CITATION: 1000758840 Ontario Ltd v. The City of Toronto, 2024 ONSC 1835
COURT FILE NO.: CV-24-00714288-0000
DATE: 20240328

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
1000758840 Ontario Ltd., o/a Niagara Neighbours for Community Safety	)	*Eric K. Gillespie,* for the Applicant
Applicant	)	
– and –	)	
The City of Toronto and St. Felix Centre	)	*Christopher J. Henderson/Alison Barclay,* for the Respondent City of Toronto
Respondents	)	*Kyle Gossen*, for the Respondent St. Felix Centre
	)	**HEARD:** March 8 and 15, 2024

L. BROWNSTONE J.

Overview

[1] The City of Toronto intends to relocate an emergency residential shelter to 629 Adelaide St. West ("the Property"). The shelter will be operated on the city's behalf by the respondent St. Felix Centre. The applicant is an organization with about sixty active members that was formed in 2023 to represent the concerns of residents living in proximity to the proposed shelter. It seeks a declaration under Rule 14 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 that the proposed use of the Property as a shelter for people experiencing homelessness is not a permitted use under the City of Toronto's applicable zoning by-laws.

[2] The applicant challenges the use of the Property as a shelter on two bases. First, it does not accept that the use of the Property as a municipal shelter or a crisis centre is permitted under the city's zoning by-laws. Second, the applicant argues that the intended inclusion of a patio is specifically prohibited by the city's by-laws, and renders the entire proposed use of the Property as a shelter improper.

[3] The respondents assert that this matter should have been brought as an appeal under s. 25 of the *Building Code Act, 1992*, S.O. 1992, c. 23, that the matter is not justiciable under Rule 14, and that in any event the intended use of the Property is expressly permitted by the city's zoning by-laws.

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[4] For the reasons that follow, I find that this proceeding should have been commenced as an appeal under s. 25 of the *Building Code Act, 1992*, and that the chief building official made no error in his decision with respect to the Property. I further find that the only decision that has been made with respect to the patio is to refer it to the city's transportation services, and there is no error in that decision. There has been no decision on whether the patio will be permitted and it is therefore premature for the court to make any substantive decision about the patio.

Background

The Property

[5] St. Felix is a registered charity and not-for-profit organization that provides a variety of social services, including the operation of residential shelters, to marginalized communities in Toronto. St. Felix operated a shelter at 25 Augusta Ave. which ceased operation in mid-2023 so that it could be converted to affordable housing units. The proposed shelter at issue in this application is about 850 metres east of the 25 Augusta Ave. shelter. It is intended to have 50 beds and requires some renovations.

[6] St. Felix intends to erect a fence around a paved area along Adelaide Street West and place some tables and chairs on it, thereby creating a patio adjacent to the shelter. The proposed patio is about four metres wide and would be on a municipal boulevard, which is city property. The proposed patio is not on the Property. The erection of the fence is the only construction that will occur in respect of the patio.

The decisions made regarding the Property and the patio

[7] On December 21, 2023, Workshop Architecture Inc. on behalf of St. Felix submitted a zoning applicable law certificate request to confirm that the proposed use of the Property would conform with zoning by-laws. The application form provided that the proposed use was a municipal shelter and described the project as a "[p]roposed change of use and interior modifications to accommodate a municipal shelter including: the addition of new [washrooms] and a commercial kitchen. No change to structure." Plans were attached. On January 25, 2024, a city zoning examiner issued an examiner's notice in response to Workshop's submission, seeking two pieces of correspondence - one confirming the shelter would be operated by or on behalf of the city, and the second indicating city council had approved the shelter and its location.

[8] The zoning examiner's notice also said, under the heading, "General Requirements": Seperate (sic) permit approval wil (sic) be required from Transportation services for any work taking place within/occupying the City's Right of Way."

[9] St. Felix provided the two pieces of requested correspondence and on February 1, 2024, the city's acting chief building official and executive director issued a zoning applicable by-law certificate that states as follows: "examination of your application has been completed and it has been determined that the submitted proposal complies with the applicable City Zoning by-law(s)

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and all other Applicable law”. The approval was based on the submitted drawings and documents, which were attached to the certificate.

[10] St. Felix requires the city’s permission to use the adjacent area for a patio. In accordance with the zoning examiner’s decision, this request is pending before the city’s transportation services. No decision has yet been made by transportation services.

