



[2] This Court has jurisdiction over the appeal as per s. 38(3) of the Act, which permits an appeal as of right to the Divisional Court from an order of a judge of the Superior Court of Justice under s. 38(1) of the Act.

## **Background**

[3] First Avenue bought the Property in 2015. It was a former automotive repair facility. The Property is contaminated. The former structures on the Property have been removed. First Avenue ultimately intends to construct a four-storey mixed unit building with 60 residential units and 8 commercial units at grade on the Property. In June 2016, First Avenue formally submitted site plan applications to Ajax with regard to the Property. Ajax conditionally approved First Avenue's site plan application and entered into a Site Plan Agreement ("SPA") on July 26, 2021. The SPA contained conditions to be completed before the development of the Property could proceed.

[4] For the purposes of this appeal, the most significant element of the SPA was First Avenue's agreement to obtain a Record of Site Condition ("RSC") which was to be filed with the Ministry of the Environment, Conservation and Parks ("MECP") in respect of the Property. An RSC summarizes the environmental condition of property. It is required when land use changes to a more sensitive use, such as in the case here with the Property going from a heavy commercial use to a mixed residential and commercial use. The process to obtain an RSC involves completing environmental assessments to confirm a subject property meets the necessary standards for its new intended use.

[5] In September 2021, Ajax issued a conditional building permit ("CBP") to First Avenue for the Property. The CBP allowed certain below-ground work at the Property to be completed including footings, foundations, and site services. A condition of the issuance of the CBP required First Avenue to file an RSC with MECP before a full building permit would be issued allowing above-ground construction on the Property.

[6] First Avenue proceeded to construct the below-ground works as permitted by the CBP. There is no dispute that they continued to build above-grade contrary to the terms of the CBP. Over the course of October and November 2021, First Avenue ignored the stop work requests, and then the Order to Comply and Stop Work Order issued by Ajax under the Act. First Avenue has admitted in these proceedings that the above-grade works were constructed in violation of the Act.

[7] Ajax commenced the application for an order for demolition in November 2021. A mandatory injunction was obtained on consent prohibiting further work on the Property at the first return of the application in November 2021. The application was adjourned *sine die*.

[8] From November 2021 until September 2024, First Avenue made various attempts and proposals to obtain an RSC. To the date of the hearing of this appeal an RSC has yet to be obtained.

[9] In late 2024, Ajax sought to return the matter before the Court. Justice Casullo heard the matter on May 22, 2025, reserved, and ultimately granted Ajax's application for an order to demolish the above-grade work on September 18, 2025.

## The Issues on Appeal

[10] First Avenue seeks to set aside Justice Casullo’s decision, on the grounds of palpable and overriding error. These grounds include:

- (i) an alleged misapprehension of key evidence;
- (ii) an internally inconsistent finding that there has been no material change in circumstances since 2021 that make it necessary or equitable to order demolition; and
- (iii) an incorrect application of the objectives of the *Building Code Act*.

## The Standard of Review

[11] Appellate standards of review apply. The Appellant has raised questions of fact and questions of mixed fact and law, which are reviewable on a standard of palpable (obvious, plain to see or clear) and overriding (going to the root of the first instance judge’s determination) error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 25 and 37.

[12] The Supreme Court of Canada in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, articulated the standard of review on a discretionary decision of a lower court as follows, at para. 27:

A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice [...] Reversing a lower court’s discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations.

[13] An exercise of discretion is entitled to deference (*Canada (Attorney General) v. Fontaine* 2017 SCC 47, [2017] 2 S.C.R. 205, at para. 36). However, an appellate court should rectify any palpable and overriding errors and determine whether the lower court’s findings can be sustained (*Stabile v. Milani* (2004), 46 B.L.R. (3d) 294 (Ont. C.A.), at paras. 53 and 55).

## Discussion

### Issue 1: Misapprehension of the Evidence

[14] The core submission of First Avenue is that Casullo J.’s exercise of discretion to order demolition was tainted by an acceptance of a factual proposition that First Avenue had agreed to remediate the Property before it was going to do any above-grade construction. First Avenue points to paragraphs 70 and 71 of the Decision where Casullo J. said:

[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 [Conditional Building Permit Agreement].

[15] First Avenue argues that on the evidence before the Court, there was no such agreement to "fully remediate the Property". What was agreed was for First Avenue to ultimately file an RSC with the MECP. The distinction is that an RSC could or can be obtained either by a full remediation or by an alternative process called a Risk Assessment which is described in the Decision at paragraph 63:

[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.

[16] First Avenue submits the end result is the same; an RSC has to be obtained and filed for the Property before above-grade construction is permitted. There was evidence before the Court from three witnesses (including two professional engineers) explaining precisely why First Avenue chose not to remediate and why the Risk Assessment approach ("RA") to obtaining an RSC is appropriate, including, among others:

- (a) the end result of an RSC through a RA is the same as through the alternative full remediation RSC process;
- (b) the residual impacts observed from the environmental testing showed that remediation under the full remediation RSC process was likely cost prohibitive and unrealistic;
- (c) the MECP itself acknowledged that certain issues could be addressed under a RA approach;
- (d) the implementation of related risk management measures under the RA would protect human and environmental health; and
- (e) the RA process provided greater flexibility to conduct a wider range of remediation options.

