

CITATION: Niagara River Coalition v. Niagara-on-the-Lake (Town), 2010 ONCA 173
DATE: 20100310
DOCKET: C50553

COURT OF APPEAL FOR ONTARIO

Winkler C.J.O., Laskin and Sharpe JJ.A.

BETWEEN

Niagara River Coalition

Applicant (Respondent)

and

The Corporation of the Town of Niagara-on-the-Lake

Respondent (Appellant)

Mark Noskiewicz, Lauren Butti, Terry H. Hill and Sarah J. Draper, for the appellant The Corporation of the Town of Niagara-on-the-Lake

Robert G. Doumani and Jody E. Johnson, for the respondent Niagara River Coalition

Hart Schwartz, for the Intervener Attorney General of Ontario

Heard: December 9, 2009

On appeal from the judgment of Justice Joseph W. Quinn of the Superior Court of Justice dated May 21, 2009, with reasons reported at (2009), 60 M.P.L.R. (4th) 163.

Winkler C.J.O.:

Nature of the Appeal

[1] The appellant, the town of Niagara-on-the-Lake (“NOTL”), has been party to a series of agreements with a jet boat tour operator since 1992. These agreements permit the tour operator to make use of a dock under the control of the town for the purposes of operating its tour ride along the Niagara River. It is a popular tourist attraction and draws thousands of visitors every year. This appeal arises from a successful application to quash the by-law authorizing the most recent agreement. The application was brought by the respondent to this appeal, a special interest group incorporated as the Niagara River Coalition (the “Coalition”).

Overview

[2] Niagara Gorge Jet Boating Ltd. (“Jet Boat”) operates a popular tourist attraction known as the Whirlpool Jet Boat Tours along the Niagara River. In doing so, Jet Boat makes use of the Melville Street Dock (the “Dock”), owned by NOTL. Since 1992, the Jet Boat operation has used the Dock under a series of licence agreements with NOTL. The first licence agreement (the “1993 Licence Agreement”) was for a period of ten years and authorized under a by-law passed by NOTL (the “1993 By-law”). Under the 1993 Licence Agreement, Jet Boat was granted a licence to use the Dock for the purposes of loading and unloading passengers, refuelling and overnight docking. In January 2002, a second license agreement was entered into for a period of eight years (the “2002 Licence

Agreement”). The 2002 Licence Agreement added the restriction that Jet Boat dock a maximum of three boats and was authorized under a by-law (the “2002 By-law”). On February 11, 2008, the by-law at issue in this appeal was passed authorizing the third licence agreement. I will refer to these respectively as the 2008 By-law and the 2008 Licence Agreement.

[3] On May 21, 2009, the 2008 By-law was quashed under an application brought by the Coalition pursuant to s. 273(1) of the *Municipal Act, 2001*, S.O. 2001, c. 25 (the “*Municipal Act*”).¹ NOTL appeals the decision.

[4] The application judge quashed the 2008 By-law, following his determination that the use of the Dock under the 2008 Licence Agreement did not conform to NOTL’s Official Plan (the “Plan”), and hence was contrary to s. 24(1) of the *Planning Act*, R.S.O. 1990, c. P.13 (the *Planning Act*).²

[5] In my view, this case turns on whether the Jet Boat operation is permissible as an “Existing Non-Complying Use” under the Plan. I am persuaded that it is. As such, it conforms to NOTL’s Plan and does not offend the *Planning Act*.

[6] I would allow the appeal and set aside the decision of the application judge. My reasons follow.

¹ **273. (1)** Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.

² **24(1)** Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith.

Facts

The Melville Street Dock Area

[7] The dock central to this litigation is located at the north end of Melville Street in NOTL and is known as the Melville Street Dock. The Dock itself is concrete, and approximately 49 feet wide and 100 feet long, augmented by a floating structure. The Dock is surrounded by a fence, except on its river side.

[8] The Dock extends into the Niagara River, which lies generally to its north. To the east is the Niagara-on-the-Lake Sailing Club, and to the west a small public park owned by NOTL. Immediately across from the Dock (to the south) are 11, three-storey high condominium townhouses bound by Melville Street to the east, River Beach Drive to the north and Lockhart Street to the south. This townhouse development was subject to a 2003 decision of the Ontario Municipal Board (the “Board”), which found the proposed development of the townhouse complex to be compatible with Jet Boat’s use of the Dock. I will return to this decision later in my reasons.

