

1 of 2 DOCUMENTS

Case Name:

R. v. Ryan-Lee Investments Inc.

**IN THE MATTER OF an appeal under clause 116(2)(a) of
the Provincial Offences Act, R.S.O. 1990, c. P.33, as
amended
Between
The Corporation of the Town of Oakville, appellant,
and
Ryan-Lee Investments Incorporated, respondent**

[2005] O.J. No. 3560

8 M.P.L.R. (4th) 301

67 W.C.B. (2d) 627

2005 CarswellOnt 2075

Docket: 8601/01

Ontario Court of Justice

F.L. Forsyth J.

Heard: January 9, April 8, November 1, 2004,

January 24 and April 15, 2005.

Judgment: May 16, 2005.

(78 paras.)

!!CR536 !!CR372 !!CR454 !!MU122 !!MU131 !!MU182 !!MU169 !!MU186

Criminal law -- Regulatory offences -- Strict liability -- Ambiguity in interpretation of exempting provisions of land use bylaw led to upholding of acquittal of accused on charge of infraction.

Criminal law -- Evidence -- Burden and standard of proof -- Standard of proof -- Beyond reasonable doubt -- Ambiguity in interpretation of exempting provisions of land use bylaw led to upholding of acquittal of accused on charge of infraction.

Criminal law -- Appeals -- Ambiguity in interpretation of exempting provisions of land use bylaw led to upholding

acquittal of accused on charge of infraction.

Municipal law -- Bylaws -- Interpretation -- Particular subject matter -- Zoning -- Planning -- Zoning bylaws -- Change of use -- Exemptions -- Non-conforming use -- Interpretation -- Ambiguity in interpretation of exempting provisions of land use bylaw led to upholding of acquittal of accused on charge of infraction.

Appeal by Crown from acquittal of accused, Ryan-Lee Investments, on charge pursuant to Provincial Offences Act of using land in an industrial zone for purpose not permitted, namely growing crops contrary to Town of Oakville By-law 1984-63, despite fact land in question used for agricultural purposes at time ceded to Town's municipal predecessor -- Justice of the Peace found wording of s. 11(2) of By-law led to ambiguity in interpretation of exemptions provided by section for land use -- As a result, he could not conclude whether or not s. 11(2) required pre-existing non-conforming use of land to be continuous from unspecified date -- Also found absence of fixed date before or after which exemptions stated to apply interfered with proper judicial interpretation of By-law in relation to circumstances of accused -- As a result, interpretational ambiguity resolved in favour of accused and charges dismissed -- Appeal dismissed -- By-law infraction was offence of strict liability and Crown bore burden of establishing violation beyond reasonable doubt -- Finding that wording of s. 11(2) led to ambiguity in attempt to interpret exempting provisions was conclusion of mixed fact and law demonstrating no probable and overriding error by Justice of the Peace -- Decision to then resolve ambiguity in favour of accused also proper.

Statutes, Regulations and Rules Cited:

Interpretation Act, s. 10

Land Titles Act,

Mississauga Zoning By-law, s. 7

Oakville By-law No. 1984-63, s. 9, s. 9(1), s. 11(1), s. 11(2)

Oakville By-law No. 1965-136, s. 13(c)

Oakville Maintenance By-law, s. 20(c)

Official Plan for Region of Halton, Part 6, s. A-12

Official Plan for Town of Oakville,

Ontario Rules of Civil Procedure,

Planning Act, s. 34(9), s. 34(9)(a)

Provincial Offences Act, s. 47(3), s. 121

Registry Act,

Counsel:

Jennifer L. Huctwith for Town of Oakville

Frank J. Sperduti for Respondent

F.L. FORSYTH J.:--

Nature of the Appeal

1 The respondent company, Ryan-Lee Investments Incorporated, was charged that on the 26th day of September, 2001, on the east side of the Eighth Line adjacent to Iroquois Shore Road, Town of Oakville did commit the offence of using land in an M2 industrial zone for a purpose not permitted; namely, the growing of crops contrary to the Town of Oakville By-law 1984-63 as amended, Section 9.1. The respondent company entered a plea of not guilty and was represented at trial and Mr. F. Sperduti appeared. The Town of Oakville was represented by Ms. J. Huctwith as prosecutor. Justice of the Peace, His Worship W.T. Phipps, conducted the trial on October 21, 2002, in Burlington Provincial Offences Court. The learned Justice of the Peace reserved his decision to January 9, 2003, in the Milton Provincial Offences Court.

2 On January 9, 2003, Justice of the Peace Phipps dismissed the charge against the respondent company and in so doing he found that there is an ambiguity in section 11(2) of the said by-law that impacted upon the ability of a court to interpret the plain meaning of the prohibiting subsection, section 9. As a result he found that that ambiguity in interpretation must be resolved in favour of the defendant company and therefore found the corporation not guilty. At page 4 of his Reasons for Judgment beginning at line 10 and following, the learned Justice of the Peace stated:

The By-law at section 9 prohibits the use of land for any purpose not allowed for the zone application to the zone applicable to the land. Exemptions under section 11(1) and 11(2) of the By-Law provide for the non-conforming use of land in certain cases. The prosecutor submits the court should apply section 10 of the Interpretation Act to the By-law and import the intention that the interpretation of the municipality would make the activity of the defendant corporation prohibited. The court finds it cannot give that broad interpretation given the ambiguity that exists in interpreting the exemptions provided at section 11. The problem with the wording of the By-law could easily be rectified by amending the By-law to require that either the land use to be continuous, or to fix a date before or after which the exemptions could apply. This would certainly assist in the interpretation of the By-law and remove the ambiguity of whether the exemption may be applied to a given set of facts. The evidence of Mr. Walker, who is a municipal planner with vast experience, appears to indicate that this course of action has been taken by a number of other municipalities in southern Ontario. As any ambiguity in interpretation must be resolved in favour of the defendant, the corporation is found not guilty and the charge against them is dismissed.

3 The Town of Oakville appealed that decision and prepared a factum and application record in accordance with the rules of court and filed them. The respondent company prepared a factum and application record and filed them in accordance with the rules of court. Each party provided the Appeal court with a booklet of authorities in support of its position. On the appeal the Town of Oakville was again represented by Ms. Huctwith and the respondent company by Mr. Sperduti.

4 It was an established fact at trial and is not contested on this appeal that the respondent was using the land in question for the growing of crops on the day in question to which the charge relates. The growing of crops, as of September 26, 2001, was not a permitted purpose in M2 industrially zoned land within the Town of Oakville's boundaries pursuant to the latter zoning by-laws. At trial the prosecution had alleged in the charge itself that the land being used by Ryan-Lee Investments Incorporated was within an M2 industrial zone and that they were using that land for the purpose of growing crops which was alleged not to be a permitted use.

5 The appellant crystallized its grounds of appeal being argued in paragraphs 3 through 5 of its factum. They are as follows:

3. The appeal turns on whether an exception to the general provisions, found in Section 11(2) of the Zoning by-law ("Section 11(2)") is applicable to this matter. Section 11(2) provides as follows:

Nothing in By-law 1984-63 including specifically Section 9(1) prohibits the use of the balance of a lot for a purpose for which the lot was legally used at the time when a part thereof was conveyed to the Corporation of the Town of Oakville or the Regional Municipality of Halton, provided that the balance of the lot is such that the lot frontage, lot area and all yards are at least 80% of those which are required by the said By-law 1984-63.

4. The Respondent claims that Section 11(2) entitles the Respondent to use the subject property for the purpose of growing crops. This entitlement is based on a use of the property for agricultural purposes at a time prior to the dedication of a road widening to the former Township of Trafalgar in 1955 as part of the registration of the plan of subdivision creating the subject property.
5. It is the position of the appellant that the Justice of the Peace erred in accepting the Respondents interpretation of Section 11(2) and in applying Section 11(2) to the facts of this matter. In particular, it is the position of the Appellant, that:

- (a) Section 11(2) only applies to properties that constitute the "Balance of a lot" rather than properties that constitute a "lot" conforming with the provisions of the Zoning By-law.
- (b) The defendant's property is not the "balance" of a lot but rather the whole of a lot on a plan of subdivision and an entire "lot" under the provisions of the Zoning By-law.
- (c) The land transferred to the former Township of Trafalgar was never part of Lot 2 Plan 608, being the subject property. The larger subdivided parcel was never a "lot" under the Zoning By-law.
- (d) Section 11(2) cannot be applied retroactively to transactions that occurred prior to the passing of both the Zoning By-law and the predecessor to the Zoning By-law and the creation of the two municipal corporations referred to under Section 11(2).
- (e) In any event, the defendant has failed to establish a use of the lands for the purpose of growing crops, sufficient to trigger the application of Section 11(2).

6 Excerpts of by-law 1984-63, including section 9 and section 11 were filed as Exhibit 11 at trial. Section 9(1), of the charging section in this case reads as follows:

PROHIBITIONS

No person shall use any land or erect or use any building or structure within a zone shown in part 7 except for a purpose permitted, and in accordance with the regulations provided, by this by-law for the zone in which it is located.

