



## **COUNCIL AGENDA**

The Corporation of Norfolk County

3:00 p.m.

Tuesday, February 13, 2018

Council Chambers

2nd Floor County Administration Building

50 Colborne Street South, Simcoe

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### **1. Ceremonial Activities**

- A) Tracey Haskett, Graphic Design and Visual Communications  
Development and Cultural Services  
Re: Norfolk County Awarded Terroir Rural Retreat

### **2. Approval of Agenda/Changes to the Agenda**

### **3. Disclosure of Pecuniary Interest**

### **4. Closed Session**

- A) CAO Memo  
Re: Liability Issue in Ward 3

Pursuant to Section 239 (2) e), f) and a) of the *Municipal Act, 2001, S.O. 2001, c.25*, as the subject matter pertains to litigation or potential litigation including matters before administrative tribunals, affecting the municipality or local board, advice that is subject to solicitor client privilege including communications for that purpose, the security of the property of the municipality or local board.

### **5. Consent Items**

### **6. Discussion Items**

- A) [Staff Report H.S.S. 18-09](#)  
Norfolk County Smoke-Free Outdoor Spaces By-Law



### Council Meeting – February 06, 2018

Subject: Legal Opinion of Building Code  
Report Number: CAO-18-09  
Division: Office of the CAO

Closed Session:	<input checked="" type="checkbox"/>	Yes	<input type="checkbox"/>	No
Budget Amendment:	<input type="checkbox"/>	Yes	<input checked="" type="checkbox"/>	No
Strategic Plan Linkage:	<input type="checkbox"/>	Yes	<input checked="" type="checkbox"/>	No

#### Recommendations:

THAT Report CAO-18-09 be received for information;

#### Introduction/Background:

The County has recently received both formal and informal inquiries pertaining to the potential to build docks on hazard land properties in the Long Point area. The purpose of this report is to provide education on the law as it pertains to this issue.

Municipalities across Ontario have traditionally employed a mixed interpretation of the application of Zoning By-Laws (“ZBL”) and the *Building Code Act, 1992*, RSO 1992 c 23 (“*Building Code Act, 1992*”) in regard to Crown lands including Ontario lakes.

Municipalities variously interpreted their own ZBLs to be either applicable or inapplicable to lakes and there was no consensus among Chief Building Officials about whether or not docks, boathouses, etc required building permits if they were over water. For the purposes of this report please note that the use of the word dock is meant to be used interchangeably with any building such as a dock, boathouse, deck, etc.

In June of 2015 the Ontario Superior Court of Justice issued a decision written by Justice Perell that provided clarification regarding the application of the *Building Code Act, 1992*, municipal zoning by-laws and the *Public Lands Act* with regard to structures built in, over, upon or abutting Ontario lakes, *Glaspell v. North Kawartha (Township)*, 2015 ONSC 3965 (hereafter “*Glaspell*”).

The Court found the following:

- That municipal zoning by-laws apply to all areas within the municipality and would include Crown lands such as Ontario lakes.
- That the *Building Code Act, 1992* applies to docks and boathouses including the requirement for a building permit if they meet the definition of a Building set out in the *Building Code Act, 1992* which for the purposes of docks or boathouses

without plumbing would generally mean a structure covering an area of more than 10m<sup>2</sup>.

In reaction to the decision, most municipalities have initiated or completed a process to put into place a permitting policy for docks and boathouses on a go-forward basis and have made changes to their zoning by-laws where applicable.

### **Discussion/Analysis:**

#### Building Permits Are Required For Docks on Ontario Lakes

The most significant change for municipalities is that the Court confirmed that building permits are necessary for any dock or boathouse on an Ontario lake that meets the definition of a Building.

One of the areas of significant examination in the decision is the discussion of ownership of Ontario lakes. It should be noted that there are complicating factors in regard to Lake Erie, being the subject of some federal acts and jurisdiction, that impact upon the construction of some kinds of docks or boathouses on that particular lake. By way of example Lake Erie is governed by the *Navigation Protection Act*.

#### Positive Duty to Enforce the *Building Code Act, 1992*

Section 3(1) of the *Building Code Act, 1992* designates County Council as the entity that is responsible for the enforcement the *Act* but it goes on to say that Council shall appoint a Chief Building Official who is responsible pursuant to the *Act* for the role assigned to the CBO, while both the Council and the CBO are empowered to pass by-laws and create processes for the application and enforcement of the *Act*. Altogether, that puts a positive obligation on the Chief Building Official and through him or her to County Council to enforce the *Building Code Act, 1992*.

#### The Building Code Act and By-Law 1-Z-2014

The *Building Code Act* sets out the following in relation to issuing a building permit:

##### **Issuance of permits**

- (2) The chief building official shall issue a permit referred to in subsection (1) unless,
  - (a) the proposed building, construction or demolition will contravene this Act, the building code or any other applicable law;

The Building Code sets out that 'applicable law' for the purpose of section 8(2)(a) includes a ZBL. Therefore, if the Chief Building Official reviews an application for a building permit and finds that an approval of the application would result in a contravention of the ZBL then the CBO shall not issue the permit. A contravention of

the ZBL could include that the use is not permitted or that it does meet the required set-back, etc., similar to any other ZBL review performed by the Chief Building Official.

Reviewing Norfolk County By-Law 1-Z-2014 it is apparent that docks would be permitted in areas such as Marine Commercial *Zone* (CM); Marine Industrial *Zone* (MM); and the Hazard Land *Zone* (HL) provided that the *Zone* provisions are met in relation to the size and siting of the proposed dock.

### Hastings Drive

The most likely area of significant contention will be Hastings Drive. That area is subject to the 1-NO 85 By-Law Hazard Land *Zone* (HL) provisions pursuant to section 1.6.2 of By-Law 1-Z-2014. That section is as follows:

#### 1.6.2 Repeal of By-Law 1-NO 85 and All Amendments:

ByLaw 1-NO 85 (The Township of Norfolk Zoning By-Law) and all amendments thereto, passed pursuant to the *Ontario Planning Act* as amended, and which were approved by the Ontario Municipal Board, the Region of Haldimand-Norfolk or the Township of Norfolk, are hereby repealed except in so far as it affects the area known as Hastings Drive (South Walsingham, Plan 206, Lots 66 and 67 of South Walsingham, Plan 251, Lots 1 to 148). The Hazard Land *Zone* (HL) as set out in 1-NO 85 remains in effect.

The HL *Zone* as set out in By-Law 1-NO 85 does not include dock, pier or wharf as a permitted use.

The Chief Building Official's interpretation of section 1.6.2 cannot be pre-judged in this report, but if the CBO were to concur with that interpretation then the *Building Code Act, 1992*, section 8(2) would prevent the CBO from approving building permits on Hastings Drive for docks that meet the definition of a building.

Docks that are under 10m<sup>2</sup> would be in contravention of 1-Z-2014 and zoning enforcement would be required if such a dock was built without the knowledge of the County.

### The OMB Appeal of 1-Z-2014

The above-noted section 1.6.2 of 1-Z-2014 is the subject of an OMB appeal wherein the hearing has ended but a decision has not yet been rendered. That decision may impact upon whether or not docks, piers and wharfs are a permitted use in the Hastings Drive area once it is released.

#### **Interdepartmental Implications:**

- Processing building permits for docks, boathouses, etc. for the Building and By-Law Department.

**Financial Services Comments:**

N/A

**Consultation:**

The preparation of this report included consultation with the General Manager of Development and Cultural Services and the CAO.

**Corporate Strategic Plan Linkage:**

- Goal 1: Financial Sustainability and Fiscal Responsibility
- Goal 2: Improved Essential Infrastructure
- Goal 3: Recruitment and Succession Management
- Goal 4: Corporate Communications Strategy

**Communication Plan:**

- Not Required
- Media Release
- Public Consultation / Information
- Public Participation Plan

**Conclusion:**

Building Permits will be required for docks meeting the definition of a Building within the geographic jurisdiction of the County.

