

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: February 14, 2018

CASE NO.:

PL160792

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Christine Clarke
Appellant:	Khortysa Inc.
Appellant:	Kim Lamers-Bellio
Subject:	By-law No. 16-2016
Municipality:	Township of McMurrich-Monteith
OMB Case No.:	PL160792
OMB File No.:	PL160792
OMB Case Name:	Clarke v. McMurrich-Monteith (Township)

Heard: June 19, 20 and 21, 2017 in Sprucedale, Ontario

APPEARANCES:

Parties

Counsel

Christine Clarke

Stephen Watt

Christine Staley

Raj Kehar

Kim Lamers-Bellio

Self-represented

Kirk Cummins

Self-represented

Township of McMurrich-Monteith

Edward Veldboom

DECISION DELIVERED BY JUSTIN DUNCAN AND ORDER OF THE BOARD

BACKGROUND

[1] This was a hearing of outstanding appeals from the Township of McMurrich-Monteith's ("Township") enactment of comprehensive Zoning By-law No. 16-2016 ("Zoning By-law").

[2] The Township is located in the District of Parry Sound and is immediately north of the Town of Huntsville. The Township consists predominately of small rural properties with residential and waterfront property uses. Approximately 60 per cent of the households in the Township are used seasonally.

[3] The Township was formed through amalgamation of unorganized townships in 1998. The Township had adopted an Official Plan which was approved with modifications by the Ministry of Municipal Affairs and Housing in 2007. The Zoning By-law is the Township's first enactment of a comprehensive zoning by-law. Various versions of the Zoning By-law had been drafted since 2000 and public meetings were held in 2015 and 2016 leading to passage by Council.

[4] The outstanding appeals relate to the tourist commercial, campground and related zoning and standards established in the Zoning By-law. In an order dated February 9, 2017 the Board had ordered that, in accordance with s. 34(31) of the *Planning Act* ("Act"), the Zoning By-law be deemed to have come into force and effect on the day it was passed by the Township, with the exception of matters still under appeal including:

- Section 2.10 (campground), 2.11 (camp site), 2.12 (camp site-serviced), 2.35 (existing) of the Definitions section.
- Section 3.26, Provisions for campgrounds.
- Section 4.5.1, Table 6, provisions applicable to the CT-1, CT-2 and CT-3 zones (Tourist Commercial Exception Zones).

- Schedules to the By-law including: Lands zoned CT-1 on Schedule D1; CT-2 on Schedule C2, and Schedule CT-3 on Schedule D4.

[5] The Board also ordered that the coming into effect of the Zoning By-law be without prejudice to the positions taken by any of the parties in regard to any of the outstanding site-specific appeals.

[6] Finally, the order approved site-specific modification to the Zoning By-law having the effect of settling the appeal filed by Khortysa Inc.

[7] The following two appeals remain before the Board:

- a. Christine Clarke appeals from the Township's recognition of an 18 camp site commercial campground that is currently owned by Christine Staley and members of her family that is located at 136 Delaware Lane.
- b. Kim Lamers-Bellio appeals from the Township's recognition of various aspects of a campground operation that is owned by Kirk Cummins that is located at 819 West Bear Lake Road.

[8] Additionally, at the outset of the hearing the Township requested that the site-specific zoning recognized for a campground operation located at 532 East Bear Lake Road be revised to remedy an error contained in the Zoning By-law in order to recognize the 17 camp sites identified at the property rather than the 22 camp sites identified in the Zoning By-law.

ISSUE

[9] The issue in all three of the matters before the Board relates to properly defining the use of land on the three properties in accordance with s. 34(9) of the Act and grandfathering those rights in the Zoning By-law.

[10] Section 34(9)(a) of the Act provides that no by-law passed under s. 34 applies “to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose”. As this examination involves consideration on a property-specific basis, the three properties are examined separately below.

136 DELAWARE LANE

[11] The site-specific CT-3 zoning recognized in the Zoning By-law for 136 Delaware Lane provides that the permitted principal uses are limited to the following:

- An existing campground where:
 - The maximum number of camp sites shall not exceed 18
 - The maximum number of cabins shall not exceed 1
- A Single detached dwelling.

[12] Ms. Clarke appeals from the Township’s recognition of 18 camp sites at 136 Delaware Lane in the Zoning By-law. She also appeals from the recognition of the operation being commercial in nature.

[13] The campground and property at issue was previously owned by Helen Staley who has since deceased. The property is now owned jointly by members of her family. The family representative on the appeal is Christine Staley.

EVIDENCE OF THE PARTIES

a. Evidence of the Appellant

[14] Jamie Robinson was qualified to provide expert planning evidence on behalf of the Appellant.

[15] Mr. Robinson explained that 136 Delaware Lane is approximately 1.5 hectares in area and that policy 4.2 of the Township's Official Plan ("OP") designates the property "Shoreline" given that it is located within 150 metres of Buck and Fawn Lakes.

[16] Mr. Robinson explained that Ms. Clarke owns a property that is immediately to the west of 136 Delaware Lane and which was created by severance from 136 Delaware Lane. He explained that Ms. Clarke purchased the property in 2002 and she must travel on a right-of-way, created by way of easement, through the south end of the property to access her land. Further, he explained that an undertaking had been entered into at the time of Ms. Clarke's purchase of her property that no trailers would be located on the approach to her property on either side of the right-of-way and further, that a fence would be established to block views of any trailers located at the north end of the property. Mr. Robinson explained that the CT-3 zoning currently does not recognize this undertaking with Ms. Clarke and that camp sites could currently be located anywhere at 136 Delaware Lane. It was Mr. Robinson's opinion that the undertaking with Ms. Clarke should be given some weight by the Board in determining historical land use at 136 Delaware Lane.

[17] Mr. Robinson explained that he conducted a site visit on April 21, 2017 at which time he observed 13 trailers on the property. He explained that he also observed that the privacy fence has been removed and trailers located on the approach contrary to the undertaking with Ms. Clarke. In reviewing photographs provided to him by Ms. Clarke, Mr. Robinson explained that the privacy fence was partially removed in 2014 and new trailers established in the approach area at that time. He explained that as of 2016 the fence had been entirely removed and a total of 12 trailers established on the

property of which five were located in the approach area south of where the fence should be located.

