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Deck building litigation was needless waste of time Judge rules that deck should have been inspected at the end of construction, not earlier

One of the reasons litigation is so expensive and time-consuming in Ontario is that too much court time is spent on cases that should never have gone there in the first place.

A prime example of this is the court decision in the case of Upchurch vs. the City of Oshawa, released by the Ontario Divisional Court a few weeks ago.

Donald and Carla Upchurch wanted to build a deck outside their house in Oshawa. When Donald attended at the city offices to obtain a building permit, he was told that no permit would be required if, upon completion, the deck would not be higher than two feet above the adjacent ground, or grade level.

This advice was based on the requirements of the Policies and Procedures Manual for the City of Oshawa. According to the written rules, a permit is not required for a residential deck if it is not more than 600 millimetres (about 24 inches) in height above the adjacent grade, with no roof above.

In September 2006, during construction of the deck, "a third party" (presumably a neighbour) complained to the city, and a building inspector came out to look at the work. The inspector himself was not certain whether a permit was required and he consulted his supervisor to see whether he could use his discretion to waive a building permit.

At the time of the inspection, construction of the deck had not been completed. Planters had been installed at the front of the deck, so that the deck boards there were clearly less than two feet above the new ground level.

Unfortunately, during the inspector's visit, planters had not been installed at the sides of the deck. The inspector measured the height at the sides of the deck and discovered that the board level there was more than two feet above grade.

Based on advice from his supervisor, the building inspector decided that a permit was required. He then issued a No Permit Order, requiring construction work to cease.

The owners filed an appeal of the No Permit order and the matter came up for a court hearing in May 2007. Justice Myma Lack dismissed the Upchurch appeal and ruled the owners should have obtained a building permit.

Not satisfied with that ruling, the Upchurches appealed to a three-judge panel of the Divisional Court in September 2008.

The court released its two-page ruling in October, rescinding Lack's No Permit order and revoking her award of costs in favour of the City of Oshawa. As well, the court awarded costs of \$3,500 against the city.

On behalf of the three-judge Divisional Court panel, Associate Chief Justice Douglas Cunningham wrote: "The deck has now been completed and the planters have been installed at the sides of the deck, such that the distance between the grade (the top of the side planters) and the deck floor is considerably less than two feet.

"In our view, the appropriate time for inspection would have been the completion of the project, not at some point midway through construction."

The owners, he said, "did everything properly on the understanding that with the planters installed, the distance between grade and the deck floor would be considerably less than two feet. They acted upon the advice given by a building official when they sought a building permit."

This case is a classic example of one that should never have been heard in one court, not to mention two. I believe the city should have admitted its mistake at the outset and given its blessing to the deck. When homeowners can't rely on municipal advice and the parties are forced to spend tens of thousands of dollars on legal fees in needless litigation, there is a huge temptation to undertake renovations without obtaining permits.

Bob Aaron is a Toronto real estate lawyer and an appointed director of the Tarion Warranty Corporation. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818. Visit the column archives at <http://aaron.ca/columns/toronto-star-index.htm> for articles on this and other topics.

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Upchurch v. Oshawa (City), 2008 CanLII 53861 (ON S.C.D.C.)

Print: PDF Format

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Docket: DC-07-084386-00

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Legislation cited (available on CanLII)

- [Building Code Act, 1992, S.O., 1992, c. 23](#)

DIVISIONAL COURT FILE NO.: DC-07-084386-00

DATE: 20081021

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CUNNINGHAM A.C.J.S.C.J., LALONDE and R.D. GORDON JJ.

IN THE MATTER OF Section 26(1) of the *Building Code Act, 1992, S.O., 1992, c.23.*

B E T W E E N:)	
)	
DONALD THOMAS UPCHURCH and CARLA PAULINE UPCHURCH)	<i>Scott R. Fairley</i>
)	for the Appellants
)	
)	
Appellants)	
)	
- and -)	
)	
)	
THE CORPORATION OF THE CITY OF OSHAWA)	<i>David J. Potts</i>
)	for the Respondent
)	
)	
Respondent)	
)	
)	
)	HEARD: September 18, 2008 at Newmarket

REASONS FOR JUDGMENT

FOR THE COURT:

[1] This is an appeal of the decision of Lack J. dated May 8, 2007 in which she dismissed the appellants appeal against an order issued by an inspector from the City of Oshawa pursuant to s. 12(2) of the *Building Code Act, 1992, S.O. 1992, c.23*, as amended. Before the Divisional Court the appellants seek an order rescinding the No Permit Order issued to them requiring them to cease construction of a new front deck on their property. This appeal is brought pursuant to s. 26 of the said Act.

