

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS



ZONING INTERPRETATION ALL WET

A cottage-country municipality interpreted its zoning by-law to mean that it had no jurisdiction to zone structures located on water such as docks and boat houses. A local cottager was frustrated by this position, especially with respect to the 2000 ft.² two-story floating boat house built by his neighbour. The floating boathouse with a patio above was tethered to the shore above the high water mark, but there was no structure attached to the bed of the lake.

As part of an application to the Court to have the boat house removed, the cottager brought a motion asking the Court to answer five preliminary questions:

1. Does the Ontario Building Code apply to the construction of structures built over water?
2. Does a municipality have jurisdiction to zone structures that are built over water?
3. Did the dock and boat house require a building permit, and must they comply with the zoning by-law?
4. Is an occupancy permit under the Public Lands Act required from the MNR? and
5. Is a work permit under the Public Lands Act required from the MNR?

The Court answered all five questions in the affirmative.

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FENCES ARE NOT A MENTAL HEALTH ISSUE

The saying that fences make good neighbours is not always true. In Ajax a neighbour complained about the height of their neighbour's fence. The fence did in fact exceed the fence by-law and the City brought enforcement action. The owner defended on the basis that the by-law violated her equality rights under section 15 of the *Charter*, arguing that she required the high fence to deal with her mental health issues.

Evidence was led that she believed that she derived some benefit from the high fence, but no treating physician had said that she required a fence of any particular height in order to deal with her mental health conditions. The

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owner's belief that she needed the fence to deal with her mental health issues was not supported by evidence that she *required* the fence to deal with such issues.

More importantly, the court concluded that even if the owner had demonstrated that she required the fence, her application still would have failed. The by-law's objectives were consistency and balancing the rights of those who desire fences and those who do not wish their property and views to be subject to any disadvantage created by fences. The height restriction caused minimal impairment of the rights of both fence-desiring and fence-hating property owners. There was also insufficient, if any, evidence that the negative impact on either set of property owners outweighed the benefits of the consistency in fences that was provided in the by-law.

The balanced approach of the court is a welcome interpretation of the interplay between by-laws and mental health issues. ■

BY-LAW ENFORCEMENT

A recent case from Manitoba reinforced the principle that the mere passing of a by-law by a municipality does not obligate the municipality to enforce. A neighbour asked the court to force the municipality to enforce a zoning by-law to prevent what he alleged was an illegal commercial use of residential property.

The court refused to grant the injunction, stating that the provisions of the *Planning Act* regarding by-law enforcement were permissive and not mandatory. While the City had a statutory power to regulate through the use of by-laws, it was in its discretion whether to do so or not. It was a "policy" decision rather than an operational decision, and was therefore not reviewable by the courts. Although this is a Manitoba case, the operative legislation is similar, the principles are applicable in Ontario, and it is consistent with previous Ontario case law.

The court also made an important finding that there was no duty of care created where a municipality monitors property use for the purpose of determining whether property is in compliance with the by-law. Having a program in place to identify non-compliance does not create a binding obligation to enforce.

The court found that imposing such a duty would open the municipality to virtually unlimited exposure to private claims, including exposing the municipality to virtually any claim from a resident that disagreed with his neighbour. This case reaffirms the position that we have always communicated to our municipal clients that enforcement is discretionary. ■



UBER

UBER NEEDS PARTNERS LIKE YOU.

Drive with Uber and earn great money as an independent contractor. Get paid weekly just for helping our customers get rides around town. Be your own boss and set your own fares for driving on your own schedule.

REGULATING UBER IS NOT EASY

Toronto attempted to apply its taxi by-law to Uber to prevent the on-line service from operating unregulated in the City. The court found that Uber was not required to be licensed as a limousine service company or taxicab broker under the by-law. The court came to this decision using a highly technical interpretation of the terms in the by-law and found that the highly automated Uber model did not satisfy the test for being a taxi or limousine service under the by-law.

The specific analysis is less important than the clear policy direction found in the decision. The court clearly articulated the potential disruptive impact of the Uber model, stating that the entire licensing regime of the taxicab and limousine industry is under growing pressure as a result of Uber's growth. However, the court emphasized that questions regarding policy or how the regulatory environment ought to respond to mobile communications technology are political ones that must be assessed and answered by local municipalities and not by the courts.

If municipalities want to regulate on-line services such as Uber (or accommodation sharing services such as Air BNB) they must understand the technical aspects of how the service works so that enforceable by-laws can be enacted. The devil is in the details, and nowhere is this saying more true than in drafting by-laws dealing with highly technical commercial regulations. ■

The Court cited a number of cases that we have long relied upon to come to the conclusion that municipalities do indeed have the legal authority to enact zoning regulations over water within their municipal boundaries. This is true even where the water is navigable and therefore owned by the Province.

