

LexisNexis®

Agricultural Law NetLetter™

A twice-monthly current awareness service reviewing recent cases on land use, marketing boards, environmental issues, creditors rights, animals, grain, import/export and other matters in an agricultural context.

Thursday, January 27, 2011 - Issue 218

Bi-weekly issues are added on Thursdays.

**** HIGHLIGHTS ****

- * The Ontario Court of Appeal has held that the Ontario Normal Farm Practices Protection Board has no jurisdiction to interfere with legitimate municipal planning designations regarding land use. The Board's jurisdiction to declare bylaws are inoperative is narrow and is restricted to regulatory provisions which restrict normal farm practices. The Court of Appeal upheld a decision of the Divisional Court, which set aside a Board decision that declared inoperative a Town bylaw which did not permit farming or agricultural uses. (*Oakville (Town) v. Read (c.o.b. Read Farms)*), [CALN/2011-002](#), [\[2011\] O.J. No. 86](#), Ontario Court of Appeal)

**** NEW CASE LAW ****

Oakville (Town) v. Read (c.o.b. Read Farms); [CALN/2011-002](#), Full text: [\[2011\] O.J. No. 86](#); Ontario Court of Appeal, J.M. Simmons, E.A. Cronk and J.L. MacFarland J.J.A., January 11, 2011.

Right to Farm Legislation -- Ontario Farming and Food Production Protection Act -- Jurisdiction of Farm Protection Board with respect to Land Use Bylaws.

Wayne Read and Laura Duncan, carrying on business as Read Farms ("Read Farms") appealed to the Ontario Court of Appeal from an Order of the Ontario Divisional Court.

The Divisional Court had set aside the decision of the Normal Farm Practices Protection Board (the "Board") dated January 23, 2008 which ordered that a zoning bylaw of the Town of Oakville (the "Town") which did not include farming as a permissible use for the lands, be stayed as against the agricultural activities of Read Farms, pursuant to the provisions of the Farming and Food Production Protection Act, 1998, [S.O. 1998, c. 1](#) (the "Act").

Sections 6(1) and 6(2) of the Act provide:

- (1) No municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation.
- (2) A person described in subsection (3) or a municipality may apply to the Board, in a form acceptable to it for a determination as to whether a practice is a normal farm practice for purposes of the non-application of a municipal by-law.

The appeal involved a parcel of land in the Town. The land was once owned by Shell Canada Ltd. ("Shell") and had formerly been used as a oil refinery. In 1983, Shell remediated the lands. Shell sold the lands in 1999 to developers - Urban Core Builders Consortium Inc. ("Urban Core"). Urban Core leased the lands in August of 2001 to Read Farms. Pursuant to the lease, Urban Core paid Read Farms \$300.00 per workable acre to farm the land and permitted Read Farms to retain any proceeds earned from the farming operations on the land.

Farm lands are subject to significantly lower property taxes than residential and industrial lands. According to the evidence, this type of "assessment farming" is reasonably common in Ontario.

The Town viewed the arrangement between Urban Core and Read Farms as a "tax grab".

The land had been zoned "E1", "E2" and "T1" which allowed for a broad range of employment, office and commercial uses. Using the land for farming and growing crops was not a permitted use.

In July of 2002, the Town charged Urban Core with using the land for a purpose not permitted under the Town's zoning bylaw.

After the charge was laid, Read Farms brought an application to the Board pursuant to s. 6(2) of the Act for a determination as to whether their farming operation was a "normal farm practice" for the purpose of the non-application of the Town's zoning bylaw.

The Town brought a preliminary Court application to dismiss Read Farms' application to the Board. The preliminary application was dismissed on the grounds that the Board ought to be given the opportunity to consider the issue at a full hearing.

A hearing before the Board proceeded and in reasons dated January 23, 2008, the majority of the Board granted Read Farms' application and ordered that the Town's zoning bylaw be stayed. The Chair of the Board dissented, and would have dismissed Read Farms' application.

The Town appealed the Board's decision to the Divisional Court. The Divisional Court allowed the Town's appeal and dismissed Read Farms' application. The Divisional Court concluded that as a matter of law "farming" was not a "farm practice" and that "farming" merely describes the use to which the land is put. The Court held that the Act was not intended to be used to permit farmers to farm lands in circumstances in which farming was not a permitted use.

