# HOW LAND USE PLANNING LAW AFFECTS YOUR TRANSACTION

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## Introduction[1]

Planning due diligence has become increasingly important in recent times as a plethora of new acts, regulations and policies have been enacted which significantly restrict or qualify land use rights. Much of the regulation in this area occurs at the municipal level, which makes it difficult to generalize about the specific standards and regulation that any given property may be subject to. Each municipality has its own zoning by-law(s) which may need to be investigated depending on the nature of the real estate transaction and the location of the property. In addition, a transaction may also be subject to additional layers of provincial regulation, such as the requirements flowing from provincial plans, such as the *Greenbelt Plan.*

This article attempts to provide a guide, or "check list", of many of the common planning searches you may need to perform to determine your client's property rights and how the property may be used or developed after the transaction has closed, or if the property currently complies with the zoning regulations. The location of the property, the client's intention for future use of the land, and other considerations will dictate the precise scope of the planning due diligence and what particular laws and regulations may apply.

[1] Please see "Appendix A – Endnotes", for all subsequent legislation, case and commentary references.

In addition to a due diligence checklist, this article also provides a primer on the City of Toronto's recently adopted comprehensive zoning by-law. The advent of this new by-law has resulted in an additional layer to consider when dealing with properties in the City of Toronto. Finally, the article concludes with a summary of the law of legal non-conforming use – a very fluid or flexible doctrine which often leaves lawyers and sometimes even judges arriving at opposite conclusions about when a non-conforming property right may be protected by the Courts pursuant to s.34(9) of the *Planning Act*.

In light of the above, the article is structured into three parts, as follows:

PART I – Planning Due Diligence Searches

PART II – City of Toronto's New Comprehensive Zoning By-law

PART III – The Law of Legal Non-Conforming Use

## PART I – Planning Due Diligence Searches

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**Overview**

The location of the property will determine the applicability of many municipal regulations, such as zoning standards and heritage status, as well as the application of provincial law including provincial plans and regional conservation authority oversight. In addition to location, the intended future use of the property may trigger additional considerations with respect to future development and land use, such as density and setback restrictions contained in the zoning by-law. Current legal use of the property may be subject to certain performance standards in a

zoning by-law, or the fulfillment of conditions pursuant to a registered statutory agreement, such as a subdivision agreement. The history of the property's use will be of particular relevance if the existing use or building does not conform with the in-force municipal zoning and the owner wishes to continue with the same use.

The best approach one can take to performing land use planning due diligence is to get as much relevant information as possible from the client or assigning lawyer. Only when the nature of the transaction and the contemplated future use of property is determined can the proper scope of the due diligence be determined.

Asking the following questions from the outset of the due diligence may be particularly useful:

1. What is the municipal address and legal description of the property?

2. What is the existing use of the property?

3. What is the intended use of the property?

4. What are the particulars of the existing or proposed development?

5. Is there a survey?

Ideally, the client or assigning lawyer will know exactly which types of searches should be performed for the due diligence. This can save time and resources since irrelevant or redundant searches need not be performed. Having a broad understanding of the transaction will also enable you to determine the relevance of searches which may have been overlooked by the client or assigning lawyer.

**Due Diligence Checklist**

The following are common planning searches which may need to be performed in order to draft a due diligence summary for a proposed real estate transaction or development application. The nature of the transaction or development proposal will dictate which searches ought to be undertaken. The list is not intended to be exhaustive, but to provide a common starting point for most transactions.

1. Provincial Policy Statement

2. Provincial Plans

    (A) Oak Ridges Moraine Conservation Plan

    (B) Niagara Escarpment Plan

    (C) Greenbelt Plan

    (D) Greater Golden Horseshoe Growth Management Plan

    (E) Parkway Belt West Plan

3. Official Plans

    (A) Official Plan

    (B) Secondary Plan(s)

4. Zoning By-laws

5. Committee of Adjustment Decisions (Variances)

6. Ontario Municipal Board Decisions

7. Heritage Act Designation or Listing

8. Conservation Authority Regulation

9. Municipal Ravine and Tree By-Laws

10. Municipal Demolition of Rental Housing Controls

11. Statutory Agreements Registered on Title

12. Legal Non-Conforming Status Enquiry

**Summary of Searches & Due Diligence Considerations**

The following is an elaboration on the above checklist of searches one may undertake to perform planning due diligence for a client. Each search item briefly describes the legal nature of the search requirement, and then provides some general commentary relevant to the particular search. Again, much of this information is provided at a very high-level to provide some guidance as to what may be relevant or applicable. The details of the specific transaction will dictate the precise legal requirements and search parameters.

**1. Provincial Policy Statement**

Subsection 3.(1) of the *Planning Act* authorizes the Minister of Municipal Affairs and Housing to issue policy statements (singularly, Provincial Policy Statement or "PPS"), subject to cabinet approval, on municipal planning matters that are of provincial interest. The current PPS came into effect on March 1, 2005. The PPS sets out the Province's planning priorities in broad

strokes. It sets policy goals and objectives under such topics as settlement areas, employment areas, transportation, water, natural and cultural heritage, mineral aggregates, etc. The PPS also recognizes the complex inter-relationships among economic, environmental and social factors in planning. Importantly, the *Planning Act* requires that all decisions affecting land use planning matters in Ontario are required to be consistent with the PPS.[1]

*Due Diligence Considerations*

The PPS applies to all lands in the Province of Ontario. Often the PPS is of limited direct impact on due diligence, but it has a significant impact on top-down (i.e. all) planning in the Province. Any proposed development project needs to be "consistent with" the goals and objectives of the Province as expressed by the PPS. Often, opinions and reports dealing with the PPS will simply list and describe the policies of the PPS that the proposal is "consistent with". No project will address all policies, but you do not want to be on the wrong side of a PPS policy.

## 2. Provincial Plans

The Provincial government has special goals and objectives for particular areas that transcend municipal boundaries. Provincial Plans have been adopted for these areas to ensure future development accords with the Province's objectives for the particular area. Many of the areas subject to provincial plans have enhanced environmental and/or economic significance for the province, (such as the Niagara Escarpment and Oak Ridges Moraine). The *Planning Act* requires that all decisions affecting land use planning matters must be consistent with provincial plans in effect on the date of the decision.[2] Provincial Plans tend to be more specific than the PPS and should be read in conjunction with the PPS. They generally contain rules for sorting out

conflicting provisions. They are also increasingly more restrictive in terms of permitted land uses, yet they still represent a fairly high level of planning.

Provincial plans apply when the property in question is located within the area that is regulated by the respective plan. One can determine whether or not a plan will apply by reviewing the schedules or maps which are provided with the Plan. Due diligence considerations for provincial plans are particular to the plan being reviewed. The plans selected below have a wide geographical application and are commonly searched in regards to properties in multiple municipalities.

**(i) Oak Ridges Moraine Conservation Plan**

The *Oak Ridges Moraine Conservation Act, 2001*[3] is the legislation which authorized the development of the Oak Ridges Moraine Conservation Plan ("ORMCP"). The ORMCP is an ecology based plan which covers a geographic area of 190,000 hectares spread over 160 km between the Trent river in the East to the Niagara escarpment in the west, and crosses over 32 municipalities in three regions (Peel, York and Durham).

*Due Diligence Considerations*

If the property subject to the transaction is within the ORMCP boundary, one must determine what designation under the ORMCP is applicable. Different land use restrictions apply depending on the designation. For example, residential uses are not permitted within the Natural Core and Natural Linkage Areas; Residential development is permitted within the Countryside Areas, but is subject to restrictions. For the most part, required "conformity exercises" have

brought municipal official plans and zoning by-laws into conformity with the Plan. However, there are exceptions (such as areas where approval of instruments has been deferred).

**(ii) Niagara Escarpment Plan**

The Niagara Escarpment Plan ("NEP") was established under authority of the *Niagara Escarpment Planning and Development Act*.[4] There have been three iterations of the NEP, the most recent of which was adopted in 2005. The NEP is similar to the ORMCP in that it is an ecology-based plan. The NEP boundary stretches over 700 km from Queenston (near Niagara Falls), to the islands off Tobermory at the tip of the Bruce Peninsula (on Lake Huron). Four counties, four regional municipalities and 37 local municipalities are regulated by the NEP. The plan designates the land into multiple categories. Development within the NEP area depends on the uses permitted by the relevant land use designation. Importantly, all proposals falling within the Act's definition of "development" require a development permit from the Niagara Escarpment Commission (with appeals heard before the Environmental Review Tribunal).

