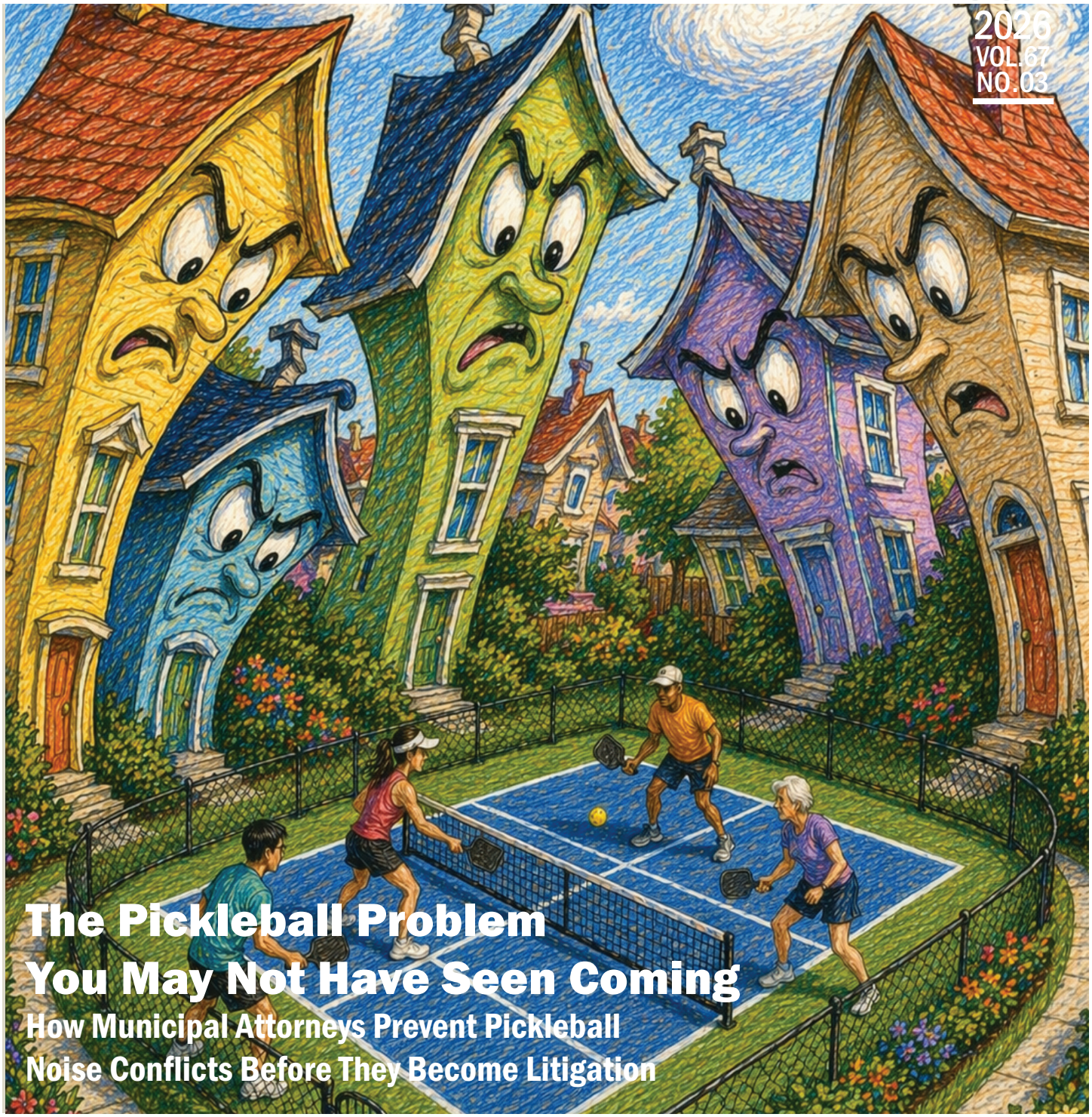
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The Pickleball Problem You May Not Have Seen Coming

