

Court File No. CV-13-00000161-0000

SUPERIOR COURT OF JUSTICE

B E T W E E N :

GRACE JOUBARNE

Plaintiff

and

THE CORPORATION OF THE CITY OF BELLEVEILLE ET AL

and

KEVIN MURPHY, TED MARECAK and SPENCER HUTCHISON

Defendants

E X C E R P T O F P R O C E E D I N G S A T T R I A L
BEFORE THE HONOURABLE JUSTICE C. HACKLAND
on May 2, 2023, at BELLEVILLE, Ontario

APPEARANCES:

A. Bouchelev

Counsel for Plaintiff

Catherine Temple

Counsel for Defendants

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Legend

[sic] - Indicates preceding word has been reproduced verbatim
and is not a transcription error.
(ph) - Indicates preceding word has been spelled phonetically.

E X H I B I T S

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25	Transcript Ordered:	October 30, 2025
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..EXCERPT OF PROCEEDINGS AT TRIAL

2:43 P.M.

CATHERINE TEMPLE: And then the next point I want to make, though I made it earlier,
(indiscernible) if we just can't bring herself(ph) with an exception from 1995 forward, we have to go back to the exception from 1997 forward. And then, Your Honour, I want to get into talking a bit about what the law says on what a semi-detached building is, and for that I'm going to go to supplemental submissions, and that starts at paragraph 71 of my supplemental submissions. I'm just going to pull them up here. We're at B-1-804. Starting at paragraph 81, Your Honour, what constitutes a semi-detached building has previously been considered. The case cited by the plaintiff at paragraph 52 of her submissions, *Holden v. Ryan*, another zoning dispute at the trial level where the proposed building was designed to be divided vertically north/south for the whole height of the building into two equal portions. The judge said that configuration (indiscernible) was a semi-detached building. (indiscernible) the whole of the height makes it semi-detached. By the time of the appeal, the building had been designed and reconfigured with the doorway through the north/south vertical wall, and the judge found that the modifications meant that the proposed construction no longer constituted two buildings. I'm just going to find the paragraph there. Okay. So here at page 92, Your Honour, the fact

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a building - two buildings as found by the trial judge. (indiscernible) found has been there was the vertical division running north and south extending to the whole height of the building.

Are you with me, Your Honour?

THE COURT: I'm on your paragraph 71 of your document?

CATHERINE TEMPLE: Oh yeah, I'm actually on paragraph - I'm at paragraph 92 in the case law.

THE COURT: Okay, paragraph 92 in the?

CATHERINE TEMPLE: I clicked on the hyperlink at paragraph 71.

THE COURT: Hmm.

CATHERINE TEMPLE: Does that work for you, Your Worship?

THE COURT: That's fine, sure. No, that's - that's good. I'm there then.

CATHERINE TEMPLE: Okay.

THE COURT: Mm-hmm. This is the *Holden v. Ryan* case?

CATHERINE TEMPLE: Yes, and this is the appeal.

THE COURT: Yes.

CATHERINE TEMPLE: And we're at page 92.

THE COURT: Yes, indeed. Got it, thanks.

CATHERINE TEMPLE: And the paragraph is,

The fact of there being two buildings, as found by the trial Judge, was so found as then [then] there was the "vertical division wall, running north and south, extending the whole height of the building, dividing it into two equal divisions...There is no door

5 or other opening in this division wall, so
that there is no means of access to and from
the easterly and westerly halves of the
building; each half has its independent
entrance facing upon Harbord Street." That
is now changed. There is a door-way through
the vertical wall. It was made in good faith
as a permanent door-way or passage-way, to
be finished and to remain as part of the
10 structure. With such an opening, through a
middle wall-called a "fire-wall"--a fire-
wall required by the city corporation-and in
a building with the four enclosing walls all
under one roof, I am not able to say that
15 this building is two buildings within the
meaning of the restriction; and, if not,
there is no violation of the injunction in
that respect.

20 CATHERINE TEMPLE: So, two buildings and we have
that vertical wall separating the whole - whole
height of the building. Right? Full height
means basement to the, to the attic, to the roof.
Two buildings. One building as soon as that
25 modification is made in the construction. So
that is also, Your Honour, the definition of a
semi-detached building that is used in the
Canadian Construction Dictionary. Okay, that's
paragraph 82. It's in - not publicly available,
30 of course. So we're - if I could just take you
next to that definition. It's at B-1-82. So
Your Honour, the Canadian Construction Law

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Dictionary, you know, accepts this as the definition of a pair(ph) semi-detached buildings.

[As Read] In the proposed building there was a vertical division wall running north and south, extending the whole height of the building, divided into two equal divisions. In each division there are some seven or eight separate apartments. There is no door or other opening in this division wall such that there is no means of access to and from each (indiscernible) half(ph) of the building.

CATHERINE TEMPLE: So that's the Court of Appeal find. It's accepted by the construction industry, Harvey Kirsh and Paul Ivanoff. That is in keeping with the law. It's in keeping with Ms. Orr's opinion about what a semi-detached building is. There can be no question that this has never been a semi-detached building. I can also take you to, Your Honour, the *Fire Code* and the, the *Building Code Act*. It goes on for some length at my submission starting at (indiscernible) submissions B-1-805 about the *Fire Code* and the *Building Code*. But the upshot here, Your Honour, is that, you know, a basement is considered part of the dwelling for the purpose of the *Fire Code*, the *Building Code*. These Acts apply to every building in the province regardless. If you'd like me to take you through those definitions, I can do that at

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this point, or we can....

THE COURT: I don't think I need that, thank you.

CATHERINE TEMPLE: Okay. The next part of my presentation, Your Honour, deals with the questions that relate to legal non-conforming use, how was the building used. At least I can't, I can't believe how much case law there is on this legal non-conforming use and how dense(ph) the facts are. What I noted, Your Honour, is that this, too, plays a pretty important part of helping the courts determine if an individual is entitled to the judicial release that they are seeking from, from the, the legislators, from the legislators on the basis of past use.

The plaintiff herself had very little evidence about the history of the building. When asked about the original construction of the building, she said she was guessing when it was built. She testified she had no personal knowledge of who lived in the house from the time it was built until 1924. She had no knowledge of who lived in the house from 1924 to 1927. She had no knowledge of any person who lived there between 1995 and 2011. She hadn't spoken to anyone about how the property was used in 1976 or 1977. She has no documents that show four separate residential living units. She has no documents in 1977. She has no documents to support four separate residential units in 1995. She has no documents for 1994. She testified that she had

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no idea as to whether she was going to call anyone other than Bob Clark to testify that the building had four separate residential uses when she purchased it. Again, Bob Clark's opinion can really be no better than the plaintiff's information.

And on that, Bob Clark, he's there in 2018. It's unbelievable to me that he accepts that the four units had been there for some time when he's given a copy of the OMB decision where it's clear that there's a dispute whether or not there are four units even back in 2011, and the OMB rejects that there's four units.

He was also given a copy of the appraisal from Mr. McCulloch - I am going to talk about that a bit later on - showing, you know, the pictures, and I, - in the pleadings there's dispute about the, the use of the building.

In any event, you know, a large part of the evidence is talking about my mandate is, you know, planning solutions if we can't prove legal non-conforming use. So, it's very different than what we are trying to determine, determine here. So, you know, next no evidence from the plaintiff, I mean what she (indiscernible) think that's a fair rendition of her evidence. In contract, you know, we looked at tax assessment rolls, one address, 1926, the first time it shows up. Between 1926 and 1990, two addresses. There

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5 is simply no record that four units ever existed in this building at this time. Now, where the plaintiff says she found four mailboxes and removed them, based on photos taken in 2010 there is simply no mailboxes to be removed.

10 And where I'd like to go next, Your Honour, is in our supplementary submissions from April, there's a chart of photographs that we can - at paragraph 18, and it's B-1-812. Do you have that, Your Honour?

THE COURT: I do, thanks. Yeah.

15 CATHERINE TEMPLE: Okay. So Your Honour, when we move over to the second column, that's photographs from Rob McCulloch that's taken from the Exhibit 80, the row entitled Front of House. We have the - an elevation taken from the west side of the property, and then we have an elevation from the east side of the property.
20 There are no - and you can blow this up at your leisure, Your Honour. There are no - there, there are no mailboxes let alone four mailboxes here, and this is in 2010, summer of 2010 when Mr. McCulloch came(ph) in. And Your Honour, the
25 next column is from Rick - (indiscernible) Presinger or Rick Presinger. He was the real estate listing agent, the second row, Front of House. And these are the photographs of the plaintiff's house taken by Mr. Presinger and no
30 mailboxes. So the plaintiff testified she took mailboxes down. The defendants say, you know, based on photos taken immediately before purchase

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there are no four mailboxes to be removed.