*Due Diligence Considerations*

If the property subject to the transaction is within the NEP boundary, one must determine what designation under the NEP is applicable. Different land use restrictions apply depending on the designation. The need for NEC approval for development is important to note.

**(iii) Greenbelt Plan**

The *Greenbelt Act, 2005*[5] authorized development of the Greenbelt Plan ("GP"). The GP was first adopted on February 28, 2005. The GP protects 1.8 million acres of sensitive land from development around the greater golden horseshoe area, and includes areas already covered by the

ORMCP and NEP. The goal of the GP is to halt urban expansion into the undeveloped "green" areas of Southern Ontario, thereby promoting "intensification" in existing urbanized areas.

The primary land designation under the GP is "Protected Countryside", which incorporates geographic specific policies, i.e., Agricultural System, Natural System, Parkland, Open Space, Trails, and Settlement Areas. Settlement Areas are divided into Towns/Villages and Hamlets. The GP imposes restrictions on the expansion of settlement areas and the creation of new lots.

*Due Diligence Considerations*

If the property subject to the transaction is within the GP boundary, one must determine what designation under the GP is applicable. Different land use restrictions apply depending on the designation.

**(iv) The Growth Plan for the Greater Golden Horseshoe**

The Growth Plan for the Greater Golden Horseshoe ("Growth Plan") was enacted under the authority of the *Places to Grow Act, 2005.*[6] The Growth Plan was created for the purpose of providing a provincial vision for the management of growth in the Greater Golden Horseshoe to the year 2031 by identifying priority urban centres, encouraging more compact urban development in identified areas and by protecting green lands, natural systems and agricultural lands.[7] The key pillars of the Growth Plan strategy are the support of compact development forms and intensification, which the government hopes will help to eliminate pressure to expand urban boundaries.[8]

The Growth Plan also contains important policies with respect to Employment Lands. Under Policy 2.2.6.5, municipalities may permit the conversion of lands within "employment areas" to

non-employment uses, only through a "municipal comprehensive review".[9] A municipal comprehensive review can only be undertaken by a municipality; private applicants cannot ask for one. Of note, "major retail uses" (ex. "big box" stores and power centres) are defined as "non-employment uses" for purposes of the conversion.

*Due Diligence Considerations*

If the property subject to the transaction is within the Growth Plan boundary, one must determine what designation under the Growth Plan is applicable. Different land use restrictions apply depending on the designation. If you are advising a commercial developer, you will want to draw their attention to employment lands conversion policy.

## 3. Official Plans

### a) Official Plan & Policies

An official plan ("OP") sets out the present policy of the municipality concerning its future physical, social, and economic development. It does not in and of itself restrict land use.[10] Authority for municipalities to adopt official plans comes from Part III of the *Planning Act*. An OP is required to contain goals, objectives and policies established primarily to manage and direct physical change and the effects on the social, economic and natural environment of the municipality.[11] In addition, an OP may contain measures and procedures proposed to obtain the objectives of the plan.[12]

No municipal by-law can be passed that does not conform with an approved OP that is in effect.[13] But, if a zoning by-law is passed and no appeal has been made within the time frame for the appeal, or if an appeal has been withdrawn, or if the by-law is amended by the Ontario

Municipal Board, the zoning by-law is conclusively deemed to conform with the official plan.[14] In addition, an OP is required to be consistent with the Provincial Policy Statement, and to conform with/ not conflict with provincial plans.[15]

*Due Diligence Considerations*

There are three types of municipalities: single-tier (e.g. City of Barrie), upper-tier (e.g. Region of Simcoe), and lower-tier (e.g. Town of Bradford West Gwillimbury). In multiple-tier municipalities, your due diligence will involve a review of both the Regional/County OP and the local OP, while single-tier municipalities only require review of their adopted OP.

When reviewing an OP, one needs to identify the applicable designation(s), and include a summary of the relevant general and designation-specific policies, such as:

- Town-wide environmental restrictions.
- Restrictions on development along major streets.
- Uses permitted within the "Light Industrial" Designation.

It is also important to note any site-specific OP policies, which can be quite specific (such as describing floor space allocation). Site-specific policies can be identified using the OP's maps and schedules. They can often incorporate prior amendments to the OP.

**b) Secondary Plans**

A secondary plan, if and where applicable, contains more specific policies within a specific area of land (ex. North Oakville). . The general policies of the "main" OP still apply and the secondary plan policies constitute a further overlay (generally pertaining to a specific area of the

municipality). . Some incorporate a “Master Plan”, which is the municipality’s vision for how the specific area will be laid out in terms of its roads, schools, parks, residential areas, business areas, etc.

*Due Diligence Considerations*

Due diligence here is the same as for the “main” Official Plan: Identify the applicable designation. Describe its goals, objectives, permissions and restrictions. Have regard for any specific policies that might apply to your lands (environment, transportation, woodlots, shoreline, density, urban design, density bonusing provisions etc.)

## 4. Zoning By-Law

Zoning implements the goals, objectives and policies expressed by the municipality in its Official Plan. Section 34.(1) of the *Planning Act* authorizes municipalities to pass zoning by-laws in respect of a variety of subject matter, including restricting the use of land, and the erection, location and use of buildings or structures. Zoning By-laws come in a variety of shapes, sizes, and style. Typically, the following is addressed:

- Definitions of terms.
- General zoning regulations applicable in all zoning categories.
- Individual zoning categories (such as residential, industrial, and commercial), containing permitted uses and various restrictions on the deployment of such uses.
- Maps indicating which zoning categories apply to which lands.
- Site specific zoning exception or permissions.

*Due Diligence Considerations*

A review of the zoning designation is necessary to determine if the current use of the property is permitted, as well as to anticipate if the client's future use or development needs will be permitted by the existing by-law, or will need to be pursued through an application for a zoning by-law amendment or minor variance. (As noted above, while official plans do not actually restrict land use, they do dictate to extent to which a change in the zoning, if desired, may be achievable.)

One needs to first identify the applicable zone(s) for the property from the zoning map/schedule. A summary of the zoning information for the client should include provisions that apply to the applicable zone that address permitted uses, performance standards in effect, and development standards (such as density, height and setback provisions). Any site-specific zoning provisions must also be noted. Any relevant information from the general provisions that apply to all zones should also be reviewed and included in any summary for a client.

Once all the zoning material is gathered, the objective is to synthesize a summary that describes as-of-right permissions on a particular piece of land. One may also be asked to determine whether a proposed use or development project would be permitted as-of-right, and if not, list the uses/development standards that must be altered to permit what the client wants.

It is also common to be asked to review a survey and/or site plan of the existing buildings and uses to determine if an existing development is in compliance with the various aspect of the zoning by-law.

## 5. Committee of Adjustment Decisions

Under the *Planning Act*, Municipalities are empowered to establish committees of adjustment to approve minor variances from the provisions of the applicable zoning by-law (and to grant consents for the subdivision of land).[16] The *Planning Act* sets out a four-part test which a Committee of Adjustment must consider for a minor variance application. The variance must be: (1) "minor" in nature, (2) objectively desirable for the appropriate development or use of the property, and it must maintain the general intent and purpose of both the applicable (3) zoning by-law and the (4) official plan.[17] All four parts of this test must be met. A minor variance may also be granted to modify a legal non-conforming use.[18]

*Due Diligence Considerations*

You will need to identify if there are any previous Committee of Adjustment decisions that pertain to the property subject to the transaction, since they may impact use or future development. A minor variance will explain and may relieve any issues of non-conformity with the existing zoning by-law. Committee of Adjustment decisions are not listed in zoning by-laws. A municipality's Committee of Adjustment must be contacted to determine if there are any prior decisions applicable to the property. If there are any previously approved minor variance decisions, it is also necessary to determine whether or not there are conditions attached to the approval, and if so, if the conditions have been fulfilled.

## 6. Ontario Municipal Board Decisions

Many decisions affecting land use may be appealed to the Ontario Municipal Board ("OMB"). The OMB hears appeals under the *Planning Act* and other legislation; financial issues related to

development charges, land expropriation, municipal finance and other legislated financial areas; municipal issues as legislated under the *OMB Act* and other legislation; and other issues assigned to the OMB by provincial statute.

