COURT OF APPEAL FOR ONTARIO

CITATION: 2708959 Ontario Inc. v. Stratford (City), 2025 ONCA 512
DATE: 20250715
DOCKET: COA-24-CV-0200

Lauwers, George and Gomery JJ.A.

BETWEEN

2708959 Ontario Inc.

Applicant (Appellant)

and

The Corporation of the City of Stratford

Respondent (Respondent)

Alan B. Dryer and Orly Kahane-Rapport, for the appellant

Paula Lombardi, for the respondent

Heard: February 5, 2025

On appeal from the judgment of Justice Scott K. Campbell of the Superior Court of Justice, dated January 17, 2024.

Lauwers J.A.:

A. OVERVIEW

[1] The appellant corporation, 2708959 Ontario Inc. (“270”) owns the property at 7 Cobourg Street in Stratford. The building encroaches on a road allowance owned by the respondent municipality, the Corporation of the City of Stratford. The

building was erected between 1998 and 2001 by 270's predecessor in title, James Morris. It is currently used as part of a boutique inn.

[2] A schedule to the 1998 site plan agreement maps the four exterior structures at the front of the property that encroach on the road allowance adjacent to the sidewalk: (1) A portion of an existing concrete retaining wall surrounding the raised gardens being used as a planter but marked on the schedule as a "sloped bank"; (2) A portion of an existing steel and wooden access ramp to the main entrance at the side of the building; (3) An existing block of red granite at the bottom of the access ramp used as a step; and (4) A portion of the "garage ramp" used as a single-car parking space. The site plan agreement schedule is attached as a schedule to this decision.

[3] Stratford objected to the encroachments for the first time in late 2021 and insisted that 270 enter into an encroachment agreement under a City policy that came into force in 2006. 270 was unwilling to accept Stratford's terms and brought the application underlying this appeal.

[4] The application judge dismissed 270's application.

[5] For the reasons set out below, I would dismiss the appeal.

B. THE ISSUE

[6] In the application, 270 sought to have the encroachments deemed to be legal non-conforming structures / "grandfathered in", and an order declaring that

Stratford is estopped from taking any steps regarding the encroachments, or, in the alternative, that 270's proposed encroachment agreement rather than Stratford's draft be approved.

[7] On the appeal, 270 does not pursue arguments based on legal non-conforming use or estoppel. 270 focuses on a single issue:

> Did the application judge make a palpable and overriding error of fact when he found that the municipality did not approve the encroaching structures when the building and site plan drawings were approved in 1998?

[8] Before analyzing the issue, I set out the relevant facts.

C. THE FACTUAL BACKGROUND

[9] On March 23, 1998, before the building was erected, Mr. Morris entered into a site plan agreement with Stratford, which by its terms was binding on the parties and their respective heirs, executors, administrators, successors, and assigns.

[10] Stratford's building department issued a building permit and approved the building plans for the property. Stratford stamped each drawing: "This permit does not guarantee that any licence, permit or other authority to use the premises will be given."

[11] Stratford issued an occupancy and compliance permit on October 1, 2001, certifying that the lands were being used in accordance with the zoning by-law and that the building was constructed in accordance with zoning and building by-laws.

The occupancy permit stated "… that the construction and/or use of premises described has been fully inspected and is acceptable in regard to" the "Building/s and Lands Used in Accordance to Zoning By-law", the "Building/s constructed in Accordance to Zoning By-law", the "Building/s constructed in Accordance to Building By-law", and the "Building/s Occupancy".

[12] In 2006, Stratford enacted an encroachment policy that required a property owner to seek permission from Stratford to encroach onto a road allowance or municipal property, subject to Council approval, and where an unapproved encroachment existed, to remove the encroachment at the owner's expense or seek permission to remain. It applied to permanent buildings or structures that were inadvertently and partially erected over a road allowance or municipal property and could not easily be removed without significant impact to the remaining structure. Lastly, it allowed property owners to enter into encroachment agreements with Stratford for these existing yet previously undiscovered encroachments.

[13] In response to an inquiry made in early 2019 on behalf of 270, Stratford confirmed that its records showed there were no outstanding work orders against the property. 270 bought the property in 2019 and applied to Stratford in October 2021 to re-zone it. Upon reviewing the re-zoning application, Stratford notified 270 that the parking spot at the front of the building was not legally permitted. Stratford

then noticed the other encroachments and advised 270 that it must enter into an encroachment agreement for all four encroachments.

