

Legal non-conforming use prevents municipality from enforcing zoning by-law

Litigation | Litigation & Dispute Resolution | Planning Act | Town of Caledon | Zoning By-Law

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While some property owners may believe that they can do what they want with their own land, municipalities control development and the permitted use of properties through zoning and other by-laws. Some properties are restricted to residential use while others may be limited to particular types of commercial activities. Municipal zoning restrictions for properties may change over time due to population densification or other reasons. What was once a permitted use may become prohibited as local planning requirements change. A recent Ontario Superior Court of Justice decision demonstrates the conflicts that can arise between property owners and their municipality due to zoning changes: *Forbes v. Caledon (Town of)*, 2021 ONSC 1442 (CanLII).

The property in question, in the Town of Caledon, Ontario, was purchased by the plaintiff's parents in 1986, after they had rented the property since the early 1970s. They operated a construction, landscaping, and fencing business and used the property for the outside storage of machinery and equipment, including vehicles and heavy trucks.

In 1987, the Town enacted a land use by-law designating the property as being within an "agricultural zone." In 2005, the Town charged the plaintiff's parents with a by-law violation for wrongfully permitting the outdoor storage of vehicles, machinery, and equipment and allowing a business operation on the property. The Town subsequently withdrew the charges, and the family continued to use the property as they had in the past.

In 2006, the Town enacted a new zoning by-law which defined a "use" as "the purpose for which any portion of a lot, building or structure is designed, arranged, intended, occupied or maintained." The definition did not include outdoor storage.

In 2007, the plaintiffs' parents attempted to sell the property but the sale was lost when the Town refused to confirm that it consented to the continued use of the lands for outside storage of machinery and equipment and for commercial activities. The parents then brought an application for a declaration as to the lawfulness of their continued use of the lands and to stop the Town from interfering with the use.

In a decision dated 26 February 2009, subsequently affirmed by the Court of Appeal, Justice Price ordered that the property could be used for the following purposes: (a) the outdoor storage of vehicles, machinery, and equipment; (b) business operation; (c) the storage of heavy trucks; and (d) such further and other uses as may be ancillary to such business use of the property.

The effect of Justice Price's order was to recognize the "legal non-conforming uses" of the property in accordance with s. 34 (9) of the *Planning Act*, which provides for the continuation of uses that were lawfully established under a prior zoning by-law, provided that the uses are a continuation of lawful pre-existing uses. Specifically, section 34 (9) states:

No by-law passed under this section applies ... to prevent the use of any land, building, or structure for any purpose prohibited by the by-law, if such land, building or structure was lawfully used for such purpose on the day of passing of the by-law, so long as it continues to be used for that purpose.

The plaintiff inherited the property in 2017. Then, in what Justice Paul Perell called a "deja vu dispute," the case returned to court in 2020, after the plaintiff had difficulties in selling the property. Essentially the plaintiff sought an updating of the order made by Justice Price in 2009. He argued that he was entitled to such

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an order because the status quo about the property's uses had not changed since 2009, but the Town was, he alleged, once again interfering with efforts to market the property for sale. The plaintiff claimed that the Town was motivated to have the property comply with the current industrial zoning for its location and wanted to have the legal non-conforming uses discontinued.

For its part, the Town largely conceded that the status quo for the property's use had continued since 2009, but the Town took issue with one alleged use as a "Motor Vehicle Compound," which was defined in a by-law passed in 2015 as premises "used for the temporary storage and impounding of motor vehicles taken from a collision scene or otherwise towed or conveyed and awaiting repair or demolition, retrieval or disposal." The plaintiff and the Town disagreed whether a "Motor Vehicle Compound" was a continuation of the property's legal non-conforming use or a new illegal non-conforming use.

Justice Perell outlined the legal requirements for a use to be a legal non-conforming use, mainly that (a) the property must have been in lawful use for a certain purpose at the date of the passing of the zoning; and, (b) the property must continue to be used for that purpose. There are a number of case-by-case requirements, including the *status quo* as of the date of the passing of the zoning by-law, as the use of the lands at that time must be shown to be a continuation of prior lawful use. A legal non-conforming use runs with the land, meaning that successors in title can lawfully continue to use the property in accordance with the legal non-conforming use.

Perell J. noted that the case was peculiar because to a large extent it was driven by the "paranoic thinking" of both parties. The plaintiff believed that the Town was intentionally being obstructive because it wanted the uses being made of the property to conform with the current zoning, and it was anxious to have some of the uses recognized by Justice Price's 2009 Order discontinued. For its part, the Town believed that the plaintiff's aim was to have the Town permit an unlawful intensification of the property's legal non-conforming uses.

In this regard, the dispute was primarily in the minds of distrustful litigants who did not listen or understand one another rather than in the "physical world." As to the "physical world," the evidence was that there was no change in the plaintiff's uses being made of the property from 2009 to 2021, save perhaps for the "Motor Vehicle Compound." The Town argued that such use aligned with parking and was not a use permitted on the property because a Motor Vehicle Compound was not in existence at the property at the time of the passing of the by-law. The plaintiff countered that the so-called "Motor Vehicle Compound" was just another type of outside storage of vehicles, which was a permitted legal non-conforming use declared to exist under the Court's 2009 Order.

Perell J. agreed with the plaintiff. The evidence of what is occurring on the property, confirmed by aerial photographs, supported the plaintiff's argument about the use.

As to the dispute in the "non-physical world" concerning the parties' respective understanding of the law of non-conforming uses, Perell J. stated that neither party was entitled to any orders regarding whatever they may believe their opponent was thinking about future legal non-conforming uses for the property.

In the result, the plaintiff was entitled to a declaration that the property could be used for the legal non-conforming uses that had continued since the last court order in 2009. However, the plaintiff was not entitled to any other mandatory orders requiring the Town to give assurances to prospective purchasers of the property about what uses they could make of the property in the future.

The case demonstrates the issues that may arise between a property owner and a municipality over use, and matters that be discovered when investigating the zoning compliance of a property, particularly for commercial uses. In cases similar to the matter at hand, a prospective purchaser of a property would need to carefully assess a property's current zoning restrictions, and whether any intended future uses of the property would either comply with those restrictions or be a continuation of the property's current legal non-conforming uses. Otherwise, future plans may run afoul of a municipality's zoning restrictions and be subject to by-law enforcement. A PDF version is available to download [here](#).

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