

CANADA / JUDGMENT

0940460 BC Ltd. v. Burnaby (City)

2018 BCSC 1495

COURT

Supreme Court of British Columbia

DECIDED

31 August 2018

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2018 BCSC 1495 0940460 BC Ltd. v. Burnaby (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0940460 BC Ltd. v. Burnaby (City),

2018 BCSC 1495

Date: 20180831

Docket: S179361

Registry: Vancouver

Between:

0940460 BC Ltd. and Crescent Beach Properties Ltd.

Petitioners

And:

The City of Burnaby and Peter Kushnir in his Capacity as Deputy Chief Building Inspector

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraph [43] on October 2, 2018, and at paragraphs [26] and [28] on October 17, 2018.

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the Plaintiffs:

N. Baker

K. Brar

Counsel for the Respondents:

D.C. Russell

Place and Date of Hearing:

Vancouver, B.C.

April 19 - 20, June 1, 2018

Place and Date of Judgment:

Vancouver, B.C.

August 31, 2018

INTRODUCTION

- [1] The petitioners apply under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, ("JRPA") for a variety of declarations and orders in their ongoing dispute with the City of Burnaby ("the City") concerning a commercial property at 6011 Hastings Street. They have abandoned the relief sought against the co-respondent Deputy Chief Building Inspector Peter Kushnir. The City opposes the petition in its entirety and moves for dismissal.

BACKGROUND

- [2] The petitioner Crescent Beach Properties Ltd. ("Crescent") purchased 6011 Hastings in 2009. The property is zoned C4 under the Burnaby Zoning Bylaw, 1965 (Bylaw No. 4742) (the "Zoning Bylaw") which mandates in s. 304.5 that the maximum allowable lot coverage for improvements is 50 percent of total lot area. There is a 1960s-era two-storey building on the property whose footprint at the time of purchase occupied maximum lot coverage.
- [3] Back in 2009 there was a restaurant called Anducci's operating on the first floor of the building. On the second floor there were some unused offices and a large empty space. It seems that the building is too large for its own good. Whatever the case may have been when it was built, nowadays it cannot be used to capacity for any purpose because it lacks sufficient parking.
- [4] Anducci's closed in October 2011 after a fire. The petitioners decided to replace it with their own restaurant called Cotto Enoteca Pizzeria, ("Cotto") which is owned by 0940460 BC Ltd., whose sole shareholder is Rino Aufiero. Mr. Aufiero is also a director and the operating mind of Crescent. When I refer to "petitioners", I am really talking about Mr. Aufiero. He provided most of the petitioners' evidence and is clearly the person in charge of the building, property and restaurant. Cotto purchased all of Anducci's business assets including the liquor licence (or so it was thought) and a form of lease agreement with the owner of 5961 Hastings Street for excess or "donor" parking. 5961 Hastings is located directly across a side

street from Cotto.

- [5] After purchasing the property the petitioners made various alterations to the building without zoning approval or building permits. These consisted of an exterior addition to the building to house a pizza oven; a glass, wood, and metal structure to enclose an outdoor patio; and the conversion of the second floor of the building into a banqueting hall and catering facility with an additional food preparation area and washrooms.
- [6] I was shown photographs of the second floor taken from Cotto's website back when the banqueting facility was up and running. These depicted a large and attractively appointed second storey room suitable for wedding receptions and other larger scale set pieces. An informal seat count, not entirely accurate because there was no single photo showing the whole room, suggests that there was unpermitted seating capacity upstairs that rivalled or exceeded the permitted capacity downstairs.
- [7] It seems clear on the evidence that this unauthorized development and the resultant change in the density of occupancy and use of the building caused complaints from local residents which the City was forced to investigate. The short-term result was that on April 4, 2016, the City issued an order that all catering and banqueting activity on the second floor of the premises must cease immediately. The evidence strongly suggests that the unpermitted business activity on the second floor continued notwithstanding this order.
- [8] On April 28, 2016, the petitioners filed a Preliminary Planning Approval ("PPA") application with the City for the additional second floor restaurant seating, with proposed parking accommodation at 5961 Hastings. Their goal was to bring their illegal banqueting and catering business into compliance with City bylaws. Instead, this turned out to be the point at which the dispute between the parties started in earnest.
- [9] The petitioners' PPA application led to inspections of the premises. These uncovered the full scope of the unpermitted construction and alteration work already referred to, which was hardly negligible, as well as other alleged non-conformities, including an illegal storage shed, deficient loading bay space, and problems with setbacks and landscaping. The City also identified a parking shortage caused, in part, by the encroachment of the pizza oven addition into the on-site parking area. Most of these non-conformities were resolved over the ensuing months, including the dismantling of the second floor banqueting area, but the parties have remained at logger heads over the pizza oven, patio, and parking issues.
- [10] The City's firm and consistent position has been that the property must be restored to its lawfully permitted condition and use, namely a 48 seat first floor restaurant operating from premises not exceeding 50 percent of lot coverage with 11 parking stalls. Instead, the petitioners have submitted a series of PPA applications calculated, for the most part, to win retrospective approval for the unpermitted work done and for off-site parking.

