

MEMORANDUM

TO: Tony Fleming

FROM: ROBERT GENCARELLI

DATE: January 19, 2018

RE: **Head, Clara & Maria - Use of Trail by County of Renfrew**

FILE NO.: 29822-4

TASK

You have asked me to assess the rights of the United Townships of Head, Clara, and Maria (the "Township") with respect to the portion of the Algonquin Trail (the "trail") located within the boundaries of the Township. The Township is concerned about the current conduct of the County of Renfrew (the "County"), which is leasing the trail and has decided to develop it for use by motorized vehicles. The County is currently in the process of purchasing the trail, but this transaction has not yet occurred.

In particular, the Township is concerned about public safety issues and impacts to adjacent properties as a result of the use of the trail for motorized vehicles. In its recent resolution, the County provides a mechanism to deal with such issues that would permit applications to be made by the Township for a bypass to the current trail, to be considered by the County. All costs of an application and the construction of a bypass would be paid for by the Township.

FACTS

On June 28th, 2017, County Council passed the following resolution:

THAT County Council designates the County of Renfrew portion of the Ottawa Valley Recreational Trail, the Algonquin Trail as multi-use; AND FURTHER THAT the definition of multi-use include all methods of self-propelled transportation, as well as horseback riding, snowmobiles, and off-road vehicles as defined by the Off Road Vehicles Act, O Reg 316/03, s 1, as amended which are commonly referred to as all-terrain vehicles (ATVs) and side-by-sides; AND FURTHER THAT if a local municipality comes forward with by-pass and/or twinning solutions for motorized and non-motorized vehicles that they are prepared to support and fund, that County Council would consider such alternatives.

The residents of the Township have concerns with the trail running through their backyards for many reasons from safety to noise to risk of trespass. Council and staff have been attempting to consult with the County but so far their staff and committees have taken the position that the Township has no input in what happens with the trail as the County has the authority to create it.

The Township is also significantly concerned with the decision of the County to require lower tiers to pay for any by-passes to the trail that are requested and approved by the County.

On December 12, 2017, the Township passed a resolution regarding the trail which read as follows:

Subject: Use of Algonquin Trail through Head, Clara & Maria

WHEREAS the County of Renfrew has moved to lease sections of the Algonquin Trail within Head, Clara & Maria without any consultation with this lower tier municipality;

AND WHEREAS Council recognizes the potential of a properly planned and managed trail system within the County and is willing to consult and come to a practical system meeting all needs;

AND WHEREAS use of a motorized trail through HCM is contrary to the current Zoning By-law, and not strictly compliant with the Renfrew County Official Plan or the Provincial Policy Statement as they speak to the importance and preference of active transportation including pedestrian and cycling over motorized trails;

AND WHEREAS municipalities have the express responsibility under the Municipal Act to protect their residents from public nuisance, noise, odour and dust, and to overall protect their general health and safety;

AND WHEREAS this Council has concern with the shared use of a trail by motorized and non-motorized users.

THEREFORE BE IT RESOLVED THAT THE Council of the United Townships of Head, Clara & Maria does hereby direct staff to notify the County of Renfrew that the use of the lands known as the Algonquin Trail as a motorized trail through the municipality is contrary to the local Zoning By-law and therefore not permitted;

AND FURTHER THAT consultations commence between the County and the municipality to come to an agreement to develop a system of trails throughout Head, Clara & Maria which meet the needs of all residents and users being mindful of property owner rights, public safety, costs and municipal liability;

AND FURTHER THAT this resolution and supporting documents be forwarded to each member of the upper tier Council of the Counties of Renfrew and Lanark and Papineau Cameron Township expressing Council's concerns as well as to all lower tier municipalities in Lanark and Renfrew Counties for support.

After this resolution was passed, County CAO Jim Hutton provided the following response:

I received an e-mail below (including attachments) from Melissa Reith, Clerk and Chief Administrative Officer regarding the Algonquin Trail in the County of Renfrew and I have the following concerns with the accuracy and contents of the e-mail:

LAND USE PLANNING: Resolution no 12/12/009 indicates that a motorized trail is not compliant with the Provincial Policy Statement and the County's Official Plan and is contrary to HCM's Zoning By-law. The Report and Background/ Executive Summary attached to the e-mail and prepared by Melinda Reith only contain selective excerpts from the County's Official Plan and the Provincial Policy Statement. Ms. Reith then goes on to make recommendations to Council based on the selected excerpts. I am not aware that Ms. Reith is an experienced land use planner or is a Member of the Canadian Institute of Planners or a Registered Professional Planner in Ontario. As an MCIP and an RPP in Ontario I find the report in terms of its advice related to land use planning very unprofessional. I can assure you that we have reviewed the Provincial Policy Statement, Renfrew County's Official Plan and the Township's Zoning By-law and do not come to the same conclusions as Ms. Reith. Our experience in dealing with land use issues that arise from time to time near trails is that there are many means of mitigating land use issues, including noise and dust.