*Due Diligence Considerations*

It is helpful to determine if there are any Board decisions that pertain to the subject property given that a Board decision may have amended the Zoning By-law or Official Plan that applies to the property, among other things. In instances where a client is proposing a use that is not currently permitted and may not be supported by the municipality, it can also be helpful to review Board decision issued for properties in the vicinity for which similar developments and/or uses were proposed in order to gage the likelihood of having a similar proposal approved for the subject property.

## 7. Heritage Act Designation or Listing

Municipalities are authorized by Part IV of the *Ontario Heritage Act*[19] to designate by by-law properties of "cultural heritage value or interest".[20] Once an individual property is designated, important restrictions apply with respect to an owner's ability to alter, demolish, relocate the designated property.[21] In addition to individual property designation, the Act provides for two other mechanisms for the conservation of built heritage: the designation of heritage conservation districts (Part V); and the entering into of heritage easement agreements (Sections 21 and 37).[22] The Act also authorizes municipalities to adopt Building Standards By-laws for designated structures. These by-laws can provide detailed regulations with respect to building maintenance.[23]

*Due Diligence Considerations*

If the property is listed and/or designated as a heritage property, or is located within a heritage conservation district, there are restrictions that must be addressed before any redevelopment can take place. Municipalities may produce an inventory of listed and designated heritage properties which in some case can be accessed online. In other cases, it is necessary to contact the clerk of the municipality to determine if a property has heritage status. The clerk is mandated by the Act to maintain a register of all properties designated by municipal council and those properties designated by the Minister of Municipal Affairs and Housing.[24]

## 8. Conservation Authority Regulation

A property owner may be subject to additional development or land use restrictions if the property is regulated by a conservation authority, established under the *Conservation Authorities Act*.[25] The objectives of a conservation authority are to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources.[26] Conservation authorities may make regulations applicable in the area under their jurisdictions.[27] In particular, an authority may make regulations prohibiting or requiring permission of the Authority for development if the control of flooding, erosion, or pollution of land that may be affected by the development; an authority may also prohibit or require permission for the straightening, changing or diverting of an existing channel of river, creek or watercourse.[28]

The Toronto and Region Conservation Authority ("TRCA") is an example of a conservation authority. The TRCA has geographical jurisdiction over a number of watercourses, river or stream valley systems, wetlands and the Lake Ontario Shoreline. If a proposed development is

located within the TRCA's regulated area, an owner must apply for permission to proceed with a development and to make alterations to shorelines and watercourses.[29]

*Due Diligence Considerations*

Conservation authorities have jurisdiction over a defined area. A property within an authority's area may be subject to its restrictions and oversight, especially if the property is located near a watercourse or shoreline. The conservation authority or the local municipality may be contacted to determine if a property is subject to the oversight of a regional conservation authority.

## 9. Municipal Ravine and Tree By-laws

Municipalities often set their own standards for the removal of trees and protection of ravines, woodlands and environmentally sensitive areas, through protection by-laws and licensing requirements.

For example, in Toronto, if your property is within the Ravine and Natural Feature Protection area the Ravine and Natural Feature Protection By-law[30] ("Toronto Ravine By-law") requires a permit in order to: (i) injure or destroy any tree; (ii) change the natural land topography, by excavation or adding soil or other materials on slopes; (iii) dump or place any type of debris including garden waste, leaves and branches; and to (iv) construct new or replacement structures or retaining walls.

The City of Toronto Private Tree By-law[31] ("Toronto Tree By-law") is an example of a municipal by-law restricting removal of trees. The by-law regulates injury or removal of privately owned trees which measure 30 cm in diameter ore more as measured at 1.4 m above ground level. A permit is required by the City of Toronto to remove or injure a protected tree.

The by-law does not apply to the ravine and natural feature portion of properties regulated under the ravine by-law.

*Due Diligence Considerations*

Ravine and Tree by-laws are particular to the municipality in which the property is situated, and requirements may vary, including exemptions and permitting procedures. These regulations may be relevant in the context of real estate transactions that contemplate future development.

Requirements will vary according to the local by-law. Size and location of trees, proximity of any structures or proposed development to ravines or sensitive lands may need to be considered. You will need to outline the process for your client in terms of what is required to be submitted to the municipality before a permit can be issued. It is also helpful to determine if there is a cash-in-lieu option available in the event the municipality requires that a destroyed tree be replaced, as well as the replacement rate that will apply.

## 10. Municipal Demolition of Rental Housing Controls

In addition to legal requirements under the *Residential Tenancies Act*[32], demolition and conversions of rental property may be subject to restrictions in municipal regulations. In 2007, under the authority of s. 111 of *The City of Toronto Act,*[33] the City of Toronto adopted the Rental Property Demolition and Control By-law ("Rental Property Demolition By-law").[34] The by-law gives the City enhanced authority to protect rental housing from demolition and conversion to non-rental purposes (e.g. condominium, offices, or other non-rental uses), by protecting rental housing from demolition or conversion. The bylaw makes it an offence to demolish or convert rental housing to non-rental purposes without a permit issued by the City.

*Due Diligence Considerations*

For Toronto's Rental Property Demolition By-law, the by-law applies to the proposed demolition of rental properties to demolition activities such as interior renovations that remove some rental units, or change the number and type of rental units in a building. The bylaw applies to proposed conversion of rental housing to co-ownership. The by-law does not apply to condominium-registered buildings or life-lease properties.

You need to determine not only whether the property subject to the transaction currently provides rental housing, but if it provided rental housing in the past, and whether any exemption applies. You will need to outline the process for your client in terms of what is required to be submitted to the municipality before a permit for demolition or a conversion can be issued.

## 11. Statutory Agreements Registered on Title

Easements and restrictive covenants are commonly searched in relation to a property to determine the extent to which they regulate the use of the land in question. In addition, there are also a number of statutory agreements which may be registered on title and which may have significant implications for land use and/or development. Under the bonusing authority of the *Planning Act*,[35] municipalities may authorize increases in the height or density of a development beyond the limits set out in the applicable zoning by-law in exchange for the provision of facilities and services. A municipality may require the owner to enter into an agreement securing the provision of facilities and services, and such agreement may be registered against the land to bind subsequent owners.[36] Similarly, as a condition of registering a plan of subdivision, a municipality may require a developer/land owner to execute a subdivision agreement, which may stipulate conditions to be fulfilled by the owner into the future (such as installing street lights) .

These agreements may also be registered against the land and enforced against subsequent owners.[37] Site plan agreements are another example of statutory agreements which may be registered on title.[38]

*Due Diligence Considerations*

A standard title search will reveal any statutory agreements that are registered on title. Provisions in the agreement must be carefully examined to determine land use restrictions and any future performance obligations that could be passed on to a future owner (i.e. your client).

## 12. Legal Non-Conforming Status Enquiry[39]

A non-conforming use is a use that is not permitted under the applicable zoning currently in force but that conformed to the zoning regulations in place prior to the current coming into force. Non-conforming status for a property will arise whenever a new zoning by-law is passed which restricts or prevents the existing use (such as a more restrictive set back requirement, or a requirement that only a certain type of use is permitted – i.e., residential). A legal or lawful non-conforming use is a statutorily-permitted use to which a building, structure, or land was put prior to the passage of a zoning by-law which would no longer allow that prior use.[40]

The *Planning Act* has long codified the common law legal principle that an owner is permitted to continue a specific use of property once it has been made unlawful by a new by-law. Subsection 34(9) is the statutory authority which allows for a non-conforming use to be permitted to continue lawfully.[41] The Act requires that (1) the property was lawfully used on the day of the amending by-law, and (2) that the use has been continuous, in order for the owner to be protected. The section also protects a property owner's right to construct and make building

alterations once a building permit has been issued pursuant to the *Building Code Act, 1992*, provided that the building continues to be used for the same purpose.[42]

*Due Diligence Considerations*

A property owner's right to a legal non-conforming use may arise under a plethora of factual scenarios, as Part III of this article will show. Whenever use of the property (use of land generally, or use of building or structure) is not in accordance with the current applicable zoning by-law, there may be a right to a non-conforming use in accordance with s. 35 of the *Planning Act*. You will need to review previous zoning by-laws to determine whether they permitted the current use of the property.

In addition, you will need to determine for how long the non-conforming use has continued. Any major discontinuances or temporary lapses may result in the right to a legal non-conforming use being lost. The Courts have provided some flexibility to owners to ensure non-conforming rights are not unfairly lost. Furthermore, it has long been established by the Courts that a non-conforming use may intensify or change to adapt to new circumstances.[43] In the end, the question of whether a non-conforming use is protected by the *Planning Act* is a contextual determination.