**Attachments:**

*Glaspell v. Ontario*

Submitted By:  
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CAO  
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CITATION: Glaspell v. Ontario, 2015 ONSC 3965

COURT FILE NO.: CV-12-448912

DATE: 20150618

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

BARRY GLASPELL

Plaintiff

– and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the Minister of Municipal Affairs and Housing, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the Minister of Natural Resources, G. BRUCE MIGHTON, MUNICIPAL PROPERTY ASSESSMENT CORPORATION, THE CORPORATION OF THE TOWNSHIP OF NORTH KAWARTHA, TIM POWELL, RICHARD HART, MARGARET HART and JANE DOE

Defendants

*Barry Glaspell*, self-represented

*Fatema Dada* and *Jonathan Sydor* for the Defendants, Her Majesty the Queen in Right of Ontario and G. Bruce Mighton

*John Ewart* for the Defendants the Corporation of the Township of North Kawartha and Tim Powell

*Pamela Miehls* and *Jody E. Johnson* for the Defendants, Richard Hart and Margaret Hart

HEARD: May 11, 2015

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Plaintiff, Barry Glaspell, brings a partial summary judgment motion against: (a) the Corporation of the Township of North Kawartha; (b) its Chief Building Official, Tim Powell; (c) Her Majesty the Queen in Right of Ontario (“the Crown”), as represented by the Minister of Natural Resources (“MNR”) and the Minister of Municipal Affairs and Housing (“MAH”); (d) G. Bruce Mighton, the Area Supervisor for MNR; and (e) Richard Hart and Margaret Hart.

[2] It is not evidence that I shall rely on, but a feature length news article written by the late Barbara Turnbull with the headline “*Peterborough boathouses have neighbouring cottagers fighting mad*” (*Toronto Star*, May 19, 2012) explains the emotive and some of the legal

background to this summary judgment motion, and Ms. Turnbull's article also explains why the outcome of this motion will be of some considerable interest to many. The article begins:

ASPLEY, ONTARIO – Barry Glaspell and Christine Elser bought their three-bedroom wilderness dream on Big Cedar Lake in 2007, enchanted by the pristine beauty and tranquility of the area. The realtor assured them that no boathouses or modern encumbrances were allowed on the lake, which they share with 127 other cottagers.

Their rude awakening came early last summer in the form of a 1,000-square-foot dock on their next door neighbour's waterfront, anchored by steel cables, mere metres from their property line, the first such development on the lake. Within weeks, a large boathouse – they liken it to a suburban garage – had been erected over it, with an open sitting area on the far side.

The Glaspell-Elsers' dismay turned to frustration when, following repeated calls to the municipality of North Kawartha and Ministry of Natural Resources, it became clear that neither level of government would take responsibility. ....

Unchecked shoreline development has implications for all Ontario, indeed Canada, says Glaspell, who has launched a lawsuit to challenge the province and townships on the ground that they have misinterpreted the law and, in effect, allowed private people to appropriate public space. This, he says, has public-policy implications that the courts must clarify. ....

[3] On this partial summary judgment motion, Mr. Glaspell seeks only declaratory relief. He asks the court to answer five questions and then to make declaratory orders. The five questions are:

Q.1 Does the Ontario *Building Code Act, 1992* apply to construction of structures (e.g., docks, marine facilities, houses) to be built on, over, in, or under Ontario lakes, and in particular, Big Cedar Lake?

Q.2 Does the Township have jurisdiction under the *Planning Act* and *Municipal Act* to enact and apply by-laws to these structures (e.g., docks, marine facilities, houses) to be built on, over, in, or under Big Cedar Lake?

Q.3 Do each of the dock and the house require building permits, and compliance with the comprehensive Township zoning by-laws, as they are each attached or anchored to land without a permit contrary to applicable by-laws?

Q.4 Does the boathouse built on Big Cedar Lake require an occupancy permit under the *Public Lands Act* to occupy public lands?

Q.5 Does the boathouse built on Big Cedar Lake require a work permit under the *Public Lands Act* regarding construction of a structure on shore lands?

## **B. FACTUAL AND PROCEDURAL BACKGROUND**

[4] In the case at bar, the Crown, i.e., the provincial government, is present through MNR and MAH. MNR is the Ontario government ministry responsible for management of Crown land, which includes shore lands and the beds of most lakes and rivers. MAH administers the *Planning Act* and the *Building Code Act, 1992*, but municipalities are responsible for the enforcement of their zoning by-laws and for enforcing the *Building Code Act, 1992* in their territories.

[5] Mr. Glaspell owns a waterfront property on Big Cedar Lake in the Township of North Kawartha. Margaret Hart and Richard Hart also own a nearby waterfront property on the lake, where they have constructed a boathouse on a floating dock.

[6] In May 2011, without notice to Mr. Glaspell or any of their neighbours, the Harts constructed a dock. A thick steel cable runs from the dock to the shore at a point beyond the high water mark. The dock floats and is not anchored to the bed on the lake, but it is tethered to the land by a steel cable. The dock is approximately 1,000 square feet in size. The Harts built a boathouse on the dock. The evidentiary record for this motion does not reveal the size of the boathouse built on the dock. The boathouse is located in front of the Harts' property and 10 feet from Mr. Glaspell's projected property line.

[7] The dock and its boathouse were constructed without a building permit from the Township or an occupancy or work permit from MNR. Mr. Glaspell believes that the Harts' dock and boathouse do not comply with: (1) the *Building Code Act, 1992*, S.O. 1992, c. 23; (2) municipal by-laws under the *Municipal Act, 2001*, S.O. 2001, c. 25; (3) zoning by-laws under the *Planning Act*, R.S.O. 1990, c. P.13; and (4) the *Public Lands Act*, S.O. 2001, c. 25. He seeks the removal of the Harts' dock and boathouse.

[8] Apart from Mr. Glaspell's noting that the *Municipal Act, 2001*, defines a municipality as having a geographical or territorial jurisdiction and his dissertation about a municipality's jurisdiction to pass by-laws and communicate with senior levels of government about planning and various matters that might involve land, water, the environment, and activities in the municipality, none of the parties informed me what, in particular, there was in the *Municipal Act, 2001* that concerned the Harts' dock and boathouse, and, therefore, as the Crown suggested, I decline to say anything more about the *Municipal Act, 2001*, but I shall go on to consider the other statutes.

[9] In 2011, Mr. Glaspell asked all of the Township, its Chief Building Official, Mr. Powell, the MNR, Mr. Mighton of MNR, and the MAH to do something about the Harts' dock and boathouse, but they respectively took the position that the Harts were within their legal rights in constructing the dock and boathouse.

[10] Unsatisfied with this response, Mr. Glaspell sued the Crown, Mr. Mighton, the Township, Mr. Powell, and Jane Doe, who was the stand-in for the Harts. I subsequently ordered the Harts joined as parties. Mr. Glaspell also sued the Municipal Property Assessment Corporation, but he claims no relief against them on this summary judgment motion. Mr. Glaspell's Statement of Claim alleges that the presence of the floating dock and boathouse is a nuisance and advances claims of negligence, bad faith, misfeasance in public office, and abuse of statutory powers.

[11] The more detailed explanation as to how the boathouse was built without a permit is that in 2010, the Harts contacted the Township's Building Department and were told that if the boathouse is located over the lakebed beyond the high water mark it was exclusively within the MNR's jurisdiction. The Harts contacted the MNR to determine what, if any, permissions or permits were necessary to construct a floating boathouse. The Harts were told by the MNR that the planned boathouse did not require a work permit or occupancy permit.

[12] After their communications with the municipal and provincial officials, the Harts set about to build their dock and boathouse.

[13] Mr. Glaspell saw the construction, and between July 12, 2011 and July 21, 2011, he wrote Tim Powell, who as noted above is the Township's Chief Building Official, and asked him to review the dock and the boathouse then under construction, and to issue a cease construction order. On July 22, 2011, Mr. Powell visited the Harts' property. The Township decided not to

issue a cease construction order.

