CITATION: Visnjic v. Town of LaSalle, 2017 ONSC 2082
COURT FILE NO.: 08-CV-11411CM
DATE: 20170403

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
THE ESTATE OF BOGOLJUB VISNJIC and MILENA VISNJIC	)	
Plaintiffs	)	*Luigi DiPierdomenico*, for the Plaintiffs
– and –	)	
THE CORPORATION OF THE TOWN OF LaSALLE	)	
Defendant	)	*Patrick W. Brennan*, for the Defendant
	)	**HEARD:** June 20, 21, 22, 23, and 24, 2016.

REASONS FOR JUDGMENT

HOWARD J.

Overview

[1] This action arises as a result of a dispute over the construction of and access to a detached garage, located at the rear of the plaintiffs' residential property, municipally known as 2550 Todd Lane, LaSalle, Ontario.

[2] The plaintiff Milena Visnjic and her late husband, Bogoljub Visnjic acquired the 2550 Todd Lane home on August 6, 1993, and were the registered owners of the property at the time this litigation was commenced. The home is located in a suburban residential development within the Town of LaSalle. It is situated on the north side of Todd Lane, which is a municipally opened and maintained public road. The driveway to the home fronts onto Todd Lane.

[3] The property is situated to the west of what the plaintiffs sometimes called the "Ninth Street Alley" before me. Ninth Street (which runs north-south) intersects Todd Lane (which runs east-west). To the south of Todd Lane, Ninth Street is a municipal public road, open to motorized vehicular traffic. However, to the north of Todd Lane, Ninth Street is an unmaintained, unopened road allowance.

[4] The Visnjic property is the second residential home on Todd Lane west of Ninth Street. Immediately beside the Visnjic property to the east is 2560 Todd Lane, which is situated at the north-west corner of Todd Lane and the Ninth Street unopened road allowance and is owned by Raymond and Nan Harris. The plaintiffs place much emphasis in this litigation on the involvement of Ms. Harris in the events in question.

[5] Immediately abutting the rear of the Visnjic property (i.e., the north side of the property) is Bondy Avenue, which is also an unopened road allowance.

[6] The Visnjic property is not unique in the sense that the evidence indicates that there are many private properties located within the Town of LaSalle that abut unopened road allowances. Indeed, the evidence of the defendant is that there are approximately 105 kilometres of unopened road allowance that exist throughout the Town.

[7] As unopened road allowances, neither Bondy Avenue nor Ninth Street are maintained by the municipality as public roads. They have no features, no paving, no drainage, no street lamps, and no maintenance. The fundamental legal position of the defendant municipality – and this is essentially common ground – is that ownership of all highways (including opened and unopened original road allowances and road allowances on plans of subdivision) is held by the Town in trust for the benefit of the residents in the area of the road allowance and for the citizens of the Town at large. As such, the defendant acknowledges that the public has a common law right to make use of these road allowances, including the unopened road allowances.

[8] However, the defendant takes the position that the public does not have a right, without the express permission of the Town, to cut down trees, remove or grade other natural obstructions, or to make any changes to the land upon which the road allowance is located to allow safe passage for pedestrians or motor vehicles. The defendant's ultimate position is that while unopened road allowances, such as Bondy Avenue and Ninth Street, provide legal access to all abutting properties by foot and/or other forms of non-motorized vehicular transportation, motorized vehicular traffic on them is prohibited.

[9] In September 2003, the plaintiffs retained a general contractor to assist them with the construction of a detached storage garage that they wished to erect at the rear of their property. With the assistance of the contractor, the plaintiffs prepared an application for a building permit for the garage and submitted it to the Town's Building Department on September 22, 2003.

[10] The Building Inspector of the Town reviewed the application submitted by the plaintiffs, including construction drawings, a survey of the property, a foundation plan, aerial

photographs, and other supporting documentation. During the building permit application process, the Building Inspector spoke with the plaintiffs, and there was discussion about the intended use of the garage and access to the garage. The substance of those discussions is central to the determination of the issues in this action.

[11] It is the position of the plaintiffs that they (or their contractor) advised the Building Inspector that they intended to use the garage to house motor vehicles and, significantly, that they intended to access the garage using the Bondy Avenue unopened road allowance. The Town denies this.

[12] The Town states that during the application process, the plaintiffs confirmed that there was ample room to access the garage via the existing driveway (which fronts onto Todd Lane) and lands located on the west side of their property. The Town states that, consistent with the supporting documentation accompanying the application, including, in particular, the survey, the Town understood that vehicular access to the garage would be conducted using the plaintiffs' side yard, located on the west side of their property.

[13] In any event, a building permit was issued on September 29, 2003. Construction of the garage was completed in 2004. The final inspection was conducted on October 17, 2005, and was cleared by the Building Department.

[14] Following the construction of the garage, beginning in October 2005 and continuing throughout 2006, the Town received various complaints relating to the plaintiffs' use of the garage and their property. The evidence suggests that those complaints were made by the plaintiffs' neighbour, Ms. Harris. The relative merits of the neighbour's complaints are a source of bitter contention for the plaintiffs. It is clear that, as events unfolded, a great deal of friction and animosity between the neighbours has resulted.

[15] In response to the complaints, the Town directed its Compliance Officers to investigate. On several occasions, the Officers attended at the plaintiffs' property, made on-site observations, took various photographs, and had various discussions with the plaintiffs directly about the use of their property and the Bondy Street unopened road allowance.

[16] In the course of its investigations, the Town observed considerable evidence of what it believed to be the unauthorized use of the Bondy Avenue and Ninth Street unopened road allowances. Indeed, the evidence presented by the plaintiffs indicated that not only the plaintiffs but the Todd Lane neighbourhood generally, including the Harris neighbours, used a variety of motor vehicles, trucks, all-terrain vehicles, riding lawn mowers, and other means of motorized and non-motorized transportation to access the Bondy Avenue and Ninth Street unopened road allowances. The evidence suggests this use had been occurring for several years.

[17] The Town became concerned with what it believed to be this unauthorized use of the open road allowances. Town officials perceived numerous legal, financial, servicing, and liability/insurance-related issues arising from the unauthorized use of the unopened road allowances. As a result, the Town began to take increasing measures to prohibit such use.