How Municipal Attorneys Prevent Pickleball Noise Conflicts Before They Become Litigation

INSIDE CANADA

Contributed by
MCM Consulting and Legal Services
Kamloops, BC

Wrecked Vehicles, Law Errors, Refuse Removal, Land Use, and Remedial Actions



Municipality Not Compelled to Accept Wrecked Vehicles in its Disposal Site

Haas v. Baie Verte (Town)
https://canlii.ca/t/kjlhg

This was an appeal by a property owner, Sherry Haas, from the Central Newfoundland Regional Appeal Board's dismissal of her appeal from the Town's denial of her business permit application.

Hass intended to buy, partially destruct, and sell end-of-life vehicles on her property located in the Town's rural zone. She applied for a business permit to run a "Solid Waste" disposal operation, which is a discretionary use under the Town's development regulations in effect at the time of the Town's decision. The Town denied the business permit application on the grounds that the business was a "Scrap Yard," which is not a permitted use in the rural zone.

Haas appealed the Town's decision to the Central Newfoundland Regional Appeal Board. The Board confirmed the Town's decision that the business was a Scrap Yard and, as it is not a permitted use, the Town cannot issue a business permit.

Haas appealed the Board's decision to the Supreme Court.

HELD: Appeal dismissed.

DISCUSSION: The Supreme Court held that the Board did not make a legal error when it upheld the Town's decision that the operation was a "Scrap Yard." Firstly, the Court considered the proper standard of review. Given that this was a statutory appeal under section 46(1) of the *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8, and considering the Supreme Court of Canada's decision in *Vavilov*, Haas was able to appeal some questions of mixed fact and law, and the standard of review is correctness if an extricable legal question or issue of principle is at stake. However, Haas is unable to appeal a factual decision.

The Court first considered whether the Board's decision was a factual one. On this issue, the Supreme Court found that whether the activity proposed by Haas is a Scrap Yard or a Solid Waste disposal yard is a question of fact alone. There is no extricable legal question, and Haas was unable to appeal this decision. This is so even if the Board made a palpable and overriding error in so deciding.

The Supreme Court also held that the Board did not make a legal error in failing to find that the Town was in conflict of interest. Haas argued that the Town ran a similar business when it rejected Haas's application and rejected her application to get rid of Haas as a competitor. The Court stated that there was no evidence before it that the Town was a competitor and rejected this argument.



Municipality's Rescission Motion Cannot Stand If It Contains an Error of Law

Churchill v. Eastern Newfoundland Regional Appeal Board
https://canlii.ca/t/kj2p2

In this case, the property owner, Mr. Churchill, owns oceanfront property at 0 Mullowney's Lane, in the Town of Witness Bay. Mr. Churchill built this property with the proper town permits. While it may have the outward appearance of a cabin, the property does not have kitchen or bathroom facilities. On August 8, 2021, the property owner made a development application to the town, seeking approval to consult with the provincial department to design and develop an environmental septic system for his oceanfront property. He described the "proposed development" for his property as "approval to consult with Service NL to design/develop an environmental septic system." He described in a section of the development application called "other buildings already on the lot," a 34m2 recreational building. The parties refer to this at various times as either a gazebo or a leisure property. He said under "Other Details" of the development application that he was "seeking approval for well and septic system for appropriate waste disposal + environmental stewardship as recommended by Service NL."

At a meeting on August 17, 2021, the town said that "the Council has been asked to approve a septic system and well for existing development at 0 Mullowney's Lane." This existing development is the gazebo. The town passed a motion during their council meeting supporting this application and referring it back to the province for final system approval. The motion said: "Moved by Councilor Paul, seconded by Councilor Swain, to support the application and refer back to Service NL for final system approval" (the "original motion").

On October 14, 2021, Service NL approved "the construction and installation of a sewage system/water supply to service a premises with three bedrooms at 0 Mullowney's Lane...." It said, "The sewerage/water supply must be installed precisely as indicated on the Approved Designer's drawings..." Service NL also said, "This Certificate of Approval does not release the applicant from the obligation to obtain appropriate approvals from other concerned provincial, federal, and municipal agencies..."