[14] Mr. Glaspell also asked the MNR to review the dock and the boathouse to determine whether there had been compliance with the *Public Lands Act*. The MNR sent land technician Trevor Harris and senior land technician Mitch Close to investigate the Harts' property. Messrs. Harris and Close did not examine the building plans for the boathouse, but they visited the Harts' property to determine whether the dock and its boathouse were constructed upon or anchored to the lakebed, which was not the case.

[15] As noted above, the structure of the boathouse did not have any direct contact with the bed of the lake, and the boathouse's steel cable was anchored beyond the high water mark; thus, in Messrs. Harris and Closes' opinion, the structure did not occupy more than 15 square metres of shore lands, and they concluded that a work permit was not required under the *Public Lands Act* and its Regulations. The position of the MNR is that because the Harts' boathouse was floating, it did not require a work permit from the MNR. This policy interprets the Regulations under the *Public Lands Act* so that boathouses that have a shadow on the lakebed but that have no matching physical presence on the lakebed do not require a permit.

[16] Relying on the MNR's *Free Use Policy*, a written directive made by the Minister with authority under the *Public Lands Act*, the MNR decided that the construction of the dock and boathouse on Crown lands did not require authorization under the *Public Lands Act*. The MNR's *Free Use Policy* identifies recreational, commercial, and industrial uses of public land that do not require an occupancy permit. It allows for certain improvements such as docks and single-storey boathouses to be placed on public lands without a permit from the MNR.

[17] Under the MNR's *Free Use Policy*, to be a permitted free use, a dock and single-storey boathouse, used strictly for private use or commercial tourism non-revenue producing purposes, must be in substantial compliance with the following. It must: (a) be a necessary adjunct to the use and enjoyment of the adjoining upland property; (b) be situate directly in front of the owner's/occupier's dry upland parcel or a road allowance or Crown shoreline reserve abutting the dry upland parcel and not interfere with neighbour's use and enjoyment of their waterfront property (e.g. blocking view of lake); (c) have been approved or exempted by the Canadian Coast Guard under the *Navigable Waters Protection Act*, if applicable; (d) in the case of a boathouse, be used only for the storage and docking of boats; and (e) have complied with applicable permitting requirements.

[18] From the Site Inspection on July 26, 2011, the MNR technicians found that the boathouse was a single-storey structure which contained only two bays for boat docking, as well as the surrounding dock, consistent with private use. The dock and boathouse were found to be situated directly in front of the owner's dry upland parcel. In the opinion of the MNR, the dock and boathouse did not block the neighbour's view of the lake or interfere with the neighbour's use and enjoyment of their waterfront property. The MNR concluded that the dock and boathouse were in compliance with the *Free Use Policy* and did not require authorization under the *Public Lands Act*.

### **C. POSITION OF THE PARTIES**

[19] The positions of the parties seemed to be fluid right up to and including the argument of Mr. Glaspell's summary judgment motion, and I understand that the Harts' ultimate position to

be that the Township was correct in concluding that it did not have jurisdiction to enforce the *Building Code Act, 1992* or its zoning by-law on Crown land and that the MNR was correct in concluding that the boathouse does not require a work permit under the Regulations or an occupancy permit under the *Public Lands Act* because it was within the MNR's *Free Use Policy*.

[20] Mr. Glaspell's position is that the Township has jurisdiction to zone the Harts' dock and boathouse and to enforce the *Building Code Act, 1992* and its zoning by-law with respect to their construction. He argues further that the MNR should have required the Harts to comply with the *Public Lands Act*.

[21] The Township's position is that because the boathouse is located over the lakebed beyond the high water mark; *i.e.*, the boathouse including its anchoring cable is built on Crown lands, the Township has no authority to enforce the *Building Code Act, 1992* or its own zoning by-law to regulate the construction of the Harts' dock and boathouse. The Township says that the zoning by-law and the *Building Code Act, 1992* only apply if the boathouse were to be placed at least partially above the high water mark.

[22] The Crown's (MNR's) position, with which the Harts agree, is that it is up to each municipality to determine whether and how the *Building Code Act, 1992* and zoning applies to Crown land, although the Crown itself is immune from zoning and *Building Code* regulation. Further, it is the MNR's position, with which the Harts agree, that the dock and boathouse do not require a work permit or occupancy permit under the *Public Lands Act*.

## **D. DISCUSSION AND ANALYSIS**

### **1. Introduction and Methodology**

[23] At its most general level, the question to be decided by Mr. Glaspell's motion is what rule of law governs the construction and use of docks and boathouses on Ontario's lakes and rivers. There are considerable differences of opinion about the how, where, when, who, and why aspects of this general question, and Mr. Glaspell, the Township, the Crown/MNR, and the Harts all have different views. Apparently, there is also no consensus amongst municipalities because there are other municipalities that differ from the opinion and approach of the Township about a municipality's authority to zone and enforce the *Building Code*.

[24] Before I can wade into these murky waters of Big Cedar Lake to provide my opinion, the Crown raises a preliminary objection about Mr. Glaspell's standing to bring this partial summary judgment motion for a declaration. I shall address this objection in this introductory section, and I will explain why I disagree with it.

[25] Then, I shall go on to decide the motion. In the section that immediately follows this Introduction, I shall discuss the nature of the ownership of lakes and rivers in Ontario, which, as will appear, is relevant to the rules of law that govern the construction and use of docks and boathouses on Ontario's lakes and rivers. Then, in the subsequent sections, I shall explain my own analysis and answer the general question of how the law of Ontario regulates docks and boathouses constructed on rivers and lakes. In the course of doing so, I will address some particular questions raised by the competing positions and arguments of the parties. For reasons that will become apparent, I will begin the discussion by discussing zoning, then move to the *Building Code* and will finish with the *Public Lands Act*. By the end of the discussion, I will

have answered the questions raised by Mr. Glaspell's motion seeking declaratory relief.

[26] Turning then to the Crown's preliminary objection to Mr. Glaspell's standing, the Crown submits that the court should not exercise its discretion to make declaratory orders in the circumstances of this case.

[27] Under section 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Superior Court may make binding declarations of right, whether or not any consequential relief is or could be claimed. Declaratory orders are in the discretion of the court: *CTV Television Network Ltd. v. Kostenuk*, [1972] 3 O.R. 338 (C.A.) at para. 5.

[28] The court's discretion to make a declaration should be exercised sparingly and with extreme caution: *Re Lockyer*, [1934] O.R. 22 (C.A.). As a general policy, the court will not make a declaratory order or decide a case when the decision will serve no practical purpose because the dispute is theoretical, hypothetical or abstract, and the remedy of declaratory relief is not generally available where the dispute or legal right may never arise: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Green v. Canada (Attorney General)*, 2011 ONSC 4778 (S.C.J.).

[29] Being a discretionary remedy, the court will withhold the exercise of its discretion to grant a declaration in circumstances in which a declaration cannot meaningfully be acted upon by parties; a declaration must have some utility: *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Giacomelli v. Canada (Attorney General)*, 2010 ONSC 985.

[30] I appreciate that the court has a discretion to refuse to grant declaratory relief and that granting such relief should be done sparingly, but, in my opinion, it would be to shirk the court's duty to the public to dismiss Mr. Glaspell's summary judgment motion based on the pretence that his grievances are academic and theoretical and do not affect his legal rights. In my opinion, there is a genuine dispute, and both Mr. Glaspell's and the Harts' legal rights are engaged as are the legal duties of the Township and of the Crown. I shall, therefore, exercise the court's discretion and decide this motion on the merits.

## **2. The Ownership of Lakes and Rivers in Ontario**

[31] In order to understand what law applies to docks and boathouses on Ontario lakes and rivers, it is necessary to understand some aspects of the law about their ownership and use.

[32] Since Confederation, the title to beds of navigable rivers and lakes has been vested in the Crown in right of the province: *Reference re Provincial Fisheries* (1895), 26 S.C.R. 444, aff'd [1898] A.C. 700 (P.C.); *Canada (Attorney General) v. Perry* (1865), 15 U.C.C.P. 329.

