

CITATION: Seguin (Township) et al v. Bak, 2013 ONSC 5788

COURT FILE NO.: CV-12-009

DATE: 2013-10-02

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

The Corporation of the Township of Seguin
and Debbie Swim, Chief Building Official
of the Corporation of the Township of
Seguin

Applicants

– and –

Paul Bak

Respondent

)
)
)
) Michael M. Miller – RUSSELL, CHRISTIE
) LLP and Gerard A. Chouest – BERSENA
) JACOBSEN CHOUEST (THOMSON
) BLACKBURN LLP), for the Applicants

)
) Leo F. Longo - AIRD & BERLIS LLP, for
) the Respondent

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)
) **HEARD:** June 26 and 27, 2013

J.S. O'NEILL

Reasons on Application

A. INTRODUCTION

[1] On this application, I am required to determine whether the structure built at and over the water's edge on Lake Rosseau is an aerodrome, thus exempting its construction from the application of provincial and municipal building, planning, zoning and environmental laws, by-laws and regulations.

[2] On February 6, 2012, the Applicants issued an application in the Superior Court of Justice at Parry Sound, requesting, in addition to other relief, the following:

A mandatory Order that the Respondent demolish and remove, within 30 days, the boathouse constructed on and adjacent to his property legally described as PT LT 11 CON 3 HUMPHREY PT1 42R19175; PT SHORE RDAL IN FRONT OF LT 11 CON 3 HUMPHREY PTS 2 & 3 42R19175 (CLOSED BY BY-LAW 2010-097 ATTACHED TO GB42018); TOWNSHIP OF SEGUIN, in the District

of Parry Sound, and being all of the lands described in PIN 52195-0508 (LT) ("the Subject Property").

- [3] The Respondent is a developer who purchased a recreational property with shoreline frontage on Lake Rosseau, municipally known as 59a Burgess Road. He demolished the existing cottage and replaced it with a larger cottage.
- [4] Mr. Bak purchased the cottage property on April 15, 2008. The shore road allowance (dry land parcel – PT2, PLAN 42R-19175 and flooded portion – PT3) were transferred by the Township of Seguin to the Respondent on or about March 28, 2011.
- [5] A Site Plan Agreement was entered into by the Respondent and the Township of Seguin and registered on or about February 15, 2011. A structure was subsequently built by the Respondent. It is the Township's position that the structure is a 1.5 storey boathouse with living accommodations on the top floor. Accordingly, the Township takes the position that the boathouse was built contrary to Planning Act and Township zoning by-laws and that it ought to be demolished.
- [6] It is the Respondent's position that the said structure is in fact an aerodrome and that the construction did not contravene the provisions of the Site Plan Agreement. Further, the Respondent submits that based upon the application of inter-jurisdictional immunity, municipal by-laws and requirements do not apply to the construction and use of a federally registered and regulated water aerodrome.
- [7] The application was argued before me at Parry Sound on June 26 and 27, 2013. At the conclusion of argument, I reserved my decision pending the release of written reasons.

B. CENTRAL FACTS AND CHRONOLOGY

- [8] The facts are generally not in dispute, although as I will indicate in this portion of the reasons, counsel for the Respondent did submit that the timeline sheet filed was not fully complete. The timeline sheet is reproduced in these reasons below:

TIMELINE

EVENT	DATE
Purchase of 59A Burgess Road	April 1, 2008
Application for Zoning Amendment	August 11, 2008
Township refused Zoning Amendment	November 17, 2008
Appeal filed to OMB	December 11, 2008

Planner Robert List in Email discusses application for an aerodrome	May 28, 2009
Application received by Township to purchase shore road allowance	November 30, 2009
Bak withdraws appeal to OMB	January 18, 2010
Application to purchase shore road allowance approved	March 3, 2010
Design drawings of David Smith commenced	November 2010 (approximately) Completed January 28, 2011
Site Plan Agreement registered	February 15, 2011
Shore road allowance sale completed	May 3, 2011
Structural drawings of Dan Duke	June 2011
David Denstedt commenced construction of the dock structure	July 2011
Stop Work Order issued	July 18, 2011
Waterfront structure substantially complete	January 2012
Court Application CV-12-009 commenced	February 6, 2012
Application to register aerodrome submitted	May 16, 2012