On November 9, 2021, the Council rescinded the approval motion by a rescission motion. Mr. Churchill appealed that rescission to the Regional Appeal Board (the "Board"). The Board upheld the town's decision. The owner appealed the Board's decision.

The basis for the rescission motion and the claimed "error" was an assertion that the original motion was just a motion to support consultation with the province and not a motion to approve the development application.

HELD: Appeal allowed.

DISCUSSION: The applicable standard of review was correctness, which means the Court gives no deference to a decision-maker on questions of law or jurisdiction. The main issue before the Court was whether the Board erred in deciding that the Town has the ability to rescind the original motion.

The Court revoked the Board's decision and referred it back to the Board for reconsideration. The Newfoundland and Labrador Supreme Court found that the Board erred in concluding that the municipality had discretion to rescind its previous motion because the town's rescission motion was based upon the conclusion that the original motion was just a motion to support an application to Service NL, not a motion by the town approving a development permit.

The basis for the rescission motion and the claimed "error" was an assertion that the original motion was just a motion to support consultation with the province and not a motion to approve

the development application. However, it had already been determined by a court decision that the original motion was, in fact, a motion to approve the development permit. The town's rescission motion was based on the conclusion that the original motion was merely a motion to support the application to the province, not a motion approving the development permit.

In these circumstances, it was determined that the Board's decision contained an error of law and was not legally correct. The decision was vacated, and the matter was referred back to the Board to be re-decided.



Municipalities Not Required to Inventory or Account for Items Removed as Refuse

Desmarais v. Fort Erie (Town)
https://canlii.ca/t/kjjw4

The plaintiff was an occupier and the primary resident of the subject property, where he operated a mechanic business, but was not the legal owner. The Town of Fort Erie issued a Property Standards Order in February 2020, requiring the repair or demolition of four specific structures on the property, including two garages, a tall barn, and a lean-to shed, and the removal of all refuse and debris from the property, including a long list of damaged or derelict motor vehicles, boats, trailers, tools, and mechanical equipment. Neither the property owner, Tammy Franzen, nor the plaintiff complied with the order. The plaintiff brought an appeal to the Property Standards Committee, which was dismissed.

After giving further notice, the town entered the property in February 2021, demolished the four structures that were the subject of the order, and removed many items of personal property that were listed in the February 2020 order, including motor vehicles, boats, trailers, tools, and mechanical equipment. Some of the personal property was set aside for the plaintiff.

The plaintiff brought a claim seeking $200,000 in damages for wrongful entry, removal, and destruction of personal property. The plaintiff alleged that he owned the personal property removed by the town. The plaintiff further alleged that the February 2020 order was invalid or unauthorized, that the town did not have the authority to enter onto the property, that the personal property removed by the town did not constitute refuse or debris, that the town did not take reasonable care in enforcing the order, and that the town failed to account to him for the items that were removed from the property.

The town argued that it had the authority to make the February 2020 order and enter onto the property pursuant to the provisions of the *Building Code Act*, 1992, S.L. 1992, c. 23, that the February 2020 order was final and binding pursuant to the BCA, and that it lawfully enforced the order.

HELD: Claim dismissed.

DISCUSSION: The Ontario Superior Court of Justice upheld the municipality's authority to enforce a property standards order, finding it acted lawfully, reasonably, and in good faith. The plaintiff's claims of trespass, improper enforcement, and damages were dismissed because the order was final and binding and no liability or damages were proven.

The Court found that the town properly accounted for the location and disposition of the plaintiff's property. The town did not owe the plaintiff a duty of care for the items classified as refuse, debris, or derelict vehicles under the Property Standards Order. The town was found to have upheld its duty to act reasonably in disposal of the items, and the plaintiff was aware of the destination of most if the items. Municipalities are not obligated to inventory or account for each item removed as refuse.