- [11] The petitioners' various applications have not been successful. In the meantime the City has resorted to bylaw enforcement measures. I was advised that bylaw citations issued to the petitioners for infractions related to the issues in dispute have now reached an approximate total of \$30,000.
- [12] The petitioners were correct, of course, that in order to accomplish their objectives, they needed building permits under the Burnaby Building Bylaw, 2016 (Bylaw No. 13658) ("Building Bylaw") authorizing all the work done that was not identified in the last approved plans for the property submitted to the City in 2006. To obtain these permits the petitioners sought to obtain PPAs from the City's Planning Department. A PPA will only be granted if a proposed development accords with all of the City's bylaws, including zoning.
- [13] Herein lies the cause of this protracted stand-off between the parties. The City says that the petitioners' improvised construction work, especially the banqueting area, the pizza oven addition, and the patio enclosure, violate Burnaby bylaws in ways that cannot be approved retrospectively. The petitioners, meanwhile, although they have abandoned their applications respecting the banqueting facility, maintain that the City's ongoing refusals to permit the pizza oven and the patio enclosures are unlawful and in bad faith.
- [14] Parking is also a major problem. The City alleges, as I have said, that the pizza oven addition has encroached upon the petitioners' parking lot to the extent that there is no longer adequate on-site parking capacity for the permitted use of the property. It takes the position that the petitioners' parking agreement with their neighbour at 5961 Hastings is neither legal nor enforceable. In July, 2018, in fact, the City issued a warning letter to both parties that their shared parking practices must cease.
- [15] Mr. Aufiero's response to this warning was to hand-deliver a flyer to local residents complaining about the City's intransigence, and warning them that they could expect much more street parking in the neighbourhood because of it. He encouraged people to phone the City to complain. According to the City's lawyer, who emailed the petitioner's lawyer about it at 4:35 p.m. on August 4, 2017, the flyer did, indeed, spark a flurry of complaints, but only of the sort that created additional pressure on the City to deal assertively with Mr. Aufiero's misuse of his property.
- [16] Within the hour, at 5:30 p.m. on August 4, 2017, a City bylaw officer, a liquor inspector and an RCMP constable showed up at Cotto. All activity on the second floor and the patio was conclusively stopped, and it was announced to the surprise of patrons and staff alike that the place had no liquor licence. It seems that, although the name of the establishment on the face of the liquor licence had been changed, and Cotto had paid the licencing fee for years, in fact the liquor licence was never properly transferred to Cotto from the previous owner of Anducci's. When the Liquor Control and Licencing Branch figured this out, the licence was cancelled.

[17] Since then, as far as I know, Cotto has reverted to the permitted use of the premises as a 48 seat restaurant. The second floor is not being used except for storage, and this is no longer the subject of dispute between the parties. The patio has been closed for months, but the enclosure remains in place, and the petitioners continue to seek approval to re-open it. The restaurant has finally been granted a liquor licence, but this happened only recently following a lengthy investigation of the petitioners' "fitness" by the Liquor Control and Licencing Branch.