[9] To that timeline, it is not disputed that the following additional events, or points can be added:

- i. On May 16, 2011, the Respondent's planner, Robert List, wrote to Transport Canada and stated in part as follows:

Please accept this correspondence as notification by the undersigned on behalf of the owner of the above noted property of the establishment of that property as a 'water based unregistered aerodrome...the hangar associated with this aerodrome will be under construction shortly and should be operational in late summer of 2011.

It is the Respondent's position that although the aerodrome was registered on May 16, 2012 the decision to register was not precipitated by the court application of February 2012.

- ii. Following the issuing of the Stop Work Order on July 18, 2011, the Respondent retained a solicitor and in his letter dated August 15, 2011 to the Township of Seguin, the solicitor in part stated:

We confirm that the building being constructed by Mr. Bak is for an aerodrome which had been approved by Transport Canada...accordingly, our position regarding the Stop Work Order recently issued is that it is invalid. It is beyond the jurisdiction of the municipality to issue a valid Stop Work Order for an aerodrome. Since the Stop Work Order is invalid it will not be adhered to...

- iii. February 2012 - Counsel for the Respondent submitted that after receipt of the August 15, 2011 letter, the Township of Seguin stood by and permitted ongoing construction at the site, and that the court application was launched before the summer of 2012, in advance of the Respondent leasing the upstairs portion of the structure to tenants and in advance of the Respondent marketing the property for sale through Royal LePage.
- iv. April 10, 2011 - The sales document from Harvey Kalles Real Estate Ltd dated April 10, 2011 referred to a newly constructed cottage and added that a "floatplane hangar/aerodrome will be constructed with 2 bedrooms and over 1000 sq. ft of living space."
- v. The Respondent further submitted that subsequent listing or advertising references to a boathouse and not an aerodrome were in fact a result of errors made by the realtors, which both realtors acknowledged was the case. Counsel submitted that when the appeal to the OMB was abandoned on January 18, 2010, the Respondent had determined by that date that he could not build a boathouse, but as he was in the business of buying developing and selling properties, he turned his attention to the building and constructing of an aerodrome.
- vi. Summer 2012 - Counsel submitted that the living space on the top floor had no plumbing, toilets or kitchen. He submitted that there was no evidence on the application that people were in fact residing in that space with the Respondent's permission.

C. ISSUE

[10] *i. Has a water aerodrome been constructed by the Respondent?*

[11] The parties acknowledge and agree on several legal points in this application. I reproduce them below:

i) The Federal Government has exclusive jurisdiction over aeronautics.

ii) The Federal Government regulates private aerodromes and aviation under the *Aeronautics Act* and its regulations. Private aerodromes are governed by a permissive regime that does not require prior federal authorization for the location of aerodromes. Further, once an aerodrome is registered with the Ministry of Transport, it is subject to federal regulation and safety standards.

iii) An aerodrome is defined in the *Aeronautics Act* as follows:

Aerodrome means any area of land, water (including frozen surface thereof) or other surface used, designed, prepared, equipped or set apart for use either in whole or in part for the arrival, departure, movement or servicing of aircraft and includes any buildings, installations and equipment situated thereon or associated therewith.

iv) The federal power over aeronautics enjoys an inter-jurisdictional immunity over provincial or municipal laws.

v) A municipality cannot regulate or place restrictions on what use is made of a water aerodrome, once it is federally registered and subject to federal regulations.

[12] But these above enumerated points still raise the major issue to be resolved on the application. In a letter to the Respondent's solicitor dated September 2, 2011, the Applicants' solicitor wrote:

We do not disagree that municipal zoning by-laws and the Building Code Act [sic] do not apply to the field of aeronautics and therefore aerodromes. The salient issue with respect to your client's property is his assertion that the structure is an aerodrome. His assertion is not determinative as to whether an aerodrome exists or will exist.