[18] Mr. Robinson explained that in 2012 that an application had been made to sever 136 Delaware Lane further to create two lots with the severed portion of the property being located south of the right-of-way to Ms. Clarke's property. Provisional consent was granted by the Township and an application had been made for a site-specific zoning by-law for the entire property, including recognition of an existing 12 unit trailer park and a residential use. He explained that the zoning by-law would have also established standards for setbacks from the shoreline and the right-of-way. He further explained that the zoning by-law would have permitted eight trailer sites on the retained portion of the site. He explained that the application for the zoning by-law was eventually abandoned and the provisional consent lapsed.

[19] It was also Mr. Robinson's opinion that the historical use of 136 Delaware Lane was by friends and family and that recognition of the operation as a commercial operation in the Zoning By-law went too far.

[20] In reference to a concept drawing provided to Council by Ms. Staley, it was Mr. Robinson's opinion that the concept drawing represented what the maximum build out on the property could be achieved should the Township decide to recognize 20 or 18 camp sites on the property through the Zoning By-law process and that it did not accurately capture the existing use at that time. Mr. Robinson explained that a 2015 site inspection by the Township identified 12 camp sites on the property. It was his view that the evidence suggests that trailers had been intentionally placed at the south end of the property to establish a use there prior to the passage of the Zoning By-law.

[21] Mr. Robinson explained that there is no evidence before the Board that 18 camp sites have ever existed on the property other than the conceptual drawing provided to Council by Ms. Staley. It was also his opinion that there is no evidence that 12 trailers have ever been on the site save for the time leading up to the passage of the Zoning

By-law. However, he was willing to accept that based on the 2015 site inspection and his site visit that 12 camp sites were in use at the time of Zoning By-law enactment but it was his opinion that they should be recognized at the north end of the property and should be zoned residential with site-specific standards in place.

[22] In reference to policy 6.2 of the OP, Mr. Robinson opined that the Township is allowed to zone where existing uses do not conform to the OP where those uses are *bona fide* prior to the enactment of a zoning by-law. He opined that the *bona fide* use in this case was camp sites north of the privacy fence between 2002 and 2014. He explained that all of the information available shows that the number of trailers varied during this time period between 5 and 10. It was Mr. Robinson's view that the undertaking with Ms. Clarke ought to be considered as part of the assessment of whether the use in this case is *bona fide*.

[23] In order to be consistent with the Township OP, it was Mr. Robinson's opinion that the Zoning By-law should establish a 20 m setback from the shoreline for all buildings and structures and a 30 m setback from the shoreline for any septic system.

[24] Additionally, Mr. Robinson recommended that any site-specific zoning approved for 136 Delaware Lane be subject to a holding provision requiring site plan control for the property. He explained that this was necessary as the Township does not currently have a site plan control by-law and that such a provision in the Zoning By-law would create the necessary authority here.

[25] Mr. Robinson did not have any issues with the Zoning By-law with regards to consistency with the Provincial Policy Statement, 2014 ("PPS") or conformity with the Growth Plan for Northern Ontario ("Growth Plan").

[26] Mr. Robinson drafted a zoning by-law (Exhibit 12) which proposes to zone the northern part of the property waterfront recreation-exception 9 (WR-9) zone with a holding provision and the south part of the property Open Space (OS) zone. He explained that the holding provision in his draft by-law is intended to ensure that a site

plan and septic approvals are in place. Additionally, he explained that the OS zoning would restrict development on the south part of the property but that a rezoning application could be made later to do something on the lands.

[27] In cross-examination, Mr. Robinson acknowledged that his site visit was conducted approximately 10 months after the Zoning By-law was passed and during the off-season which he acknowledged was between October 31 and April 30 annually. He explained that his knowledge of the state of use at the property previous to the passage of the Zoning By-law is based largely on photographs provided to him by Ms. Clarke and also the inspection by Township staff that found that 12 camp sites were being used.

[28] Mr. Robinson acknowledged that there are 14 duplex receptacle plugs on the property which is indicia of up to 28 camp sites being possible. He also acknowledged that sites where only tents are used could mean that there are additional sites.

[29] With regards to the test for the Board to apply in this situation, Mr. Robinson also acknowledged that s. 34(9) of the Act uses the language "lawfully used" and not "bona fide use". He also acknowledged that the Act requires the Board to consider the date of Zoning By-law passage.

[30] With regards to commercial use, Mr. Robinson acknowledged in cross-examination that there is no definition of commercial use in the Zoning By-law and he also acknowledged that commercial activity is not limited to people who do not know each other. He also acknowledged that commercial activity can occur absent the need to zone a property for commercial activity. Mr. Robinson believed non-commercial best described the use of the property but acknowledged that not much turned on this point as there is no difference in permitted uses whether the campground operation is zoned as a residential or a commercial use.

[31] With regards to the undertaking, Mr. Robinson acknowledged that it was an agreement between private parties but it remained his view that it should be a

consideration for the Board in deciding the appropriate zoning for the property. He did acknowledge that the language of the undertaking does not contain a requirement for the maintenance of the fence in perpetuity.

[32] In relation to the septic and the site plan, Mr. Robinson acknowledged that the conservation authority has issued a permit recently to service 18 camp sites and that the Township has a campground licencing by-law that requires the preparation of a site plan which would apply to the property. It was his opinion that a site plan requirement governed by the Act in the circumstances was appropriate in order to enforce the Zoning By-law on the property.

[33] Next, the Board heard from Ms. Clarke. She explained that she purchased her property directly from Helen Staley in 2002. She explained that she was only interested in purchasing the property if Ms. Staley was willing to agree to remove trailers on the south side of the right-of-way and erect a fence to hide the trailers located to the north. She explained that the purpose of the undertaking was to ensure that she would not have to see trailers while driving to her cottage.

[34] Ms. Clarke explained that Ms. Staley had passed away in the spring of 2014 and that the privacy fence was removed shortly thereafter. She also explained that it was her observation that the several trailers moved to the south side of the property after this time were never used but just placed there.