And Your Honour, now I'm going to go back to the August submissions proper, and we're going to look at the chart from Lindsay Reid, starting at B-1-80. And my colleague has directed us there, Your Honour.

THE COURT: Mm-hmm. Yes.

CATHERINE TEMPLE: Okay. So, what we see starting in 1993 is really just one side of the property being utilized in terms of municipal address for the directory purposes, for tax purposes, you know, and between that, our tax rolls end in 1997. At times there are three people. It looks like they're living in, in, the - one side of the house. It doesn't tell us how they're using it, but there's three people one side, it appears, and if we go through to B-1-81, the last directory we have tells us it looks like one person is in 49 Catharine and (indiscernible) any return on him for the last year, 2007.

So, you know, one, one side being used from 1992 up 'til 2007, but that's where the story ends in terms of, of documents that we've been able to assemble. The next thing we know is that there's a fire in 2009 that is - and just let me know when a suitable time for a break is, Your Honour.

THE COURT: Well no, let's, let's keep going.

Sorry, I do need one I, I confess, but that doesn't mean anything.

CATHERINE TEMPLE: Okay. 2009 there's a fire,

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arson. The home is boarded up. And, you know, up to the point that we know there is arson going on in the home, up to this point, that's kind of the first, first - first things we've heard about actual use. It's vacant. People starting fires. And been boarded up. In 2010 Robert McCulloch, a real estate appraiser, came in and assessed the building as part of the power of sale, and he considered the highest and best use of the building to be a single family dwelling. He also noted on his appraisal that he considered the building to be detached and now that it's on the point of detached building, Mr. Presinger prepared actually two listings, and on the second listing which is at B-1-1479, he indicated - I'm just going through to take the court there.

THE COURT: Okay, thanks.

CATHERINE TEMPLE: So B-1-1479, he also indicated there the building was detached. And the point is, Your Honour, we heard evidence that this is a marketing tool. To get a greater number of hits he would kind of market it in more than one category. And I also want to take us to Exhibit 80, which is Mr. McCulloch's appraisal report. Give me a moment, Your Honour.

THE COURT: Okay.

CATHERINE TEMPLE: I actually found it. Tab 21 of the defendant's initial compendium.

THE COURT: Right.

CATHERINE TEMPLE: Okay. And what I want to take you to, Your Honour, is - well first of all, he finds there's only two kitchens and three

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5 bathrooms in this building, and you're up here, right, on the B-1-468. We have so one full bath on the main and two baths on the second. One's a three-piece, the other one's an eight-piece, and he puts five bedrooms. Okay. But (indiscernible) is important. Mr. McCulloch prepares a sketch. Here it is, Your Honour. It is at B-1-44. This is a sketch of the main floor, and as we see you walk in, turn to the right, there's a living room. You go through a passageway, and then underneath the stairs you can walk into the dining room. So this is one of the openings that we have been talking about that - before and Ms. Reid discussed extensively, you know, in their report, in her - in her testimony, and Mr. McCulloch also indicated he could walk through the house from one side to another.

This sketch is also consistent with Mr. Presinger's photo of the open French doors and the opening under the stairway. And (indiscernible) back to this photographic presentation that we put, put together of all of the photos taken by all the different witnesses. You know, the plaintiff knows that Mr. Presinger's photos cut to the heart of her case, which is why she maintains that they're not of her house. But it's not just the fact that other people didn't take the same picture. If you look at the pictures and line them all up, there are striking similarities in every single person's photos between different elements of the house -

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of the house in different points of time.

Mr. Presinger's photos can only be of the plaintiff's house, and we're going to go back to that chart I was just referring to at paragraph 18 of the supplementary submissions. And my colleague has just (indiscernible) B-1-812. And Your Honour, are you - you have those photos?

THE COURT: I do. Mm-hmm.

CATHERINE TEMPLE: Okay, perfect. So across the columns where the source of the photo was, it says Grace Joubarne, Robert McCulloch, (indiscernible) Rick Presinger, Alice and/or Charles Onuah. So main ductwork on the main floor, here it's depicted from a photo from the plaintiff herself. This photo we're looking at first the plaintiff made a request for the consideration to MPAC. She wanted tax relief because the house was not in a livable state, I guess, or a usable state. So in support of her application she submitted certain photos of the building. This photo depicts the ductwork in the corner of - and this is - this is the living room, the main floor living room on the west half of the property.

Similarly, Mr. McCulloch, and we can see here ductwork window. Mr. McCulloch also took a picture of the main floor where the ductwork was, and it shows the ductwork; and Mr. Presinger also has a photo showing the ductwork. Now interesting, if we look here at Mr. McCulloch's

photo, behind the French doors we don't see any bathroom like we see in these other photographs of where the plaintiff put a bathroom.

5 The next series of photos is the front of the house. I've, I've canvassed that already. You know, plaintiff's house, well Mr. Presinger took a picture of the plaintiff's house, the front of it. Can be no dispute there. So did Mr.
10 McCulloch. All the witnesses did in this chart. Looks, looks like the plaintiff's house. Then the next row I want to bring your attention to, Your Honour, is bathroom with clawfoot tub. This is a feature of the building. It appears in the
15 plaintiff's photos. This is the first column. It is the plaintiff's request for reconsideration, clawfoot tub there. Mr. McCulloch also has a photo of the clawfoot tub, and so does Mr. Presinger.

20 We also have pictures of cabinetry in Mrs. Joubarne's request for reconsideration that look just like the pictures of cabinetry that Mr. Presinger has in his MLS listing.

25 Furthermore, we have pictures of the French doors in the plaintiff's - the first row is the plaintiff's pictures of all of her French doors. Second row is Mr. McCulloch's pictures of the
30 French - French doors. And here (indiscernible) Your Honour, if you scroll down to near the end, and the plaintiff has a staged bathroom in this,

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this area that in Mr. McCulloch's photo doesn't have a bathroom.

And then finally we have, you know, Mr. Presinger's photos. I mean there's just striking similarities, including the angle of the stringer of, of the staircase at the back.

And then finally we have the stairs. Column 1, pictures that Mrs. Joubarne took of her, her staircase side by side with photos taken by Mr. McCulloch; photos of the stairs taken in the third row, Mr. Presinger. The fourth row, Ms. Orr took photos when she attended. And then finally the fifth row is Mr. Olmwood(ph). Photographs of the stairs. So all I'm saying is put all the evidence together. You know, it doesn't matter what Mr. Presinger remembered about the house decades later. All that matters is that those photos are reliable depictions of the plaintiff's house in his MLS report. And on the totality of all of the photos there can be no other conclusion. Not to mention that fact that he practically - you know, at that point the technology is such that he was having to download his photos from the chute(ph) as took them, and November wasn't a particularly busy listing month.

And this was put at some extent, but extensively to the plaintiff in her cross-examination, you know, just these are, are the photos. This has

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5 to be - can only be the photos of your house.
It's not anyone else's house. She refused to
accept that. And our position is Mr. Presinger's
photos are accurate and reliable depictions of
the plaintiff's building just before she
purchased it.

10 And now I'd like to take you to the law on legal
non-conforming use, Your Honour. And, you know,
on the legal non-conforming use, it's Mrs.
Joubarne's onus to prove that she is entitled to
the legal non-conforming use. The evidence
that's necessary to make this determination
predates her acquisition of the building. And
15 it's the defendants' submission that the
plaintiff has simply failed to establish that
four units existed at any point in time prior to
her purchase let alone that any use continued
uninterrupted to the point where she purchased
20 the building. And we can - the case law on that
or the authority for the onus resting with the
plaintiff is *Feather*, and it's found at paragraph
59 of the supplementary submissions.

THE COURT: Have it, thank you.

25 CATHERINE TEMPLE: And do we have it? And are
you able to see the case, Your Honour?

THE COURT: Yes, I have. Mm-hmm.

CATHERINE TEMPLE: Okay. So, paragraph 64.

30 (indiscernible) get to which ones we're using.
So, one moment, Your Honour. I apologize. It
says at paragraph 93, (indiscernible)

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Both parties agreed that the onus is on the Applicant, on a balance of probabilities, to satisfy the court that a legal non-conforming use was established for the subject property and that such a use has continued. The court agrees that the onus is on the party alleging s. 34(9) protection....

CATHERINE TEMPLE: That's onus. What the defendants say here, Your Honour, is that the plaintiff purchased and abandoned a vacant building. It didn't possess any legal non-conforming use. At the point that she purchased it, its highest and best use was as a single family dwelling. Her own witness, (indiscernible) from MPAC, testified there are not, you know, four units in 76 or 77. The other important thing, Your Honour, is that use is an active concept.