After receiving this response, Ms. Reith is now requesting our assistance in determining what the rights of the Township are under the circumstances, and how to proceed moving forward.

ISSUES

The issues that arise from the current situation are as follows:

1. Is the use of the Algonquin Trail as a motorized trail permitted under the Township's Zoning By-law, Zoning By-law 2004-12 (the "Zoning By-law")?
2. Does the Resolution passed by the County take precedence over the Township's Zoning By-law, thereby permitting use of the Algonquin Trail as a motorized trail regardless of whether such use is prohibited under the Township's Zoning By-law?
3. Can the County pass a By-law requiring the Township to apply to the County for any by-passes that it requires to the Algonquin Trail? Would such a by-law have any real practical implications?
4. What mechanisms are available to the Township to allow it to enforce its Zoning By-law against the County?

BRIEF ANSWER

1. The Township's Zoning By-law does not permit the use of the Algonquin Trail for any form of recreational trail.
2. Under the *Planning Act*, the Township is provided with the authority to implement zoning for the Algonquin Trail. The County must comply with that zoning.
3. While the County can pass a by-law regarding by-passes, such a by-law would be of little practical effect. If the Township were to zone portions of the trail to allow for recreational motor-vehicle use, and then later determine that such is inappropriate, it could simply re-zone the portion of the trail that is of concern to remove the permitted motor vehicle use. Such would be a more efficient resolution to such issues.
4. There are several mechanisms of enforcement available to the Township under the circumstances. Immediate enforcement could include the installation of barriers at locations where the Algonquin Trail intersects with the Township's municipal roadways. The Township could also prosecute the County for facilitating the breach of its Zoning By-law, or make an application to Superior Court to restrain any continued breach of its Zoning By-law by the County.

ANALYSIS

1) Are Motorized Trails Permitted Under the Township's Zoning By-law?

Section 3.2 of the Township's Zoning By-law permits only the following uses on all lands throughout the Township:

3.2. Permitted Uses

- a) Dwelling
- b) Cottage
- c) Farm
- d) Home Industry
- e) Home Occupation
- f) Hunt/ Fishing Camp

Therefore, it is clear that the lands that comprise the Algonquin Trail throughout the Township are not zoned for use as a motorized trail or even for use merely as a recreational walking or hiking trail, and therefore such use by the County is not permitted under the Township's Zoning By-law.

This is confirmed by looking at the By-laws of neighbouring Townships within the County of Renfrew that do in fact permit hiking and walking trails and trails for motorized use. For example, the Township of Bonnechere Valley Comprehensive Zoning By-law No. 2006-28 permits the following uses of land:

RECREATION, ACTIVE means the use of land, water and/or building for the purpose of organized active leisure activities and shall include an arena, a sports field, and motorized vehicle trails, including snowmobiles and all-terrain vehicles.

RECREATION, PASSIVE means the use of land and/or water for the purpose of passive leisure activity and shall include a park, a garden, a picnic area and the like, equestrian and hiking trails, as well as a play lot with activity equipment for children.

Another example is the Township of Madawaska Zoning By-law No. 22-2003, which states:

RECREATION, ACTIVE means the use of land, water and/or building for the purpose of organized leisure activities and shall include an arena, a golf course, a sports field, and motorized vehicle trails.

RECREATION, PASSIVE means the use of land and/or water for the purpose of passive leisure activity and shall include a park, a garden, a picnic area and the like, equestrian and hiking trails, as well as a playlet with activity equipment for children.

These zoning by-laws confirm that use of land for a recreational trail is indeed a “use” that must be explicitly permitted under the Township’s Zoning By-law. It cannot be argued by the County that use of the Algonquin Trail as a motorized trail is not a use of land that can be regulated by zoning, such that there is no violation of the Township’s Zoning By-law.

