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Amend code to protect innocent neighbours

Last week's column told the story of the illegal chimney on a north Toronto bungalow owned by Ruta Benjamin and her husband.

When the house next door to the Benjamins' was torn down in 2007 and a monster home erected in its place, the couple discovered that their chimney was now lower than the roofline of the new house next door and too close to it.

Suddenly their chimney became illegal.

The column brought some interesting email responses.

Bernadette Celis, communications advisor with the Technical Standards and Safety Authority (TSSA), explained why the Benjamin chimney became illegal: as a result of the construction of the new house, the chimney on their bungalow was in violation of the Natural Gas and Propane Installation Code and Ontario regulation 212/0 Gaseous Fuels.

The code requires a fuel distributor to report to the TSSA when it finds a contravention or hazard. In this case, since the Benjamin chimney was less than two feet higher than the roof next door and less than 10 feet closer to the new house, it became a code contravention.

The code required the Benjamins to make their chimney comply at their own expense.

Was the city of Toronto wrong in issuing a permit, which resulted in a code violation against the house next door? Ray Hewlett, a retired chief building official, emailed to say that the Ontario Building Code applies to this situation.

He directed my attention to Section 8(2) of the Ontario Building Code Act, which states that if an application is properly submitted, a chief building official shall issue a permit to construct a building unless the proposed building...will contravene this Act, the building code or any other applicable law.

To my dismay, I discovered that the city of Toronto acted according to legal precedent when it issued a permit for the new house. That was the permit that caused the Benjamin chimney to be in breach of the fuel installation code.

Prior to his retirement some years ago, Pille Hansen was the chief building official of the former city of York. He emailed me to say that it was his policy to inspect properties for problems relating to chimney clearance in connection with building permit applications.

He referred me to a court case* in 1995 about a property on Snider Ave. owned by Peter Alaimo. As chief building official in the city of York, Hansen had refused Alaimo a building permit due to the proximity of the chimney on an adjacent property.

Alaimo appealed to the Building Code Commission**, which ruled that the building code requirement that a new permit cannot create a contravention of the act only applies to a contravention on the site under consideration, and not a property next door.

The city of York appealed the Commission decision to the Ontario Court of Justice, and lost*. Justice Dennis Lane ruled that Hansen, as chief building official, could not refuse to issue a permit simply because it would create a hazard or violation with respect to the functioning of the neighbour's chimney.

The judge wrote that the provisions of the Building Code do not regulate adjacent buildings and ordered York to issue Alaimo a building permit.

If Justice Lane's decision is correct in law (and I have my doubts), then there is an urgent need for Queen's Park to amend the Building Code Act to prevent innocent neighbours like the Benjamins from being placed in an unsafe and dangerous condition a result of construction on neighbouring properties.

****Building Code Commission ruling:**

http://www.obc.mah.gov.on.ca/Page648.aspx

BCC Ruling No. 94-36-414

BUILDING CODE COMMISSION DECISION ON B.C.C. #94-36-414

IN THE MATTER OF Subsection 24(1) of the *Building Code Act, 1992.*

AND IN THE MATTER OF Article 9.21.4.4. of the Revised Regulation of Ontario 1990, Regulation 61, as amended by O.Regs. 400/91, 158/93 and 160/93 (the "Building Code").

AND IN THE MATTER OF an application by Mr. Pietro Alaimo for the resolution of a dispute with Mr. P.D. Hansen, Chief Building Official, City of York.

APPLICANT

Mr. Pietro Alaimo, Owner
Toronto, Ontario

RESPONDENT

Mr. P.D. Hansen
Chief Building Official
City of York

PANEL

Sarah Maman, Chair
Demir Delen
Sang Shim

PLACE

Toronto, Ontario

DATE OF RULING

November 22, 1994

APPEARANCES

Mr. Brian Haley
Assistant City Solicitor
City of York
For the Respondent

RULING

- **The Applicant**

  Mr. Pietro Alaimo is the holder of a permit under the Building Code Act, 1992 to construct a two storey single family dwelling (i.e. house) at 46 Snider Avenue, City of York, Ontario.

- **Description of Constrution**

  The applicant proposed to construct a two storey house within 3 m of a chimney on the adjacent property.

- **Dispute**

  The dispute between the Applicant and Respondent concerns the interpretation of the technical requirements of Article 9.21.4.4. of the Building Code. At issue is the determination of whether the building may be constructed within 3m of an existing chimney on the adjacent property.