If you look at paragraph 88 here of *Feather*,

A non-conforming use is a use for which a building or land is lawfully occupied at the time a restricted area bylaw becomes effective but which does not comply with the zoning regulations of the bylaw. The nature of a non-conforming use is not defined by reference to the definitions in a bylaw but must be determined by reference to the use to which the bylaw was put at the time the

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5 bylaw was passed. In the absence of a
statutory exemption for non-conforming uses,
the right of an owner to erect such
buildings on the owner's land as the owner
wishes in conformity with the law in force
for the time being, including the right to
receive the necessary permit for a proposed
building, is not a valid right to the extent
10 that it can be defeated by a subsequently
enacted bylaw prohibiting the use of such
land for the proposed buildings

15 CATHERINE TEMPLE: It's an active concept, Your
Honour. And Your Honour, it is also something
that has to be exercised or it can be lost. And
the case here - there's a couple of cases. And
the first one I'd like to take you to is the
Gayford case, and I believe that was not found on
line within our listed public available
20 resources. One moment, Your Honour. Here we
are.

THE COURT: Okay.

25 CATHERINE TEMPLE: This is at Section B-1-762,
and it's about a summer home. Again, all these
cases are very fact driven. So it starts on the
very second to last paragraph.

30 The property in question is within the
narrower area covered by By-law 1159. On the
date when By-law 1135 was passed it was
being used as a resort and tourist home and
continued to be so used until the summer of

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1953. The defendants purchased it in June 1954 and they have operated it as a resort and tourist home since they first acquired it. It is not disputed that such use of lands to which By-law 1159 applies is thereby forbidden. The defendants' immediate predecessor in title was one Edna Street. In the last summer during which she was the owner, viz. the summer of 1953, she leased it for use as a private residence from the middle of July to the middle of September and during that period to her knowledge it was used, not as a resort catering to the public, but exclusively as a private residence. The property is in a summer colony on the shore of Lake Simcoe. The tourist season in that area covers only the summer months and I agree that discontinuance of user as a lodge or tourist home catering to the public during the major part of the summer season is tantamount to discontinuance for the whole year. In my opinion there was such a lapse in or discontinuance of the non-conforming user in 1953 as to remove from the property the cloak....

CATHERINE TEMPLE: Sorry, I just lost my place.

that quote that up to that time exempted it from the by-law, and the appellants' second submission also fails.

5 CATHERINE TEMPLE: So, you have to keep using it,
and if you don't use it, in a very short time
comes to an end, you have no evidence of what was
going on that - in really at any point. All we
know is that the house was left abandoned in
2009, subject to arson, and a real estate
professional thinks the best - the highest and
best use is a single family dwelling in, in 2010.

10 And one last case here, Your Honour, and then
maybe - would you like to take a break?

THE COURT: Okay.

CATHERINE TEMPLE: Okay, so....

15 THE COURT: (indiscernible)

CATHERINE TEMPLE: Okay. I just want to take us
to the *Harrison v. North Dumfries and the Chief
Building Official*, and that can be found - I
believe we just uploaded that yesterday. Okay.
20 Here we have it, Your Honour. Did you get the
invitation?

THE COURT: I have it, thanks, yeah.

CATHERINE TEMPLE: Okay. And this is why I
wanted the break because I won't - I'll have to
25 address some other arguments on the *Saint-Romauld*
afterwards the intensification. Defendants say
we don't even get into those intensification
arguments on legal non-conforming use because
they (indiscernible) no legal non-conforming use
30 has even been established. And the support for
that is found at paragraphs 78 and 79 in
Harrison. The applicants rely on the Supreme

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Court of Canada's decision in *Saint-Romauld v, Olivier*:

...to suggest that the doctrine of acquired rights would give the applicants a right to continue using the premises in the same way they were used at the time the Township bylaw was passed in 1985 but also that they would enjoy a certain flexibility in the exercise of that right.

However, that does not apply in this case as the actual use of the building by George Barrett and his surviving family members and friends for repair, servicing and manufacturing of small engines was discontinued with no intention to continue that use in any way from 1995 and for almost 12 years before January 2007.

CATHERINE TEMPLE: So you don't get to intensification, Your Honour, unless you can establish a use. You don't get to continue an intention unless you know what that intention was before. Here we know nothing except there's an empty, abandoned building. So we don't - intensification is very heavy. The defendants submit that we don't even have to get into that because the plaintiff hasn't established a legal non-conforming use in the first instance. And those are where I'd like to leave it if you'd like a break, Your Honour.

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THE COURT: Okay, that's fine, counsel. And then after a little break you're, you're going to cover what? Just the amendments, the recent case law? Excuse me, the recent statutory amendments?

CATHERINE TEMPLE: I....

...OVERTALKING

THE COURT: I, I just ask because....

CATHERINE TEMPLE: Yes, yes, yes.

THE COURT: (indiscernible)

CATHERINE TEMPLE: Yes, Your Honour. I want to just touch - there's further a couple of things on intensification and then cover off the recent amendments.

THE COURT: Okay, fine. So I have 3:33. Let's come back at a quarter to, okay?

CATHERINE TEMPLE: Okay.

THE COURT: We'll just take a short break.

CATHERINE TEMPLE: Thank you.

THE COURT: (indiscernible).

CLERK REGISTRAR: Thank you, Your Honour.

THE COURT: Thank you.

CLERK REGISTRAR: Court is in recess. We're off the record. 3:45 we....

R E C E S S

U P O N R E S U M I N G :

Court Reporter: Back on the record.

CLERK REGISTRAR: On the record. Court is resumed. Please proceed.

THE COURT: Yes, counsel. (indiscernible)

CATHERINE TEMPLE: Thank you, Your Honour.

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A. BOUCHELEV: Your Honour, I apologize for the interruption. I apologize for the interruption.

THE COURT: Yes.

A. BOUCHELEV: I was just wondering if I can inquire with my friend what her estimate is as to how much longer she will be because I need about half an hour by my estimate. My submissions were two hours approximately this morning.

THE COURT: Yeah. So counsel, if you can finish up in 15 minutes or so I think you should aim for that. Could you, please?

CATHERINE TEMPLE: Okay. I will do my best and then just direct Your Honour to....

THE COURT: Yeah, that'd be okay, sure.

CATHERINE TEMPLE: Okay. So, so Your Honour, I just wanted to distinguish my friend's cases. You can find that at the April submissions, paragraphs 86, 87 and 88, how they are distinguished.

THE COURT: Yes, okay.

CATHERINE TEMPLE: The other thing I wanted to add on that, *TDL v. Ottawa*. That's - I mean that's a leave(ph) to Divisional Court on a decision from the OMB challenging a comprehensive zoning by-law. A very different type of thing what we're - than what we're dealing with here. It might talk about general principles but no factually of any assistance in my submission.

THE COURT: Okay.

CATHERINE TEMPLE: The next thing, Your Honour, before I close off the semi-detached home declaration my friend's seeking, you know, that's

5 going to be a judgment that affects this home for history, and we've heard from Ms. Orr that she has serious concerns about having different residential occupancies over an open basement. That - so that's a point of just fire safety. What my friend is seeking is to have this semi - the home declared as semi-detached with an open basement. That's a hatch. We heard that from Ms. Orr.

10 On intensification, there's also, you know, *Saint-Romauld*, you know, the eight factors there. We don't get there, but important considerations for community affect is that evidence from Ms. Orr, that there are fire safety issues with this home, not just the open basement but also the drywall, which she testified she found intention to create units based on the drywall, separate units. They were not - that drywall was not fire-rated. That's a concern.

20 And finally, Your Honour, I want to talk about, you know, where we do see four units based on the totality of the evidence. That could only have happened after Ms. Joubarne moved into the, you know, building. And, you know, where she wants to argue that you have any legal non-conforming use, you know, once you start making changes you can't go back, and the - so she can't go - if she has one thing when she was there and she starts to make changes, like the defendants submit based on the totality of the evidence here,

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5 particularly from the real - independent real
estate appraiser, you know, three bathrooms, two
kitchens can't be four residential units. You
just can't go back and claim an earlier legal
non-conforming use. The authority there is just
found in our supplemental stand-alone compendium.
It's a line of cases called *Gallow(ph)* There's
three of them. But essentially, you know, that
the court says,

10 [As Read] If he - the applicant lost any
legal non-conforming use, he may otherwise
have been entitled to when he moved the
front doors of his restaurant inward in
15 order to comply with an amended by-law.