RELIEF SOUGHT

[18] The petitioners seek the following relief:

- a) A declaration that s. 7.3 of the City's Zoning Bylaw is ultra vires the Local Government Act, R.S.B.C. 1996, c. 323 and Community Charter, S.B.C. 2003, c. 26;
- b) A declaration that s. 7.3 of the Zoning Bylaw unlawfully fetters the discretion of the City's Building Inspector to process and issue building permits;
- c) A declaration that the petitioners may apply for and obtain all required permits, including building permits and business licences, without first obtaining a PPA from the Director of Planning;
- d) If s. 7.3 of the Zoning Bylaw is intra vires, a declaration that the petitioners are exempt from the PPA requirement pursuant to s. 7.3(1);
- e) If s. 7.3 of the Zoning Bylaw is intra vires, a declaration that the City's decision on September 19, 2017 to refuse to issue PPA #17-0248 was unlawful, unreasonable, and/or made in bad faith;
- f) A declaration that the canopy cover over the approved and existing patio at 6011 Hastings is permissible and is exempted from lot coverage calculations;
- g) An order of mandamus compelling the Building Inspector to accept and process the petitioners' application for a building permit for the canopy cover over the patio and for "any other proposed constructions or additions".
- h) An order of mandamus compelling the Director of Planning to issue PPA #17-0248; and,
- i) A declaration that the Petitioners are permitted to use 5961 Hastings for donor parking pursuant to section 800.5 of the Zoning Bylaw.

STANDARD OF REVIEW

- [19] The standard of review applicable to the question of whether or not the City has jurisdiction to implement and use the PPA process, and whether a given use is permissible under the Zoning Bylaw, is correctness: *Brinkworthy Properties Ltd. v. North Salt Spring Waterworks District*, 2017 BCSC 951 at para. 40; *Dragonwood Enterprises Ltd. v. Burnaby (City)*, 2009 BCSC 1236 at paras. 68-70; *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494.
- [20] For the other relief sought by the petitioners, the standard of review is reasonableness. This is a deferential standard. Generally, a court should not interfere with the decision of a municipal official unless that decision is made in bad faith, with the intention to discriminate against the applicant, or on a specious or totally inadequate factual basis: *Western Eagle Properties Ltd. v. City of Burnaby* (1999), 93 A.C.W.S. (3d) 371 (B.C.S.C.) at para. 13 (W.L.).

THE PPA PROCESS

- [21] The main thrust of the petitioners argument is that the City's PPA process is beyond the statutory authority of the City to enact. The relevant provisions are ss. 7.2 and 7.3 of the Zoning Bylaw, which read as follows:

7.2 Permits and Licences:

The Chief Building Inspector shall not issue any permit, nor shall the Chief Licence Inspector issue any licence for a building, structure or use which violates any of the provisions of this Bylaw.

7.3 Preliminary Plan Approval and Development Permits:

- (1) Any person wishing to undertake a development shall apply for and receive preliminary plan approval from the Director of Planning before the issuance of a building permit or a business license, except in the case of the following: (B/L No. 12713-09-11-16)
- (b) The maintenance of any building, structure or use.
- (d) The improvement or alteration of any building within the property lines of the lot, provided that such improvement or alteration shall not materially affect the external appearance, increase the density of occupancy nor change the use of such building.
- (3) When such application for development conforms to the provisions of this Bylaw and does not contravene any approved land use or road plan, preliminary plan approval shall be given by the Director of Planning.
- (5) The granting of preliminary plan approval shall not absolve the applicant from compliance with all relevant municipal Bylaws.

[22] Margaret Malysz, a member of the City's Planning Department, explained the PPA process in greater detail as follows:

In the usual course of the PPA process the City receives a preliminary plan approval submission and, if there are aspects of the proposed development that do not meet the requirements of the Burnaby Zoning Bylaw, the City provides comments so as to clarify to the applicant the deficiencies in their submission.

This is done in an effort to assist the applicant in bringing their development proposal in line with the requirements of the Burnaby Zoning Bylaw. At all times the onus is on the applicant to provide a proposal for development that meets the Burnaby Zoning Bylaw.