- 11(1) and (2) state as follows:

NON-CONFORMING USES

Nothing in by-law 1984-63 including specifically section 9(2) prohibits the conveyance of any land to the Corporation of the Town of Oakville or the Regional Municipality of Halton, provided that the conveyance does not result in a lot frontage, lot area or any yard being reduced so that it is less than 80 per cent of that which is required by the said by-law 1984-63.

Nothing in by-law 1984-63 including specifically section 9(1) prohibits the use of the balance of a lot for a purpose for which the lot was legally used at the time when a part thereof was conveyed to the Corporation of the Town of Oakville or the Regional Municipality of Halton, provided that the balance of the lot is such that the lot frontage, lot area and all yards are at least 80 per cent of those which are required by the said by-law 1984-63.

7 The learned Justice of the Peace in his Reasons for Judgment stated that he had read the cases and statutes that were provided and cited by both counsel before arriving at his decision. He also stated that he had read the Official Plans of both the Town of Oakville and the Regional Municipality of Halton. He heard evidence from Fred Somerset, a by-law officer with the Town of Oakville who had been employed in that capacity for 14 years as of October 21, 2002, the date of the trial. Mr. Somerset's evidence was the entire case for the Crown at trial.

8 Justice of the Peace Phipps found as a fact from the evidence of Mr. Somerset that the land in question in this charge was being used as of September 26, 2001 to grow crops. There was no issue in the trial with respect to the growing of crops being a use that is not listed as one of the permitted uses for an M2 industrial zone in the Town of Oakville as of September 26, 2001, pursuant to by-law number 1984-63 as amended. The learned Justice of the Peace also stated that he was concluding from documentary exhibits filed under the Registry Act and the Land Titles Act that the property in question had been transferred to Ryan-Lee Investments Incorporated on December 11th, 1980, and had been in their continuous possession since that date to the present time. He also stated that in coming to his conclusion that the land was being used to grow crops, he was assisted by photographic Exhibits numbers 6 and 8, in addition to the evidence of Mr. Somerset.

9 He further stated that Exhibit number 12, an aerial photo of the subject land and surrounding area which was taken on September 24th, 1954, and referring to that photograph as the best evidence in the trial that his only conclusion could be that the land in question was used for an agricultural purpose at the time when that photograph was taken on September 24th, 1954. By implication he seemed to be saying that the growing of crops on September 26, 2001 would comply with the definition of agricultural purpose. At page 3 of his Reasons for Judgment on January 9, 2003, he said:

Even looking at the regional plan of today agricultural activity is given a rather broad definition as found in part 6, section 4 of the Region of Halton Official Plan.

10 The learned Justice of the Peace then addressed what he stated to be the main issue at trial when he said on page 3 beginning at line 19,

The main issue in the matter at bar is the statutory interpretation to be given to section 9(1) and section 11(2) of by-law 1984-63.

11 The prosecutor had submitted that the court should apply a broad interpretation of the by-law as provided for in section 10 of the Ontario Interpretation Act. He then set out section 10 of that Act:

Every Act shall be deemed to be remediable whether its immediate purport is to direct the doing of anything the legislature deems for the public good, or to prevent or punish the doing of anything that it deems to be contrary to the public good and shall accordingly receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of

the Act according to its true intent, meaning, and spirit.

12 J.P. Phipps then turned his mind to what he referred to as the exemption sections 11(1) and 11(2) of by-law 1984-63 pointing out that they provided for the non-conforming use of land "in certain cases". He then rejected the Town of Oakville's position that he should apply section 10 of the Interpretation Act, *supra*, to the by-law, including section 11 and "import the intention that the interpretation of the by-law would make the activity of the defendant corporation prohibited." (See page 4 Reasons for Judgment)

13 In his conclusion J.P. Phipps stated beginning at line 21 on page 4 of his reasons:

The court finds it cannot give that broad interpretation given the ambiguity that exists in interpreting the exemptions provided at section 11. The problem with the wording of the by-law could easily be rectified by amending the by-law to require that either the land use to be continuous, or to fix a date before or after which the exemptions could apply. This would certainly assist in the interpretation of the by-law and remove the ambiguity of whether the exemption may be applied to a given set of facts. The evidence of Mr. Walker, who is a municipal planner with vast experience, appears to indicate that this course of action has been taken by a number of other municipalities in Southern Ontario. "As any ambiguity in interpretation must be resolved in favour of the defendant, the corporation is found not guilty and the charge against them is dismissed." (emphasis added)

14 J.P. Phipps did not deal with any issue with respect to the definition of a "balance of a lot" within section 11(2) as that term is expressed in that subsection of the by-law. Furthermore, he did not expressly deal with the issue of the timing of the conveyance of the land in question with respect to whether or not it was actually conveyed to the Corporation of the Town of Oakville or the Regional Municipality of Halton, or whether it was even important that that be proven. Quite clearly, the appellant has made this an issue on this appeal. Section 5(d) of the appellant's *factum* states:

Section 11(2) cannot be applied retroactively to transactions that occurred prior to the passing of both the zoning by-law and the predecessor to the zoning by-law and the creation of two municipal corporations referred to under section 11(2).

15 Ms. Huctwith argues that the land in question was conveyed to the Township of Trafalgar as an initial conveyance in 1955 before either the Town of Oakville or the Regional Municipality of Halton came into existence. A witness was called by the defence (respondent) at trial to discuss this issue amongst other things. His name was Peter Walker and he testified as a professional planner. He was qualified as an expert by the learned Justice of the Peace and allowed to give expert opinion in the evidence in the areas of land use planning, interpretation and understanding of by-laws, and interpretation and understanding of aerial photographs. Ms. Huctwith at trial had no questions whatsoever with respect to Mr. Walker's qualifications. The only references made by Justice of the Peace Phipps to Mr. Walker's evidence, and the *viva voce* evidence of Mr. Somersett are as above and set out from his Reasons for Judgment.

16 I will now set out some of the areas of evidence covered by Mr. Somersett in the case for the Town of Oakville trial which I feel are important from a standpoint of the factual underpinnings or are important with respect to any factual and legal conclusions that may be seen to have been drawn by Justice of the Peace Phipps. It is clear to this court that the learned Justice of the Peace felt that the ambiguity to which he was referring in section 11(2) was the fact that it did not include a requirement for continuous use of land to qualify as a non-conforming use. He also found that in the absence of such a requirement that there should be a specified date in section 11(2) before or after which the exemptions set out in that subsection would apply. Based on those ambiguities he came to his conclusion that the corporation should be found not guilty presumably because by resolving the ambiguity in favour of the defendant the company would receive the benefit of the exemption in section 11(2) on the factual findings by Justice of the Peace Phipps that the land in question was being used for an agricultural purpose, namely the growing of crops on September 26, 2001, and which

use was what it was being used for at the time of the initial conveyance of the land which contained this particular section of land to the Township of Trafalgar in 1955 and which eventually worked its way through to the respondent company in 1980 by way of conveyance.

Summary of the Trial Evidence

Fred Somerset Evidence In-Chief

17 He was the by-law officer who laid the charge. He identified the property in question from a map which became Exhibit number 1 as being located on the east side of the Eighth Line adjacent to Iroquois Shore Road in the Town of Oakville. Before laying the charge he did title searches on the property and determined that the land was owned by Ryan-Lee Investments and it was registered as P.CL.23 Section H608 Lot 2, Part Lot 608, Oakville. Through him Exhibit number 2, a certified copy of the deed was produced and entered and Exhibit number 3, a certified copy of the land registry abstract was entered. Through him a survey from the Public Works Department showing the lot part 2, part number 608, plan 608 was entered, and he identified that description as being the subject property of these proceedings. He did a corporate search to determine that Ryan-Lee Investments was the corporate owner of the property in question at the time in question and that corporate profile report was produced and entered as Exhibit number 5. None of these matters was the subject of a dispute at the trial. He had been asked by the Town of Oakville Tax Department to investigate this property which they understood was growing grain or wheat or crops on August 15, 2001. He then visited the site and took a sample of what was growing on the property. He took a photograph of that sample and it was entered as Exhibit number 6. At some point in the trial it was agreed that the sample was part of a crop of oats. Next he contacted Mr. Ryan Polata (ph) who identified himself as being the owner of the property and told him that the growing of crops on that property was not permitted and subsequent to that phone call he wrote a letter informing him of the same thing. The letter became Exhibit number 7. After receiving no response he laid this charge on September 26, 2001.

18 After laying the charge he took photographs of the property on September 26 to show what was growing on it. Exhibit number 8 became collectively those photographs and also photographs of a zoning by-law map. It was at that point that he identified the crop as being oats.

19 He then identified an excerpt from the Town of Oakville's zoning by-law in question identifying the property in question as being an M2 industrial classification. The excerpt was in the form of a map which became Exhibit number 9. He said that the permitted uses on that property at the time were light industrial buildings and manufacturing within enclosed buildings. He then identified a further section number 68 which listed permitted uses such as banks, service shops, bakeries, pubs, link book housing and warehousing and some other unrelated uses in section 69. That document became Exhibit number 10 identified as the industrial zones by-law.

20 He then identified the chart what he referred to as the prohibition section of the By-law 1984-63. He paraphrased the prohibition section which was 9(1) as prescribing any use on the property in question other than the permitted uses to which he had already referred. The by-law became Exhibit number 11.

