

Cases of Interest

By: Monica Ciriello, Ontario 2015

Appeal Granted Based on Literal Interpretation of Definition in Land Use By-law

***Fuhr v Parkland (County),* 2017 ABCA 413 (CanLII) http://canlii.ca/t/hp4cb**

Robert and Sheri Hanna (Residents" were granted a development permit by the Parkland County Development Authority to operate a small trucking and building company on their property under the "Home Based Business Level 3" definition of the *Land Use Bylaw*. The Applicant, neighbours of the Residents appealed the decision to issue a development permit to the Parkland County Subdivision and Development Appeal Board (Board), arguing potential concerns surrounding increased traffic, noise and a decrease in property values. The Board denied the appeal, finding that the use was discretionary and complied with the County's Bylaws. The Applicants submitted an application for permission to appeal the Board's decision.

HELD: Applicant granted permission to appeal.

DISCUSSION: Citing *Carleo Investments Ltd v. Strathcona (County),* 2014 ABCA 302, the Court outlined the three-prong test to grant leave to appeal; first, the appeal must raise a question of law or jurisdiction; second the question of law or jurisdiction must be sufficiently important to merit a further appeal; and third, the appeal must have a reasonable prospect of success. The current issue surrounding the third prong requirement in the wake of *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd,* prompted the Court to highlight that the standard of review on appeals from decisions of development appeal boards is uncertain. Until it is clarified the Court opted to interpret the Board's findings using correctness.

The Applicant relied on a plain reading of the "Home Based Business Level 3" definition as the crux of its argument for appeal. The definition in the *Land Use Bylaw* states that the type of business in this category means it is "within the residential dwelling and/or accessory building". The Applicant submited that the Residents' small trucking and building company does not meet this definition because the their business operates mainly outside the dwelling and accessory building. Based on this argument, the Court was satisfied that the Applicant met the first and second prong by raising a legal question and identifying that the question is of importance to the property owners in Parkland County. Turning to the third prong, the Court stated that the Applicants did not need to demonstrate that they are likely to succeed on appeal. Therefore, the Applicant was granted permission to appeal.

City's "Special" Transit Pass Results in Discrimination Claim From User

***Barchet v. Greater Sudbury (City),* 2017 HRTO 1563 (CanLII) http://canlii.ca/t/hp1q1**

The Applicant filed an application under the *Human Rights Code,* R.S.O. 1990 (*Code*) alleging discrimination with respect to services on the basis of disability against the City of Greater Sudbury (City). To promote accessibility of the City's transit system the City offers a variety of monthly passes at different price points. Since 2011, the Applicant, has purchased a "Special" pass offered to children or adults receiving disability or pension benefits. The Applicant, submitted that he was publicly humiliated when he used his "Special" pass because the pass indicated that he was in receipt of social assistance. As a result, the Applicant sought to have the pass remove any identification that would suggest that a user has a disability. The City requested to have the application dismissed under section 14 and or section 34 of the *Code.*

HELD: Request to dismiss denied.

DISCUSSION: The City's argument was twofold; first the City relies on section 14 of the *Code* which states:

> a right under Part I [of the *Code*] is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

The City submitted that the pass program which includes the "Special" pass used by the Applicant for the City's transit system was created for the purposes of section 14 of the *Code*, to relieve the hardships and assist disadvantaged persons. The Adjudicator disagreed, finding that section 14 does

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not apply when a program such as the City's pass program that was intended to benefit individuals resulted in the discrimination against those individuals such as the Applicant.

In the alternative, the City argued that the application should be dismissed for delay. The application was filed in 2016 but the Applicant first raised concern with the pass program in 2011 and as a result violated the one year limitation period outlined in section 34. The Applicant argued that the discrimination had begun in 2011 but was ongoing, and therefore the limitation period had not run out. The Adjudicator relied on an analogous case *Garrie v. Janus Joan Inc.*, 2012 HRTO 1955, which held that each alleged occurrence of discrimination was a separate contravention of the *Code.* Therefore, as long as the Applicant purchased a "Special" pass within the prior 12 months, the limitation period in section 34 was satisfied. The Adjudicator clarified that if the Applicant wanted to proceed with the 2011 allegations, the Applicant would have to demonstrate that the delay was incurred in good faith. However, the Applicant would be permitted to rely on 2011 untimely allegations as contextual evidence, to the extent that they are relevant to the timely allegations.

