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Actual Use, not Intended Use, is Required for Legal Non-conforming Use
Evans v. Muskoka Lakes (Township) Chief Building Official

Evans owned two islands in the township of Muskoka Lakes, Elsinore Island and Harry Island, which were connected by a wooden bridge. A cottage was located on Elsinore Island and a boathouse on Harry Island. Evans applied for permits to construct a dwelling and a septic system on Harry Island. Both permits were denied by the chief building official. Under the zoning bylaw, no structure could be built on an island unless the lot was an existing lot of record. To be a lot of record, the lot needed to be at least 2 acres, and Harry Island was only 1.12 acres. On that basis, the building permit was denied. The septic permit was denied because the proposed setback of the septic system would not comply with the setback requirements in the zoning bylaw.

Evans appealed to the court under section 25 of the Building Codes Act. With respect to the denial of the building permit, Evans argued that the use of Harry Island for dwelling purposes was a legal nonconforming use as the second story of the boathouse was used as a dwelling before the first zoning bylaw came into place in 1988, and that such use continued after the zoning bylaw was in place. Alternatively, Evans argued that the chief building officer improperly fettered his discretion under the bylaw to deem conformance of the island despite it being undersized. With respect to the denial of the septic system permit, Evans argued that the septic system setback complied with the Building Code and that the Code supersedes municipal bylaws so the septic permit should have been approved.

HELD:

The appeal of the chief building official's refusal of the development permit was dismissed. The appeal of the septic permit refusal was allowed.

DISCUSSION:

The Court confirmed that where there is a period of non-use, a legal nonconforming use will lapse in the absence of an intention on the part of the owner to continue the use. Further, where the asserted use of the property ceased before the effective date of the zoning bylaw, a legal nonconforming use will not be created in the absence of an intention on the part of the owner to continue the use. In this case, the Court found there was no evidence of residential use since the late 1920s-early 1930s and no evidence that any owner since that time intended to continue the residential use. Evans tried to argue that it was sufficient that the boathouse could have been used for living purposes even if it wasn't used in that way, but the Court did not accept that argument, reiterating that the law requires actual use. The Court also rejected the argument that the chief building officer had improperly fettered his discretion to deem conformance of the island. Looking at the relevant sections of the bylaw, the Court found that there was no discretion to be exercised by the chief building officer. The township official plan required a zoning bylaw amendment for development on an island of less than two acres. Therefore, an interpretation of the zoning bylaw as allowing the chief building officer to deem compliance of an undersized island without a zoning bylaw amendment would not conform with the official plan. Further, the deeming provisions of the bylaw only applied to lots that didn't meet the requirements of a lot frontage of 100 feet and an area of 15,000 square feet. Harry Island met both of these requirements so the deeming provisions of the zoning bylaw would not apply to it in any event.

The Court did find that the septic system permit should have been granted as the *Building Code Act* superseded the zoning bylaw and the septic system met the requirements of the Building Code.

Evans v. Muskoka Lakes (Township) Chief Building Official

Voluntary Contributions or an Illegal Mandatory Contribution Scheme?
Lorval Developments Ltd. v. Langley (Township)

The Township of Langley, BC, approved a Civic Amenity Contribution Policy in 2018. The CAC Policy provided the administrative guidelines by which the Township was to negotiate contributions for civic amenities from those seeking to rezone commercial, residential, and industrial lands. The goal of the Policy was to help offset the cost of providing new and upgraded public amenities for the growing population. Lorval brought an action under the *Judicial Review Procedure Act*, RSBC 1996 c. 241, seeking to overturn the CAC Policy, arguing that it was an illegal mandatory contribution scheme, that it was unreasonable, and that it was adopted in breach of procedural fairness.

Langley argued that the Policy was not a mandatory contribution scheme but rather a guidance document about the non-mandatory contribution targets the township would hope to negotiate in voluntary rezoning agreements with developers, and that such agreements were authorized under its general power to contract. Langley's position was that the Policy was reasonable as it was consistent with the Provincial Government's 2014 Guidelines and similar policies had been adopted by numerous municipalities in the province. Langley further argued that the procedural fairness issue was moot as the specific decision affecting Lorval had been rescinded and remitted for further consultation, which was the same relief Lorval would have been granted in these proceedings. More generally, the procedural fairness issue was moot because the only amenity contributions in the Policy that would have been applicable to Lorval's development lands were rescinded in 2024.

