

Property owner allowed to maintain property's use as three dwelling units (*Vitale v. Toronto (City of)*)

Building Code Act | Litigation | Litigation & Dispute Resolution | Municipal Law | Real Estate

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Municipal zoning by-laws regulate, among other things, the number of separate residential units that are permitted in a property. Violation of a zoning by-law may lead to the municipality issuing orders to comply, which can result in costly renovation expenses and/or other penalties. In *Vitale v. Toronto (City of)*, 2023 ONSC 5649 (CanLII), the Ontario Superior Court of Justice extended a homeowner's time to appeal an Order to Comply as it was based upon a shared misunderstanding by the owner and the municipality of the legal use of the property at the time in issue.

The property was a three-storey building apparently constructed in 1927. In 1963, the property was zoned by the City of Toronto for use as a single-family dwelling.

At some point between 1927 and 2011, the property had been converted from a single-family dwelling to a five-unit residential multiplex. When precisely this had occurred was unknown.

In 2011, the applicant (Vitale) purchased the property. At the time, the property had multiple entrances and five separate dwelling units. Vitale moved into one unit and rented out the other four.

Before purchasing the property, Vitale retained a conveyancing lawyer to inquire about whether a three-family dwelling was a lawful use. It is unclear why the conveyancing lawyer had inquired as to whether a three-unit dwelling was permitted as opposed to five, but this may have been because only three units were occupied at the time. The City confirmed that at the time it was built in 1927, there were no zoning by-laws in effect, but at the current date, the property was zoned for a single-family dwelling and there were no records confirming the dwelling as having three apartment units. Vitale was told to satisfy himself as to whether the uses complied with the zoning by-law and the *Ontario Building Code*.

In 2013, Vitale began constructing a deck in the backyard. The City received a complaint that this construction was occurring without a permit, and they issued an Order to Comply, requiring Vitale to obtain a permit. Vitale subsequently submitted an application, which described the property (falsely) as a detached single-family dwelling. The application included a site plan that also described the property as a single-family dwelling. The City issued a permit.

In 2017, the City received a complaint that there was an increase in the number of dwelling units in the property. An inspector attended and Vitale explained that he had recently engaged an architect to design and construct a new single-family dwelling at the property, and planned to submit the permit application within four to six months. Nothing significant occurred for several years.

In 2021, the City received another complaint, this time from one of the tenants in the upstairs unit, indicating that the property was being used as a five-unit multiplex in contravention of zoning and the *Ontario Building Code*. An inspection by the City concluded that the property had originally been a single-family dwelling but had been altered to be a multiplex with five apartment units.

On 7 June 2021, the City issued an Order to Comply under the *Building Code Act* requiring Vitale to "revert" the use of the building into a three-unit dwelling.

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As far as Vitale was aware, however, the building had *never* been used as a three-unit dwelling.

Vitale engaged in discussions with the City but did not appeal the Order to Comply. The City delivered a demand letter in February 2022. Again there was no appeal. In May 2022, Vitale was served with a summons to appear before the Ontario Court of Justice.

In September 2022, Vitale finally took steps to apply to the Superior Court of Justice for an appeal of the Order to Comply, well beyond the deadline for doing so.

Under section 25(2) of the *Building Code Act*, a judge may extend the time for making the appeal if the judge is satisfied that there are reasonable grounds for the appeal and for applying for the extension. An extension generally requires a reasonable explanation for the delay.

In the application judge's view, the driving issue was that it was unknown how many units were converted prior to the enactment of the zoning by-law in 1963, and how many were converted after that time.

Any use that was established prior to 1963, and continued uninterrupted thereafter, could be considered a "legal non-conforming use", meaning that it could continue despite the enactment of the zoning by-law. To prove a legal non-conforming use, a party must prove that: (a) the use of the land, building or structure was lawful at the time of the enactment of the zoning restriction (in this case 1963); and (b) the use continued thereafter: *Feather v. Bradford (Town)*, 2010 ONCA 440.

