

CITATION: Joubarne v. The Corporation of the City of Belleville et al., 2023 ONSC 5308
COURT FILE NO.: CV-13-0161-00
DATE: 2022-09-22

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Grace Joubarne, Plaintiff

AND

The Corporation of the City of Belleville, Kevin Murphy, Ted Marecak, The Chief Building Official of the City of Belleville, and Spencer Hutchinson
Defendants

BEFORE: The Honourable Justice C.T. Hackland.

COUNSEL: Arkadi Bouchelev, for the Plaintiff

Catherine A. Temple, for the Defendants

HEARD: Closing submissions on May 2, 2023 (via zoom videoconference)

JUDGMENT

OVERVIEW

[1] The plaintiff Grace Joubarne is the owner of the subject property municipally identified as 49 and 49 1/2 Catherine St. in Belleville. She took title to the property on April 15, 2011, having purchased it from the Bank of Nova Scotia under a power of sale. At the time of sale the property had been boarded up for a lengthy period of time and had been previously used as a rooming house.

[2] It was the plaintiff's intention to renovate the property into 4 residential units which she then planned to lease out. Her belief was that the subject property was originally constructed as two semi-detached units. However, City of Belleville building officials took the position that the subject property was constructed as a single residential dwelling, not eligible for multi-residential occupation, and placed a stop work order on the renovation project which had been proceeding without building permits. This gave rise to the present litigation.

[3] The residential building on the subject property was built in the early 1900s, specifically in 1906, and unfortunately there are no building records pertaining to how the original building

was constructed. Various additions were made to the building in later decades. These later additions do not assist in determining the nature of the original construction.

[4] The plaintiff seeks a declaration that the building was originally constructed as two semi-detached living units. In the alternative, the plaintiff seeks a declaration that she is entitled to have four residential apartments in the building on the basis of a legal non-conforming use which she believes existed when the relevant municipal by-laws came into force in April 1977.

[5] For the determination of whether the building was originally constructed as a single family residence in 1906, versus two semi-detached units, each party called expert opinion evidence. The plaintiff relied on the evidence of Charles Onuah, a structural engineer, who concluded the building was originally constructed as two semi-detached units separated by a double wall on the ground and second floors. The defendants relied upon the expert evidence of Allison Orr, an engineer and Lindsay Reid an architect, who both concluded the original building was constructed as a single family dwelling.

DEFINITION OF SEMI DETACHED DWELLING

[6] The plaintiff seeks to have the building declared as semi detached pursuant to the specific legal definition under Ont. Reg. 384/94 under the *Planning Act (the requirement of a vertical plane dividing the whole building)*, and also seeks a declaration that the building is semi-detached based on by-laws, and based on a more general understanding of the concept of semi-detached.

[7] Ms. Orr testified the term semi detached is a technical term and not one defined by the Building Code. While she was unaware of a “legal” definition in the early 1900’s, the Building Code does touch upon semi-detached houses. It was her opinion there is a general understanding that a semi detached building is constructed side-by-side with a shared wall, with each semi-detached dwelling unit requiring all of the elements of a dwelling unit including a kitchen and a bathroom. The shared wall would run from the footings all the way through to the roof. That wall would not be open. Fire protection is one of the key purposes of the wall. I accept Ms. Orr’s observations in this regard.

[8] Mr. Onuah, the plaintiff's expert, was of the opinion the building was originally constructed as two self-contained units in the semi detached building. He based his conclusion on the fact the building was constructed in the early 1900s, and that he assumed it met the necessary building standards at that time (the details of which he was unaware); that the common wall between the units at the second floor level had no internal access; and that the opening in the common wall on the main floor was blocked off at the time of the original construction, eliminating the possibility of internal access between the two units.

[9] The experts agreed the building as originally constructed contained only one internal staircase connecting the main floor to the second floor. This internal staircase was located on the west side of the building. Mr. Onuah hypothesized that access to the second floor on the east side of the building was facilitated through an external staircase. However, there is no evidence of an outside staircase existing when the building was originally constructed. A forensic assessment of the physical structure and historic records carried out by the defendant's expert Ms. Reid does not support the theory of the existence of an external staircase.

[10] In the court's opinion the expert assessments provided by the defence experts Ms. Reid and Ms. Orr are more thorough and are to be preferred. Moreover, these two experts have superior qualifications and experience with historical construction and they carried out what the court views as a more thorough analysis, including records of occupancy of the residence from the time of construction as well as census records and insurance records, in addition to their site investigations on the property.

[11] Ms. Reid concluded that the building did not have a continuous vertical plane dividing the building. In particular, one could move freely throughout the basement within the original footprint of the building. On the ground floor there were two openings that allow a person to move from one side to the other. On the second floor there was an opening at the top of the stairs when one could move through the building. Accordingly, the definition under Ont. Reg. 384/94 under the *Planning Act* which requires a vertical plane from the foundation up to the roof, was not met.

[12] Ms. Reid cross-referenced her assessment and site work with the historical records including fire insurance plans as well as a Government of Canada census from 1921. The 1921

census identified the building as a single-family dwelling. The fire insurance plans, documents that were prepared by surveyors to inform insurance companies as to the construction of the building for risk purposes, also confirmed Ms. Reid's opinion that the building was constructed as a single family dwelling.