[35] It was also Ms. Clarke's view that the Ms. Staley's presentation to Council prior to Zoning By-law enactment, which included a proposed layout for 18 camp sites, was a proposed use and not an existing one. Ms. Clarke explained that it was her experience in observing the property that the Staley family was large and that the trailers were used by overflow members of the family who could not fit in the cabin on the property. It was her view that the operation was not a commercially operated campground. She expressed the view that the evidence filed on the appeal by Ms. Staley supported this

view as invoices for only 2016 had been filed with the Board and had been issued only to family members.

[36] In cross-examination, Ms. Clarke explained that she has not yet attempted to enforce the undertaking in Court.

[37] With regards to the removal of the privacy fence, Ms. Clarke explained that she did observe damage to the fence caused by a snow plow but that it was not otherwise damaged when it was removed.

[38] Neil Haist, John Campbell, Glen Huxtable, James Forster and Eric Davenport are local residents who provided evidence relating to the historical development in the area, including at 136 Delaware Lane. They all had concerns about the potential impact of any increased intensity or new type of use on the property and the potential for impact on other users of the right-of-way leading the property. All four witnesses explained that it was their experience that the property was not used as a commercial campground previous to the enactment of the Zoning By-law but that it was used by family and friends. Mr. Davenport explained that he had rented property from Helen Staley in Florida and she had told him in 2007 or 2008 that she only rented camp sites to family members and friends in order to cover expenses.

[39] Mr. Haist explained that he has been a seasonal resident of the area all his life. He explained that the property at issue had originally been owned by his father and Helen Staley. He explained that his family now owns a property north of the subject property which can only be accessed by traveling the entire length of the subject property along a right-of-way. He explained that his family's property has been accessed in this manner for over 65 years.

[40] Mr. Haist explained that he has observed trailers on the property since the 1980s and that his most recent observations have been that there have been six or seven trailers located on the north end of the property and that trailers have only recently been located at the south end. He expressed the view that locating 18 trailers on the property

represents an intensification of the existing use. He expressed significant concern about the recent removal of vegetation along the water front on the property and how that removal, combined with intensification, may impact the water quality of Fawn Lake.

[41] David Ailles was qualified to provide opinion evidence in the area of civil engineering on the issue of the condition of the right-of-way leading to the property. He explained that the road consists of a single lane and the only major issue he has with the road is that there is a significant crest on the road at the point of a turn which he characterized as a blind curve. He opined that this results in a safety issue as vehicles moving in opposite directions at this point will not be able to observe each other.

[42] In cross-examination Mr. Ailles acknowledged that the safety issue he has identified already exists. He explained that he would normally suggest mitigation such as road improvements or right-of-way widening at the location of the blind curve but that the proximity of the road to buildings and unwilling cottagers who own the road would probably limit the potential for mitigation. He acknowledged that signage may assist this situation but that it would not cure the safety issue.

b. Evidence of Christine Staley

[43] Larry Dennis was qualified to provide expert planning evidence on behalf of Ms. Staley.

[44] Mr. Dennis explained that he had conducted site visits at the property on three occasions following his retainer in January 2016. He explained that there are 18 camp sites on the property with 13 of the sites being occupied by trailers. He also explained that the property contains a dwelling with an area of approximately 1,200 square feet attached to similarly sized deck.

[45] Mr. Dennis walked the Board through a series of photographs he had taken of the property between April and June 2017 showing the locations of existing trailers and camp sites. He explained that he was able to identify 18 camp sites on the property

during his site visits by locating trees between sites, counting water and electrical hook up locations, and identification of fire pit and barbeque locations. He explained that up to 28 camp sites could be serviced on the property based on the availability of electrical servicing.

[46] Mr. Dennis acknowledged that the layout of trailers provided by Ms. Staley to the Township was indeed a concept plan and that the Township understood this but he explained that it was the intention of the concept plan that the existing 18 camp sites be shifted slightly to better meet the performance standards contained in the Zoning By-law rather than simply grandfathering the location of existing camp sites.

[47] Mr. Dennis also explained that the existing septic system does not comply with setback requirements from Buck Lake but that the new system will comply. He explained that the existing septic system could remain where it is given that it would be grandfathered upon Zoning By-law enactment but that Ms. Staley has committed to moving its location with the new system that will service the camp sites.

[48] Mr. Dennis explained that historically the property was much larger and was part of a most expansive commercial camp site operation that included multiple cottages and camp sites.

[49] Mr. Dennis was of the opinion that there are indicia of a commercial campground operation including: issuance of receipts to renters; tenant liability insurance being in place showing that there are renters on site; claiming of business income by Ms. Staley in 2015; and a partnership agreement between the new owners of the property, dated February 4, 2015, stating that the campground operation will continue with a view to profit.

[50] With regards to the applicable policy context, Mr. Dennis reviewed the CT-3 site-specific zoning against the policies contained in the Growth Plan, the PPS, the District of Muskoka Official Plan ("District OP") and the Township OP.

[51] Mr. Dennis was of the opinion that the zoning recognized for the property conforms to the policies of the Growth Plan, including those directed at the preservation of tourism attractions, diversification of the economic base and ensuring the competitiveness of commercial enterprises. Similarly, Mr. Dennis opined that the site-specific zoning is consistent with the policies contained in the PPS, including those relating to the promotion of recreational and tourism opportunities. It was also his opinion that the new septic system to be installed at the property would address any concerns with preservation of water quality and would meet PPS policy directed at limiting additional demand on municipal services and infrastructure.

[52] Mr. Dennis explained that the most recent consolidation of the District OP identifies Buck Lake and Fawn Lake as “moderate” on the scale of phosphorus sensitivity and the lakes are not over the limit for nutrient loading. He also opined that the new approved septic system could be expected to improve the existing situation. He opined that there are not policies in the District OP that would prevent the Township recognizing the site-specific zoning contained in the Zoning By-law.