Once a proposal for development meets the requirements of the Burnaby Zoning Bylaw, the PPA will be granted

Pursuant to s. 7.2 of the Burnaby Zoning Bylaw no building permit shall be issued for a building, structure or use that violates any of the provisions of the Burnaby Zoning Bylaw. Review, including a review of use and change of use for a property such as 6011 Hastings Street, for compliance with the Burnaby Zoning Bylaw is therefore undertaken in advance of approving an application for a building permit or a business licence.

[23] The petitioners submitted two PPA applications in each of the years 2016 and 2017 seeking approval to change the use of the second floor from storage to restaurant/office, to add seating capacity to the existing restaurant, and to use parking spaces at 5961 Hastings. All of these applications were rejected by the City. As I have said, the petitioners have abandoned their plans for the second floor of the building, and the City recently agreed, on April 17, 2018, that this space could remain in its current, changed condition so long it is used only for storage.

[24] It seems that the main impediment to the petitioners' second floor banqueting ambitions was a parking shortage. The City maintains that the owners of 5961 Hastings cannot lawfully lease donor parking to the petitioners because, for years now, the commercial building on the lot has been unoccupied and unused. Its principal use, indeed its only use, is as a parking lot. The problem with this is that 5961 Hastings is in a C2 zone under the Zoning Bylaw where properties are not allowed to be used primarily for parking.

[25] The petitioners submitted their latest PPA application, #17-0248, in September 2017. At the time of the present hearing this application was still under review by the City and had not been approved or denied. On September 19, 2017, the City informed the petitioners that PPA #17-0248 in its current form continued to be non-compliant with the Zoning Bylaw. The reasons given for this were consistent with the City's previously and repeatedly expressed objections: the building continues to exceed the maximum allowable lot coverage, and the petitioners have failed to secure adequate off-street parking.

DISCUSSION

- [26] The petitioners overall complaint is that they have been singled out for punishment by a vengeful, over-reaching municipal bureaucracy. Having had ample time, by now, to study in detail the voluminous materials presented on this petition, I'm afraid that I must reject this contention. This case is not, in the end, about bad faith, pointless red tape or pettifogging inspectors.
- [27] Under contemplation here, instead, are illegal building improvisations leading to a commercial property in significant non-compliance with City bylaws. The City has taken a firm line in dealing with the petitioners, certainly, but in my view it cannot be faulted for this. Local householders were complaining, for one thing, and I shouldn't wonder, as well, if nearby competing businesses were annoyed about unfair advantage being taken by a neighbour playing outside the rules.
- [28] Especially in busy and densely populated urban conurbations, the extent to which people may develop and use their properties is constrained, quite rightly, by the legitimate competing rights of their neighbours and the community as a whole. We are entitled to expect that our local governments will broker these interests fairly and enforce the rules impartially and consistently. On the whole of the evidence, I am satisfied that this is what the City has been attempting to do in the present case.
- [29] Commercial property owners enjoy a wide range of autonomy with their holdings, of course, but this must yield to the limitations imposed by validly enacted planning laws. Quite simply, Mr. Aufiero was not entitled to do whatever he liked at 6011 Hastings. He certainly had no unilateral right to increase lot coverage, to undertake unpermitted structural, electrical, gas and plumbing work on the second floor, or to increase significantly his restaurant's seating capacity with its attendant parking headaches for his neighbours.
- [30] For its part, the City was not obliged to acquiesce in these illegal activities because they were presented as *faits accomplis*. To the contrary, in my view, it had a clear duty to enforce compliance with its bylaws and regulations for the simple and unanswerable reason that they are binding on everyone else doing business in the C4 zone. Execution of this duty is only a matter of plain dealing and does not amount to some kind of vendetta, as the petitioners allege. I have concluded that the regrettable hardships facing the petitioners, including all the fines, have been self-inflicted.
- [31] I will address the petitioners' points in the order referred to above.
- a) Jurisdiction

[32] The petitioners argue that s. 7.3 of the Zoning Bylaw is ultra vires the City's power to regulate under the Local Government Act and the Community Charter. They point out that while s. 565A of the Vancouver Charter, S.B.C. 1953, c. 55 explicitly authorizes the City of Vancouver to make bylaws prohibiting an applicant from undertaking a development without first obtaining a development permit, the Local Government Act and the Community Charter contain no similar provisions.