[13] In the Respondent's factum, at para. 45, the Respondent stated in response to the position outlined in the September 2, 2011 letter, as follows, "It is respectfully submitted that the Federal Government's registration, publication and regulation of the Respondent's water aerodrome is determinative of this issue."

[14] I am not able to agree with this statement, and I come to that conclusion based on my examination of the underlying facts, events, documentation, statements and legal authorities referred to and filed on the application.

[15] Firstly, I conclude that the following facts are not in dispute:

i) The Respondent has been in the development business for many years. He does not own a plane nor does he have a pilot's licence.

ii) When the Respondent purchased the subject property on Lake Rosseau, it was his intention to tear down the old cottage, build a new cottage and construct a single storey boathouse.

iii) On August 11, 2008 the Respondent applied for a zoning by-law amendment as s.4.28.6 of the Township's by-law prohibited the construction or installation of in-water shoreline structures in an Environmental Protection (EP) Zone. In his application, Mr. Bak stated "I seek to change the boundary of the EP Zone along the shoreline to permit a future boathouse."

iv) On November 17, 2008, the Township refused the zoning amendment. Mr. Bak appealed.

v) On May 28, 2009, Mr. List emailed Mr. Bak, in relation to the OMB Appeal. Mention was made of the boathouse issue and on pg. 3, Mr. List stated, "However, the Application for an aerodrome (if that course is taken) should wait until the road allowance is acquired."

vi) Mr. Bak withdrew his appeal to the OMB when the Township determined not to process the shore road allowance acquisition until after the appeal had been concluded.

vii) It was not until after the Stop Work Order was issued by the Township that the Respondent, through counsel, advised the Township that the structure being built was an aerodrome. The construction undertaken in July 2011 was occurring in the EP Zone. In August 2011 when the letter was written, the structure was not registered as an aerodrome.

viii) In the Respondent's counsel's letter of August 15, 2011, he stated, "Since the Stop Work Order is invalid, it will not be adhered to."

ix) Construction continued on the structure up to and including February 2012, when this application was launched by the Township.

x) A Site Plan Agreement was concluded between Paul Bak and the Township on February 7, 2011 and was registered on February 15, 2011. Paragraph 5.2 of the Site Plan Agreement provided, "The owner agrees that there shall be no further development or expansion of the buildings, structures, parking areas and fire pits except in accordance with the Township's Site Plan Control By-Law and this Agreement."

The affected lands are the lands referred to in Schedule "A" which included the original legal description of Mr. Bak's property, as well as the lands shown on the Site Plan as Schedule "B".

xi) Had Mr. Bak been successful at the OMB Appeal, without a frontage by-law change, he would be limited to building a one storey boathouse.

xii) Mr. Bak determined to build an aerodrome given the cost and uncertain result under the OMB Appeal process.

xiii) Mr. Bak's designer, Terry Ledger, designed the structure to have an entrance of 40 feet wide and to have a height of 12 feet from the top of the decking to the top of the entrance, after speaking to a number of pilots.

xiv) The structure as built has a 38 foot wide door and an entrance height of 9 feet, 7 inches. A Cessna 182 plane will not fit into the structure.

xv) David Smith, who prepared the building plans from the Ledger conceptual drawings, knew nothing about airplanes and undertook no investigation of plane sizes.

xvi) The structural engineer, who prepared the plans for the steel dock, the building's eventual foundation, had no input into its size or functional use as an airplane hangar.

xvii) The application to Transport Canada to register the area in Lake Rosseau as an aerodrome was not completed until May 16, 2012.

xviii) Keith Reilly of Transport Canada indicated that as long as an applicant provides the required aeronautical data and confirms that he is not aware of any hazards, the Ministry is obliged to register and publish the information.

xix) Page 33 of the "COPA Guide to Private Aerodromes" (Canadian Owners and Pilots Association, 2011, 23rd ed. [COPA Guide]) states the following, under the heading "Federal Jurisdiction and 'Mixed Uses'":

To qualify as "Aeronautics" and therefore fall under federal jurisdiction it is imperative that the facility be strictly "Aeronautics" and not "mixed use".