21 Mr. Somerset then said that during the 14 years that he had been working as a by-law enforcement officer he had an opportunity to make observations of this property from time to time. He described it as being "pretty well vacant land with brush and weeds and what not on it." I think in 1999 for approximately a year it was used by the Ford Motor Company to store vans on the property. (See Somerset trial evidence transcript October 21, 2002, page 12, line 26 and following). He did not recall any other use that he had observed and he specifically said he had not observed seeing any farming on this property, nor any growing of crops.

Cross-Examination

22 Mr. Sperduti began by referring Mr. Somerset to section 11(2) of the Exhibit 11 by-law. Mr. Somerset read into the record a paraphrase of that section:

Nothing in this by-law 1984-63 including specifically 9(1) prohibits the use of the balance of the lot for the purpose for which the lot was legally used at the time when a part thereof was conveyed to the Corporation of the Town of Oakville or Regional Municipality of Halton provided that the balance of the lot is such that the lot frontage, lot area and all yards are to meet 80 per cent of those which are required by the said By-law 1984-63." (See Somersett evidence transcript October 21, 2002, page 13-14).

23 He then agreed that if an owner of land was able to fit within that exception (emphasis added) that no offence would have been committed.

24 When asked if he had considered section 11(2) before laying this charge Mr. Somersett said he had but he interpreted it as referring to buildings and setbacks for those buildings and that this property was a vacant property with no building setbacks, therefore, he seemed to be testifying that he did not feel section 11(2) would provide an exception to the respondent. He agreed of course that the plain words in section 11(2) provided that there had been, as he put it, a "portion of the land transferred to the Town or Region in the past with a legal use thereon and that that transfer had been this property in question that that would seem to be covered by the 11(2) exception section. However, he said he was not aware of any such situation and he finally agreed with Mr. Sperduti that his interpretation of this section was as it applied to a situation where a building was being built but those words were not included within the section.

25 Mr. Sperduti then asked him if he would agree that if the property in question was being used for a farm as a time when it, as a portion of a larger property, was transferred to the municipality then that would be considered a legal use based on section 11(2). Mr. Somersett agreed but said that the requirement would be continuous uninterrupted use for farming "right up to the date that the Town took the setback." However, once again he had to admit that there were no words in section 11(2) which would suggest that the use had to be continuous and uninterrupted. Finally he agreed with Mr. Sperduti that regardless of whether the use was continuous or not if farming was the use at the time when a portion of the property was transferred to the municipality then that use would continue to be legal regardless of whether or not it was continuous. He therefore appeared to be retracting his original position that the use would have to be continuous.

26 Mr. Sperduti then referred Mr. Somersett to Exhibit 4, the plan of subdivision. Somersett noted that the plan had been registered and approved under the Planning Act on June 8, 1955. Mr. Sperduti drew his attention to a description on Exhibit 4 that addressed a 16-foot road widening of North Drive and a ten-foot portion of the Eighth Line and one-foot reserves. Mr. Somersett agreed that those portions represented road widenings that were dedicated as public roads. Somersett agreed that the road allowance referred to as the Eighth Line was a widening which abuts lot 2, the subject property in this case. He further agreed that the Exhibit 4 is evidence of a dedication of a portion of lot 2 to the Municipality for the widening of the Eighth Line. Mr. Somersett next agreed that if that property was being legally farmed in 1955, when a portion of it was transferred to the municipality, that Section 11(2) of the subject by-law would "legalize that use".

27 Mr. Sperduti then produced for Mr. Somersett an aerial photograph taken September 24, 1954. It was marked as Exhibit 12 on the trial. Somersett identified part 2 of the lot in question on the photograph. Through a series of questions Mr. Sperduti succeeded in getting Mr. Somersett to agree that the land in question in this case appeared in the Exhibit 12 photograph to be located in a rural area and that it was "likely that the property was in some kind of farm use, be it pasture or active crop farming or some such thing." He agreed that the land did appear to be cleared in the photograph, but he could not be certain as to whether or not there was a barn depicted. Mr. Somersett conceded that he did not have any specific information to say that the property in question was not a farm in 1955 and he admitted that he did not know specifically whether or not the land was being farmed during the years of 1995, '96, '97 and part of 1998. He ventured to say that he did not think that it would have been a farm during those years but he conceded that he did not inspect the land closely. He added that when you drive by land and you see brush, weeds, trees, et cetera, then you would not think that this was land laid out by a farmer for the growing of crops. Mr. Sperduti informed Mr. Somersett that he intended to lead evidence that the land was actually being farmed during those years and in response to that Mr. Somersett agreed that he was just guessing when he said that he did not think it was being used as a farm.

28 Mr. Sperduti then referred Somerset to the Town of Oakville's Maintenance By-law, otherwise known as the Property Standards By-law. Somerset indicated he was familiar with that; it was part of his responsibility to enforce it. Referred to section 20(c) which he agreed encourages and requires a property not to be left uncovered and it stipulates the type of cover that is acceptable such as seed, sod or agricultural crop, he agreed that that was a requirement for landowners in Oakville. However, he denied that if the respondent had left its property to become overgrown or unsightly that they would have been automatically charged under that Act. He said it would only be if a complaint was raised and brought to their attention and requiring an inspection. He agreed that there had never been any such complaint to his knowledge made against the respondent company before he laid this charge.

29 After Mr. Somerset's evidence, Ms. Huctwith indicated that she had no further witnesses to call and that was the case for the Town of Oakville.

30 Mr. Sperduti called Antoinette Benedetto as the first witness for the defendant respondent. She testified that she was a director of the respondent company and that she was personally aware of the use that was being made of the subject land through the mid-1990's, specifically 1995 through 1998. She said it was used as a farm and that the company rented it out. In cross-examination she agreed with Ms. Huctwith that the first farm use that she was aware of for this property was this particular time period between 1995 and 1998.

31 The last witness called by the respondent was Peter Walker. He testified in-chief that he had been practising as a land use planner since 1966. He has a Masters of Science in Planning from the University of Toronto and an honours urban geography degree. He is also a fellow of the Canadian Institute of Planners and is a registered professional planner in the Province of Ontario. He had been practising for 35 years as of the time of the trial. He has done work with both the Town of Oakville and the Region of Halton and he said that he had worked in "the earlier areas" and by that he seemed to mean the areas that existed before the formation of the Region of Halton in 1973 that incorporated Oakville.

As part of his work, he examines aerial photographs. He said that he uses aerial photographs to give him an idea of what the land use would have been at a certain point in time. He said that in this particular case he was investigating the use of this particular land in question in 1955 and he managed to locate a 1954 aerial photo which he used to arrive at a conclusion that he was going to provide in evidence. I should note at this point that Mr. Somerset admitted that he was not trained to examine aerial photographs.

Mr. Walker stated that he had been qualified as an expert witness in front of the Ontario Municipal Board, the Land Compensation Board, and at various levels of court in the Province of Ontario. He estimated that he had been qualified as an expert witness in one or more of those forums approximately three or four hundred times. Mr. Sperduti asked Justice of the Peace Phipps to qualify Mr. Walker in the areas of land use planning, interpretation and understanding of by-laws and interpretation and understanding of aerial photographs. Ms. Huctwith had no questions whatsoever with respect to Mr. Walker's qualifications and the request of Mr. Sperduti to have him qualified as an expert witness in those areas. J.P. Phipps then ruled that Mr. Walker would be qualified as an expert witness in those areas requested and indicated that he had also read Mr. Walker's curriculum vitae which had been filed with the application.

Mr. Walker said that he had studied By-law 1984-63, the charging by-law in this case and he was familiar with it. His attention was drawn to section 11(2). He said that he had examined the wording of that section with the wording of similar provisions in the by-laws of other municipalities. His opinion was that section 11(2) of the subject by-law is "quite unique". Exhibit 13 was introduced through Mr. Walker which is a package of extracts from other similar by-laws from other municipalities. He made reference to five such by-laws and pointed out that all of them contained a requirement that a property had to have a continuous use for the purpose that it was used in order to qualify as a non-conforming use. He said that section 11(2) of the Oakville by-law has a caption which indicates it also is intended to describe a non-conforming use. Similar captions are contained in virtually all of the zoning by-laws dealing with such a subject, he said. By comparison he pointed out that the Oakville by-law section 11(2) is completely silent with respect

to the concept of continuous use as a requirement for a property to be qualified as a non-conforming use. In addition, he referred to the similar by-law from the City of Mississauga, section 7 and pointed out that Mississauga actually freezes the date on April 10, 1953 so that any use of the land as of that date was permitted as long as it was continued. It would then be considered a legal non-conforming use. As a result of this analysis Mr. Walker testified that in his opinion section 11(2) of the subject Oakville by-law legalizes the use in his professional planners' opinion, what the lot was being used for on the date when the transfer of property was given to the Municipality without the requirement of continuous uninterrupted use.