- **Provision of the Building Code**

  Article 9.21.4.4.: Height of Chimney Flues.

  A chimney flue shall extend not less than 900 mm (2 ft 11 in) above the highest point at which the chimney comes in contact with the roof, and not less than 600 mm (23? in) above the highest roof surface or structure within 3m (9 ft 10 in) of the chimney.

- **Applicant's Position**

  The applicant stated that prior to May of 1992, he owned a two storey brick and frame residential dwelling on the subject property.

  On May 4, 1992 he was granted a demolition permit and was assured the corresponding building permit would be issued forthwith. After effecting the demolition of the existing dwelling house, Mr. Alaimo proceeded to construct the footings for the proposed house. He was advised on June 3, 1992, that the building department had taken theposition that two existing chimneys on an adjacent property caused the proposed house to be in contravention of the Building Code.

  The building department then suggested that the problem could be solved if Mr. Alaimo agreed to extend the chimney belonging to the adjacent property owner to a height which would cause it to be at least 3 m away from the roof of the proposed house. Unfortunately, Mr. Alaimo was not able to secure the consent of the neighbour to extend the chimneys.

- **Chief Building Officials Position**

  The respondent stated that an application for a building permit was made in May, 1992 for a two storey house. The respondent refused to issue the permit unless the plans were changed to provide adequate clearance to the existing chimney on the neighbouring property. An alternative was to extend the chimneys or convert the existing furnace on the neighbouring house to a high efficiency furnace. However, this would only address one chimney since the other is a fireplace chimney.

  The owner cancelled his application for a permit in April 1993. A new application was made on June 30, 1994 and a permit was issued August 5, 1994. The plans showed that part of the second floor was recessed at two locations to provide the 3 m clearance required by the building department.

  The respondent argued that Article 9.21.4.4. applies not only to the new construction but to the existing two chimneys on an adjacent property. In other words, the applicant's dwelling must be designed to ensure that the proper clearances as per Article 9.21.4.4. between the existing chimneys and the applicant's dwelling are maintained.

  The respondent also felt he had a common Law duty of care which extends to neighbouring properties.

  The respondent said that he considers Common Law to be applicable Law under Subsection 8(2) of the Building Code Act, 1992.

  The respondent stated that the owner was issued a stop work order as he proceeded to construct the second story without the recesses as shown on the permit plans.

- **Commission Ruling:**

  In favour of the Applicant. It is the decision of the Building Code Commission that the two storey dwelling under construction at 46 Snider Ave., City of York, complies with Article 9.21.4.4. of the Building Code.

- **Reasons:**

    - Article 9.21.4.4. applies only to the proposed construction on the applicant's property and is not applicable to existing chimneys on adjacent properties.

    - The Code does not address any adverse effect to adjacent properties in this matter of chimney flues such as the Code does in the matters of surface drainage and groundwater levels.

    - Should there be cause for concern after construction of the new building with regards to life safety and the protection of property of the adjacent buildings, other legislation is available.

Dated at Toronto, this 22nd day, in the month of November, in the year 1994, for application number 1994-48.

Sarah Maman

Demir Delen

Sang Shim

***Ontario Court of Justice (General Division) - Appeal**

Alaimo v. York (City) (Chief Building Official)

Between

Peter Alaimo, applicant, and

P.D. Hansen, Chief Building Official, City of York, respondent

[1995] O.J. No. 862, 26 M.P.L.R. (2d) 69, 54 A.C.W.S. (3d) 585

Court File No: RE4741/94

Ontario Court of Justice (General Division)

Dennis Lane, J.

Heard: January 31, 1995.

Judgment: March 30, 1995.

Counsel:

Karl D. Jaffary, Q.C., for the applicant.

Brian W. Haley, for the respondent.

D. LANE J.:-- This is an application by Peter Alaimo, a property owner in the City of York, against the Chief Building Official of that City. The application is brought pursuant to s. 25(1) of the Building Code Act which provides that any person who considers himself aggrieved by an order or decision made by a Chief Building Official may appeal the decision to a Judge of the Ontario Court (General Division).

The decision appealed from is contained in a letter dated November 30, 1994 in which the Respondent refused to issue a permit for certain construction on lands known municipally as 46 Snider Avenue in the City of York.

The Applicant seeks an order requiring the Respondent to issue the building permit, and costs.

