CITATION: Fisher v. Guelph, 2024 ONSC 482
COURT FILE NO.: CV-20-00000080-0000
DATE: 2024 01 23

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Stirling Fisher, Applicant

The Corporation of the Township of Guelph/Eramosa, Respondent

BEFORE: Bloom, J.

COUNSEL: William R. Appleby, for the Applicant

Alexander Verrilli, for the Respondent

HEARD: January 8, 2024

E N D O R S E M E N T

I. INTRODUCTION

[1] This matter is an appeal under s. 25 of the *Building Code Act, 1992* ("*BCA")* of 5 orders issued under s. 22(2) of the act by Dan Sharina, the chief building official of the Respondent. I refer to the Appellant from time to time as the Applicant, since he has styled himself as "Applicant."

II. STANDARD OF REVIEW AND APPELLATE JURISDICTION

[2] S. 25(1) and (4) of the act provide:

Appeal to court

25 (1) A person who considers themself aggrieved by an order or decision made by the chief building official, a registered code agency or an inspector under this Act (except a decision under subsection 8 (3) not to issue a conditional permit) may appeal the order or decision to the Superior Court of Justice within 20 days after the order or decision is made. 2002, c. 9, s. 40 (2).

Powers of judge

(4) On an appeal, a judge may affirm or rescind the order or decision and take any other action that the judge considers the chief building official, registered code agency or inspector ought to take in accordance with this Act and the regulations and, for those purposes, the judge may substitute his or her opinion for that of the official, agency or inspector. 2002, c. 9, s. 40 (3).

[3] The applicable standard of review under s. 25 (1) has been defined in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at paras. 33 to 37 and 50:

> **33** This Court has described respect for legislative intent as the "polar star" of judicial review: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 149. This description remains apt. The presumption of reasonableness review discussed above is intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker. Second, it may direct that derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.
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> (1) Legislated Standards of Review
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> **34** Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect: see, e.g., *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 31-32; *Khosa*, at paras. 18-19; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 20; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 55; *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108, at para. 16; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health*

Authority, 2016 SCC 25, [2016] 1 S.C.R. 587, at paras. 8 and 29; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 28.

35 It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the *Administrative Tribunals Act*, S.B.C. 2004, c. 45: see ss. 58 and 59. For example, it has provided that the standard of review applicable to decisions on questions of statutory interpretation by the B.C. Human Rights Tribunal is to be correctness: *ibid.*, s. 59(1); *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 32. We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

(2) Statutory Appeal Mechanisms

36 We have reaffirmed that, to the extent possible, the standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision. Just as a legislature may, within constitutional limits, insulate administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect. As noted by the intervener Attorney General of Quebec in its factum, [TRANSLATION] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.

37 It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002

> SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.
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> ….
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> **50** We wish, at this juncture, to make three points regarding how the presence of a statutory appeal mechanism should inform the choice of standard analysis. First, we note that statutory regimes that provide for parties to appeal to a court from an administrative decision may allow them to do so in all cases (that is, as of right) or only with leave of the court. While the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard.

[4] Justice Agarwal of this court in 1672736 *Ontario Inc. v. Savini*, 2022 ONSC 6177 at paras. 41 and 42 applied that reasoning to the appellate structure before me:

> [41] So, in short, *Vavilov* changes the standard of review for questions of mixed fact and law in a statutory appeal from a CBO's or inspector's decision—they are now to be reviewed for a palpable and overriding error. This revised framework is consistent with the pre-*Vavilov* jurisprudence that deferred to the decisions of CBOs. Municipal planning and zoning are "specialized areas" that fall within the expertise of the CBO. Most of the determinations made by CBOs are mixed questions of fact and law. See *Berjawi v Ottawa (City)*, 2011 ONSC 236 at para 12.
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> [42] On questions of law, the standard of review remains correctness. When applying the correctness standard, the reviewing court may choose either to uphold the CBO's determination or to substitute its own view. While this court should take the CBO's reasoning into account, I am ultimately empowered to come to my own conclusions on the question.