[33] As confirmed by s. 1 of the *Beds of Navigable Waters Act*, R.S.O. 1990, c. B.4, unless there is an express grant in the Crown patent of the bed of a navigable body of water or stream bordering on or passing through a property, title to the bed of that body of water belongs to the Crown. Section 1 of the *Act* states:

*Grant to be deemed to exclude the bed*

1. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been or is granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.

[34] In *Real Estate Practice in Ontario* (4<sup>th</sup> ed.) (Toronto: Butterworths, 1990) at p. 29, D.J. Donahue and P.D. Quinn, discuss the *Beds of Navigable Waters Act* and state:

There is no definition in the Act of a navigable water or stream. A navigable water or stream has been defined as one capable of being traversed by craft of some sort, as small as canoes, skiffs or rafts, or capable of being used to float logs. Such use need not be continuous; it may fluctuate seasonally. The issue of whether a stream is navigable is to be determined as of the date of the Crown grant (see *Coleman et al. v. Attorney General for Ontario et al.* (1983), 27 R.P.R. 107).

The Act does not, however, apply to mill ponds or small lakes which have no navigable outlet or inlet; they have been found to be not navigable and the boundaries of lots on which such bodies of water are located follow the original lot lines notwithstanding the water lying thereon, (see *William v. Salter and Karwick* (1912), 23 O.W.R. 34.)

[35] An obvious deduction from s. 1 of the *Beds of Navigable Waters Act* is that the Crown can expressly grant the title of the bed of a body of water in a Crown patent. This deduction is supported by the case law that holds that the Crown can grant title subject to the public's right of navigation: *R. v. Harran* (1912), 3 O.W.N. 1107 (H.C.J.); *Barber v. Andrews* (1921), 20 O.W.N. 239 (H.C.J.); *Rice Lake Fur Co. v. McAllister* (1925), 56 O.L.R. 440 (C.A.).

[36] The fact that the Crown can sell or convey Crown lands is also confirmed by ss. 15, 16, and 17 of the *Public Lands Act*, which state:

*Regulations re sale or lease of public lands*

15.(1) The Lieutenant Governor in Council may make regulations,

(a) prohibiting or regulating and controlling the sale or lease of public lands for any specified purpose or use, other than agricultural purposes, and fixing the prices or rentals and the terms and conditions of sale or lease;

(b) fixing the periods for which the Minister may extend the time for performance of a term or condition of a sale or lease under subsection 23 (2) and prescribing the fee therefor.

....

*Reservation of mines and minerals*

(6) In every sale or other disposition of public lands for summer resort locations there shall be reserved to the Crown all mines and minerals thereon or thereunder, and the instrument of sale or other disposition shall so provide.

*Sale, etc., of public lands not otherwise provided for*

16. Where the sale or lease of any public lands is not otherwise provided for in this or any other Act or the regulations, the Minister may direct the sale or lease of any such public lands at such price or rental and upon such terms and conditions as the Minister considers proper.

*Quit claim letters patent*

17. (1) Where the Minister is satisfied that the right to bring an action on behalf of Her Majesty against a person for the recovery of land is barred by subsection 3 (1) of the *Real Property Limitations Act*, the Minister may direct the issue of quit claim letters patent in respect of the land to that person or to that person's predecessor in possession if the right of recovery was barred against that predecessor upon such conditions as the Minister considers proper.

....

[37] Under s. 20 of the *Act*, the Minister may also issue licences of occupation. Section 20 states:

*Licences of occupation*

20. (1) The Minister may issue under his or her hand and seal a licence of occupation to any person who has purchased, or is permitted to occupy, or is entrusted with the care or protection of any public lands or who has received or been located on any public lands as a free grant.

*Effect of licence of occupation*

(2) Such person or the person's assigns may take possession of and occupy the land for which the licence is issued, subject to the conditions of the licence, and may under it, unless it has been revoked or cancelled, maintain actions against any wrongdoer or trespasser, as effectually as the person could under letters patent from the Crown.

*As evidence*

(3) The licence of occupation is proof, in the absence of evidence to the contrary, of the right to possession by such person and the person's assigns of the land, but has no force against a licence to cut pine trees existing at the time of its issue or where the pine trees are reserved to the Crown against a licence to cut such trees then existing or thereafter issued.

[38] Sections 37 and 38 of the *Act* address Crown grants. Sections 37 and 38 state:

*Grants, etc.*

*Definition*

37. (1) In this section,

“Crown grant” means a grant of a freehold or leasehold interest in unpatented public lands or of an easement in or over unpatented public lands made under this or any other Act.

*Crown grants, release, grants of minerals registered in land registry offices*

(2) If a Crown grant of public lands, a release under subsection 58 (6) or a grant under *The Canada Company's Lands Act*, being chapter 24 of the *Statutes of Ontario, 1922*, is given, the Minister shall forward the instrument by which the release or grant is given to the proper land registry office.

*Registration*

(3) Upon receipt of an instrument under subsection (2), the land registrar shall, without fee or other charge, register the instrument, note particulars of registration on a copy and forward the copy to the grantee at the address furnished by the Ministry.

....

*Certificate that land is public lands*

*Definition*

38. (1) In this section,

“Crown” means Her Majesty the Queen in right of Ontario as represented by the Minister.

*Certificate forwarded for registration*

(2) When the Crown becomes the registered owner of land that has been patented or otherwise

disposed of or when land reverts to or vests in the Crown, the Minister may forward to the proper land registry office a certificate stating that the land is deemed to be public lands.

#### *Registration*

(3) The land registrar shall, without fee or charge, register every certificate received under subsection (2).

#### *Effect of registration*

(4) Upon registration of a certificate under subsection (3),

(a) the *Land Titles Act* or the *Registry Act*, as the case may be, ceases to apply to the land described in the certificate and the land registrar shall note that fact in the appropriate register or abstract index; and

(b) the land described in the certificate may be granted, sold, leased or otherwise dealt with in the same manner as other public lands.

....

[39] I was not enlightened by the parties to the case at bar as to whether the Crown has made any grants, sales, leases, or licences, and as far as I can determine, it has been simply assumed or admitted that the Crown owns and controls the use of the lands under Big Cedar Lake in the Township.

[40] The Crown, *prima facie*, has the ownership of the bed of body of water and it also owns title to the foreshore between the low and high water marks, although a subject may establish a title by proving an express grant or by establishing title by adverse possession and the presumption of a lost grant: *Attorney General v. Emerson*, [1891] A.C. 649 (H.L.).

[41] To avoid misunderstandings, it is worth noting that riparian rights are different from ownership of the bed of the lake or river and rather depend upon access to the water. The authors of the title *Waters and Watercourses (Ontario), Riparian Rights*, in the *Canadian Encyclopedic Digest* state at paragraph 61:

The Ontario courts have laid down the following well-established rules: a riparian owner's rights are not founded on ownership of the bed of the lake or river, but on access to the water; a grant of land to the water carries with it to the grantee the right of access to and from the water from any point of his or her own lands; any grantee of the Crown must take subject to the right of navigation; a riparian owner has the right to the natural flow and quality of water, subject to the same rights as his or her riparian neighbours; a riparian owner is entitled to accretions; a riparian owner and the public have the right of navigation in navigable waters; and the right to navigation is a public right, but may be connected with a right to exclusive possession to particular land on the bank. The latter right is a private one, invasion of which may form a ground of action for damages. *Snow v. Toronto (City)* (1924), 56 O.L.R. 100 (C.A.); *Canada (Attorney General) v. Higbie*, [1945] S.C.R. 385.

### **3. The Regulation of Structures on Bodies of Water**

#### **(a) Zoning**

[42] I turn now to how docks and boathouses are regulated by a municipality's zoning by-laws. Pursuant to s. 34 of the *Planning Act*, zoning by-laws may be passed by the councils of municipalities. The scope of zoning by-laws is described in s. 34 (1) of the *Planning Act*, which

states:

*Zoning by-laws*

34(1) Zoning by-laws may be passed by the councils of local municipalities:

*Restricting use of land*

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.