## PART II – City of Toronto's New Comprehensive Zoning By-law

### Introduction

At its meeting of August 25-27, 2010, Toronto City Council enacted a new, single city-wide comprehensive zoning By-law ("**the CZ By-law**").[44] Prior to its adoption, the City of Toronto's

zoning framework consisted of 43 different zoning by-laws inherited from the six pre-amalgamation municipalities, (Metropolitan Toronto, East York, Etobicoke, North York, Scarborough and York).[45] Combined, these By-laws contained over 13,000 regulations, 10,000 site-specific amendments, 1550 definitions, and 276 different zones. Many of the by-laws addressed similar land use concerns, but employed significant differences in their methods of approach and values of development standards. As a result of the complexity of the pre-existing zoning framework, the City of Toronto undertook a major initiative to replace the existing zoning by-laws with one comprehensive zoning by-law which sought to develop a common terminology, structure and set of defined zoning terms that would apply across the City. The result of this project came to fruition (more or less) this past August when the CZ By-law was finally adopted by City Council ("**the City**").

**Background & Process**

The development of a new comprehensive zoning by-law was viewed as the second critical step after the creation of a new Official Plan when the amalgamated City of Toronto was born on January 1, 1998.[46] Shortly after the Official Plan was approved by City council in November 2002, City Planning staff began work on project design for the CZ by-Baw initiative; a City report dated December 5, 2002 predicted that the project would take 5 years to complete.[47]

In drafting the new CZ By-law, the main objective was to produce a single zoning by-law for the City which captured the intent of the existing zoning by-laws, by developing a "common language", as opposed to making major changes to development standards (e.g. – height, density, setbacks); yet it was also recognized that some changes would be necessary.[48]

City Staff sought to develop a "common language" for the new CZ By-law through careful section-by-section comparisons between the existing 43 zoning by-laws.[49] In some respects, significant differences were apparent; for instance, all of the existing by-laws regulated height and gross floor area but adopted different means to measure and calculate these standard.[50] To address these challenges, a "Best Practices" approach was utilized: prevalence of the standard amongst the 43 existing by-laws, ease of implementation, and regard for legislative changes or Official Plan policies were considered in choosing the standard or "Best Practice" for the new CZ By-law.[51]

**Basic Structure**

The final version of the CZ By-law adopted by City Council is 2279 pages long and is split into 3 volumes. Volume 1 is where the bulk of the new content is located (and is "only" 266 pages). It contains chapters of general application, including "Administration", "Non-Conformity/Non-Compliance", and "Regulations applying to all Zones".[52] The core of Volume 1 are chapters outlining the City's major zoning categories and zones, along with specific land use requirements particular to the associated land use function.

For example, The first part of the Chapter 10 in Volume 1 outlines regulations applying to the entire Residential category. It is followed by regulations which apply to each type of zone in the Residential category – Residential Zone (R), Residential Detached Zone (RD), Residential Semi-Detached Zone (RS), Residential Townhouse Zone (RT), and finally Residential Multiple Dwelling Zone (DM). [53]

The regulations are further broken down into sections outlining various requirements, such as "Permitted Uses" and "Lot Requirements", many of which are commonly addressed between

zones. Volume 1 concludes with chapters addressing particular subject matter, including Specific Use, Parking, Loading Space, Bicycle Parking, Special Districts (Downtown), and Overlay Zones regulations.[54]

Volume 2 is comprised of one chapter, Chapter 900, which addresses Site Specific Amendments for the residential zoning category. Volume 3 continues with the chapter addressing Site Specific Amendments for all the remaining zoning categories, and concludes with chapters dealing with Prevailing By-Laws and Prevailing By-law Sections, Zoning Maps and Overlay Maps.[55]

**Zoning Categories**

The CZ By-law establishes 9 zoning categories, some with multiple zones within each category. The following table summarizes all the zones in the CZ By-law:

| Section | Zone Type | Purpose |
|---|---|---|
| **RESIDENTIAL** | | |
| **10.10** | Residential Zone **(R)** | To provide a zone for a variety of residential building types, including detached houses, semi-detached houses, townhouses, duplexes, triplexes, fourplexes and apartment buildings, as well as a limited set of other uses suited to the residential setting. |
| **10.20** | Residential Detached Zone **(RD)** | To provide a zone for detached houses, as well as a limited set of other uses suited to the residential setting. |
| **10.40** | Residential Semi-Detached Zone **(RS)** | To provide a zone for detached houses and semi-detached houses, as well as a limited set of other uses suited to the residential setting. |
| **10.60** | Residential Town house Zone **(RT)** | To provide a zone for detached houses, semi-detached houses and townhouses, as well as a limited set of other uses suited to the residential setting. |
| **10.80** | Residential Multiple | To provide a zone for detached houses, semi-detached houses, duplexes, triplexes, fourplexes, and apartment |

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|---|---|---|
| | Dwelling Zone **(RM)** | buildings that are limited in height, as well as a limited set of other uses suited to the residential setting. |
| **RESIDENTIAL APARTMENT** | | |
| **15.10** | Residential Apartment Zone **(RA)** | To provide a zone for apartment buildings, as well as a limited set of other uses suited to the residential setting. |
| **COMMERCIAL** | | |
| **30.20** | Commercial Local Zone **(CL)** | To provide for small-scale commercial uses to serve the needs of the local residential area. |
| **COMMERCIAL RESIDENTIAL** | | |
| **40.10** | Commercial Residential Zone **(CR)** | The purpose of the CR Zone is to:<br><br>(A) provide for a broad range of uses including retail, service commercial, office and residential uses, often in mixed use buildings; and<br><br>(B) limit the impacts on adjacent residential neighbourhoods and contribute to pedestrian amenity. |
| **COMMERCIAL RESIDENTIAL EMPLOYMENT** | | |
| **50.10** | Commercial Residential Employment Zone **(CRE)** | To provide a range of retail, service commercial, office, residential and limited industrial uses in single use buildings and mixed use buildings. |
| **EMPLOYMENT INDUSTRIAL** | | |
| **60.10** | Employment Light Industrial Zone **(EL)** | To provide an area for light manufacturing, industrial and other employment land uses that can co-exist in relatively close proximity to sensitive land uses, such as residential and open space uses. |
| **60.20** | Employment Industrial Zone **(E)** | To provide an area for general manufacturing, industrial and other employment land uses that can be expected to co-exist in relative close proximity to other manufacturing and industrial land uses without major impacts on each other. |
| **60.30** | Employment Heavy Industrial Zone **(EH)** | To provide an area for heavy manufacturing, industrial and other employment land uses that may have impacts on adjacent lands. |

| | | |
|---|---|---|
| **60.40** | Employment Industrial Office Zone **(EO)** | To permit an area for a mix of manufacturing and office uses that can be expected to co-exist with each other in a 'business park' setting. |
| **60.50** | Employment Industrial Commercial Zone **(EC)** | To accommodate employment lands that are also contained on the date of the enactment of this by-law existing large scale, stand-alone retail and/or "power centres". |
| **INSTITUTIONAL** | | |
| **80.10** | Institutional General Zone **(I)** | To permit a variety of institutional uses. |
| **80.20** | Institutional Hospital Zone (**IH)** | To accommodate a hospital and other specific uses that are directly related, complementary or ancillary to the operation of the hospital. |
| **80.30** | Institutional Education Zone **(IE)** | To accommodate a post-secondary school in a campus setting with other uses that are considered to be directly related, complementary or ancillary to the operation of the post-secondary school. |
| **80.40** | Institutional School Zone **(IS)** | To accommodate public schools and private schools and the uses that are ancillary to the operation of a school as a community resource. |
| **80.50** | Institutional Place of Worship **(IPW)** | To accommodate a place of worship and uses that are ancillary to the operation of a place of worship. |
| **OPEN SPACE** | | |
| **90.10** | Open Space Zone **(O)** | To provide an open space zone where the only permitted principal use is a park, such as ornamental gardens or small play areas, with no principal buildings permitted. |
| **90.20** | Open Space Natural Zone **(ON)** | To provide an open space zone for the conservation of lands such as ravines and waterways, that are part of the natural system. |
| **90.30** | Open Space Recreation Zone (**OR)** | To provide an open space zone for parks in which recreation uses and facilities, such as sports fields, arenas and community centres, along with associated services, are permitted. |
| **90.40** | Open Space Golf Course Zone (**OG)** | To permit golf courses, including clubhouses and associated services, recreation uses and facilities. |
| **90.50** | Open Space Marina | The to permit marinas, including clubhouses and |

| | | |
|---|---|---|
| | Zone **(OM)** | associated services, recreation uses and facilities. |
| **90.70** | Open Space Cemetery Zone **(OC)** | To provide a zone for cemeteries, including associated services and facilities. |
| **UTILITY AND TRANSPORTATION** | | |
| **100.10** | Utility Zone **(UT)** | To permit public utilities, transportation uses, horticultural and outdoor recreation uses. |

**New Zoning Standards**

While much of the CZ By-law harmonizes existing development standards, there are a number of new standards and provisions which were included. The following are just some of the more noteworthy changes or additions.