CATHERINE TEMPLE: And it indicates that the use
was discontinued when the doors were moved. He
wanted - he needed a letter of compliance so he
20 thought he'd move the doors in. He does it.
Then he moves them out, and then he tries to go
back and say well hey, I have this legal non-
conforming use. They say no, you made the
change. You don't get to go back.

25 So I don't - you know, Ms. Joubarne on the legal
non-conforming use, it's four units or its
nothing. She can't go back and say the house
was, was something else.

30 So in the interest of time I will move now to the
submissions on the *More Homes Built Faster Act*.

Excerpt of Submissions by Catherine Temple

So....

5 THE COURT: So, so if your, if your - if your proposition is that this was and always has been properly seen as a single - single residence, not a semi-detached residence, and now we have legislation that says in a single residence up to three living units can exist and that it's unlawful to have by-laws that prevent that or try to prevent that. So it would have - I would have
10 thought that Ms. Joubarne is looking at three units anyway. Would have thought that might be the basis for resolving the case, but apparently not?

15 CATHERINE TEMPLE: Well Your Honour, that is up to Ms. Joubarne to make the application.

THE COURT: I know that. But aren't you going to take me - I was just reading your submissions, of course, yesterday, and I'm hearing that well, that doesn't apply to this anyway and so on.
20 Maybe I missed....

CATHERINE TEMPLE: Well, I'd say this is what the law is. But now I would say differently to my friend. It doesn't matter. This is a semi-detached or a single family dwelling. She only
25 gets three units there because it's tied to a parcel of urban residential land which is essentially a lot. And Your Honour, I have the definition of...

THE COURT: Oh, I see.

30 CATHERINE TEMPLE: ...parcel of urban residential land up there.

THE COURT: I see. Okay, sorry. I missed it.

Excerpt of Submissions by Catherine Temple

5 You're not saying that either the three, three-unit amount that's contemplated in the new legislation doesn't apply here. It does. But you're saying it applies once. It's not, it's not semi-detached. It's single, so it's three.
CATHERINE TEMPLE: I'm saying....

THE COURT: She'd, she'd be entitled to three if she applied.

10 CATHERINE TEMPLE: Either way, even if she has a semi-detached home, Your Honour, because...

THE COURT: Yes.

15 CATHERINE TEMPLE: ...it's tied to the urban - parcel of urban residential land, which means a parcel of land that is within an area of settlement on which residential use other than ancillary residential use is permitted by by-law, and that it's served by sewage works within the meaning of the *Ontario Water Resources Act* and owned by a municipality, et cetera. So, there's
20 only one parcel of land. She, she can't get six even if, you know, there was some determination that this home is semi-detached. I mean this is gentle intensification. If you wanted to say you could have six units, that's what they'd say.
25 But it's three units tied to one piece of - tied to one lot. You know, the case has gone on so long. This isn't what the case was about when it started. But here we are now, and that's the law.

30 THE COURT: And do you want to show me the - we've got the statute here. Do you want to show me this part that says tied to one lot, the

Excerpt of Submissions by Catherine Temple

limitation you're talking about?

CATHERINE TEMPLE: Yes. So here they have the definition of urban - parcel of urban residential land.

THE COURT: Yeah.

CATHERINE TEMPLE: Okay. And then that's a new definition.

A. BOUCHELEV: I'm sorry, Your Honour. I'd like to be able to follow this as well. I'm just not sure where my colleague's referring to.

CATHERINE TEMPLE: So did - I think we shared....

THE COURT: Yeah, you heard from - can you, can you resent the invitation to Mr. Bouchelev? It's B-1-1849. There it is. Do you see it, Mr. - the invitation is there. See there in the box(ph).

A. BOUCHELEV: I think, Your Honour, I think this may be a problem my end. The invitations for CaseLines are not coming through for some reason, but if I could have the CaseLines number I think I should be....

THE COURT: B, B as in Bob, B-1-1849.

A. BOUCHELEV: 1849, okay. Thank you very much, Your Honour.

THE COURT: Sure. CaseLines has a mind of its own. You never know what it's going to do and to whom.

A. BOUCHELEV: Yeah.

THE COURT: Sorry, go ahead, counsel.

CATHERINE TEMPLE: That's the definition of urban - urban - parcel of urban residential land. And if we go to Section 16 of the *Planning Act*, which has now been amended, which is at paragraph 94 of

Excerpt of Submissions by Catherine Temple

my submissions - just one moment. Mr. Bouchelev,
are you there?

THE COURT: B-1-809. Yup.

CATHERINE TEMPLE: Yes.

THE COURT: Thank you.

CATHERINE TEMPLE: Okay. So Section 16(3) of the
Planning Act now reads that,

No official plan may contain any policy that
has the effect of prohibiting the use of,
(a) two residential units in a detached
house, semi-detached house or rowhouse on a
[a singular] parcel of urban residential
land, if all buildings and structures
ancillary to the detached house, semi-
detached house or rowhouse cumulatively
contain no more than one residential unit;
(b) three residential units in a detached
house, semi-detached house or rowhouse on a
parcel of urban residential land, if no
building or structure ancillary to the
detached house, semi-detached house or
rowhouse contains any residential units; or
(c) one residential unit in a building or
structure ancillary to a detached house,
semi-detached house or rowhouse on a parcel
of urban residential land, if the detached
house, semi-detached house or rowhouse
contains no more than two residential units
and no other building or structure ancillary
to the detached house, semi-detached house
or rowhouse contains any residential units.

5 CATHERINE TEMPLE: So, Your Honour, gentle intensification of density, that is, is the objective here. It's tied to a parcel of land, and the house is tied to a - whatever structure we're talking to here, it's tied to a parcel of residential land. She only has one parcel of land, the plaintiff. So it's three regardless. So we go back to the OMB decision I referred to, 10 and they talked about the intention of a semi-detached house there. It was a house in separate ownership. That's the - a house. Here's it a piece of land. The intention to give whatever the owner has the option of having three units; 15 not six, three.

THE COURT: Well the house here, well, 40 and - sorry, 40 ½, or you know. I'm sorry, 46 and....

CATHERINE TEMPLE: It's (indiscernible), Your Honour.

20 THE COURT: I'm sorry, 49 and 49½, they are - it's all - that's plunked on a parcel of urban residential land, is it not?

CATHERINE TEMPLE: Yes, one piece of land. She only has...

25 THE COURT: That's right.

CATHERINE TEMPLE: ...one lot. Yeah, so...

THE COURT: That's right.

CATHERINE TEMPLE: ...it doesn't matter what the house is. It's three at the most.

30 THE COURT: Yeah, that's what - right. Okay. It's like - you read that like it's per, per, or in respect of a parcel of urban land. So one

Excerpt of Submissions by Catherine Temple

5 parcel of urban residential land means three residential units in a, in a well on a detached, semi-detached or rowhouse. Okay. And if it's a single one - single house, one residential unit ancillary(ph)....

10 CATHERINE TEMPLE: Your Honour, there are different configurations, right, but no more than three total structures. Like some people want a granny flat. Terrific, you can have one, but you can't have a granny flat and four apartments in your house, or three apartments. You can't have four in total. You can have three in total. Right? So granny flat and two units in your house. Or no other kind of residential structure on your property and three units in your house. Or maybe you want to have one unit in your house and stick two people in the garage to live. Like that's (indiscernible) gentle density. It's not just piling on. There's a limit here, and it's three....

20 THE COURT: And your, your position, counsel is it's a single. It's never been - it has never been a detached house. It's - or semi-detached, excuse me. You say this is a detached house. It's never been a semi-detached house on the evidence. So with a detached house you can have three residential units. Ms. Joubarne could, if she applied for a building permit, she'd be entitled under the legislation. Is that what I'm hearing?

30 CATHERINE TEMPLE: Yes, and...

THE COURT: Perfect(ph).

Excerpt of Submissions by Catherine Temple

CATHERINE TEMPLE: And even if you find it's semi-detached, she only gets three. Like it doesn't matter...

THE COURT: And that's...

CATHERINE TEMPLE: ...if it's detached because...

THE COURT: ...because it's just...

CATHERINE TEMPLE: ...it's (indiscernible).

THE COURT: ...one parcel.

CATHERINE TEMPLE: That's right.

THE COURT: Okay, I see what you're saying.

Well, you know, this isn't the time to talk settlement but I just - you know, when we're, when we're having this expansive lengthy litigation all about can she do - can she have three, three residential units in there or four, I mean it just doesn't in anybody's mind justify fighting over that. I just - anyway, that's an editorial comment I'll keep to myself. In, in fact that's water under the bridge, isn't it because we're, we're already there. Yeah. Okay, I understand what you're saying, counsel. Thank you, about the - you know, about why and what provisions you're talking about here. It's 16(3)(a), (b) and (c). Mm-hmm. 16(3)(a), (b) and (c). Okay. All right, yeah.