*Restricting erecting, locating or using of buildings*

2. For prohibiting the erecting, locating or using of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway.

*Marshy lands, etc.*

3. For prohibiting the erection of any class or classes of buildings or structures on land that is subject to flooding or on land with steep slopes, or that is rocky, low-lying, marshy, unstable, hazardous, subject to erosion or to natural or artificial perils.

*Contaminated lands; sensitive or vulnerable areas*

- 3.1 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures on land,
  - i. that is contaminated,
  - ii. that contains a sensitive groundwater feature or a sensitive surface water feature, or
  - iii. that is within an area identified as a vulnerable area in a drinking water source protection plan that has taken effect under the *Clean Water Act, 2006*.

*Natural features and areas*

- 3.2 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures within any defined area or areas,
  - i. that is a significant wildlife habitat, wetland, woodland, ravine, valley or area of natural and scientific interest,
  - ii. that is a significant corridor or shoreline of a lake, river or stream, or
  - iii. that is a significant natural corridor, feature or area.

*Significant archaeological resources*

- 3.3 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures on land that is the site of a significant archaeological resource.

*Construction of buildings or structures*

4. For regulating the type of construction and the height, bulk, location, size, floor area, spacing, character and use of buildings or structures to be erected or located within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway, and the minimum frontage and depth of the parcel of land and the proportion of the area thereof that any building or structure may occupy.

*Minimum elevation of doors, etc.*

5. For regulating the minimum elevation of doors, windows or other openings in buildings or structures or in any class or classes of buildings or structures to be erected or located within the municipality or within any defined area or areas of the municipality.

*Loading or parking facilities*

6. For requiring the owners or occupants of buildings or structures to be erected or used for a purpose named in the by-law to provide and maintain loading or parking facilities on land that is not part of a highway.

[43] Pursuant to s. 34 of the *Planning Act*, zoning by-laws may be passed by the councils of local municipalities. The word ‘may’ indicates that municipalities are empowered but not obliged to pass zoning by-laws. In the case at bar, the Township has enacted a zoning by-law, but it says that as a matter of interpretation or application, it does not apply to the Crown lands where the Harts’ dock and boathouse have been built.

[44] I pause here to say that there was some discussion in the parties’ arguments about a municipality’s discretion to enforce its by-laws. Since that discretion is not relevant to the issues of whether or not the zoning applies to lands covered by water, I shall say nothing more about these arguments.

[45] I also pause to say that I should not be taken as ruling on whether or not the Harts’ dock and boathouse comply with the zoning by-law or with the requirements of the *Building Code Act*. The focus of this motion has been on the predicate issues of whether and how any laws might apply to their dock and boathouse.

[46] Returning to those issues, it may be noted that a municipality’s authority to zone under s.31 of the *Planning Act* has a locative or territorial limitation. A municipality may zone “within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.” Zoning by-laws regulate the use of land by delineating an area and prohibiting uses of land within that area.

[47] It is important to note 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 not the land itself: *Re Gay* (1959), 20 D.L.R. (2d) 170 (C.A.), discussed below.

[48] A body of water can be located on the land within a municipality, as is the situation in the case at bar, where Big Cedar Lake is located in the Township of North Kawartha. Thus, subject to a qualification, discussed below, a municipality is empowered to enact by-laws that regulate the use of land in the municipality including land in the municipality covered by water.

[49] The qualification is that the Provincial Crown and Crown Agents are immune from a municipality’s zoning authority. See: *Re Gay, supra*; *College d’arts appliquées et de technologie La Cité collégiale v. Ottawa (City)* (1994), 20 O.R. (3d) 541 (Gen. Div.); *Toronto Area Transit Operating Authority v. Mississauga (City)*, [1996] O.J. No. 843 (Gen. Div.).

[50] It is helpful in understanding this qualification to recall that zoning by-laws operate on the person using the land. The subtleties here are demonstrated by *Re Gay, supra*. In *Re Gay*, Mr. Gay was a squatter on Crown lands in the Improvement District of Elliot Lake, and he was convicted for occupying the lands and using them for a purpose other than permitted by the municipality’s zoning by-law.

[51] On his appeal, Mr. Gay argued that the lands he was using without permission were admittedly lands owned by the Crown in the right of the Province of Ontario and, therefore, the municipality's by-law could not apply to the lands by virtue of s. 11 of the *Interpretation Act*, R.S.O. 1950, c. 184, which provided that "No Act shall affect the rights of His Majesty, His Heirs or Successors, unless it is expressly stated therein that His Majesty shall be bound thereby."

[52] (See now *Legislation Act*, S.O. 2006, c. 21 Sch. F at s. 71, which states: "No Act or regulation binds Her Majesty or affects Her Majesty's rights or prerogatives unless it expressly states an intention to do so.")

[53] The Court of Appeal, however, held that although the Crown, its servants and agents were not bound by the by-law, Mr. Gay was personally subject to the by-law. Justice Morden explained for the Court that the description of the zones defines the area in which the conduct of persons (other than the Crown and its agents) is regulated. Thus, Justice Morden stated at para. 8 of the Court's judgment:

The duties and liabilities created by by-laws passed under the powers conferred by Sec. 390 of The *Municipal Act* are imposed upon persons. These duties are not imposed upon land. The section refers to the user of land, the erection of buildings, etc. - matters which are the result of the actions and conduct of persons. The zoning by-law, the application of which we are considering, provides that

"No person shall use any land or erect or use any building or structure for any purpose except one or more of the following uses ... "

An earlier section of the by-law states:

"The provisions in this by-law shall apply to all of the lands included in the Improvement District of Elliot Lake, the boundaries of which are shown on the zoning map attached."

The purpose and effect of this section is merely to define the area in which the conduct of persons, true in respect of lands is to be regulated. By virtue of Sec. 11 of The *Interpretation Act*, the Crown and its servants and agents upon the Crown lands are not bound by the by-law. I know of no principle which extends this immunity of the Crown to a squatter on its lands and I should say in fairness to Mr. Brewin's able argument that he did not argue that any such principle existed.

[54] *Township of Moore v. Hamilton* (1979), 23 O.R. (3d) 156 (C.A.) is another demonstration that a zoning by-law can apply to persons using land owned by the Crown. Under the *Territorial Divisional Act*, R.S.O. 1970, c. 458, the boundaries of townships lying on the St. Clair River extend to the boundary of the Province of Ontario in the river. Thus, the plaintiff Township's territory extended into the St. Clair River. The defendant obtained a permit from the federal Minister of Transport pursuant to the *Navigable Waters Protection Act*, R.S.C. 1970, to build a dock into the St. Clair River; *i.e.*, over Crown lands. The Township of Moore, where the dock was being built, sought an injunction because the proposed use was contrary to its zoning by-law. Reversing the motions judge, the Court of Appeal granted the injunction and enforced the by-law. See also *Humphrey (Township) v. Robinette*, [1993] O.J. No. 1995 (Gen. Div.).

[55] *Galway and Cavendish (United Townships) v. Windover*, [1995] O.J. No. 3932 (Gen. Div.), is another example of a municipality zoning lands covered by water. In this case, the court recognized that municipalities have the power to pass by-laws to regulate matters on land covered by water provided they do not permit structures which would interfere with navigation.

[56] The dock and boathouse in *Galway* were similar to the dock and boathouse in the case at bar. The boathouse was built on top of the dock which floated above the bed of Mississauga Lake, a navigable body of water and part of the Trent Severn Waterway in the United Townships of Galway and Cavendish. The dock was anchored by a chain attached to stakes driven into the lakebed or into the shore of the lake. The defendant Windover built the dock and boathouse without permits from the municipality, the province, or the federal government. The Townships successfully brought an action for a declaration that they had jurisdiction to pass a by-law concerning the waters of Mississauga Lake and that Mr. Windover's dock and boathouse were a structure that did not conform with the municipality's building by-law and the *Building Code Act*.