A hangar will not necessarily get the protection of federal jurisdiction if it is also used as a residence or used for storing non-aeronautical equipment such as boats, RVs or ATVs. Likewise a fuelling facility that is used for fuelling aircraft and also other vehicles will not necessarily be protected under federal jurisdiction. To ensure that federal jurisdiction is effective the facility must be clearly "Aeronautics" and nothing else.

Facilities can even lose their federal jurisdiction protection years later. This can happen if a hangar is built legally without a municipal building permit, and is used solely for storing aircraft and other aeronautical equipment, but years later non-aeronautical equipment is stored there, even if it is by a later owner of the same property. If discovered as storing non-aeronautical equipment the municipality can require permit and if the design would not qualify for a permit, the municipality may insist that it be torn down. Since the structure is not being used for aeronautics, the municipality would be within their jurisdiction.

Development of combinations of aeronautical and non-aeronautical facilities can cause confusion as to the jurisdiction. For instance when developing a "fly-in residential community" fully detached hangars, fuelling facilities, windsocks, runways and taxiways would be considered "aeronautics" and would not require building permits. Houses, roads and other non-aeronautical uses on the same property would require building permits as these are not aeronautics and do not come under federal jurisdiction. Confusing "mixed uses" of aeronautical and non-aeronautical facilities should be avoided, such as hangars physically attached

to houses. These will not be clearly “aeronautics” and may require municipal building permits.

xx) Mr. Reilly understood from conversations with Mr. Bak, that in seeking aerodrome registration, this was in part his motivation to solve the problem he was having with the Township.

xxi) In an email dated November 19, 2012, Mr. Reilly wrote as follows:

With regard to your application for registering an aerodrome, there is some information missing as follows...

In addition, based on the picture you provided, it does not appear that a floatplane could be accommodated at your dock.

xxii) On September 12th, 2012, an ultra-light, amateur built aircraft, C-GREZ, was pushed inside the structure. Mr Bak was heard to say: “No, that’s all I need right now. The lawyers wanted.”

xxiii) There is no evidence that the structure was used as a hanger or for aeronautical purposes during the summer of 2012 and up until January 2013.

xxiv) The structure was observed in use as a boathouse. Pictures take on June 15 and August 18, 2012, show boats and watercraft moored inside the structure.

xxv) Mr. Bak rented out the accommodation in the structure to various persons in the summer of 2012. He had six to seven tenants and the rental leases or terms did not restrict the use of the property or expand the use of the property. He advertised the rentals as a “boathouse just because I know the average person wouldn’t understand what an aerodrome was.”

D. LEGAL DECISIONS AND ANALYSIS

[16] In the decision *Mississauga (City) v. Greater Toronto Airports Authority*, 50 O.R. (3d) 641 [*Mississauga*], Laskin J.A., at para. 35, quoted with approval the following statement made by MacPherson J:

However, it is clear that federal jurisdiction is not just celestial; it is also terrestrial. It extends to those things in the air and on the ground that are essential for “aerial navigation” or “air transportation” to take place.

A long line of cases establishes that airports, or in the early cases “aerodromes”, are integral to the subject matter of aeronautics.”

[17] In *Mississauga*, no suggestion was made by the City of Mississauga that any of the buildings in the redevelopment project were not essential for an international airport.

- [18] In the decision *Taylor v. Alberta*, 2005 ABCA 200 (CanLII), the court examined a condominium plan as part of the expansion and redevelopment of an existing rural airport. The court stated, at para. 44, as follows:

The facts of this case differ materially from those in *Mississauga*. In that case, there was evidence before the Court as to the intended use of all phases of the airport redevelopment. Further, the City did not suggest that any of those phases was not essential for airport operations. In the case at bar, there is uncertainty at best as to the future development and use of the 82 units available for sale to third parties. It is impossible for the Court to determine with any degree of certainty whether or not those 82 units will be used for aeronautics-related purposes at all, let alone whether their future use is or will be essential or vital to the operation of the airport.

- [19] At paras. 48 and 54, the appeal court concluded:

It cannot be said with any certainty that the future development of the 82 units will be aeronautics-related...

