

**CITATION:** Municipality of Lambton Shores v. Drysdale et al, 2019 ONSC 7533  
**COURT FILE NO.:** CV-19-131  
**DATE:** 20191231

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** The Corporation of the Municipality of Lambton Shores, Applicant

**AND:**

Mark Douglas Drysdale and Tamara Roanne Nyssonen, carrying on business as the Roaring Cat Retreat, Respondents

**BEFORE:** The Honourable Justice J.A. Desotti

**COUNSEL:** Analee J.M. Baroudi & Meaghan Carlson, Counsel for the Applicant

Paula Lombardi & Dagmara Wozniak, Counsel for the Respondents

**HEARD:** December 16, 2019

**ENDORSEMENT**

**A. The Application**

[1] The Municipality seeks the following orders in this application as follows:

- a. An Order permanently restraining the Respondents from breaching section 12.1 of the Zoning By-law by operating a wildlife retreat on the facility in which they house animals;
- b. An Order permanently restraining the Respondents from breaching section 1 of the Noise Control By-law by allowing animal noise to emit from the property;
- c. An Order permanently restraining the Respondents from breaching section 2.1 of the Exotic Animals by-law by possessing prohibited animals; and
- d. An Order permanently restraining the Respondents from breaching the Open Air Burning By-law.

**B. The Facts**

[2] This is an application to restrain the respondent from operating a facility that house 40 animals on its property known legally as Pt. Lt. 10 Con. Lake Road East Bosanquet as in L297096 & L197002 Except Pt. 1, 25 R5537, S/T L755682; S/T L755682, L925569, Lambton Shores hereinafter referred to as the "property".

- [3] The types of animals on this property are described as exotic animals and are subject to a new Municipal by-law that specifically prohibits the housing of exotic animals. These animals include 8 lions, 2 tigers, a lynx, a serval, and 6 lemurs plus other animals.
- [4] The property was purchased in the spring of 2019 and the respondents have resided at this site since March 27<sup>th</sup>, 2019. Their purpose in purchasing this property was to operate a “Roaring Cat Retreat”, an exotic animal retreat and education centre.
- [5] The property in question is comprised of two lots. Each lot is zoned differently with lot 9827 zoned R6 Residential and 9813 zoned A2 agricultural. The property in question is surrounded by both agricultural and residential properties.
- [6] Until 2006, this property was used as a petting zoo, known as Pineridge Zoo. This zoo operated for 40 years until it closed. I accept as uncontroverted evidence that the enclosures on this property had housed lions, tigers, baboons, lemurs, bears, leopards, meerkats, cougars, wolves and coatimundis. These enclosures are functional and still remain on the property.
- [7] Inquiries were made by the respondent purchasers prior to making an offer on the property about whether there was an Exotic Animal By-law in place, and were advised that there was not. Presently, the Municipality has passed an Exotic Animal by-law that is the subject of separate litigation out of London, Ontario seeking to quash this by-law.
- [8] **Presently, the respondents are resisting this application for a permanent injunction on the basis of an “arguable defence” and/or “exceptional circumstances”.**
- [9] The respondents alleged that on February 25<sup>th</sup>, 2019 before closing their real estate agreement, they had contacted a senior land use planner with the Municipality, a Will Nywening, who indicated to the respondents that since the property had operated as a zoo in the past, that an exotic animal retreat would be permitted as a legal non-conforming use.
- [10] On this issue they rely on a **corroborative e-mail** dated April 9<sup>th</sup>, 2019 from Will Nywening to the Chief Administrative Officer, Kevin Williams which I have reproduced in its entirety with the heading “**Old zoo Lands on Parkview Crescent**” as follows:

Further to my voice message, I spoke with Chris Martin and Randy Lovie about this also. We did have people inquiring about purchasing and resurrecting the zoo. I have been trying to find my notes/contact info without success.

The current zoning is residential so the zoo **could only operate as a legal non-conforming use**. They were advised they **would only be able to operate “as-is”**. They have indicated that the buildings have basically been left as they were when the zoo ended and are suitable for their purposes. They were advised any new buildings or significant alterations to existing buildings would be subject to obtaining appropriate zoning. They felt they could make do with what was there as long as they were permitted to upgrade enclosures, etc. to required standards.