[11] Presumably in an attempt to bolster its position opposing the proposed shelter, the applicant had submitted a proposal for use of the Property that it claims mirrored St. Felix’s application. On January 5, 2024, the zoning examiner determined that the applicant’s proposed use of the Property was not permitted under the Property’s zoning. However, the applicant’s proposal included emergency veterinary services, a use not contemplated by St. Felix and a use not permitted by relevant by-laws. The applicant did not have the permission of city council and would not be operating a shelter on behalf of the city. I find that the rejection of its proposal is irrelevant to the approval granted to St. Felix.

History of this litigation

[12] The applicant issued its notice of application under Rule 14.05 on February 6, 2024. The notice of application seeks “[a] declaration that the proposed use of 629 Adelaide Street West, Toronto as a shelter for people experiencing homelessness is not a permitted use under the City of Toronto's applicable zoning By-law(s).” The application also sought an interlocutory injunction, but the urgent date granted for the hearing of the application obviated the need to seek an interlocutory order pending disposition of the application.

[13] The matter was first heard on March 8, 2024. In its factum, the city raised preliminary arguments that the matter is not justiciable under rule 14 and that the proper route the applicants should have followed is an appeal under section 25 of the *Building Code Act, 1992*. The applicant adverted briefly to the preliminary issues in its reply factum. When the matter came before me on March 8, I requested that the applicant address the preliminary jurisdictional grounds raised by the respondents, and in particular, whether the matter should properly be constituted as an appeal under s. 25 of the *Building Code Act, 1992*. The applicant’s counsel was unwell and asked the court to excuse him. In the result, I gave the applicant until March 12th, 2024, to file a brief factum regarding the jurisdiction issues. The city was to advise the court whether, in the event the matter is reconstituted as an appeal under s. 25 of the *Building Code Act*, *1992*, the chief building official whose decision would be subject to the appeal wished to appear with separate representation as a party to the proceeding.

[14] The applicant filed a further factum maintaining its position that its application for a declaration under rule 14 was the appropriate procedure. The chief building official advised that if the court deemed it appropriate to proceed as though it were a s. 25 *Building Code Act, 1992* appeal, the official should be added as a co-respondent. The chief building official did not oppose being added as a party, and, as he takes the same position as does the city, he would be represented by the city’s counsel and did not seek an adjournment. Argument proceeded on March 15, 2024.

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The matter should have proceeded as an appeal under s. 25 of the *Building Code Act, 1992*

[15] Section 25 of the *Building Code Act, 1992* provides in relevant part as follows:

> 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. …
>
> (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.

[16] The applicant relies on Rule 14.05(3)(d), which permits a proceeding to be commenced by an application where the relief claimed is determination of rights that depend on the interpretation of, among other things, a municipal by-law. The applicant relies on *Toronto (City) v. 1291547 Ontario Inc.*, 2000 CanLII 22398 (ON SC). That case was not a free-standing application in the face of a decision by the chief building official that the zoning permitted a proposed use. It does not assist the applicant.

[17] The applicant argues that he cannot be required to proceed under s. 25 because the patio does not form part of the chief building official's decision, and therefore cannot be subject to a s. 25 appeal. He relies on the fact that the decision of the chief building official dated February 1, 2024, was accompanied by plans on which the following stamp was placed:

> THIS ZONING REVIEW IS FOR THE PROPOSED INTERIOR ALTERATIONS TO ACCOMODATE (sic) A NEW MUNICIPAL SHELTER ONLY. ANY OTHER WORK IS BEYOND THE SCOPE OF THIS REVIEW.

[18] The applicant argues that because the outdoor patio and fencing have not been reviewed by the chief building official or his delegates, there is no order or decision for the court to review and the applicant is not "aggrieved" under s. 25(1).

[19] The respondents argue that the February 1, 2024, decision of the city's acting chief building official and executive director that the proposal complies with the applicable city zoning by-laws and all other applicable law is a decision for purposes of s. 25. Further, the zoning examiner's notice of January 25, 2024, which includes the notation set out above at paragraph [8] that refers to the patio, is a decision of the chief building official for purposes of s. 25: *TDSB v. City of Toronto*, 2014 ONSC 3605, aff'd by the Divisional Court at 2014 ONSC 5494. As noted above, the respondents argue that the matter should have been constituted as an appeal of the chief building official's decision, with the official, who is independent of the city, being added as a co-

respondent. The applicant cannot circumvent a specific, legislated appeal route that carries with it an appropriate standard of review.

[20] The decision of the chief building official that the Property conforms with the zoning by-laws and all other applicable law was based on a review of the plans, the zoning examiner's report, and the correspondence provided in response thereto. The patio was part of the proposal reviewed. The decision in respect of the patio made by the zoning examiner was that the patio had to obtain a permit from the city's transportation services, as it is on city property. As indicated above, all parties agree that this request for permission remains outstanding.