HELD:

The Court found that the CAC Policy was invalid as it did represent a mandatory amenity payment regime in exchange for certain, specified rezonings without the appropriate statutory authority.

DISCUSSION:

The Court found that when read as a whole, the CAC Policy indicates a mandatory payment regime as it suggests that the specified contributions will be required as a condition of rezoning approval. In coming to this decision, the Court emphasized that despite the language of the Policy suggesting otherwise through its use of words such as “guidance”, “targets”, and “voluntary contributions”, the Policy as a whole made it clear that specified contributions would generally be required for a rezoning to be approved. The Court referred to numerous sections within the Policy that suggested the obligatory nature of the Policy. The Court also found that the Policy represented a complex, detailed scheme with many detailed formulas, processes, exemptions and exceptions to the exemptions - similar to the legal pronouncements found in a regulation. For example, there was a precise percentage of funds allocated to specific amenities; detailed terms for timing of collections and specific inflation factors for specified amounts. The Court found that Langley’s argument that the CAC Policy was consistent with the Provincial Government’s 2014 Guidelines was irrelevant to the issue of statutory authority, as the Guidelines were not a substitute for provincial legislation. In addition, even though the Policy did not involve the use of sanction-like powers, it was linked to Langley’s discretionary rezoning power, so the effect was to coerce developers to make unauthorized contributions as a condition of the development process. Having found that there was no legal authority for the Policy, the Court did not need to address the issues of unreasonableness and the procedural fairness issue was moot.

Lorval Developments Ltd. v. Langley (Township)

How Much is this Land Worth - Payment in Lieu of Property Taxes
Cold Lake (City) v. Canada (Attorney General)

Under the *Payments in Lieu of Taxes Act,* RSC 1985, c. M-13 (“PILT”), the City of Cold Lake was entitled to receive a payment from the Crown in lieu of municipal property taxes and based on the value of Crown lands for the 4 Wing Cold Lake Military Base located in the city. The Minister of Public Services and Procurement Canada (Minister) determined the land values of the military base. The lands had water and sewer infrastructure, but such infrastructure was not subject to PILT. The issue was whether the Minister should have considered the land to have an enhanced value because of the existence of water and sewer infrastructure, even though such infrastructure was not subject to PILT. This was referred to as the “gate issue”. The City brought an application for judicial review of the Minister’s decision. That application was dismissed at the Federal Court. The City appealed to the Federal Court of Appeal. The three issues before the Federal Court of Appeal were: 1) did the Minister err with respect to the gate issue; 2) did the Minister err in her decision not to pay the City late payment supplements and 3) was the Minister’s decision procedurally unfair.

HELD:

The Federal Court of Appeal set aside the judgment of the Federal Court and allowed the application for judicial review in part. The Minister’s decision relating to the statutory exclusion for water and sewer infrastructure was set aside and remitted back to the responsible Minister for redetermination in accordance with the findings of this court.

DISCUSSION:

The FCA first considered whether the Minister’s interpretation of the exclusion of water and sewer mains as meaning for all purposes was reasonable. Referring to *Vavilov*, the FCA reiterated that the Minister’s decision must be both justifiable and justified. It wasn’t sufficient that the result was

reasonable, the reasons for reaching that decision also had to justify the outcome. The matter of valuation of the land had been put to the Dispute Advisory Panel, which was responsible for providing advice to the Minister regarding valuations and payments required. The panel was split in its decision, with the majority recommending that the valuation exclude water and sewer mains for all purposes, including any positive impact their presence might have on the value of the land. The minority recommended that although the water and sewer lines themselves must be excluded, the value their presence brings to the land must be considered. The majority recommended land values ranging from about $42 million to 60 million while the minority recommended land values in the range of $90 million to $141 million. The Minister accepted the majority's recommendation, despite the fact that it was a significant departure from the 2014 Dispute Advisory Panel recommendation. The FCA noted that the Minister did not address the City's concerns about the different methodologies applied to the valuation of the land by the dispute advisory panel in 2014 and 2022, but skirted around it. The FCA held that the Minister failed to adequately respond to the City's arguments about key issues regarding the valuation and therefore the Minister's decision was unreasonable in light of the teachings of *Vavilov.* With respect to the late payment issue, the FCA found the Minister's decision was reasonable, and that the Minister's decision was not tainted by procedural unfairness.

Cold Lake (City) v. Canada (Attorney General)