I advised of specie at risk legislation and they indicated that the trails were still all open, that they did not need to clear any vegetation.

They said they are considered to be governed by all the same legislation as a zoo, but would be open to the public only select days and only by prior appointment. They indicate that they are more focused on conservation and animal rescue (especially big cats) than on putting animals on display to the public.

Will Nywening  
Senior Planner

- [11] Without forming a determination at this juncture about the significance of the discussions allegedly between the senior planner and the respondents, the e-mail specifically refers to an existing non-conforming use that seemingly would be permitted on this property, even though this use was terminated 13 years earlier.
- [12] In a letter dated April 7<sup>th</sup>, 2019 from a David Maguire to the same Chief Administrative Officer, Kevin Williams, Mr. Maguire indicated the following in paragraphs 2 and 3 of his e-mail:
- I see that the zoning for the property states Agriculture A2. **There is no mention of a zoo as a permitted use.** Although the site was once a zoo 30 years ago, it appears that during the creation of the last zoning by-law, **this use was removed.**
- Just wondering if such an activity is still permitted within the Municipality** and if so is there any licensing that the property owner would have completed.
- [13] At a special meeting of the Municipality on April 15<sup>th</sup>, 2019, an Exotic Animal By-law was given first, second and third readings and passed in significant haste and without notice to the known property owners, the respondents.
- [14] The most significant aspect of the by-law was that the Municipality could remove the animals and euthanize them within a period of 5 days.
- [15] The rationale for the quick passing of the by-law was the issue of public safety given the nature of animals housed at the "Roaring Cat Retreat". There was no attempt by anyone from the Municipality to undergo an investigation to determine whether the animals so housed posed any actual threat to the safety of the community.
- [16] On the other hand, the Agreement of Purchase and Sale clearly spells out that there were no representations with respect to this property and certainly no condition precedent that a zoo-like facility could operate on this property.
- [17] The other troubling problem is that at the time that the respondents alleged that they were told that the property had the grand-fathered legal non-conforming use as a zoo (February 25<sup>th</sup>, 2019), the respondents had already waived the financial condition on their purchase of the property thus creating a situation where if they failed to close they would be liable

to damages or specific performance regardless of what was said or what assurances they believed they received from the Municipal Planner.

**C. The Issues**

- 1) What impact did the potential breach of the Open Air Burning By-law No. 60 have on this application pursuant to s. 440 of the Municipal Act, 2001?
- 2) Secondly, whether the passing of the Exotic Animal By-law in such a precipitous manner would give rise to “an arguable defence”?
- 3) Thirdly, has the Municipality satisfied its burden to establish a clear and continuous breach of s. 7.1 of the Noise By-law or is there “an arguable defence”?
- 4) The final issue concerns the possible erroneous information given by the Municipal Planner to the respondents concerning a potential legal non-conforming use. Does that possible misleading fact impact on the existing zoning uses that were already in place with respect to the two lots purchased by the respondents and would this possible fact alone constitute “exceptional circumstances” precluding the imposition of a permanent injunction?

**D. Analysis**

- [18] With respect to the first issue, there is no evidence that the alleged burning that took place at the respondent’s property on September 10, 2019 is an ongoing problem. There is no evidence that the respondents knew or directed that there would be this type of burn, which included furniture and animal waste.
- [19] I conclude that this isolated incident, which may have constituted a breach or contravention of this Open Air Burning By-law does not create a scenario that would allow for a permanent injunction pursuant to s. 440 of the Municipal Act.
- [20] The second issue, the passing of the Exotic Animal By-law has two significant concerns. The most serious is that the targeted land owners, the respondents, did not receive notice of the By-law’s potential passage and secondly, that its passage on Monday, April 15<sup>th</sup>, 2019, a week after the Municipality learned about the ‘Roaring Cat Retreat’ was enacted without any consultation or discussion with the respondents.
- [21] The following are stated by the respondents to be *indicia* of bad faith:
- a) The Exotic Animal By-law took merely 15 minutes to pass first, second, and third readings;
  - b) Only the Chief Administrative Officer, Kevin Williams visited the property and he did not accept an invitation by the owners to be shown around;

