



EWART

O'DWYER

Barristers and Solicitors

November 19, 2024

Connie Parent
Township of North Kawartha
P.O. Box 550
280 Burleigh Street
Apsley Ontario
K0L 1A0

VIA EMAIL: c.parent@northkawartha.ca

Dear Ms. Parent:

**Re: Part of Lot 6 & 7, Concession. 15, (former Township of Burleigh),
Township of North Kawartha, being Part 40 on Plan 45R-363
Our File Number: 3195**

At this time, it is the writer's understanding that an issue has arisen as a result of use of the above-noted lands and lands in proximity thereto for commercial barging which commenced mid to late August 2024.

Background

By way of background, the Township acquired ownership of Part 40 on Reference Plan 45R-363 on July 17, 1978. Although there is a statement by former municipal staff that the subject lands were dedicated to the Township in satisfaction of parkland dedication, the deed by which the Township acquired the subject lands does not disclose this fact.

The lands were conveyed by a Sylvia Simmons to the former Township of Burleigh-Anstruther on July 7, 1978, pursuant to Instrument No. 340819 registered December 13, 1978, in the Land Registry Office for Peterborough.

Upon the Township acquiring the subject lands, the lands were subsequently zoned Open Space (OS) pursuant to the first comprehensive zoning by-law for the former Township of Burleigh-Anstruther being By-Law No. 2-1979.

It is noted the property is located on a private road, being Fire Route 52A. Fire Route 52A is not a municipal highway under the jurisdiction of the Township of North Kawartha but remains privately owned.

Pursuant to Instrument No. 340819, the former Township of Burleigh-Anstruther was granted a right-of-way over Lot Nos. 6 & 7, Concession 15 (Fire Route 52A), for the purposes of access to the subject lands and designated as Part 76 on Plan 45R-363.

Surveyor Sketch

As a result of complaints having been received by the Township in mid to late August 2024, a survey was undertaken of the subject lands in order to ascertain the limits of the subject property and the location of the boat launch being used for commercial barging.

Pursuant to the sketch to illustrate property lines of Part Lot 6 & 7, Concession 15, prepared by J.D. Barnes, OLS, it would appear that only a very small triangular portion of lands owned by the Township are being used for commercial barging.

The location of the boat launch and parking area is situated primarily on lands adjacent to Part 40 on Plan 45R-363.

History of Barging

A review of this matter and based on records provided by the Township, there exists only anecdotal evidence that barging may have been carried out from the subject property prior to the Township acquiring ownership of same. From the date of acquisition of the subject lands by the Township on July 7, 1978, and the passage of the first comprehensive zoning by-law passed February 23, 1979, there are no conclusive records that establish that the subject lands were used for the purposes of commercial barging.

It is of note that “barging” or “commercial barging” are not terms contained in the current comprehensive zoning by-law or any prior zoning by-laws passed by either the former Township of Burleigh-Anstruther or the Township of North Kawartha pursuant to the provisions of section 34 of the *Planning Act, as amended*.

Legal Non-Conforming Use

A review of municipal records would indicate that requests had been received by the Township in the mid-90s on two occasions for permission to make use of the subject lands and the boat launch situated thereon for the purposes of barging which was denied by the Township.

Records further indicate that in August of 2004, the municipal council of the day received correspondence from several ratepayers requesting the Township take steps to restrict access to the boat launch through the passage over Fire Route 52A.

As noted, Fire Route 52A is not a “highway” under the ownership or jurisdiction of the Township. A review of the use of Fire Route 52A was subject to legal opinion obtained by the

Township in September of 1989 at which time the Township was being asked to obtain an injunction to restrict the use of Fire Route 52A.

By-Law No. 2-1979 (Township of Burleigh-Anstruther)

The first comprehensive zoning by-law with implications to the subject lands was By-law No. 2-1979, passed February 23, 1979, by the former Township of Burleigh-Anstruther.

Pursuant to By-law No. 2-1979, "barging" or "commercial barging" was not identified as a permitted use upon the subject lands. Subsequent zoning by-laws have not included "barging" or "commercial barging" as permitted uses upon the subject lands with the current zoning by-law being silent as to barging or commercial barging as permitted uses.

The subject lands are currently zoned Open Space (OS) and Lake (L) of which barging or commercial barging are not identified as permitted uses.

In order to allow for barging or commercial barging to be carried out on the subject lands without planning relief, there would have to be some evidence that a commercial barging operation was being carried out at the time of the passage of By-law No. 2-1979, thereby affording such use the status of being legal non-conforming as of February 23, 1979.

Based on the municipal records examined, no records exist which would serve to identify barging or commercial barging as occurring as of February 23, 1979, as a basis in order to allow for such use to carry on as a legal non-conforming use upon the subject lands.

When dealing with the issue of a legal non-conforming use, it is the party who wishes to make use of the lands to prove that a legal non-conforming use existed prior to the passage of an intervening by-law when such use is otherwise not identified as a permitted use.

In the case at hand, no such records or conclusive proof exist other than anecdotal evidence which is sufficient to establish "barging" or "commercial barging" as a legal non-conforming use. In contrast, there are municipal records that exist indicating that permission had been sought of the Township for permission to make use of the subject lands for commercial barging, which permission was denied by the Township. The obvious question that arises is if "barging" or "commercial barging" was a permitted use based on a legal non-conforming use, why would permission be required or sought from the municipal council of the day.

Fire Route 52A

As identified, when the former Township of Burleigh-Anstruther acquired Part 40 on Reference Plan 45R-363 on July 17, 1978, such conveyance included a right-of-way over those lands currently known as Fire Route 52A. The acquisition of a right-of-way over Fire Route 52A did not serve to place ownership of Fire Route 52A in the name of the Township, but rather only the right to traverse Fire Route 52A in order to gain access to the subject lands.

Accordingly, the writer concurs with the opinion put forward by Mr. Pakenham in the September 1989 correspondence wherein Fire Route 52A was identified as a highway not

under the ownership or jurisdiction of the Township. As such, there was no ability to seek an injunction restricting the use of Fire Route 52A for the purposes of allowing for barging or commercial barging. The Township's rights with respect to an injunction against any individuals making use of Fire Route 52A would pertain only to a restriction or obstruction of the Township's right to make use of Fire Route 52A in order to gain access to the subject lands.

Summary

In summary, the use of the subject lands and those lands in proximity to Lot 40, Plan 45R-363 for the purposes of commercial barging would appear to be a use not permitted by the Township's comprehensive by-law. Furthermore, the use of the subject lands does not appear to enjoy the status of a legal non-conforming use based on an examination of municipal records.

I trust the above is of some assistance to you. Should you have any questions or concerns, please do not hesitate to contact the writer.

Very truly yours,

EWART O'DWYER

M. John Ewart
MJE/cf