detailed analysis of the law permitting council to regualte councillor behaviour.

When implementing any measure to deal with improper councillor conduct, council should turn its mind to the purpose of the measure and whether or not it would be classified as a penalty. If it is a penalty, the measure must be one of the two permitted sanctions outlined in section 223.4(5).

With regards to other remedial measures, council has a broad discretion to tailor the remedy to the particular situation, but must take care to ensure the remedy is reasonable and justified. The Divisional Court in the Rob Ford case specifically stated that "other remedial measures" are available to council to carry out its objectives. Examples endorsed by the Court included an apology and requiring a return of improperly appropriated municipal property. So long as the remedial measure is not a "penalty", council can pass resolutions to control the behavior of its members. The recent example from Wawa shows the extent to which councils might go to express displeasure over one of its members' behavior. ■

WHEN BEING A GOOD NEIGHBOUR ISN'T A GOOD IDEA

The Ontario Court of Appeal recently resolved a 20 year dispute between neighbours with respect to the ownership and possession of a parcel of land.

The registered owner of an island claimed possessory title over a beach and isthmus which provided land access to her island. The island owner did not effectively exclude the mainland owner from his land. Even though the island owner used the beach and isthmus as an owner would, this did not effectively exclude the mainland owner from his property. Without this, a claim of adverse possession could not be successfully pleaded.

There was also no prescriptive easement over the beach area, as recreational use of an area was not "reasonably necessary" for the better enjoyment of the island property. Silence on the part of the neighbour in this respect did not amount to acquiescence, but was merely 'neighbourly goodwill'. However, the island owner had acquired a right-of-way over the isthmus that ran to the island. Seasonal use of a piece of land for a cottage property was sufficient to establish a prescriptive easement for the pathway. Silence on the part of the mainland owner in this case was not simply 'good neighbourliness', but was acquiescence to the use of the path for this purpose. This prescriptive easement was granted for foot traffic only and did not extend to vehicles because there was no evidence of continuous vehicle traffic over this land. The evolution of the easement from travel by foot to travel by vehicle would substantially and significantly alter the burden on the mainland owner.

These principles do not apply to an unopened road allowance, but for all other municipally owned property, claims in adverse possession or for a prescriptive right-of-way may be possible. ■

Details, Details

The OMB ordered the City of Ottawa to amend its Official Plan Amendment in the Centretown Area to eliminate several policies that the Board found overly prescriptive. The Board found a maximum height provision to be too prescriptive and that it would lead to hardship for developers when design or construction considerations required variations in height that would necessitate an official plan amendment or revisions to the design. The Board preferred a standard that had flexibility built in.

The evidence at the hearing confirmed that rigid performance standards were not appropriate in this context and that for heritage buildings the primary guidelines should be the heritage conservation district plan.

The City appealed the decision and the Divisional Court upheld the Board's decision.

The Divisional Court noted however, that the Board's decision should not be interpreted as signalling a general rule against prescriptive wording in an Official Plan, but rather was relevant to the particular circumstances of the amendment. The court ultimately found that the Board's decision was grounded in good land use planning, and there was insufficient evidence to doubt the legal correctness of the Board's decision.

In order to have prescriptive policies upheld, there must be a sound land use planning rationale. Generally, the Board is looking for detailed performance standards to be implemented through zoning, unless the standard is so fundamental to the principles of land use planning that it needs to be enshrined in the Official Plan. ■

Regulating Communication Towers

The Supreme Court of Canada recently dealt with whether a municipality may regulate the siting of a radio communication antenna system. The municipality of Chateauguay took the position that the location of the tower put the health and well-being of people living near the location at risk and took steps to expropriate land in a different location for the tower and established a "notice of reserve", which prohibited all construction on the property in question for two years. When this notice was due to lapse, the city renewed it a further two years, which prompted Rogers Communications to pursue legal action.

The Court found that the notice of a reserve by the City was beyond its powers because it constituted an exercise of the Federal power over radio communication. The purpose and practical effect of the notice of a reserve was to prevent Rogers from installing its tower on the property. Even if the notice of a reserve addressed the health concerns raised by the City's residents it would still clearly "constitute a usurpation of the federal power over radio communication".

