Citation: *Atlantic Commercial Properties Inc. v The City of Moncton*, 2024 NBKB 163

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

MM-36-2024

BETWEEN:

ATLANTIC COMMERCIAL PROPERTIES INC.

APPLICANT

-and-

THE CITY OF MONCTON

RESPONDENT

DECISION

BEFORE:	Justice Maya Hamou
DATE OF HEARING:	July 17, 2024
DATE OF DECISION:	August 8, 2024
APPEARANCES:	Samuel Gagnon, counsel appearing on behalf of Atlantic Commercial Properties Inc.
	Timothy R. Bell, counsel appearing on behalf of The City of Moncton

1. This matter is a statutory appeal of a decision of the Building Code Administrator under the *Building Code Administration Act*, SNB 2020, c 8.

OVERVIEW

2. In the Fall of 2021, Atlantic Commercial Properties Inc. ("ACP"), replaced two outer doors with one overhead door and built an access ramp to provide vehicles grade-level access to the property. The construction was undertaken without obtaining a building permit from the City of Moncton ("City"), in violation of By-Law #Z-419.

3. In September of 2021, Scott Murchison, the Building Inspector, observed modifications brought to the property while conducting a drive-by inspection. The Building Inspector communicated with ACP and outlined the steps required to rectify the situation, however the issue was not resolved.

4. An order was issued against the property in October of 2021 ("2021 Order"). The 2021 Order required ACP to apply for a building permit in relation to the overhead door and access ramp to bring the property into compliance with the National Building Code of Canada (the "National Building Code"), the *Building Code Administration Act* and By-Law #Z-419.

5. In November of 2021, emails were exchanged between ACP and the Building Inspector. The Building Inspector advised ACP of the building permit application process and advised ACP of the modifications required to add the necessary fire separation upgrades to the property. As an alternative to fire separation upgrades, the Building Inspector suggested the ramp could be modified back to its original form to prevent vehicle access to the property. Although ACP started the building permit application process, the application was never completed.

6. A second order was issued against the property in October of 2023 ("2023 Order"). The 2023 Order required ACP to apply for a building permit in relation to the overhead door and access ramp to bring the property into compliance with By-Law #Z-419.

7. The *Building Code Administration Act* came into force and was proclaimed on February 1, 2021, and amendments to the *Building Code Administration Act* providing a statutory appeal procedure for orders were assented to on June 16, 2023.

8. ACP appealed the 2023 Order under subsection 15.1(1) of the *Building Code Administration Act.* The Building Code Administrator, responsible for appeals of Building Inspector orders,

issued a decision on November 17, 2023, and rejected the appeal, thereby confirming the 2023 Order.

9. For clarity, the 2021 Order was not appealed to the Building Code Administrator and is not the object of the current statutory appeal before the Court of King's Bench. The 2021 Order solely forms part of the factual background in this case.

10. ACP appeals the decision of the Building Code Administrator, under section 15.2 of the *Building Code Administration Act*, based on three alleged errors.

    (1) Determining the property was intended to be used as a storage garage when that was not the actual use of the property;

    (2) Determining the Building Inspector has authority to issue the 2023 Order requiring a property owner to apply for a building permit; and

    (3) Refusing to consider whether the limitation period for the enforcement of the violation had lapsed.

11. ACP also sought interlocutory relief, however the parties reached an agreement on this question prior to the scheduled hearing.

12. The parties agree on the standard of review applicable to a decision of the Building Code Administrator.

    (1) Correctness for a question of law.

    (2) Palpable and overriding error for a question of fact.

    (3) Palpable and overriding error for a question of mixed fact and law.

13. The Court finds the Building Code Administrator did not commit an error of mixed fact and law by determining the property constituted a "storage garage". The Building Code Administrator considered the question of "intended or actual use" and "possible use" of the property, concluding the permanent nature of the modifications to the property gave rise to the identification of the space as a "storage garage". The Building Code Administrator determined that the letter sent to the tenant, requesting vehicles not be parked inside the property, was insufficient to prevent the parking of vehicles inside the property.

14. The Court finds the Building Code Administrator did not commit an error in law by determining the Building Inspector has authority to issue the 2023 Order requiring a property owner to apply for a building permit. A fair, large, and liberal construction and interpretation of section

14 of the *Building Code Administration Act* authorizes a Building Inspector to issue an order requiring a building permit as a means of ensuring the safety of construction work completed without a building permit (*Interpretation Act*, RSNB 1973, c I-13, section 17).