[33] The City disagrees, and says there is clear statutory authority enabling it to enact s. 7.3 of the Zoning Bylaw and to implement and enforce the PPA scheme. The City refers in particular to s. 479 of the Local Government Act, which reads:

479 (1) A local government may, by bylaw, do one or more of the following:

- (a) divide the whole or part of the municipality or regional district into zones, name each zone and establish the boundaries of the zones;
- (c) regulate the following within a zone:
 - (i) the use of land, buildings and other structures;
 - (ii) the density of the use of land, buildings and other structures;
 - (iii) the siting, size and dimensions of
 - (A) buildings and other structures, and
 - (B) uses that are permitted on the land;
 - (iv) the location of uses on the land and within buildings and other structures;

[34] The Local Government Act does not define "regulate", but s. 2 of the Schedule to the Act states that in such a circumstance, the definitions in the Community Charter apply. The definition of "regulate" in the Community Charter is set out in the following terms:

"regulate" includes authorize, control, inspect, limit and restrict, including by establishing rules respecting what must or must not be done, in relation to the persons, properties, activities, things or other matters being regulated;

[35] In addition, s. 15 of the Community Charter provides:

15 (1) A council may, in regulating under this Act or the Local Government Act, provide for a system of licences, permits or approvals, including by doing one or more of the following:

- (a) prohibiting any activity or thing until a licence, permit or approval has been granted;
- (b) providing for the granting and refusal of licences, permits and approvals;
- (c) providing for the effective periods of licences, permits and approvals;
- (d) establishing

(i) terms and conditions of, or

(ii) terms and conditions that must be met for obtaining, continuing to hold or renewing

a licence, permit or approval, or providing that such terms and conditions may be imposed, the nature of the terms and conditions and who may impose them;

[36] Finally, s. 9(4) of the Building Bylaw, which is not challenged by the petitioners, allows the City to refuse to issue a building permit if the proposed construction would contravene the requirements of the City's Building Code, the Building Bylaw, or "any other bylaw of the City". Similarly, s. 7.2 of the Zoning Bylaw stipulates that the Chief Building Inspector "shall not issue any permit for a building, structure or use which violates any of the provisions of [the Zoning Bylaw]".

[37] All in all, I am well satisfied that the Local Government Act and Community Charter provide the City with the authority to implement a PPA system to govern its process for issuing building and other permits and to establish the necessary pre-requisites to their acquisition. I do not accept the petitioners' argument based on s. 565A of the Vancouver Charter. The fact that the Community Charter and Local Government Act do not specifically refer to the same "development permit" system contained in the Vancouver Charter does not mean that other municipalities are prohibited from enacting bylaws that require zoning approval prior to building permits being issued.

[38] In my view, the Local Government Act and Community Charter must be interpreted with enough flexibility to allow municipalities to enact bylaws and permit approval systems that appropriately address the needs within their various jurisdictions. I reject the petitioners' argument that s. 7.3 of the City's Zoning Bylaw is ultra vires.

b) Discretion

[39] The petitioners say that s. 7.3 of the Zoning Bylaw unlawfully fetters the discretion of the Building Inspector to process and issue building permits. They rely on the general proposition that if an application for a building permit meets the requirements of existing law, the applicant has a right to that permit subject only to s. 463 of the Local Government Act. Section 463 states that a local government can withhold a building permit for 30 days, but only if it passes a resolution identifying a conflict between the proposed development and its zoning bylaws.

[40] What s. 7.3 of the Zoning Bylaw purports to do, according to the petitioners, is introduce an unlawful impediment to the Building Inspector's receipt and evaluation of permit applications. I note, however, that the alleged offence of "fettering discretion" is a specific one. It occurs when, rather than exercising its discretion to decide the individual matter before it, an administrative body binds itself to policy or to the views of others: *H.E.U., Local 180 v. Peace Arch District Hospital* (1989), 35 B.C.L.R. (2d) 64 (C.A.).