[5] The remedial power on the appeal before me is set out in s. 25(4). That power has been defined by Justice D. Rutherford in *Hull v. Greater Napanee (Town)*, 2014 ONSC 315 at para. 5:

> [5] In his Notice of Appeal, Mr. Hull included as Part D, claims for compensation for loss of rental income, loss of past and future business income, lost personal time, lost building value, and personal damages for stress and suffering. Some of the materials Mr. Hull filed related to these compensatory claims. At the outset of the hearing, I advised Mr. Hull that I had no jurisdiction on the appeal to entertain such claims as the Chief Building Official had no such jurisdiction and the Court's jurisdiction on an appeal under s. 25 was confined to the same authority of that Official.

[6] The jurisdiction of this Court excludes tort claims by an appellant, including claims of negligent inspection. I am confined to the defined remedial powers set out in s. 25(4) of the *Building Code Act.*

III. UNDISPUTED FACTS

[7] The Applicant is the owner of the property at 8376 Highway 7, Township of Guelph/Eramosa. He acquired the property in 2010.

[8] On February 5, 2020, Mr. Sharina issued five orders to comply under s. 22(2) of the act in respect of structures on the property.

[9] Originally all five orders were subject of this appeal. In oral argument the Applicant took the position that 3 of the orders were not subject of attack. The remaining two orders were subject of attack in oral argument.

IV. ARGUMENTS OF THE PARTIES

A. Arguments of the Applicant

[10] In his factum the Applicant argues that he has made his best efforts to comply with the orders subject of the appeal; and that the Respondent should be more lenient in their enforcement. He has developed in oral argument specific complaints in relation to the two orders subject of the appeal. I will set out those specific arguments in my analysis below.

B. Arguments of the Respondent

[11] In its factum the Respondent contends that the Appellant has failed to demonstrate either an error of law, or a palpable and overriding error of fact or mixed fact and law, in Mr. Sharina's orders subject of the appeal. I will be more specific in addressing the Respondent's arguments in my analysis below.

V. ANALYSIS

A. ORDER NUMBER 2020-002

[12] For ease of reference, I will adopt the nomenclature used by the parties in oral argument and refer to this order as order #2.

[13] This order was issued by Mr. Sharina on February 5, 2020 in respect of a horse barn on the property. The order cited as violations of the *Building Code Act* the construction of an apartment without a building permit, the construction of

plumbing without a building permit, and the construction of a septic system without a septic permit.

[14] The order required the obtaining of a building permit or removal of the offending structures in relation to the first two violations, and the obtaining of a septic permit or removal of the septic system in relation to the third.

[15] The Appellant argued that the order demonstrated reversible error in finding that there was a dwelling on the premises.

[16] The Respondent argued that the order was valid as long as the premises was a "building" as defined by the *BCA*; and that it was a "building." Alternatively, the Respondent argued that it was a dwelling.

[17] I have concluded that the Appellant has shown no reversible error in respect of order # 2. The *BCA* does not define a "dwelling." The material provisions are set out below:

> **Interpretation**
> **Definitions**
> s. 1 (1) In this Act,
> "building" means,
> (a) a structure occupying an area greater than ten square metres consisting of a wall, roof and floor or any of them or a structural system serving the function thereof including all plumbing, works, fixtures and service systems appurtenant thereto,
> (b) a structure occupying an area of ten square metres or less that contains plumbing, including the plumbing appurtenant thereto,
> (c) plumbing not located in a structure,
> (c.1) a sewage system, or
> (d) structures designated in the building code; ("bâtiment")

> **Inspection of buildings and building sites**
> 12 (1) An inspector may enter upon land and into buildings at any reasonable time without a warrant for the purpose of inspecting the building or site to determine whether or not the following are being complied with:
> 1. This Act.
> 2. The building code.
> 3. An order made under this Act. 2017, c. 34, Sched. 2, s. 6 (1)
>
> **Order**
> s. 12(2) An inspector who finds a contravention of this Act or the building code may make an order directing compliance with this Act or the building code and may require the order to be carried out immediately or within such time as is specified in the order. 1992, c. 23, s. 12 (2).
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> **Powers**
> s. 22(2) A chief building official may exercise any of the powers or perform any of the duties of an inspector. 1992, c. 23, s. 22 (2).