In short, the Town decided to tackle the larger issue of the public's use of the 105 kilometres of unopened road allowances throughout the Town. To be sure, as events ultimately unfolded, the issue transcended far beyond the plaintiffs' garage and the Harris complaints.

[18] Accordingly, on or about January 3, 2007, the Town placed four large concrete barriers along Todd Lane at the entrance to the Ninth Street unopened road allowance. This effectively barred the plaintiffs from accessing their detached garage from the rear of their property using the Bondy Avenue and Nine Street unopened road allowances.

[19] Thereafter, Town Council directed its administrative staff to review the Town's existing policies, practices, and procedures pertaining to the public use of the existing unopened road allowances and to report back to Council with recommendations for addressing the Town's legal, liability, insurance, servicing, and financial concerns.

[20] Ultimately, on May 8, 2007, the Town enacted By-Law No. 6807, which restricts the public's use of unopened road allowances and, in particular, prohibits any person from entering onto or using any unopened road allowances with a motorized vehicle of any kind.

[21] The plaintiffs commenced this action by statement of claim issued July 10, 2008, seeking, *inter alia*, an order requiring the Town to remove the concrete barriers adjacent to Todd Lane, an easement over the Bondy Avenue and Ninth Street unopened road allowances so as to allow the plaintiffs access to the detached garage from the rear of their property or, in the alternative, damages for breach of the equitable doctrine of promissory estoppel and/or negligent misrepresentation, together with punitive damages.

[22] Sadly, the plaintiff Bogoljub Visnjic passed away on December 18, 2010. An order to continue permitting the proceeding to continue with the Estate of Bogoljub Visnjic and Milena Visnjic as plaintiffs was obtained on March 26, 2014.

Factual Background

[23] I do not propose to summarize the evidence of each of the witnesses who testified before me over this five-day trial. There is no need to repeat all of that detail here. However, the parties should know that while I have considered all of the evidence presented at trial, my decision deals with the particulars of the material evidence only insofar as it is necessary to determine the legal issues in question.

[24] That said, it is useful to review certain events in the factual background of this case.

[25] In 1999, the plaintiffs' son, Slobodan (Bob) Visnjic ("Mr. Visnjic" or "Bob Visnjic"), moved in with his parents to reside at their home at 2550 Todd Lane, when he was then about 37 years of age. Mr. Visnjic has continued to reside in the home since that time. In 2002, Mr. Visnjic's son, Christopher, also moved in.

[26] Mr. Visnjic is a licensed mechanic. He has been an automobile enthusiast since his youth. As of 2002, he kept five "hobby cars," most of which were not fully assembled and which he would work on in his spare time. He was keeping his five hobby cars in storage off-site, as a result of which he was paying "thousands of dollars" for the rental of storage space. Sometime in 2002, he sat down with his parents to discuss the situation, and they decided that it would be less expensive if they were able to build a structure at the parents' home where he could store and work on the hobby cars, thus saving the expense of the storage rental. Thus, they began to investigate the possibility of building a detached garage at the rear of the property.

[27] The evidence of Mr. Visnjic was that they felt they had only two options: either they would approach the Town to obtain permission to build the detached garage on site, or they would sell the home and move to another residence. Mr. Visnjic's evidence was that his parents quite liked their home, they all thought it was a "great neighbourhood," and the parents had resided in the home for almost ten years at that point. But on Mr. Visnjic's evidence, they felt they would have to move if the Town did not give them permission to build the detached garage on the property. In my view, this is an important feature of the case when considering the parties' motivations.

[28] The Visnjic property at 2550 Todd Lane is quite a deep lot. It is 72.1 feet wide at the front of the property on Todd Lane, 230 feet deep, and 72.15 feet wide at the rear of the property, abutting the Bondy Avenue unopened road allowance. The home itself is a yellow-brick, 1,600 square foot bungalow, situated at the south end of the property, close to Todd Lane. The home features an attached, below-grade garage, which occupies about one-third of the basement of the house. The other two-thirds of the basement is finished residential space. There is a paved, sloped driveway from Todd Lane to the below-grade garage, which is on the west side of the house.

[29] Immediately west of and adjacent to the paved, sloped garage driveway is another paved driveway that runs at grade-level from the back of the house at its north-west corner, along the west side of the house, to the front at Todd Lane. Part of this driveway runs between the Visnjic house and a wooden fence on the eastern border of the property at 2540 Todd Lane, the neighbouring property to the immediate west of the Visnjic home. This driveway on the west side of the house joins the paved, sloped garage driveway at the front (south) of the property, immediately adjacent to Todd Lane.

[30] As indicated on the site plan or survey of the property, the distance from the west side of the Visnjic home to the neighbouring lot line is 7.90 feet at the north-west corner of the house. (The survey appears to show, and this is consistent with the evidence of Mr. Bob Unis, the Town's Building Inspector, an additional "encumbrance" onto the property of 2540 Todd Lane, which encumbrance is shown on the survey as being 0.75 feet wide at the north end.)

[31] The survey indicates that the distance from the east side of the Visnjic house to the neighbouring lot line of the Harris property is 10.89 feet at the north-east corner of the

house. There is a chimney on the east side of the Visnjic house, which, on Mr. Visnjic's measurements, protrudes 23 inches from the side of the house.

[32] As indicated above, in September 2003, the Visnjics retained a general contractor to assist them with the detached garage. They selected Mr. Steve Derose, whom Mr. Visnjic described as a "childhood friend," whom he had known for at least 30 years. Mr. Derose is a residential contractor of some 30 years' experience, who had previously lived in LaSalle for 20 years. (Curiously, in cross-examination by counsel for the Town, Mr. Derose said that he and Bob Visnjic were "not really friends, more of acquaintances.") In any event, Mr. Derose assisted the Visnjics with the application to the Town's Building Department for the building permit, and he was then retained to do the foundation work on the detached garage, including the excavation, gravel, and laying the blocks.

[33] The building permit application form was completed by both Bob Visnjic and Mr. Derose, was signed by the late Mr. Visnjic ("Mr. Visnjic Sr.") as the applicant, and was submitted to the Building Department on September 22, 2003.

[34] At all material times, Mr. Unis held the position of Plan Examiner/Building Inspector and Acting Chief Building Officer (assuming those functions whenever the Chief Building Officer, Mr. John Naccarato, was absent from the office). Mr. Unis, who has both an architectural degree and a diploma in architectural technology, has been with the Town for 22 years.