Land Belongs to County After Railway Ceases Operation
***Corporation of the County of Oxford v. Vieraitis,* 2017 ONSC 6615 (CanLII) http://canlii.ca/t/hmw8f**

A piece of land acquired by the Canada Southern Railway Company (Canada Southern) in the late 1800's was at the centre of this dispute between Oxford County (County) and residents of the County, Mr. and Mrs. Vieraitis (Defendants). Both parties claim ownership of the land and both seek a declaration of fee simple ownership. When the railway line was discontinued, Canada Southern divested itself of the land as required by the *Canada Transportation Act*. At issue was whether the land was transferred to the County or reverted back to the original successors in title and thereby to the Defendants once the use for the railway ended. The County sought to use the land as a recreational trail, and argued that the Defendants interfered with its attempted use. The Defendants moved for a partial summary judgement.

HELD: Motion dismissed.

DISCUSSION: The County's position was simple; the original owner of the land conveyed full ownership of the lands to Canada Southern, and when Canada Southern divested, the County obtained a fee simple ownership in the land. The Defendants' position hinged on the statute that governed Canada Southern when the land was acquired; they and argued that the statute did not permit the land to be acquired in fee simple. Therefore, the argument followed that Canada Southern obtained a temporary interest only as long as it was necessary to operate the railway and once that interest was finished in the land, the land reverted back to the original transferor--and thereby the Defendants as the current successors in title.

The Court outlined three questions it needed to address to determine the interest that Canada Southern had acquired in the land: first, the language of the applicable statutes; second, the transactional documents between the original parties; and third, subsequent actions and declarations. When examining the statutory powers authorized to Canada Southern under the *Railway Act,* regarding its authority to acquire land in fee simple, the Court found that the statutory provisions were analogous to those examined in *Canadian Pacific Ltd. V. Lowe,* [1998] N.S.J. No. 69 (Q.B). In *Lowe* it was determined that a railway company should acquire and own real estate either by agreement or by expropriation for the construction, maintenance and operation of the railway. By relying on the findings in *Lowe*, the Court agreed with the County and determined that Canada Southern was permitted to acquire the land at issue in fee simple. The Court recognized that as a result of this transaction taking place in the late 1800's the details within the original transactional documents would be scarce. As a result, the Court reinforced that Canada Southern had a statutory authority to acquire the land in fee simple and therefore it was acting within its authority.

The Defendants unsuccessfully attempted to argue that the fee simple obtained by Canada Southern was determinable, and was terminated and reverted back to the successors in title when it stopped using the land for the purpose of the railway. The Court disagreed, finding that there was no wording in the transactional documents that suggested that the land would revert back. In reviewing the subsequent events, the Court concluded that Canada Southern obtained a fee simple interest in the land, and as a result the Defendants never acquired such an interest. Therefore, the Court held, the County is the owner of the land in fee simple.

Residency in Mobile Home is Not Recognized Form of Charter Discrimination
***Prediger v Calgary (City),* 2017 ABQB 755 http://canlii.ca/t/hp6vn**

Midfield Mobile Home Park (Midfield) in the City of Calgary (City) was operated by the City and managed by Calhome Properties (Calhome). The City became aware that Midfield was experiencing water and sanitary infrastructure problems, making the use of the land as a mobile home park undesirable. In 2014, City Council decided to close Midfield. To satisfy the requirements in the *Mobile Home Site Tenancies Act* (*Act*), the City sent residents a one-year termination notice in September 2016. As of September 2017, Midfield was formally closed; however, there were still residents occupying the lots. One of those residents was the Applicant, Mr. Prediger. On behalf of himself and other residents of Midfield, the Applicant alleged that by closing Midfield, the City and Calhome violated the *Act* and section 15 of the *Canadian Charter of Rights and Freedoms (Charter).* A cross-application was filed by Calhome to obtain vacant possession of the lots still oc-

cupied and permission to demolish the abandoned mobile homes.

HELD: Application dismissed, and cross-application granted in part.