The CZ By-law contains new parking standards. Parking rates vary based on access to public transit. Lower standards for parking rates have been adopted in the Downtown and in areas with higher access to transit. In addition, the CZ By-law contains provisions prohibiting charging for visitor parking in residential zones and the residential apartment zone. There is also a new set of revised city wide loading standards for multi-unit residential, commercial, and industrial land uses that allow for service by different size trucks. Also in the residential zones are measures relating to soft landscaping in rear yard, new setback requirements for properties on ravines, and a requirement for new schools and places of worship to apply for a zoning by-law amendment.

In commercial-residential zones, the CZ By-law introduces three sets of development standards for downtown, main streets, and large streets, as well as a minimum three-storey height requirement in the downtown and along main streets. In the industrial zones, special restrictions for industrial propane facilities have been added (in response to the Sunrise Propane explosion of

August 2008); such facilities are now only permitted in the heavy industrial zone (EH) and are subject to additional requirements. There are also Tall Building regulations for buildings with heights greater than 46 metres; of note is a new maximum floor plate restriction of 750m², which is significantly smaller than many existing office towers and condominiums. There are also new provisions addressing specific uses, such as rooming houses, group homes, and schools, and a new chapter of regulations addressing bicycle parking.

Finally, throughout the CZ By-law are numerous regulations pertaining to renewable energy and co-generation facilities, including solar panels and wind turbines; these measures anticipate more businesses and residents taking advantage of government energy incentive programs that have been rolled-out in the last couple years, (such as the Ontario Power Authority's "Feed-in Tariff"/FIT program).

**Non-Conforming Properties**

*Grandfathering of Non-Conforming Properties*

Some of the development standards in the CZ By-law, such as residential setback requirements, may differ from the previous standard which applied to a particular property. As a result of such changes, some properties would no longer be in compliance with the new standard, and would become legal non-conforming in status. In some cases, the CZ By-law addresses this problem by including numerous provisions which deem properties and their existing buildings to comply with the new standard (i.e. legalizes them without resort to subsection 34(9) of the *Planning Act*).

An example of such a provision in the Residential zoning category is found at 10.5.30.200:

> (1) Existing lots Not Complying with Minimum Lot Area
>
> If a residential building existed on a lot in the Residential Zone category on the date of the enactment of this By-law, and the lot has a lot area less than that required by this By-Law, the minimum lot area for that lot is the existing lot area that lawfully existed on the date of the enactment of this By-law.

*Legal Non-Conforming Uses – subs.34(9) of the Planning Act*

For some properties and performance standards, the CZ By-law may not include a deeming or "grandfathering" provision, like the one above. As a result, some aspect of the property's building structure or use would not conform with the new CZ By-law. Subsection 34(9) of the *Planning Act* protects these property owners so long as the same use of the property continues, and does not cease. Likewise, the same protection is offered for properties that were already legal non-conforming under the previous By-law which applied to the property. The law in this area is fluid, as the discussion below will illustrate.[56]

For a property owner, having a non-conforming use "grandfathered" or deemed in compliance is a much preferable method to preserve a non-conforming property right than a legal non-conforming use under s.34(9) of the *Planning Act*. A deemed conforming use is a legal use that that need not be proven as "legal" to a Chief Building Official, Committee of Adjustment, or the Ontario Municipal Board, unlike a legal-conforming use. And since the right to the use is entrenched in the deeming provision, it cannot be lost by the actions of the owner on the grounds of discontinuance of use. This characteristic provides additional comfort for subsequent owners of a property, since they need only go as far as the deeming provision to prove their non-conforming right, rather than examine the conduct of prior owners to determine that there was no

lapse in the use. The result is that a deeming provision provides much more certainty than a legal non-conforming use protected under s.34(9) of the *Planning Act.*

Chapter 700 in the CZ By-law provides a number of regulations which address issues of non-conformity/non-compliance, as well as affirming an owner's right to a legal non-conforming use.

**Exemptions & Exceptions – The Concepts of "Holes" & "Prevailing By-laws"**

The 43 zoning by-laws inherited by the amalgamated City of Toronto were not repealed and continue to apply and have effect, but only with respect to the exempted properties (i.e. - the "holes" on the new zoning map) and as necessary to give effect to "prevailing by-laws" (discussed below).

At the time of the CZ By-law's adoption by City Council, a number of properties were specifically exempted from the application of the CZ By-law (approximately 1.4% of properties within the City[57]). In the case of those excluded properties, the old zoning continues to apply. Essentially, each site specific or area specific exemption becomes a "hole" in the zoning map of the CZ By-law (and is subject to the pre-existing zoning).

Properties that were left out of the CZ By-law include:

1. Those non-conforming with the City Official Plan;
2. Properties subject to complex area-specific By-laws, such as the University of Toronto campus;
3. Properties subject to current site plan applications;
4. Those under appeal to the Ontario Municipal Board; and

5. Properties subject to site-specific amendments passed in July/August 2010.

As noted above, for properties that are not exempted as "holes", the CZ By-law applies. Yet within that framework, some properties which are included in the CZ By-laws are specifically subject to a "prevailing by-law". Prevailing by-laws are explicitly referenced in the CZ By-law, and generally reference a pre-existing site or area specific amendment that was made to the old by-law. In effect, the use of prevailing by-laws adopts, by reference, a particular aspect of the prior by-law, and incorporates it into the new CZ By-law. The prevailing by-law functions as an exception to a performance or development standard expressed in the CZ By-law. Only properties that are governed by the CZ By-law may be subject to a prevailing by-law exception. Properties that fall into a "hole" are exclusively regulated by the existing (or old) zoning by-law, and possibly applicable amendments made to that by-law.

The end result is that for <u>all</u> properties within the City of Toronto either the new CZ by-law or the existing by-law will apply to a site at any one time, but not both. Properties will be subject to the new CZ By-law, unless they are specifically exempted. The demarcation line is clear and there is no opportunity to argue that the existing by-law should apply if the property in question is not specifically exempted. Any relaxation of the applicable zoning standards must be pursued through a rezoning application.

It is anticipated that many of these properties will eventually be brought under the application of the CZ By-law at a later date. Excluded properties subject to site-specific by-laws will be the last to be brought under the CZ By-law.

### Ontario Municipal Board Appeals

Undoubtedly many property owners will appeal provisions of the CZ By-law to the Ontario Municipal Board ("**OMB**").[58] As a pre-condition to filing an appeal, the *Planning Act* requires that a party make oral submissions at a public meeting or file written submissions to City council before the By-law was passed. If the By-law is appealed, it will not come into effect until it is approved or modified by the OMB. Furthermore, it could take years before all the appeals are resolved by the OMB and possibly the Courts, meaning that the status of the CZ By-law may be left in limbo for the foreseeable future.

## PART III – The Law of Legal Non-Conforming Use

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### Introduction

A non-conforming use is a use that is not permitted under the applicable zoning currently in force. This comes into play when the use is apparently out of conformity with the zoning. In Ontario, subs. 34(9) of the *Planning Act* is the statutory authority which allows for a non-conforming use to be permitted to continue lawfully. The Act requires that (1) the building, structure or land was lawfully used on the day of the amending by-law, and (2) that the use has been continuous, in order for the owner to be protected. In addition, the Act has a provision which protects an owner's rights conferred in a issued building permit from changes in zoning, so long as the project conforms its original purpose.[59]

The law of legal or lawful non-conforming use has grown out of a wide variety of factual contexts examining various types of zoning by-law provisions. As a result, Courts have developed a flexible body of rules to protect land owners from the perceived expropriation of a

zoning change, while also balancing the interests of the local community in promoting consistent development standards. This section seeks to provide an introduction to the basic legal requirements for a legal non-conforming use, and highlight some notable cases which illustrate the fluid or flexible nature of this area of the law.