Mr. Sperduti then referred Mr. Walker to Exhibit 4 known as the plan of subdivision number 608 and Mr. Walker said that he had examined that exhibit. He stated that in his opinion Exhibit 4 provides evidence of a "dedication" (Emphasis added) of a portion of lot 2 for the road widening of the Eighth Line in Oakville. He described it as a ten-foot widening abutting the Eighth Line for a widening of Eighth Line. He said that it did take "a piece" out of part 2 and that in fact all of the Eighth Line frontage of lot 2, or part 2, was being taken for a ten-foot widening. He then gave his professional opinion that the effect of that ten-foot widening, which was in 1955, was to bring the respondent within the terms of the exception provided and required by section 11(2) of the subject by-law for a legal non-conforming use of property. Mr. Walker then added that he had examined a by-law that preceded the subject by-law and found that it had the same provisions in it as does the subject by-law and the wording was effectively unchanged with respect to the requirement for a legal non-conforming use. He emphasized that the municipality, and it would appear that he was referring to the Town of Oakville at that time, had not had an opportunity to change the wording if they were concerned but they had not made such a change. He believed that the date of the by-law in question was 1955 and he referred to it as the original by-law and pointed out that it had been updated since then because the current by-law refers to the Region of Halton which did not come into existence he said until 1973. That previous by-law number was 1965-136. Mr. Sperduti produced the by-law and referred Mr. Walker to section 13(c) which he identified as having the same wording as the 1984 by-law with respect to the establishment of a legal non-conforming use. He again pointed out that there was no requirement for a continuing use in that by-law either. The by-law 1965-136 then became Exhibit number 15 on the trial.

32 Mr. Sperduti then asked Mr. Walker if he had had an opportunity to examine the 1954 aerial photograph that had been marked as an exhibit. He said that he had and in fact he had been the person who obtained it from the Ministry of Natural Resources. He then identified the portion on the photo, which in his opinion was part 2, containing the land in question. He then gave his professional opinion that part 2 was a farm in 1954. He provided the foundation for his opinion by referring to the surrounding lands and the barn and the building which he definitely felt was a barn depicted on part 2 in the photo and all of the other indications which he felt substantiated his opinion that it was an established farm in 1954.

33 Mr. Walker was then referred to the date of June 1955, the date when a portion of part 2 was transferred to the Municipality. He was asked what in his opinion was likely happening on the property in June of 1955 based on the September 24, 1954 aerial photograph. He said that in his opinion the property was being planned for industrial purposes but that that would not change the use of the land until June of 1955. After the registration of the plan of subdivision in 1955, of course, he said that the land could be developed if desired. He was asked if in his opinion the farming use would be legal on that land in 1955. He said that in the Township of Trafalgar with all of the farmland surrounding it if there was a zoning by-law agriculture would be a permitted use. If there was no zoning by-law then agriculture was an existing use and would be what he would consider a legal use. He said that even if there had been a zoning law that the non-conforming use provision of such a by-law would likely have permitted the agricultural use at that time. Mr. Walker then said that in his opinion it did not matter if the property was used for some other purpose between 1955 and 2001 for the purposes of section 11(2) of the by-law because of the unique wording of that particular non-conforming use section. He also gave the opinion that cropping was not an incompatible use by comparison with other uses in the area of the land in 2001.

34 Mr. Sperduti then produced an extract of the official plan for the Region of Halton with respect to its provisions for interim farming uses in urban areas. That document became Exhibit number 16. He pointed to section A-12 which

states:

Within the urban areas agricultural uses are encouraged and permitted as interim uses until the lands are required for the de-phasing of urban development.

He gave as a professional opinion that it was clear from that section that within the urban areas agricultural uses are both encouraged and permitted as interim uses until the lands are required. He then referred to part 6 on page 86 which contains a definition of agricultural or agricultural industry and farming. He said that those definitions included a wide range from husbandry to actual field crops and to pasturage. He next referred to page 78 of that Act and explained that it provided for the local official plan to be more restrictive than the regional plan as long as it includes a statement to that effect. A statement has to indicate the nature of how the local plan is not conforming to the wording of the regional official plan and also has to contain a statement stating that the more restrictive provisions will prevail over the less restrictive provisions of the regional plan. Excerpts from the Town of Oakville's official plan were then introduced as Exhibit number 17 through Mr. Walker. He explained that as of April 1st, 1960, the Town of Oakville, as it then was constituted and the Township of Trafalgar as it had been constituted before that date became one planning area. Mr. Walker stated that his examination of the Town of Oakville official plan revealed that nowhere in it is there a statement that deals with the two required statements by the Regional plan if the Town did not intend to follow the Regional plan's provisions. He concluded by saying, it is very clear that where the policies of the Regional plan conflict with the local town's official plan that the regional plan shall prevail. Mr. Walker concluded his testimony in-chief by stating that if the zoning by-law in question is somehow being read by the prosecution to prohibit agricultural uses as an interim use within the urban area without a statement to the effect that the Town is intending to go "along that route" then that by-law would not be a proper implementation of the Regional Official Plan.

35 In cross-examination by Ms. Huctwith, she referred Mr. Walker to section 34(9)(a) of the Planning Act. He stated it for the record. No by-law passed under this section applies:

- (a) To prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law so long as it continues to be used for that purpose.

36 He agreed that that wording is very similar to the wording of the continuous non-conforming use sections of the by-laws of the other municipalities to which he had referred other than section 11(2) of the Town of Oakville's by-law.

37 Ms. Huctwith then asked Mr. Walker whether in his opinion it was necessary to protect the legal non-conforming use with specific wording for such in any by-law when section 34(9)(a) of the Planning Act seems to do so anyway. He said that he thought in general that by-laws should reflect what the Planning Act allows them to reflect and in this case the Oakville by-law did not do that. He also said that it does not include a section that says a use that is permitted on the day before the passing of the by-law is still permitted as long as it continues to be so used. He pointed out that section 11(2) goes back further in time to an unspecified time when by-laws were perhaps not necessarily in existence which is a totally different approach to a non-conforming use. Ms. Huctwith then asked Mr. Walker if he thought that his interpretation of section 11(2) makes any sense from a planning perspective and he said that to him it did. He said that it was just another way of ensuring an additional level of compensation or amelioration for the actual taking of the land by the municipality. Ms. Huctwith suggested to him that if his interpretation were to "hold true" then if a person was using the land for some purpose whatever at one point in time and then years from then no matter what purposes or uses had ever occurred in the meantime then that individual would be permitted to use the land for a similar purpose again to that for which it had been used as far back as 1955, using this case as an example. Mr. Walker responded by saying that in his opinion that is exactly what the words of section 11(2) would allow. Ms. Huctwith, seemingly becoming argumentative with Mr. Walker, asked him again if that made any sense from a planning perspective, and Mr. Walker responded that presumably the planning processes would provide for uses which were as he put it "doable or useable". However, if they did not then this would be a fallback position. He opined that perhaps it would be a debateable point in some cases, but he stated that he saw no reason why cropping a piece of land in what is otherwise an industrial

subdivision in the year 2000 is inappropriate given the fact that it is not yet being used for the purpose for which the planning took place "many, many years ago." He also pointed out that that cropping use was not incompatible with the remainder of the uses surrounding the land. He pointed out that he had been on this particular site and also on adjacent lands and viewed them himself and found there had been no incompatibility of a cropping use on the land in question with the surrounding uses.

38 Ms. Huctwith then put to Mr. Walker, "would you agree with me that if your interpretation of this section holds true for farming it would have to hold true for other uses as well?" Mr. Walker responded, "yes, in other circumstances. I would have expected to see similar wording to other by-laws. The Town of Oakville apparently has chosen not to do that on two different occasions with two different by-laws. They have kept this wording in place. And I heard the interpretation of a chap who was in the witness box before me and that interpretation is what Mississauga's building inspector would be able to use but I don't believe that's a fair interpretation of the wording of this by-law." Clearly, Mr. Walker at this point was disagreeing with the opinion given by Mr. Somersett in the case for the Crown about his interpretation of the applicability of section 11(2) of the subject by-law to the property in question of the respondents.

39 Ms. Huctwith then engaged Mr. Walker in another dialectical exercise by asking him if from a planning perspective would it make sense to permit somebody to move back into a residence in an industrial area after the town had gone through the process of zoning it for industrial use. His answer was that he didn't know whether it made good sense or not, but it's clearly permitted by this by-law. Again, Ms. Huctwith asked him if this appeared to be good planning, and Mr. Walker responded that in some cases it would be. He said, "in this particular case I think it is good planning to let a vacant piece of land for which the asphalt on which the trucks were stored has been taken off, the weeds have been cut down, the crops have been put in, and taken off and controlled that way, so, yes, it does make sense. In other cases it might not." The next question was, "In other cases it might not but if the section says that it has to hold true for every case, is that not correct, that was your answer before?" His answer was, "Where land has been taken and dedicated to the municipality the words say that." (See October 21, 2002 transcript of trial page 64) Mr. Walker agreed that when reading a zoning by-law you should read the by-law as a whole to try and make sure that you have the proper context to a section.