DISCUSSION: The City argued that the application was misdirected and was truly a collateral attack on the original 2014 decision made by City Council. The City suggested that the Applicant should have argued for judicial review of City Council's decision, however the challenge was now barred under the limitation Rule 3.15(2) of the *Alberta Rules of Court*, Alta Reg. 124/2010. The Court agreed; the Applicant's argument primarily concentrated on City Council's conduct and its decision to close Midfield. Despite this finding, the Court proceeded to address the remainder of the arguments. The crux of the Applicant's argument was that the City deliberately neglected and failed to maintain Midfield's infrastructure so it could justify closing it. The Court disagreed; in part because the Applicant could not provide evidence that action or inaction by the City caused it to fail to meet its infrastructure obligations, and once City Council agreed to close Midfield, it was clear why the City no longer invested funds into improving the mobile home park.

The Applicant unsuccessfully challenged the validity of the termination notice, suggesting that it did not meet section 13(1)(a) of the *Act* because it was silent on the future use of the land. Relying on an analogous decision, *Howe v. 3770010 Canada Inc,* 2008 BCSC 330, it was held that the only requirement required was the indication that there was an intention to use the land for a purpose other than a mobile home park. Therefore, the Court dismissed the Applicant's argument. Lastly, the Court addressed the section 15(1) *Charter* violation raised by the Applicant. The Court referenced the Supreme Court of Canada (SCC) decision *R v. Kapp,* 2008 SCC 41 which outlines the two-prong test for demonstrating discrimination. The first prong required that the Applicant must be discriminated against on an enumerated or analogous ground. An enumerated ground is not applicable; as a result the Court examined the definition of an analogous ground as clarified by the SCC in *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, 1999 CanLII 687; a "personal characteristic that is immutable or changeable only at unacceptable cost to personal identify". The Court found that being a resident of a mobile home park does not meet this standard, and as a result did not proceed to the second prong. The Applicant's application was dismissed. The Court granted Calhome's cross- application in part, extending the date by when the remaining residents must vacate Midfield to February 2018.

Tribunal Searches for an Appropriate Remedy Following a Contravention Application

LaBerge v. Guelph (City), 2017 HRTO 1435 (CanLII) **http://canlii.ca/t/hmvrv**

The Applicant, a resident in the City of Guelph (City) filed an application under the *Human Rights Code*, R.S.O. 1990 (*Code*) alleging that the City discriminated against her on the basis of disability and age. The discrimination stemmed from the Applicant's experience on the City's transit system with other passengers. In the original application, the Applicant indicated that she was frequently asked by passengers with strollers to move out of the priority seating so they could sit with their strollers, even though she required this seating. Following the Human Rights Tribunal, the Applicant and the City entered into Minutes Of Settlement (MOS). The Applicant submits that the City has contravened the MOS.

HELD: Seven drivers were ordered to receive training upon return to work.

DISCUSSION: Section 45.9(3) of the Code allows a party who believes there has been a contravention of a MOS to make an application to the Tribunal. The Applicant submitted an application citing multiple contraventions of the MOS by the City. The first contravention was signage. The Applicant argued that the City did not install new interior signage explaining that disabled passengers have a higher claim to priority seating by the date outlined in the MOS. City conceded that it did not meet the deadline, but all signage was updated at the time of this hearing.

Next, the MOS required a priority seating public awareness campaign; the Applicant argued that the City failed to do such a campaign. The City highlighted the steps it took to satisfy this requirement: updating the City website, placing information at bus shelters, and creating written material for circulation. The City submitted that the MOS did not define the requirements of an awareness campaign. The Tribunal agreed, indicating that the steps taken by the City demonstrated its intent to carry out the terms of the MOS.

Third, the Applicant argued that the City did not provide updated training to its drivers about priority seating. This argument was premised on her recent experiences on the bus, where she was still asked by other passengers to move from priority seating. The City conceded that it did not train seven of the 170 bus drivers, as those drivers were off on long term disability. The challenge as suggested by the City was that regardless of the training provided, it had no control over the behavior of the passengers on the bus.

Finally, the Applicant agreed that the City did meet the MOS requirement to have an article published in the newspaper regarding priority seating, but the Applicant expected that there would be more than one. Article. The City highlighted the wording in the MOS which included "a" notice and submitted that this requirement was met, to which the Tribunal agreed. With regards to a remedy, the Tribunal cited *Matos v. Transplay,* 2010 HRTO 2527 which stated "the power to remedy a contravention of settlement is tied to the harm caused as a result of the contravention." At a loss for the remedy, the Tribunal required that the City have the remaining seven bus drivers trained within six months upon returning to work. ML