

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
THE CORPORATION OF THE TOWN OF)
AJAX, STEVEN MCREELIS and CHIEF) John George Pappas, Brian Chung, for the
BUILDING OFFICIAL FOR THE TOWN) Applicants
OF AJAX)
)
Applicants)
)
- and -)
)
1940475 ONTARIO INC., PINA)
MORELLI, FIRST AVENUE)
PROPERTIES and MOREX)
CONSTRUCTION)
)
Respondents) Kevin O’Brien, Evan Barz, Andrew Rintoul,
) for the Respondents
)
)
) **HEARD:** May 22, 2025

2025 ONSC 5325 (CanLII)

REASONS FOR DECISION ON APPLICATION

CASULLO J.

Overview

- [1] The Applicants seek, *inter alia*, an order requiring the Respondents to demolish and remove from the property municipally located at 599 Kingston Road West, Ajax, Ontario (the “Property”), all above-grade construction carried out without the benefit of a building permit.
- [2] The Respondents acknowledge that the above-grade construction on the Property was carried out without a permit. However, they resist an order for demolition, submitting that the better course of action is to dismiss the Application and allow them to continue working toward obtaining the requisite building permit.

Background

- [3] Historically, the Property was used as an automotive sales and repair facility. This resulted in soil contamination, as evidenced by environmental reports provided to the Town of Ajax (“the Town”) as part of the building’s approval process.
- [4] The Property was purchased by 1940475 Ontario Inc. (“194 Corp”) in 2015. Pina Morelli is the principal of First Avenue Properties Inc. (collectively, “First Avenue”). It was 194 Corp and First Avenue’s intention to build a four-storey mixed-use building on the Property, with commercial units at grade, and residential units above (the “Development”).
- [5] Over the ensuing five-plus years, First Avenue prepared and submitted to the Town multiple site plan applications for the Property, including detailed design drawings and environmental reports. Various consultants were retained to prepare requisite materials. The existing structures were removed.
- [6] On April 30, 2021, the Town conditionally approved First Avenue’s site plan application.
- [7] A Site Plan Agreement (“SPA”) was executed on July 26, 2021, pursuant to which First Avenue paid a performance guarantee of \$353,685, and \$109,700 as “cash in lieu of parkland” fees.
- [8] The SPA contained a number of conditions which First Avenue was required to clear before the Town issued a final approval. The Town’s final approval was required before the Development could proceed.
- [9] Condition 31 of the SPA is germane to this Application. It required First Avenue to file a Record of Site Condition (“RSC”) with the Ministry of the Environment, Conservation and Parks (“MECP”) prior to the issuance of any above-ground building permit. The Town expected that environmental remediation of the Property would occur before an RSC would be issued.
- [10] Condition 31(2) of the SPA gave the Town the discretion to issue permits that would enable below-grade works to be completed at the Property prior to First Avenue filing the RSC.
- [11] On September 14, 2021, the Town and First Avenue entered into a Conditional Building Permit Agreement (“CBPA”), allowing First Avenue to construct footings, foundations, and site services.
- [12] By entering into the CBPA, First Avenue acknowledged that an RSC was required in order to obtain a full building permit. First Avenue agreed to obtain an RSC by April 15, 2022.
- [13] On the strength of the CBPA, the Town issued a conditional building permit on September 28, 2021, allowing construction of the footings and foundation system (the “Conditional Permit”). The Town’s Building Code directed that the following mandatory inspections

were required: (i) prior to pouring concrete footings; (ii) upon completion of the foundation; and (iii) prior to backfilling.