- c) An opposition meeting to the 'Roaring Cat Retreat' was held on the Sunday before the Monday meeting, with the respondents not invited to the meeting;
- d) No Exotic Animal By-law was passed during the forty years when the same property was operated as Pineridge Zoo even though there were many incidents of escaped animals from this property;
- e) No input was sought by the public who had a favourable positive position concerning this 'Roaring Cat Retreat';
- f) The respondents indicate that the same 12 individuals in the community are the source of any and all the complaints;
- g) In order to minimize any problems with the 'Roaring Cat Retreat', the respondents agreed to an interlocutory injunction on October 21<sup>st</sup>, 2019 forbidding the respondents from adding new animals, from allowing members of the public to attend, and the respondents removed the noisiest of the animals, the lemurs and the roosters.

[22] A Municipality seeking an injunction must satisfy the court that the respondent is in a clear and continuous breach of a valid by-law and that the respondents are in fact taxpayers within the Municipality.

[23] The onus then shifts to the respondents who must present a defence that the by-law is invalid or unenforceable or "*ultra vires*" the Municipality and/ or that there are exceptional circumstances to justify the Court's exercise of residual discretion not to grant the injunction.

[24] An arguable defence arises when there is an interpretation of the by-law that would render it unenforceable to the extent of the impugned activity. Additionally, the following are some exceptional circumstances that courts have held would bar injunctive relief:

- 1) There exists a right prior to the enacted by-law that is subject to the alleged contravention (legal non-conforming use for example);
- 2) There is a clear and unequivocal expression that the lawful conduct will not continue (I infer that this is the ongoing interlocutory injunction and the application by the respondents for re-zoning;
- 3) There is such uncertainty that it can be said that the breach is not being flouted;
- 4) The events do not give rise to the mischief the enactment was intended to preclude;
- 5) The respondent has ceased the impugned activities;

- 6) The respondent has only continued the activity in a limited way so that it does not cause the harm the by-law was intended to prevent;
- 7) By-law invalidity or bad faith of a municipal council may also constitute exceptional circumstances.

[25] The respondents argue that the Exotic Animal zoning by-law is subject to an application to declare it to be invalid and that application is still outstanding, leaving only the existing zoning by-law designating the property as part residential and part agricultural, without specifically regulating pets and exotic animals on the property.

[26] The respondents also rely on the Municipality's Planner who indicated to the respondents that there was a legal non-conforming use on the property based on the former zoo that occupied this site, and that the respondents had applied for re-zoning.

[27] In reviewing case law found in the respondents 'Book of Authorities' the decision in *Mavis Baker v. Canada* has a passage that I adopt as a reasonable statement of principle when determining whether an administrative tribunal has conducted themselves appropriately as follows:

Within the duty of procedural fairness, is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, **with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.**

[28] While I accept the aforementioned principle, I do not agree that the Exotic Animal By-law specifically targets the respondents. The effect of the By-law prohibits any taxpayer in the Municipality from acquiring and housing exotic animals.

[29] Whether the Exotic Animal By-law is invalid or not is to be determined by another Superior Court out of London. Nevertheless, I do not agree that the haste taken to pass this by-law was strictly about public safety. Without determining that the respondents have raised an arguable defence, I am **not satisfied** that an injunction should issue based on the actions of the Municipality that led to the By-law's passing.

[30] I will leave the determination of the fate of this By-law to the Superior Court out of London. I would note that the decision of *The Municipality of Southwold and Norman Buwalda* is very close to the facts in this case, but I note that the Municipality in that case did not rely on the rural zoning reality in their application but on their hastily crafted new Exotic Animal By-law.

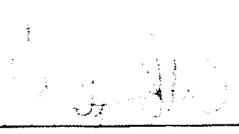
[31] The respondents in paragraph 84 of their factum outline other reasons that they assert reflect a bad faith approach by the applicant, Municipality. I accept that there are 14 factors that the respondents allege that the Municipality embarked upon to reflect their bad faith approach when they passed this By-law.