15. The Court also finds the Building Code Administrator did not commit an error in law by refusing to consider whether the limitation period for the enforcement of a violation had lapsed. The enforcement provisions available to the City for violations of the *Building Code Administration Act* cannot be used to attack the validity of the order issued by the Building Inspector. The issuance of an order by the Building Inspector is not tied to the time limits applicable to enforcement proceedings for the violation of an order. The Building Code Administrator did not fetter his discretion by refusing to consider the question, given the nature of his role within the *Building Code Administration Act*.

16. The Application is dismissed with costs of $2,500 and allowable disbursements payable by ACP to the City.

ISSUES

Jurisdiction

17. Does the Court of King's Bench have the jurisdiction to hear the appeal of the Building Code Administrator's decision? What standard of review applies to the appeal?

Decision of the Building Inspector

18. Did the Building Code Administrator commit an error in determining the property was intended to be used as a storage garage when that was not the actual use of the property?

19. Did the Building Code Administrator err in determining the Building Inspector has authority to issue the 2023 Order requiring that a property owner apply for a building permit?

20. Did the Building Code Administrator err by refusing to consider whether the limitation period for the enforcement of the violation had lapsed?

ANALYSIS

Jurisdiction on Statutory Appeal and Standard of Review

21. The *Building Code Administration Act* provides that property owners have the right to appeal an order to the Building Code Administrator. Subsequently, the decision of the Building Code Administrator may be appealed to the Court of King's Bench (*Building Code Administration Act*, sections 15.1 and 15.2).

22. The parties agree that the applicable standard of review is correctness for a question of law and palpable and overriding error for a question of fact or for a mixed question of fact and law (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37).

> [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.
>
> [Emphasis added]

Designation of the Property as a Storage Garage - Intended or actual use versus possible use

23. ACP suggests the Building Code Administrator erred in law in determining the property was a "storage garage". The City suggests this issue is rather a question of mixed law and fact, with no extricable question of law.

24. The Court agrees with the City; the issue of whether the property constitutes a storage garage is a question of mixed fact and law with no extricable question of law. The determination of this issue requires the Court to review the language in a definition and determine whether the

facts fit within the scope of that definition. Therefore, the decision of the Building Code Administrator is reviewable on the standard of palpable and overriding error.

25. The crux of ACP's argument is that the Building Code Administrator was wrong in assessing the property as a "storage garage" because he considered the "possible use" of the property rather than the "actual or intended use" of the property.

26. The National Building Code defines a "storage garage" as "a building or part thereof intended for the storage or parking of motor vehicles and containing no provisions for the repair and service of such vehicles".

27. ACP suggests turning to the *Motor Vehicle Act*, RSNB 1973, c M-17 and its definition of "park", as an interpretive tool. The definition of "park" in the context of the *Motor Vehicle Act*, excludes the standing of a vehicle engaged in loading or unloading.

> "park, when prohibited, means the standing of a vehicle, whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in loading or unloading;*(stationner ou garer)*

28. The parallel with the *Motor Vehicle Act* fails to account for the context in this case. A vehicle parking temporarily on a roadway brings about different considerations than a vehicle parking inside a property, namely the fire safety considerations raised by the Building Inspector and considered by the Building Code Administrator.

29. ACP also referenced, in oral arguments, other provisions of the National Building Code, addressing specific situations such as vehicles parking under canopies or vehicles parking in a car dealership. Those other provisions do not apply in the current circumstances; there was no reference to a "loading and unloading garage" as opposed to a "storage garage" in the National Building Code.

30. The Building Code Administrator, in determining whether the property constituted a storage garage, considered the question of "intended or actual use" and "possible use". While acknowledging the letter sent by ACP to its tenant requesting vehicles not be parked inside the property, the Building Code Administrator concluded that request did not prevent vehicles from parking inside the property. The Building Code Administrator considered the "possible use" of the property given the relatively permanent nature of the modifications made.

> When evaluating the intended uses of spaces, building inspectors will typically look to the building design, elements, and amenities of the construction. While they may give some weight to what the user indicates their use of the space will be, ultimately regulating based on the owner or

> tenant's stated use of the space is fundamentally flawed as we are regulating a non-permanent user instead of the relatively permanent building design and fixtures.
>
> […]
>
> To demonstrate that the space will not be used for the storage of vehicles, the property owner provided a letter to the tenant. The letter of request from the property owner to the tenant to not park a vehicle in the space is far from a prohibition. Rather, it is clearly worded as a request. Additionally, this request only applies to the current tenant. There is nothing to indicate that there is any enforcement of the request on the part of the owner and nothing to indicate how it could apply to future tenants. For a building inspector to accept this as a proof that vehicles will not be parking in this space, would not be in keeping with their responsibilities to the public. Furthermore, there is nothing in the legislation that would support accepting a letter as proof of the use of a space.

