CITATION: 2755249 Ontario Inc. v. Wilson et. al., 2024 ONSC 5627
COURT FILE NO.: CV-23-077 (Perth)
DATE: 2024 10 09

SUPERIOR COURT OF JUSTICE

APPLICATION UNDER section 25 of the Building Code Act, 1992, S.O. 1992, c. 23, and Rule 14 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194

RE: 2755249 ONTARIO INC., Applicant

AND:

JON WILSON, in his capacity as Chief Building Official for the Municipality of Mississippi Mills and THE CORPORATION OF THE MUNICIPALITY OF MISSISSIPPI MILLS, Respondents

BEFORE: C. MacLeod RSJ

COUNSEL: Sylvain Rouleau, for the Applicant

James McCarthy, for the Respondents

HEARD: July 19, 2024

REASONS FOR DECISION

[1] This Application is an Appeal of a decision of the Chief Building Official ("CBO") of Mississippi Mills. The issue arises from fees charged to the Applicant for building permits in relation to a building conversion and renovation. The CBO assessed the resulting residential units as new construction rather than renovation of an existing structure and charged fees accordingly.

[2] The Applicant has a statutory right of appeal to this Court in certain circumstances, but it is subject to a time limit. There are also other routes and other procedures that could have been pursued and there is parallel pending litigation. The Court must therefore decide whether to entertain this appeal, whether to grant it and the appropriate remedy.

BACKGROUND

[3] The Applicant is a corporation owned by Timothey and Laurie Dillon. In June of 2020, the Dillons purchased an abandoned seniors' residence located at 4676 Dark's Side Road in the Village of Packenham, Town of Mississippi Mills.[1] According to the evidence and original plans, the approximately 22 units in the residence were self contained seniors' apartments with a bedroom, washroom and a kitchen or kitchenettes but they were also connected by an interior hallway to common areas of the residence. As originally constructed, each unit had both an exterior and interior entrance. The original owners had gone out of business. The Applicant purchased the property under Power of Sale when the building had been abandoned and was in a state of disrepair.

[4] The Applicant's plan was to redevelop the property as low rise apartments with the stated objective of creating affordable housing. When the Applicant submitted an application for a building permit in February of 2021, it was advised by the then CBO that it would be necessary to rezone the property to permit apartments instead of the previous institutional use. The Applicant submitted a rezoning application. Evidently, the Municipal Council supported the project. The rezoning application was granted on September 21, 2021 and Site Plan Approval was granted on December 21, 2021.

[5] The Applicant did not believe it needed a building permit to update and modernize the existing units but it would require a permit to extend the units into what had been the internal hallway and to insert fireproof demising walls. The Applicant decided to proceed in two phases. Phase I involved 12 units, all of which were enlarged versions of existing units. It began the work of demolition and started some construction before re-applying for a building permit and before the Site Plan Approval. It appears this may have been the start of friction between the Applicant and the Mississippi Mills building department.

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[1] Mississippi Mills was incorporated in 1998 by amalgamating the Town of Almonte with the townships of Ramsey and Packenham. Besides Almonte, it includes Appleton, Blakeney, Clayton, and Packenham and occupies the Northeast corner of Lanark County.

[6] On November 9, 2021 the CBO issued a "Stop Work Order" because he was of the view that work being done on the site required a building permit. The Stop Work Order was for "construct without a building permit". [2]

[7] Subsequently, on January 22, 2022, the Applicant submitted a new building permit application. That building permit for Phase I was duly granted on April 11, 2022. The work was then completed, and occupancy permits were granted on May 2, 2022. I understand those apartments are now occupied. So, from that point of view, Phase I proceeded without much additional difficulty.

[8] An issue arose, however, over the fees. When the Phase 1 building permit was issued, the CBO took the position that the proposed work would result in the creation of new housing units and therefore assessed the Applicant for a building permit fee and development charges based on that conclusion. In addition, the CBO assessed the Development Charges for "row housing" and not "apartments". The total of the fees and charges invoiced in March of 2022 was $61,624.00.

[9] The Applicant disagreed with the position of the CBO but advised it would pay the fees "under protest" and reserving the right to challenge the amounts. The Applicant paid the sum of $27,954.00 on April 11, 2022 and under a Fee Deferral Agreement is supposed to pay $6,734.00 on April 11 in each of five succeeding years. It also commenced a Court Application (Perth Court file no. CV-22-44) on May 2, 2022. That Application was subsequently adjourned *sine die*. It was not formally before me, but the issues are identical and the arguments are the same. In any event, it has not been previously decided and is still before the Court.