CATHERINE TEMPLE: So, the only one last thing is, I know we're not dealing with Bill 108 but, you know, my friend was not correct. She - even if the house had been semi-detached, she would not have been entitled to four - two and two on each side as a right because her house did not meet the definition of semi-detached for the

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5 purpose of the policy under Bill 108. That's how
the, the definition of semi-detached under 108
was houses and separate ownership, and there was
a common (indiscernible) wall. We don't have
that here. So, that's water under the bridge
too. This is - the case has gone on so long,
the, the law keeps changing. This is where we're
at now, with, with what the law is I would apply
to the structure and again, semi-detached,
10 detached, it doesn't matter. One piece of land,
one lot, you only get three units. So unless you
have anymore questions, I'm mindful of the time.
THE COURT: Okay.

CATHERINE TEMPLE: Those are my submissions.

15 THE COURT: Thank you, Ms. Temple. Thank you
very much for that. All right, yes. So Mr.
Bouchelev, I'm sure you have a bit of reply, if
you would.

20 A. BOUCHELEV: I do, thank you, Your Honour, and
I'll just try to move through my points quickly.

SUBMISSIONS IN REPLY BY A. BOUCHELEV:

25 So I'd like to address the last issue first. So
back to the definition of the parcel of urban
residential land that my friend took you too, and
as Your Honour pointed out, both 49 and 49½ are
on a parcel of residential land. And by the way,
my friend says that parcel of urban residential
land is the same thing as a lot. That can't be
30 correct. A lot has a specific legal meaning.
There are lot numbers in the Land Registry and so
on. So this doesn't refer to lots. It refers to

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parcels of urban residential land.

5 And I'll take you to the Section 35.1 and Section
16.3 of the *Planning Act*. I'll focus on 35.1,
but they basically say the same thing. "(b)
three residential units in a detached house,
semi-detached house or rowhouse on a parcel of
urban residential land, if no building or
10 structure...." et cetera. So what my friend is
trying to do is she is trying to read in language
that's not there. She wants you to interpret
that section as saying three residential units in
a detached, semi-detached or rowhouse provided
that there is no other unit on the same parcel of
15 land. Like that is - the only way that we can
interpret the, the Act in that way is to insert
that kind of language and I don't - it's simply
not there. This definition is this idea that you
can only have three units in a semi-detached
20 house if there are no other semi-detached houses
on the same parcel of land, you know, the same
lot. That simply is not in the Act.

25 We can imagine the situation, for example, where
we're not dealing with semi-detached houses.
We're dealing with two detached houses on the
same parcel of land. Does it mean that between
the two of them they can only have three, three
residential units? Is it - you know, how do you
30 know - how do you decide which one's going to get
two, which one is going to get one. That simply
wouldn't - wouldn't make sense.

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5 Your Honour, I'd like to address a few comments
that my friend made about the, the expert Charles
Onuah, the structural engineer. I think there
was some unfounded attacks on his qualifications.
His resumé can be found at CaseLines page H-479.
He has been a senior - he is a senior structural
engineer. He's been a structural engineer for 30
- over 30 years. He's worked on some very
10 impressive projects, and his area of expertise is
structural designs, you will see from his resumé.
And that is exactly what we - what the focus of
this proceeding is, the structural design of the
building. Is it a semi-detached structure or a
15 single family dwelling.

The sketch that my friend said something to the
effect of well Mr. Onuah's sketch does no show
openings in the wall. That's the whole point.
20 He is showing a structural sketch. He is showing
that wall as being - as what the wall was at the
time of the original construction, not after it
was opened up for renovations.

25 And Your Honour, this is kind of - my friend has
taken some pot shots at the plaintiff's
witnesses. She is saying that Mr. Onuah is
guessing about the age of the building. Well, he
estimated the age of the building to be
30 constructed in 1906, which is actually the exact
same year that my friend's engineer - architect
has estimated the date of construction. So if

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he's making an estimate, it seems a pretty accurate one.

There's also an allegation that Mr. Clark, the planner, was - didn't know when the building was constructed and was just guessing. That's simply not the case. He has stated in his report that he relied on the MPAC documents, and I've shown you the MPAC document, Your Honour, that shows that the building was constructed in 1910.

So my friend's witnesses have missed, or her views of the building was built in 1906 but that date is inconsistent with what MPAC states. So there's some inconsistency there as well.

My friend spent some time talking about the attic hatch, and I want to briefly address that because what Ms. Orr has done with her sketch that my friend took you to is a little bit sneaky, and you may not be able to catch that if you haven't been in that building. But I'll take you to Exhibit - Trial Exhibit 67. That is Ms. Orr's report. And I'll take you to that sketch just to refresh your memory so we know what we're talking about. So this is going to be, Your Honour, on - sorry, just bear with me a second. So this is, Your Honour, the sketch that my friend was showing you. This is the second floor, and if you see what I'm showing with my cursor, this is what my friend described as an attic hatch, right?

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5 And if you look at this - if you look at this picture, it seems that this attic hatch is almost in the middle of this room. And let me now show you what the attic hatch actually looks like because we do have a photograph of it. And this is in Trial Exhibit 22. This is the photo album. Sorry, Trial Exhibit 2.

10 Now, so Your Honour, so this is the - the so-called attic hatch. You can see how close it is to the window, right?

THE COURT: Yup.

15 A. BOUCHELEV: Now, why does that matter? Why does it matter that it's so close to the window? Well, you have to visualize what the exterior of this building looks like. And I'll take you to page 20. Let's see what page shows us. It's at page nine of the same document.

20 Now, the window that we were looking at is in 49, so this is the window right above the, the front door of the 49. And if you visualize how close that hatch is to the window, you're basically right below the rafters. So if it is a hatch it's a very strange location for a hatch because as you open it, as you open it you'd be banging your head up against the rafters because it's right against this sloping area of the roof. And Your Honour, there is no evidence that this is in fact an attic hatch. No one has opened it. In fact, my understanding is that it's not openable

25

30

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5 presently, but there is no evidence that anyone
 tried to open it. There is no evidence that this
 attic hatch was - is original to the building,
 that it existed at the time that it was
 constructed, and the location for it is also
 extremely odd.

10 And Your Honour, if you look at page - I didn't
 take you through those photographs before but
 since my friend mentioned this, you'll start
 looking at page - just a second. There is - you
 will find in the - in Trial Exhibit 2 you will
 find the pictures of access to the, to the third
15 floor, and I believe they start on - just bear
 with me for a moment. And when I'm looking for
 this photograph, Your Honour, the point is, if
 you already have a staircase leading to the third
 floor, why on earth would you also have this very
20 strange attic hatch that you basically have to be
 a Harry Houdini to use to, to access the third
 floor at the same time. If in fact that was an
 attic hatch that was original to the building
 that was used to access the third floor, then it
 is quite likely that the staircase leading to the
25 third floor did not exist at the time. In fact
 that would be the only logical explanation.

30 So regardless of whether it was the stairs that
 was used - the staircase that was used originally
 to access the third floor or that attic hatch,
 there can be no, no doubt that there would have
 been only one point of access to the third floor,

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and that is entirely consistent with the building being a semi-detached. There is simply no evidence that there was - there were two access points to the attic at any point in time.

And Your Honour, the - I, I haven't been able to find this photograph quickly. I'll just note, Your Honour, because I'm short on time, that it is in Trial Exhibit 2, and there is an index at the front of that exhibit so you will be able to find the pictures showing the entrance to the third floor in that exhibit.

THE COURT: Okay.

A. BOUCHELEV: And my friend mentioned Ms. Joubarne's sketch that she mislabeled the - you know, the third floor as being 49. She labeled it as, as 49 as opposed to 49½, and to that I say, you know, so what. She, she's not a professional sketch artist. She may have made a mistake. But the point is, it's quite clear from her sketch that there was a wall dividing the two units on the main floor and on the second floor.

Your Honour, my friend took you to the photograph of Mr., of Mr. Presinger, and she basically said - suggested that Ms. Joubarne made that opening herself and that you shouldn't believe her explanation that the opening was made to allow access between the two parts of the building and to run, you know, extensive electrical wiring that would have to be run, which, which is what she testified.

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5 Now, Mr. Onuah, of course, we, we don't dispute
that there is an opening there, but the point is
that Mr. Onuah says that this opening was blocked
off at the time of construction. So does, so
does Ms. Joubarne. And the - and so does Mr.
McMullen. As you have seen the - if we were to
accept that, that Ms. Joubarne opened - made that
opening herself, we would have to completely
10 discount the evidence of Mr. McMullen who was
very thorough and who was very adamant that he
spent five and a half hours investigating that
fire. He is a senior investigator who has
investigated hundreds of fires. His, his
15 evidence on that point is at CaseLines, page
A1088, and I'll just put that on the screen, Your
Honour. It's what Mr. McMullen said about the
firewall.