History of the Melville Street Dock

[9] The Dock was granted to the municipality in 1866, via a Federal Crown Grant of Letters Patent, and is currently owned by NOTL. In December 1962, the Dock was leased to the Federal government for a period of 99 years, for use as a customs entry point. The Dock was operated by personnel of the Canada Customs and Revenue

Agency (“CCRA”) until 1989, following which persons who wished to gain entry into Canada via boat made use of a telephone at the Dock to report to the CCRA. These persons were not allowed to tie up at the Dock, and instead made docking arrangements elsewhere. The CCRA telephone was removed from the Dock prior to 1992, and persons entering the country by boat made use of a phone at the Sailing Club. From 1989 to 1991 the Dock was used by small pleasure boats touring the Niagara River, following which the Dock was locked, unused, and in disrepair until 1992.

Jet Boat’s use of the Melville Street Dock

[10] As the Dock was no longer in use for Federal purposes, a proviso in the agreement allowed NOTL to buy out the lease from the Federal government. This re-acquisition of the Dock occurred in 1992, and allowed NOTL to permit Jet Boat, on a short-term basis, to use the Dock for its tour operation of the Niagara River. Soon after, formal long-term agreements were entered into between NOTL and Jet Boat licensing the use of the Dock. These agreements were authorized pursuant to by-laws passed by NOTL for that purpose.

The 2008 By-law and Licence Agreement

[11] The first by-law was passed in 1993, authorizing the initial licence agreement between NOTL and Jet Boat. This 1993 Licence Agreement was later superseded by similar documentation in 2002. The most recent incarnation of the agreement between NOTL and Jet Boat was authorized on February 11, 2008, when NOTL passed the 2008

By-law that is the subject of this appeal rescinding the 2002 By-law and authorizing the 2008 Licence Agreement.

[12] The uses of the Dock authorized under the 2008 Licence Agreement remained the same as those authorized under the prior agreement: (1) docking space for the loading and unloading of passengers as required; (2) refuelling of boats as permitted by the applicable law; and (3) overnight docking. Docking space was restricted to a maximum of three boats, though a fourth was allowed to dock if circumstances required.

[13] The 2008 Licence Agreement was to last for 60 months, commencing on April 1, 2008, and expiring March 31, 2013. NOTL reserved the right to licence the use of the Dock to other users, subject to a proviso that such licensees would not materially detract from the ability of Jet Boat to carry on its operations. NOTL also agreed to not licence the use of the Dock to other white-water boating operations. The 2008 Licence Agreement acknowledged NOTL's intention to develop a Community Plan for the Dock area during its term. In doing so, however, the Agreement also provided for a yearly extension of the licence (beyond March 31, 2013) if the Community Plan was not completed by April 1, 2011. Any such extensions were to be subject to an agreed upon increase in fees.

Jet Boat's tour ride operation

[14] Jet Boat operates a tour of Niagara River that it describes as “exciting, wet and exhilarating”. Tickets for the tour are issued at the King George III Hotel, which is located just south of the townhouse development on the west side of Melville Street. An orientation is provided for riders on Lockhart Street, immediately south and across from the townhouses, following which the riders walk up Melville Street and cross River Beach Drive to arrive at the Dock for their tour.

[15] Jet Boat uses the Dock: to load and unload the riders; for the issuance and return of safety equipment; and, for the fuelling and inspection of the jet boats. Four jet boats are kept at the Dock, three of which are in use. Each boat carries 48-54 riders. Tours run from the third week of April to the third week of October, every day of the week. During peak season (mid-June to Labour Day), three boats run per hour and 24 boats run per day. Departures are commenced at 9:45 a.m. and the last boat runs at 5:30 p.m., except in July and August when the last boat runs at 7 p.m. In 2000, approximately 40,000 Jet Boat riders used the Dock, and this number grew to approximately 80,000 in 2007.

[16] The period during which the Dock lies unused by Jet Boat, the fence surrounding the Dock is locked and the Dock is inaccessible to the public. In order to gain access to the Dock during the times in which Jet Boat operates, members of the public must purchase a ticket to the tour ride.

*Decision of the Ontario Municipal Board*³

[17] In February 2003, the developer of the townhouse complex located directly across from the Dock appealed to the Board from the refusal of NOTL to permit the residential development. The developer, 1440900 Ontario Ltd., requested that the Board amend the Plan to re-designate land at 35-45 Melville Street from “Marine Commercial” to “Medium Density”, and to re-zone those lands from “Commercial” to “Medium-Density Residential” in order to permit the development of the 11 townhouse units.