[10] Phase II of the development was similar to Phase I as it principally involved expanding existing units into the former interior hallway. The plans also called for the conversion of certain spaces that had been the lounge or lobby or offices for the seniors' residence. It is acknowledged that some of that construction, converting former office space or common areas to apartments, would have created new dwelling units. The Applicant's position was that there were 10 expanded

[2] I am also advised that charges were laid and are proceeding in Provincial Offences Court although it is unclear whether those charges relate to this instance or to subsequent construction.

units and 2 new units. The Applicant requested building permits for the 10 units and deferred construction of the new units, effectively dividing Phase II into two parts.

[11] It is the position of the Respondent that more than 2 of the units were to be built in space that was formerly non-residential. The Respondent also submits that some of the original residential units had been converted to office space or storage space by the previous owner and so lost their character. Regardless, the current CBO reached the same conclusion as his predecessor and assessed all of the proposed units as new housing when the Applicant submitted the Phase II building permit application.

[12] That application was submitted on August 29, 2022. The CBO assessed all of the proposed units as new apartments. An invoice was issued for building permit fees of $18,720.00 and Development Charges of $29,062.99 for a total of $47,762.99.

[13] Between January and July of 2023, the Applicant and its consultants entered into discussions with the CBO, seeking to persuade the Municipality that the expanded units in Phase I and in Phase II were not “new units”. There was a great deal of debate about whether or not the units in the former senior’s residence all had full kitchens or not and precisely how the units had been used by the previous owner in recent years.

[14] Eventually by way of correspondence, the CBO took the position that “twelve new dwelling units were created from a portion of a building that had been operating as a single occupancy as a retirement home” and the conversion of a retirement home into individual dwelling units was in his view considered a change of use by the Building Code. On May 5, 2023, the CBO issued a document entitled “Building Permit Fee Review” in which he indicated that the building permit fees invoiced for the Phase II development should not have been at the “apartment rate” but at the “townhouse rate” and therefore had been undercharged by $12,480. This was consistent with the position taken by the previous CBO in relation to Phase I. The effect would have been to increase the fees for Phase II to $60,242.99 but although this amount was set out in the memo, no invoice was provided.

[15] Ultimately there was no building permit issued for Phase II. The adjusted fees proposed in the Building Permit Fee Review were not invoiced. The Applicants were not given the opportunity to pay under protest. The Applicant's application for a building permit was not dismissed or rejected. The Applicant's legal counsel wrote to the CBO demanding either a permit and an invoice or a decision to reject the application. Neither was forthcoming. The Applicant characterizes this as an unreasonable failure to make a decision and also as bad faith.

[16] The current Application was issued on September 5, 2023. The Applicant seeks an Order compelling the CBO to issue a building permit, declaring that the amount owing for permit fees for Phase II is $250 and declaring that the amount owing for Development Charges is $0.

[17] It should be noted that the Applicant has also sued the Municipality. That claim has just been issued.

THE RIGHT TO APPEAL

[18] The first question is whether this Court has jurisdiction to hear the matter. It is styled as an appeal under section 25 of the *Building Code Act*.[3] That section reads as follows:

> **Appeal to court**
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> **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.
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> **Extension of time**
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> (2) A judge to whom an appeal is made may, upon such conditions as the judge considers appropriate, extend the time for making the appeal before or after the time set out in subsection (1), if the judge is satisfied that there is reasonable grounds for the appeal and for applying for the extension.
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> **Effect of appeal**

[3] *Building Code Act, 1992,* SO 1992, c. 23

(3) If an appeal is made under this section in respect of a matter in which a question is pending before the Building Code Commission, the proceeding before the Commission is terminated.

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.

Reference to Commission

(5) A judge may refer a question respecting the interpretation of the technical requirements of the building code or the sufficiency of compliance with the technical requirements of the building code to the Building Code Commission for a hearing and report to the judge.

[19] Notably, s. 25 (1) is drafted in broad terms. It allows an appeal from "an order or decision" of the Chief Building Official. This appears to cover anything done by the CBO in exercising his powers under the *Act* but at a minimum it covers the decision to issue or refuse a building permit. That is one of the main functions of a CBO. Although the fees to be charged for building permit applications are established by the Municipal Council pursuant to s. 7 of the *Act*, it is not contested that the decision as to what fees should apply and the calculation of those fees would be a "decision". Both are appealable to this Court under s. 25 provided the appeal is brought within 20 days or such longer period as the Court may allow under s. 25 (2).