- [32] For those factors and exercising my discretion in considering the reasons put forward by the Municipality, I am not satisfied that on these facts an injunction should issue pursuant to s. 440 of the Municipal Act.
- [33] The third issue is the continuous noise emanating from the property and in particular the animals that are housed there. I have heard a tape recording of these noises. I have also been privy to other individuals produced by the respondents who dispute the continuous noise problem emanating from the property.
- [34] Frankly, I agree with counsel for the respondents that with competing evidence concerning the noise issue and with the removal of certain offending animals, a trial of this issue is mandated.
- [35] The fourth issue is the most problematic for the respondents. Since they are attempting to rezone their property to allow for a commercial zoo, they are seeking a deferral of an injunction until that hearing or application has been determined.
- [36] Equally challenging is their assertion that since a specific use had not been prohibited then the corollary to that reality is then a particular use may be permitted by the zoning by-law.
- [37] A zoning by-law is set up to narrowly structure permitted uses. Zoning by-laws such as residential or agricultural, have common defined permitted uses. My example of a strip-mall built in agricultural property defines the absurdity of such a use.
- [38] Because a strip-mall is not mentioned in the definitions of agricultural uses, then it follows that there is no prohibition of a strip-mall found within the agricultural zoning by-law. **Absent a prohibition is, obviously, not a permitted use.**
- [39] The aforementioned statement is self-evident. Mr. Scott Allen a planner who provided the respondents with his expert evidence and affidavit in Exhibit #O to the affidavit at paragraph 35 the following:

**In my planning opinion, based on my review of the Zoning By-law and the applicable provisions and definitions; there are no specific land use permissions defined for the A2 zone that expressly allow for a wildlife retreat on the southerly portion of the subject lands.**

- [40] The fact that there had been a legal non-conforming use on this property that allowed for a zoo had lapsed in 2006 when the Pineridge Zoo closed its operation. Even if the Municipal Planner advised the respondents that this lapsed legal non-conforming use could continue, the agreement of Purchase and Sale and the condition precedent of financing this purchase had already been waived by the respondents before any discussions.
- [41] While this may have been a misstatement of legal non-conforming uses, there was no other representation by anyone before the agreement of purchase and sale was signed that a specific 'Roaring Cat Retreat' could be operational on this site.

- [42] In fact, except for the inquiry by the respondents about a by-law referencing exotic animals, no other inquiry about permitted uses was made to anyone. The push back by the Municipality is thus understandable whether or not the Exotic Animal By-law is declared invalid or not.
- [43] The property in question is now surrounded by other permitted uses including significant residential properties. Even setting aside any noise issues, there was an obvious disquieting concern exhibited by residents in the area when they discovered that large cats would be housed on this property.
- [44] In my view, the breach of the zoning by-laws that reflect permitted uses in residential and agricultural properties is clear and persistent. There are no 'arguable defences' available to the respondent. An order shall issue restraining the respondents from continuing to house exotic animals on their property that is zoned both residential and agricultural a use that is not permitted under the Municipality's zoning by-laws.
- [45] The timing of the removal of the animals can be discussed by the parties and either agreed to or argued before me in the new year. The issue of costs may also be discussed with my trial coordinator in the new year to fix a date for argument.

  
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The Honourable Mr. Justice John A. Desotti