40 Ms. Huctwith then referred Mr. Walker to section (a)(12) of the Region's plan which he had discussed in-chief. He agreed that the wording of that section stipulated that the plan encourages or permits agricultural uses as interim uses only until the lands are required for the orderly phasing of urban development. He added that he believed that the 1955 subdivision was perhaps the first layer of phasing that was put onto this land in question as it was actually a proposed subdivision. He said that it was part of a planning for the use of those lands for urban development but not necessarily for the use of those lands until such time as that development occurred. Ms. Huctwith then referred Mr. Walker to subsection 30 of the Town of Oakville by-law which defines a "lot". She then said to Mr. Walker that she was trying to determine what the lot was for the particular piece of land in question since the word "lot" was used in section 11(2). She then asked Mr. Walker if his interpretation of section 11(2) was to be accepted as permitting a person to continue to use the property (and then she didn't finish the thought but I presume that she meant for cropping or agricultural purposes) and she wanted him to tell her what the lot was; was it all of lot 2? His answer was that he thought that was exactly the question before the trial court. She then engaged in a cross-examination suggesting to him that none of lot 2 had been taken from the original parcel of land back in 1955. Mr. Walker took the position that Ms. Huctwith was wrong. He agreed that the property was all one property at the time of the first plan of subdivision. He agreed with her that the strip of land that was shown along the Eighth Line on the left-hand side of one of the photographic exhibits that was conveyed to the Town of Oakville was a road widening according to the document. She asked him if that particular strip of land was part of the whole parcel of land. He responded that it was hard for him to tell. He said it depended upon when the conveyance took place. If it took place at the time of registration then it may have come off the lot but he said he did not know. He explained that he did not have in his possession the draft for the approved subdivision that later became registered. Ms. Huctwith asked him if that meant that he did not know that any of lot 2 was conveyed to the Town or whether or not he could simply not tell from that exhibit. Mr. Walker answered that he could not tell from that exhibit particularly one way or the other but he believed that that strip did come off the land which is part 2 or lot 2.

He explained that it was dedicated to the municipality as part of a registration of a plan. He said he did not know the exact mechanics of it. He referred Ms. Huctwith to section 11(2) of the by-law again and said that he wanted to do that in order to answer her question. He then said, "if you look at 11(2) you'll see that this has to be operative in the same way as you see graphically here this refers to some piece of land from which the dedication has been taken. I think it's absolutely on all fours what you see graphically in front of you it's part of, among other things, lot 2. This came off in the same way. This happens. It comes off a lot before this kicks in. So it happens all at the same time, so what you see graphically here I think is what is described in 11(2).

Question: Okay, lot 2 itself is described as a parcel of land within this plan of subdivision. The land refers to a strip here along Eighth Line which is something separate from lot 2. Would you agree with me with that?

Answer: It's described here as a separate parcel, you are correct about that.

Question: Okay. So a strip of land, would you agree with me that the strip of land is coming off the entire parcel but it's not necessarily coming off of lot 2?

Answer: It's coming off among others but it's part of, it's coming off part 2 or lot 2. I don't know what you are trying to get at here. It doesn't ... graphically you don't see a line going out through the ten-foot reserve that's part of lot 2 so I understand that that is what you are getting at, but if you read 11(2) the land has to be conveyed before the rights come to the parcel, according to 11(2), before you can use the land in a way that it was used before the conveyance was taken. So in my opinion, and I'm only talking from a planner's standpoint, I think that what you see here is exactly what 11(2) is illustrating, or trying to get permission for. So beyond that I can't answer your question anymore. (See October 21, 2002 trial transcript cross-examination of Peter Walker, Pages 74 to 76)

41 He then told Ms. Huctwith that that strip of property, the ten-foot widening, would be conveyed to the Town at the time of registration. She suggested that that would be "around 1955 or thereabouts". Mr. Walker responded by saying, "not around, the registration took place the dates are on this drawing. But I believe that's consistent with what you see in 11(2) it would all be happening at the same time. And the rights go with the land once the conveyance occurs." Ms. Huctwith then entered as Exhibit number 18 the excerpt of the Town of Oakville by-law in question with the definition of "lot". This concluded her cross-examination of Mr. Walker.

42 In re-examination Mr. Walker told Mr. Sperduti that the difference between the Mississauga by-law to which he had referred in chief and the Town of Oakville by-law with respect to a non-conforming use of land is that Mississauga required the use to continue and the Town of Oakville has not seen fit to include such a requirement. In addition, Mississauga happened to insert a point in time, a frozen point, so to speak, at 1953.

He then said that it was his opinion that part 2 shown on the exhibit subdivision plans, which is the subject of this charge, falls squarely within the provision of section 11(2) of the Town of Oakville's by-law, including the last portion dealing with lot areas.

43 Justice of the Peace Phipps, after Mr. Sperduti had completed his re-examination of Mr. Walker asked the following question at page 81 of the trial transcript beginning at line 22:

Sir your Interpretation of section 11(2) of the by-law, assuming that I accept that particular interpretation that you have been kind enough to give us this morning, would it be your interpretation sir to put this in a nutshell that given that the matter was agricultural back in 1955

when the land was sold and the right of way for the road given to the Township of Trafalgar, now the Town of Oakville, that as long as you don't re-zone it or build anything on it you sort of can use it for agricultural purposes almost indefinitely, given the wording of that by-law.

Mr. Walker answered:

That's right. The answer to that is sort of split, or twofold. The answer is as you have described it if nothing is built on it then I think you can continue to use this lot 2, or part 2, for agricultural use. If something had been put on it to speak to the crown counsel's position, and there was a desire to remove that then I believe you could go back to agriculture as a permitted use under 11(2). So you could actually reconstitute the agricultural use.

44 This completes my summary of the material evidence that was available to the learned Justice of the Peace at trial.

Findings of Fact by Justice of the Peace Phipps

- (1) The property registered in the information was transferred to Ryan-Lee Investments Incorporated on December 11, 1980 and has been in their possession since that date to the date of the trial. This appeared to be an undisputed fact.
- (2) That the land was being used to grow crops on September 26, 2001, the date alleged in the information. In order to arrive at this factual conclusion, the learned Justice of the Peace accepted the evidence of Mr. Somersett on that point and he drew a factual inference from Exhibits 6 and 8, the photographs of the land in question introduced in the case for the Crown.
- (3) That the land in question was being used for an agricultural purpose as of September 24, 1954, the date of the aerial photograph of the land in question introduced as defence Exhibit Number 12. He concluded that the aerial photograph, Exhibit Number 12, was the best evidence available on the trial on that point.

Rationale of Justice of the Peace Phipps in Dismissing the Charge at Trial

45 Justice of the Peace Phipps focused on what he called the main issue as being the statutory interpretation to be given to s. 9(1) and s. 11(2) of By-law 1984-63. He referred to the submission by Ms. Huctwith for the Town of Oakville that he should apply s. 10 of The Ontario Interpretation Act to those sections and, by giving it the broad interpretation that she submitted it should receive, that he should find that the Respondent company was in contravention of the by-law by growing crops on the subject land. He identified the provisions of s. 11(2) which he said provided for the non-conforming use of land in certain cases. He then concluded that he could not accept the prosecutor's argument because the wording of s. 11(2) leads to an ambiguity in the interpretation of the exemptions that are provided by that section for land use. Specifically, he implied that he could not conclude whether or not s. 11(2) required the pre-existing non-conforming use of the land to be continuous from an unspecified earlier date, and he found that the absence of a fixed date before or after which exemptions would be stated to apply also interfered with the proper judicial interpretation of the by-law to a given set of facts. He concluded that any ambiguity in interpretation must be resolved in favour of the defendant and, therefore, he found the corporation not guilty and dismissed the charge.

46 In what I would term obiter dicta, the learned Justice of the Peace also added that, in his opinion, the by-law could be rectified by amending it to specify that the non-conforming use must be continuous or to insert an operational date after which the exemptions will apply. He pointed out that he was assisted by the evidence of Mr. Walker in which he spoke about the by-laws of the other municipalities in Southern Ontario which had such specified wording in their non-conforming use sections.

47 The learned Justice of the Peace did not deal with the issue of whether or not the land in question in this case was the "balance of a lot" which was legally used for an agricultural purpose or cropping at the time when a part of it was

conveyed by dedication to the Township of Trafalgar in 1955, as Mr. Walker concluded in his evidence at trial. In fact, he did not deal with the question of whether or not an exception to the general provisions prohibiting the use of the land in question for the growing of crops could be found in s. 11(2) of the by-law in question. Nor did he deal with the issue raised on this appeal of whether or not s. 11(2) could be applied retroactively to transactions that occurred before the passing of both the present Town of Oakville zoning By-law 1984-63 and its predecessor and even before the creation of the two legal entities of the Town of Oakville and the Regional Municipality of Halton.

Position of the Appellant

48 As part of its argument on this appeal, the Appellant, in the preamble to paragraph five in its factum, states: "It is the position of the Appellant that the Justice of the Peace erred in accepting the Respondent's interpretation of s. 11(2) and in applying s. 11(2) to the facts of this matter". From a careful reading of the Justice of the Peace's Reasons for Judgment, I find that he never stated that he was accepting the Respondent's interpretation of s. 11(2) and applying it to the facts of this matter. Indeed, quite to the contrary, he found that because of the ambiguity in the wording of s. 11(2), he could not make a proper determination as to its application to the facts of this case. What he did do, was to reject the argument of the Appellant that a broad and liberal judicial interpretation of s. 10 of the Ontario Interpretation Act should have permitted him to find that the use of the land in question on the date in question by the Respondent was prohibited by s. 11(2) notwithstanding any apparent ambiguity in language of the section.