[20] There are other appeal routes open to the Applicant under other statutory provisions. In addition to building permit fees provided for in the *Building Code Act* (on a cost recovery basis), Municipalities can establish Development Charges. Those fees are governed by the *Development Charges Act*.[4] Development charges are levied both by Mississippi Mills and by Lanark County and are established by Municipal by-laws but they are administered by the CBO who must determine what charges apply and must calculate the total when issuing building permits.

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[4] *Development Charges Act, 1997,* SO 1997, c. c.27 as amended

[21] Section 20 of the *Development Charges Act* provides that a complaint that the development charge was incorrectly charged or that there was an error in the application of the development charge by-law may be made "to the council of the municipality imposing the development charge" within 90 days. The Council must then hold a hearing and the decision of the Council is then appealable to the Ontario Land Tribunal pursuant to s. 22 of that *Act*.

[22] In addition to the specific rights to appeal or complain in the *Building Code Act* and the *Development Charges Act*, an Applicant might have a right to judicial review under the *Judicial Review Procedure Act* [5] ("JRPA"). For example, in the matter before me, the Applicant has requested an Order directing the CBO to issue a building permit and directing the CBO to fix the fees at particular amounts. That specific relief appears in substance to be an order in the nature of *mandamus.* Sections 7 and 8 of the *JRPA* provides that any application for an order in the nature of *mandamus, prohibition or certiorari*, or for injunctive relief dealing with the exercise or refusal to exercise a statutory power of decision, shall be "deemed to be an application for judicial review" and made, treated and disposed of accordingly. Applications under the *JRPA* must be made to the Divisional Court.

[23] This is a potentially confusing network of interlocking appeal routes to different tribunals. The *Building Code Act* authorizes the Court to "affirm or rescind" an order or decision and "take any action" that the CBO ought to have taken. This means that if the Court grants the appeal, the Court "stands in the shoes of the CBO from whose decision the appeal is brought and can make any decision which the CBO ought to have made when issuing the building permit." Read literally, this authorizes a judge to issue a building permit but not to direct the CBO to do so although the Divisional Court could so direct under the *JRPA.* That would be an absurd result.

[24] Similarly, an interpretation that would require the decision of the CBO to invoice for permit fees and development charges (based on his assessment that this was new construction) to be appealed to two separate tribunals would be unworkable and impractical. In interpreting

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[5] *Judicial Review Procedure Act*, RSO 1990, c. J.1 as amended

legislation, a Court should strive to give harmonious and practical effect to the legislation when it is possible to do so.[6]

[25] Some assistance in how to deal with overlapping rights has recently been forthcoming from the Supreme Court of Canada. In the *Strickland* decision the Court was dealing with an application for judicial review in connection with the federal child support guidelines issued under the *Divorce Act.* The Federal Court has exclusive jurisdiction to hear applications for judicial review in relation to federal boards and tribunals and in that context to grant declaratory relief. Despite that, the Federal Court and the Federal Court of Appeal declined to entertain the matter and held that any question of invalidity of the guidelines would be appropriately determined by a provincial superior court in the context of a divorce proceeding within the superior court's jurisdiction.

[26] The Supreme Court agreed. Judicial Review and the remedies originally available under the prerogative writs are discretionary remedies and not rights in themselves. Exclusive jurisdiction to hear judicial review applications does not deprive another court before which a matter is properly brought from making findings of fact or law necessary to discharge its function. Thus, a Divorce Court can rule on the validity of the guidelines if the matter is raised in a divorce proceeding.[7] It follows that just because a matter could be put before the Divisional Court or another tribunal, this Court is not precluded from ruling on the matter in an appeal that is properly before it.

[27] In the recent *Yatar* decision, the Supreme Court held that in the absence of a privative clause, a statutory right of appeal is not the only remedy available to a party. Mr. Yatar was entitled to a statutory appeal from Ontario's Licence Appeal Tribunal on a question of law. The Supreme Court held that this would not bar him from also seeking judicial review on normal administrative law principles. Both the statutory right of appeal and reliance on the former prerogative writs could co-exist.[8] While the Supreme Court also held that if both remedies are sought, they should

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[6] See *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 SCR 342 and *Re: Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27
[7] *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713
[8] *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8

be heard together, they did not restrict the right of an appellant or applicant to choose which route to pursue.

