



McCarthy Tétrault LLP
PO Box 48, Suite 5300
Toronto-Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673

Jonathan Nehmetallah
Associate
Direct Line: (416) 601-8146
Email: jnehmetallah@mccarthy.ca

Assistant: Namdol, Tenzin
Direct Line: (416) 601-8200 x542084
Email: tnamdol@mccarthy.ca

May 30, 2023

Via Email (clerks@kawarthalakes.ca)

Cathie Richie
City Clerk
26 Francis Street, P.O. Box 9000
Lindsay ON, K9V 4R5

Re: Concerns with Proposed By-law to License, Regulate and Govern Short-Term Rental (“STR”) Accommodation in the City of Kawartha Lakes (the “Proposed By-Law”)

We are counsel group for a collective of STR owners and operators within the City of Kawartha Lakes (our “**Clients**” or the “**Collective**”). The Collective was formed to protect the interests of owners of lands in the City which are used for STR purposes. We write to provide details with respect to our Clients’ concerns regarding the Proposed By-Law and our request that the City reconsider its passage in light of these concerns.

Our Clients have been operating STRs from their properties located in the City. Our Clients are of the view that the Proposed By-Law would be illegal if passed because:

- 1) It contravenes section 34(9) of the *Planning Act*, RSO 1990, c P.13 (“**Planning Act**”), in that it offends the legal non-complying/conforming use rights of property owners in the Township and constitutes zoning regulation in the guise of a licensing regime;
- 2) It contravenes section 152(1) of the *Municipal Act*, 2001, insofar as a Municipality shall not refuse to grant a license for business by reasons only of the location of the business; and,
- 3) Is so restrictive that it is effectively prohibitory, not regulatory.

The discretion of a municipality is not unfettered: municipalities must act within the powers granted to them, and they must exercise those powers in good faith.¹ The City may exceed its own authority if it passed the Proposed By-Law, which is effectively a zoning by-law that attempts to regulate land use rather than regulating and governing the manner in which a business is carried out on the land. Moreover, the City risks expressly contravening provincial planning legislation

¹ *Grosvenor v East Luther Grand Valley (Township)*, 2007 ONCA 55 at para 41.

and may fail to comply with the strict requirements of the *Planning Act* to impose further zoning restrictions on the use of STRs.

Legal Non-Complying/Conforming Uses

The benefit of a legal non-conforming/complying use runs with the land.² The City by arbitrarily limiting the number of STR licenses to those not within 300 m of another STR, and it has not made clear whether existing owners of STRs will be guaranteed licenses together with guaranteed license renewal rights in order to continue the use of their properties as STRs. If property owners who previously lawfully operated an STR are denied a license or are unable to secure license renewals, they may be required to either (1) operate their STR without a license, exposing themselves to possible regulatory enforcement actions, or (2) abandon the legal non-conforming/complying use rights to which they are entitled. It is also discriminatory and thus offends Section 153 of the *Municipal Act*.

In a similar vein, as we understand it, section 3.01(b) of the Proposed By-Law provides that a license cannot be assigned or transferred to another person. This would likely impede sales of properties with legal non-complying/conforming uses from owners who obtain licenses, who will now be unable to sell their properties to be used for STR operations. This effectively strips property owners of their property rights that are guaranteed under the *Planning Act*. In the context of an impending recession with climbing interest rates that will further limit property sales, such an impediment will result in undue financial hardship for STR owners. Moreover, the assignment prohibition, both alone and in conjunction with the limit on licenses within 300 m of another STR, undermines the proposition that the legal non-complying/conforming rights run with the land and are not dependant on the property owner. An STR license which is not attached to the land to which it was originally given is rights-abhorrent.

We set out above some of the key problems with the Proposed By-Law as it relates to legal non-complying/conforming rights. As noted above, a key problem is that it does not address how it will be applied to legal non-complying/conforming uses. We ask that such recognition of these important rights be codified with a by-law amendment.

300 Metre License Exclusion Zone

The broad authority for municipal corporation to license business is provided by section 10(2)(11) of the *Municipal Act*. Moreover, section 151 of the *Municipal Act* provides a broader authority to the City to license, regulate or govern real and personal property used for a business which is subject to a license enacted under section 10. That being said, these sections do not provide for a prohibition on the issuance of a license based on geographic distance. Indeed, section 153(1) of the *Municipal Act* specifies that the City shall not refuse to grant a license for a business for reasons only of the location of the business.

Section 2.02(h) of the Proposed By-Law provides that “No Person shall advertise or permit: a Short Term Rental within 300m of another licensed Short Term Rental”. This limitation is plainly in contravention of the above sections of the *Municipal Act* and ought to be struck from the Proposed By-Law. The City is not at liberty to regulate the granting of a license based only on the location of the proposed STR and that is exactly what this section purports to do.