Decision: MacFarland, J.A. (Simmons and Cronk, J.J.A. concurring) dismissed Read Farms' appeal with costs [at para. 47 and 48].

MacFarland, J.A. considered the previous decision of the Ontario Court of Appeal in *Hill and Hill Farms Ltd. v. Bluewater (Municipality)* (2006), [82 O.R. \(3d\) 505](#) (C.A.), and the preamble of the Act. The preamble provides:

It is desirable to conserve, protect and encourage the development and improvement of agricultural lands for the production of food, fibre and other agricultural or horticultural products.

Agricultural activities may include intensive operations that may cause discomfort and inconveniences to those on adjacent lands.

Because of the pressures exerted on the agricultural community, it is increasingly difficult for agricultural owners and operators to effectively produce food, fibre and other agricultural or horticultural products.

It is in the provincial interest that in agricultural areas, agricultural uses and normal farm practices be promoted and protected in a way that balances the needs of the agricultural community with provincial health, safety and environmental concerns.

MacFarland, J.A. observed the preamble referred to protecting the development and improvement of "agricultural lands in agricultural areas" and that the preamble did not purport to extend protection to lands "that had been legitimately zoned for non-agricultural purposes" by a municipality in which the farmer did not have "legal non-conforming use status" [at para. 29].

MacFarland, J.A. observed, at para. 30 and 32 as follows:

[30] It is readily apparent that the statute is concerned with the activities and practices that occur on agricultural lands. It is about farming - and about balancing the interests of farmers in carrying out their farming operations with the interests of adjacent landowners who may be impacted by those practices.

[32] The Act is primarily concerned with nuisance lawsuits by neighbouring residents. This Act replaced the former Farming Practices Protection Act, R.S.O. 1990, c. F-6 and added a wider variety of nuisances that would be covered.

MacFarland, J.A., at para. 31 to 34, referred to Hansard debates to support this interpretation of the Act and concluded, at para. 38, the Act was not concerned with land use and its jurisdiction to deal with municipal bylaws was narrow, stating:

[38] The Act is not concerned with land use; it presupposes that the use of the land is properly agricultural. Nowhere in the Act is there any provision to change land use to agricultural where it is not otherwise permitted. The

jurisdiction of the Board to deal with municipal by-laws is narrow..

MacFarland, J.A. also concluded that the Board had no jurisdiction to declare the bylaw in question inoperative, and that the Board's jurisdiction was limited to regulatory portions of zoning bylaws [at para. 41 and 42]:

[41] What this application before the Board really sought was a ruling that would permit the appellants to carry on their farming operations on lands that are not zoned for farming. It had nothing to do with whether their practice was a "normal farm practice" for the purpose of the non-application of the zoning by-law. In my view, the Board has no jurisdiction to make such an Order and the Act has no application in these circumstances. As the Vice Chair (now Chair) of the Board noted in his decision on the town's preliminary motion on jurisdiction:

Although this Board has made a number of decisions giving relief to farmers under Section 6 of the Act with respect to the regulatory portions of zoning by-laws, I am not aware of any case before this Board where relief has been granted in relation to the use provisions of a zoning by-law.

[42] That is precisely the difference. The Board may have power to order that some restrictive provision of a zoning by-law does not apply so as to restrict a normal farm practice which is carried on as part of an agricultural operation, but it has no jurisdiction to grant relief from the use provisions of a zoning by-law.

And at para. 46:

[46] .The Act does not permit circumvention of legitimate municipal planning regarding the land use designations of various lands.

**** CREDITS ****

This NetLetter is prepared by Brian P. Kalie, Q.C. of Miller Thomson LLP, Edmonton, Alberta.

For more information about the LexisNexis® Quicklaw™ service,
call 1-800-387-0899 or email service@lexisnexis.ca.

For more information about LexisNexis® products and services, visit www.lexisnexis.ca.

Design and compilation © 2011 LexisNexis Canada Inc. All rights reserved. Unless otherwise stated, copyright in the content rests with the author(s). LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under licence. Quicklaw and NetLetter are trademarks of LexisNexis Canada Inc. Other products or services may be trademarks or registered trademarks of their respective companies. Use of this NetLetter is subject to the LexisNexis Canada Inc. Terms and Conditions of Data File Usage.