[18] The scheme of the act provides for an inspector to inspect a "building," and to make an order arising from the inspection. The chief building official may exercise any of the powers or perform any of the duties of an inspector.

[19] Mr. Sharina, the chief building official, made an order in respect of the premises which was a "building" within the meaning of the act. He was not required to determine whether the premises was a dwelling. The Appellant has shown no reversible error in respect of order #2.

[20] I will briefly review the evidence relating to the premises in question to further support my conclusion.

[21] It is uncontested that the premises in question was a horse barn which contained an apartment. It is also not in dispute that the apartment contained a

full kitchen, full bathroom, laundry facilities, and plumbing fixtures; and that there was a holding tank for human sewage which was drained from time to time.

[22] The order applied to this building and made requirements for permits described above.

[23] The Appellant demonstrated no error of law, or palpable and overriding error of fact or mixed fact and law, in Mr. Sharina's order, based on the evidence I have summarized.

B. ORDER NUMBER 2020-003

[24] Order # 3, as it was referred to in oral argument, was issued by Mr. Sharina on February 5, 2020 in respect of a hay barn on the property. The order cited as violations of the *Building Code Act* the construction of an apartment in the attic of the barn without a building permit, the construction of plumbing without a building permit, the construction of a septic system to support the plumbing without a septic permit, and the cutting of trusses in the roof structure of the barn incidental to the construction of the apartment.

[25] The order required the removal of the offending structures or the obtaining of the requisite permits in respect of the first three violations, and the obtaining of a building permit to repair the trusses.

[26] The Appellant argued that the order demonstrated reversible error by finding that the offending structures were or were part of a dwelling.

[27] The Respondent argued, similar to its argument in relation to order #2, that the structures were or were part of a building; and that, whether they were or were part of a dwelling, was not germane to sustain the order.

[28] Alternatively, the Respondent argued that the structures were or were part of a dwelling.

[29] My conclusion and reasoning are the same in respect of order #3 as they were in relation to order #2. Mr. Sharina, the chief building official, made an order in respect of the premises which was a “building” within the meaning of the act. He was not required to determine whether the premises was a dwelling. The Appellant has shown no reversible error in respect of order #3.

[30] I will briefly review the evidence in relating to the premises in question to further support my conclusion.

[31] An employee of the Appellant used an apartment in the barn; the apartment had been built by cutting attic trusses. There was no building permit for the apartment. There was also a toilet in the apartment with limited plumbing connections to it; this toilet drained human waste to lower in the barn, from where

it was removed like animal waste. There was no building permit for the plumbing. There was also a kitchen sink, and a bed in the apartment.

[32] The order applied to the barn which was a building, and made requirements for permits described above.

[33] The Appellant demonstrated no error of law, or palpable and overriding error of fact or mixed fact and law, in Mr. Sharina's order, based on the evidence I have summarized.

C. SUMMARY AND ORDER

[34] Since there were no reversible errors in the orders subject of the appeal, I affirm all four orders under s. 25(4) of the *BCA.*

VI. COSTS

[35] The Respondent seeks substantial indemnity costs of $30,602.95 inclusive of fees, disbursements, and applicable taxes based on its success, the difficulty in understanding the errors alleged by the Appellant, and the lack of basis for the appeal. An additional factor cited by the Respondent was the fact that there were no concessions made by the Appellant as to the validity of orders #1, #4, and #5 until oral argument, necessitating preparation in relation to all four orders.

[36] The Appellant submits that both parties should pay their own costs; and, alternatively, that he should be ordered to pay partial indemnity costs to the Respondent of $10,000 inclusive of fees, disbursements, and applicable taxes.

[37] In my view the total success of the Respondent and the fact that the Appellant did not concede the validity of three orders until oral argument, entitle the Respondent to costs in this matter. However, I do not agree that substantial indemnity costs are justified. Accordingly, I order that the Appellant pay to the Respondent within 30 days partial indemnity costs of $23,101.94 inclusive of fees, disbursements, and applicable taxes.

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Bloom, J.

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Alexander Verrilli, for the Respondent

ENDORSEMENT

Bloom, J.

DATE: January 23, 2024