The most significant facts are not in dispute. The Applicant obtained certain variations to the City of York zoning by-law from the Committee of Adjustment of the City of York on March 13, 1990. Thereafter, on May 4, 1992, the Applicant's agent applied for a building permit based on certain plans that were examined by the Respondent's staff, which took the position that s. 9.21.4.4(1) of the Ontario Building Code prohibited the intended construction because of the proximity and height of chimneys on the adjacent building. Shortly put, the Code requires that a chimney must extend not less than 600mm above the highest surface within 3 metres of the chimney. A permit for the building was not issued. The Applicant acknowledges that, in the belief that a permit would be issued shortly, he proceeded with form work for the new foundation, but he was ordered to stop work on June 2, 1992 and did so.

Attempts to find a solution satisfactory to the Building Department were not successful and on April 6, 1993, the Respondent classified the application as "non-active". In 1994, the Applicant submitted a new set of drawings. The design of the second floor had been revised in a fashion that would satisfy the concerns of the Respondent. The second floor level was set back to provide a separation from the neighbouring chimneys. A permit based on those drawings was issued on August 3, 1994. The Applicant states that it was his hope that he would be able to construct the building he had originally applied for, and that before construction reached the second floor level, he would have solved the problem of the adjacent chimneys in some other way.

Sometime after the issuance of the building permit, the Applicant learned of the provisions of s. 24 of the Building Code Act, providing for an application to the Building Code Commission for the resolution of any dispute between any applicant or holder of a permit and the Chief Building Official. The Applicant applied to the Building Code Commission which conducted a hearing and issued a ruling on November 22, 1994. The Building Code Commission considered the interpretation of Article 9.21.4.4 of the Building Code Act and the submissions of both the Applicant and the Respondent Chief Building Official. At the hearing, the Respondent put his position, that the article prevented new construction based on the location of the two existing chimneys on the adjacent property. He also argued that he had a common law duty of care extending to neighbouring properties and that he considered the common law to be "applicable law" under s. 8(2) of the Building Code Act.

The Commission ruled in favour of the Applicant. It decided that Article 9.21.4.4 applied only to the proposed construction on the Applicant's property and was not applicable to existing chimneys on adjacent properties. It also ruled that the Code does not address any adverse effect to adjacent properties in the matter of chimney flues, and that if there is any cause for concern after construction, with regard to life safety and the protection of property of the adjacent buildings, other legislation is available. It appears to me that this decision of a statutory tribunal acting within its powers in a dispute between the very parties before me renders the merits of the dispute res judicata. The principle is not confined to decisions of courts. However, the case was not argued on the basis of res judicata and accordingly I will not decide it on that ground.

Shortly after the Building Code Commission decision, the Applicant again attempted to obtain a permit for the building he wished to build, the one shown in the drawings filed in

1992. Applicant's counsel advised the City of York that the Applicant persisted in his demand for a permit. On December 1, 1994, the Applicant received the letter dated November 30, 1994 giving the Respondent's decision. The Applicant reattended at the municipal offices on December 2, 1994 to make certain that it was clear that he was seeking a permit on the drawings that are before the court. In his affidavit, the Applicant says that a member of the City of York Building Department advised that "a permit cannot be issued on the plans because they do not address the issue of the chimney".

This application was then launched on December 8, 1994.

Section 8(2) of the Building Code Act provides in part as follows:

"The Chief Building Official shall issue a permit...unless,

the proposed building, construction or demolition will contravene this Act or the building code or any other applicable law;"

The Building Code provides in s. 1.1.3.2, the definition section, in part as follows:

> "The words and terms in italics in this code have the following meaning for the purposes of this Code, and where indicated, the following meaning for the Act as well."

The following definition was added to the Code by Ontario Regulation 160/93:

> "Applicable law means, for the purposes of s. 8 of the Act, any general or special Act, and all regulations and by-laws enacted thereunder, which prohibit the proposed construction or demolition of the building unless the Act, regulation or by-law is complied with." (emphasis in original)

The Applicant submits that "the common law right of every man is to build upon his own land whatever kind of building he sees fit so long as it is not a nuisance, public or private. It requires an express statute to take away that right of property": City of Toronto v. King (1923) 54 O.L.R. 100, 102, (App.Div.). That has been the law since long before the enactment of the Ontario Building Code Act. In Mackenzie v. City of Toronto [1915] O.W.N. 820, at 821, Middleton J. observed:

> "When the plans and specifications of the proposed building conform to the building by-law the duty of the civic official is to issue the permit. ... The company proceeds entirely at its own risk, and must at its peril avoid committing any nuisance or the violation of any valid regulation applicable to its undertaking."
>
> Rogers, Canadian Law of Municipal Corporations at p. 862.17 cites Mackenzie, supra, in support of the statement:
>
> "So a permit cannot be refused on the grounds that the building may be used in such a manner as to become a nuisance....".