**Threshold Legal Requirements**

Subsection 34(9) of the *Planning Act* is the legal authority for the protection of non-conforming property rights. It states as follows:

> **34.(9)** No by-law passed under this section applies,
>
> (a) 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 the passing of the by-law, so long as it continues to be used for that purpose; or
>
> (b) to prevent the erection or use for a purpose prohibited by the by-law of any building or structure for which a permit has been issued under subsection 8 (1) of the *Building Code Act, 1992*, prior to the day of the passing of the by-law, so long as the building or structure when erected is used and continues to be used for the purpose for which it was erected and provided the permit has not been revoked under subsection 8 (10) of that Act. R.S.O. 1990, c. P.13, s. 34 (9); 2009, c. 33, Sched. 21, s. 10 (1).

A legal non-conforming use under section 34.(9)(a) has been interpreted by the Courts to require an owner to prove two basic requirements:[60]

1. The use of the land, building or structure was <u>lawful</u> at the time of the enactment of the relevant zoning restriction; and

2. The previous lawful use has <u>continued</u> thereafter.

If the use has ceased, the current by-law thereupon becomes applicable and the land cannot thereafter be used for original non-conforming purpose.[61]

**The Modern Test – Saint-Romuald (City) v. Olivier**

The 2001 decision of *Saint-Romuald (City) v. Olivier*[62], is the most recent Supreme Court of Canada case which examines the law of legal non-conforming use. In deciding this case, the Court reviewed and interpreted much of the existing case law to develop a comprehensive test for courts to apply when confronted with the task of determining if a non-conforming use ought to be legally protected.

*Facts of the Case & Lower Court Decisions*

The case involved a country and western cabaret located in the City of Saint-Romuald ("the City") in Quebec. Since 1990, several tenants in succession had operated a bar in the building, which was permitted under the zoning in place. On May 22, 1991 a new zoning by-law was passed by the City which circumscribed the permitted uses within the zone. In the fall of 1994 the club's owners bought the country and western bar and began operating it as a bar with nude female dancers, and renamed it *L'Extase* ("Ecstasy"). The new bar became very busy. The local police increased surveillance, yet there was no evidence that there was a problem of discipline within the bar, nor any evidence that it attracted a more troublesome clientele than when it was a country and western bar.

In the fall of 1994, the City made an application to Court under the Quebec planning legislation[63] for an order requiring cessation of what it regarded as an unlawful replacement of a non-conforming use. The Court of first instance decided in favour of the owners, finding (i) that they

enjoyed an acquired right to operate the "cabaret"; (ii) that a bar that presents entertainment with erotic dancers is a cabaret; and (iii) that neither the Quebec *Cities and Towns Act*[64], nor the new by-law expressly prohibited entertainment with erotic dancers. When the decision was appealed, The Quebec Court of Appeal agreed with the lower court, again finding that absent an express prohibition in the new by-law, the owner's acquired a right to operate a "cabaret". [65]

*Majority Decision*

When the appeal was finally heard by the Supreme Court, a panel of seven justices split 4-to-3 in favour of the owners. In writing the majority decision for the Court, Justice Binnie reviewed the jurisprudence of legal non-conforming use in common law provinces and in civil law Quebec (where the doctrine is known as "acquired rights") to come to a number of conclusions about the state of the law.

The nature of a non-conforming use is not to be defined in reference to the prior zoning by-law which permitted the use; instead, it is determined by reference to the use to which the property was put at the time when the amending by-law was passed.[66] The law allows for flexibility in the operation of a non-conforming use; normal evolution of the use may occur with the passage of time; and a protected use may be exercised more intensively and to adapt to the demands of the market or the technology that are relevant to it.[67] Yet there are some limitations on increasing the intensity of a non-conforming use, particularly where the intensification is of such a degree as to create a difference in kind; but the threshold is very high.[68]

A non-conforming use may contemplate numerous activities, and so the Courts are tasked with determining how many of these activities, and of what nature, may be added, subtracted or modified before they can be considered protected under the same "type" of use.[69] The

landowner overreaches when such new or modified activities are too remote from the earlier activities, or if they can be shown to create undue additional aggravated problems for the municipality, when balanced against the interests of the owner and its expectations.[70]

Justice Binnie then considered how the law applied to the appeal in question. The owner's pre-existing use could be characterized as the commercial offering of a combination of food, drink, ambiance and lawful entertainment to the public.[71] The switch from western-style concerts to nude dancers was within the general nightclub purpose of the pre-existing use, and it was not too remote from the original use.[72] There was also no serious evidence of adverse neighbourhood effects to challenge the use on the grounds of negative community impact. In sum, the change in entertainment offered by the owners did not constitute the illegal replacement of the original non-conforming use.[73]

*Summary of the Test*

Justice Binnie articulated a number of principles and considerations that lower courts will apply when confronted with a legal non-conforming use problem, particularly when a change or discontinuity of use is alleged. These were referenced in his decision and are summarized as follows.[74]

1. The purpose of pre-existing use should be characterized.

2. The degree of intensification of the use must be discerned and whether it constitutes, in terms of community impact, a difference in kind, in which case the protection may be lost.

3. Consideration of how remote the expansion is from the earlier activities.

4. To the extent activities are added, altered or modified within the scope of the original purpose, there must be a balancing of the landowner's interest against the community interest, taking into account the nature of the pre-existing use, the degree of remoteness and the new or aggravated neighbourhood effects. The greater the disruption, the more tightly drawn will be the definition of the pre-existing use or acquired right.

5. Neighbourhood effects, unless obvious, should be established by evidence to be relied upon.

6. Consideration of the proper balance in the characterization of the acquired right or legal non-conforming use (not too general as to liberate the owner from the constraints of what he actually did, and not be so narrow as to rob him of some flexibility in the reasonable evolution of prior activities).

7. The definition of the acquired right or legal non-conforming use will always have an element of subjective judgment but it must be grounded in objective facts.

In determining whether to non-conforming use ought to be protected, the Supreme Court of Canada has stated that the Court's overall objective,

> "is to find the proper balance between an individual's right to the continued use and enjoyment of his or her property and the power of the community, expressed through the local municipality, to enhance, by changing the land use regulations, the amenities of surrounding and other affected landowners."[75]

**Significant Case Law**

When Courts are tasked with determining whether a non-conforming use is legally permitted, they are essentially examining the particular use and the previous by-law which permitted its use, to determine if it should continue to be permitted. The result is that each case is very fact specific, making general determinations about what type of uses are legally non-conforming next to impossible. Furthermore, the nature of the legal test is flexible and amorphous, as the summary of the *Saint-Romuald* test above illustrates. The case law highlights how wide a variety of uses and factual circumstances have been examined by the Courts to determine if the law allows the use to continue to be permitted.

*A Sunken Cottage Makes a Wonderful Dock*

One of the more colourful cases that have recently come to the Courts is the 2010 Ontario Court of Appeal decision of *Feather v. Bradford (Town).*[76] The case concerned a cottage structure that had been submerged and uninhabited for over 14 years. In February 2006, the property's owner, Michael Feather ("Feather"), started to raise the submerged cottage. But in late March 2006 he was advised by representatives of the Town of Bradford West Gwillimbury ("Bradford") to stop his work since he had not obtained the required building permit. When Feather finally applied for a building permit the Chief Building Official ("CBO") denied his application on the grounds that the proposed work did not comply with the town's zoning by-law, and since the cottage had been abandoned (in the CBO's view), it was no longer allowed as a legal non-conforming use. When the case came to court, the central legal issue was whether the intention of the three preceding property owners to carry out the remedial work to rehabilitate the "sunken cottage"

was sufficient to preserve the legal non-conforming use status of the cottage, despite it being uninhabited for 14 years.[77]

The sunken cottage was originally built in 1963, and was permitted by the zoning by-law in effect at the time, (subject to certain provisos, including it not be occupied for more than six months during the year). In 1971, a new zoning by-law was adopted which prohibited the construction or use of a building except for agricultural uses. At the court of first instance, the application judge found that when the 1971 amending by-law came into effect, the land and cottage had been lawfully used and had not been legally abandoned or discontinued thereafter by the preceding owners' of the property. In particular, the second owner's regular use of a tent trailer on the property and his professed intention to raise the cottage, along with the third owner's renting of the cottage to tenants who used the sunken cottage as a place to moor their houseboat, in the opinion of the lower court, constituted continuation of actual use to the extent possible. As a result, the current owner, Feather, enjoyed a legal non-conforming use.[78]

When Bradford appealed the decision, the Ontario Court of Appeal came to the opposite determination in applying s. 34(9) of the *Planning Act*. Writing for the Court, Rouleau J.A. determined that despite the zoning change, successive owners "continued" lawful use of the property until 1991 when the owner at the time, Mr. Alder, moved out. But the Court ultimately held that during the proceeding period the cottage was ultimately abandoned by successive owners; thus the current owner, Mr. Feather, could not revive a legal non-conforming use that had not been preserved by the time he took ownership of the cottage.