Further, in the Appellant's factum, at paragraph 5(d), Ms. Huctwith argues that s. 11(2) cannot be applied retroactively to transactions that occurred before the creation of the Town of Oakville and the Regional Municipality of Halton, i.e. a transaction in 1955 of the dedication of the strip of land to the Township of Trafalgar. In the Appellant's oral submissions on this appeal made on January 9, 2004, Ms. Huctwith argued that as a matter of statutory interpretation, since s. 11(2) refers to the Corporation of the Town of Oakville and the Regional Municipality of Halton, then those words must be interpreted strictly to be confined to those two municipalities. The following passage on page 25 of the transcript of January 9 crystallizes the Appellant's position on this point. Beginning on line nine:

MS. HUCTWITH: The Regional Municipality of Halton means the Regional Municipality of Halton and if there -- in order to rely on this section, you have to convey land to one of those entities, and it is that conveyance that triggers the application of the section. You're looking at the use for which the lot was legally used at the time where a part thereof was conveyed to one of those two municipalities.

THE COURT: When either or both of them existed?

MS. HUCTWITH: Both of them had to exist in order for you to convey land to them.

THE COURT: That's your argument?

MS. HUCTWITH: That's my argument.

49 In support of this argument, Ms. Huctwith argued that the Township of Trafalgar had ceased to exist before the subject by-law ever came into existence and, therefore, to apply s. 11(2) of the by-law to the dedication of land to the Township of Trafalgar in 1955 was "a stretch which does not agree with the plain words of that section".

The Respondent strongly objected to the Appellant's attempt to advance this argument on appeal. Mr. Sperduti argued that there is no evidence that the Township of Trafalgar had "ceased to exist". He argued that it was subsumed and changed names and that this was led through the evidence of Mr. Walker. He argued that Ms. Huctwith had not

challenged that evidence at trial and it, therefore, was not appropriate for her to advance the argument on appeal, and hide behind the proposition that it was really a point of law, not a question of fact. He strenuously argued that it is a question of fact as to whether or not there was a transfer of the strip of land to the then existing municipality of the Township of Trafalgar. It is an issue of fact that that Township's name was changed eventually to the Town of Oakville, and that once again this was all dealt with by Mr. Walker's testimony and was not challenged at trial. Ms. Huctwith responded by agreeing that she did not challenge the evidence of Mr. Walker on that point because she likes the evidence and agrees with the evidence. She simply argues that it is a matter of statutory interpretation, and as such, it is a question of law on which the learned Justice of the Peace erred in finding that s. 11(2) had any application to the transfer in 1955. Of course I have already pointed out that I do not believe that a strict reading of the reasons of Justice of the Peace Phipps would permit a conclusion that he had applied s. 11(2) at all. He simply terminated his analysis when he concluded that the section was so ambiguous that he could not apply it and that that ambiguity had to be decided in favour of the Respondent.

50 In paragraph 5(3) of the Appellant's factum, Ms. Huctwith sets out another discrete argument to the effect that the Respondent has failed to establish a use of the lands in question for the purpose of growing crops, sufficient to trigger the application of s. 11(2). In her oral submissions on January 9, 2004 Ms. Huctwith made it clear that she was arguing that if the Respondent was seeking to rely upon the exceptions or exemptions that are provided in s. 11(2) for what would amount to a non-conforming use of the land, then the use must be demonstrated in evidence to have been in place on the date that the conveyance took place. By that she was referring to the dedication of the strip of land in question, that was discussed in the evidence of Mr. Walker, to the Township of Trafalgar for the road widening in 1955. She further clarified her submission by putting the hypothetical to the court that if I happened to accept that the Township of Trafalgar from a statutory interpretation point of view became the Corporation of the Town of Oakville and that it is not necessary to restrict s. 11(2) to conveyances to the Regional Municipality of Halton, or the Town of Oakville legal entity solely, then she was advancing the argument that the continuity period that she argued was important was from the date of the September 24, 1954 aerial photo of the land to the June 16, 1955 dedication. She argues that the Respondent has the onus, which would be on a balance of probabilities, to establish the continuity of agricultural use during that period of time in order to rely upon the exemption provisions in s. 11(2).

In arguing that the Respondent has not met that evidentiary onus, the Appellant argues that Justice of the Peace Phipps erred when he held that the September 24, 1954 photograph was the best evidence that this property was being used for an agricultural purpose in June 1955. She submitted that that photo was not the test. Ms. Huctwith argued that the farming has to continue or at least start up again in the spring season (of 1955) for there to be evidence of farming activity by June 1955. In other words, the Appellant argues that the September 24 aerial photo is not evidence of farming use in June 1955 and that to conclude otherwise is to engage in speculation which is not a proper evidentiary conclusion.

51 The Appellant also argues that since s. 11(2) provides exemptions for a "balance of a lot" and the Respondent's property in question was not the balance of a lot but, rather, was the whole of the lot on the relevant plans of subdivision, that the Respondent is, thus, disentitled by this particular argument to rely upon the s. 11(2) exemptions. The Appellant argues that Mr. Walker was wrong when he gave his professional opinion that the land in question was the balance of a lot after the dedication of the strip of land for the road widening in June 1955 to the Township of Trafalgar. The Appellant argues that Mr. Walker has not properly interpreted the documentary evidence of the photographs and plans of subdivision that were filed at trial. It should be noted that the Appellant did not call its own expert planning witness to dispute Mr. Walker's opinion which was given as a qualified expert planner, but rather simply argues that a careful analysis of the documentary exhibits by Justice of the Peace Phipps should have revealed that Mr. Walker was in error. Again, I must also point out that I find that Justice of the Peace Phipps never made an actual finding that the land in question as a balance of a lot as those words are set out in s. 11(2) because he declined to apply s. 11(2) to the facts in this case because of the ambiguities in the section which he found prevented him from doing so.

52 Ms. Huctwith argued orally at the appeal that s. 34(9) of The Planning Act of Ontario, which deals with

non-conforming uses of land, must supersede the provision of any municipal by-law on the same subject. Section 34(9) reads as follows:

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

Ms. Huctwith relies on the wording in that subsection requiring continuous use for her argument that continuous use would need to be demonstrated by the Respondent if it is to rely upon s. 11(2) of the Town of Oakville subject by-law. Quite apart from the fact that Ms. Huctwith has also conceded in oral submissions in this appeal that continuous use is not an issue when dealing with s. 11(2), I must note that the purpose of s. 34(9)(a) would seem to be to override any municipal by-law that tried to prohibit a lawful use so long as it had continued to be in use from the day of the passing of the by-law to the time when the issue arose. Section 11(2) does not attempt to prohibit such land use. As a matter of fact, I find that it does not create a requirement for continuous use by a plain reading of the section and also from the evidence of Mr. Walker. In any event, Justice of the Peace Phipps did not make a finding in that regard because he limited his reasoning to his finding of ambiguity within s. 11(2). I find that even if he had turned his mind to this argument of the Appellant, that the correct conclusion would have been that s. 34(9) of The Planning Act does not override s. 11(2) of the Oakville by-law in question with respect to the issue of continuous use because the Oakville by-law does not even deal with the subject.

53 Ms. Huctwith submitted in oral argument on appeal that the decision of the Justice of the Peace that lot number two was not a lot, as opposed to being a balance of a lot, was either a palpable factual error or an error of law in misinterpreting the documentary evidence available to him at trial such as Exhibit Number 2, the original deed of the whole of Lot 2, and Exhibit Number 4 dealing with the dedication of the strip that Ms. Huctwith submits was part of the larger parcel than Lot 2 and is arguably now a part of another parcel of land. She argues, therefore, that the strip was never part of what is now known as Lot 2 and she argues that that is apparent from the exhibit survey of the land.

54 The Appellant further argues that Justice of the Peace Phipps made an error in law by concluding that the land in question, Lot 2, was being used for farming in 1955. She argued that there must be continuous activity of farming and evidence up to that point and that Mr. Walker testified only to "intention of use".

55 The Appellant submits that the ultimate question on this appeal is the interpretation of s. 11(2) of the subject by-law. She refers the court to a case which is submitted by the Respondent: *R. v. Raceworld Inc.*, [1991] O.J. No. 1748 (Ont. Prov. Div.) [1991] September 23, Belobradic J. On page five of that decision the learned judge sets out a quotation from the Ontario Court of Appeal in *R. v. Budget Car Rentals (Toronto) Ltd.* (1981), 57 C.C.C. (2d) 201 (Ont. C.A.), at page 207 where Chief Justice Howland was speaking for the court:

Among these principles is the often quoted principle that a penal statute must be construed 'strictly'. That is so is surely beyond dispute, but it is important that it should be clear what the principle really means, and what it does not mean. What it does mean is that where a person is charged with an offence created by a statute, the conduct of that person which gives rise to the charge, or the conduct of someone for which that person may be held answerable, must be such as can be clearly and unmistakably demonstrated to fall within the kind of conduct which is prescribed by the statute. What the principle does not mean is that because a statute is 'penal' or contains provisions to which penal consequences for breaches are attached, the meaning that is to be given to language used in a statute is to be determined in accordance with a rule of construction that is somehow 'stricter' than, or is to be applied more stringently than, the ordinary rules which apply to determine the meaning to be given to language used in statutes.