- [14] By October 13, 2021, the Town became aware that the Development was exceeding the scope of the Conditional Permit. On this date, a Town building inspector attended the Property and observed construction of above-grade elements of the Development. Not only did First Avenue not have a full building permit for above-grade elements, First Avenue had failed to have the below-grade elements inspected. First Avenue acknowledges these two facts to be true.
- [15] The Town immediately issued an Order to Comply, requiring First Avenue to immediately cease working on all above-grade elements. First Avenue was also to deliver various inspection and testing reports as required by the Town's Building Code.
- [16] A second attendance on October 27, 2021, revealed that First Avenue had disregarded the Order to Comply and continued with the above-grade construction.
- [17] On October 27, 2021, the Town issued a Stop Work Order.
- [18] On November 3, 2021, the Town's legal counsel wrote to First Avenue's Project Manager, enclosing a copy of both the Order to Comply and the Stop Work Order. First Avenue was advised that if construction did not immediately cease, the Town would seek injunctive relief from the courts.
- [19] A third attendance on November 17, 2021, revealed that construction of the exterior walls of the Development were now near completion. This was despite the lack of a building permit, the lack of the mandatory inspections required by the Town's Building Code, and the three warnings from the Town.
- [20] Construction continued until at least November 2022, when a crane was observed to be erecting structural steel.
- [21] On November 25, 2021, this Court issued a mandatory injunction, on consent, prohibiting First Avenue from carrying on any further work at the Property until a building permit had been issued. The Order also held that if the Town deemed any of the work that had been completed without a building permit to be unsafe, it could authorize First Avenue, in writing, to complete whatever additional work was necessary to bring the structure into a safe condition.
- [22] First Avenue did not abide by the mandatory injunction. Instead, it asked Mr. Kwan, its structural engineer, to assess the above-grade work that had been completed at the Property. Mr. Kwan opined that certain walls would present a safety concern if they were left unattended for too long. Mr. Kwan recommended that the walls and steel frame be secured with temporary braces or, alternatively, that core slabs be installed on the second floor to act as a structural support for the walls.

- [23] First Avenue chose the latter approach and advised the Town it was going to install the core slabs, by letter dated November 26, 2021. That same day, First Avenue directed its construction crew to install the core slabs, without the Town's prior written authorization. The Town takes the position that it did not receive a copy of Mr. Kwan's letter until January 28, 2022, two months after the core slabs had been installed.

2021 to 2025

- [24] On November 25, 2021, First Avenue delivered an RSC Submission, prepared by its engineer, Van Voorst Engineering Ltd., to the MECP. After review, the MECP advised that the submissions contained significant deficiencies and further field work was required.
- [25] On June 22, 2022, First Avenue delivered a second RSC Submission, again prepared by Van Voorst. A month later, the MECP advised that the second submission also contained significant deficiencies.
- [26] The MECP exercised its powers under the *Environmental Protection Act*, R.S.O. 1990, c. E. 19, to inspect the Property and review all documentation in support of the Development. The resulting Inspection Report detailed significant problems, including a finding that the Property's soil and groundwater were contaminated. The Inspection Report also highlighted various compliance issues, including the fact that construction had occurred without a proper RSC. By October 31, 2022, First Avenue was to prepare a plan to investigate the full vertical and horizontal extent of all soil and groundwater contamination, both at and migrating from the Property (the "Plan").
- [27] In October 2022, Van Voorst retracted its previous RSC submissions, indicating it was no longer First Avenue's environmental engineer.
- [28] The MECP's October 31, 2022 deadline passed without a Plan being delivered.
- [29] First Avenue retained a new environmental engineer, Alexana Engineering. Alexana delivered the Plan on December 2, 2022. On December 7, 2022, the MECP advised that the plan was unacceptable.
- [30] On January 13, 2023, the MECP issued an Order requiring 194 Corp to comply with various conditions. The Order set out that the work completed by First Avenue failed to assess the Property's conditions, identify sources of contamination, or remediate the Property's soil and groundwater.
- [31] First Avenue delivered a report to the MECP. The MECP had issues with the report, including:
- a. the fact that only 5 of 19 monitoring wells were located and were either repaired or decommissioned, and the remaining 14 were damaged, destroyed accidentally, or buried during construction; and