In giving his reasons, Rouleau J.A. interpreted s.34(9) of the *Planning Act* to require both an intention to use and continuation of the actual use as far as possible in the circumstances, as the

basic threshold to establish prove continuity of use.[79] In his view, the lower court mistakenly conflated use of the land with use of the cottage as the focus of the inquiry to determine if continuation of use had occurred.[80] Mr. Alder, the first of three preceding owners to Feather, had stopped residing at the cottage in 1991, but thereafter he maintained an intention to fix the problem and eventually return; this was manifest in his periodic placing of sand around the building in an attempt to prevent it from further sinking.[81]

The second owner, Mr. Davey, purchased the property in 1994 from Mr. Alder's estate and held it until 2004. He placed a tent trailer on the land which he resided in when staying on the property; he also used a backhoe to create parking spaces on the property which were used for his and his family's vehicles; and during 2004 and 2005 he rented the property to tenants who docked a houseboat to the roof of the sunken cottage. For Rouleau J.A., these actions did not constitute use of the cottage for the purpose for which the building was designed and occupied under the prior by-law; furthermore, the use of the sunken cottage as a dock for the house boat was a change in kind, rather than intensity which the Supreme Court in *Saint-Romuald* endorsed as acceptable within the scope of a legal non-conforming use.[82] The court also rejected the argument that Mr. Davey's intention to raise the cottage, in itself, was sufficient to preserve the use of the cottage; intention to continue the use is relevant where there is a temporary vacancy of use, but in addition there must some reasonable explanation or circumstance to explain the vacancy.[83]

Perhaps more comical than ironic, the Ontario Court of Appeal did find that Feather was entitled to a legal non-conforming use of the land (and more specifically, the sunken cottage) for boat docking. Boats had been docked at the property by all preceding owners since 1953, and the docking of boats was not prohibited under both of the prior zoning-by laws.[84] This case

illustrates how different judges can come to opposite conclusions when confronted with the same facts. It also shows how the actions of previous owners can have a bearing on a current owner's right to a legal non-conforming use.

*Duelling Auto-body Shops*

As a review of the recent *Feather* case illustrates, the legal question of when a non-conforming use is protected by the *Planning Act* is a complex, fact-driven analysis. As a result of the fluid nature of the law of legal non-conforming use, the cases that do reach the courts have come in a surprisingly broad range of contexts. The following is a sampling of cases which underlines this observation.

In *1218897 Ontario Ltd. v. Toronto (City) Chief Building Official*,[85] an auto body shop ("the applicant") contested the issuance of a building permit by the City of Toronto's Chief Building Official to Ryding Auto Body ("Ryding"), a competitor located on the same street. The building permit allowed for the construction of a paint booth and other alterations. It was challenged on the grounds that Ryding's business was non-compliant with the current zoning by-law and was not a legal non-conforming use in accordance with subs. 34(9) of the *Planning Act*. Ryding's previous owner sustained fire damage at the property in 2000, and as a result, temporarily relocated the business for nearly one year until repairs could be made and business could resume at the original site.

The applicant argued that the vacancy during this period constituted a discontinuance of use which precluded Ryding from protecting its current non-conforming status. In addition, the building permit authorized construction to support business activities (such as spray painting)

which would amount to a change in the type of use at the auto body shop which would not be protected as a legal non-conforming use.

Justice Ducharme denied the application, finding that Ryding in fact held a legal non-conforming use which contemplated the activities authorized by the building permit. The temporary lapse of use, owing to the fire, did not constitute a discontinuance of use in the eyes of the law; a temporary lapse is permitted when the use has been interrupted by an event outside the property owner's control (such as a storm or fire in this case), if the owner demonstrates an intention to continue the use and continues the use as far as possible in the circumstances.[86] Ducharme J. found that Ryding easily met this requirement. In addition, the Court considered the principles in *Saint-Romuald* to reject the applicant's submission that the expansion of spray painting activities was a change of use in kind, instead finding they amounted to a simple intensification of use, that was not too remote from the original use at the shop, and had no significant negative community impacts to outweigh protection under the law.[87] This case is noteworthy because it shows the courts approving a temporary lapse or discontinuance of use owing to circumstances outside the control of the owner.

*Racing Go-Karts*

Another colourful case is *Township of Emily v. Johnson.*[88] The defendant Johnson operated an amusement resort, which provided activities such as waterskiing and swimming. Johnson later added a go-kart track, which was not fully operational until after the Township passed a zoning by-law on February 24, 1978. The new by-law restricted go-karting on portions of the property where the track was located. The Town then sued Johnson, seeking an injunction from the Court compelling him to cease his go-kart operations. Johnson's defence rested on whether his right to

operate the go-kart operation had crystallized before the new by-law, by virtue of holding a legal non-conforming use

Justice Smith of the Ontario High Court of Justice determined that Johnson's go-kart operations were a protected use under the *Planning Act* legal non-conforming use provisions. His defence led credible evidence from a number of witnesses which established that before the by-law was passed considerable sums of money were spent on preparing the track (i.e.- grading, shaping, removing debris), and on advertising. Furthermore, some revenue was generated from go-kart rides on the unpaved track. After the by-law was passed the track was considerably improved, with full paving and other features.[89]

The Town's main argument was that the go-kart operation was not being run as a business in a "business like way" until after the by-law was passed, and that the actions taken by Johnson to prepare the track and plan for the service were not enough to constitute a legal non-conforming use; the operations that were provided in 1978 (on the fully paved track) after the by-law was passed "bore no resemblance whatsoever to what may have been established as having taken place in 1977."[90]

For Justice Smith this argument held no sway. The operation was in existence and it was bona fide, and it was a commercial venture involving the use of same land. Furthermore, the facts did not suggest an unlawful extension of use, and there was no interruption (or discontinuance of use) since the go-kart operation began service, either of which could result in the legal non-conforming use being lost.[91] This case is important because it shows that an "embryo" of a use can be established before a zoning change, and develop into a "full-grown" use after such a change.

*An Undertaker with a Business Plan*

Another widely-cited case is *O'Sullivan Funeral Home Ltd. v. Sault Ste. Marie*[92], a 1961 decision of the Ontario High Court of Justice. The applicant, O'Sullivan Funeral Home Ltd. ("O'Sullivan") had carried on a business as an undertaker in the West end of Sault Ste. Marie since 1950. In November, 1954 the company sought to relocate its business, by purchasing a residential property on Queen Street, the principal business street in the City. Shortly thereafter, some minor alterations were made to the property to prepare it for use as a funeral home.

Between March, 1955 and October, 1956, O'Sullivan conducted several funeral services at the premises. On October 17, 1955, the City passed a residential zoning by-law which restricted use of O'Sullivan's property as a place of business. When O'Sullivan applied to the City for a building permit to make additional alterations to its funeral parlour it was denied on the grounds that its business was a non-conforming use of the property. O'Sullivan then made an application to Court to compel the City to issue the permit on the basis that the company had a protected use under the *Municipal Act*'s former legal non-conforming use provision.

Justice Ferguson decided in favour of O'Sullivan, granting its request to compel the issuance of the building permit. Funerals were in fact held at the O'Sullivan premises prior to the restricting zoning by-law being passed in October, 1955. And the City's argument that funeral services were only an incidental use of the property was negated by the City assessing business tax on the company in 1958, 1959, and 1960. The City also objected on the grounds that only part of the building was used for funeral services. Ferguson J. rebutted this argument, by citing an earlier Supreme Court of Canada case, *Central Jewish Institute v. Toronto*,[93] which decided it is not

necessary that the entire premises, or every room in the building, be used, to have a legal non-conforming use protecting the entire building.[94]

The City also argued that there was a discontinuance of use which would negate O'Sullivan's rights to a non-conforming use, since no funeral was held between October, 1955 and September, 1956. Yet Ferguson J. found that during this period a number of alterations were made to make the premises more suitable for funeral services, and there was no evidence that the main floor of the building was turned back into a living quarters. During the 11 month lapse of use, the premises continued to be equipped to receive funerals, and it was not used for any other purpose.[95]

This case ties together a number of observations from more recent decisions. A temporary lapse may be permitted, particularly where the owner has not taken any inconsistent actions which suggest an abandonment of the non-conforming use (here the owner closed shop to enhance the provision of services). A legal non-conforming use may intensify or evolve within reasonable limits (funeral related services were not restricted to one portion or room in the building). A municipality cannot treat a use as non-conforming for one purpose (denying a building permit), while implicitly recognizing the non-conforming use for another purpose (to assess business taxes).