[18] Jet Boat was granted party status and made submissions regarding the compatibility of the proposed development with Jet Boat’s existing operation. Jet Boat’s concern was that the residents of the proposed dwellings would find the pedestrian traffic associated with the business a nuisance. NOTL also opposed the called-for amendments, submitting that the development would conflict with the existing Jet Boat operation.

[19] 1440900 Ontario Ltd. disagreed that the project would impact Jet Boat’s business, stating instead that the proposal was compatible with existing development. Ultimately, the Board concurred, noting approvingly that Jet Boat’s professional handling of its customers would minimize, if not eliminate, any negative impact its patrons and operations may have on neighbours in the vicinity.

[20] The Board determined the proposed dwellings compatible and capable of coexisting in harmony with existing development. In doing so, the Board held that the

³ *Niagara on the Lake (Town) Official Plan Re-designate Lands Amendment (Re)*, [2003] O.M.B.D. No. 118 (QL).

proposed townhouses would have no unacceptable adverse impacts upon the existing Jet Boat business, and allowed the re-designation and re-zoning amendments requested.

The current state of affairs

[21] In time, the concerns expressed before the Board by NOTL and Jet Boat relating to the possible conflict between the tour boat operation and the residential development became a reality. The Coalition, in its application to quash the by-law authorizing Jet Boat's use of the Dock, emphasized the negative impact on area residents, some of whom provided affidavit evidence on the application at issue. The deponents, some but not all of whom reside in the residential town house development, describe a variety of adverse effects stemming from the proximity of Jet Boat's operations, including fumes and noise from the jet boats, litter and trespass by Jet Boat riders, and an overall invasion of privacy due to the mass number of customers enjoying the Niagara River tours.

[22] These complaints led to the application brought by the Coalition against NOTL, under s. 273(1) of the *Municipal Act*. The application challenged the validity of the 2008 By-law, on the basis that the By-law contravened section 24(1) of the *Planning Act* and/or ss. 18 and 270(1) of the *Municipal Act*.⁴ After hearing lengthy submissions, the

⁴ **18.** A municipality shall not confer on any person the exclusive right of carrying on any business, trade or occupation unless specifically authorized to do so under any Act. **270. (1)** A municipality shall adopt and maintain policies with respect to the following matters: 1. Its sale and other disposition of land.

application judge granted to the Coalition the requested relief.

Decision of the Application Judge

[23] The application judge held that the 2008 By-law was contrary to NOTL's Plan and void on that basis, as it contravened s. 24(1) of the *Planning Act*. He found that Jet Boat ran an intense, private and commercial operation that did not fit within the "Conservation" designation under the Plan.

[24] In determining that the licensed use of the Dock was impermissible under the Plan, the application judge concluded that the Dock use could not constitute a "park" – a permitted land-use under the "Conservation" designation. In doing so, he relied on a passive understanding of the word "park" drawn from the case law. The application judge also relied on the evidence of Mr. John Perry, the former town planner and drafter of the Plan, who testified that the "Conservation" designation under the Plan was meant to recognize passive parks and public open space. The application judge further held that the Dock's fence, together with the inability of the general public to access the Dock without purchasing a ticket, thwarted the public access policies espoused in NOTL's Plan.

[25] The application judge went on to consider whether or not the 2008 By-law authorized a use of the Dock that could be permitted to continue as a "non-conforming use" under the Plan. He defined such a permissible use as an existing use, lawfully

established in accordance with the zoning by-laws of NOTL, as of the date the Plan was adopted. The application judge concluded that the Jet Boat operation, as licensed at the time the Plan was adopted, was not such an existing use as it was not permitted under NOTL's zoning by-law designating the Dock area "Institutional".

[26] The application judge rejected the argument that since the Dock was used as a dock by the CCRA, and is currently used as a dock by Jet Boat, the licensed use of the Dock is therefore a permitted use or a legal non-conforming use. He found instead that the nature and intensity of Jet Boat's operation significantly exceeded the use of the Dock when it was in the hands of the CCRA from 1962-1991. As a result, he held that the nature of the Dock's use had so dramatically intensified, its character was now an "altogether different use" (relying on *Saint-Romuald (City) v. Olivier*, [2001] 2 S.C.R. 898) and was incapable of maintaining any possible status of legal non-conforming use.