There is no convincing evidence before us that the eventual use of these lots will be an integral part of the aeronautics undertaking.

- [20] Finally, in the decision *2241960 Ontario Inc. v. Scugog (Township)*, 2011 ONSC 2337 (QL), the applicant asserted that the Township had no authority to regulate its activities because it was bringing landfill onto its property in order to build an aerodrome and a runway. One of the three directors and shareholders of the applicant company held a private pilot's licence and owned a helicopter. The additional facts relating to the decision were summarized by Swinton J. at paras. 18-21, which I reproduce in full below:

18. There is no indication in Mr. Churchill's evidence that the Township was informed of the applicant's intention to build an aerodrome before the receipt of a letter from the applicant's solicitor dated October 12, 2010. It stated,

Please be advised that the owners have now decided to pursue the long-term use of the site as an aerodrome. Future filling activities will now be based on creating final grades suitable for development of the remainder of the site for a landing strip. As these activities are purely a matter of federal jurisdiction under the Aeronautics Act, Earthworx does not intend to apply for a Site Alteration Permit under Township By-law 52-10.

19. The applicant continued to operate its fill site, despite the expiry of its permit on November 6, 2010. In early November, it created a sign,

EARTHWORX
Industries
THIS IS A FEDERAL AERODROME
Municipal and provincial bylaws do not apply to aerodromes & airports.

20. In February, 2011, Mr. Churchill obtained a quote from Miller Paving for the cost of paving a taxiway, runway, the EMS helipad and the areas around hangar

buildings, although he conceded in cross-examination that it would be about two and a half years before the site was filled and compacted to the subgrade level needed to allow for paving a runway.

21. As of the time of cross-examination, the applicant had not retained the services of an aviation consultant to assist in the design of the aerodrome, nor had it conducted formal soil strength testing. However, it has begun construction on a steel building that it describes as a hangar. The applicant has also obtained a quote for constructing four other hangar buildings.

[21] In answer to the issue as to whether the applicant was engaged in the activity of aeronautics, the court stated, in paras. 32-34 as follows:

32. In my view, the applicant is not engaged in the activity of aeronautics at this time; rather, it is operating a commercial landfill site. Therefore, the doctrine of interjurisdictional immunity does not come into play, as the Township's by-law is not affecting, let alone impairing, an activity that falls within the federal competence over aeronautics.

33. The applicant submits that it is operating the landfill so as to prepare the site for ultimate construction of a runway and the operation of an aerodrome. That may be its intention for the use of the land some years down the road. However, at the moment, it is engaged in the commercial activity of a landfill site.

34. Moreover, the record calls into serious question the sincerity of the avowed intention to build a runway and an aerodrome. The first notice to the Township of this intention was in October, 2010, after the stop work order had been made.

[22] In my view, the Court's reasoning in para. 33 is applicable to this case. It is true that the Respondent built a structure and registered a water aerodrome with Transport Canada. But the facts of this case lead one to the inescapable conclusion that the structure was built as a boathouse, not as an aerodrome or hangar.

[23] The Respondent withdrew his OMB Appeal as it was uncertain he could achieve an EP Zoning change to build a one-storey boathouse. His primary and early intentions throughout were to redevelop a Muskoka property and to include a boathouse as part of the redevelopment.

[24] While the structure can accommodate only a small, ultra-light plane, in every other way, as others have acknowledged on the facts, it looks like a boathouse, and at all material times it was utilized only as a boathouse on a lake. The facts which I have analyzed seriously erode and call into question the Respondent's sincerity in his position that at core, the structure is an aerodrome and not a boathouse. There are simply no facts, events or circumstances on the record before me that the structure was essential or integral to aeronautics or to aviation. At its simplest, this is because I find that the decision to register an aerodrome was an attempt by the Respondent to evade and circumvent zoning and planning by-laws. The facts here do not demonstrate that the

Respondent had any real intentions to operate an aerodrome or to use his structure for aeronautics related purposes.

