

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:** )  
 )  
BRIAN BONDY ) Gregory J. Elliott, for the Applicant  
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 )  
Applicant )  
 )  
- and - )  
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 )  
THE CORPORATION OF THE ) Raymond G. Colautti, for the Respondent  
MUNICIPALITY OF CHATHAM-KENT )  
 )  
Respondent )  
 )  
- and - )  
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 )  
THE ATTORNEY GENERAL OF ) Michael Dunn, for the Intervener  
ONTARIO )  
 )  
Intervener )  
 )  
 ) **HEARD:** January 29, 2008

2008 CanLII 5961 (ON S.C.)

**Rogin J.**

**JUDGMENT**

[1] The City of Chatham enacted a by-law on June 23, 2003 which is known as the “fortification by-law”. The by-law prohibits excessive fortification of land. It clearly targets a

property municipally known as 27 Degge Street, Chatham, Ontario, although it does not explicitly say so. It, of course, also regulates all other structures within the city. It is common ground that 27 Degge Street, Chatham, is the clubhouse of a motorcycle club.

[2] Brian Bondy, the applicant, is one of the registered owners of 27 Degge Street along with William Hunt. The property was conveyed to them on March 31, 1995. Hunt and Bondy are described in the Land Transfer Tax Affidavit as “Trustees of Organization”. Bondy applies to quash the by-law on the grounds that it is:

- 1) Criminal law which is *ultra vires* the city;
- 2) Vague and overbroad; and
- 3) Contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*.

[3] The application to quash the by-law must be dismissed for the following reasons.

1) The Criminal Law Argument:

[4] It is argued that this by-law is in pith and substance, criminal law because it targets bikers or motorcycle gangs, and their alleged criminal activity. Further it is argued that sustaining this by-law will allow the authorities to obtain search warrants by using the building inspector of the town as a police agent, to gain access to the club’s premises by use of the by-law, and gain evidence which will ultimately be used to obtain *Criminal Code* search warrants.

[5] The criminal law power under s. 91(27) of the *Constitution Act* can overlap areas of provincial jurisdiction. It is only when the two jurisdictions directly collide that resort can be made to the division of powers under the *Constitution Act*.

[6] The applicant does not dispute that the City of Chatham has the power pursuant to s. 133 of the *Municipal Act, 2001*, (S.O. 2001 c. 25 s. 133) which allows a municipality that is responsible for enforcement of the *Building Code Act* to:

- 1) regulate in respect of the fortification of and protective elements with respect to land use; and
- 2) prohibit excessive fortification of land.

[7] Section 133 is not *ultra vires* the province because the protection of public safety through land use regulation is a proper municipal purpose.

[8] The suppression of conditions conducive to crime is also a valid provincial purpose as long as the by-law does not attempt to fill perceived gaps in the existing criminal law or attempt punishment of a crime. See: 1) *R. v. Morgentaler*, [1993] S.C.R. 463; and  
2) *Bedard v. Dawson*, [1923] S.C.R. 684.

[9] This by-law attempts to make access to land more accessible to firefighters, E.M.S. personnel, and also the police in the valid execution of their duties. This is a protection of public safety issue, not a criminal law issue.

[10] Even if it does overlap on the criminal law power, the by-law is constitutionally valid as long as the land use regulations and public safety issues are valid and genuine and within the provincial sphere of validity. See: *R. v. Banks* (2007), 84 O.R. (3d) 1; leave to appeal to S.C.C. refused [2007] S.C.C.R. No. 1576:

“Because a matter within provincial competence may also be the subject of the federal criminal law power, it is not enough ... to show that the provisions attacked have a criminal law aspect. ... It must establish that the provisions do not fall within the provincial competence, or are repugnant to federal legislation.”

[11] This by-law falls within the provincial sphere as it is also aimed at suppression of crime and health and safety, both areas within provincial competence.

[12] Accepting Mr. Bondy’s argument at its highest, namely that the by-law may be used indirectly by the police to obtain information to obtain criminal search warrants, that argument must also fail. If a person, the subject of a criminal search warrant can establish that the building inspectors were used by the authorities for such a purpose, those building inspectors would presumably become police agents and subject to the same *Charter* scrutiny as the police themselves.

## 2) The Vague and Overbroad Argument:

[13] It is argued that as there is no definition of “excessive” in the by-law itself, the by-law is vague. It is also argued that every property in the City of Chatham contravenes this by-law and it is therefore overbroad.