[28] I conclude that the rights of appeal under the *Building Code Act*, the *Development Charges Act* and the *JRPA* can co-exist. The fact that a remedy could have been pursued under the latter statutes does not preclude this Court from exercising the appellate function provided under the former.

[29] In this case, the decision under review is the decision of the CBO to categorize the construction in question as new construction, to calculate permit fees and development charges on that basis and then, in the face of a dispute, his decision not to issue a building permit. In my view these are decisions by the CBO which may be the subject of an appeal under the *Building Code Act.*

[30] There remains the question of whether the Court should entertain the appeal. Under the statute, the appeal must be made within 20 days but the time may be extended "if the judge is satisfied that there is reasonable grounds for the appeal and for applying for the extension". The delay is explained by the ongoing efforts of the Applicant to engage the CBO and the Municipality in a discussion, by the subsequent recalculation of the fees and in the refusal of the CBO to make a formal decision on the permit application. As I am satisfied that the appeal has merit, I am granting the extension and the appeal is properly before the Court.

THE STANDARD OF APPEAL

[31] The decision of the CBO is a decision taken in the course of his duties in interpreting and applying the relevant provisions of the building code, the *Act* and the Municipal by-laws. The CBO does not conduct a "hearing" so there is no record. In relation to questions of law such as statutory interpretation, the standard of review is correctness. Deference is still appropriate, however, given the expertise and knowledge of the CBO whose primary duty is to interpret and apply the code.

DECISION

[32] In this case, whether the decision is reviewed on a standard of correctness or reasonableness, the decision to treat the Applicant's project as new construction is both unreasonable and incorrect. Certainly, the conversion of institutional units in a seniors' residence to separate apartments is a change in use. This change in use was addressed by the requirement for rezoning and a new site plan. The change in use was approved by the Municipal Council and is not an issue.

[33] Interpreting the renovation and expansion of existing individual dwelling units as construction of new units is not reasonable and is an incorrect interpretation of the governing legislation, code and by-laws. One of the touchstones in such an assessment is whether the proposed dwelling units create a new burden on municipal services . That is not the case here. Each of the pre-existing units already had individual sewer and water service and electrical connections. Merely enlarging an existing residential unit and upgrading or modernizing existing connections is not an increased burden. By contrast, creation of new units with new drainage and water supply would be new construction.

[34] I have no hesitation in overruling the decision by the CBO to assess the 10 units in Phase II that were individual units in the original building plans as new construction.

REMEDY AND ORDER

[35] The time for bringing this Appeal is extended and the Appeal is granted.

[36] The decision of the Chief Building Official to assess the Phase II units for which building permit applications were made as new construction is set aside. An invoice is to issue only for building permit fees of $250.00. The amount of the development charges is set at $0. Assuming all other criteria for issuing a building permit have been met, then upon payment of the $250.00 permit fee, a building permit is to issue for the expansion of the 10 Phase II units covered by the Applicant's application for building permits.

[37] The Applicant may also submit a building permit application for the additional Phase II units that will create new residential units. That application is to be processed in a timely manner.

[38] The Applicant asked that I also make a declaration regarding the Phase I fees that were the subject of the Appeal in Court file no. CV-22-24. Although the Applicant should have taken steps to formally bring that matter back before the Court, the merits were canvassed in the hearing before me and the Respondent addresses the Phase I invoice in its Factum. Consequently, there will be an Order consolidating the two Appeals.

[39] There will be an extension of the time for bringing the Appeal in file CV-22-24 and a finding that the former CBO was in error in invoicing the Applicant for new row house construction. The invoice will be set aside and the amount assessed for development charges is to be refunded. The proper building permit charge for enlarging 12 pre-existing units is to be calculated and the balance refunded.

[40] The Applicant seeks costs on a substantial indemnity scale. I am not prepared to award costs on an enhanced scale because I am not making any finding of bad faith or misconduct on the part of the Municipality or its officials. The Applicant is entitled to costs on a partial indemnity scale. If the parties cannot agree on the quantum, I will hear submissions providing there is a request to do so within 30 days.

[41] I make no findings regarding allegations of misconduct by the Applicant towards the CBO and Municipal staff. As noted earlier, there are apparently proceedings before the Provincial Offences Court and the Applicant has issued a Statement of Claim. I would encourage the parties to resolve all of those outstanding matters and bring an end to all of the related litigation.

Justice C. MacLeod

Date: October 9, 2024