- [41] Here, there is no question of the City's Building Inspector failing to exercise a vested discretion or, instead of exercising such a discretion, adhering to the views of others. In fact, because of the "gatekeeping" function of the PPA procedure, the Building Inspector has not yet received a building permit application to review, and so far has had no discretion to exercise. In my view, in any event, the PPA system comprises no bar to building permit applications, but strives merely to ensure in a preliminary, almost informal way that they comply with City bylaws.
- [42] All of the PPA applications presented to me for inspection during this hearing, for example, were handwritten and in point form. The procedure seems to me to be a reasonably straightforward means of waving compliant proposals through to the permit stage, of giving useful and necessary advice to owners whose proposals might be approved if amended, and of weeding out non-starter projects. In general terms, I should think that this system saves a good deal of time, money and aggravation.
- [43] The task of the Building Inspector, in turn, is to ensure that, once an application complies with the Zoning Bylaw, it also complies with the Building Bylaw and Building Code. This two-step process does not fetter the Building Inspector's discretion within his or her own remit. It simply means that an applicant must obtain preliminary approval from the City's planning department before submitting a building permit application. The Building Inspector continues to have free rein, within his or her lawful authority, to evaluate the application and approve or reject it. I have concluded that there is nothing wrong or illegal about any of this.
- c) PPA Declaration
- [44] The petitioners seek a declaration that they should be able to obtain all required permits, including building permits, without obtaining a PPA. This item of relief was allied, if I understood it correctly, to the question of vires and discretion, or was related to work on the second floor that will no longer be required. Based on my findings that the PPA scheme is intra vires and does not unlawfully fetter the discretion of the Building Inspector, and as the second floor issues have been settled by consent, I decline to order this relief.
- [45] For convenience, however, I will address here the issue of the non-conforming pizza oven enclosure, which was built as an addition to the building itself occupying 88 square feet of lot coverage over the permissible maximum. The petitioners' argument is that a building permit was issued for this improvement in 2013, and it is now unconscionable for the City to claim that it creates excess lot coverage that must be removed because it violates the Zoning Bylaw. This was an important part of the petitioners' narrative of the City's high-handedness in dealing with their issues.
- [46] I am not sure why the building permit in question was issued. I have already said that s. 7.2 of the Zoning Bylaw mandates that the Chief Building Inspector "shall not issue any permit for a building, structure or use which violates any of the provisions of [the Zoning Bylaw]", and it seems reasonably clear to me that this injunction was overlooked when it came to the

pizza oven addition. The evidence on this point was not as clear as it might be for the unfortunate reason that the Building Inspector most involved in the matter, a Mr. Skinner, has since passed away.

- [47] I would note, however, that the petitioners applied for this building permit only after they had already constructed the addition and moved the pizza oven into it without the City's knowledge or approval. The permit application did not disclose that the addition had already been constructed, and description of the work to be approved was specified as an "interior alteration for relocating [the] pizza oven", not an exterior addition to the building of the kind they had already built.
- [48] The petitioners submitted that this was not an attempt to mislead the City, and their evidence included a copy of the floor plan allegedly filed with this application showing the oven in its present location. On the whole, however, I think it probable that this building permit was issued by mistake or on the basis of a misunderstanding. The work plainly violated s. 304.5 of the Zoning Bylaw concerning maximum lot coverage.
- [49] The petitioners argue that because the City did not request or require a PPA for the pizza oven addition in 2013, they are "estopped" from doing so now. I do not agree. As s. 4.1 of the Zoning Bylaw makes clear, the obligation to apply for and obtain a PPA before the construction of such an improvement rests squarely with the applicant. The petitioners have repeatedly failed to discharge this obligation, including as it relates to the pizza oven addition, and I am not persuaded that there is any lawful basis for making an exception or prohibiting the City from enforcing compliance.
- [50] The petitioners contended in submissions, finally, that there is no maximum density requirement or floor area ratio provision for C4 zoned property. While the pizza oven addition doubtlessly causes a minimal excess to permissible lot coverage, the petitioners argue that, especially since the City, mistakenly or otherwise, issued a permit for it, they should be able to apply to the City's Board of Variance for relief under s. 524 of the Local Government Act. Lot coverage is not "density", they say, and therefore a relaxation of the strict application of the lot coverage rules might be achievable in their case.
- [51] I have read the affidavit and email evidence of City employees that there can be no exception to lot coverage limits to accommodate the pizza oven addition, including by means of a variance. I have also taken note of the petitioners' argument that this evidence is inadmissible and, more importantly, incorrect. I have decided, however, that there is nothing in this difference of opinion for me to decide. As far as I can tell, the petitioners have never applied for a variance or been prevented from doing so. Their claim made in submissions that the City has somehow barred access to the Board of Variance has not been established in evidence. I will leave it to them pursue a remedy in that forum if they wish.