[27] The application judge concluded that upon commencement of the 1993 Licence Agreement, the use made of the Dock by Jet Boat was both non-conforming and illegal, and that the use continued to be so when the 2008 By-law was passed.

[28] As an additional basis for quashing the 2008 By-law, the application judge held that NOTL had unlawfully "disposed" of the Dock, contravening s. 270(1) of the *Municipal Act*. Relying on the decision of this Court in *2015429 Ontario Ltd. v. Dynasty Homes (Wasaga Hills) Ltd.* (2006), 270 D.L.R. (4th) 401, he found that the word "sale" enjoys a wide ambit, and that the Disposition Policy of NOTL applied to the 2008

Licence Agreement. NOTL did not consider the Disposition Policy applicable, and therefore did not apply it in respect of the licensing of the Dock.

[29] While the issue does not appear to have been directly addressed on the application, the application judge made a finding that NOTL's reservation of the right to licence the use of the Dock to other users was an "empty right" as it was a practical impossibility. He concluded on this issue that while the 2008 Licence Agreement remained in force, Jet Boat enjoyed a monopoly.

Issues

[30] The appellant raises four issues on this appeal:

- a. First, does the 2008 By-law contravene s. 24(1) of the *Planning Act*, by licensing a use of the Dock not permitted under the "Conservation" designation assigned to the Dock under NOTL's Plan?
- b. Second, if the licensed use of the Dock does not conform to NOTL's Plan, may the current use of the Dock continue as an "Existing Non-Complying Use" under the Plan?
- c. Third, was the 2008 Licence Agreement an unlawful disposition of the Dock, contrary to s. 270(1) of the *Municipal Act*?

- d. Fourth, does the 2008 Licence Agreement authorized by the 2008 By-law confer on Jet Boat an exclusive right in the nature of a monopoly to carry on its business at the Dock, contrary to s. 18 of the *Municipal Act*?

[31] The appellant also raised an argument on appeal that the interpretation of the Plan by the application judge offends the doctrine of paramountcy: that the application judge's construction of the Plan created a constitutional conflict between the Plan and applicable federal legislation pertaining to navigation and shipping. The respondents were not called upon in respect of this issue as, in our view, it lacked merit. In any event, as this case can be disposed of on the municipal law grounds, this argument need not, and should not, be considered, as emphasized by the Supreme Court of Canada in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97.

[32] In my view, the essence of this appeal lies in the second issue. Prior to dealing with that issue, however, it would be useful to review the salient facts.

[33] The Dock has been a hub of marine commercial activity since the 1830s. There has been no general public access to the Dock since at least 1962, commencing with the lease to the Federal government. In 1992, the Dock lease was re-acquired from the Federal government. At the time, the Dock was not accessible to the general public.

[34] In order to build the townhouses on Melville Street, an amendment to the Plan was necessary to change the designation from "Marine Commercial" to "Medium Density

Residential”. The change was opposed by NOTL and a hearing was conducted before the Board. Central to the issue before the Board was the compatibility of the residential townhouse development with the existing commercial activity in the Dock area, and in particular with the Jet Boat operation.

[35] The Board ultimately ruled that the amendment should be granted. On the issue of compatibility, the Board stated: “Based upon an analysis of the detailed evidence by the planners, the architect/urban designer, and the operating partner of the jet boat business, the Board finds that the proposed dwellings would not cause an unacceptable adverse impact upon the existing jet boat business.” [Emphasis added.]

[36] The status of Jet Boat as a party to the hearing was contested by the applicant developer. The Board determined that Jet Boat was a proper party, but there is no reference in the decision to any issue relating to the legality of the 2002 By-law under which Jet Boat was operating at the time.

Standard of Review

[37] As explained in more detail below, the interpretation of an official plan is a matter of law; therefore, the applicable standard of review is correctness. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

Analysis

Issue 1: Contravention of s. 24(1) of the *Planning Act*

[38] The first question the application judge addressed was whether the 2008 By-law contravenes s. 24(1) of the *Planning Act*, by licensing a use of the Dock not permitted under the “Conservation” designation assigned to the Dock under NOTL’s Plan. Section 24(1) of the *Planning Act* provides:

24. (1) Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith.