[57] See also *R. v Black*, [2002] O.J. 3049 (O.C.J.), where the defendant was convicted for non-compliance with the municipal zoning by-law for construction of a dock and *Seguin (Township) v. Bak*, 2013 ONSC 5788, where in an application brought by the Township of Seguin, Mr. Bak was ordered to remove a boathouse at his cottage property that he unsuccessfully argued was an aerodrome and thus exempt from provincial and municipal building, planning, zoning and environmental laws, by-laws and regulations.

[58] Before explaining the application of the above law to the circumstances of the case at bar, it should be recalled, as noted earlier, that the province can convey its ownership of public lands to private citizens (or municipalities for that matter), in which case, the zoning by-law would simply apply to the owner of what was formerly Crown lands.

[59] Turning to the case at bar and applying the above principles of law, the Township of North Kawartha can lawfully zone the lands under Big Cedar Lake and regulate the type of construction and the height, bulk, location, size, floor area, spacing, character and use of buildings or structures to be erected or located within the Township. Its by-law, however, would not apply to the Crown or its agents. However, the by-law would apply to the Harts who are not a Crown agent.

[60] The Township of North Kawartha is, therefore, mistaken in thinking that simply because Crown lands are involved it cannot enact or enforce its by-laws over the Crown lands.

[61] Indeed, in my opinion, although the Township apparently thinks that it has not zoned the land associated with the Harts' boathouse, the applicable zoning by-law (By-law No. 66-1996) (Comprehensive Zoning By-law for the Townships of Burleigh and Anstruther) already is applicable to that boathouse.

[62] Section 1.2 (a) of By-law No. 66-1996 provides that it shall apply to all lands within the corporate limits of the Township. Regardless of who owns it, Big Cedar Lake is within the corporate limits of the Township as are the Hart and Glaspell cottages. Section 1.2 (b) of By-law No. 66-1996 provides that no building or structure shall be erected nor shall the use any building, structure, or lot be changed in whole or in part except in conformity with the provisions of the by-law. The by-law defines "dock" to mean a structure, attached to a shoreline and/or boathouse on permanent or semi-permanent basis, which projects into a body of water, with a finished floor area elevated above the level of the water. The by-law defines "marine facility" to mean a "building or structure attached built or anchored to land, which is used to place a boat into or take a boat out of a water body; or to moor, to berth or to store a boat." The definition of marine facility goes on to say that it may include a boathouse. The by-law specifies the permitted uses for docks and regulates building area and height and setbacks for boathouses and docks. The by-

law specifies certain lakes that are to be free of boathouses. In my opinion, the Township's by-law applies on and to the lands being used by the Harts for their dock and boathouse and it applies to the Harts who are using the dock and boathouse.

[63] Apparently because the Township did not want to expose itself to the liability for a duty of care in inspection (see *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2.), it has interpreted its by-law as not applying to Crown lands and, therefore, as not applying to structures built on Crown land as measured by the high water mark of Big Cedar Lake. The result is that some but not all boathouses are being regulated by the Township's zoning by-law. In my opinion, the Township's interpretation is wrong. The result of the Township's interpretation of its zoning by-law is that had the anchor cable for the Harts' boathouse been moved past the high water mark onto the Harts' property by even an inch, then the boathouse would have had to comply with the zoning by-law's size and location restrictions.

[64] I assume that the Harts have been responsible and did not construct an unsafe structure, but if the Township's interpretation were correct, then provided the Harts keep their dock and boathouse within the high water mark, they could have constructed any structure and one that would be unregulated as far as the *Building Code* is concerned.

[65] Relying on *Harrison v. Toronto (City)* (1982), 39 O.R. (2d) 721 at p. 724 as authority for the proposition that it is the duty of the court, if reasonably possible, to construe a by-law to give effect to the object intended by council, the Township argued that its council never intended to have its by-laws apply to structures built entirely beyond the high water mark and, therefore, any ambiguity as to how the by-law applies should be resolved in favour of the by-law not applying beyond the high water mark.

[66] With respect, the Harts do not enjoy Crown immunity and the location of the anchor of the steel cable does not make any difference to their exposure to the zoning by-law. Whatever the subjective intent of council members, I cannot reasonably construe the by-law in the manner suggested by the Township. And, having regard to the public safety aspects of zoning and construction by-laws, I cannot responsibly interpret the by-laws that would allow the municipality to abdicate its governance responsibilities over zoning or the *Building Code Act*, to which I now turn.

#### **4. The Building Code Act, 1992**

[67] The next issue is the matter of the application of the *Building Code Act, 1992* to docks and boathouses on the rivers and lakes of Ontario.

[68] Pursuant to s. 8. (1) of the *Building Code Act, 1992*, no person shall construct a building or cause a building to be constructed unless a permit has been issued therefor by the chief building official. Cottage owners, like the Harts, are persons subject to the *Act* and their dock and boathouse could, and most likely does, qualify as a building as defined by the definitions found in s. 1(1) of the *Act*.

[69] Under s. 1(1), "building" and "building code" are defined as follows:

1.(1) In this Act,

"building" means,

(a) a structure occupying an area greater than ten square metres consisting of a wall, roof

and floor or any of them or a structural system serving the function thereof including all plumbing, works, fixtures and service systems appurtenant thereto,

(b) a structure occupying an area of ten square metres or less that contains plumbing, including the plumbing appurtenant thereto,

(c) plumbing not located in a structure,

(c.1) a sewage system, or

(d) structures designated in the building code

“building code” means regulations made under section 34.

[70] Pursuant to s. 1.1 (1) of the *Act*, cottage owners constructing buildings, which may include docks and boathouses, are obliged to construct in accordance with the *Act*. Section 1.1 (1) states:

*Role of various persons*

1.1 (1) It is the role of every person who causes a building to be constructed,

(a) to cause the building to be constructed in accordance with this Act and the building code and with any permit issued under this Act for the building;

(b) to ensure that construction does not proceed unless any permit required under this Act has been issued by the chief building official; and

(c) to ensure that construction is carried out only by persons with the qualifications and insurance, if any, required by this Act and the building code.

[71] Pursuant to s. 3 (1) of the *Act*, the council of the municipality is responsible for the enforcement of the *Act*, and pursuant to s. 3 (2) the council is obliged to appoint a chief building official and inspectors as are necessary for the enforcement of the *Act*. Pursuant to s. 7 (1) of the *Act*, the council of the municipality may pass by-laws for the enforcement of the *Act*. Pursuant to s. 1.1 (6) of the *Act*, it is the role of the chief building official, among other things, to oversee the enforcement of the *Act* and the building code within the municipality. Section 1.1 (6) states:

*Role of chief building officials*

1.1 (6) It is the role of a chief building official,

(a) to establish operational policies for the enforcement of this Act and the building code within the applicable jurisdiction;

(b) to co-ordinate and oversee the enforcement of this Act and the building code within the applicable jurisdiction;

(c) to exercise powers and perform the other duties assigned to him or her under this Act and the building code; and

(d) to exercise powers and perform duties in accordance with the standards established by the applicable code of conduct.