[35] The application form submitted by the Visnjics indicated that the proposed garage would be 1,600 square feet in area, with a width and length of 40 feet each. The application form was accompanied by handwritten construction drawings, prepared by Mr. Derose, showing the east elevation and floor plan of the proposed garage. The floor plan showed a "side entry door" on the south side of the structure (which would face the Visnjic home) and a 16-foot garage door on the north side of the structure (which would face Bondy Avenue). The evidence of the plaintiffs was that they proposed to build the detached garage such that its north face would be set back 26 feet from the property's rear lot line (one foot more than the Town requirement that there be a 25-foot clearance) and its east face would be set back six feet from the east lot line abutting the Harris property (again, one foot more that than the Town requirement that there be a 5-foot clearance).

[36] However, the application was not accompanied by a site plan, as required by the Building Department, so it was marked incomplete until the survey was filed with the Department, which, the evidence suggests, was done on September 25, 2003.

[37] Also, at some point the submitted application materials were supplemented by two aerial photographs of the Visnjic property. In cross-examination of Mr. Unis, it was suggested that Mr. Unis retrieved the photographs, and while Mr. Unis acknowledged that it is common for the Building Department to look at aerial photographs from time to time, he could not remember whether he was the one who pulled the photographs or whether he saw the photographs at the time he reviewed the application (as opposed to them being placed in the file after the issues arose). However, the evidence of Mr. Visnjic was that

the aerial photographs were submitted by the plaintiffs; Bob Visnjic specifically remembers his father being quite enthralled with the photographs of his property. In my view, nothing much turns on who submitted the aerial photographs, especially given the evidence of Mr. Unis that he cannot say whether he looked at them before he issued the permit.

[38] At some point during the application process, there was a series of discussions between the plaintiffs and Mr. Unis of the Building Department. The evidence of Mr. Unis is that his first contact with the plaintiffs was when the application was made. He recalls that Mr. Visnjic Sr. and Bob Visnjic came in to discuss the application. He recalls that Bob did most of the talking. He believes that there were at least five meetings with the Visnjics. To his knowledge, he was the only representative of the Town who had direct dealings with the plaintiffs.

[39] Mr. Unis does not recall having any meetings with Mr. Derose. His evidence was that he did not know Mr. Derose was even involved in the project until later on in the process.

[40] Mr. Unis recalls that during his meetings with the Visnjics, there was discussion about the intended use of the detached garage. The evidence of the witnesses is essentially consistent on this point. Bottom line, Mr. Unis understood that the detached garage would not be used for a commercial purpose but for a purpose ancillary to the residential use of the property; specifically, Mr. Unis understood that the garage would be used so that Mr. Visnjic could store and work on his hobby cars. The evidence of Mr. Visnjic was to the same effect; he said that he told Mr. Unis that he had hobby cars, that he wanted to consolidate their storage in one building, and that the detached garage would not be used to carry on any kind of commercial business.

[41] Consistent with the parties' discussion, Mr. Unis himself wrote on the construction drawings that had been submitted with the application, right beside the floor plan of the garage, "Building to be used for residential storage only." Mr. Unis was asked why he made a point of noting that on the plans. He explained that the proposed garage was a large structure – it was not a standard-sized 24 feet by 24 feet garage – and so he wanted to clarify that it was to be used only for residential and not commercial purposes, so that everyone understood and agreed that was the purpose and there would be no questions later.

[42] Mr. Unis recalls that during his meetings with the Visnjics, there was discussion about how the detached garage was to be accessed. He specifically remembers having such discussions with Bob Visnjic, who told him that there was plenty of room to access the garage by way of the side of the house. After having reviewed the survey, Mr. Unis accepted that explanation.

[43] Mr. Unis' acceptance of the explanation given was consistent with his understanding of the requirements of the Building Department. Mr. Unis' understanding of the *Building*

Code Act[1] is that the Building Department is obliged to issue a building permit if the application complies with the municipality's by-laws and Building Code. Given that the proposed structure was intended to be a garage, and not merely a garden shed, Mr. Unis' understood that there needed to be access to an open road allowance, i.e., Todd Lane. He understood that there was absolutely no requirement that the proposed access be by way of a paved or gravelled road; they could drive on the grass. He believed that, given the intended use of the garage was to be for the housing of hobby cars and not as a commercial business, it would likely be used infrequently, i.e., when Mr. Visnjic had some leisure time to work on his cars, and so the need for access to Todd Lane would be infrequent. Importantly, Mr. Unis understood that the house itself had a primary garage (i.e., the below-grade garage in the basement) that would be used for every-day access.

[44] Mr. Unis believed that, consistent with what Mr. Visnjic had told him, there was sufficient space to access the detached garage from Todd Lane via the west side of the property. Mr. Unis understood that, apart from the sloped driveway to the below-grade garage, there was also a paved driveway on the west side of the house. He noted that the survey showed an allowance of 7.9 feet on the west of the house, which he believed provided sufficient space to access the garage from Todd Lane. He also pointed out that the driveway on the west side of the house was visible in the aerial photographs, which photographs also appear to show a motor vehicle(s) parked on the driveway.[2]

[45] In cross-examination, when plaintiffs' counsel took Mr. Unis to the specific provisions of the Town of LaSalle Zoning By-Law, Mr. Unis agreed that s. 5.20.1(e) of the Zoning By-Law provides that "a private garage shall have a driveway with a minimum width of 2.75 metres, which will extend from the garage door to an open publicly maintained street or lane" and, further, that a 2.75 metre required allowance, being the equivalent of 108.26 inches or a little over 9 feet, would not be satisfied by the 7.9 feet allowance on the west of the house. Counsel put it to Mr. Unis that he did not make that observation at the time, and Mr. Unis agreed. Mr. Unis explained that the Building Department interprets the Zoning By-Law in the context of a proposed structure's intended use; in this case there was already a primary garage on the property (which satisfies the required 2.75 metre allowance), and the proposed structure was to be used as a hobby garage. He said that the purpose of the provision in the Zoning By-Law was to regulate the use of a primary garage, and that they do not interpret it as applying to a hobby garage. He believed the appropriate question is whether there is reasonable access given the intended use as a

[1] *Building Code Act, 1992*, S.O. 1992, c. 23.