[21] I find that the applicant's challenge should properly have been brought as an appeal under s. 25 of the *Building Code Act, 1992*. The decisions at issue are decisions of the chief building official. Given the chief building official's consent to be added as a co-respondent and represented by counsel for the city, I will proceed to consider the matter under that provision. I will continue to refer to the applicant as the applicant, although it is properly an appellant given my finding on jurisdiction.

The standard of review is one of palpable and overriding error

[22] Prior to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, decisions under s. 25 were reviewed on a reasonableness standard for all but purely legal questions: *Berjawi v. Ottawa (City)*, 2011 ONSC 236, 79 M.P.L.R. (4th) 280 at para. 12. The city argues that the post-*Vavilov* standard of review is one of palpable and overriding error since the issues raised are questions of mixed fact and law: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Fisher v Guelph*, 2024 ONSC 482.

[23] The *Building Code Ac*t, *1992* provides for a right of appeal but does not legislate a standard of review. I agree that in accordance with *Vavilov*, the standard of review is determined by reference to the nature of the question before the court and the applicable appellate standards of review. The observation in *Berjawi* that decisions of the kind that are reviewed under s. 25 are usually decisions of mixed fact and law continues to apply. The decisions before me are decisions of mixed fact and law from which legal principles are not readily extricable. Therefore, the standard of review is one of palpable and overriding error.

The decisions contain no errors

[24] The chief building official rendered a decision with respect to the Property. The parties differ as to whether the official's decision included the patio. The city states that because the patio was included in the plans before it, the chief building official's decision includes the patio. In the alternative it argues that the zoning examiner's decision with respect to the patio, namely that it be referred to the city's transportation services, is a decision for purposes of s. 25. The applicant argues that no decision has been made with respect to the patio.

[25] On either party's reading, a final decision with respect to the patio remains outstanding.

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[26] The applicant's initial position was that the shelter itself was impermissible. In the face of the Municipal Shelters by-law, it modified its position to assert that the fencing around the patio constituted an addition under the by-law, that the addition was not permitted, and that therefore the entire proposed use of the Property was impermissible. However, the applicant does not seek a declaration in respect of the patio. The applicant confirmed in oral argument that it continues to seek the same relief it has sought from the outset, namely, a "declaration that the proposed use of 629 Adelaide Street West, Toronto as a shelter for people experiencing homelessness is not a permitted use under the City of Toronto's applicable zoning By-law(s)."

[27] The Property is zoned according to the city's pre-amalgamation comprehensive zoning by-law no. 438-86, but is also subject to by-law no. 138-2003, the city's municipal shelter by-law. That by-law was amended by by-law 545-2019. It states:

> 2. Notwithstanding any other general or specific provision in any By-law of the City of Toronto or of its former municipalities, municipal shelters shall be a permitted use in all zones or districts of the City of Toronto, provided:
>
> (i) any new buildings or additions comply with all other applicable zoning provisions of the zone or district; …
>
> (iv) the municipal shelter, including its location, has been approved by City Council.

[28] A municipal shelter is defined in s. 11 of the by-law as a supervised residential facility, operated by or for the City of Toronto, or any agency of the City of Toronto. which provides short-term emergency accommodation and associated support services. Under the 2019 by-law amendment, the only applicable conditions to a municipal shelter are that i) any new buildings or additions comply with all other applicable zoning provisions of the zone or district, and that ii) the municipal shelter and its location has been approved by City Council.

[29] St. Felix will operate the shelter pursuant to an operating agreement with the city. It will be a supervised residential facility providing short-term emergency accommodation and associated support services. The shelter and its location have been approved by city council.

[30] St. Felix argues, with the support of the city, that the intended use of the Property is also permitted as a crisis care facility under zoning by-law 438-86. The Property is zoned "industrial" under this by-law. Subsection 9(1)(a) provides property cannot be used "for any purpose except one or more of the uses where permitted by the chart in paragraph (f) and subject to qualifications where indicated." In the chart, under the heading "Miscellaneous Uses", a "crisis care facility" is permitted in the I1 zone. There are no qualifications on this use. The by-law defines a "crisis care facility" as: a temporary residence for persons requiring immediate shelter and assistance for a short period, and: (i) the facility is supervised, or the members of the group are referred, by a hospital, court or government agency; or (ii) the facility is funded wholly or in part by a government, other than funding provided solely for capital purposes; or (iii) the facility is regulated

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or supervised under a general or special Act; but does not include a use otherwise classified or defined in this by-law. The uncontradicted evidence before the court is that the proposed shelter will be a temporary residence for people who need immediate shelter and assistance for a short period, that it will be supervised by St. Felix Centre staff 24 hours a day, 7 days a week, and it will be wholly funded by the city, bringing it within the by-law requirements.