A person who is charged with or sought to be made answerable for conduct to which penal consequences are attached by a statute is, therefore, entitled to insist that the impugned conduct be shown to the required degree of certainty to be conduct which in fact and in law, renders him liable under the statute to the penalty prescribed therefore.

The Appellant argues that this principle enunciated by the Court of Appeal of Ontario informs her argument that s. 11(2) must be interpreted within the complete statutory scheme of the by-law, including the spirit of the by-law. She further argues that the most important definition in s. 11(2) is "balance of a lot" and that the dedication of the strip of land discussed in evidence in this case in 1955 would not have created a "balance of a lot" or "remnant" status which could be enjoyed by the present Lot 2. She points out that the term "balance of a lot" was not even coined until the Oakville by-law was enacted in 1984 which created that term.

56 The Appellant argues strenuously that the decision of the learned Justice of the Peace will lead to an absurdity and open the floodgates to illegal non-conforming uses of property.

Position of the Respondent on Appeal

57 Mr. Sperduti argues that for the purposes of the trial and this appeal the Township of Trafalgar as it existed in 1954 and 1955 must be considered to be the same legal entity as its successor, the Town of Oakville, and its successor, the Regional Municipality of Halton. He cites the evidence of Mr. Walker on that point and refers the court to the Municipal Act of Ontario.

58 In his factum, Mr. Sperduti argued at paragraph 14 that contrary to the submission of the appellant, s. 11(2) of the by-law does not create an exception, exemption, authorization, or qualification to the use of the land as contemplated by s. 47(3) of The Provincial Offences Act. Rather, he submits that it is a provision that simply further defines the scope and application of the by-law, particularly s. 9(1). Therefore, he argues there never was any burden upon the Respondent at trial to establish on a balance of probabilities that the land was being used on the date of the charge in a legally non-conforming fashion as an exception to the prohibition provisions of s. 9(1). He submits that the onus was on the Appellant, to have proven beyond a reasonable doubt that crop farming on the subject property on the subject date in 2001 was prohibited by the zoning by-law. He points out that s. 9(1) of the by-law establishes the general prohibition, but that s. 11(2) simply further defines or informs the scope of the general prohibition of s. 9(1) by stating:

Nothing in by-law 1984-63 including s. 9(1) prohibits the use of the balance of the lot for a purpose for which it was legally used at a time when a portion thereof was conveyed

59 In the alternative, Mr. Sperduti at paragraph 17 of his factum argues that if this court finds that the Respondent did bear at trial the burden of proving that its conduct fell within an exemption or exception that is created by s. 11(2) of the by-law, by virtue of the application of s. 47(3) of The Provincial Offences Act, then this court should find that there was ample evidence at the trial for Justice of the Peace Phipps to have concluded that that evidentiary burden had been met on a balance of probabilities by the Respondent.

60 Mr. Sperduti argued in oral submissions on this appeal that the Appellant is asking the court to do exactly what Mr. Justice Howland declared should not be done with the wording of a penal statute. He argues that this court is being asked to improperly read into and beyond the words of the statute in order to conclude that the Respondent had breached s. 9(1) of the by-law.

61 Mr. Sperduti argued that there is ample precedent authority for the conclusion that was drawn by Justice of the Peace Phipps in giving the Respondent the benefit of the doubt at trial because of the ambiguous wording, as he found it to be, of s. 11(2) of the by-law. On the evidence available to justice of the Peace Phipps, combined with the ambiguous wording of s. 11(2) of the by-law, Mr. Sperduti argues that it was not incumbent upon Justice of the Peace Phipps to engage in any more detailed analysis than he did once he determined that s. 11(2) was ambiguous and, therefore, found that he had to resolve that ambiguity in favour of the Respondent and dismissed the charge.

In support of this argument, Mr. Sperduti refers this court to the following cases: *Thunder Bay (City) v. Potts*, 39 O.R. (2d) 725, 1982 CarswellOnt 820 (Ont. H.C.) Dupont J., November 10, 1982, 730, where Mr. Justice Dupont sets out in quotation from *Re: Caldwell v. Toronto (City)*, [1935] O.R. 255 (Ont. C.A.) by then Chief Justice Mulock of the Ontario Supreme Court:

If there is any doubt upon this subject (the meaning of a by-law) the doubt must be resolved in favour of the land owner. He is not to be subject to have his property practically expropriated without compensation unless the situation is free from all doubt.

Further, a quotation from *R. v. Heit*, [1963] 2 O.R. 471 (Ont. C.A.) and 474, Mr. Justice Roche speaking for the Ontario Court of Appeal:

"It is a fundamental rule in the construction of by-laws and restraint of rights of property that they should be strictly construed"

Further, from *Bayshore Shopping Centre Ltd. v. Nepean (Township)*, [1972] S.C.R. 755 (S.C.C.) Spence J.:

A man's property is his own which he may utilize as he deems fit so long as in such utilization he does not commit nuisance, entrap the unwary or act in breach of statutory prohibitions, and therefore by-laws restrictive of that right should be strictly construed.

Finally, on this point, Mr. Sperduti refers the court to commentary by Mr. Justice Kelly of the Ontario Court of Appeal in *R. v. Sandler*, [1971] 3 O.R. 614 (Ont. C.A.):

When a municipal council purports to legislate under the powers found in The Municipal Act and thereby creates obligations to be observed by its citizens, the failure to observe which attracts punishment, it is to be expected that the by-law creating such obligations will itself be so explicit that a well-intentioned citizen seeking to observe the provisions of the by-law may, from a reading of the by-law, without the enlargements of its requirement by the order of a municipal servant, be able to satisfy himself that he has complied with its requirements.

Mr. Sperduti refers to Mr. Somersett as a well-intentioned witness who was perplexed by the ambiguous wording of s. 11(2) in his attempts to define legal non-conforming uses of the property in question. In conclusion, Mr. Sperduti argues that the prohibition of a legal non-conforming use of land must be subject to a strict construction and interpretation of the prohibiting by-law in the absence of evidence of the use being noxious or a nuisance.

62 On the subject of whether or not Justice of the Peace Phipps' decision leads to an absurdity, Mr. Sperduti refers the court to the evidence of Mr. Walker at page 49 of the trial transcript of October 21, 2002 where he said that he had spoken to neighbouring residents who said that they preferred to look at crops rather than at Ford vans which had been stored on the lane at some time before the date of this charge. He refers to the evidence of Mr. Walker wherein he said that it was inoffensive to have an agricultural use in an urban area until orderly urbanization of the land in question takes place. He referred the court to Mr. Somersett's evidence, the Crown's own witness, wherein he said that this use of growing crops might even be of some benefit to the area because people tend to dump garbage on vacant land and, therefore, growing oats would tend to prevent that situation from occurring. On the issue of whether or not Justice of the Peace Phipps erred in finding that the strip of land that was dedicated in 1955 was not "part of Lot 2", Mr. Sperduti argues that this is a finding of fact by the Justice of the Peace which was available to him from the totality of the evidence at trial. He points to the evidence of Mr. Walker at trial at page 48 of the October 21, 2002 transcript wherein he said that the land in question was an active farm in 1955 when the plan of subdivision was registered. Mr. Walker gave his reasons for forming that conclusion notwithstanding the fact that he was working from an aerial photograph of September 1954. He stated that in his opinion farming was a legal use for the land in question in 1955, the time of the dedication. He gave his professional opinion that the strip that was dedicated did come off what he referred to as Lot 2, and the Lot 2 in question in this case. He stated that he formed that opinion to some extent from his interpretation of the

exhibit survey at trial. Therefore, argues Mr. Sperduti, this is a finding of fact by Justice of the Peace Phipps on evidence that was available to him to support that factual finding from the standpoint of an appellate analysis and, therefore, this appeal court should not interfere with that finding. He argues that it is absurd and illogical to describe the remainder of the land from which the dedication was severed as something other than a "balance of a lot". In his factum at page six, paragraph 19(a)(iii) Mr. Sperduti argues that Mr. Somersett, the sole witness for the prosecution, at trial agreed that the subdivision plan in question evidenced a dedication of a portion of lot to the municipality for the widening of Eighth Line (see Somersett, October 21, 2002 transcript, page 18). At paragraph 19(d) Mr. Sperduti argues that the appellant's interpretation of the definition of "balance of a lot" would render s. 11(2) practically meaningless. He argues that the section would never be able to apply with a dedication of land in question was accomplished by way of a plan of subdivision which is the most common mechanism for municipalities to acquire lands needed for public purposes.

63 The Respondent's position is succinctly stated at paragraph 20 and 21 of its factum:

- 20. Phipps J.P. made no palpable and overriding error in coming to the conclusion that Section 11(2) applies in the circumstances of this case such as to justify the intervention of this Honourable Court;
- 21. In the alternative, it is submitted that this finding by Phipps J.P. raises a question of mixed fact in law in that it deals with the application of a legal standard to a set of facts. In either situation, this Honourable Court should afford the Justice of the Peace great deference with respect to his findings.

The Respondent seeks a dismissal of this appeal.

Analysis

The Law on an Appeal Against an Acquittal

64 A court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. In addition, an appellate court should not interfere with a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.), paragraph 2). The appellate court must not re-try a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities. (See *Housen v. Nikolaisen* (supra) paragraph 3, a quotation from *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (B.C.C.A.) 204).