31. In terms of the application of the legal principles to the facts, the Record before the Building Code Administrator highlights the presence of a ramp and overhead door, used to facilitate access of a vehicle inside the property, confirms that vehicles were left inside the property at one time as evidenced by pictures, and references the purpose of the modifications made by ACP to allow a vehicle to enter the property to facilitate loading and unloading.

32. The Building Code Administrator did not commit an error in determining the property constituted a "storage garage".

Authority of Building Inspector to issue the 2023 Order

33. ACP suggests paragraph 14(1)(c) of the *Building Code Administration Act* does not authorize the Building Inspector to issue an order requiring a property owner to apply for a building permit.

34. The question of whether the Building Inspector can issue an order requiring a property owner to apply for a building permit is a question of law, subject to the correctness standard of review.

35. ACP argues that paragraph 14(1)(c) allows a Building Inspector to order that work done, without a building permit, cease, be altered, or demolished or order that any steps needed be taken to make the building or property safe. ACP suggests, paragraph 14(1)(c) does not permit a Building Inspector to issue an order requiring a property owner to apply for a building permit. It is on this basis that ACP suggests the 2021 and 2023 Orders are unenforceable.

> 14(1) If construction or demolition work is undertaken in contravention of the Code, a building by-law, this Act or a regulation under this Act, a building inspector may make one or more of the following orders:
>
> (a) cessation of the construction or demolition work;
>
> (b) alteration of the construction or demolition work to remove the contravention; and
>
> (c) taking any other action required to make the building or real property safe.

36. The interpretation suggested by ACP is flawed.

37. As pointed out by the Building Code Administrator, the 2023 Order fell within the authority of "taking any other action required to make the building or real property safe".

38. Some other provinces have enacted legislation which presents greater clarity in the dichotomy of orders issued to address safety concerns and orders issued to address administrative compliance (*Safety Codes Act*, RSA 2000, c S-1, paragraph 49(1)(b) and 49(1)(a), *Building Code Act*, RSNS 1989, c 46, subsection 12(1) and paragraph 12(6)(b), *Building Code Act*, 1992, SO 1992, c. 23, subsection 15.9(4) and section 12, and *Construction Codes Act*, SS 2021, c 9, subsection 25(5) and subsection 25(1)-(4)).

39. The City argues that subsection 14(1)(c) of the *Building Code Administration Act* must be considered within the context of subsection 4(1) of the *Building Code Administration Act* which requires a building permit for construction work and must be considered within the context of the *Building Code Administration Act* which is geared towards ensuring that construction or demolition in the province proceeds with a building permit, in conformity with the National Building Code, the standards prescribed by by-laws and the terms and conditions of the building permit (subsection 4(1) and 4(2) of the *Building Code Administration Act*).

> 4(1) No person shall construct a building in the Province unless:
>
> (a) a building permit has been issued under this Act, and
>
> (b) the construction work conforms
>
> (i) with the Code,
>
> (ii) with the standards prescribed by a building by-law of the local government in which the building is to be constructed or by a regulation, and
>
> (iii) with the terms and conditions of the building permit.

40. ACP also relied upon *Canada (Minister of Citizenship and Immigration) v Vavilov* to suggest that the administrative decision maker could not reverse engineer a desired outcome (*Canada (Minister of Citizenship and Immigration) v Vavilov*, para 121). However, the administrative decision maker is also required to interpret contested provisions in a manner consistent with the text, context, and purpose of the *Act*.

> [121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

41. If the Court were to accept ACPs suggested interpretation of the *Building Code Administration Act*, and the suggestion that construction undertaken without a construction permit is only punishable by way of a *Provincial Offences Procedures Act*, it would be accepting that construction undertaken without a permit is only subject to an administrative fine. This interpretation does not accord with the spirit and intent of the *Building Code Administration Act*.

42. The Court accepts the City's argument that a fair, large, and liberal construction and interpretation of the *Building Code Administration Act* authorized a Building Inspector to issue an order requiring a building permit as a means of ensuring the construction work previously completed without a building permit renders the property safe (*Interpretation Act*, RSNB 1973, c I-13, section 17).