Rogers, supra, also notes at p. 862.16:

> "The question has arisen in some cases whether the duty to issue a permit is absolute once compliance with all by-laws is shown or whether the council or its official has a discretion to refuse a permit notwithstanding. It seems that in all provinces the duty to issue a permit is an absolute one and does not involve an exercise of discretion as there is in the granting of municipal trade or business licences";

and at p. 862.17:

> "Thus it appears that a building permit cannot be refused for reasons which are extraneous to the question whether the plans for the building comply with the by-laws in force relating to construction and whether the intended uses of the property are within the permitted uses of the by-law."
>
> Accordingly, it is well established that: "An owner who has been refused a permit to erect or alter a building which conforms with the requirements of a building construction or building restriction by-law is entitled to a mandatory order directing the issue of the permit.": Roseburg v. North Grimsby, [1952] O.W.N. 745 (C.A.).
>
> These authorities show that an official has no discretion to refuse to issue a permit when all of the statutory requirements have been fulfilled.

The Applicant further submits that the Respondent cannot rely on any general common law duty of care to adjoining residents, unless such duties can be grounded in "applicable law" within the meaning of the Ontario Building Code Act.

The Respondent finds support for the concept of common law power for Chief Building Officials in the decision of Cosgrove J. in Leeds and Grenville v. Gerard, (unreported, Oct. 4, 8, [1991] O.J. No. 1825). Cosgrove J. found that the Chief Official was required to act "responsibly - that is professionally and reasonably" and that he had a duty of care to persons whose relationship was sufficiently close that they should be within his contemplation as likely to be injured by a breach of that duty. The Leeds case turned on the issue of whether persons proposing to pump a toxic chemical into pipes that could leak into the ground water required a certificate of approval under the Environmental Protection Act, and the court found that such an approval was required.

The Leeds case proceeds upon the basis that the Chief Building Official has a duty at common law not to grant a permit where the result might be to cause damage to someone. I think that is what Cosgrove J. meant by saying the official must act "responsibly - that is professionally and reasonably" and by citing the duty of care referred to in City of Kamloops v. Nielsen et al, [1984] 2 S.C.R. 2.

Since 1991, when Leeds was decided, the Building Code has been amended to define "applicable law" in terms that confine it to statutes, regulations or by-laws which prohibit the proposed construction of the building unless complied with. This definition excludes common law considerations such as nuisance. It also confines the relevant enactments to those prohibiting the erection of buildings unless complied with. It seems to me that the decision in Leeds has not survived this statutory change.

If I am wrong in this conclusion, I turn to the common law as put forward by the respondent.

It is argued that the Chief Building Official has a common law duty of care to those who foreseeably may be affected by his act of approving the building permit: City of Kamloops v. Nielsen and Hughes, [1984] 2 S.C.R. 2. Accepting that to be the law, does that justify withholding the permit in the instant case? In my view, it does not for two reasons:

> (1) The duty of care may be fully discharged by warning the neighbouring land owner to review the effectiveness of his chimney in the new circumstances. There is no need to prohibit the erection of the nearby building.
>
> (2) The Chief Building official can only be liable if he acts in breach of his duty under the statute. Kamloops, supra, is not authority for the view that the Municipality is liable for the consequences to neighbours of every building erected under a permit issued by it. There must be an underlying breach of duty under the Code before there can be any question of liability to others. In Kamloops itself, the Municipality knew of the placing of the foundations upon fill rather than solid ground and did not effectively prevent the builder from continuing construction without remedying the defect.

At p. 21, Wilson J. defined the two important questions: "(1) What was it that the building inspector failed to do that is alleged to have contributed to the plaintiff's damage? and (2) Was he under a duty to do that thing?" She goes on to point out that unless the inspector was under a duty to do what he failed to do, there could be no liability. In short, Kamloops widens the scope of persons affected by a municipality's breach of duty, but does not create new duties.

In the case at bar, the prospect of civil liability does not add to the Chief Building Official's powers nor to his obligations. They remain the same, as defined in the statute - to issue the permit unless the proposed structure would contravene the Building Code Act or any other applicable law. There is no power to attach extraneous conditions through some right derived in common law: Napanee v. Doornekamp, [1970] 2 O.R. 419, 424 (H.C.J.).