Conversely, any converted use that occurred after 1963 other than as a single-family dwelling would have been in contravention of the zoning by-law.

The City's Order to Comply required that Vitale submit plans and obtain the necessary permits to change the occupancy of the building from three dwelling units to five dwelling units, or to revert the building to its legal use.

The application judge commented that neither side appeared to understand that the only thing Vitale needed to do to comply with the Order to Comply was to decrease the tenancy load by one unit since only three units were being rented out in addition to his own family's residence. Therefore, he needed to either terminate one of the existing tenancies or vacate his unit to revert to the last legal use as a three-unit multiplex.

There were abundant reasons to explain Vitale's delay in bringing the appeal. In that regard, the City had been trying to determine for over a decade whether Vitale had established a legal non-conforming use to no avail. After the City finally issued the Notice to Comply, Vitale attempted to get the City's acquiescence as he firmly believed that his plan to restore the property to a single-family dwelling should have been reasonable to the City.

As to the merits of the appeal, Vitale argued that the Order to Comply was an example of a bureaucracy gone amok and was a "Kafkaesque impossibility" since the City wanted him to revert a building to something that never existed. He argued that the City had no evidence upon which to make its Order to Comply and that it ought to be rescinded.

The application judge determined that the City had treated Vitale very fairly and reasonably since they could have sued Vitale for contravention of the by-law, which would have placed the onus on him to prove that the property had been converted prior to the 1963 by-law enactment.

Ultimately, however, the fatal flaw in the City's case was that they issued a Notice to Comply pursuant to section 10(1) of the *Building Code Act* which states in part "[e]ven though no construction is proposed, no person shall change the use of a building". The City appeared to assume that Vitale had purchased the property as a three-family dwelling; that a three-family dwelling was a legal non-conforming use; and that he had, at some point, changed the property to be a five-unit dwelling without a building permit. However, that was not the case.

Rather, the evidence was that Vitale did not change the use of the property. When he purchased the property in 2011, it was already a five-unit dwelling. Then, when the Notice to Comply was officially issued, there were only four units being occupied, and a reversion to a three-unit dwelling, which the City believed to be the last legal non-conforming use, could have been achieved without any renovations at all: simply by vacating his own unit or terminating one of the tenancies. Therefore, Vitale was being prosecuted for an offence that he had not committed.

The application judge noted that the *Building Code Act* was legislation for public health and welfare and was therefore to be interpreted broadly and liberally. In the circumstances of the case, the court's decision was to rescind the City's Order to Comply but also to require Vitale to only use his property for three dwelling units.

The application judge noted that the ironic result was that had Vitale complied with the Order to Comply in the first place he not only would have avoided prosecution and the appeal, but it would not have interfered with his ultimate plans to demolish the multiplex and to build a single-family home, which was

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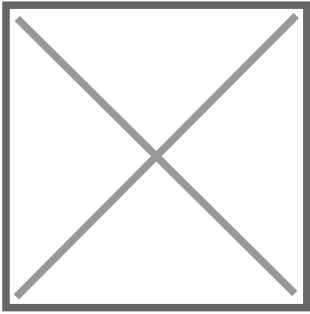
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permitted.

This case highlights the complex interaction between historical zoning by-laws and building codes. The complication in the case arose from the fact that it was unknown when the use of the property had been converted and what the last legal use truly was. When possible, records of changes of use should be sought out and maintained in order to discharge any potential burden of proving legal non-conforming use. A PDF version is available for download [here](#).

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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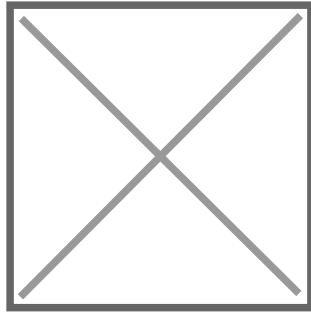


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