20 [As Read] Firewall would be best described
as a wall running from the first floor to
the top floors, and it could be drywall. It
could have been lathe and plaster, but it
was clearly a wall separating one side from
25 the other side and clearly obvious, as I
progressed to the front of the house and
towards the second floor and third floor.
It was continuous.

30 Question: Right, and it was a firewall that
divided the building on the second floor and
on the first floor.

Correct.

Excerpt of Submissions by Catherine Temple
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And that firewall was made of lathe and plaster, correct?

I did not - I did not find out whether it was lathe and plaster. I'm assuming from the age of it, it probably was lathe and plaster.

And, okay, and have you seen firewalls like that in other buildings that you've inspected?

That's correct. Many, many, many times. And you'd often find them in semi-detached homes, right?

In the semi-detached homes, they are - they are most obvious and generally speaking that's, that's what separates semi-detached dwellings, one from the other.

A. BOUCHELEV: So, to accept the explanation that there was this opening that the defendant alleges was there, you would have to completely discount the evidence of Mr. McMullen. Mr. McMullen is the defendant's own witness. He is a fire investigator. He clearly has no interest in the outcome of this proceeding because the fire department is not a party to this proceeding. He is testifying based on what he saw when he conducted the investigation.

THE COURT: Mr. Bouchelev, is it your understanding that your friend is saying that there was no, no north to south firewall in this house actually. There just wasn't. Right? That's what I heard you say, and you'll correct

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Ms. Temple if I got that wrong. And if that's true you, you just - you come up against your own - well, as your friend just said, you come up against the fire marshal's evidence on the point. This - he says this is typical of your firewall that divides a house and so on and so forth. And, and you're saying no, there's no firewall there. That's just a - and yet that's really, really, really important, isn't it, because that's the key indicia of a semi-detached house. There must be a firewall, call it what you will, that divides, dividing wall. You know, a wall that doesn't have doorways and....

A. BOUCHELEV: My friend - what my friend said is that they don't necessarily agree that this was a firewall, and from my recollection the witness says - my friend's witness says we're wishy-washy about the subject. They, they refused to acknowledge that this is a fire wall. But I would say that, that Mr. McMullen would be more credible on this issue. The defendant's witnesses are not experts on fire prevention and Mr. McMullen clearly is. He is a fire prevention officer, and when he says that there is a firewall dividing the building in half on the main and second floor, I think you pretty much take it to the bank. I think that he, he knows what he is doing when he can verify a wall when he sees one. He did - I asked him in cross-examination how many fires he investigated. He said hundreds. So, this was not his first day on the job. He was quite - he's quite a senior

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investigator.

CATHERINE TEMPLE: Your Honour, I just have to jump in here. You know what? Mr., Mr....

THE COURT: Yeah, I was (indiscernible). Let me - you give us your five cents on that, then I'll let Mr. Bouchelev come back to you, okay?

CATHERINE TEMPLE: Yes. Mr. McMullen also said he could walk freely from the east half of the house to the west half of the house on the second floor. You know, it's his - we were calling him to give his recollection of the configuration of the home. Like he was called to confirm that he found a vacant home subject to arson and that he boarded it up. He was called to address breaks in any chain of causation on this legal non-conforming use. If you get him in here and you can suggest all kinds of things to a man who hasn't been inside a house for a decade, well, you know, maybe he's suggestible. And it doesn't - this house isn't about the - a fire - I mean it's about the common wall. But it's not going to turn on a fire prevention officer's evidence about...

THE COURT: Well, Ms. Temple....

CATHERINE TEMPLE: ...a walk-through. One....
...OVERTALKING

THE COURT: It's going to turn on what I say it's going to turn on. So I (indiscernible).....

CATHERINE TEMPLE: Sorry, you, you're the judge and I maintain that that's one piece of evidence. It's disputed. (Indiscernible) fine.
(indiscernible) said that. A picture's worth a

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thousand words. Look at the pictures that we have. And even he is not clear. He says when he gets to the second floor he can go from the east side to the west side. Your Honour....

5 THE COURT: You know what? I'm going to get - you know, counsel, what I have to do, of course, is re-read the, the key reports, maybe all of them, but certainly, you know, Clark's and Onuah's on behalf of Ms. Joubarne but also - and 10 then Lindsay Reid and Alison Orr's. Obviously I'll have to read those carefully, better informed by all of the guidance I've got today for sure. But you know, in the final analysis just stepping back from this for a moment, this 15 is an historical situation, and there are credible, honest witnesses on both sides who are giving their best professional view to reconstruct the reality of the situation and they may come to different conclusions. I have to 20 pick one I guess, won't I, and just given the relief that's requested, and I'll do that honestly. And it'll be my impression. I will not know the case as well as either lawyer or the witnesses who were testifying. It's, it's a 25 gamble. This is one of those cases where there's a bunch of reasonable and well qualified experts opining on a matter that nobody can be certain on at this state of things years later in this historical house. So, we'll just - I honestly, 30 right now, after hearing the benefit of your long - your very thorough submissions and, and your great materials that I have - I'm going to have

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to read further and again, I'm still - I can't tell you right now which way I'm really fully leaning. You know, I appreciate that Ms. Orr's gotten a longer list of credentials but, you know, it's an overall view of the matter, and I'm going to struggle with this. But my observation is, you know, you've got this change in the law. Ms. Joubarne can apply to have three units in there, not four, you say. In any event not four if it's a single unit. Three, you know, units, and it can be take - the mothballs can be taken out of this place. It can be put back in a commercially reasonable order and rented out, and people can walk away from this continuing litigation that's, that's out there. There are ways to resolve cost issues, but people can and should walk away from this. I cannot believe that I'm going to have to potentially come down to Belleville and we'll have another five-day trial or whatever, surrounding the issues with the individual defendants, and we will have to have a case that I think could go to the Court of Appeal, especially if I get into opining about this new legislation and what it means. That'll cost so much, so much more. And of course I, I know the defendant is a corporate entity, but nonetheless, they're business people as well, and Ms. Joubarne is a, a senior citizen who - just like me - who I don't think want to spend the - all of her savings on something like this. She wants to, I think, probably get the this place in order so that it's rentable; maybe sell it; and

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5 then maybe have a life that doesn't involve
paying large sums of money to counsel. So both
sides are getting thoroughly represented and, and
capably represented. I can see that. But I want
you to think about those thoughts, and if that
dawns on anybody that there's some merit in it,
if you want to have a pretrial I'll get somebody
to do it, somebody like Justice Mew in Kingston,
or somebody, anybody you want. You know, even
10 one of the Belleville judges. Whatever, that can
be arranged. I'll - and I would like you to tell
me though if you get to that stage before I
invest the very considerable time that's going to
go into getting myself up to speed so that I can
15 give you a, a decision this summer, which of
course is my duty and my objective(ph). So I
just wanted to say that. That's my part of the
reply. You know, I, I want people to go away,
you know, with something to show for their
20 significant efforts here. And maybe there'll be
three happy families living in that place. I
don't know. I don't(ph) see where there's room
for four, actually, anyways, but that's just a
gratuitous view from looking at your photographs.
25 Anyway, I think, counsel, that's about all I can
absorb today, don't you think? Have I not got
the key points (indiscernible).

A. BOUCHELEV: Your Honour, I - there's a couple
of other things. I, I understand it's late.

30 THE COURT: Okay, the, the short version, sir.

A. BOUCHELEV: I'll give you the short version,
yeah. So my friend took you - I think this is a

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5 little bit easier to absorb because it involves
photographs. So, you know, we've seen this
picture before. This is that famous opening, and
my friend is saying well, you know, you'll recall
that Mr. Onuah testified that there are no door
hinges or signs of door hinges on that - in that
opening. And my friend said well, door openings
don't actually have to have doors, right? You
could just have a passage. But this photograph
10 that Mr. Presinger took and that it supposedly
shows my client's house, you can clearly see the
door and the door hinges there. So if it isn't
my client's house and if the door was removed,
there would have been marks from where the hinges
15 would have been screwed onto the frame. And Mr.
Onuah examined that frame and didn't find any
sign that there were door hinges remove there.
So that is an important point.

20 And Mr. - again, I think this goes back to what
my friend said about Mr. Presinger's testimony.
This is what he actually said about that wall
that shows that very, you know, supposedly shows
that opening.