The essence of the Chief Building Officer's position is set out in his letter of November 30, 1994:

> "Although the Code may or may not directly deal with the problems relative to the neighbouring chimney, I am under a common law duty not to permit construction which may create a hazard with respect to the functioning of the neighbours chimney(s)."

In my view, no such common law duty exists. Its existence would be in direct conflict with the Building Code Act which commands the issuance of the permit unless a contravention

of applicable law as defined is shown.

Neither the Respondent's belief in the proper interpretation of s. 9.21.4.4 of the Ontario Building Code, nor his objections to the decision of the Building Code Commission set out in paragraph 33 of his affidavit, can be a basis for withholding a permit.

The Respondent refers in paragraph 34 of his affidavit to the Code of the American National Fire Protection Association, to a textbook on gas utilization and to excerpts from publications by the British Department of the Environment and by the Canadian Standards Association. None of these documents is "applicable law" within the meaning of the Building Code Act.

The Respondent, in paragraph 35 of his affidavit, advises that since the commencement of these proceedings he has become aware of certain provisions of the Ontario Gas Utilization Code, 1989. The Energy Act, in s. 28(1), provides that regulations may be made for the "handling and use of hydrocarbons", and particular examples of the exercise of that power are listed in subsections (a) through (p). Subsection (b) of s. 28 provides as follows:

> (b) requiring and providing for the approval of design and construction standards for appliances and works.

Section 1 of the Energy Act contains the following definitions:

> "Appliance" means a device that uses a hydrocarbon and includes all valves, fittings, controls and components attached or to be attached thereto;
>
> "Work" used as a noun means the facilities used in the handling of a hydrocarbon.

Pursuant to the power contained in s. 28(1), Regulation 331 of the Revised Regulations of Ontario was enacted entitled "Gas Utilization Code". By s. 9 of that Regulation, the Ontario Gas Utilization Code, 1989 is adopted by reference into the Building Code.

Section 5.14 of the Ontario Gas Utilization Code does set standards for the height of the chimneys of gas appliances in relation to both the roof of the building through which it passes and "any other obstruction". The regulations contemplated by s. 28(1)(b) of the Energy Act are regulations governing the construction and the standards for works used in the handling of a hydrocarbon. Regulations under that Act do not purport to regulate construction of adjacent structures or buildings. No such power is contained in the Energy Act, or purported to be given by that Act's power to make regulations. While incorporation into the Building Code makes them "applicable law", it does not alter their substantive effect. If it were otherwise, any owner of a building with a low chimney and a gas furnace would, by the act of building his chimney, have imposed height restrictions on his neighbour's land. No statute, by-law or code in Ontario purports to create such restriction. The sections of the Code relied on do not regulate adjacent buildings; they regulate chimneys. It is for the owner of the regulated gas appliance to bring and keep his machinery and his chimney in compliance with the regulations that govern its operation.

As the Commission ruled, if there is any cause for concern following construction, other legislation is available. I add to that the common law of nuisance: T.H. Critelli Ltd. v Lincoln Trust and Savings Co. et al. (1978) 20 O.R. (2d) 81, (H.C.J.). While those who build in a way that has an adverse impact on neighbouring buildings may be liable in damages for nuisance, it is no part of a Chief Building Official's duty to anticipate such a claim, or to attempt to prevent construction that might be adjudged in the future to have given a property owner a civil remedy. The law of nuisance is not "applicable law" within the meaning of the Building Code Act.

It is clear that the Respondent has been adamant in his view since June of 1992. Notwithstanding the "final" resolution of the matter by the Building Code Commission on November 22, 1994, the Respondent has refused to do his statutory duty and issue the permit. Instead he launched a collateral attack on the Commission's ruling by the manner in which this application was defended, particularly paragraph 33 of the Respondent's affidavit. It was submitted that the Applicant should have his costs on a solicitor and client basis. There is much merit in this submission, but there is another matter that bears on the disposition of costs. The Chief Building Official's affidavit discloses that the Applicant, having obtained the building permit as a result of revising his application to show the second floor set back to create separation from the chimney, then proceeded to build the second floor without the set-back. It would be incongruous to reward such conduct with a higher level of costs. As well, I accept that the Respondent was throughout actuated by a genuine concern for his duty as he saw it. In the circumstances the Applicant will have party and party costs.

The Applicant is therefore entitled to:

> (a) an order requiring the Respondent to issue a permit forthwith for the building as shown on the plans that are Exhibit "B" to the Affidavit of Peter Alaimo; and
>
> (b) the costs of this application, on a party and party basis.