[2] This is most clearly visible from an aerial photograph taken in 2006 (Exhibit no. 11, tab 3); however, Mr. Unis made it clear in his evidence that the 2006 photograph was taken after the detached garage had been constructed (as it is visible in the photograph); as such, the 2006 photograph was not before him in the course of the permit application process. However, the 2002 photographs that were part of the application (Exhibit no. 1, tab 1) also show vehicles parked in the driveway on the west of the property. I would also note that, as Mr. Derose conceded in cross-examination, there are no lot-line overlays or demarcations on the aerial photographs.

hobby garage, and he maintained that, consistent with Mr. Visnjic's representations, there was sufficient space on the west side of the property to accommodate the intended use.[3]

[46] In my view, Mr. Unis' explanation of his contextual approach to the Zoning By-Law requirements is both reasonable and appropriate. Moreover, given the manner in which the plaintiffs' claim has been pled, it is not, strictly speaking, necessary for me to determine whether the Building Department's contextual approach is the legally correct or most appropriate interpretation of the By-Law.

[47] A good portion of the examination-in-chief of Mr. Visnjic involved his review of various photographs taken of the Visnjic property, their house, the detached garage, etc., from a variety of different angles and at a variety of different time-periods, ranging from 1993, ten years before the garage was constructed, to the week before trial. One of the points that the plaintiffs sought to establish was that, given the on-site visualizations depicted in the photographs, it would be clearly impossible for a motor vehicle such as a pick-up truck to access the detached garage using the driveway and lands to the west of the house (or the east of the house for that matter).

[48] But for the purposes of the causes of action as pled by the plaintiffs, the question is not so much whether a vehicle could in fact access the garage from the west given the lot lines, the fencing, the landscaping, etc., but, rather, what the plaintiffs actually *told* the Building Department about any such limitations on their access and, as a corollary, what the Building Department understood from the representations made to it by or on behalf of the plaintiffs and the information available to it when it issued the building permit. In other words, it may well be that if the plaintiffs had provided the Building Department with copies of the sort of photographs that were led at trial, they may have brought it home to the Building Department that it was not practically feasible to access the garage from the west side of the house – but they did not do that. Indeed, it is clear they did not. There was no such evidence.

[49] Moreover, for his part, when Mr. Visnjic was asked what conversations he had with the Building Department about access to the garage, he replied, "there was no access" – meaning there was no access from either the west or east side of the house, in his view. The point, however, again, is not whether he himself believed there was no such access from Todd Lane, but whether he *told* Mr. Unis that there was no such access. On this latter and more relevant point, the evidence of Mr. Visnjic is wholly lacking.

[50] In a similar vein, so too is the evidence of Mr. Derose. In examination-in-chief, Mr. Derose was asked whether, in his opinion, one "could … get to this garage either on the

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[3] In cross-examination, Mr. Unis was also asked if he knew that the garage was going to be used to house all of the Visnjics' vehicles, because Mr. Visnjic Sr., Bob, and his mother all had cars. Mr. Unis replied that he did not know that. In fairness, on such points, Mr. Unis would know only that which he was told. There is no evidence from the plaintiffs that they told Mr. Unis they were going to use the detached garage for their primary vehicles. Rather, the evidence of both Mr. Unis and Mr. Visnjic was that Mr. Unis was told the garage would be used to house Bob's hobby cars.

left side of the house or on the right side of the house at 2550 Todd Lane," and he answered in the negative. When asked why that was, he replied because "[o]ne side is lawn and one side is too narrow on one side." But again, apart from what he himself may or may not have believed, the more salient point is what did Mr. Derose *tell* the Building Department. Significantly, Mr. Derose was never asked whether he conveyed his opinion to the Building Department. At the end of the day, there is no evidence whatsoever that Mr. Derose told Mr. Unis or anyone at the Building Department that, in his view, the detached garage could not be accessed from Todd Lane by either the west or the east side of the house.

[51] Thus, the conclusions that Mr. Unis reached after hearing the representations he said he received from Mr. Visnjic and looking at the survey of the property would not have been displaced by anything Mr. Derose said to him – because the evidence indicates Mr. Derose said nothing at all to Mr. Unis about the access to the garage from either the west side or east side of the house.

[52] Apart from accessing the detached garage from Todd Lane by either the west or east side of the Visnjic property, the parties were also asked about what discussions, if any, were had about accessing the detached garage from the rear of the property by way of the Bondy Avenue unopened road allowance. The evidence of Mr. Unis was unequivocal that there was never any such discussion. His evidence was unshaken in cross-examination.

[53] The initial evidence of Mr. Visnjic, given in examination-in-chief, was that he told the Building Department that they were planning to access the detached garage from Bondy Avenue. Asked about the Town's reaction, he offered that it "didn't seem to" cause a problem for the Building Department.

[54] However, tellingly, in cross-examination, when Mr. Visnjic was asked what specific discussions he had with the Building Department about the prospect of accessing the garage from Bondy Avenue, Mr. Visnjic replied that, "it wasn't really a discussion." He said that, "I don't believe it was actually mentioned much." He speculated that, "I'm sure somebody said something at some point" but when asked for particulars of his claim, he replied to the effect that it was now "thirteen years later," i.e., he could not remember any particulars of the discussion. Assessing the whole of Mr. Visnjic's evidence, I am satisfied that his evidence cannot reasonably support a finding that the Building Department was actually told that the Visnjics planned to access the garage from Bondy Avenue.

[55] Mr. Derose was also asked, in examination-in-chief, what was said to the Building Department about how the Visnjics planned to access the detached garage. He replied, "[w]ell, there's a 16-foot door at the rear, that's our access point." He was further asked,

"[d]id you tell them that?" and he answered in the affirmative.[4] He was not cross-examined on the point.

[56] On my view of the evidence, I find it telling that when Mr. Derose was first asked about what discussions were had about access to the garage, he did not speak of what actual discussions were had but, rather, immediately pointed to the configuration of the building, i.e., that the plans called for a 16-foot garage door on the north side of the proposed structure, facing Bondy Avenue. In my view, the clear implication from a reading of Mr. Derose's evidence is that he believed the Building Department ought to have known that such a configuration meant that the garage was to be accessed from the Bondy Avenue unopened road allowance. I return to that supposition below.