[72] Pursuant to the municipality’s by-law making authority, the municipality may, among other things, prescribe class of permits and provide for applications for permits requiring the application to be accompanied by plans, specifications, and other information. Section 7(1) of the

*Act states:*

*By-laws, resolutions, regulations*

7. (1) The council of a municipality or of an upper-tier municipality that has entered into an agreement under subsection 3 (5) or a board of health prescribed for the purposes of section 3.1 may pass by-laws, a planning board prescribed for the purposes of section 3.1 may pass resolutions and a conservation authority prescribed for the purposes of section 3.1 or the Lieutenant Governor in Council may make regulations, applicable to the matters for which and in the area in which the municipality, upper-tier municipality, board of health, planning board, conservation authority or the Province of Ontario, respectively, has jurisdiction for the enforcement of this Act,

(a) prescribing classes of permits under this Act, including permits in respect of any stage of construction or demolition;

(b) providing for applications for permits and requiring the applications to be accompanied by such plans, specifications, documents and other information as is prescribed;

(b.1) subject to the regulations made under subsection 34 (2.1), establishing and governing a program to enforce standards prescribed under clause 34 (2) (b), in addition to any programs established under subsection 34 (2.2);

(b.2) subject to the regulations made under subsection 34 (2.2), governing a program established under subsection 34 (2.2);

(c) requiring the payment of fees on applications for and on the issuance of permits, requiring the payment of fees for maintenance inspections, and prescribing the amounts of the fees;

(c.1) requiring the payment of interest and other penalties, including payment of collection costs, when fees are unpaid or are paid after the due date;

(d) providing for refunds of fees under such circumstances as are prescribed;

(e) requiring a person specified in the building code to give notice to the chief building official or an inspector or to a registered code agency if one is appointed, of any of the stages of construction specified in the building code, in addition to the stages of construction prescribed under subsection 10.2 (1) and prescribing the period of time after such notice is given during which an inspection may be carried out;

(f) prescribing forms respecting permits and applications for permits and providing for their use;

(g) enabling the chief building official to require that a set of plans of a building or any class of buildings as constructed be filed with the chief building official on completion of the construction under such conditions as may be prescribed in the building code;

(h) providing for the transfer of permits when land changes ownership;

(i) requiring the person to whom a permit is issued to erect and maintain fences to enclose the site of the construction or demolition within such areas of the municipality as may be prescribed;

(j) prescribing the height and description of the fences required under clause (i).

[73] Section 8 of the *Building Code Act, 1992* establishes the regime for the application and

issuance of building permits for construction and demolition. Section 8 states:

*Construction and Demolition*

*Building permits*

8. (1) No person shall construct or demolish a building or cause a building to be constructed or demolished unless a permit has been issued therefor by the chief building official.

*Application for permit*

(1.1) An application for a permit to construct or demolish a building may be made by a person specified by regulation and the prescribed form or the form approved by the Minister must be used and be accompanied by the documents and information specified by regulation.

*Issuance of permits*

(2) The chief building official shall issue a permit referred to in subsection (1) unless,

(a) the proposed building, construction or demolition will contravene this Act, the building code or any other applicable law;

(b) the applicant is a builder or vendor as defined in the *Ontario New Home Warranties Plan Act* and is not registered under that Act;

(b.1) the *Architects Act* or the *Professional Engineers Act* requires that the proposed construction of the building be designed by an architect or a professional engineer or a combination of both and the proposed construction is not so designed;

(c) a person who prepared drawings, plans, specifications or other documents or gave an opinion concerning the compliance of the proposed building or construction with the building code does not have the applicable qualifications, if any, set out in the building code or does not have the insurance, if any, required by the building code;

(d) the plans review certificate, if any, required for the application does not contain the prescribed information;

(e) the application for the permit is not complete; or

(f) any fees due have not been paid.

....

*Decision*

(2.2) If an application for a permit meets the requirements prescribed by regulation, the chief building official shall, unless the circumstances prescribed by regulation apply, decide within the period prescribed by regulation whether to issue the permit or to refuse to issue it.

*Same, reasons for refusal*

(2.3) If the chief building official refuses to issue the permit, he or she shall inform the applicant of all of the reasons for the refusal of the permit and shall do so within the period prescribed by regulation.

....

*Revocation of permits*

(10) Subject to section 25, the chief building official may revoke a permit issued under this Act,

- (a) if it was issued on mistaken, false or incorrect information;
- (b) if, after six months after its issuance, the construction or demolition in respect of which it was issued has not, in the opinion of the chief building official, been seriously commenced;
- (c) if the construction or demolition of the building is, in the opinion of the chief building official, substantially suspended or discontinued for a period of more than one year;
- (d) if it was issued in error;
- (e) if the holder requests in writing that it be revoked; or
- (f) if a term of the agreement under clause (3) (c) has not been complied with.

*Prohibition*

(11) No person shall construct or demolish a building or cause a building to be constructed or demolished except in accordance with this Act and the building code.

*Notice of change*

(12) No person shall make a material change or cause a material change to be made to a plan, specification, document or other information on the basis of which a permit was issued without notifying, filing details with and obtaining the authorization of the chief building official.

*Prohibition*

(13) No person shall construct or demolish a building or cause a building to be constructed or demolished except in accordance with the plans, specifications, documents and any other information on the basis of which a permit was issued or any changes to them authorized by the chief building official.

*Restriction*

(14) If a request for authorization referred to in subsection (12) or (13) is accompanied by a change certificate that contains the prescribed information, the chief building official is not entitled to refuse to authorize the change on the grounds that the construction of the building to which the certificate relates does not comply with the building code.

[74] Subject to an argument advanced by the Township that I shall shortly reject (which argument is again connected to the legal principle that the Crown is immune from legislation unless expressly made binding on the Crown), the application of the above provisions of the *Building Code Act, 1992* leads to the conclusions that the Harts and others constructing docks and boathouses in the Township must apply for and obtain a building permit before constructing their dock or boathouse and that the Township is obliged to enforce its zoning and the *Building Code Act, 1992*.

[75] The Township's arguments to the contrary is set out in paragraphs 11-15 of its factum, which state:

11. Further and in the alternative, if individuals other than the Crown building on lakes are not agents of the Crown or building on her authority, North Kawartha would have no jurisdiction to issue building permits to them and all building on lakes in Ontario would need to cease.

12. Pursuant to section 8 (1.1) of the *Building Code Act*

An application for a permit to construct or demolish a building may be made by a person

specified by regulation and the prescribed form or the form approved by the Minister must be used and be accompanied by the documents and information specified by regulation

Reference: *Building Code Act, 1992*, S.O. 1992 c. 23 at s. 8(1.1)

13. Pursuant to section 1.3.1.2 of the *Building Code*:

(1) An application for a permit under section 8 of the Act to construct or demolish a building shall be made by,

(a) the owner of the property on which the proposed construction or demolition is to take place, or

(b) the authorized agent of the owner referred to in Clause (a).

Reference: *Building Code, O-Reg 332-12*, at s. 1.3.1.2

14. The fact that an owner of the land needs to be the one who applies for a permit is confirmed by the case of *Matwijow v Pelham (Town)*, where the Court states that, only the owner of land or someone authorized by him is entitled to make an application for a building permit.

Reference: *Matwijow v Pelham (Town)*, 2013 ONSC 2079 at Para 25

15. Since almost no one or in fact no one living upon Ontario lakes is either the owner of the lake upon which their property sits, or an authorized agent of the Crown. All applications for a building permit on Ontario lakes would need to be denied.

[76] I reject the Township's argument precisely because its interpretation of the *Act* leads to an absurd result that could not have been intended by the Legislature and further is not a necessary interpretation of section 1.3.1.2 of the *Building Code*.

[77] It is presumed that the legislator does not intend absurd consequences and an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or it is incompatible with other provisions or with the object of the legislative enactment. Where there are competing plausible constructions, a statute should be interpreted in a way that avoids absurd results: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 27; *Blue Mountain Resorts Ltd. v. Bok*, 2013 ONCA 75 at para. 43.

[78] Where the grammatical and ordinary sense of words when read in their context including the purpose and objective of the statute leads to some consequence that is repugnant or inconsistent with the purposes of the statute, the ordinary meaning may be departed from but only if there is a plausible alternative within the language used by the legislator: *Victoria City v. Bishop of Vancouver Island* (1921), 59 D.L.R. 399 (P.C.) at p. 387; *R. v. McIntosh*, [1995] 1 S.C.R. 686 at para. 20; *Grey v. Pearson* (1857), 6 H.L.C. 61 at p. 106; *Abbott v. Middleton* (1858), 7 H.L.C. 67 at p. 114; *Pinner v. Everett*, [1969] 3 All E.R. 257 at p. 258.

[79] In my opinion, section 1.3.1.2 of the *Building Code* should be interpreted to mean the owner of the property on which or for which the proposed construction or demolition is to take place.

[80] For reasons similar to those about the application of the zoning by-law, I conclude that the Harts' dock and boathouse are subject to regulation under the *Building Code Act* and any

associated by-laws and regulations.