- [25] Furthermore, while an offer to purchase may have been received from a pilot, registration of the aerodrome and construction alone of the structure, in the circumstances of this case, demonstrate no real intention to operate a water aerodrome.
- [26] On the facts as I have set out, I am unable to conclude with any degree of certainty or assurance that the structure as built is an integral part of a registered water aerodrome or will be an essential and integral part in the future. I conclude that a court on an application such as this can examine the facts and circumstances and the chronology of events to determine whether a structure such as the one built by the Respondent is or will be an essential or integral part of a water aerodrome, regardless of the Transport Canada registration processes involved.
- [27] Indeed, the COPA Guide (*supra* para. 16 xix), found at Tab HH of the application record, clearly sets out issues with respect to federal jurisdiction and “mixed uses”.
- [28] For all of these reasons, I conclude that the Respondent did not construct a water aerodrome, and as such he cannot take shelter under the doctrine of inter-jurisdictional immunity. Accordingly, his construction activity with respect to what I have found was at core a boathouse, is and was subject to Township zoning and planning by-laws.
- [29] The record demonstrates that as early as July and August 2011, the parties held different legal interpretations with respect to the validity of the Stop Work Order and whether or not the Respondent was or was not subject to Township oversight with respect to his building of the structure in question. In hindsight, perhaps the parties could have stated a case to the court for its determination. In hindsight, perhaps there could have been more open communication and declaration of intentions between the parties, before this expensive construction continued to completion.
- [30] In the end, it was the parties who permitted or allowed full construction to proceed, in the face of a Stop Work Order. Clearly, while the Respondent held a particular view on the legality of his construction activities, in the face of the July 2011 Order, he carried on at his own risk and cost. I am not able to conclude that the period between August 2011 and the application date of February 2012 is such a lengthy period as to impair or disqualify the Township’s ability to apply to this court to secure injunctive or other relief.
- [31] I make mention here of some additional points. Clearly there is a purpose for enacting environmental zoning or planning regulations and building regulations. Lakes and rivers are not immune from slow degradation as a result of human activity. If the Respondent’s position, as concisely summarized in para. 45 of his factum, is correct, then subject to the expenditure of time, energy and costs, aerodromes looking like and operating as boathouses will in due course come to proliferate or at least become more prominent on Ontario’s lakes, all without environmental zoning or planning oversight.
- [32] For the reasons which I have outlined above, I conclude that an applicant’s true intention and the issue of good faith are subject to analysis and examination when a court is


required to determine whether a structure is essential and vital to an alleged aeronautics undertaking.

E. THE SITE PLAN ISSUE

- [33] I need not determine this issue to arrive at my conclusions herein. A very small corner of the structure clearly encroached into Part 3, which was subject to agreement between the Township and the Respondent. Whether that small encroachment, in and of itself, and only within the framework of the Site Plan Agreement, was sufficient to enable the Applicants to secure the demolition relief requested, is a matter I need not decide.

F. CONCLUSION

- [34] For the reasons given, this application is allowed. An order shall forthwith issue as set out at para. 156 (a) and (b) of the Applicants' factum. However, the period of time to demolish and remove the structure, as described in para. 156 (a), shall be increased from 30 days to 90 days.
- [35] The Applicants are entitled to their costs of this application on the partial indemnity scale. If the parties cannot agree on these costs, they shall be fixed by me following my receipt and review of written costs submissions. If necessary, the Applicants shall forward a Bill of Costs, together with submissions, to the Trial Coordinator at Parry Sound, by October 21, 2013. The Respondent may file a response by October 31, 2013.
- [36] Order accordingly.


Justice J.S. O'Neill

Released: October 2, 2013

CITATION: Seguin (Township) et al v. Bak, 2013 ONSC 5788

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

The Corporation of the Township of Seguin and Debbie
Swim, Chief Building Official of the Corporation of the
Township of Seguin

Applicants

– and –

Paul Bak

Respondent

REASONS ON APPLICATION

J.S. O'NEILL

Released: October 2, 2013

OCTOBER 2, 2013
for written release
to son, the Application is
allowed. Order to issue

~~in the event of a~~

as outlined in
para. 34 of the

Said Reasons.

Linwood