[14] 270 was not prepared to sign Stratford's proposed encroachment agreement out of concern that Stratford could terminate 270's rights or refuse to continue them in the future.

[15] The 2006 encroachment policy expressly excludes from its operation encroachments that were approved by Stratford before the policy came into force and, on that basis, 270 argued that this policy did not apply.

[16] Brigitte Shim was one of the building's original architects. She noted that the encroaching structures are plainly visible on the site plan and in the building permit drawings as stamped and approved by Stratford. In his testimony the Chief Building Official agreed that all four encroachments were visible in the drawings and on the property. He also testified that he had likely walked by the site on numerous occasions over the years and had not noticed the encroachments.

[17] Ms. Shim testified that the encroaching structures are integral to the design, structure, and functioning of the building. The access ramp provides access to the main door of the house. The concrete planter is contiguous to and forms part of the building's structural foundation; the inference is that removing it would cause structural damage to the building.

D. THE POSITIONS OF THE PARTIES

[18] 270 argues that it is not required to enter into an encroachment agreement because Stratford authorized the original construction in 1998 when the encroachments were plainly visible on the site plan and building permit drawings, and it confirmed compliance to 270 before it bought the property in 2019.

[19] Stratford argues that the evidence better supports a finding that neither party was aware of the encroachments before 270 filed its application for re-zoning in 2021. The approved 1998 site plan did not show the parking space, the concrete planter or the other encroachments, and the consolidated land surveys did not show any encroachments. 270 is therefore required to enter into an encroachment agreement.

E. ANALYSIS

Issue: Did the application judge make a palpable and overriding error of fact when he found that the municipality did not approve the encroaching structures when the building and site plan drawings were approved in 1998?

[20] I agree with 270 that the application judge's findings were of mixed fact and law. Thus, 270 must establish that the application judge made a palpable and overriding error. He made no such error.

[21] It seems likely that no one noticed the encroachments in 1998 or for years thereafter. They only came to light in 2021. That said, it seems Stratford,

Mr. Morris, the architects, and later 270, were all innocent actors. On whom does the onus or burden fall?

[22] Looking at the application judge's reasons as a whole, he was right to determine that the onus for bringing the encroachments to Stratford's attention fell on the original proponent, Mr. Morris, and on his professional advisors, not on Stratford. The application judge noted: "At best, there [was] an oversight which arguably could have and should have been better understood by the architects submitting the plans than [Stratford] tasked with interpreting them."

[23] 270 argues, "based on the evidence it submitted, that the City-stamped Site Plan drawings, the City-stamped Building Permit drawings and the Certificate of Occupancy and Compliance issued by the City upon inspection after the completion of construction, are express approvals of the [encroachments] as drawn and constructed."

[24] 270's argument is best set out in its own words in its factum:

> In the years between 1998-2001, the City in fact approved the [encroachments] under the only process which existed at the time. Whether it is labelled by a judge 20 years later as an express or as a tacit approval cannot change the facts. It is respectfully submitted that, where there are no positive proven facts from which an inference can be drawn, then a conclusion based on an inference that lacks an evidentiary basis is speculative. By conflating "tacit" approval which was an issue[] argued by both parties in relation to the estoppel issue, with the express approval process which was in place at the relevant time, the [a]pplication [j]udge entirely

> misdirected himself in his approach to the analysis of this factual issue, and in doing so committed a palpable and overriding error.
>
> It is respectfully submitted that, in the case at bar, there is clear and unequivocal evidence that the Site Plan Agreement drawing depicting the [encroachments] … was expressly approved and formally issued, the Building Permit drawings depicting the same thing were expressly approved and formally issued, and the [encroachments] as built were inspected and expressly approved through a Certificate of Occupancy and Compliance, which was also formally issued by the City after the [encroachments] were built. In our case, there was no evidence on which the [a]pplication [j]udge could have concluded that the [encroachments] were not expressly approved. As such, the [a]pplication [j]udge's conclusion that the [encroachments] were not specifically approved is speculative and amounts to palpable and overriding error in the fact finding and inference drawing processes.

[25] The application judge was well aware of 270's arguments and rejected them.

[26] The application judge made factual findings on the encroachments. He found that the "the site plan clearly depicts a ramp … [b]ut it does not depict a step or a red granite block." He found that the ramp to the garage was also marked but not that it would serve as a parking spot (there is now no garage if there ever was one). He observed that "any reader of the plan would have to infer that a vehicle may park along the ramp." Finally, he found that "[t]here is no concrete planter shown" but only "a sloped bank with cover." In his view, the encroachments were not clearly identified as encroachments on municipal property but were only visible upon close examination or what he called "significant investigation or interpretation" of the site and building permit plans.