43. Additionally, ACP raised concerns with the Building Code Administrator starting with the premise that a building is safe if constructed in accordance with the minimum standards of the National Building Code.

44. ACP relied upon the findings in *The City of Toronto v Ellis*, 1954 CarswellOnt 250, [1954] OWN 521 to suggest that a violation of the National Building Code does not render a building unsafe. In that 70-year-old case from the Ontario Superior Court (at the time the Ontario High Court of Justice), the Court found the City of Toronto could not require that an older building be brought up to current National Building Code standards based on safety concerns not brought forward in evidence. The current case is different; ACP undertook work on the property without a building permit and the resulting product created a fire safety concern identified by the Building Inspector and supported by the Building Code Administrator.

45. It is worth noting that the argument raised by ACP about the absence of evidence of safety concerns was not raised before the Building Code Administrator; it was only raised at the statutory appeal stage before the Court of King's Bench.

46. The Building Code Administrator did not commit an error in law in determining the Building Inspector has authority to issue the 2023 Order requiring a property owner to apply for a building permit.

Limitation Period

47. ACP suggests the Building Code Administrator committed an error of law by refusing to consider whether the limitation period allowing the City to enforce a violation of the *Building Code Administration Act* had lapsed. This is a question of law, subject to the correctness standard of review.

48. Violations of the *Building Code Administration Act* create an offence punishable under categories of the *Provincial Offences Procedures Act* (section 16).

> 16(3) For the purposes of Part 2 of the *Provincial Offences Procedure Ac*t, a person who does any of the following commits an offence punishable as a category E offence:
>
> […]
>
> (b) violates or fails to comply with an order of a building inspector under section 14.
>
> 16(4) When a person violates or fails to comply with an order under section 14 and is convicted of an offence in respect of the violation or failure, the court imposing the conviction may order the person to comply with the order under section 14.
>
> […]
>
> 16(6) For the purpose of Part 2 of the *Provincial Offences Procedure Act*, a person who does any of the following commits an offence punishable as a category B offence:
>
> (a) violates or fails to comply with section 4;
>
> […]

49. Section 95 of the *Provincial Offences Procedures Act*, SNB 1987, c P-22.1 includes a 6-month limitation period within which proceedings may be initiated for an alleged offence punishable under the *Act*.

> 95 Where an Act creates an offence but does not prescribe a limitation period within which proceedings may be commenced, proceedings shall be commenced within six months after the date on which the offence was, or is alleged to have been, committed.

50. The City became aware of the overhead door in the fall of 2021 and issued the 2021 Order and then the 2023 Order. ACP claims the City attempted to circumvent the 6-month limitation period by issuing a second substantially identical Order against the property two years later.

51. The Court disagrees with ACP's contention for reasons outlined by the City – the enforcement options available to the City for a violation of the *Building Code Administration Act* cannot be used to attack the validity of an order issued by the Building Inspector. The issuance of an order by the Building Inspector is not tied to the time limits applicable to the enforcement proceedings for violations of an order.

52. Additionally, the questions of whether ACP violated the *Building Code Administration Act,* whether the violation is a continuing violation, and whether it constitutes a continuous act subject to section 6 of the *Limitation of Actions Act*, SNB 2009, c L-8.5, was not a question before the Building Code Administrator nor is it before this Court. That is a question for the judge hearing a proceeding under the *Provincial Offences Procedures Act*.

53. The Building Code Administrator was correct in determining that the *Provincial Offences Procedures Act* did not apply to the matter before him. The Building Code Administrator did not fetter his discretion by refusing to consider the question. The scope of the Building Code Administrator's discretion is delimited by the nature of the *Building Code Administration Act* which is geared towards ensuring construction or demolition in the province proceeds with a building permit, in conformity with the National Building Code, the standards prescribed by by-laws and the terms and conditions of the building permit (subsection 4(1) and 4(2) of the *Building Code Administration Act*).

54. The Building Code Administrator did not commit an error in law in refusing to consider whether the limitation period for the enforcement of the violation had lapsed.

DISPOSITION

55. The Application brought by Atlantic Commercial Properties Inc. is dismissed with costs of $2,500 and allowable disbursements payable to the City of Moncton.

DATED at Moncton, New Brunswick, this 8th day of August 2024.

Justice Maya Hamou
Court of King's Bench of New Brunswick