

KEEPING CURRENT

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Municipality improperly abandoned ratepayers by failing to oppose application for legal non-conforming use of lakeside land

By James R.G. Cook

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Some municipal zoning restrictions are intended to address local planning needs for commercial and residential purposes, while other zoning controls may be intended for purposes such as environmental protection. For lakeside properties, one should carefully review the existing zoning by-laws at the time of the purchase to ensure that intended uses of the land are permitted. The case of *Mawhiney v. Norfolk County*, [2021 ONSC 1928 \(CanLII\)](#) shows why.

In 2009, the applicant, Mawhiney, bought land on Lake Erie in the County of Norfolk (then called the Regional Municipality of Haldimand-Norfolk). The land was zoned as "Hazard Land" in the County's zoning by-law which expressly prohibited the construction of any buildings on the land except for either an "open pavilion" or "sanitary facilities, change houses for bathers and accessory maintenance and storage buildings." The zoning by-law did not permit any type of seasonal or temporary residential dwellings.

After buying the property, Mawhiney and his family made several alterations

to the land, including grading the lots, installing a driveway and cement pad for a recreational vehicle, installing electrical and potable water connections, and change houses for bathers. The Mawhineys used the land thereafter as a "camping and recreational compound," and parked a fifth-wheel travel trailer on the cement pad from May to Thanksgiving each year.

Unfortunately for the Mawhineys, the property was not zoned to allow for this type of use, even during the summer months. Their mistaken belief was understandable, as the then Mayor of Norfolk County specifically told Mawhiney that he could have a trailer on the property for seasonal use. As subsequently noted by the court, the Mayor's erroneous advice was the beginning of "a lengthy and expensive journey."

Over the next few years, various changes to the zoning by-law were proposed by the County, which would have allowed the placement of travel trailers on vacant lots. However, no by-laws permitting such use were ever approved and enacted. During this time the Mawhineys

carried on using the property as a recreational compound with a trailer, notwithstanding that this use was not permitted by the Hazard Land zoning by-law.

In 2018, the County enacted a new by-law that permitted “day use” of properties in the Hazard Land zone, which was defined as “personal use and enjoyment of a vacant lot for a day, which may include launching boats.” The by-law expressly prohibited certain uses of the Hazard Zone land, including tent and trailer parks, recreational vehicles, overnight parking of trailers, tents and vehicles, and buildings or structures of any type, decks and docks.

As a result of the new zoning restrictions, Mawhiney commenced an application against the County to try and obtain a court order confirming that he could continue to park his fifth-wheel trailer on the land during the summer months, relying on the doctrine of legal non-conforming use. This doctrine is based on the principle that zoning by-laws which introduce new restrictions on the use of property should not deny landowners the right to continue to use their property in the same manner as they did prior to the introduction of the new restrictions: *Ottawa (City) v. Capital Parking Inc.* (2002), [2002 CanLII 41644 \(ON CA\)](#), 59 O.R. (3d) 327 (Ont. C.A.), at para. [30](#).

One would have expected the County to resist the application as a challenge to its authority to enact and enforce zoning by-laws. And initially the County was indeed a respondent to the application. However, prior to the hearing, the County withdrew their formal response to Mawhiney’s application and became only an observer. Effectively, this left the application without any responding party, save for an adjacent property owner who brought a counter-application for a

declaration that Mawhiney’s use of the property for a motor home or travel trailer was not a legal non-conforming use.

The Honourable Mr. Justice D.J. Gordon heard Mawhiney’s application in January 2021. In his [Reasons for Decision](#), Justice Gordon was highly critical of the County’s position (or lack thereof), finding that the Council had “improperly abandoned the ratepayers” and failed to comply with their role to “represent the public and consider the well-being and interests of the municipality.” In this regard, the minutes for meetings of the County’s Council demonstrated support for one group of ratepayers without consideration for others. No reports were generated to support their change in position, and no notice was given to the public. Gordon J. described his concerns as follows:

[50] There is nothing improper in taking a new position, provided it is based on evidence and done in a transparent manner. Council is expected to defend its by-law and its position by participating in cases of this nature. Withdrawing from a case, when it was the only respondent, was not a legitimate use of Council’s powers.

[51] The decision to withdraw was political. It was not based on sound planning principles, given the absence of evidence to support Council’s new position. To now say the municipality does not oppose Mr. Mawhiney is improper.

Gordon J. then reviewed the new 2018 zoning by-law and found that the words used therein were clear and unambiguous. Only two uses are

permitted, namely personal use and enjoyment of a vacant lot *for a day*. Accordingly, all other uses are prohibited. Justice Gordon also found that the nature of the Hazard Land supported these restrictions, given that this is “one of the most sensitive environmental areas in Ontario.” In the court’s view, no residential or recreational use, seasonal or otherwise, should be permissible other than day use, save for any legal non-conforming uses.

Mawhiney could not establish evidence that his use of the property was ever legally allowed pursuant to the former zoning by-laws, and he could therefore not established that he had established a legal non-conforming use. When he bought the land in 2009, he did not seek advice from a qualified planner or lawyer and his subsequent use did not comply with the existing zoning by-law. Further, the Mayor was not qualified to give planning or legal advice and had no authority to bind the municipality to permit a use in contravention of the zoning by-laws.

In the result, Mawhiney’s application was dismissed and the counter-application by the adjacent property owner was granted. An Order was granted declaring Mawhiney’s use of his property for a motorhome, travel trailer, recreational vehicle or recreational trailer was not a legal non-conforming use and was not a use of his property that was lawful pursuant the earlier versions of the by-laws.

The decision is another [example](#) of the type of situation where a prospective purchaser of a property needs 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. In the case at hand, the property owner will have to cease using the property in the manner that he had for over ten years.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **James Cook** at 416.865.6628 or jcook@grllp.com.

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