[39] The current Plan for NOTL was adopted in 1994 and approved by the Board on October 21, 1998. The Plan remains in effect today. The Plan designates the Dock area for “Conservation” land use, a land use designation that “applies to lands considered environmentally significant”. The goals and objectives of such land use include: to increase public access to the Niagara River; to prevent damage to the Niagara River shoreline; and, to preserve and enhance the amenities and natural resources offered by the waterways. Among its permitted “Main Uses” are “public and private parks”.

[40] In his consideration of the proper interpretation of the Plan, the application judge admitted and relied upon the evidence of Mr. John Perry, the former town planner responsible for drafting the Plan.

[41] The appellant submits that this was improper, and that the application judge ought to have applied the accepted rules of construction of legislation when interpreting the text of the Plan.

[42] I agree with the thrust of the appellant's submission that the evidence is inadmissible. However, the appellant approaches the issue from the perspective that official plans are akin to legislation. This is not the case. As stated by this Court in *Toronto (City) v. Goldlist Properties Inc.* (2003), 67 O.R. (3d) 441, at para. 49:

[I]t is important to bear in mind that the purpose of an official plan is to set out a framework of "goals, objectives and policies" to shape and discipline specific operative planning decisions. An official plan rises above the level of detailed regulation and establishes the broad principles that are to govern the municipality's land use planning generally. As explained by Saunders J. in *Bele Himmel Investments Ltd. v. City of Mississauga et al.* (1982), 13 O.M.B.R. 17 at 27:

Official plans are not statutes and should not be construed as such. In growing municipalities...official plans set out the present policy of the community concerning its future physical, social and economic development.

In our view, it is essential to bear in mind this legislative purpose when interpreting scope of authority to adopt an official plan. The permissible scope for an official plan must be sufficient to embrace all matters that the legislature deems relevant for planning purposes.

[43] Further, the proper interpretation of an official plan is not a factual matter to be decided based on opinion evidence from planners, but rather a question of law. See *Romlek Enterprises, Re* (2009), 61 M.P.L.R. (4th) 256 (Ont. S.C. (Div. Ct.)), at para. 34; *Toronto (City) v. 2059946 Ontario Ltd.* (2007), 38 M.P.L.R. (4th) 176 (Ont. S.C. (Div. Ct.)), at para. 4.

[44] The application judge relied upon a decision of the Board for authority in admitting the evidence of Mr. Perry. While administrative tribunals have an ability under s. 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, to admit evidence that would otherwise be inadmissible in a court of law, I am not persuaded that it is appropriate to do so where the interpretation of an official plan is at issue. I find the words of Bouck J. in *Capital Regional District v. Saanich (District)* (1980), [1981] 24 B.C.L.R. 154 (S.C.), at para. 47, to be apposite: “The [municipality] must set out in its official...plan what it is trying to do. When it fails in its purpose, others cannot fill in the gaps because they are then placing themselves in the position of the [municipality] which alone is responsible for the decision”.

[45] It is clear that official plans are not legislation, and where interpretation is necessary, it is a question of law that must be determined on the basis of the documents that comprise such plans. In this instance, the application judge relied on opinion evidence that was inadmissible to determine the scope and meaning of the language used in the Plan. As a result of this error, I am not prepared to accept his finding that Jet Boat’s use of the Dock could not shelter under the Plan’s “Conservation” designation and would set it aside. In light of the answer I would give to the second issue, it is unnecessary to address any further the question of whether or not the licenced use of the Dock could fall under this designation, or be considered a “private park” under the designation.

Issue 2: Is the use of the Dock by Jet Boat an Existing Non-Complying Use?

[46] In turning to the second issue, I am prepared to assume for the purposes of this appeal that the 2008 By-law contravenes s. 24(1) of the *Planning Act*, and cannot be saved under s. 24(4)⁵.

[47] It is apparent that the error in admitting the evidence of Mr. Perry as an aid in the interpretation of the Plan permeated the entirety of the reasons of the application judge. This is particularly so with respect to the second issue, which in my view is the crux of the appeal. I turn then to an analysis of that issue: namely, if the licensed use of the Dock does not conform to NOTL's Plan, can the current use of the Dock authorized under the 2008 By-law continue as an "Existing Non-Complying Use" under the Plan?