Under the Township’s Zoning By-law, the Public Use exemption also does not apply to the County’s use of the Algonquin Trail. The exemption is limited to use of land by the Township or any local board thereof, any telephone, gas or telegraph company, and any department or agent of the Government of Ontario. Section 3.18 of the Township’s Zoning By-law states:

PUBLIC USE OF LAND

The provisions of this By-law shall not apply to prevent the use of any land or the erection or use of any building or structure for the purpose of public service by the Municipality or by any local board thereof defined by the Municipal Affairs Act, any telephone, gas, or telegraph company, and department or agent of the Government of Ontario or Canada, including Hydro One, provided that:

- a) With the exception of a public utility, the lot coverage, setback and yard requirements prescribed shall be complied with.

Overall, it is clear that the Township’s Zoning By-law does not permit the proposed use of the Algonquin Trail by the County. The Township has full control over what portions of the trail it wishes to zone for use as a walking/hiking trail, and which portions it wishes to zone for use as a motorized vehicle trail, subject to ensuring that such decisions are in accordance with good planning principles.

2) Can the Resolution Passed by the County of Renfrew Trump the Township's Zoning By-law?

The *Municipal Act, 2001*, S.O. 2001, c. 25 (the "*Municipal Act*") contains spheres of jurisdiction for both upper and lower-tier municipalities. These are outlined in section 11 of the *Municipal Act*, which states as follows:

Spheres of Jurisdiction

Broad authority, lower-tier and upper-tier municipalities

11 (1) A lower-tier municipality and an upper-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public, subject to the rules set out in subsection (4). 2006, c. 32, Sched. A, s. 8.

By-laws

(2) A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting the following matters:

1. Governance structure of the municipality and its local boards.
2. Accountability and transparency of the municipality and its operations and of its local boards and their operations.
3. Financial management of the municipality and its local boards.
4. Public assets of the municipality acquired for the purpose of exercising its authority under this or any other Act.
5. Economic, social and environmental well-being of the municipality, including respecting climate change.
6. Health, safety and well-being of persons.
7. Services and things that the municipality is authorized to provide under subsection (1).
8. Protection of persons and property, including consumer protection. 2006, c. 32, Sched. A, s. 8; 2017, c. 10, Sched. 1, s. 2.

By-laws re: matters within spheres of jurisdiction

(3) A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting matters within the following spheres of jurisdiction:

1. Highways, including parking and traffic on highways.
2. Transportation systems, other than highways.
3. Waste management.
4. Public utilities.
5. Culture, parks, recreation and heritage.
6. Drainage and flood control, except storm sewers.
7. Structures, including fences and signs.
8. Parking, except on highways.
9. Animals.
10. Economic development services.
11. Business licensing

Sections 13 of the *Municipal Act* then goes on to discuss conflicts between by-laws passed by upper and lower-tier municipalities. Section 13 states as follows:

Conflict between certain by-laws

13 (1) If there is conflict between a by-law passed by a lower-tier municipality under subsection 11 (3) and a by-law passed by its upper-tier municipality under subsection 11 (3), the by-law of the upper-tier municipality prevails to the extent of the conflict. 2006, c. 32, Sched. A, s. 9.

Example

(2) Without restricting the generality of subsection (1), there is conflict between by-laws of different tiers if a by-law of the lower-tier municipality frustrates an integral part of a system of the upper-tier municipality.

Overlapping powers

(3) For the purpose of subsection (1), if a municipality has the power to pass a by-law under subsection 11 (3) and also under any other provision of this or any other Act, the by-law is deemed to have been passed under subsection 11 (3). 2006, c. 32, Sched. A, s. 9.

Inoperative by-law

13.1 (1) A by-law of a lower-tier or upper-tier municipality under subsection 11 (1) or (2) is inoperative to the extent it frustrates an integral part of a system of its upper-tier municipality or lower-tier municipality, as the case may be, authorized by by-law under subsection 11 (1) or (2). 2006, c. 32, Sched. A, s. 9.

Overlapping powers

(2) For the purpose of subsection (1), if a municipality has the power to pass a by-law under subsection 11 (1) or (2) and also under any other provision of this or any other Act, the by-law is deemed not to have been passed under subsection 11 (1) or (2).

However, section 13 deals with conflicts between by-laws passed by municipalities under section 11 of the *Municipal Act*. Here, the conflict is between a resolution/by-law passed by the County of Renfrew, and the Township's Zoning By-law, which is passed under the *Planning Act*, R.S.O. 1990, c. P.13 (the "*Planning Act*").