[57] On this point, Mr. Unis was cross-examined on whether he recalled Mr. Derose telling him that the plaintiffs planned to access the property from the rear, using Bondy Avenue. Consistent with his previous evidence, Mr. Unis maintained that he could not recall having any discussions with Mr. Derose.

[58] However, significantly, Mr. Unis went on to explain that if anyone had specifically asked him to have access from an unopened road allowance, it would have stuck in his mind, and he would have then had discussions with the Chief Building Official, "and I know I did not have that conversation." I wholly accept that evidence, and I return to it below.

[59] Moreover, in the same line of cross-examination, when Mr. Unis was again challenged on his evidence that he was told by the Visnjics that they would have sufficient room on the west side of the house to access the garage and that the available allowance was inconsistent with the requirements of the Zoning By-Law, Mr. Unis replied, "you're speaking of two different things. I'm not saying that … the distance is adequate and I'm not saying that it's inadequate, what I am saying is that there was no request or any discussion for access to the rear road allowance." Mr. Unis was unshaken in cross-examination in this regard.

[60] The plaintiffs attempted to argue, in their closing submissions and in their evidence, that because of the fact that the construction drawings for the detached garage showed that they planned to have a double-length, 16-foot garage door located on the north side of the structure, i.e., facing Bondy Avenue, the Town ought to have known that the Visnjics intended to access the garage by way of the Bondy Avenue unopened road allowance.

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[4] While I would not rest my decision on this point alone, I note that the witness had given a compound answer, i.e., that (1) there is a 16-foot door at the rear of the garage, and (2) "that's our access point," and when he was then asked if he told the Building Department "that," it is not entirely clear whether the witness meant he told the Department (1) or (2) or both. Moreover, there is a difference between the witness saying that the 16-foot door at the rear of the garage was the access point and saying that the garage would be accessed from Bondy Avenue. He gave evidence of the former but not of the latter. The distinction is significant given especially the understanding of Mr. Unis that, with the 26-foot clearance from the rear lot line, there was enough space at the back for the property for the Visnjics to access the rear garage doors by approaching from the south, swinging around from the west side of the structure, then turning around into the garage.

[61] Mr. Unis was asked, in examination-in-chief, whether he had any concerns about access to the garage based on the application of the plaintiffs, and his evidence was that, upon reviewing the submitted construction drawings, he noted that the garage doors were located on the north face of the building. That raised some questions in his mind. Mr. Unis said that he reviewed the issue with Mr. Visnjic, who said that his mother did not want to look at the garage doors from the house, that it would not be an attractive view, and that they preferred to have the garage doors on the back of the building. Mr. Unis accepted that answer.

[62] Moreover, Mr. Unis also said that he reviewed the issue with the Chief Building Officer, Mr. Naccarato, who decided that there was nothing in the By-Law that would prevent the proposal. Specifically, the plans indicated that the rear/north side of the building would be situated 26 feet from the rear lot line, and that such clearance provided more than enough space for the Visnjics to access the garage from Todd Lane to the south, approach the detached garage from the west side of the structure, and then swing around to the rear of the garage to enter the structure from its northern front. In other words, the explanation given to them by the Visnjics made sense – that Ms. Visnjic did not want to look at the 16-foot garage doors – especially when they had more than enough space at the back for the property, with its 26-foot clearance from the rear lot line, to swing around from the west and access the proposed rear garage doors.

[63] In sum, I do not find, as suggested by the plaintiffs, that the mere fact that the drawings for the detached garage indicated that the 16-foot, double-door was to be located on the north side of the building, facing Bondy Avenue, ought to be taken as a representation to the Town that the plaintiffs intended to access the garage from the unopened road allowance. There was a perfectly reasonable alternative explanation for the contemplated access.

[64] Considering all of the evidence, I find that the Town was not aware that the Visnjics intended to access their detached garage using the Bondy Avenue unopened road allowance.

[65] As Mr. Unis reviewed the application, he made his own notations on the application material. He filled in such basic information as the lot number of the property, the assessment roll number of the property, the probable cost of the proposed improvement and the resultant permit fee, etc. As indicated above, Mr. Unis clarified on the drawings that the building was "to be used for residential storage only," he noted that truss drawings were required, he made notations on the slope requirements for the roof, and he made notations of certain requirements on the foundation plan. All of these notations were made, in my view, in keeping with the actions of a careful and prudent building inspector.

[66] In that same vein, just as, for example, Mr. Unis made an express notation on the construction drawings that the building was to be used "for residential storage only" where he had a concern that the plaintiffs not use the garage for commercial purposes, it strikes me that if it had been brought home to him that the Visnjics intended to access the

detached garage using Bondy Avenue, Mr. Unis would have made a notation somewhere that the plaintiffs were not permitted to access the garage using an unopened road allowance. Mr. Unis' evidence is that he would have consulted Mr. Naccarato if there was such a request, and he does not remember any such conversation. And he made no such notation on the construction drawings or application permit.

[67] For all of these reasons, I conclude that the preponderance of evidence overwhelmingly establishes that the plaintiffs did not indicate or make it clear to the Town that they intended to access the proposed detached garage from the rear Bondy Avenue unopened road allowance.

[68] When the building permit was picked up by Mr. Derose, he signed for it as the "applicant." I attach no legal relevance to this point. It is not disputed that on the application form applying for the permit the "Property Owner" was shown as Mr. Visnjic Sr., the "Applicant" was shown as "Same as Owner," and the application form itself was signed by Mr. Visnjic Sr. Clearly, Mr. Derose simply picked up the permit and signed for it as agent of Mr. Visnjic Sr.

[69] As referenced above, construction began on the garage after the permit was issued. Mr. Derose did the foundation work and the Visnjics and various friends of the family completed the work. The structure was standing with a roof by February 2004, and the family finished work on the siding by the end of June 2004. The detached garage has plumbing, sewage, electrical, and gas service; it has a toilet, roughed-in plumbing for a sink, a roughed-in shower, and in-floor heating (which was never completed). Evidence of the cost of the construction varies from $35,900 to almost $52,900; however, it is clear that the costs were considerable for the family.