² See e.g. *Forbes v Caledon (Town of)*, 2021 ONSC 1442 at para 11.

Having regard to the limitations imposed by the *Municipal Act*, we ask that the City promptly remove this limitation from the Proposed By-Law. Supporting our view are two legal opinions provided to two municipalities seeking to impose a similar limitation based on the location of a business. We attach these opinions for your review and consideration.

The Proposed By-Law is Effectively Prohibitory

In addition to the limitations on legal non-complying/conforming use and the licensing restrictions based on an accommodations location, our Clients are also deeply concerned with other elements of the Proposed By-Law, which also strip away legal non-complying/conforming uses and are zoning restrictions dressed up as licensing measures. These elements are also overly restrictive and unduly limit the property rights of owners who previously lawfully operated STRs in the City. In our view, the limitations outlined below effectively limit the viability of an STR in the City in such a restrictive manner that they become prohibitive in all but a select few scenarios. When a by-law is so restrictive that it makes the activity economically unviable to operate, it is *ultra vires* the power of the municipality and thus illegal.³

Minimum Rental Period

The Proposed By-Law limits STR owners to a 6-day minimum rental period. Our view is that this term of the Proposed By-Law is overly harsh and inhibits property owners' ability to rent their property for shorter rental periods. This ability is important, given the fact that many families and other renters take advantage of weekends to rent a property. Indeed, the minimum rental period will cause an acute loss of business from families with school-aged children who cannot take their children away from school from September to June, or who live in condos or rent apartments, and who look forward to weekend getaways outside of the city.

Maximum Total Rental

The Proposed By-Law also limits STR owners to a maximum of 180 combined rental days per calendar year. This is an unduly harsh restriction and an entirely arbitrary limit that is contrary to the rental market. The arbitrary limit undermines the ability of owners to use their properties for STRs, as well as their ability to adequately defray the costs of property ownership, and thus jeopardizes the continued viability of owning the properties. This limit is particularly punitive in a context where, as noted above, an impending recession with climbing interest rates will make property sales more difficult, causing undue financial hardship for STR owners.

Occupancy Cap

Finally, the Proposed By-Law stipulates that no Person STR shall permit more than 2 renters on the premises for each bedroom. This is not a reasonable restriction, and such a cap does not appear to apply to properties that are not used for STR purposes despite similar concerns about noise, parking, or level of activity, for example.

Prohibitive licensing by-law schemes are illegal, as the entire purpose of licensing by-law is to regulate, not to prohibit. Our Clients' concern is that these limitations, in conjunction with the others noted above, effectively prohibit STRs in most scenarios, even where the use of the

³ *Edwards v Faraday (Township)*, 2006 CarswellOnt 9598 (ON SC), [2006] OJ No 2741 at para 58; *Re Leavey et al and City of London*, 1979 CanLII 1957 (ON SC), 11 MPLR 19, at p 18.

property as an STR would be entirely reasonable. This may effectively make the operation of an STR within the City economically unviable—which is akin to prohibiting the activity altogether.⁴

Request to Reconsider Proposed By-Law

While we write this letter on behalf of our Clients, we also write on behalf of property owners in the City that have legal non-complying/conforming uses and wish to ensure that their rights are fully protected. Our Clients urge the City not to proceed with the implementation of the Proposed By-Law as presently drafted—a regime that is unduly harsh, improperly prohibitory, and inconsistent with property owners' legal non-conforming/complying use rights.

The loss of property rights is not something to be taken lightly, as was highlighted by the court in the recent United States District Court of Hawai'i case, *Hawai'i Legal Short-Term Rental Alliance vs. City and County of Honolulu, et al.* In this case, the court granted an injunction to halt enforcement of an STR regulation, noting repeatedly that the deprivation of these rights constituted an irreparable injury.⁵ In a similar vein, our office has brought an application against the Township of Tiny challenging a by-law that is substantially similar to the Proposed By-Law – I enclose the Notice of Application for your review and consideration.

Our Clients are prepared to further engage in dialogue with the City where they can work collaboratively with the City to address their concerns with the Proposed By-Law, some of which have been laid out above. In order to enter into such dialogue our Clients request to have the passing of the Proposed By-Law postponed.

Yours truly,



Jonathan Nehmetallah
Associate

JN/LW/hc

CC: Doug Elmslie; Mike Perry; Charlie MacDonald; Tracy Richardson; Dan Joyce; Emmet Yeo; Pat Warren; Eric Smeaton; and, Ron Ashmore

⁴ *Edwards v Faraday (Township)*, 2006 CarswellOnt 9598 (ON SC), [2006] OJ No 2741 at para 58.

⁵ *Hawai'i Legal Short-Term Rental Allianc vs. City and County of Honolulu et al*, Civil No 22-00247 DKW-RT, at p. 26.

MTDOCS 47076024