[27] The application judge found that there was no evidence that Stratford specifically authorized the encroachments. Further, he noted that there was no evidence that the original owner or the architect had made any effort to draw Stratford's attention to the encroaching structures when it processed the building permit plans and the occupancy agreement. He described as surprising the argument that "the approval of such important encroachments would be left to the happenstance of the building official or city clerk properly interpreting the plans that were submitted."

[28] The application judge stated:

> Further, the applicant's argument that there was no encroachment policy in place prior to the 2006 bylaw is not compelling. While it is true that there was no formal policy or bylaw, it was still common practice in this municipality to require encroachment agreements where appropriate. The lack of a formal policy and bylaw does not mean all encroachments are therefore lawful.

[29] Stratford's witness at trial was the contemporaneous City Clerk, Tatiana Dafoe. She testified that, before the passage of the 2006 policy, Stratford would expressly approve encroachments and would have entered into an encroachment agreement to be registered on title if it had done so. She noted that Stratford did have such agreements with other landowners.

[30] The application judge noted the fact that the land being encroached is a municipal road allowance – "land held by the municipality in trust for a public purpose – the common benefit of a municipality's residents". As Howden J. noted

in *Oro-Medonte (Township) v. Warkentin*, 2013 ONSC 1416, 30 R.P.R. (5th) 44, at para. 118, “property that is owned by a municipality is held by way of a qualified title for public benefit” and “is imbued with special public significance.”

[31] I agree with the application judge that none of Stratford’s actions in approving the site plan agreement and the building permit drawings in 1998, issuing the occupancy permit in 2001, and providing confirmation that there were no outstanding work orders in 2019, forms a sufficient basis on which to conclude that Stratford expressly approved the encroachments.

[32] The application judge also rejected the submission that the enactment of the encroachment policy in 2006 regularized pre-existing encroachments.

[33] Although 270 asserts that it did not argue that Stratford’s approval was tacit in 1998 or thereafter, the application judge did consider the issue. He built on the approach Howard J. took in *Visnjic v. Town of LaSalle*, 2017 ONSC 2082, aff’d 2018 ONCA 803, who said, at para. 115:

> Where, as here, the plaintiffs did not bring it home to the Town that they intended to access the garage using the unopened road allowance, they cannot argue that it was reasonable for them to have regarded the Town as having given tacit approval for them to use the unopened road allowance to access the garage.

[34] The application judge considered whether Stratford had tacitly approved the construction of the encroachments in 1998 and their continued use. Because the encroachments were not clearly identified as encroachments on municipal

property but were only visible upon “significant investigation or interpretation” of the site and building permit plans, the application judge found that “even if tacit approval was sufficient, I do not find the evidence establishes that such approval has occurred.”

[35] I pause to note that there is no need in this appeal to resolve the thorny question of whether tacit approval of an encroachment on a municipal road allowance is legally possible. That issue must be left for a case on which it turns.

[36] In sum, 270 did not satisfy the application judge that Stratford had expressly or tacitly approved the encroachments. An encroachment agreement was necessary.

[37] In my view, the application judge made no errors in reaching this conclusion, let alone palpable and overriding errors, and I would dismiss 270’s appeal.

[38] That said, it is worth observing why Stratford might consider leniency in the terms it wants to impose on 270 in the encroachment agreement. First, both sides were innocent in the original situation even if Mr. Morris and his architects had the greater burden. Second, 270 was not the proponent who encroached but a successor in title who innocently relied on Stratford’s compliance certificate. Third, the encroachments are not burdensome on the municipality or users of the road or sidewalk. No one, including the Chief Building Official, even noticed them for many years, and it is highly unlikely that they will ever need to be removed for practical

purposes. Fourth, there is an issue of basic fairness. The law generally resists retroactivity. Stratford might well be stricter now than it was in the past with respect to minor encroachments such as these, perhaps because it now has more professional expertise and is more rigorous in its document review than it was in 1998.

[39] The appeal is dismissed with costs payable by 270 to Stratford in the amount as requested of $8,701.54, inclusive of HST.

Released: July 15, 2025 “P.D.L.”

“P. Lauwers J.A.”
“I agree. J. George J.A.”
“I agree. S. Gomery J.A.”

SCHEDULE