[2] Before commencing the proceeding before us, the appellants brought a motion seeking to introduce an engineering report provided by Gianier Engineering Ltd. in which the author of the report concludes that the newly constructed porch deck in question meets and/or exceeds the minimum structural requirements of the Ontario Building Code 1997. We allowed this evidence to be put before us concluding that it adequately met the test for the introduction of fresh evidence.

[3] The issue in this case is whether the reconstruction of this deck met the requirements of the Policies and Procedures Manual for the City of Oshawa, more specifically, as it relates to the height of residential decks. In the Policy Manual, it states that a building permit is not required for the construction of residential decks not exceeding 600 mm. (24

inches) in height above adjacent grade with no roof above. Whether there was a roof above was never at issue in the proceeding before Lack J., the only issue being the height of the deck from grade. The evidence before Lack J. indicated that the appellant Upchurch attended at the City of Oshawa for the purpose of obtaining a building permit to replace the front deck on his property. He was assisted at that time by one Volkirk Van Beusekom of the Buildings Division. The appellant Upchurch, in evidence, stated he was advised by Van Beusekom that he did not require a building permit if, upon completion, his deck would not be greater than two feet above the adjacent grade. When a building permit is not required, the Building Code does not apply.

[4] Apparently, acting on a complaint made by a third party, a building inspector, one Kevin Van Vaals, attended the property to inspect the deck on September 28, 2006. After inspecting the property, Van Vaals was not certain whether a building permit would be required and he consulted his supervisor, one Herman Guta, to determine whether the discretion to not require a building permit applied. Apparently he was told by Guta that a permit was required. Accordingly, Van Vaals advised the appellants that a building permit would be required because they were building a porch not a deck. As a result, Van Vaals issued a No Permit Order.

[5] At the time the inspection was made by Van Vaals, the construction of the deck had not been completed. Van Vaals apparently was satisfied that the front portion of the deck met the two foot requirement in that planters had been put into place in front of the deck, making it readily obvious that the deck boards were less than two feet above grade, which would have been the top of the planters. Unfortunately, the planters had not been installed at the sides of the deck, which is the area Van Vaals measured and he found to have been in excess of two feet above the grade at that time.

[6] The deck has now been completed and the planters have been installed at the sides of the deck, such that the distance between the grade (the top of the side planters) and the deck floor is considerably less than two feet.

[7] In our view, the appropriate time for inspection would have been the completion of the project, not at some point midway through construction.

[8] Relying upon the advice given in the first instance, the appellants, in our view, did everything properly on the understanding that with the planters installed, the distance between grade and the deck floor would be considerably less than two feet. They acted upon the advice given by a building official when they sought a building permit.

[9] In the circumstances, we are of the view that the decision of Lack J. was unreasonable and ought to be set aside, and accordingly we do so. The No Permit Order is hereby rescinded, the costs award of Lack J. set aside, and the appellants are granted their costs in the amount of \$3,500.00.

Cunningham A.C.J.S.C.J.

Lalonde J.

R.D. Gordon J.

Released: October 21, 2008

DIVISIONAL COURT FILE NO.: DC-07-084386-00

DATE: 20081021

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CUNNINGHAM A.C.J.S.C.J., LALONDE and R.D. GORDON
JJ.

BETWEEN:

DONALD THOMAS UPCHURCH and CARLA PAULINE
UPCHURCH

Appellants

- and

THE CORPORATION OF THE CITY OF OSHAWA

REASONS FOR JUDGMENT

Released: October 21, 2008

by
Lexum

for the

Federation of Law Societies of Canada