[53] With regards to the Township OP, Mr. Dennis was in agreement with Mr. Robinson that the property is captured by the shoreline designation. He explained that the Township OP, at policy 2.3.2, provides that tourist commercial is appropriate along the shoreline and promotes expansion of tourist operations in order to grow and diversify the Township’s economic base. He also explained that policy 2.3.5 of the Township OP requires that servicing on the property be private. He also explained that a residential dwelling with a commercial campground on the property is a permitted use under policy 4.2.3 of the Township OP.

[54] Mr. Dennis opined that although the site-specific zoning recognition is not a proposal for a new development, the campground operation nevertheless meets the policies of the Township OP for land use compatibility contained in policy 3.14 as the camp sites and trailers are located over 100 feet from Ms. Clarke’s property line and over 220 feet from her cottage. Additionally, there is a ridge line that visually separates

the property from Ms. Clarke's property meaning she will not be able to see the camp sites from her property once she is there.

[55] Mr. Dennis also reviewed policy 6.2 of the Township OP which allows for zoning to recognize existing uses where specific criteria set out in the policy are met. It was Mr. Dennis' opinion that, as set out in his evidence previously, these policy requirements have been met in order that the existing uses on the property can be recognized in the Zoning By-law.

[56] Overall, it was Mr. Dennis' opinion that the site-specific zoning recognized in the Zoning By-law is consistent with the policies contained in the Township OP.

[57] With regards to the site-specific zoning, Mr. Dennis opined that the Zoning By-law does not confer additional rights but appropriately recognizes a pre-existing campground operation. He explained that the Zoning By-law places the property in the Tourist Commercial (CT) zone which allows campgrounds as a permitted use. He explained that s. 3.26 of the Zoning By-law sets out special provisions for new campgrounds, including lot coverage limitations. He explained that even if another five camp sites were added to the operation that it would meet the lot coverage limitation. He explained that although the camp site width standards under the Zoning By-law are not met the camp sites are currently legal non-complying.

[58] In cross-examination by Mr. Veldboom, counsel for the Township, Mr. Dennis explained that the existing septic system will not be removed but will only be used to continue to service the existing dwelling on the property. He also clarified that at the time the Zoning By-law was passed that there were 12 or 13 seasonally used trailers on the property with five or six less frequently or occasionally used additional camp sites.

[59] In cross-examination by Mr. Watt, counsel for Ms. Clarke, Mr. Dennis explained that at the time that the consent and zoning by-law applications were made in 2011 or 2012, that he made the applications as agent for the owner but that he had not counted the specific number of trailers on the property at that time. He acknowledged that a

sketch prepared by his office using aerial imagery in 2012 showed eight trailers on the property. He also acknowledged that his first site visit following his retainer by Ms. Staley for this appeal was conducted approximately 10 months after the Zoning By-law was passed by the Township.

[60] With regards to whether the operation is commercial in nature, Mr. Dennis opined that even if it were only family and friends renting that this did not disqualify the operation from being zoned commercial. He also expressed the view that in the circumstances it was evident that Helen Staley was not the best record keeper given the lack of invoices and records relating to the campground.

[61] Next, David Methot provided factual evidence on behalf of Ms. Staley. He explained that he has camped at the property since the 1980s. He explained that he recalls that the electrical outlets for the camp sites were installed in the mid-1980s. He also explained that his family has paid fees annually to camp at the property. In terms of the number of camp sites on the property, he explained that he has seen anything from between 14 and 20 sites being used and that in 2016 at the time the Zoning By-law was passed there were approximately 10-12 trailers occupying camp sites. It was his observation that the campground has not changed much in the past several years.

[62] In cross-examination by Mr. Veldboom, Mr. Methot explained that there are often tents in addition to trailers at the campground and they number between 11 and 14 on busy weekends and are usually located closer to the cottage building.

[63] Finally, Michael Cullip was qualified to provide expert transportation engineering evidence on behalf of Ms. Staley. It was his opinion that Delaware Road and Delaware Lane could be considered long driveways given the limited volume of traffic associated with the existing cottagers and campers using them.

[64] Mr. Cullip responded to the two areas of concern raised in the appeal: the sharp horizontal-vertical curve on Delaware Road and the width of the driveway/right-of-way on the property itself. He explained that the curve on Delaware Road was essentially a

90 degree turn in the road. It was his opinion that as a result of this turn and the condition of the road that people would tend to travel very slowly around the curve. He estimated that motorists would travel approximately 10-15 kilometres per hour on this bend in the road. As a result of this low speed, it was his opinion that no road improvements are necessary. However, he opined that a warning sign and possibly a mirror at the corner could assist with improving safety without the need to alter the road contours. With regards to the width of the driveway/right-of-way on the property, Mr. Cullip was of the opinion that the road width was sufficient as is given that the land uses are not intended to change.

[65] In cross-examination by Mr. Watt, Mr. Cullip explained that he has no concerns with road safety should all 18 camp sites turn over every weekend with new visitors. With regards to trailer traffic in particular, Mr. Cullip was of the opinion that people pulling trailers to the campground would travel at even lower speeds around the 90 degree turn on Delaware Road.

c. Evidence of the Township

[66] Richard Hunter was qualified to provide expert opinion evidence to the Board on behalf of the Township. He explained that the Township's approach to existing campgrounds was to recognize them in the Zoning By-law rather than have them continue as legal non-complying operations. He explained that the challenge with campgrounds generally in this process was determining existing use since intensity of use varies greatly throughout the year.

[67] Mr. Hunter explained that the Zoning By-law went through numerous edits between 2015 and the time of passage in 2016 as a result of input from campground owners and members of the public who provided more refined information for the Township to consider.

[68] Mr. Hunter explained that while the Zoning By-law was under review by the Township, the Township also coordinated revisions to its campground and trailer by-

laws. He explained that the trailer by-law is intended to regulate single trailers on private property while the campground by-law (By-law No. 18-2006) is intended to regulate campgrounds containing multiple trailers.

[69] Mr. Hunter explained that the conceptual site plan provided to the Township by Ms. Staley is to be used as part of her submission for a licence under the campground by-law. He explained that a site plan will be finalized for the property as part of the licencing process. He further explained that although he currently has some concerns about lack of landscaping on the concept plan that this deficiency can be addressed during the licencing process.