[13] The Court accepts in particular the architect Ms. Reid's conclusions from her report, (ex 83): She stated:

Based on this review, it is my opinion that this building was originally constructed as a single family house:

- The 1907 assessment roll listed the first occupants of this house as E T Thompson and one other family member.
- Within the footprint of the original house there is a single stair connecting the ground floor to the second floor. A semi-detached house would have required a second stair within the original house.
- Within the footprint of the original house, the presence of door openings in the central wall adjacent to the main stair indicates that the house was fully connected and that this wall did not function as a dividing wall between the two units.
- The existing house layout is the result of later alterations which includes the construction of a two-storey rear addition and alterations to the original building layout.

It is my opinion that the existing house does not comply with the definition of a semi-detached house in *Ontario Regulation 384/94*. There is no evidence of a vertical plane dividing the building such that there is no internal access from one semi-detached house to the other. The existing house lay-out is the result of alterations to the original building.

[14] The Court also accepts the opinion of the defendant's expert engineer Ms. Orr who concluded, like Ms. Reid, that the building was originally constructed as a single family dwelling. Ms. Orr observed, (ex 97): "the building does not have a layout, characteristics, or necessary elements, to suggest that there were originally two semi-detached dwelling units."

Ms. Orr answered Mr. Onuah's 2 key points as follows: Mr. Onuah had concluded, "the common wall between the units at the second floor had no internal access".

Ms. Orr responded, "as discussed, it was clear to me that there was internal access across the second floor. A doorway leading to the east portion of the second floor, at the top of the stairs, had existed, as recently as 2010 (Photograph 19) and was filled in (Photographs 18, 23 and 25). Mr. Onuah also asserted the opening in the common wall on the main floor was blocked off at the time of original construction, eliminating the possibility of internal access between the two units. Ms. Orr's response was that Mr. Onuah failed to recognize that there were 2 openings at the main floor level (Photograph 8). The opening under the stairs was open as recently as 2010 (Photograph 9). The presence of trim around the other opening (Photograph 10) is not consistent with the opening being blocked off at the time of original construction. Additionally, there is no separation in the basement, and it was accessible from only one side of the original house, which would not be expected in a purpose-built semi-detached building. The court accepts the opinion of Ms. Orr over that of Mr. Onuah.

CONCLUSION: ORIGINAL CONSTRUCTION WAS AS A SINGLE FAMILY DWELLING

[15] The Court is satisfied on the balance of probabilities that the residence on the subject property was originally constructed in 1906 as a single family dwelling, and accepts the defendant's expert's evidence in this regard. The key point here is the Court's acceptance of the opinion of the defendant's two expert witnesses that there was internal access between the living area of the structure on the first and second floors at the time of original construction. A dwelling can not be considered as "semi-detached" if there are openings in a dividing wall allowing internal passage between areas of the residence.

LEGAL NON-CONFORMING USE

[16] The plaintiff argues, in the alternative, that the residence was occupied as 4 residential units at the time the first municipal by-law was introduced in 1977 and continuing thereafter, so as to constitute a lawful non-conforming use under s. 34(9) of the *Planning Act*.

[17] The Court is not persuaded the subject property ever comprised four self-contained residential units prior to the zoning by-laws introduced in April of 1977, or that such use continued up to the time the plaintiff purchased the property in 2011. The building had been boarded up for two years prior to the plaintiff first viewing the property. At an OMB hearing brought by the plaintiff the municipality's land use planner testified that according to property assessment records from 1976 to 2006 and MPAC records, the property had been used and taxed as a two unit dwelling. This evidence was supported by the testimony of a neighbour Mr. Gelinis who viewed the home in May 2011 and his evidence was accepted by the Board. The OMB's decision may be regarded as *res judicata* on its finding that there were never 4 residential units in the building. In any event this court finds on the evidence, the plaintiff has failed to prove there was ever 4 residential units in the building.

[18] In addition to the above noted finding of the OMB, the Court is satisfied the evidence of Lindsay Reid, Robert McCullough and Rick Preisinger, the selling agent when the plaintiff purchased the property, are directly inconsistent with the building having ever contained 4 living units when the property was acquired. In summary, the court finds the plaintiff has failed to establish the alleged legal non conforming use.

[19] Included in the parties written submissions are conflicting positions about the plaintiff's entitlement to additional living units in light of recent (2022) Provincial legislation amending the *Planning Act*, [*Bill 23: More Homes Built Faster Act*] designed to allow property owners to have additional residential units in detached or in semi-detached houses. The Court will not be addressing that question at this time as it was not fully argued and was not part of the declaratory relief sought by the plaintiff in this hearing.

DISPOSITION

[20] For the reasons set out above, the plaintiff has failed to establish that the building on the subject property was originally constructed as two semi-detached residential units or that the building was ever used as four self contained residential units so as to constitute a lawful non-conforming use under s. 34(9) of the *Planning Act*. Accordingly, the requested Declarations are dismissed.

[21] If the defendant City of Belleville wishes to claim costs of this portion of the proceeding, it shall provide a concise written submission within 30 days of the release of these reasons and the Plaintiff may respond within 30 days of receiving the said defendant's submission.

Justice Charles T. Hackland

Date: September 22, 2023

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Released: September 22, 2023