The Township's Zoning By-law is passed under section 34 of the *Planning Act*, which grants the authority to make zoning by-laws to lower and single-tier municipalities. Section 34 states:

Zoning By-laws

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

Therefore, the Township has the sole authority to regulate the use of land throughout its boundaries. This includes the regulation of use of land owned or leased by other municipalities, including upper tier municipalities like the County. The County's use of land

throughout the Township is therefore regulated by the Township's Zoning By-law – there are no exceptions for lands owned or leased by the County.

3) By-law Requiring Township to Pay for By-passes to the Trail

As a component of its resolution, the County provided as follows:

AND FURTHER THAT if a local municipality comes forward with bypass and/or twinning solutions for motorized and non-motorized vehicles that they are prepared to support and fund, that County Council would consider such alternatives.

While the current resolution/ by-law of the County is, as discussed above, of no force and effect to override the Township's Zoning By-law, the passing of such a by-law after the Township has zoned the Algonquin Trail to allow it to be used as a recreational trail is worth considering. While the County could pass a similar by-law stating that it would consider closing parts of its trail if the Township were willing to close and pay for a by-pass, such is likely to have very little practical effect. Again, the Township controls zoning, and if at any point in time significant concerns are raised regarding the use of a portion of the trail, the Township could simply re-zone the trail accordingly.

As an example, say the Township zoned parts of the trail for pedestrian use only, and parts of the trail for use by both pedestrians and motor vehicles. After that date, the County could then pass a by-law similar to the above, requiring the Township to apply to the County for a by-pass and, if approved, pay for that by-pass. After all of that had been done, a significant concern might arise with a part of the trail being used by motorized vehicles. Instead of applying to construct a by-pass at that time, the Township could simply amend the zoning for the portion of the trail causing concern, removing the use of the trail by motorized vehicles. That would be a more efficient solution for the Township, and a solution that is within its full authority.

4) Enforcement

The mechanisms of enforcement that are available to the Township under the circumstances include:

- Prosecution under section 67 of the *Planning Act*;
- Application to the Superior Court for an injunction restraining the County from continuing to facilitate and permit use of the Algonquin Trail within the Township's boundaries as a motorized trail; and
- Blocking Access to the Algonquin Trail where it intersects municipal roadways.

i) Prosecution and Prohibition Order

The Township could commence a prosecution against the County if it continues to allow use of the Algonquin Trail for motorized vehicles in contravention of the Township's Zoning By-law. Section 67 states as follows:

Penalty

67(1) Every person who contravenes section 41, section 46, subsection 49(4) or section 52 or who contravenes a by-law passed under section 34 or 38 or an order made under section 47 and, if the person is a corporation, every director or officer of the corporation who knowingly concurs in the contravention, is guilty of an offence and on conviction is liable;

- (a) on a first conviction to a fine of not more than \$25,000; and
- (b) on a subsequent conviction to a fine of not more than \$10,000 for each day or part thereof upon which the contravention has continued after the day on which the person was first convicted.

Corporation

(2) Where a corporation is convicted under subsection (1), the maximum penalty that may be imposed is,

- (a) on a first conviction a fine of not more than \$50,000; and
- (b) on a subsequent conviction a fine of not more than \$25,000 for each day or part thereof upon which the contravention has continued after the day on which the corporation was first convicted

And not as provided under subsection (1)

Order of Prohibition

(3) Where a conviction is entered under subsection (1), in addition to any other remedy or any penalty provided by law, the court in which the conviction has been entered, and any court of competent jurisdiction thereafter, may make an order prohibiting the continuation or repetition of the offence by the person convicted.

As outlined above, a prosecution could involve the levying of a fine and a prohibition order preventing any further breaches of the Township's Zoning By-law. The downside to this form of enforcement is the time it will take to successfully complete a prosecution and the orders necessary to restrain the County from continued breach of the Township's Zoning By-law.

ii) Order to Restrain Continued Breach of the Township's Zoning By-law

As an alternative to prosecution, the Township could apply to the Superior Court of Justice for an order restraining the continued breach of the Township's Zoning By-law by the County. Such an application would be made under section 440 of the *Municipal Act*, and Rule 14.05(2) and 14.05(3)(d) and (g) of the *Rules of Civil Procedure*, R.R.O 1990, Reg 194. Section 440 of the *Municipal Act* states:

Power to Restrain

440. If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board.

Rule 14.05 of the *Rules of Civil Procedure* provides:

Application Under Statute

14.05(2) A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes;

Application Under Rules

14.05(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is;

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution.