- b. locating the wells was hampered by health and safety considerations, and at times physically impossible given the partial building and footings.
- [32] First Avenue was to deliver a new plan by March 31, 2023 (the “March Plan”). This deadline was met.
- [33] However, the MECP took issue with the March Plan, including that the sampling parameters were fundamentally flawed. The MECP mandated a peer review of the March Plan.
- [34] First Avenue retained DS Consultants Ltd. (“DS”) to conduct the peer review. DS noted a number of deficiencies and made recommendations. The MECP accepted the March Plan.
- [35] In June 2023, Alexana wrote to the MECP and proposed a new path forward: filing two RSCs for the Property (the “Proposal”). The first RSC would be in respect of the building envelope already constructed, which would allow construction to recommence. The second RSC would be for the remainder of the Property, after First Avenue completed a Risk Assessment (“RA”). MECP recommended that the Town be consulted. Alexana did so in June 2023, estimating it would take around 18 months to obtain the RA. The Town advised it would consider the Proposal.
- [36] By July 2023, First Avenue had complied with the terms of the MECP’s Order, and the Order would be closed out. But first, the MECP required a timeline for the completion of certain further work, including the submission of a plan that ensured First Avenue complied with its legal obligations with respect to the damaged or destroyed monitoring wells.
- [37] By this time, the Town was concerned with whether First Avenue would be able to fulfil its obligation to obtain an RSC. In September 2023, the Town wrote to First Avenue to reiterate its expectation that First Avenue would be responsible to remediate the Property and submit an RSC during or shortly after the foundation work was completed. The Town also advised that given the significant environmental issues, the Proposal was inappropriate.
- [38] The Town advised First Avenue that it must obtain an RSC confirming that the Property had been fully remediated, in a manner acceptable to the MECP, by September 19, 2024. In the event First Avenue was unable to do so, the Town would return its application and seek a demolition order for the above-grade construction at the Property.
- [39] The parties met in October 2023, at which the Town reiterated that the only acceptable path forward was a full RSC submission, not an RA. The Town took the position that First Avenue had been aware of the Town’s concerns and its environmental obligations in respect of the Property since 2015.
- [40] First Avenue instead chose to proceed with its preferred path of seeking an RA. First Avenue delivered a Pre-Submission Form for an RA to the MECP. The MECP noted deficiencies and made recommendations, by letter dated March 24, 2024.

- [41] Hearing nothing further, the Town contacted the MECP in April 2024 to inquire whether First Avenue had taken any steps since receiving the MECP’s comments. MECP advised that it had not received any substantive updates from First Avenue.
- [42] In September 2024 and January 2025, the Town again contacted MECP for an update and was advised that First Avenue had taken no steps.
- [43] In February 2025, DS delivered a Tier 3 Risk Assessment to the MECP. DS estimated it would take another 12-18 months to complete the risk assessment process. Until that process was complete, First Avenue would not be in a position to file an RSC.

Current Status of the Development

- [44] Since November 2021, the partially constructed building – an entire ground floor – has sat unfinished. The Property remains an active construction site. There are fences erected around the building’s perimeter to prevent ingress by the public, but the structure sits exposed to the elements.
- [45] On January 6, 2022, the Town sent a request for the footing and foundation reports, as mandated by the Town’s Building Code, and required pursuant to the Order to Comply. In their response dated January 14, 2022, First Avenue advised that on December 14, 2021, Mr. Kwan indicated that he was satisfied that the below-grade work was completed in general conformity with the approved drawings and specifications, and in compliance with the Town’s Building Code. The Town has still not received a satisfactory response to its follow-up requests for further information on the inspections carried out by Mr. Kwan.
- [46] The deadline for filing the RSC passed three years ago. It is now closing in on the end of 2025.
- [47] There has been no material change in circumstances since the Order that make it necessary or equitable to demolish the above-grade construction that was built without a permit.