The Court found that the siting of an antenna system is part of the core of the federal powers over radio communication and that the notice of a reserve significantly impaired the federal government's core power over radio communication and that therefore the reserve notice was inapplicable. The expropriation was permissible, but the municipality went too far in restricting the preferred site. ■

Free-Riders Beware

Cottage roads are often maintained by local residents who form volunteer committees and organizations for the benefit of all property owners on those roads.

A local Brockville Area Private Road Association sued one of its members for refusing to pay dues for the upkeep of a private cottage road. The non-paying member argued that they had not paid their dues since 2008 because there were no receipts provided, they were not satisfied with the maintenance, they received no notice of association meetings and there was no private road liability insurance.

The Small Claims Court Judge was unimpressed with these arguments and found the member was in the wrong. Since the association was only formed in 2013, it was understandable that some processes took some time to develop – receipts were now available on request and the association was developing a better meeting notification system. The judge held that it was illogical to argue that payment was withheld because the maintenance or liability coverage was substandard. Obviously, the withholding of funds would make it more difficult for the association to maintain roads and purchase insurance policies. The court held that the non-paying residents were unjustly enriched, but unfortunately for the road association, the claim was limited to two years. The recovery for non-payment of upkeep fees prior to that period was barred by the Limitations Act.

This case highlights the well-known problem with private road associations; those who enjoy the benefits but refuse to pay. There is little a municipality can (or should) do about these private disputes. Legal tools exist to solve the problem, but they require co-operation of the members, which as this case illustrates is not always possible. ■

WHO'S WHO ...

Tony Fleming
Partner

Tony Fleming is a partner in the Municipal and Land Use Planning and Development Groups. The law Society of Upper Canada has recognized Tony as a Certified Specialist in Municipal Law. Tony provides advice to municipalities and private sector clients on all aspects of land use planning and development as well as environmental law.

Prior to joining Cunningham Swan, Tony was Senior Legal Counsel with the City of Kingston and practised with private law firms in Toronto. Tony appears regularly before the Ontario Municipal Board, the Assessment Review Board and the Environmental Review Tribunal. He has also defended large and small corporations and municipalities against Ministry of the Environment and other regulatory orders, investigations and prosecutions.

Tony may be contacted by email at tfleming@cswan.com
or call 613.546.8096 direct.

David Munday

David Munday is an associate in our Municipal and Planning and Development Groups.

David joined Cunningham Swan in 2009 as an articling student and, following his Call to the Bar, returned to the Firm as an Associate lawyer in July 2010.

David assists municipalities and private clients with planning and development issues and handles real estate transactions and tax sales for our municipal clients. David also provides advice and opinions on all aspects of the Municipal Act and other legislation that impacts municipalities.

To contact David, please email dmunday@cswan.com, or call 613.546.8091.

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to secondary suite policies as required under section 16(3), which it argued only speaks to requiring policies that *permit* secondary suites. The developer maintained that interpreting section 34(19.1) in a way that sheltered by-laws that reduced opportunities for secondary suites ran contrary to the intent of the legislature. In their view only by-laws that increased secondary suite opportunities could be sheltered from appeal.

The Board agreed with our argument that section 34(19.1) does not distinguish between by-laws that increase opportunities for secondary suites and those that decrease such opportunities. Amending a secondary suite by-law to add, remove, or modify areas where secondary suites are permitted are all methods by which a municipality *gives effect* to its policies, and are therefore all methods that are sheltered from appeal under section 34(19.1). The Board ruled that the legislation leaves it open to municipalities to determine appropriate locations and standards for secondary suites within its planning policies and declared that the developer's appeal was statute-barred pursuant to section 34(19.1) of the *Planning Act*. ■

Register Now for the South East Ontario Municipal Law Seminar

October 26 in Eganville
or October 27 in Kingston

Invitations will be sent shortly with an agenda and a list of topics.

Reserve your seat now
by sending Karen James an e-mail at
kjames@cswan.com