[48] NOTL argued before the application judge that the use of the Dock authorized by the 2008 By-law could be permitted to continue as a "non-conforming use" under the Plan. That argument was rejected. The application judge concluded, at para. 145, that "[u]pon commencement of the First Agreement, the use made of the dock by Jet Boat was both non-conforming and illegal. When the 2008 by-law was passed, that use continued to be non-conforming and illegal." The appellant contends that the application judge erred in arriving at this result.

⁵ **24(4)** If a by-law is passed under section 34 by the council of a municipality or a planning board in a planning area in which an official plan is in effect and, within the time limited for appeal no appeal is taken or an appeal is taken and the appeal is withdrawn or dismissed or the by-law is amended by the Municipal Board or as directed by the Board, the by-law shall be conclusively deemed to be in conformity with the official plan, except, if the by-law is passed in the circumstances mentioned in subsection (2), the by-law shall be conclusively deemed to be in

[49] The Plan's "Non-Complying Uses" provision allows for the continuation of an existing use of land regardless of whether it complies with the land use designation under the Plan. "Existing" is defined in the Plan as "any use existing as of the date of the adoption of this Plan which was lawfully established in accordance with the By-laws of the municipality as they existing [*sic*] on the date of the adoption of this Plan".

[50] The Plan was adopted on March 14, 1994, and the first licence agreement was entered into in 1993. There is nothing in the record to indicate that any appeal was taken in relation to the by-law authorizing the 1993 Licence Agreement.

[51] The Plan addresses non-complying uses in section 6:

Non-Complying Uses:

The land use policies and designations of this plan represent a concept which will be worked towards. However, it is recognized that there are existing in the Town many uses of land that will not presently comply with this concept and that this situation is likely to persist for a long time. Moreover, many of these uses have been established for a considerable number of years and frequently a large measure of stability has been obtained between them and their neighbours. While a conscious planning program would not seek deliberately to foster a mixture of uses that were believed to be detrimental to each other, it must be recognized that there are many existing situations that can be tolerated in the interim without serious adverse results.

The Plan, therefore, while endeavouring to obtain a high degree of land use compatibility for new development, intends that there be a greater degree of leeway in land use for existing areas where time and custom have achieved acceptable levels of compatibility. [Emphasis added.]

[52] The foregoing highlights a key point: the expressed intention of the “greater degree of leeway” applicable to non-complying land use in areas of existing development. Subsection (1) of the Non-Complying Uses provision of the Plan goes on to state that “[w]here a property has an existing use of land that does not comply with the land use designation shown in this Plan, or to any other applicable policy in this Plan it may, notwithstanding the policies of this Plan, be zoned for the existing use”. [Emphasis added.] Accordingly, the Non-Complying Uses provision expressly recognizes that while there are certain uses and zoning classifications of land that may not comply with the policies of the Plan, those uses may continue.

[53] In my view, quite apart from the required generous interpretation, even a literal reading of the definition of existing use, a use “lawfully established in accordance with the By-laws of the municipality” on the date of the adoption of the Plan, can only lead to the conclusion that the Jet Boat operation was an existing, non-complying use permissible under the Plan. The application judge erred in concluding otherwise. This error was the result of his reading into the language of the definition two limiting elements. First, he confined the scope of “By-law” to zoning by-laws. Second, as evident from paras. 96 and 97 of his reasons, he also determined that a by-law, to be lawfully established, had to “conform” to the Plan. With respect, each of these elements adds a requirement that is not expressed in the plain words of the Plan.

[54] The requirement is that the land use be lawfully established in accordance with the by-laws that existed as of the date the Plan was adopted. There is nothing in the definition restricting its application to zoning by-laws. It is clear from the record that the application judge accepted the evidence of Mr. Perry that the definition was limited to zoning by-laws. The words of Bouck J. in *Capital Regional District* bear repeating:

The [municipality] must set out in its official...plan what it is trying to do. When it fails in its purpose, others cannot fill in the gaps because they are then placing themselves in the position of the [municipality] which alone is responsible for the decision.

The term “By-law” in the definition, in my view, cannot be read as being limited to zoning by-laws. There is nothing in the plain words that precludes the by-laws in question from being those that licence or authorize the land use. If there was an intention on the part of NOTL to narrow the ambit of “By-law” to zoning by-laws, the municipality failed “in its purpose”. It was improper to admit the evidence of Mr. Perry to “fill in the gaps” in the language in the Plan.