Even though the Province owned the “land” over which the structure was built (the bed of the Lake), the zoning by-law nevertheless applied. It is the user of the lands to which the zoning by-law applies, not the owner of the land. This is an important distinction as the Crown is immune from zoning regulations, but users of Crown land are not.

The Court also found that the Building Code applied to floating structures notwithstanding an argument by the municipality that only an “owner” can apply for a building permit. Again, although the Crown owned the land (bed of the Lake) this did not immunize the boathouse owner from the requirement for a building permit. The Court found that allowing an owner to evade the application of the Building Code in this fashion would create an absurd result and would not be in the public interest.

The main action has not yet been heard, but this motion will undoubtedly influence the outcome. ■

REIGNING IN A ROGUE MAYOR

In Fort Macleod Alberta, Town Council removed the authority of the Town Mayor to chair Council meetings, sign by-laws and call special meetings. Council also removed the Mayor from boards and committees and restricted him from attending meetings representing the Town or Council and acting as its official spokesperson. This was accomplished through resolutions and a new procedural by-law. The Mayor argued the by-laws were passed for the improper purpose of punishing him for expressing opinions contrary to Council and Town administration.

The evidence showed that the Mayor held himself out as having the authority to speak and negotiate for the Town, and as having the authority to direct Town administration. There was also evidence that the Mayor communicated his personal opinion as if it were the opinion of the Town, contravened the Town’s advertising policy, unreasonably criticized staff and members of the public, and performed administrative functions including issuing orders to Town staff and volunteers. The court found that such conduct supported the conclusion that Council passed the resolutions and by-law for the purpose of good governance, not as a punishment.

In Ontario, of the many things Rob Ford has taught us, one is that only certain specific “penalties” can be imposed on a councillor, and only then after having the integrity commissioner investigate and make recommendations. The Court of Appeal in Rob Ford’s case did however leave open the possibility that council could impose sanctions provided they were not “penalties”. This Alberta case is helpful to illustrate some potential sanctions that might satisfy the Court of Appeal’s distinction between penalties and sanctions. Where alterations to the procedural by-law are necessary to ensure good governance, that may not be considered a penalty. The facts will always govern the outcome, but the principle is applicable in Ontario; Council has the authority to create and control its own process through its procedural by-law (with limited exceptions for powers granted to the Mayor under the Municipal Act).

The court ruling reinforces the important role that councils play in terms of ensuring appropriate conduct of elected officials and strong governance. ■

THE WINDS OF CHANGE FAVOUR RENEWABLE ENERGY

In another case of a municipality attempting to oust a wind energy project, Kawartha Lakes Council passed a resolution that any request by the proponent to use an unopened portion of a road allowance to access the wind project would be refused.

The Ontario Divisional Court held that the municipal by-law was inoperative because its purpose was to frustrate the Renewable Energy Approval. The Renewable Energy Approval authorized the construction of five wind turbines and associated infrastructure in the municipality. Because the Renewable Energy Approval specifically referred to the use of the unopened road allowance for access to the site, refusing to permit its use, even if it was a legitimate exercise of the City’s jurisdiction over roadways, frustrated the purpose of the REA.

The argument by the City that its resolution did not frustrate the REA because the proponent had a number of alternative roads that it could have used was found to be beside the point.

The court also held that the Resolution could have been quashed on the basis of bad faith, finding that the prohibition on the proponent’s use of the Road was driven by the City’s opposition to the development, and not by the legitimate exercise of its jurisdiction over roadways. The City clearly opposed the wind project by passing an “unwilling host” by-law and urging the province to refuse the project in its consultation document submitted as a part of the REA process. The court warned that while the City was entitled to take these positions, it was not entitled to use its jurisdiction over roadways to thwart or frustrate the project. ■

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.

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4th Annual South East Ontario Municipal Law Seminar

Thanks to everyone who attended our seminars this year in Kingston and Eganville.

We hope you found the presentations helpful and we look forward to seeing you next year.

If you missed us this year please send us an email and we would be pleased to send you copies of the PowerPoint presentations.



ALLAN WHYTE
PARTNER



Alan is a partner in our Labour and Employment group. Alan has extensive experience working for municipal sector employers. Alan provides opinions and advice on all aspects of the employment relationship.

Prior to joining our firm, Alan served as a Vice-chair of the Human Rights Tribunal of Ontario. Before joining the Tribunal, Alan represented employers throughout Eastern Ontario for 26 years in all areas of labour and employment law.

Alan appears before all levels of courts in Ontario and numerous administrative tribunals.

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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.

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