25 [As Read] You would agree with me that the
house, the building has the original brick
portion and then the addition.

That is correct.

30 And it is in through the wooden addition
that you'd be able to walk between the two
halves of the building, right?

Excerpt of Submissions by Catherine Temple
Submissions in Reply by A. Bouchelev

Yes.

5 A. BOUCHELEV: If he's talking about going
between south and - sorry, going east and west in
the back, that's what Mr. McMullen is referring
to as well. Yes, you can move on the second
floor through that addition. And then I'm asking
Mr. Presinger,

10 [As Read] And the big portion of the
building was divided by a solid wall,
correct?

15 No. It was at the time, but I also remember
being in the house so much that there was
one room that it looked like the door had
been, but there was like a wall that had a
door that was like filled in with drywall,
so it was closed off. So if I remember
correctly, I think originally it was
20 probably one house and the left side on the
east side of the house was likely the
servants' quarter like typically built in
the 1880s.

25 A. BOUCHELEV: So, he says that there is a door
that is blocked off, but the photograph that's
attributed to him shows the door that is clearly
open. So Your Honour, that's, that's all I have
to say about that. Just, you know, I'm trying
30 to, you know, just to be as concise as possible.
There are a lot of points to respond to. The
Mississauga case that my friend - that the

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5 Ontario Court of Appeal Mississauga case that my
friend took you to does not assist the defendants
at all. That case - in that case, the building
was clearly not originally constructed as a semi-
detached. That was a single family dwelling that
was converted into four apartments and, you know,
the - one of the parties tried to argue that it
is now a semi-detached because it's been
converted into four apartments, so obviously very
10 different from the situation that we have.

15 The, the 577326 *Ontario Inc.* in Mississauga, this
is the, this is the Ontario Lands Tribunal
decision, that only relates to Section 76,
Apartments and Houses Regulation. It does not
relate to the new changes as a result of Bill 23.
Obviously it doesn't apply to new - Section 35 of
the Act. It is also a decision of the Board, so
it's not binding on, on this court. It - I don't
20 think, Your Honour, you should really, you know,
take much from that decision. I have - if the
only authority that we have for the proposition
that, you know, a semi-detached has to be on a,
you know, on a separate lot is that decision of
25 the Tribunal, I think that it's clearly open to
you to come to a different conclusion.

30 The *Ryan v. Holden* case, this is the 1912 case
that my friend - that I - my friend referred to
as well as I did, essentially my friend argued
that after the door was added you no longer have
two buildings. But I don't think that case

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stands for that proposition. If you read the case, you'll see that it was dealing with very specific building restrictions that basically said, you know, which street the building can face on, what the lot's frontage has to be. So those - that case is very fact-specific. It does not translate - you can't take that case and say that oh, once you've, you know, you've got an opening in a common wall in a semi-detached it's no longer a semi-detached for the purposes of the *Planning Act*.

And one other point is the Construction Law Dictionary that my friend referred to. This is on CaseLines. The reference is page B-1-1857. So that definition does not stand for what my friend says it stands for and how, how it is cited in the - in her written submissions. That, that (indiscernible) definition simply quotes from the *Holden* case, which I just referred you to. It doesn't say that a semi-detached house has to be on a separate lot. That's not what the Construction Law Dictionary says. So I would encourage you to read that carefully, Your Honour, because that Construction Law Dictionary definition does not conflict with the definition that the plaintiff is using.

Your Honour, the - there was a mention of the *Fire Code* and how you can have, you know, one basement with two units. There's no dispute that there was no *Fire Code* in the early 1900s. It

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5 wasn't introduced until the 1950s. So at the
time the *Fire Code* standards were obviously very
different. There may be an issue as to whether
my client, if she were to have four apartments,
if she would need additional, you know, fire
safety measures installed. That is a question
for another day, not before this court. We're
simply...

THE COURT: Yes, I agree.

10 A. BOUCHELEV: ...we're simply asking for a
declaration. That may be something to deal with
at a later date. And I think I'm just about
done, Your Honour. If I can just have one second
THE COURT: Sure.

15 A. BOUCHELEV: There was some reference to the
OMB decision that my friend referred to. That
OMB decision is not precedent for the court.
There was no evidence filed in that proceeding,
and my view is it should have never been brought
20 because that's not the appropriate venue to deal
with the issues. But I don't think anyone is
suggesting that that decision has in any way
disposed of any of the issues in this proceeding.

THE COURT: Well, that's interesting. I was
25 going to ask about that. So just remind me,
counsel, (indiscernible) I read, you know, when I
look at (indiscernible) I read that OMB decision
but I've forgotten what it's about now. Who, who
- well Ms. Joubarne obviously appealed, what the
(indiscernible) to the OMB. What did she appeal?
30 A. BOUCHELEV: She applied....

CATHERINE TEMPLE: (indiscernible).

Excerpt of Submissions by Catherine Temple
Submissions in Reply by A. Bouchelev

...OVERTALKING

A. BOUCHELEV: She applied...

CATHERINE TEMPLE: Minor variance.

A. BOUCHELEV: ...for a minor variance, and that
was denied.

THE COURT: Right. On the basis of what in a
nutshell?

A. BOUCHELEV: On the basis that there was no
evidence filed in that proceeding, and the OMB
concluded that there was no evidence of four
units.

THE COURT: On the....

CATHERINE TEMPLE: (indiscernible).

...OVERTALKING

THE COURT: Well all right, but also - okay, I'm
going to read - I've just made myself a note to
read the OMB decision. I, I - re-read, okay.
But we're - that, I don't know, whatever they
found I'm going to study that. But it would be
an issue estoppel. It's the same parties. Okay?

CATHERINE TEMPLE: I....

A. BOUCHELEV: I don't think so, Your Honour. I
think that the - essentially what - first of all,
there was no evidence filed in that proceeding so
that isn't what the OMB based on, you know, on
any kind of a substantive record. The defendants
have not raised issue estoppel. That is not -
they've never made that argument. The, the, the
question really is properly before the court as
an application for a declaration, declaratory
relief, not, not an application for -
essentially, Your Honour, my submission is that

Excerpt of Submissions by Catherine Temple
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5 it should have never been brought before the OMB.
It's not the right venue. The fact that it was
dismissed without, you know, looking at any
evidence because none was filed doesn't - doesn't
preclude you from making findings in this
proceeding.

10 THE COURT: Well, it troubles me a little bit.
You're right. Your friend - I don't think your
friend raised that, but I'm going to ask you, Ms.
Temple right now, if you are (indiscernible) or
were you or whatever, but you know, I'm the
gatekeeper as the judge here of evidence, and we
don't relitigate things. We don't allow that.
15 It's a form of abuse of process, and it could be
an issue estoppel and, you know, it could stand
in the way of the argument that there's been a
non-conforming use of having four units in there.
And anyway, I'm thinking about that. So Ms.

20 Temple what were you going to say? I'm sorry.

CATHERINE TEMPLE: I was going to say one thing.
The OMB as they were back then, they dealt with
these minor variance appeals all the time, so
that's typically something they deal with. What
we're dealing with here is something slightly
25 different, which is a legal non-conforming use.
Ms. Joubarne is asking for essentially the same
thing but a slightly different way, and I also
would say that in the - you know, the OMB can
also hear issues about legal non-conforming use.
30 In that case we're listening to Ms. Joubarne's
appeal on a minor variance where she said I had
four - there were four units and I found it this

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5 way. Give me a minor variance from the zoning. The city looked at it. There's four tests to give you a minor variance. They say the Committee of Adjustments said no 'cause it's under the jurisdiction of the Committee of Adjustments to grant a minor variance. Ms. Joubarne appealed it. The point isn't raising it, and I'm not sure if it was true issue estoppel because again, minor variance versus legal non-conforming use are two slightly different things.

10 (indiscernible) two sides of the same coin. The point is, you know, Ms. Joubarne was asking for what essentially is the same thing in 2011. She comes to court in 2021 and the evidence she needs in court is really no different than the evidence she needed a decade ago. It wasn't sufficient then. Why does she expect it to be sufficient now? The other thing is Mr. Clark, he had a copy of that decision. He doesn't seem to consider it when he writes his opinion. So, you know, there's some findings in there. This one neighbour came and he said no, there's no - there's not four units there. When I attended, you know, two. So that's his evidence. And then again his whole thing about two units and under zoning, two units is different from a semi-detached dwelling. 25 That's the point (indiscernible) in there. You had a chance ten years ago. You relitigate it in a slightly different - you take a slightly different approach ten years later. The evidence really isn't that different than it was ten years ago. And the, the OMB wasn't convinced there

Excerpt of Submissions by Catherine Temple
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were four units there then. That's the point.