65 Mr. Justice Iacobucci and Mr. Justice Major, in delivering the judgment of the Supreme Court of Canada in *Housen v. Nikolaisen* (supra) at paragraph four stated:

There is no suggestion that appellate court judges are somehow smarter, thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the Arguments of the parties and the relevant evidence than to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge.

66 And further at paragraph five the Court stated:

What is palpable error? The New Oxford Dictionary of English, 1988, defines "palpable" as "clear to the mind or plain to see" (page 1337). The Cambridge International Dictionary of English, 1996, describes it as "so obvious than it can easily be seen or known" (page 1020). The Random House Dictionary of the English Language (2nd Edition 1987) defines it as "readily or plainly seen" (page 1399).

Further at page 10:

The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error".

67 It is important to distinguish questions of mixed fact in law from factual findings. Questions of mixed fact in law involve applying a legal standard to a set of facts. Factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences. The difference lies in whether the inference drawn is legal or factual (See *Housen v. Nikolaisen* (supra) at paragraph 26).

68 An error on a question of mixed fact and law can amount to a pure error of law subject to the standard:

If a decision maker says that the correct test requires him or her to consider A, B, C and D, but, in fact, the decision maker considers only A, B and C, then the outcome is as if he or she had applied a law that required consideration of only A, B and C. If the correct test requires him or her to consider D as well, then the decision maker has, in effect, applied the wrong law and so has made an error of law.

Therefore, what appears to be a question of mixed fact in law, upon further reflection, can actually be an error of pure law. (See *Housen v. Nikolaisen* (supra) at paragraph 27.)

.....

Matters of mixed fact in law lie along a spectrum where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or a similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding the trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, [1981] 2 S.C.R. 2, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. (See *Housen v. Nikolaisen* (supra) at paragraph 36.)

69 A by-law offence such as the one at bar creates an offence of strict liability. The Prosecutor, therefore, bears the burden of establishing that the by-law has been violated beyond a reasonable doubt. (See *R. v. Raceworld Inc.* (1991), [1991] O.J. No. 1748 (Ont. Prov. Div.), *Belobradic J.*)

Analysis

70 The powers of the appeal court on an acquittal after a trial on a part three information in The Provincial Offences Court are contained within s. 121 of the Provincial Offences Act. Section 121 reads as follows:

Where an appeal is from an acquittal, the court may by order,

- (a) dismiss the appeal; or
- (b) allow the appeal, set aside the finding and,

- (i) order a new trial, or
- (ii) enter a finding of guilt with respect to the offence of which, in its opinion, the person who has been accused of the offence should have been found guilty, and pass a sentence that is warranted in law.

71 Although s. 121 does not enumerate the grounds on which the court may allow or dismiss the appeal as is done in s. 121 for appeals against conviction, the general rule is that the Prosecutor can obtain appellate relief against a verdict of acquittal only where it is demonstrated that the verdict would not necessarily have been the same had the trial been properly conducted (See *R. v. Vézeau* (1976), [1977] 2 S.C.R. 277 (S.C.C.) and *R. v. Morin* (1988), 66 C.R. (3d) 1 (S.C.C.)). Both of these decisions are from the Supreme Court of Canada). In other words, has the Prosecutor demonstrated that the verdict would not necessarily have been the same without the error? (See *R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.)) Furthermore, a verdict will only be set aside as unreasonable if the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle or entered a verdict inconsistent with the factual considerations; reached (See *R. v. Biniaris*, [2000] 1 S.C.R. 381 (S.C.C.)). Again, these latter two decisions are from the Supreme Court of Canada.) I have taken these references from the 2004 Annotated Ontario Provincial Offences Act, Segal and Libman, commentary, page 299 to 300.

72 Again, from page 300 of the commentary under the Ontario Provincial Offences Act Annotated, (supra):

It is not the duty of an appeal judge under Section 121 to re-try the case, nor substitute his or her view of the evidence for that of the trial judge. Any error on the part of the trial judge must be such that, but for the error, the judge might have come to a different conclusion. (See *R. v. St. Michael's Hospital* (1987) 2 C.E.L.R. (N.S.) 327 (Ont. Dist. Ct.))

73 The learned Justice of the Peace referred to s. 11(1) and 11(2) of By-law 1984-63 as "exemption sections" and found that they provided for the non-conforming use of the land "in certain cases". As a matter of law, I find that he was entitled to come to that conclusion, although Mr. Sperduti has argued on appeal that 11(1) and 11(2) simply "inform" s. 9(1) and (2). The learned Justice of the Peace then chose to reject the Appellant's argument at trial that he should apply Section 10 of the Interpretation Act to the by-law, including s. 11(2) and "import the intention that the interpretation of the by-law would make the activity of the defendant corporation prohibited". He explained his reason for that rejection in his conclusion on page four of his Reasons for Judgment which I have already set out at paragraph 13 in my summary of this case:

The court finds it cannot give the broad interpretation given the ambiguity that exists in interpreting the exemptions provided in Section 11. The problem with the wording of the by-law could easily be rectified by amending the by-law to require that either the land use to be continuous, or to fix a date, before or after which the exemptions could apply. This would certainly assist the interpretation of the by-law and remove the ambiguity of whether the exemption may be applied to a given set of facts. The evidence of Mr. Walker, who is a municipal planner with vast experience, appears to indicate that this court of action has been taken by a number of other municipalities in Southern Ontario. As any ambiguity in interpretation must be resolved in favour of the defendant, the corporation is found not guilty and the charge against him is dismissed.

74 I find that the learned Justice of the Peace's rationale on the ambiguity issue of s. 11(2) is supported by the authorities which I have cited, particularly the *Raceworld* decision. I also find that his conclusion that the wording of s. 11(2) leads to an ambiguity in any attempt to interpret the section to be a decision of mixed fact and law. As such, the Appellant must demonstrate probable and overriding error on his part. Clearly, in my view, there was ample evidence available to the learned Justice of the Peace from Mr. Walker, whose expertise was not challenged by the Appellant at trial, to support his conclusion that s. 11(2) contains ambiguities. I am further satisfied that the Justice of the Peace's decision to resolve the ambiguity in favour of the defendant Respondent was in keeping with the rationale of the

prevailing authorities on the subject, including the Raceworld decision cited above.

75 In my view, Justice of the Peace Phipps was entitled to confine his reasons for decision to the resolution of the ambiguity to s. 11(2). However, assuming for the moment that the Appellant is correct when she argued on appeal that the learned Justice of the Peace should have inquired further into the issues of whether or not the land in question was "the balance of a lot" after a transfer of a part of that land to either the Regional Municipality of Halton or the Town of Oakville had taken place, at some time after either or both of those two corporate entities had come into existence, as opposed to a transfer to the Township of Trafalgar, which is not one of the enumerated municipalities in s. 11(2) and was in existence before the by-law in question, and, therefore, the failure to deal with these issues by the learned Justice of the Peace amounts to palpable and overriding error and/or "incorrectness" in his findings of law, I make the following comments.

76 Even if I were to find that such a failure by the learned Justice of the Peace amounted to an error in the conduct of the trial, and I do not so find, I would find that the result of the trial would remain unchanged even if all of these analyses requested by the Appellant had been conducted. In my view, there is ample evidence from Mr. Somersett, the Crown's witness, and the evidence of Mr. Walker, and also from the documentary and photographic exhibits in the trial for the trial court to have found that the land in question was indeed "a balance of a lot" as contemplated by s. 11(2) that had been created by the dedication of the road widening strip to the Township of Trafalgar in 1955. There was evidence from Mr. Walker that the Township of Trafalgar should be treated as an entity that was simply subsumed into the Town of Oakville upon the latter's creation and that any use that was being permitted on the land in question before that time when there were no by-laws governing its use should be permitted up to the present day unless specifically prohibited by the original Town of Oakville by-law and its successor, the subject 1984 Regional Municipality of Halton by-law.

With respect to the continuous use issue, I agree with Mr. Sperduti that Ms. Huctwith, for the Appellant, effectively conceded in her argument on the appeal that the continuous use was not an issue at trial. However, the remainder of her submissions seem to suggest that she was revisiting that issue and, if so, I would find that there was sufficient evidence from Mr. Walker again for the learned Justice of the Peace to have found that s. 11(2) did not require a continuous use in order to have the land qualify for an exemption to s. 9(1) and (2). Mr. Walker's illustrations of the similar by-laws from the other municipalities to which he referred made it clear that had the Town of Oakville or the Regional Municipality of Halton wished to make continuous use a requirement for a non-conforming use property, then they could have and should have done so. I find that Mr. Walker's evidence, including his interpretation of the 1954 aerial photo, was evidence upon which the learned Justice of the Peace could have concluded that the land in question was used for farming or an agricultural use, which includes cropping, in my view, and that that use was still in place in June 1955 when the strip of land for road widening was dedicated. Therefore, that aspect of s. 11(2) would have been complied with, and since there is no requirement for continuous use within s. 11(2), then the learned Justice of the Peace would have been perfectly entitled to rely upon Mr. Walker's evidence and his opinion to the effect that the agricultural use could be interrupted and then resumed again as appeared to be the case in this matter.

77 In conclusion, I find that the Appellant's appeal must be dismissed.

78 Appeal dismissed.

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