[70] With regards to the evidence tendered by various witnesses about the historic use of the property, Mr. Hunter opined that historic use should not factor into legal non-complying assessments.

[71] Mr. Hunter explained that despite the site-specific zoning recognized in the Zoning By-law for the property, setback and other standards in the Zoning By-law would continue to apply on the property.

[72] Mr. Hunter also opined that whether or not the property was placed in the CT zone or not, the operation on the property is a commercial campground operation that should be recognized in the Zoning By-law. He explained that even if the property were not zoned commercial that the owners could still rent out sites. It was Mr. Hunter's opinion that the Zoning By-law should recognize the number of camp sites rather than the number of trailers on the property. It was his opinion that in recognizing 18 sites on the property that Council had struck a balance between the number of trailers existing on the property and the number of potential camp sites on the property. It was his opinion that 18 sites seemed to best reflect the intensity of use on the property.

[73] Mr. Hunter explained that both he and the Chief Building Official for the Township had observed 12 trailers on the property and the potential for additional trailers and

tents being located on it. He explained that in his site visit he was satisfied that there were 18 camp sites on the property.

[74] With regards to the Waterfront (WR) and Open Space (OS) zoning proposed to be applied by Mr. Robinson, Mr. Hunter observed that it would be problematic to use such zoning as it would not be obvious to others in reviewing zoning maps that the property contained a commercial use. Further, it was his opinion that such zoning would not preclude the existing non-conforming uses from continuing or from being expanded, contrary to the intent of the Township. Additionally, he opined that a holding provision would be unnecessary as site planning would be established through the campground licencing process.

[75] Similar to Mr. Dennis, Mr. Hunter opined that the site-specific zoning recognized for the property in the Zoning By-law does not offend policies contained in the Growth Plan, the PPS or the Township OP.

[76] In cross-examination by Mr. Watt, Mr. Hunter acknowledged that he did not observe 18 camp sites specifically being utilized during his site visit.

SUBMISSIONS OF THE PARTIES

[77] By way of summary, on behalf of Ms. Clarke, Mr. Watt submitted that the issue for the Board is properly defining the historic uses at 136 Delaware Lane. He submitted that the evidence reveals that nobody has witnessed 18 trailers on the property and nobody presented evidence of 18 camp sites being used. Mr. Watt submitted that Ms. Clarke is willing to concede that there are 12 trailers in use at the north end of the property but that anything beyond that requires a development application be filed with the Township.

[78] Mr. Watt submitted that Council improperly approved a proposal for a concept plan rather than an existing use as reflected in the minutes of the Council meeting

approving the Zoning By-law. Furthermore, Mr. Watt submitted that there is insufficient evidence of a commercial operation on the property.

[79] Mr. Watt invited the Board to make an adverse inference from the fact that none of the current owners of the land were called to testify about the number of camp sites and the nature of the operation.

[80] Mr. Watt requested that the appeal be allowed and that the alternative site-specific zoning by-law drafted by Mr. Robinson be enacted by the Board.

[81] On behalf of Ms. Staley, Mr. Kehar referenced the Supreme Court of Canada's decision in *Saint-Romuald (Ville) c. Olivier*, [2001] 2 S.C.R. 898 where the Court examined the issue of balancing acquired rights with a municipality's ability to regulate land use through by-law enactment. In reference to the Court's summary of the proper approach to limitations on acquired rights at para. 39 of the decision, Mr. Kehar submitted that, in the context of this appeal, the Board should focus its consideration on the following:

- a. The purpose of the use at issue;
- b. That intensification of the use is rarely objectionable; and
- c. That objections based on neighbourhood impacts must be proven by those raising them.

[82] In assessing these considerations, Mr. Kehar submitted that the purpose of the use at issue is a commercial campground, that the evidence shows that intensification has not actually been proposed and that Ms. Clarke has not proven that any neighbourhood impacts will result from the site-specific zoning recognized by Township Council.

[83] Further, Mr. Kehar submitted that municipalities and the Board do not “people zone” and that it would be improper to limit visitors to the commercial campground to friends and family.

[84] With regards to the undertaking entered into between Ms. Clarke and Helen Staley, Mr. Kehar submitted that the Board does not have the jurisdiction to interpret and enforce it when applying s. 34(9)(a) of the Act. He submitted that the undertaking is not a registered covenant that binds the future owners of the land. Further, Mr. Kehar referenced the case of *893472 Ontario Ltd. v. Whitchurch-Stouffville (Town)* (1991), 7 M.P.L.R. (2d) 296 (Gen. Div.) (“*Whitchurch-Stouffville*”) where the Court held, at paras. 31-33, that the phrase “lawfully used” is to be interpreted within the confines of what is provided for within the *Planning Act* and that any legal matter relating to the use or occupation of lands, including the existence of necessary permits under other legislation, claims to title or rights, and behaviour of occupiers of land, that falls outside of the *Planning Act* is irrelevant to the application of s. 34(9)(a). Mr. Kehar also referenced the case of *1218897 Ontario Ltd. v. Toronto (City) Chief Building Official* (2005), 14 M.P.L.R. (4th) 217 (S.C.J.) (“*Toronto*”) at paras. 17-19 for the same proposition.

[85] Mr. Kehar submitted that the concept plan for 18 camp sites is a compromise by Ms. Staley as there are more sites on the property. Further, he submitted that any operational issues that the Board identified during the hearing can be addressed through site planning under the campground licensing process.

[86] Mr. Kehar requested that the Board dismiss the appeal.

[87] Finally, on behalf of the Township, Mr. Veldboom submitted that the only issue for the Board’s determination is what uses legally existed on the property at the time of Zoning By-law passage. Further, he submitted that the question is not how many trailers existed but how many camp sites are located on the property. He submitted that

the land is the relevant consideration here, not the equipment, whether tents or trailers, that may be placed on the land.

[88] Mr. Veldboom submitted that there is plenty of evidence before the Board to make a determination that the property hosts a commercial campground operation. Furthermore, he submitted that it was critical that the evidence of Mr. Robinson was that there was nothing in either the Zoning By-law passed by the Township or the site-specific zoning by-law drafted by Mr. Robinson that would prevent renting camp sites to strangers.