[55] The application judge further erred by concluding that the “lawfully established” language used for the purpose of defining existing uses imported an additional requirement that the by-law authorizing Jet Boat’s use of the Dock conform to the Plan. In my view, this requirement is not supported by the language used in the Plan. There is no indication of what is, on the interpretation of the application judge, essentially a double qualification test. The requirement is that the land use be lawfully established

pursuant to a by-law. There is nothing that indicates that the inquiry should then proceed to determine whether the by-law itself conforms to the Plan. Moreover, importing restrictive terms is directly contrary to the expressed intent of “leeway” with respect to existing uses.

[56] The authorizing by-law for the first licence agreement was enacted in 1993, prior to the adoption of the Plan. It was facially valid, and there is no record of any successful appeal relating thereto. Accordingly, the use of the Dock as of 1994 was lawfully established in accordance with this 1993 By-law, and was an existing use for the purposes of sheltering under the Non-Complying Uses provision.

[57] The Non-Complying Uses provision of the Plan permits no other conclusion than the policy of the Plan is to permit the continuance of existing uses. Given that a greater degree of leeway is to be accorded to such uses, and the fact that the Jet Boat operation was lawfully established pursuant to the 1993 By-law authorizing the Dock use, Jet Boat’s use of the Dock is a permissible existing, non-complying use under the Plan.

[58] Furthermore, I find equally erroneous the application judge’s conclusion that the use of the Dock by Jet Boat was incompatible with surrounding uses. I note that in arriving at his conclusion, the application judge focused on the evidence of the adverse effects stemming from the proximity of the residential use to Jet Boat’s operation, as attested to by those residents.

[59] That particular compatibility issue was dealt with by the Board in its 2003 decision amending the Plan to permit the nearby townhouse residential development in what was then a “Marine Commercial” designated area of NOTL. On that application, the Board considered the issue of compatibility between the Jet Boat operation and the proposed residential development mere blocks away from the Dock. It is apparent from its decision that the Board was mindful of the factors listed under the Non-Complying Uses provision of the Plan that inform compatibility:

- a. The zoning will not permit any change of use or performance standard that will aggravate any situation detrimental to adjacent complying uses;
- b. The use does not constitute a danger to surrounding uses and persons by virtue of a hazardous nature, the traffic generated, or other nuisance;
- c. That full regard has been given to protection and/or enhancement of heritage resources;
- d. It does not interfere with desirable development in adjacent areas that are in conformity with this Plan.

[60] The Board determined that Jet Boat’s professional handling of its business eliminated any potential adverse impact upon neighbours in the vicinity, and that its existence did not interfere with desirable development in the area. This decision was made with due regard for how the character of the built environment would likely evolve in the foreseeable future. The Board concluded that “[b]ased upon an analysis of the detailed evidence by the planners, the architect/urban designer, and the operating partner

of the jet boat business, the Board finds that the proposed dwellings would not cause an unacceptable adverse impact upon the existing jet boat business.” [Emphasis added.]

[61] This passage from the decision of the Board highlights the irony inherent in this case. The current residential development allegedly most affected by the Jet Boat operation only exists because the developer persuaded the Board, over the objections of both NOTL and Jet Boat, that its development was a compatible use that would not have an adverse impact on Jet Boat’s business.

[62] The question of compatibility is a question that falls squarely within the jurisdiction of the Board. It is the tribunal with the acknowledged expertise to deal with the matter. In this case, the Board had made a determination on the issue of compatibility on the basis of facts existing in 2003. There is no record of any successful appeal.

[63] Insofar as the application judge compared the existing Jet Boat operation with the prior CCRA operation, he was in error. The primary evidence of incompatibility was provided through the affidavits of residents of the Melville Street townhouse development. That development did not exist until 14 years after the CCRA operation had ceased at the Dock. It is difficult to see how the CCRA operation could have any relevance to the issue. At the time of the application, the compatibility question concerned only the Jet Boat operation, which had been in operation at that point for approximately ten years. There is no evidence that the operation of Jet Boat had changed, except in volume. Accordingly, the application judge’s reliance on the Supreme Court of

Canada's decision in *Saint-Romuald (City) v. Olivier* was misplaced. To the contrary, that decision holds that a mere increase in volume does not represent a changed use if the essential character of the business remains the same.

[64] In the result, I find that the Jet Boat operation was an existing non-complying use at the time that the 1994 Plan was implemented, and is compatible with surrounding uses. I will turn now to the remaining issues in this appeal.