**Date:** December 31, 2019

**Cases Considered**

Municipality of Lambton Shores, By-Law No 31 of 2019, *Being a Bylaw to Prohibit or Otherwise Regulate the Keeping of Certain Animals Within the Municipality of Lambton Shores* (15 April 2019); Excerpts of the Municipality of Lambton Shores, By-Law No 1 of 2003, *Zoning Bylaw of the Corporation of the Municipality of Lambton Shores* (3 February 2003); Municipality of Lambton Shores, By-Law No 60 of 2009, *Being a By-Law to Regulate the Setting of Fires in the Open Air and Identify the Precautions and conditions to be Observed for Such Fires in the Municipality of Lambton Shores* (21 September 2009); Municipality of Lambton Shores, By-Law No 30 of 200, *Being a by-law to provide for the prohibition of certain sounds* (21 May 2002); *Newcastle Recycling v. Clarington Municipality*, 2005 Can LII 46384 (Ont (CA)); *Allied Properties v. 1064249 Ontario Inc.*, 2016 ONSC 6665 (CanLII); *The Corporation of the Township of Schrieber v. Figliomeni et al.*, 2018 ONSC 3657; *Peachland (District) v. Peachland Self Storage Ltd.*, 2011 BCCA 466; *Ottawa (City) v. Barrymore's Inc.*, 2002 CanLII 5565 (Ont (SupCt)); *The Neighbourhoods of Windfields Limited Partnership v. The Corporation of the City of Oshawa*, 2008 CanLII 42428 (Ont (SupCT)), aff'd 2009 ONCA 277, leave to appeal to SCC refused, 2009 CanLII 65019; *Township (Stone Mills) v. Rebel Scrap Metal*, 2012 ONSC 5052; *Faryna v. Chorny*, [1952] 2 DLR 354 (BC (CA)); *Equity Waste Management of Canada v. Panorama Investment Group Ltd.*, (1997) 35 OR (3d) 321 (CA), *Baker v. Canada (Minister of Citizenship and Immigration)* 1999 CanLII 699(SCC); *Burlington (City) v. Burlington Airpark Inc.*, 2017 ONCA; *Clublink Corporation ULC v. Oakville (Town)*, 2019 ONCA 827 (CanLII); *York v. Diblasi*, 2014 ONSC 3259 (CanLII); *Grosvenor et al v. The Corporation of the Township of East Luther Grand Valley*, 2007 ONCA 55 (CanLII); *Gustavan Drilling*, 1975 CanLII 4 (SCC); *Newcastle Recycling Ltd. v. Clarington (Municipality)*, 2005 CarswellOnt 7237 (ON CA); *Puslinch v. Monaghan*, 2015 ONSC 2748 (CanLII); *R. v. Greenbaum*, 1993 CarswellOnt 80 (SCC); *R. v. Sharma*, 1993 CarswellOnt 79 (SCC); *R. v. Varga*, 1979 CanLII 1715 (ON CA); *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC); *Saanich (District) v. Island Berry Company Ltd.*, 2008 BCSC 614 (CanLII); *The Corporation of the Township of South Frontenac v. 360788 Ontario Ltd.*, 2018 ONSC 1344 (CanLII); *Southwold (Township) v. Buwalda*, 2006 CarswellOnt 3384 (OSCJ); *Whitchurch-Stouffville (Town) v. Bolender*, 2015 ONCA 533 (CanLII); *Xentel DM Incorporated et al v. The Corporation of the City of Windsor*, 2004 CanLII 22084 (ON SC); Excerpt of The Corporation of the Municipality of Lambton Shores Comprehensive Zoning By-Law 1 of 2003, Section 1 – Administration, Enforcement & Interpretation; Excerpt of The Corporation of the Municipality of Lambton Shores Comprehensive Zoning By-Law 1 of 2003, Section 2 – Definitions; Excerpt of The Corporation of the Municipality of Lambton Shores Comprehensive Zoning By-Law 1 of 2003, Section 3 – General Provisions; Excerpt of The Corporation of the Municipality of Lambton Shores Comprehensive Zoning By-Law 1 of 2003, Section 6 – Agricultural – 2 (A2) Zone; Excerpt of The Corporation of the Municipality of Lambton Shores Comprehensive Zoning By-Law 1 of 2003, Section 12 – Residential – 6 (R6) Zone; The Corporation of the Municipality of Lambton Shores Procedural By-Law No. 14 of 2017; The Corporation of the Municipality of Lambton Shores Exotic Animals By-Law No. 31 of 2019; The Corporation of the Municipality of Lambton Shores Open Air By-Law No. 60 of 2009; The Corporation of the Municipality of Lambton Shores Noise By-Law No. 30 of 2002; Sections 224 (d.1) and 440 of the *Municipal Act, 2001*.