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by notice of application.

Similar to the prosecution option, obtaining this form of relief will take time and is not immediate. However, in such proceedings, the Township might be entitled to a costs award should it be successful.

iii) Placing Barriers Along the Algonquin Trail to Block Access

While the Township could place barriers on its municipal roadways to block access to the Algonquin Trail at locations where it intersects with its roads, the Township should be aware that there are some minor risks associated with such action that it should take steps to mediate.

The first is a potential concern with the applicability of the *Road Access Act*, R.S.O. 1990, c R.34 (the “*Road Access Act*”). Section 2 of the *Road Access Act* prohibits the construction of a barrier or other obstacle over an “access road”, which is a private roadway that provides the sole means of motor vehicle access to one or more parcels of land.

If the Algonquin Trail does in fact constitute an access road, and the Township were to construct a barrier on its own municipal roadway to prevent motor vehicles or other access to the trail, such would be permissible and would not constitute a breach of the *Road Access*

Act. The Township has every right to place barriers on its own municipal roadways, and doing so would not constitute the placement of a barrier “over” an access road. While there would be no technical breach of the Act, the Township should be aware that a court may view the Township’s actions as undermining the Act’s general intent and purpose, and therefore find that a breach has occurred nonetheless. We cannot quantify the magnitude of risk, but the possibility exists.

To mediate any risk of a breach of the *Road Access Act*, however, the Township should confirm the status of the portions of the trail it intends to block to ensure that they do not constitute access roads under the Act.

In placing barriers along the untravelled portion of its municipal roadways, the Township is unlikely to be open to any risk of liability. Section 44(8) of the *Municipal Act* states as follows:

44(8) Untravelled portions of highway – No action shall be brought against a municipality for damages caused by,

- (a) the presence, absence or insufficiency of any wall, fence, rail or barrier along any highway; or
- (b) any construction, obstruction or erection, or any siting or arrangement of any earth, rock, tree or other material or object adjacent to or on any untravelled portion of a highway, whether or not an obstruction is created due to the construction, siting or arrangement.

However, out of an abundance of caution, the Township should ensure that if barriers are placed where its municipal roadways intersect the trail, that adequate signage is posted informing potential users of the trail of the existence of such barriers. The signs should be of suitable size and colour to ensure that they are clearly visible to persons entering and using the trail; it is also important to place signs in locations where users have adequate distance to stop once they see the sign. Once erected, it is also important that there be periodic checks to ensure that the signs remain in place and are visible.

CONCLUSION

Overall, the County’s decision to allow the portion of the Algonquin Trail running through the boundaries of the Township to be used as a recreational trail for use by motor vehicles is contrary to the Township’s Zoning By-law, and is therefore not permitted as a matter of land use. The County has the legal authority to create the trail, but it is still subject to local zoning if it wants to allow that use to occur. Before the Algonquin Trail can be used for any form of recreational trail, whether for hiking or for use by motor vehicles, the Township must amend its Zoning By-law to permit such uses. The Township therefore has significant control over

what portions of the trail may be used merely as a hiking trail, and what portions of the trail may be used by recreational motor vehicles.

There are several mechanisms of enforcement that could be utilized by the Township to enforce its Zoning By-law. These include immediate enforcement by placing barriers at locations along the trail where it intersects with the Township's municipal roadways, as well as the commencement of a prosecution against the County and/or an application in Superior Court to restrain the County from continuing to facilitate breaches of the Township's Zoning By-law.

Through further dialogue and enforcement, the Township may be successful at bringing the County to the table to negotiate which portions of the trail can be used as a recreational motor vehicle trail, and which portions can be used only as a hiking trail by pedestrians. Such negotiations may assist in avoiding any appeals by the County when the Township undertakes the process of rezoning the trail to allow for recreational hiking and/or recreational motor vehicle use.

If the Township re-zones the trail to permit recreational trail use, the County may also attempt to pass a by-law implementing a process for by-passing certain portions of the trail. However, such by-law is unlikely to have any significant practical effect, as the Township is the body with zoning authority, and if it is determined that the zoning of certain portions of the trail is resulting in inappropriate impacts, it has full authority to undertake a re-zoning of the such portions of the trail.