[70] I accept the evidence of Mr. Visnjic that for the purposes of the construction of the garage, the construction crews and construction vehicles used the Bondy Avenue unopened road allowance to access the rear of the property. I also accept Mr. Visnjic's evidence that at least some of the Building Department officials who conducted the various inspections of the construction (which did not include Mr. Unis) also used Bondy Avenue to attend at the property.

[71] While the plans originally submitted with the plaintiffs' application for the building permit indicated that the detached garage would have a 26-foot clearance from the north side of the building to rear lot line, the plaintiffs made a mistake in their measurements. The evidence of Mr. Visnjic was that to mark the north side of the garage, he measured 26 feet back or south from what he took to be the property line, as indicated by the fence line on the northern-most part of the neighbouring Harris property. What he did not know was that the Harris fence was actually built 13 feet encroaching onto the Bondy Avenue unopened road allowance. The result was that the Visnjic's detached garage was actually built with only a 13-foot clearance from the lot line to the north. It was, however, as Mr. Unis allowed in his evidence, "an honest mistake."

[72] The evidence of Mr. Visnjic was that at about the same time that construction on the garage was finished, the family also put in an above-ground swimming pool. Mr. Visnjic admits that the plaintiffs did not obtain a permit from the Town for the pool; his evidence was that he did not believe a permit was required for an above-ground pool. The evidence of Mr. Unis was that a pool enclosure permit from the Town is required, but one was never applied for or issued to the plaintiffs.

[73] In terms of the plaintiffs' actual use of the garage once constructed, the evidence of Mr. Visnjic Sr. (taken on examination-for-discovery) was that 60 per cent of the garage space was used to house Bob's hobby cars and the remaining 40 per cent was used for general storage of gardening supplies and equipment, pool equipment, tools, bicycles, lawn furniture, picnic table, etc.[5]

[74] As well, Bob Visnjic owned a motor-home, which he parked at the rear of the property, on the north side of the detached garage. Although not in evidence, at some point in time, the plaintiffs erected a chain-link fence on the northern lot line of their property, separating it off from Bondy Avenue.

[75] The uncontradicted evidence is that, prior to the Town's action in 2007, the Bondy Avenue unopened road allowance had been used by many people in the neighbourhood for several years. In particular,

a. the evidence of the plaintiffs, as given by Mr. Visnjic Sr. at discovery, was that he estimated he himself would use the unopened road allowance to drive his vehicle behind the garage "[a]nywhere from once a day to four times a day"; [6]

b. at trial, Bob Visnjic testified that all of the residents of the homes located at 2540 through to 2670 Todd Lane used the Bondy Avenue unopened road allowance to various extents; and

c. the evidence of Mr. Guy Santarossa, who resides at 2660 Todd Lane and has done so continuously since 1997, was that he would use the Bondy Avenue and Ninth Street unopened road allowances, particularly in the summer, to access the rear of his property in order to maintain and service his property and his cars. In addition, Mr. Santarossa testified, as did Mr. Visnjic, that he regularly took various steps to maintain the unopened road allowance behind his property, including clearing various debris from the woods, removing refuse from the lands, and cutting the grass. Like Mr. Visnjic, not only did Mr. Santarossa undertake such activities himself, he also observed many neighbours doing the same. Speaking for himself, Mr. Santarossa explained that he cut the grass and maintained the lands on the unopened road allowance behind his property because he did not want to have

[5] Exhibit no. 11, tab 26, transcript of the examination-for-discovery of Bogoljub Visnjic taken January 21, 2010, p. 170, QQ. 412-415.
[6] Exhibit no. 11, tab 26, transcript of the examination-for-discovery of Bogoljub Visnjic taken January 21, 2010, p. 167, Q. 390.

> overgrown woodland immediately abutting his property; in effect, he maintained what he called "a buffer" between his property and the woods to the north of Bondy Avenue, saying he kept the unopened road allowance "all groomed. It looked like a park, groomed grass … that we had cut and maintained." The neighbours also tried to police the land and stop other residents who did not live in the neighbourhood from dumping discarded items onto the unopened road allowances, often to no avail.

[76] As referenced above, beginning in October 2005 and continuing throughout 2006, Ms. Harris lodged various complaints, both written and oral, with the Town about the Visnjic's use of the detached garage and their property. Those complaints involved various allegations, including that the Visnjics were using their detached garage for commercial purposes, that Bob Visnjic was running an auto-repair shop business out of the garage, that there were some 15 to 20 motor vehicles on the property and the Bondy Avenue unopened road allowance, that cars were running in and out of the Visnjic property every few minutes, etc. There were traffic complaints. There were noise complaints. There was a multitude of complaints. The Building Department was contacted frequently. Even the police department was contacted, on at least one occasion, and dispatched out to the Visnjic property.

[77] In response to the complaints, the Town properly directed its Compliance Officers to investigate. The officers attended at the property and conducted their investigations. There was much time devoted to this issue at trial, but to cut through it, it is a fair summary of the evidence to say that the observations of the By-Law Officers did not substantiate the merits of Ms. Harris' complaints.

[78] However, as referenced above, what was substantiated was the observations of the Compliance Officers that the Bondy Avenue and Ninth Street unopened road allowances were being used in ways that raised concern with Town officials. Among other things, there was a level of vehicular traffic on the unopened road allowances that was of concern to the Town.

[79] And, in my view, from that point on, the issue took on larger dimensions, which transcended the Visnjic property and the merits of Ms. Harris' complaints. The issue then resonated at the entire municipal level. The clear inference that I draw is that Town officials then began to think of the issues against the larger backdrop of the public's use of the 105 kilometres of unopened road allowances located throughout the Town.

[80] Accordingly, the Town authorized the placement of the concrete barriers on the Ninth Street unopened road allowance at Todd Lane on January 3, 2007. On January 17, 2007, Mr. Larry Silani, the Director of Planning for the Town, delivered a report to Town Council recommending that Council authorize Town administrative staff to meet with the Town Solicitor and the Town's insurance agent "for the purpose of reviewing the Town's existing policies, practices and procedures pertaining to the public use of existing unopened road allowances, and to report back to Council with recommendations … to

address relevant legal, insurance, servicing, and financial implications to the Town of LaSalle."