[14] The *Concise Oxford English Dictionary* definition of excessive is “more than is necessary, normal or desirable”.

[15] The mere fact that there is no definition of “excessive” in the by-law does not of itself constitute vagueness. Words in other statutes such as “unduly” in s. 32(1)(c) of the *Combines Investigation Act*; R.S.C. 1970 c. 23, and the words “for any use that can be made of” [the natural environment] in s. 13(1) of the *Environmental Protection Act*, R.S.O. 1980 c. 141 have both been held not to be vague despite a lack of definition in the respective Acts.

See: 1) *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.R. 606; and

2) *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (which also discusses the word “impairment”).

[16] In *R. v. Nova Scotia Pharmaceutical Society*, *supra*, at para. 63 the following is said:

“A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasonable analysis applying legal criteria. It does not sufficiently delineate any area of risk and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion.”

[17] In this case the by-law itself defines what is not excessive:

Section 5.1(1) – commercially marketed household security devices.

Section 5.1(2) – use of protective elements designed to provide advance warning to occupants ... where an actual entry into a dwelling house has occurred.

Section 5.1(3) – common household alterations meeting Building Code and Fire Code requirements.

[18] In addition, in the definition section of the by-law in s. 6, examples of what are excessive are given. They are not exhaustive as no by-law is capable of defining everything that is prohibited.

[19] Similarly in s. 7 of the definition section, examples of devices which would be “excessive protective elements” are listed, again not exhaustively.

[20] The combination of the dictionary definition of excessive along with s. 5 and sections 6 and 7 of the definition section of the by-law give ample material to define a legal debate and the risk that the land owner undertakes if he alters his property in such a way to attract the attention of the by-law.

### 3. The Charter Issue

[21] Although the applicant appeared to base his argument on s. 7 of the *Charter* he touched briefly on s. 8. With respect to s. 8, there is a right of search under s. 158 of the *Provincial Offences Act*. There is also a right to search under s. 9 of the by-law as long as a search warrant has been granted. The usual pre-requisites must be present in order for a search warrant to be granted under the by-law. As long as there is compliance with these elements in the granting of a warrant pursuant to the by-law there would be no unreasonable search.

[22] With respect to the s. 7 argument that the applicants are deprived of or there may be a limitation on their life, liberty or security of the person, the onus is on them to demonstrate same before the issue of vagueness can be addressed. Vagueness is not a free standing *Charter*

principle upon which to consider the possible invalidity of the by-law. See: *Major Mack Hotel v. Ontario (Liquor License Board)*, [1994] O.J. No. 2493 affirmed [1999] O.J. No. 1418 (C. of A.)

[23] Not every right or “freedom” in our society is elevated to a *Charter* right. To find otherwise would be to trivialize the *Charter*. It was argued that this by-law deprives the applicants of their right of self-defence against rival motorcycle clubs. Indeed there was evidence in the material filed by the City of Chatham of an altercation at 27 Degge Street, Chatham, between the club that owns the property and another group. Personal injury was involved. Not surprisingly none of the participants asked the police for assistance. While self-defence may very well be part of ...”life, liberty and security of the person”, there is provision in the by-law for exemption from its provisions. While it may be cynical to expect these applicants to attempt to avail themselves of those provisions, nevertheless those provisions exist for all citizens potentially impacted by this by-law. There has been no violation of any *Charter* right established by the applicants. Therefore the vagueness analysis cannot be made.

[24] Even if the vagueness analysis could be made, it would fail for the reasons previously discussed.

[25] Accordingly, the application to quash the by-law is dismissed.

[26] Costs, if requested, may be addressed by the respondent within 30 days in submissions of no more than five pages.

[27] Applicant to have 14 days to answer.

[28] Respondent to have seven days to reply.

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”original signed by Justice Rogin”

Steven Rogin  
Justice

**Released:** February 13, 2008

**COURT FILE NO.:** 3670/06 (Chatham)  
**DATE:** 20080213

***ONTARIO***

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

BRIAN BONDY

Applicant

- and -

THE CORPORATION OF THE MUNICIPALITY  
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Respondent

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THE ATTORNEY GENERAL OF ONTARIO

Intervener

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**REASONS FOR JUDGMENT**

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Rogin J.

**Released:** February 13, 2008