d) PPA Exemption

- [52] The fourth order sought by the petitioners is a declaration that they are exempt from the PPA requirement in s. 7.3 of the Zoning Bylaw pursuant to one of the exceptions set out in s. 7.3(1). The petitioners say that the alterations they have made to the building and property at 6011 Hastings are either "maintenance of the building, structure or use" under s. 7.3(1)(b), or an "improvement or alteration" that has "not materially affect[ed] the external appearance, increase[ed] the density of occupancy nor chang[ed] the use" of the Building under s. 7.3(1)(d).
- [53] As already mentioned, the parties have come to terms that a PPA is not required for any of the work done on the second floor of the Building. They have agreed that it may remain "as is", so long as the space is used only for storage. However the City maintains that the other construction, including the pizza oven addition and the patio structure, constitute alterations to the Building that materially affect its external appearance, and increase its density of occupancy.
- [54] In my view, there is no doubt at all that the pizza oven addition and the patio structure have, at the very least, materially affected the external appearance of the building. I am also inclined to think that, if permitted, the patio structure would necessarily increase the density of occupation. In my view, the City's decision that the petitioners are not exempt from the PPA procedure based on the exceptions set out in s. 7.3(1) is reasonable. It falls squarely within a range of acceptable outcomes under the bylaw and is to be accorded deference. I decline to make any declaration otherwise.
- e) PPA #17-0248
- [55] The next several items of relief sought have to do PPA #17-0248. These may conveniently be dealt with together.
- [56] To recap, the petitioners seek a declaration that the City's decision on September 19, 2017, to "refuse" to issue PPA #17-0248 was unlawful, unreasonable, and made in bad faith; a declaration that the "canopy" cover over the outdoor patio is permissible and exempted from lot coverage calculations; an order of mandamus compelling the Director of Planning to issue PPA #17-0248; an order of mandamus compelling the Building Inspector to "accept and process" the petitioners' application for a building permit for the "canopy cover" over the patio and "any other proposed constructions or additions."
- [57] The first question is whether the City did, in fact, "refuse" to issue PPA #17-0248. The parties have continued to communicate about outstanding compliance issues since September 19, 2017, and over the past year or so they have settled a number of issues of contention, including matters referred to in PPA #17-0248, such as what would be required to bring the upper floor of the building into compliance. The City's position, accordingly, is that the PPA in question is still active and the declaratory relief sought is premature.