## **5. The Public Lands Act**

[81] The *Public Lands Act*, regulates the use of “public lands,” which are defined by s. 1 of the *Act* to include lands designated as Crown lands.

[82] Section 14 of the *Act* authorizes the enactment of regulations, among other things, to govern activities that may be carried out on public lands and on shore lands and governing the issue of work permits. Section 14 states:

### *Regulations re work permits*

14.(1) The Lieutenant Governor in Council may make regulations,

- (a) governing activities that may be carried out on public lands and on shore lands, including requiring that such activities be carried out in accordance with the regulations and prohibiting certain activities on public lands or shore lands unless the activity is carried out in accordance with the terms and conditions of a work permit;
- (b) defining “shore lands” for the purpose of clause (a);
- (c) governing the issue, refusal, renewal and cancellation of work permits and prescribing their terms and conditions;
- (d) providing for and governing appeals from a refusal to issue or renew a work permit, from the cancellation of a work permit or from the imposition of terms and conditions in a work permit;
- (e) exempting any person or class of person from the requirement of obtaining a work permit to carry out an activity on public lands or shore lands.

### *General or particular*

(2) A regulation under subsection (1) may be general or particular in its application.

### *Fee*

(3) The Minister may charge such fee as he or she considers appropriate for the issuance or renewal of a work permit.

### *Offence*

(4) A person who contravenes a regulation made under clause (1) (a) is guilty of an offence.

### *Order to stop activity*

(5) An officer who finds that an activity is being carried on in contravention of the regulations made under clause (1) (a) without the necessary work permit may order that the activity cease until the work permit has been obtained.

....

[83] Section 26 of the *Act* imposes a penalty for unlawfully taking possession of public lands and erecting buildings and improvements, etc. Section 26 states:

### *Penalty for unlawfully taking possession of public lands and erecting buildings, etc.*

26.(1) Any person who enters into possession of public lands without lawful authority and erects any building or structure or makes any improvements thereon is liable to a penalty of an amount

equal to twice the market value of the public land so entered as determined by the Minister.

*Recovery of penalty*

(2) A penalty imposed under subsection (1) is recoverable at the suit of the Minister in any court of competent jurisdiction.

*Idem*

(3) If a person fails to pay a penalty imposed under subsection (1) and the Minister brings an action for the recovery of the penalty, it is the duty of the court,

- (a) to determine whether such person is liable to a penalty under subsection (1);
- (b) if it is determined that the person is liable to a penalty, to confirm or vary the amount thereof claimed by the Minister;
- (c) to give such judgment as it considers proper; and
- (d) to make such order as to costs or otherwise as it considers proper.

*Saving*

(4) Nothing in this section limits or in any way affects any right or remedy of the Minister or the Crown at common law or under any statute.

[84] Ontario Regulation 239/13 (Activities on Public Lands and Shore Lands – Work Permits and Exemptions), enacted pursuant to the *Public Lands Act*, prohibits activities on Crown lands unless carried out in accordance with a work permit. Section 2 (1) of the Regulation states:

PROHIBITED ACTIVITIES AND REQUIREMENT TO OBTAIN A WORK PERMIT

*Activities prohibited unless carried out in accordance with work permits*

2.(1) No person shall carry out any of the following activities except under the authority of and in accordance with the terms and conditions of a work permit that authorizes the activity:

- 1. Construct or place a building on public land.
- ...
- 6. Construct or place a structure or combination of structures that occupies more than 15 square metres on shore lands.

[85] Under s. 1(1) of the Regulation buildings are defined not to include “floating structures, docks, boathouses, tents, or ice hunts.” But a dock or boathouse could come within paragraph 6 of s. 2 (1) as a structure or combination of structures that occupies more than 15 square metres on shore lands. “Shore lands” are defined to mean “lands covered or seasonally inundated by the water of lake, river, stream or pond.”

[86] As noted above, in the case at bar, the MNR’s position is that because the Harts’ boathouse floats above the lakebed and is only tethered to a point above the high water mark, it does not “occupy more than 15 square metres on shore lands” and, therefore, the Harts do not require a work permit under s. 2 (1) of the *Act*.

[87] In my opinion, this interpretation of regulation is fallacious. Shore lands include the lands covered by the water of Big Cedar Lake and assuming that the dock and boathouse displaces more than 15 square metres of the water, it occupies the shore lands. The *New Concise Oxford*

*English Dictionary* (11<sup>th</sup> ed.) defines the verb “occupy” as follows:

**Occupy** v. (**occupies, occupying, occupied**) ... 2 Fill or take up (a space or time). 3 hold (a position or job) ... 5 take control of (a place) by military conquest or settlement – enter and stay in a (building) without authority, especially as a form of protest

[88] *Black’s Law Dictionary* (8<sup>th</sup> ed.) defines “occupancy” as follows:

**Occupancy** 1 The act, state or condition of holding, possessing or residing in or on something; actual possession, residence or tenancy, especially. of a dwelling or land. In this sense, the term denotes whatever acts are done on the land to manifest a claim of exclusive control and to indicate to the public that that actor has appropriated the land. Hence, erecting and maintaining a substantial enclosure around a tract of land usually constitutes occupancy of the whole tract. ....

[89] The action of occupying or the state of occupancy describes what the Harts are doing with their boathouse. I, therefore, conclude that the Harts and others with plans for docks or floating boathouses that displace more than 15 square feet of water are required to obtain work permits to construct their docks or boathouses.

[90] Regulation 975 of R.R.O. 1990 governs the issuance of work permits. Section 2 (1) of R.R.O. 1990/975 states:

2. (1) An officer shall issue a work permit to any person who applies for it and pays the prescribed fee unless the officer is of the opinion that the work for which a permit is required,

(a) is contrary to law;

(b) is inconsistent with or does not conform to,

(i) an official plan as defined in the *Planning Act*,

(ii) a Ministry Resource Management Plan,

(iii) the Ministry District Land Use Guidelines,

(iv) a policy and procedure directive of the Ministry of Natural Resources; or

(c) is likely to create a threat to public safety or to a natural resource including Crown lands, waters and watercourses, forests, flora, wildlife and fisheries

[91] In my opinion, the officer issuing permits should not issue a permit that contravenes the local municipality’s zoning by-law because the work permit would authorize work contrary to law and be inconsistent with an official plan as defined in the *Planning Act*. See *Humphrey (Township) v. Robinette, supra*. It remains to be determined whether a work permit can be issued for the Harts.

[92] This brings me to the final issue of whether the Harts are subject to s. 26 of the *Public Lands Act* which makes it unlawful to take possession of public lands and erect improvements without lawful authority. Relying on its *Free Use Policy*, the Ministry’s position is that taking possession of public lands without an occupancy permit to build a floating dock and boathouse tethered to the shore land but not physically touching the lakebed is not erecting an improvement to the public lands. In my opinion, this is a fallacious and indeed foolish interpretation that is also inconsistent with the operation of the work permit provisions of the *Act*.

[93] For the MNR to have its *Free Use Policy* interpret s. 26 in this way is also inconsistent with the policy of the *Act* of having the MNR manage and control the use of Crown lands.

[94] I conclude that an occupancy permit is required in the circumstances of this case. It

remains for the MNR to determine whether or not it will grant one to the Harts.

**E. CONCLUSION**

[95] Declarations should issue in accordance with these Reasons for Decision.

[96] I order costs in the cause.

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Perell, J.

Released: June 18, 2015

**CITATION:** Glaspell v. Ontario, 2015 ONSC 3965

**COURT FILE NO.:** CV-12-448912

**DATE:** 20150618

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

BARRY GLASPELL

Plaintiff

– and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the Minister of Municipal Affairs and Housing, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the Minister of Natural Resources, G. BRUCE MIGHTON, MUNICIPAL PROPERTY ASSESSMENT CORPORATION, THE CORPORATION OF THE TOWNSHIP OF NORTH KAWARTHA, TIM POWELL, RICHARD HART, MARGARET HART and JANE DOE

Defendants

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**REASONS FOR DECISION**

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PERELL J.

Released: June 18, 2015