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[31] In support of its argument that the proposed use is impermissible, the applicant filed affidavits of Mr. Manett, an expert land use planner. The affidavit asserts several legal conclusions, including that "the proposed use is unlawful" and that because of the proposed patio, St. Felix's proposal does not qualify for the municipal shelter by-law exemption. The city and St. Felix object to the report on the grounds that it advances legal conclusions, not permitted by an expert. The applicant posits that the city and St. Felix cannot argue against Mr. Manett's interpretations, because they filed no contradictory "evidence" and did not put their legal interpretations to Mr. Manett, thereby offending the rule in *Browne v. Dunn* (1893) 6 R. 67, H.L

[32] Parties may not tender expert evidence on domestic legal interpretation. As Grace J. noted in *Southside Construction v. Ingersoll (Town of)*, 2018 ONSC 6561 at para. 16, affirmed 2019 ONCA 459: "the bulk of the affidavits filed by the parties are inadmissible because they consist of the affiants' opinion concerning the appropriate interpretation of the zoning by-law. The interpretive exercise is for the court to undertake." This is consistent with Court of Appeal decision in *Niagara River Coalition v. Niagara-on-the-Lake (Town)*, 2010 ONCA 173. I find Mr. Manett's legal conclusions inadmissible.

[33] Further, the rule in *Browne v. Dunn* has no application here. Mr. Manett was put forward as an expert, not a fact witness. He did not put forward "uncontradicted evidence" as asserted by the applicant. In overstepping his expertise he attempted to provide a legal opinion. The respondents were understandably loathe to question him deeply on these opinions given that they disputed the propriety of him advancing them. This is not a credibility determination. It is a legal determination. To argue that counsel cannot make legal submissions if they were not put to a land use expert misconstrues the nature and proper boundaries of expert evidence, the nature of legal submissions, and the important distinction between the two. I give no effect to this argument.

[34] The applicant's argument turns on whether the proposed fence for the patio is an addition for purposes of s. 2(i) of the by-law, and if so, whether it renders the proposed use of the Property itself impermissible. As stated, there has been no decision made with respect to the patio. The chief building official did not view the plan submitted by St. Felix as including an addition for the Property. There is no error in his decision even if it comprises an implicit conclusion that a proposed fence on adjacent property does not render the permitted use of the Property itself impermissible.

[35] To the degree the zoning examiner made a decision about the patio on January 25, 2024, it is that permit approval would be required from transportation services for the fence and patio. Assuming that this decision is reviewable, it contains no error.

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[36] It is important to remember that the by-law does not prohibit additions. It merely provides that any new buildings or additions must comply with all other applicable zoning provisions. There is no information or argument before the court that the fence or patio does not comply with any applicable zoning provisions.

[37] There is no palpable and overriding error, and indeed no error, in either the chief building official's decision or the zoning examiner's decision.

[38] To the degree I were to accede to the applicant's argument that, because no decision has been rendered with respect to the patio, the applicant is not aggrieved and therefore does not come within the ambit of s. 25, I would dismiss the application on the grounds that, even if such a decision of transportation services is justiciable, and without commenting on appropriate avenues that may exist to challenge any such decision, it would be premature for the court to consider the issue while a decision is pending: *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541

[39] I conclude as follows. This is properly an appeal of the decisions of the chief building official. Those decisions contained no error. Whether a patio will be permitted is undetermined. The potential for a patio on adjacent property does not render the decision in respect of the Property itself impermissible. No decision has been made by the city transportation services with respect to whether a permit will issue for the patio. That decision properly belongs to another body at first instance. It is premature for the court to consider the issue of the patio.

Disposition

[40] The decisions of the chief building official are affirmed under s. 25(4) of the *Building Code Act, 1992*. The application is dismissed.

[41] The parties are encouraged to agree on costs. Should they be unable to do so, the respondents may provide costs submissions of no more than three pages double spaced, along with a bill of costs and any offers to settle, within 14 days. The applicant shall have 14 days to respond, with the same page limits. There shall be no reply submissions without leave. These submissions may be sent to my judicial assistant at linda.bunoza@ontario.ca.

L. Brownstone J.

Released: March 28, 2024

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Applicant

– and –

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Respondents

REASONS FOR JUDGMENT

L. Brownstone J.

Released: March 28, 2024