[81] The erection of the concrete barriers was of great concern to the residents of Todd Lane, who were angered by the Town's direction on the issue, as was apparent from the evidence of not only Mr. Visnjic but also Mr. Santarossa.

[82] Indeed, para. 10 of the plaintiffs' statement of claim alleges that "without notice" to the plaintiffs or any other residents in the Todd Lane neighbourhood, the Town blocked the access of the residents by placing the concrete barriers on the Ninth Street unopened road allowance adjacent to Bondy Avenue. The plaintiffs maintained that position at trial.

[83] However, the plaintiffs' position in their pleading is starkly contradicted by the evidence given at trial. Indeed, Mr. Visnjic admitted in examination-in-chief that he received a phone call from Mr. Bob Hayes (the Town Engineer) in October 2006, advising that the Town was considering blocking off access from the Ninth Street allowance.

[84] Further, it is not disputed that the Town delivered a letter to the plaintiffs, dated October 13, 2006, advising that the Ninth Street unopened road allowance would be barricaded off as of November 1, 2006. The letter explained that, this "action is being taken due to increased activity that is occurring on the Bondy Street road allowance." Further, the letter specifically advised the plaintiffs that, "[s]hould you have any vehicle now sitting on the unopened road allowance it would be advisable to remove these vehicles before this date."

[85] Given the clear evidence that the Town gave notice that access to the Bondy Avenue unopened road allowance would be cut off, I am troubled by para. 10 of the plaintiffs' pleading and their maintenance of that position at trial. In my view, it goes to their credibility.

[86] Moreover, I am also troubled by the reaction of the plaintiffs to the notice given by the Town. That is, in the face of the Town's express written notice that access from Bondy Avenue would be cut off within a matter of mere weeks, coupled with the Town's advice that they may wish to remove any vehicles that may otherwise become trapped, the plaintiffs apparently decided that they did not have to move the hobby cars out of the garage or Bob Visnjic's motor-home at the rear of the property. In some respects, their response smacks of a certain degree of defiance.

[87] At its regular public meeting of January 23, 2007, Town Council directed its administrative staff to review the Town's existing policies, practices, and procedures pertaining to the public use of the existing unopened road allowances and to report back to Council with recommendations for addressing the Town's legal, liability, insurance, servicing, and financial concerns.

[88] In anticipation of the Council meeting on January 23rd, Mr. Larry Silani (the Town's Director of Planning) and Mr. Bob Hayes (the Town Engineer) had delivered a report to members of Council dated January 17, 2007. That report speaks to how the issue of the

use of the unopened road allowances had become a Town-wide issue. The report concludes with the following comments:

> As Council knows, there are many private properties located in LaSalle which abut unopened road allowances. Over the years there have been instances where owners of such properties have requested approval from Council to utilize these unopened road allowances for vehicular access purposes. In certain instances, such access has been allowed by Council with legal encroachment agreements being prepared and entered into with the Town to permit individual driveways. In other instances, requests to use such road allowances have been denied. There are numerous legal, financial, servicing and insurance-related issues arising from the unauthorized use of unopened road allowances. Consequently, should Council wish that Town Staff undertake a comprehensive review of our current policy as it pertains to the use of existing unopened road allowances, we would recommend that Council authorize Town Staff to meet with the Town Solicitor and the Town's Insurance Agent, and to report back to Council with corresponding recommendations to address this matter on a Town-wide basis.

[89] At the January 23rd Council meeting, many of the residents of the Todd Lane neighbourhood, including Mr. Visnjic, Mr. Santarossa, Ms. Harris, and others, appeared before Council and spoke to the impact of the Town barricading access to the Ninth Street and Bondy Avenue allowances. The minutes of the meeting indicate that Mr. Hayes "noted that since use of the road was brought to the attention of the Town, and recognizing that motor vehicles are not permitted on unopened road allowances, the right-of-way was blocked in order to avoid liability issues."

[90] The results of the comprehensive review that Town Council directed be undertaken at its January 23rd meeting are reflected in a report that was prepared by Mr. Silani, Mr. Hayes, and Ms. Christine Riley (Town Solicitor). The report recommended, *inter alia*, that Council use the powers available to it under s. 35 of the *Municipal Act, 2001*,[7] to enact a by-law prohibiting all forms of motor vehicles on all unopened road allowances. The report explained that:

> By virtue of section 35 of the *Municipal Act, 2001*, municipalities have now been given the authority to pass by-laws that would remove or restrict the common law right of passage the public has enjoyed over highways. The municipality can even restrict the common law right of access to a highway by an owner of land abutting the highway. The Town is therefore now in a position where it can pass a by-law to remove all rights of any member of the public to cross over or along an unopened road allowance, or

[7] *Municipal Act, 2001*, S.O. 2001, c. 25.

> to only permit the public to use unopened road allowances as pedestrians. The Town may also prohibit the use of these unopened road allowances by any kind of motor vehicle, including cars, snowmobiles, all-terrain vehicles, dirt bikes, etc. … Municipalities have been given this authority to ensure that limited tax dollars are used in a cost-effective manner, and the communities affected are better able to protect themselves from unnecessary liabilities.

[91] The report clearly reflects the concerns of senior administrative staff that the Town not be exposed to "unnecessary liabilities." In that vein, the report considered simply removing the concrete barriers without conditions, but it rejected that option for the following reasons:

> The Town's liability policy covers any personal injury or property damage claim made against the Corporation where the injury occurred on any land owned or leased by the Town, which would include unopened and unassumed road allowances. However, in instances where the Town has already placed a physical barrier to prevent vehicular traffic from using an unopened road allowance, the Town's insurer has advised Council and Town Staff that by removing the barricades now, the abutting property owners may assume that they have been given an implied permission to begin to use the unopened road allowance again as they had before the barricades were put in place, which position could cause problems and liability concerns if it became necessary to defend the Town against a claim for damages at some future time.

[92] The report also recommended that the contemplated by-law enable Council to make exceptions on a case-by-case basis through a formal legal encroachment agreement. The report explained that option as follows:

> [Should an affected property owner] wish to obtain permission to drive a motor vehicle on one or more of these unopened road allowances for a specified activity, Council may consider such a written request provided [the owner is] willing to pay all of the costs associated with the preparation and execution of a legal encroachment agreement for a specific use, with a corresponding insurance policy being purchased by the property owner and kept in force for the term of the encroachment agreement – in order to indemnify and hold harmless the Corporation in the event of an accident while using a motorized vehicle on the named unopened road allowance.