[17] First Avenue submits this evidence was not considered and therefore not expressly rejected by Casullo J. when she came to her conclusions concerning remediation in paragraphs 70 to 71 of the Decision.

[18] First Avenue also submits that Casullo J. made a palpable and overriding error that the state of the above-ground construction made it impossible to conduct the required inspections of the below-grade construction including the footings and the foundation. In fact, there was evidence before the Court that a structural engineer had done site visits in 2021 and 2025 that confirmed the below-grade work was completed in conformance with the structural drawings and compliant with

the *Building Code*. It is submitted this type of evidence is regularly accepted by municipal Chief Building Officers. This error, it is submitted, further improperly tainted the decision to order demolition.

[19] Ajax submits that the position of First Avenue concerning alleged factual errors conveniently ignores events that occurred subsequent to the consent order to stop work in November 2021. In July 2022, after MECP rejected two separate RSC submissions by First Avenue, Ministry staff conducted an inspection of the Property. After the inspection, MECP issued a Record of Site Condition Inspection Report on September 28, 2022. This report detailed significant problems with the Property and First Avenue's first two RSC submissions. It was only then that First Avenue proposed a new "dual track" approach: submitting an RSC for the building envelope, and a separate RSC for the balance of the Property through an RA. According to First Avenue, this would allow construction on the building to continue while an RA was prepared and approved for the balance of the Property. This RA was expressly rejected by the MECP on December 7, 2022.

[20] In September 2023, Ajax advised First Avenue its "dual track" approach was unacceptable. First Avenue had agreed to deliver an RSC and it would have until September 2024 to comply. It did not comply by September 2024.

[21] With respect to the comments concerning inspection of the below-grade work, Ajax argues this too is not a circumstance where Casullo J. made any palpable and overriding error. At para. 45 of the Decision, it is acknowledged that the state of assessing compliance of the below-grade work was still very much an open question as at the date the application was heard:

[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.

[22] Ajax submits Casullo J. stated the obvious; the above-grade construction made a physical inspection of the below grade construction impossible. However, this was not a fact upon which the exercise of discretion was based.

[23] I am persuaded that whatever the Decision said regarding remediation, or the inability to inspect the below-grade work, these statements do not indicate that Casullo J. fell into palpable and overriding error concerning this aspect of the factual matrix. I agree with the submission of First Avenue that the end result of either a full remediation or an RA approach leads to the issuance of an RSC for the Property. This is the necessary condition precedent for the issuance of a permit for above-ground work. However the fact remains, the RSC was not obtained in November 2021. It was not obtained as of January 21, 2026, four and a half years after the SPA was made.

[24] The principle that guided the exercise of discretion by Casullo J. was not founded or guided by any agreement concerning or directed at the state of remediation of the Property at any time. Rather the Decision makes it clear that the actions of First Avenue to advance construction well beyond the scope of the CBP is what provided the principled basis for the exercise of discretion. The principle is that the CBP cannot be ignored when the safety of the public is at issue. First Avenue did not have an RSC when it went beyond the scope of the CBP. The RSC is a necessary statement of the safety of any property to support the type of use proposed by an owner. In the concluding paragraphs of the Decision, Casullo J. demonstrates the principled approach she took to exercise her discretion to make the order at issue:

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.

[25] The SPA was made with First Avenue agreeing to obtain an RSC for the Property. Casullo J. noted at para. 70 she was not making any findings concerning the state of remediation or the reasons why First Avenue took whatever route it had to that point, which had failed to obtain the site conditions sufficient to file an RSC for the Property. There was evidence from Ajax setting out the process and what had been done after the consent order to stop work. I agree with the submissions of Ajax that Casullo J. did not make any error of fact that materially affects the outcome of the Decision. The state of remediation of the Property either by full remediation or by an RA was not completed in November 2021 when the work at issue was performed. The only relevant fact pertaining to First Avenue's efforts to obtain an RSC that was material to the outcome of the Decision is that First Avenue did not have one, and still does not.

[26] This is material because the municipal building permit process only allows construction which complies with applicable law. In this case, the Building Code prescribes a list of applicable legal requirements which included the requirement to have an RSC because the use of the Property was changing to a more sensitive use. I agree with the submission of Ajax that the comments concerning the state of remediation do not represent the "heart" of the Decision. The evidence tendered by First Avenue to explain the change to include an RA component do not change the fact that the appellant had not complied with all applicable law in constructing above-grade in October and November 2021.

[27] I also agree that any comments concerning the ability or non-ability of Ajax to complete inspections of the below grade work, were not occasions where Casullo J. made a palpable and overriding error of fact. The inspection issue was still alive as at the date of the hearing of the application for an order to demolish. In my view any reference to this circumstance was not to show a basis upon which discretion was or was not exercised. Rather it was simply recognition of the narrative that had led to the place where Ajax had brought the matter back before the Court. Ultimately the Building Code leaves it to the Chief Building Officer and not a property owner to pass on the results of inspections and make a final determination on Building Code compliance. In my view, the Decision does not contain a palpable and overriding error concerning this factual issue.