Issue 3: Was the 2008 Licence Agreement an unlawful disposition of the Dock?

[65] This may be dealt with briefly. Section 270(1) of the *Municipal Act* requires municipalities to adopt and maintain policies respecting the sale and other disposition of municipal land. In January 2008, NOTL adopted a "Disposition Policy" for municipal property that stated that prior to selling any land the town council would declare it to be surplus. The applicant argued successfully that NOTL failed to comply with its Disposition Policy as it did not declare the Dock to be surplus prior to licensing its use to Jet Boat, thus violating s. 270(1) of the *Municipal Act*.

[66] Under the 2008 Licence Agreement the Dock remains the property of NOTL, and the town enjoys the benefit of the revenue collected from the annual licence fee. Further, the Agreement contains a provision in which NOTL expressly reserves the right to licence other uses of the Dock in addition to the use made by Jet Boat. The 2008 Licence Agreement contemplates termination through the implementation of a Community Plan

for the dock area; however, the Agreement also allows for its automatic extension on a year to year basis in the event that the Community Plan is not completed prior to April 1, 2011. These extensions are subject to written notice of termination and associated with an annual fee escalation.

[67] The application judge held that the licence agreement constituted a “disposition” of the Dock. In my view, it does not. There is a non-exclusive use of the Dock, with both defined termination and escalating rent provisions. These are not indicia of a “disposition” under any definition. Moreover, a licence is an agreement to enter upon and occupy land. It is not a transfer of an interest in land. Hence, it does not amount to a sale or disposition of land. See *D.D.S. Investments Ltd. v. Toronto (City)* (2000), 11 M.P.L.R. (3d) 243, at para. 25 (Ont. S.C.).

[68] Further, the application judge concluded that the non-exclusivity was an “empty right” based on the opinion offered under cross-examination by one deponent: that the use by anyone other than Jet Boat would be “practically” difficult. This ignores the fact that NOTL had reserved rights to itself under the 2008 Licence Agreement, and presumably would have been able to enforce those rights should another user have wished to make use of the Dock. “Practical” difficulties constitute neither an impossibility that another use may be made, nor afford a basis for concluding that such agreements are *de facto* “dispositions”. I would allow the appeal on this ground.

Issue 4: Is the 2008 Licence Agreement contrary to s. 18 of the *Municipal Act*?

[69] Similarly, in keeping with my reasons under the preceding issue, I find that the application judge was in error in finding that the 2008 Licence Agreement allowed “Jet Boat to enjoy a monopoly”, as prohibited under s. 18 of the *Municipal Act*. NOTL clearly maintained rights to licence other uses of the Dock. The terms limiting such other uses to ones which would not “materially detract from the ability of [Jet Boat] to carry on its operations in accordance with the terms and uses granted by this Licence Agreement” and which were not “other white water boating tours” are normal commercial terms that are not monopolistic or in contravention of s. 18 of the *Municipal Act*.

[70] Section 18 of the *Municipal Act* prohibits exclusive rights within the municipality. It does not prohibit entering into contracts or licence agreements in respect of specific properties within the municipality. Here the 2008 By-law, and the Licence Agreement it authorizes, relate only to the Dock. They have no general application elsewhere within NOTL. I would allow the appeal on this ground.

Conclusion

[71] The Jet Boat operation at the Dock is a legal non-complying use, compatible with surrounding uses, and was an existing use, as that term is defined, at the time NOTL’s Plan was adopted in 1994. The area has a long history of marine and commercial use. That is the heritage of the Niagara River. With respect to the Dock, whatever purposes it

may have served in the past, in present terms it has not been accessed or used by the general public since the inception of the lease to the Federal government in 1962. Simply put, there is no current history of unfettered public access. The Board considered all of the relevant factors in allowing the amendment to the Plan that led to the construction of residential units proximate to the Dock. It is telling that there were no challenges to the legality of Jet Boat's Dock use at that time, and indeed, it is even more telling that it was necessary to demonstrate compatibility with the Jet Boat operation - for the Board to approve the requested amendment. This latter day attack on the legality of the Jet Boat operation is unsupportable.

[72] I would allow the appeal and set aside the decision of the application judge.

[73] The parties may make brief written submissions as to costs within 15 days of the release of these reasons.

RELEASED: March 10, 2010
"WKW"

"W. Winkler CJO"
"I agree John Laskin JA"
"I agree Robert J. Sharpe J.A."