Issue

- [48] The only issue for the court to determine is whether the court should exercise its discretion and order First Avenue to demolish and remove the above-grade construction that was built without a building permit.

Applicable Legislation

- [49] Section 38 of the *Building Code Act, 1992*, S.O. 1992, c. 23 (the “Act”) provides as follows:
 - (1) Where it appears to a chief building official that a person does not comply with this Act, the regulations or an order made under this Act, despite the imposition of any penalty in respect of the non-compliance and in addition to any other rights he or she may have, the chief building official may apply to the

Superior Court of Justice for an order directing that person to comply with the provision.

- (2) Upon the application under subsection (1), the judge may make the order or such other order as the judge thinks fit.

- [50] Courts are thus empowered to order a demolition when a structure is built without a permit. Considerations such as costs thrown away due to demolition, or benefits to a community lost through demolition, are legally irrelevant to this exercise: see *Cavan Monaghan (Township) v. Kings Custom Homes Incorporated*, 2022 ONSC 1888 (Div. Ct.), 29 M.P.L.R. (6th) 16, at para. 15.
- [51] Appropriate considerations include the important public interests that the *Act* and municipal regulation of construction serve, as well as the need to ensure the provisions of the Building Code and *the Act* are enforced: *Cavan*, at para. 15.
- [52] The court in *Cavan* cited other instances in which the Superior Court has ordered demolition: see *Gravenhurst (Town) v. Brunton*, 2011 ONSC 1799, 83 M.P.L.R. (4th) 161; *Smith-Ennismore-Lakefield (Township) v. Tarala*, 2016 ONSC 7109.

Analysis

- [53] Building codes are prescriptive to ensure that construction projects comply with safety standards and regulations as promulgated by all levels of government.
- [54] As the Supreme Court stated in *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298, at para. 23:

The legislative scheme is designed to ensure that uniform standards of construction safety are imposed and enforced by the municipalities. Sections 5 and 6 of the Act require that building plans and specifications be inspected before a permit is issued to ensure that they conform with the building code. Sections 8 to 11 set out the powers of the inspector to ensure that all work that is being completed conforms with the permit and, as a result, with the building code. [...] The purpose of the building inspection scheme is clear from these provisions: to protect the health and safety of the public by enforcing safety standards for all construction projects.

- [55] The importance of adhering to a building code cannot be overemphasized and is particularly evident in this case. For many years, the grounds of the Property housed an automobile repair garage and a used car sales lot. The Town had significant concerns regarding the potential for soil contamination.

Record of Site Condition

- [56] An RSC is typically required when there is a change in use of a property, as is the case here, where the proposed change is from a less sensitive use (commercial) to a more sensitive use (residential). The RSC summarizes a property's environmental condition based on environmental site assessments.
- [57] A Phase I report conducted in 2016 identified a number of concerns, including the following:
- The main structure, constructed in 1929, consisted of an automotive garage with an attached showroom/storage space.
 - A gated back lot was used for storage of old cars and boats.
 - An oil/water separator tank was located in the auto garage. It was no longer in use, in poor condition, and completely full.
 - A previous assessment from 2015 found that:
 - BH4 exceeded Table 3 standards for Benzene, Ethylbenzene, Xylenes and PHC F2
 - BH5 exceeded Table 3 standards for PHC F1 and F2
 - Groundwater analysis found that MW3 exceeded Table 3 standards for PHC F2
 - Four former in-ground hydraulic hoists were observed in the parts office.
- [58] A Phase II report also found that contaminants were present in amounts exceeding acceptable standards, and remedial work was recommended to bring the site within acceptable levels.
- [59] The process First Avenue was required to follow is straightforward. The contaminated site was to be remediated. Once remediation was complete, First Avenue would apply to the MECP for an RSC. The MECP would conduct its own assessments. Once it was satisfied that the site was in a satisfactory condition, the MECP would approve the application for the RSC, and confirm that the RSC is filed in the Environmental Site Registry.
- [60] However, this never came to pass. First Avenue ignored its obligations to the Town and its future tenants. It constructed the entire ground floor of the Project without the benefit of a building permit. Not to belabour the point, but pursuant to the CBPA, a full building permit would not be issued until the RSC had been obtained.
- [61] What was First Avenue's rationale for building without a permit, before it obtained the RSC? As set out in the affidavit of Adam Grossi, sworn in support of the Application, the RSC process was taking longer than anticipated. First Avenue was at risk of losing its crew of masons and bricklayers, and was worried it would not get them back again.
- [62] First Avenue submits that an order for demolition will not only further delay the RSC process, but it may also result in new environmental issues at the site. According to First Avenue's environmental experts, remediation is no longer viable given the level of contamination in the groundwater.