# APPENDIX A – ENDNOTES

[1] *Planning Act*, R.S.O. 1990, c. P.13, s.3.(5)(a). [*Planning Act*]
[2] *Planning Act*, s. 3.(5)(b).
[3] *Oak Ridges Moraine Conservation Act, 2001*, S.O. 2001, CHAPTER 31.
[4] *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2.
[5] *Greenbelt Act, 2005*, S.O. 2005, c.1.
[6] *Places to Grow Act, 2005*, S.O., c.13.
[7] Robert Doumani and Patricia Foran, *2009/2010 Ontario Planning Legislation & Commentary*, (Markham: LexisNexis, 2009) at p. 13 [Doumani & Foran].
[8] Doumani & Foran at p. 14.
[9] Doumani & Foran at p. 14.
[10]Doumani & Foran at p. 38.
[11] *Planning Act*, s. 16.(1).
[12] *Planning Act*, s. 16.(2)(a).
[13] *Planning Act*, s. 24.(1).
[14] *Planning Act*, s. 24.(4).
[15] *Planning Act*, s. 3.(1)-(6).
[16] *Planning Act*, s. 45.(1), 51.2(1) and 53(1).
[17] *Planning Act*, s. 45.(1).
[18] *Planning Act*, s. 45.(2).
[19] *Ontario Heritage Act*, R.S.O. 1990, c. O.18
[20] Eileen P.K. Costello, *Ontario Heritage Act & Commentary*, (Markham: LexisNexis, 2010) at p. 23 [Costello, *Ontario Heritage Act*].
[21]Costello, *Ontario Heritage Act* at p. 23.
[22]Costello, *Ontario Heritage Act* at p. 2.
[23]Costello, *Ontario Heritage Act* at p. 4.
[24] Costello, *Ontario Heritage Act* at p. 25.
[25] *Conservation Authorities Act*, R.S.O. 1990, c. C.27 [*Conservation Authorities Act*].
[26] *Conservation Authorities Act*, s.20.
[27] *Conservation Authorities Act*, s.28.(1).
[28] *Conservation Authorities Act*, s.28.(1)(b) and (c).
[29] O. Reg. 166.06 ("Toronto and Region Conservation Authority: Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses", adopted under the *Conservation Authorities Act*, approved May 4, 2006).
[30] City of Toronto, Municipal Code, Chapter 658, 'Ravine and Natural Feature Protection', (Adopted 3 October 2002 by By-law No. 838-2002), ["Ravine By-Law'].
[31] City of Toronto ,Municipal Code, Chapter 813, Article III, 'Private Tree Protection,' (Adopted 11 April 2000 by By-law No. 310-2000), ["Private Tree By-law"].
[32] *Residential Tenancies Act, 2006*, S.O. 2006, c. 17.
[33] *City of Toronto Act, 2006*, S.O. 2006, c.11, Schedule A.
[34] City of Toronto, Municipal Code, Chapter 667, 'Residential Rental Property Demolition and Conversion Control', (Adopted 16-10 July 2007 by By-law No. 885-2007) ["Rental Property Demolition By-law"].
[35] *Planning Act*, s. 37.
[36] *Planning Act*, s. 37.(3).
[37] *Planning Act*, s. 51.(25).
[38] *Planning Act*, s. 41.(10).
[39] For a more robust discussion of legal non-conforming uses, see Part III – The Law of Legal Non-Conforming Use
[40] Doumani & Foran, at p. 69.
[41] *Planning Act*, s. 34.(9)(a).
[42] *Planning Act*, s. 34.(9)(b).
[43] See for instance, *Central Jewish Institute v. Toronto*, [1947] S.C.R. 101.

[44] City of Toronto, By-Law No. 1156-2010, *Zoning By-law*, (25-27 August 2010) ["CZ By-law"].
[45] For an excellent summary of the background to and key features of the CZ By-law, see City of Toronto, City Planning Division, *Staff Report: Draft New Zoning By-law: Summary and Public Consultation Process*, (Toronto: City Planning Division, March 27, 2009), online: <http://www.toronto.ca/legdocs/mmis/2009/pg/bgrd/backgroundfile-19921.pdf> ["Background Report"].
[46] Background Report, p.3.
[47] Background Report, pp.3-4.
[48] Background Report, p.5.
[49] Background Report, p.6.
[50] Background Report, p.6.
[51] Background Report, p.6
[52] CZ By-law, Chapters 1, 700, and 5 respectively.
[53] CZ By-law, Chapter 10.
[54] CZ By-law, Chapters 150, 200, 220, 230, 280 and 600 respectively.
[55] CZ By-law, Chapters 950, 955, 990 and 995 respectively.
[56] See discussion of s. 34(9) of the *Planning Act* requirements in PART III – The Law of Legal Non-Conforming Use.
[57] City of Toronto, City Planning Division, *Final Report on the City Wide Zoning By-law – Presentation to Toronto City Council*, (Toronto: City Planning Division, August 25, 2010) online: <http://www.toronto.ca/legdocs/mmis/2010/cc/bgrd/backgroundfile-33322.pdf>
[58] When the City of Ottawa adopted its comprehensive city wide zoning by-law in 2003, there were over 70 appeals: see *TDL Group Corp. v. Ottawa (City)*, 2009 CarswellOnt 7336 (O.M.B.).
[59] *Planning Act*, s.34(9)(a)-(b).
[60] *Rotstein v. Oro-Medonte (Township)*, 2002, 34 M.P.L.R. (3d) 266 (Ont. S.C) at para. 35.
[61] Doumani & Foran,) at p. 72.
[62] *Saint-Romuald (City) v. Olivier*, [2001] 2 S.C.R. 898 (Binnie J.) [*Saint-Romuald*].
[63] *An Act Respecting Land Use Planning and Development*, R.S.Q., c. A-19.1.
[64] *Cities and Towns Act*, R.S.Q., c. C-19.
[65] *Saint-Romuald* at paras. 54-56
[66] *Saint-Romuald* at paras. 5-6
[67] *Saint-Romuald* at paras. 19-21.
[68] *Saint-Romuald* at paras. 24-28.
[69] *Saint-Romuald* at para. 30.
[70] *Saint-Romuald* at paras. 34-35.
[71] *Saint-Romuald* at para. 40.
[72] *Saint-Romuald* at para. 41.
[73] *Saint-Romuald* at paras. 43-45.
[74] *Saint-Romuald* at para. 39, as paraphrased in Doumani & Foran, at p. 73.
[75] *Saint-Romuald* at para. 1.
[76] *Feather v. Bradford (Town)*, 2010 ONCA 440 (Ont. C.A.; Rouleau J.A.) [*Feather*].
[77] *Feather* at para.2.
[78] *Feather* at para.33.
[79] *Feather* at para.32.
[80] *Feather* at para.34.
[81] *Feather* at para.34.
[82] *Feather* at paras. 41-44.
[83] *Feather* at paras. 45-46.
[84] *Feather* at paras. 50-54.
[85] *1218897 Ontario Ltd. v. Toronto (City) Chief Building Official (2005)*, 14 M.P.L.R. (4th) 217 [Ryding].
[86] Ryding at para.24.
[87] Ryding at paras. 25-38.
[88] *Township of Emily v. Johnson* (1982), 37 O.R. (2d) 623 (Ont. H.C.J.) [*Emily*].
[89] *Emily* at p.628
[90] *Emily* at p.629

[91] *Emily* at p.630
[92] *O'Sullivan Funeral Home Ltd. v. Sault Ste Marie*, [1961] 33 O.R. 413 [*O'Sullivan*].
[93] *Central Jewish Institute v. Toronto*, [1947] S.C.R. 101.
[94] *O'Sullivan* at pp. 416-417.
[95] *O'Sullivan* at pp. 417.