[89] Mr. Veldboom agreed with the submission of Mr. Kehar that it would be improper for the Board to enforce a private undertaking through the Zoning By-law.

[90] In reply to Mr. Kehar and Mr. Veldboom, Mr. Watt submitted that Ms. Clarke is not asking the Board to enforce the undertaking but to consider it in determining what was occurring on the property prior to the enactment of the Zoning By-law between 2002 and 2014.

ANALYSIS AND FINDINGS OF THE BOARD

[91] It is worth repeating the language of s. 34(9)(a) of the Act at this juncture. It provides that:

- 34 (9) No by-law passed under this section applies,
 - a.) to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose;

[92] In applying s. 34(9)(a) the Board's role is limited to assessing how to recognize the existing use of 136 Delaware Lane in the Zoning By-law. The Board's role is not to consider the existing use similar to a new development application, which often

necessitates an examination of potential adverse impacts such as traffic and visual impacts.

[93] With this limitation in mind, I find that much of the evidence led relating to traffic and road impacts was irrelevant to the Board's consideration of the appeal. The evidence of adverse impact stemming from an existing legal use is irrelevant as it is pre-existing and cannot be regulated through the application of s. 34(9)(a).

[94] Based on the evidence and submissions of the parties, I find that the following matters arise in the context of Ms. Clarke's appeal for the Board's determination:

- a. What is the use at issue generally;
- b. What is the relevant time for the Board's assessment of the extent of that use;
- c. What was the extent of the use at the relevant time;
- d. Was the use commercial in nature; and
- e. Does the undertaking reached between Ms. Clarke and Helen Staley operate to limit the use?

[95] With regards to the use at issue, there is no disagreement that it is a campground operation and there is no dispute that this use was legal prior to the passage of the Zoning By-law.

[96] The evidence and submissions varied in focus from the number of trailers to the number of camp sites on the property. In this context, I agree with the submission of Mr. Veldboom and the evidence of Mr. Hunter that what the Board must do in this appeal is determine the number of camp sites on the property. The evidence is clear that both tents and trailers have been used on camp sites located on the property. That is not to say that evidence of trailers is irrelevant. Rather, evidence relating to the number of trailers is one indicia of the number of camp sites located on the property.

[97] The relevant date for the Board's consideration is stipulated by s. 34(9)(a) of the Act itself: the day of the passing of the Zoning By-law. That is not to say that in some circumstances it may be that a change in use or an increase in intensity of use shortly before the passing of a zoning by-law would not be relevant to the Board's consideration. In this instance, it has been alleged that additional trailers were added to the property and trailers moved into the southern part of the property shortly before the passing of the Zoning By-law, with the implication being that the owners of the property were attempting to exhibit an intensity of use that was not previously present on the property in order to improperly acquire rights on the property at the date of Zoning By-law passage. However, as set out above and as will be examined more fully below, the Board's focus is not only the number and location of trailers but the totality of the evidence showing the number of campsites. The issue of camp site locations is also considered below in the context of assessing the relevance of the undertaking.

[98] With regards to the number of camp sites, the evidence was that the property has been used consistently since at least the 1980s for camping using both tents and trailers. There is no evidence to suggest that this has ever ceased. The challenge for the Board is that camping is seasonal and fluctuates throughout the camping season so a single snapshot in time may show a certain number of sites occupied but other sites may be available on the property at that time that are not occupied. As a result, I find that any single site visit, aerial photograph, sketch or observation cannot provide a fulsome representation of the use of the property or the number of camp sites.

[99] However, I found Mr. Dennis' detailed photographic evidence showing 14 dual outlets, various water hookups, fire pits and barbeque locations, and bare patches of land where tents and trailers are typically located particularly helpful. Mr. Dennis indicated that he had identified 18 camp sites through the property and he explained that there could very well be sufficient infrastructure in place to service significantly more sites.

[100] Similarly, both Mr. Hunter and the Township's Chief Building Official had observed 12 trailers on the property and the potential for additional camp sites on the property shortly before the Zoning By-law was passed. Mr. Hunter ground-truthed the submission to Council by Ms. Staley and was satisfied that there were 18 camp sites available on the property.

[101] Mr. Robinson explained that he conducted a site visit on April 21, 2017 at which time he observed 13 trailers on the property. His evidence focused on the number and location of trailers. He did not provide detailed evidence estimating the number of camp sites on the property similar to Mr. Dennis.

[102] Based on the evidence heard, I find that it is reasonable to conclude that there are 18 camp sites located on the property. In recognizing these 18 camp sites, based on the variation of occupancy shown in the evidence tendered, I observe that it would be unlikely that these sites will always be in use during the camping season but that the variation in use will fluctuate throughout the season. Given this natural fluctuation in occupancy that occurs during the camping season and the lack of evidence or submissions on limiting occupation, I find that it is unnecessary to specifically delineate a limitation on occupation of these 18 camp sites.

[103] Based on the evidence heard, I also find that the campground should be recognized as commercial in nature and that the CT zone is appropriate. One of the challenges in this appeal arose from the fact that Helen Staley's passing and the transfer of the property to new owners were coincident with the drafting and passage of the Zoning By-law. It is abundantly clear that the bookkeeping and invoicing by Helen Staley was less than perfect but it was clear on the evidence that whether it be friends or family or strangers, people appear to have consistently paid a fee to camp at the property. Although apparently Helen Staley wished only to cover her expenses and the new owners seek to turn a profit, from my perspective this evidence is sufficient to find that the operation was commercial in nature at the time of the passing of the Zoning By-law.

[104] Furthermore, I agree with the evidence of all three planners who recognized that zoning the property non-commercial would not prevent commercial activity from taking place on the property.

[105] That brings the Board to the final matter for consideration and that is whether the undertaking reached between Ms. Clarke and Helen Staley should operate to limit the number and location of camp sites on the property or alternatively, that it should serve as part of the evidence of use of the property.