[28] Therefore, I would not give effect to this first aspect of the appeal.

## **Issue 2. Express finding contradicting ultimate order granted**

[29] At paragraph 47 of the Decision, Casullo J. said “There has been no material change in circumstances since the [2021 Consent Order] that make it necessary or equitable to demolish the above-grade construction that was built without a permit.” First Avenue submits the ultimate order on the application requiring demolition of the above grade work effects the exact opposite result. First Avenue argues this is incongruous and vitiates any deference to be given the Decision and warrants intervention of this Court.

[30] I disagree.

[31] I am persuaded that, as argued by Ajax, this paragraph has to be assessed in the context of the entire Decision. It appears in a section of the Decision, at paras. 44 to 47 that is entitled “Current Status of the Development”. Paragraph 47 is simply an observation, not a finding of fact, that nothing further happened at the Property after the application was commenced that would, in an of itself, justify a demolition order. The words of paragraph 47 are incongruous only if applied against the final result and without consideration of the context of the entire judgment. Appellate courts should prefer an interpretation of reasons for decision that is consistent with knowledge of the record before the court as a whole (*R v. G.F.* 2021 SCC 20 at para. 79).

[32] I agree with the submission of Ajax that it is clear from reading the entire Decision that the exercise of discretion was motivated by First Avenue’s conduct resulting in unlawful construction before the initial return of the Application and the making of the consent order in November 2021. The decision First Avenue made to ignore the scope of the permit is not regularized by the fact that after they did what they did, nothing further was done by them that, independent of their original act, would lead a court to consider a remedy such as demolition. A submission that the statement at paragraph 47 is incongruous depends on only assessing the result and the statement in isolation without considering everything else that Casullo J. said about the reason why she came to the decision that she did. In my view this statement was not indicative of a contrary intention to the ultimate result or misapprehension of any evidence before the Court. It was narrative, *obiter dicta*, and not the point in the case that determined the outcome. The path taken by Casullo J. is intelligible and free from palpable and overriding error.

### **Issue 3. Incorrect application of the objectives of the *Building Code Act*.**

[33] The parties agree the purpose of s. 38 of the Act is to secure compliance and not to punish. First Avenue argues the decision to demolish can only fairly be described as punishment. Ajax argues to the contrary.

[34] First Avenue made this argument before Casullo J. In paragraphs 65 and 66 of the Decision she states;

[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.

[35] I am not persuaded by the relitigation of this point on appeal. Compliance with the Act had not been obtained for about 4 years from the date of the consent order to the date of the hearing before Casullo J. Compliance regarding the essential element of obtaining the RSC has not been obtained to date of the hearing before this panel. I agree with the submissions of Ajax that the Decision addresses why a demolition order in this case was not punitive. In the context of a regulatory regime that engages the health and safety of the public, it is not acceptable to incentivize actors to make decisions, and take risks, to not comply with their legal obligations. The Act does not give a CBO authority to order demolition of a building on the sole ground that a building permit has not been issued. That said, the Act gives that discretion to a Superior Court judge on application. In my view, there are no errors in the reasoning of Casullo J. in exercising her discretion to order demolition. The only reason to interfere with the order to demolish is to engage in an exercise of weighing the evidence differently and assessing the relevant factors in a way that would lead to a different result. That is not the job of a reviewing Court.

[36] The provisions of the Building Code must be enforced. There is no question that demolition is a significant remedy. In this case, the exercise of discretion of Casullo J. is entitled to deference. In my view she fully and adequately balanced the necessary considerations of the impact to First Avenue against the need for Ajax to comply with its obligations to ensure construction in the municipality was and is done in accordance with the Act and the Building Code.

[37] For these reasons the appeal is dismissed with costs as agreed by the parties fixed in the amount of \$30,000.00, inclusive of disbursements plus HST payable forthwith by the appellants to the respondent the Corporation of the Town of Ajax.

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Fitzpatrick J.

I agree

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O'Brien J.

I agree

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Tranquilli J.

**Released:** March 26, 2026

**CITATION:** 1940475 Ontario Inc. v. The Corporation of the Town of Ajax, 2026 ONSC  
**1940475 DIVISIONAL COURT FILE NO.:** DC-25-1702  
**DATE:** 2026-03-26

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**  
**Fitzpatrick, O'Brien, Tranquilli JJ.**

2026 ONSC 1846 (CanLII)

**BETWEEN:**

1940475 ONTARIO INC., PINA MORELLI, FIRST  
AVENUE PROPERTIES, MOREXCONSTRUCTION

Appellant

– and –

THE CORPORATION OF THE TOWN OF AJAX;  
STEVEN MCREELIS; CHIEF BUILDING OFFICIAL  
FOR THE TOWN OF AJAX

Respondents

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**DECISION ON APPEAL**

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**Fitzpatrick J.**

**Released:** March 26, 2026