- [58] I think this is stretching things. The only aspects of PPA #17-0248 that remain in question are the so-called "canopy" over the outdoor patio and the issue of parking. It seems obvious to me on all of the evidence that the City has no intention of budging on either of these issues, and in my view the application for PPA #17-0248 is a dead letter even if there has been no official declaration to this effect. I will deal with the question of parking below, and focus for the time being on the patio enclosure. The question is whether the City's refusal to issue the PPA for this was reasonable.
- [59] The petitioners say that the patio "canopy" is exempt from lot coverage calculations pursuant to s. 3 of the Zoning Bylaw. Section 3 defines "lot coverage" as "the combined area covered by all buildings and structures on the lot, expressed as a percentage of the lot area, measured as the area of the projection of the outline of the buildings and structures onto a horizontal plane but excluding canopies and sun shades". The Zoning Bylaw does not define "canopy". It does, however, define "street canopy" as a "structure that is attached to a building by a cantilever, is not part of the building and consists of a lightweight rigid frame covered by a stretched fabric membrane" (s. 3).
- [60] The alleged "canopy" in this case is a wood, glass and metal structure that covers and encloses a rather large patio on the Hastings Street side of the building. It has a fixed roof and is anchored to the ground. In my view it amounts, in practical terms, to a significant addition to the building itself. What the petitioners maintain is a "canopy" is in fact a "building" or "structure" as those terms are defined in the Zoning Bylaw. A "building" is defined therein as a "structure, located on the ground, which is designed, erected or intended for the support, enclosure, or protection of persons or property" (s. 3). A "structure", meanwhile, is "anything constructed or erected, the use of which requires location on the ground or attachment to something having location on the ground".
- [61] Based on these definitions, I find that the City's decision to include the patio structure in lot coverage calculations is reasonable, supportable and justified. I therefore decline to make the declaration sought. It follows that there can be no order of mandamus compelling the City's Building Inspector to accept and process a building permit for the "canopy", much less as it relates to "any other proposed construction or additions", as the preconditions for the application of this prerogative remedy have not been established.
- [62] In short, I am satisfied on the basis of the evidence before me that PPA #17-0248 does not comply with the Zoning Bylaw. The City's decision to that effect is reasonable, it has provided the petitioners with clear reasons for its decision, and there is no evidence of bad faith.
- f) Parking
- [63] Finally, the petitioners seek a declaration that they are permitted to use 5961 Hastings for donor parking pursuant to s. 800.5 of the Zoning Bylaw. This item of relief was not spelled out in the pleadings but was raised in argument by consent as "further and other relief".

- [64] It seems to be common ground that there is insufficient on-site parking at 6011 Hastings to satisfy the requirements of s. 800.4(19) of the Zoning Bylaw. The petitioners maintain, however, that this problem may be solved by access to donor parking at 5961 Hastings, and that the City's decision to prohibit this was unlawful. They concede that there is no business operating at 5961 Hastings, but in their submission this does not mean that the property's principal use is as a parking facility, or that the Zoning Bylaw prevents a donor or excess parking agreement between the owners as a permissible accessory use to both properties.
- [65] In its correspondence with the respondents on this subject, the City has taken the position that, in order to be lawful, the owner of both the donor and recipient sites in a s. 800.5 collective parking arrangement must apply for PPAs. Neither owner has complied with this obligation in the present case. The evidence shows, in fact, that the City cancelled the last recorded donor parking agreement between the former owners of 6011 and 5961 Hastings in 2000. The City says that a PPA is required so that it can evaluate the use of each property and determine, by recourse to calculations set out in s. 800.4 of the Zoning Bylaw, that the donor actually has surplus parking capacity to share and the recipient is entitled to have it. There is also a letter in the materials from the City's Director of Planning to Mr. Aufiero saying that "a legal easement arrangement between [the] two properties would have to be registered to ensure the permanency of the parking agreement."
- [66] While the City's position makes a good deal of sense, I have not been persuaded on this hearing that it is correct as a matter of law. The petitioners say, quite rightly, that there is nothing in s. 7.3 of the Zoning Bylaw requiring PPAs for collective parking agreements, and I was directed to no other authority for this proposition. If a system exists requiring the registration of such agreements, it was not explained to me or referred to in evidence. On this point the City's argument was merely that it should be accorded deference in interpreting and applying its bylaws, and that its prohibition of the petitioners' parking arrangement was reasonable. I share the petitioners' doubts that this is the correct standard by which to review the decision.
- [67] In any event, I was told that 5961 Hastings has been put to no permissible Zone C2 use since 2005. I agree with the City that, if the petitioners had their way, then in practical terms this property's primary use - indeed its only use - would be as an overflow parking lot for the petitioners. In my view the City's decision that this is impermissible under the Zoning Bylaw is assuredly correct. I can find no fault, either, with the City's explanation that parking as a permissible accessory use, and the availability of donor parking in the first place, may only be properly evaluated on the establishment and continued operation of a permitted use on the donor site.

RESULT

- [68] The various items of relief sought are accordingly denied. The petition is dismissed with costs to the City on Scale B.

"Baird J."

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Prepared on 29 October 2026 · Esheria