[106] Before wading into this examination I note that in enacting the Zoning By-law, there were no policies in any applicable provincial or municipal policy documents that were brought to the Board's attention that required the Township to ensure access to Ms. Clarke's property free from the visual impacts associated with the campground. That leaves the Board with the undertaking as the main basis for Ms. Clarke's argument that the approach to her property should be free from such visual impacts.

[107] The undertaking, dated January 30, 2002, provides that:

The undersigned agrees to remove forever all campers, tents, trailers, buses etc., from the entrance of the approach to the property and to construction within 4 months of closing a 6 foot high "Privacy Fence" of quality acceptable to the buyer for 50 feet to either side of the drive which approaches the property to the north and at the point where the access to the subject runs uphill at a left turn.

[108] Although I am sympathetic to Ms. Clarke and recognize her desire to have this undertaking enforced, based on the Court rulings in the *Whitchurch-Stouffville* and *Toronto* cases referenced by counsel for Ms. Staley, I find that in applying s. 34(9)(a) of the Act that a private undertaking such as this is not a relevant consideration for the Board. Enforcement of this agreement and resolution of any associated disputes about interpretation and enforcement against subsequent owners of the land are not within the Board's mandate in recognizing acquired rights in the Zoning By-law under s. 34(9)(a).

[109] Furthermore, based on the totality of the evidence I find that the evidence is not that this undertaking was being followed at the time of the passage of the Zoning By-law but rather, that for a considerable period of time prior to Zoning By-law passage that camp sites were being used south of the approach to Ms. Clarke's property. Based on the evidence before the Board, including the application for a zoning by-law at the property, it appears the area south of the access to Ms. Clarke's property was being used for camping between approximately 2012 and the time of Zoning By-law passage.

[110] On this basis of the findings above, I am not prepared to geographically limit or delineate specific locations for camp sites on the property. Further, based on the evidence of Mr. Hunter, I am satisfied that the campground licencing process will address site planning issues, including the need for additional vegetation noted by Mr. Hunter in his evidence.

[111] To conclude, I find that the site-specific CT-3 zoning recognized for 136 Delaware Lane in the Zoning By-law appropriately recognizes the rights acquired on the property on the date that the Zoning By-law was passed and that the appeal by Ms. Clarke should be dismissed.

819 WEST BEAR LAKE ROAD

[112] The site-specific CT-1 zoning recognized in the Zoning By-law for 819 West Bear Lake Road provides that the permitted principal uses are limited to the following:

- An existing campground where:
 - The maximum number of camp sites shall not exceed 22 including any located on adjacent crown land
- A Single detached dwelling,
- A tourist establishment.

[113] Ms. Lamers-Bellio owns the property adjacent to 819 West Bear Lake Road and appeals primarily from the Township's recognition of 22 camp sites on the property.

Evidence of the Parties

[114] Ms. Lamers-Bellio explained that her main objections are that the Zoning By-law should only recognize camp sites located on the property and not any that are located on Crown land and that any camp sites located on the property line shared with her property or located at the water's edge should not be recognized in the Zoning By-law. She explained that in her communication with the Ministry of Natural Resources and Forestry ("MNRF"), the Ministry confirmed that some of the structures associated with the campground are located on Crown land.

[115] Ms. Lamers-Bellio referenced and relies on policy 3.6 of the Township's OP which provides that "the policies of the Plan are not binding on undertakings carried out on Crown land by the Crown or its agents..." Ms. Lamers-Bellio takes the position that the Township cannot regulate on Crown land by recognizing any camp sites located on Crown land through the Zoning By-law.

[116] Ms. Lamers-Bellio also takes the position that 22 camp sites does not reflect historical land use on the property and that a smaller number should be recognized. Additionally, a draft of the Zoning By-law had previously proposed to limit the number of cabins on the property to a maximum of six. Subsequently, the Zoning By-law was revised by removing this limitation and including recognition of "a tourist establishment" and this version was enacted.

[117] Ms. Lamers-Bellio referenced the definition of "tourist establishment" in the Zoning By-law which is reads as follows:

The premises used for the provision of commercial roofed accommodation where commercial accommodation units are offered for rent on a short term or transient basis to the public who is travelling, vacationing, engage in leisure or recreation, or participating in conventions or meetings. A tourist establishment may include accessory

uses, services, equipment or facilities, including a restaurant, normally incidental to such accommodation. A tourist establishment does not include a dwelling unit except for a dwelling unit for the owner or operator, or staff quarters that are accessory to the principal use. A tourist establishment does not include a campground.

[118] Ms. Lamers-Bellio requested that the existing six cabins be recognized in the site-specific Zoning By-law in order to ensure that any potential cabin expansions at the property be fully regulated as the definition of tourist establishment contains no limit on the number of cabins.

[119] Finally, Ms. Lamers-Bellio explained that a deer wintering yard identified on the property in the OP should be protected in the Zoning By-law from any uses associated with the campground that may be impacting it.

[120] 819 West Bear Lake Road is owned by Kirk Cummins. He explained that he purchased the property in 2012 in its existing state with the cabins, structures and camp sites as currently laid out. He explained that he only found out in 2017 that some trailers may be located on Crown land. He explained that the MNRF has temporarily permitted him to maintain the trailers on Crown land but has given him one year to move them onto his property. He explained that he has meetings scheduled with the MNRF to explore the possibility of leasing Crown land so they do not have to be relocated. With regards to the deer wintering yard, he explained that he also owns the area of land where the deer wintering yard is located but that it is located across the road from the resort operation.

[121] Testifying on behalf of the Township, Mr. Hunter opined that the Zoning By-law needs to recognize some form of site-specific zoning for 819 West Bear Lake Road and that casting aside the CT-1 zone would not be advisable as no restrictions would then be in place for the existing operation on the property.

[122] Mr. Hunter explained that when the Zoning By-law drafting process started that the original discussion focused on the number of trailers (camp sites) and cabins on the property. However, following property inspections by a By-law Officer for the Township,

it was determined that the operation on the property was better described as a tourist establishment with a 22-site campground associated with it rather than six separate cabins and a campground.

[123] Furthermore, Mr. Hunter explained that all the structures on the property existing at the time of Zoning By-law enactment are legal non-compliant and that the Township cannot require that any camp sites be setback further from the water or property lines at this time.