- [63] In place of remediation, First Avenue now proposes a Risk Assessment approach, a methodology not initially contemplated between the parties. As I understand it, the Risk Assessment approach will manage the contaminants in perpetuity instead of removing them.
- [64] The Risk Assessment approach to obtaining an RSC may take another year to achieve. There is no guarantee that First Avenue will get the RSC.
- [65] First Avenue further submits that an order for demolition would unfairly punish it for circumstances beyond its control.
- [66] I could not disagree more. First Avenue finds itself in these circumstances solely of its own accord. It failed to comply with the terms it *explicitly* agreed to. First Avenue was motivated to agree to the terms of the CBPA so it could begin construction.
- [67] I disagree with First Avenue’s characterization of the Town’s actions as designed to punish. The evidence demonstrates that the Town was initially willing to work with First Avenue and allow it time to standardize its processes. However, the Town became more and more disillusioned as a large, unsightly, and partially constructed building sat empty at one of its busiest intersections.
- [68] In September 2023, the Town advised First Avenue that it had until September 2024 to obtain the RSC. This deadline came and went.
- [69] By bringing this Application the Town is simply fulfilling its duty to its constituents to ensure that the Project is built according to the requirements of the *Act* and all other applicable laws.
- [70] Here is the heart of the issue. First Avenue is not an unsophisticated builder that acted impulsively. Mr. Grossi describes First Avenue as “a family-owned and operated real estate development company with over 30 years experience building and managing high quality and attainable residential and commercial projects throughout the Greater Toronto Area.”
- [71] First Avenue decided it did not want to remediate the site. Perhaps remediation was going to be too expensive. Or perhaps the site was beyond remediation. There is no evidence as to “why” First Avenue chose not to remediate, and I need not make any finding in this regard. I do find, however, that First Avenue made a calculated decision to build beyond the scope of the CBPA. After 30 years in the business, it understood that mandatory inspections were required (i) before pouring the concrete footings; (ii) upon completion of the foundation; and (iii) prior to backfilling.
- [72] Instead, without the benefit of the required inspections, it constructed virtually the entire first floor of the Project, making it impossible to conduct the required inspections.

- [73] First Avenue appears to be operating by the familiar adage that “it is better to seek forgiveness than ask permission.” This approach must not be condoned when the health and safety of the public is engaged, particularly on a build of such grand scope.
- [74] The court acknowledges that First Avenue has expended substantial monies to undertake significant environmental work, through its consultants, to respond to the MECP’s investigations and orders. But the fact remains that these were steps that ought to have been completed before construction began in earnest.
- [75] To permit a building to remain where it was constructed without the benefit of a building permit, would encourage disobedience of, and promote disrespect for, the law: *Eramosa (Township) v. Hilts* (1997), 42 M.P.L.R. (2d) 187 (Gen. Div.), at para. 23.
- [76] First Avenue’s conduct must not be rewarded. An order for demolition is the only just and appropriate remedy in the circumstances.

CASULLO J.

Released: September 18, 2025