Municipality Acted Ultra Vires by Requiring Aviation Safety Compliance

The Corporation of the Township of Clearview v. 12966344 Canada Inc.
https://canlii.ca/t/kj147

The subject property (the "site") comprises 172.38 acres of vacant land zoned airport industrial, with a small portion zoned environmentally protected. The site was adjacent to an aerodrome used commercially for aviation, which was unregulated and had no registered zoning bylaws under the federal *Aeronautics Act*; thus, the site was not restricted by any regulations thereunder concerning its use.

The site owners commenced construction of a privacy berm to shield the intended development from fill operations. The Township issued a stop-work order and notified the owners that they must obtain a fill permit. The owners submitted extensive documentation but eventually abandoned

The town did not owe the plaintiff a duty of care for the items classified as refuse, debris, or derelict vehicles under the Property Standards Order.

efforts with the Township and filed notice of appeal with the Ontario Land Tribunal. When the owners resumed placing fill on the site, the Township issued a notice of contravention under the fill bylaw and a stop-work order, but the owners nonetheless continued.

The Corporation of the Township of Clearview in Ontario brought an application seeking a permanent injunction restraining the corporation, 12966344 Canada Inc., and Ms. Williams (the "respondents") from placing, dumping, or otherwise depositing fill on the subject property, except in strict compliance with the Township's Bylaw 02-62. The respondents/owners brought a counterapplication for a declaration that the bylaw was invalid, and alternatively, for a declaration that they complied with the bylaw and the permit should be issued forthwith.

HELD: Application dismissed. Counterapplication granted.

DISCUSSION: The Township was ordered by the Ontario Superior Court of Justice to issue a fill permit to the owners. The Court found that the Township's requirement that owners verify compliance with the Obstacle Limitation Surfaces Guidelines, which are Transport Canada's Aerodrome Standards and Recommended Practices, was *ultra vires* its authority.

While the Township was not prepared to grant a fill permit until the owners demonstrated that the berm would be constructed in accordance with proper engineering practices and would not pose a risk to aviation safety, the Township did not have the authority to regulate the height placement or scope of the proposed berm; aviation safety falls within the sole purview of the federal government, NAV CANADA, the body with operational authority with respect to aeronautics and aviation, indicated that berm posed no safety risk.

The Court ruled that the municipality acted *ultra vires* by requiring aviation safety compliance for a fill permit near an unregulated aerodrome. The Court found that the applicant met all requirements and ordered the municipality to issue the permit. An injunction sought by the municipality was denied.



Order By Municipality Requiring Removal of Two Buildings Found to be Reasonable

Ferstel v. Nanaimo (Regional District)
https://canlii.ca/t/kjcnm

The respondent municipality, the Regional District of Nanaimo in British Columbia, issued a remedial order requiring the applicant, Mr. Brian Ferstel, to remove two buildings from a property formerly owned by the applicant's deceased father. The property had not yet been transferred to Mr. Ferstel, but the municipality conceded that the applicant had a right of redemption over the property. As a result, the applicant was served with all materials related to the municipality's proposed remedial action requirement.

The applicant demolished one building but claimed that the remaining two buildings were not unsafe or hazardous. The applicant brought a petition for judicial review of the municipality's decision to issue the remedial order and for a reconsideration of the decision.

HELD: Petition dismissed.

DISCUSSION: The municipality acknowledged that the applicant had made significant progress in addressing the property's unsightliness, such that there were no longer any grounds to impose a remedial action requirement on the basis of unsightliness. The municipality found, however, that work had been done on the property without permits and that the two remaining buildings were still structurally unsound. Promised engineering assurances had still not been provided, and what was provided to the municipality was insufficient to reassure the British Columbia Supreme Court that the work done since reconsideration of the decision did anything more than lessen the extent of the severely compromised structural integrity of one building.

The Court found that the municipality's decision that the two buildings on the property remained structurally unsound was reasonable. The stay of the remedial order was lifted to allow the municipality to proceed with the demolition of buildings at the landowner's cost. ML