THE COURT: You know, my questions are on the basis of what you've just told me. Are you, are you relying on an issue estoppel in respect of this issue about what the (indiscernible)...

CATHERINE TEMPLE: (indiscernible)

...OVERTAKING

THE COURT: ...the units in there.

CATHERINE TEMPLE: Yeah, I'm going to have to look at that carefully, Your Honour, because I think it's slightly different. It wasn't - I mean I think it can be somewhat persuasive that there wasn't four units then. Ms. Joubarne didn't give...

...OVERTALKING

THE COURT: No, I, I....

CATHERINE TEMPLE: ...but she didn't give any evidence.

THE COURT: This is the kind of thing that the Court of Appeal hones in on. I can tell you, they're fixated on that issue. They - on case after case, I find. So I think what you should do, Ms. Temple, is just take your time and think about it. Not too much time. And write and give me your position on that. Copy your friend, and then I'd wait for Mr. Bouchelev to respond to that, depending if you choose to but just to say whatever you want to say, Mr. Bouchelev, and - because, because I think that it's something that could cause us a lot of trouble no matter, you know, which way I, I go on that. But what I think what I'm saying is at the appellate level I

Excerpt of Submissions by Catherine Temple
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5 can tell you that the appellate courts are very
sensitive to that issue, the issue of the
potential of basically asking for a
reconsideration of previous findings in another,
another tribunal and an issue estoppel problem,
and when the, when the parties are the same and
the, the general issues are the same, maybe not
the - not quite the same. (indiscernible) I'm
not sure, but I think...

10 A. BOUCHELEV: Your Honour,...

THE COURT: ...you should do that, both of you.

A. BOUCHELEV: ...if I may just address that
point. So this is....

THE COURT: Yup.

15 A. BOUCHELEV: I'm showing you - this is the
decision of the OMB as at Exhibit 7, Trial
Exhibit 7, and....

THE COURT: Exhibit 7, yeah.

20 A. BOUCHELEV: Yeah, and my friend has obviously
put some thought as to whether or not she was
going to argue estoppel. She hasn't made that
argument since, you know, in ten years and I
think that that shows that they recognize that
this is not an issue estoppel case. So this is
25 what the - the OMB in, in considering the minor
variance application was considering Planning
evidence right, because my friend is right. It
is a different issue from legal non-conforming
use. This is....

30 THE COURT: Wel....

A. BOUCHELEV: And this is what the, what the OMB
said:

Excerpt of Submissions by Catherine Temple
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5 [As Read] In view of numerous pages
submitted by the applicant outlining the
major reasons for the appeal, which for the
most part failed to provide any land use
planning reasons, this member ascertained
Ms. Joubarne's understanding of subsection
(485) (1) (ph) of the *Planning Act*.

10 A. BOUCHELEV: This was an application under
485(1) of the *Planning Act*. The proceeding
before you is not under that section of the
Planning Act. So I would say that this is a
different issue that was before the OMB. It
15 would also be, if my friend were to raise that
argument now after a trial, it would be
prejudicial because we may have, you know, made
different arguments and used different evidence
if that was their position from day one.

20 Also of course the - this doesn't apply to
whether or not the building is semi-detached.
This would only apply to the question of legal
non-conforming use.

25 THE COURT: (indiscernible).

30 A. BOUCHELEV: Yeah, but in any event the, the
legal non-conforming use is a different issue
from what was before the OMB, and that was a
minor variance application. So that's - I guess
that's, that's my main point. And just on a, on
a final note, Your Honour, and on a different
subject, there is an allegation that the house

Excerpt of Submissions by Catherine Temple
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5 was left abandoned in 2009. We haven't seen
evidence of that. We know that there was a fire,
but I think my friend was just - you know, there
may have been some evidence that it was boarded
up at some point. But in any event that would
have been a fairly brief period of time between
that happening and my friend buying the house.
And my friend - sorry, Your Honour, my client.
10 It's been a long day. And the - my client bought
the property in May of 2011 as you know, and my
client - there is an allegation that she
rearranged the interior of the building. Well
no, because there was a stop-work order issued
approximately two and a half months later. So
15 she's only been doing renovations there for a
couple of months. This is why you see some of
that new - some of the new studs using new
lumber. She, you know, as you can see, she, she
just barely started it. She hasn't been able to
20 do much. So there, there is no evidence that she
has changed the layout of any of the rooms to
install kitchens or bathrooms where none existed.
Like she may have replaced toilets and things
like that but not creating new rooms where a
25 fixture is - did not exist before. There is no,
no evidence of that.

30 And Your Honour, I think I'll, I'll end it on
that point. I know that it's a lot of
information to absorb and it's late in the day.
But unless you have any questions....

THE COURT: There's particularly a lot of

Excerpt of Submissions by Catherine Temple
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information to absorb when you haven't learned it incrementally.

A. BOUCHELEV: Yeah.

THE COURT: Because I'm now the trial judge but I wasn't before, and that's a very unusual situation as you know.

A. BOUCHELEV: It is, yes.

THE COURT: Hopefully I won't get appointed to the Supreme Court of Canada in the meantime, and I'll be able to get you a judgment, which will be this summer. I, I thank you both for some excellent advocacy, and the written materials are first class as well. So that's a big help to me. So all the best to everyone. Thanks very much.

And on that issue estoppel, you do what you want on that, Ms. Templeman[sic], and I'll make sure that Mr. Bouchelev gets to respond should you - but if you just - if you think that that's not an issue that you wish to pursue, just maybe send me a one-liner saying that, if you would. And then I would like to - I'd probably put it in my reasons. Well I may or may not. You know, that, that was not an issue raised by counsel or pursued by counsel is the way I'd put it. So they don't think that I'm missing things or whatever, if the matter goes for....

A. BOUCHELEV: And Your Honour, one point that you've made about discussing settlement before you invest a lot of time into this. My client is as of right - the law has changed, right? My client as of right is entitled to, you know, three units. She wants to have four because she,

Excerpt of Submissions by Catherine Temple
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5 she - I mean this is a recent change and she - it
makes more sense to have four units in there. I
mean we are open to negotiations, but any
settlement would require at least some compromise
from the other side, and the compromise would be
in terms of four units instead of three units.
We're happy to discuss that if that's on the
table. Previously it was communicated to us that
basically that it was not on the table. So if
10 there is - you know, my friend feels like there
is a point in having a discussion and trying to
resolve this, we're always happy to do that, Your
Honour, but....

15 THE COURT: Mr. Bouchalev, your, your friend told
me today when we were discussing the new
legislation that it's her position that this was,
of course, originally built as a - you know, as
a, a single family home and that there's not a -
there's not a non-conforming use scenario. So
20 the new legislation means that there would be an
entitlement of three residential units under the
law. That law is retrospective. In other words,
it's in, in force now and applies to this house.
Obviously the appropriate permits would need to
25 be pursued and so on. So I, I think you're - I
think both sides are honour-bound to consider the
circumstances in view of the current law. This
isn't the first time the law has changed in a way
that affects the rights of actually both parties,
30 and it's - actually opens the door to be a way
out that people have been looking for I think in
this case. I just think both sides need to put

Excerpt of Submissions by Catherine Temple
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5 this one to bed. It's an intentionally -
intentionally factual case. I don't think any
appellate courts will, will have to sit there and
listen to it all. I don't think they'll want to
intervene. I think it's going to be left up to
me, and I just want a fair outcome for, for both
sides. So thank you both very much for your able
submissions. If you get the idea that hey maybe
we could have a judicial pretrial, I can tell you
10 that I have some very capable colleagues who
would be very pleased to do that. You know, I
have in mind, you know, my favourite judicial
pretrial person is, is Justice Graham Mew from
Kingston, and he, he, you know, sits along at the
15 Seaway Centre so along the 401 often. A great
settler of cases, full of wisdom and good humour.
You might think of him, but I have some - I have
some other colleagues as well who would on a
confidential basis, not talking to me, although I
20 might tip them off about the changes in the law
and why I think that opens some doors. You know,
I give them a few clues. I hope you might do
that. You feel free to contact me in respect of
that through, through the trial coordination in
25 Belleville, and I'll help set that up. So thank
you both very much.

CATHERINE TEMPLE: Thank you,...

A. BOUCHELEV: Thank you, Your Honour.

CATHERINE TEMPLE: ...Your Honour.

30 THE COURT: Thank you. Bye for now.

CATHERINE TEMPLE: Bye-bye.

A. BOUCHELEV: Take care.

Excerpt of Submissions by Catherine Temple
Submissions in Reply by A. Bouchelev

...END OF REQUESTED EXCERPT

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61.
Certification

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