[124] Finally, Mr. Hunter explained that should the MNRF require Mr. Cummins to remove any trailers from Crown land that the Zoning By-law would allow them to be located on Mr. Cummins' property. Alternatively, Mr. Hunter explained, the Zoning By-law would have the flexibility to zone the camp sites should the MNRF decide to grant Mr. Cummins a Crown land patent or lease permitting the trailers to remain where they are currently located.

[125] It was Mr. Hunter's opinion that the CT-1 zoning meets applicable provincial and municipal policy.

[126] In response to questions from the Board, Mr. Hunter explained that a site plan for the operation will become necessary when Mr. Cummins is required to obtain a campground licence for his operation. Further, Mr. Hunter explained that the notes of a By-law Officer attending on the property had specifically identified the number of cabins and trailers located on the property. With regards to the deer wintering issue raised by Ms. Lamers-Bellio, Mr. Hunter explained that the policies of the OP are intended to address new development, whereas the development at issue before the Board has been in existence for quite some time and that any impact to the deer wintering yard that may have resulted from the operation already exists.

Analysis and Findings of the Board

[127] In final submissions, Mr. Veldboom submitted that one of the main issues with Ms. Lamers-Bellio's appeal is that she has criticised the maximum limit placed on camp sites but has not proposed an alternative in her appeal, raising the issue of what zoning standard should exist for the property.

[128] With regards to the location of trailers, Mr. Veldboom submitted that the trailers located on the property are legal non-compliant and that there is nothing the Township can do about them.

[129] As for trailers located on Crown land, Mr. Veldboom referenced and relied on the Court's decision in *Glaspell v. Ontario*, 2015 ONSC 3965 ("*Glaspell*") which raised the question as to whether a municipality can apply zoning standards on Crown land. In that case the issue was whether the municipality could regulate, through zoning, structures attached to the lake bed, being property owned by the Crown.

[130] In considering this issue, the Court in *Glaspell* found that although the subject of zoning by-laws is land and zones are defined on the ground, zoning by-laws operate on the person using the land. The Court found that although municipalities cannot regulate the Crown, its servants or agents, municipalities are permitted to regulate the use of Crown land by others within the boundaries of the municipality. On this basis, the Court found that municipalities can regulate land use on Crown land through zoning by-laws.

[131] In considering the evidence tendered and in considering the Court's reasoning in *Glaspell*, I find that there is nothing problematic in the Township regulating the use of Crown land adjacent to 819 West Bear Lake Road by recognizing existing uses through the Zoning By-law.

[132] Furthermore, despite the fact that some of the camp sites are located on Crown land, I find that there is no dispute that there were 22 camp sites at the operation at the time that the Zoning By-law was enacted. Although some camp sites do not meet the

new setback requirements established by the Zoning By-law, the Board is in agreement with the submissions of Mr. Veldboom that these camp site locations are legal non-conforming as they pre-date the enactment of the Zoning By-law.

[133] The remaining dispute is whether the six cabins located on the property should be recognized in the Zoning By-law as a tourist establishment or whether the Zoning By-law should be modified to recognize six individual cabins. In considering the evidence I find that a combination of these options would be appropriate. I accept the evidence that the cabins are associated with a broader operation but also accept Ms. Lamers-Bellio's evidence that it would be preferable to recognize the specific number of cabins at the property to ensure that any expansion in the number of cabins can be regulated by the Township. As a result, I find that the phrase "A tourist establishment" in the CT-1 zone should be modified to state "A tourist establishment that includes six cabins".

[134] In all other respects the appeal of Ms. Lamers-Bellio is dismissed.

532 EAST BEAR LAKE ROAD

[135] Based on the evidence of Mr. Hunter, there is an existing tourist commercial operation that consists of 17 camp sites (eight fully serviced, six partially serviced and three unserviced) and four cabins at 532 East Bear Lake Road.

[136] Mr. Hunter explained that the Zoning By-law was adopted based on a site plan submitted around the day of the adoption of the Zoning By-law and that he accidentally inserted the number 22 for the number of camp sites for the site-specific CT-2 zone. He explained that the number 22 was intended for the CT-1 zone (the site specific zoning recognized for 819 West Bear Lake Rod) rather than the CT-2 zone and that the CT-2 zone should have recognized 17 existing camp sites at the date of Zoning By-law adoption.

[137] Furthermore, Mr. Hunter explained that, to his knowledge, the owners of 532 East Bear Lake Road do not take issue with the Zoning By-law correction he proposes.

[138] Based on the evidence of Mr. Hunter, the Township requested that the Board correct the CT-2 zoning in the Zoning By-law.

[139] Having considered the evidence of Mr. Hunter and upon subsequent review of the Board's file, I find that at no point were the owners of 532 East Bear Lake Road served with notice of the hearing. Additionally, no direct correspondence is contained in evidence or in the Board's file from the property owners agreeing to the correction proposed by the Township. Although I accept that Mr. Hunter is correct that an error was made in Zoning By-law drafting and that it is more likely than not that the owners of the property do not take issue with the correction being made, I note that it was not until the outset of the hearing that this error was brought to the Board's attention. 532 East Bear Lake Road is not mentioned at any point in the Board's file previous to hearing and the Board does not have any correspondence from the owners of the land.

[140] I am not prepared to make the correction requested absent proper notice being served on the land owners of the land or alternatively, absent clear communication from them directly that they accept such correction be made.

ORDER

[141] The appeal of the CT-3 site-specific zoning for 136 Delaware Road filed by Christine Clarke is dismissed.

[142] The appeal of the CT-1 site-specific zoning for 819 West Bear Lake Road filed by Kim Lamers-Bellio is allowed in part and the CT-1 zone is modified as set out in the reasons above.

[143] The request by the Township to correct the CT-2 site-specific zoning for 532 East Bear Lake Road is denied.

[144] Subject to the modification made to the CT-1 zone, the remaining provisions of By-law No. 16-2016 are brought into full force and effect.

“Justin Duncan”

JUSTIN DUNCAN
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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