[93] At its regular public meeting of April 10, 2007, Council adopted a resolution concurring with the senior staff recommendations set out in the report of April 4, 2007.

[94] Ultimately, on May 8, 2007, the Town enacted By-Law No. 6807 to restrict the public's use of unopened road allowances and, in particular, to prohibit any person from entering

onto or using any motorized vehicles on unopened road allowances within the Town without Council's permission, which permission would require the execution of a written encroachment agreement containing various terms and conditions.

[95] At its regular public meeting of July 10, 2007, Council adopted a policy setting out when motorized vehicle use of unopened road allowances would be permitted. That policy provided that encroachment agreements or leases would be granted only where an abutting owner wishes to construct a private driveway from an exterior side yard onto an unopened road allowance, and that owner has entered into an encroachment agreement or lease with the Town addressing the liability and insurance issues.

[96] Over the period from April to July 2007, the Visnjics approached the Town at various times and asked them to remove the concrete barriers from the Ninth Street unopened road allowance and/or grant them an exception to use the unopened road allowances at no cost to them. Those requests were denied by the Town. The Visnjics' requests that they be permitted access at no cost to them were inconsistent with the Town's exemption policy, which contemplated an affected owner entering into an encroachment agreement and arranging for liability insurance. Moreover, at one point in June 2007, Mr. Visnjic Sr. asked Council for a "write-off of part of property tax for garage building on our property that Town of LaSalle preventing us to use." That request was also denied by Council on the basis that it had no legislative authority to act on the request.

[97] It was in the context of addressing one of the requests from the Visnjics that they be granted access that senior administration asked Mr. Unis for a background explanation of the circumstances leading up to the issuance of the building department. In response, Mr. Unis prepared a memorandum to Mr. Silani dated May 4, 2007, in which Mr. Unis explained that:

> Bogoljub Visnjic applied for a building permit on September 22, 2003, for a detached garage to be located at the northerly portion of his property on 2550 Todd Lane.
>
> The site plan indicated the building to be located 26 feet from the rear lot line, with the garage door to be located at the rear of the building (see attached).
>
> *Through discussion with Mr. Visnjic and his son Bob, he indicated that he did not want to view the garage door from his residence and that he had plenty of room to drive a vehicle from behind the building, through his property and to Todd Lane from the existing driveway at the west side of his property*.
>
> The use of the proposed building was also discussed, clarifying that the building was to be used as an accessory to the residence for personal use only, and that no commercial (repair business) was allowed. Mr. Visnjic indicated that he restored his own personal vehicles as a hobby only and would store them in the garage.

> Building permit # 8403 was issued September 29, 2003 for the detached garage.
>
> Upon review of the 2004 InfoLaSalle aerial photo (attached), it was determined that the building was located less than 26 feet from the lot line (approx. 13 feet), and that Mr. Visnjic was accessing the building from the unopened road allowance at the rear of the property. [Emphasis added.]

[98] The content of the memorandum from Mr. Unis is consistent with, and corroborates, his testimony at trial. Further, I note that the memorandum was prepared more than an entire year before the action here was commenced – at a time when the recollection of Mr. Unis would not have been tainted by the spectre of litigation.

[99] As referenced above, the plaintiffs commenced this action against the Town on July 10, 2008.

Positions of the Parties

[100] The plaintiffs rely on the equitable doctrine of proprietary estoppel and/or negligent misrepresentation and seek damages for, *inter alia*, expenses incurred in the construction of their storage garage.

[101] In particular, as clarified by counsel for the plaintiffs in final argument, the plaintiffs claim:

a. damages in the range of $35,900 to $45,000, representing their costs of the construction of the garage;

b. compound interest on the damages for their construction costs at the rate of 6% per annum;

c. damages in the amount of $31,000, representing the alleged diminution in the value of the property because of the lack of access to the property from the unopened road allowances; and

d. punitive damages in the amount of $25,000.

[102] The Town denies that the plaintiffs are entitled to any of the relief sought. The Town takes the position that the plaintiffs are entirely responsible for their own damages, as the plaintiffs misled the Town or omitted to inform the Town as to how they actually intended to access the garage. Further, the Town states that the By-Laws, resolutions, and decisions it made with respect to prohibiting the use of the unopened road allowances at issue in this proceeding were made in good faith.

[103] In my view, it is also appropriate to clarify what this proceeding is *not* about.

[104] First, this proceeding does not engage any review or challenge to the Town's ability or authority to enact By-Law No. 6807. This is not a proceeding to quash the By-Law. The plaintiffs have made no claim that the Town did not have jurisdiction to enact the By-Law. In keeping with that position, in final argument counsel for the plaintiffs repeatedly submitted that the plaintiffs do not want an open public road at the Bondy Avenue unopened road allowance. Moreover, the plaintiffs did not press their claim for a prescriptive easement, as originally pled in their statement of claim. Counsel made no submissions in final argument in support of any claim for an easement; counsel's submissions were limited to the damages claim only, as itemized above.

[105] Second, as I have referenced above, this action is not about the merits of the complaints launched with the Town by Ms. Harris. Much time at trial was devoted to whether there was any basis for Ms. Harris' complaints against the plaintiffs. However, given the manner in which the plaintiffs have pled their claims, nothing legally turns on the merits of the neighbour's complaints. This is not a case of a personal vendetta by the Town against the plaintiffs. This is not a case where a neighbour's dispute was taken up by the Town and championed against another neighbour. That is not supported by the evidence. As I have outlined above, the factual relevance of the complaints of Ms. Harris is that they attracted the attention of the Town to larger issues, which the Town then proceeded to address at the municipal level.

[106] Finally, in my view, despite the considerable time at trial devoted to the issue, this case is also not about the proper environmental designation of the lands located to the north of the Visnjic property, including the Bondy Avenue unopened road allowance. The position of the Town is that those lands are designated Natural Environmental in the Town's approved Official Plan, since they have been identified by the Province of Ontario as being part of the Spring Garden ANSI (Area of Natural Scientific Interest). The plaintiffs dispute that. In my view, I am not required to determine the correct designation. The Town's belief or position may be relevant to some aspects of the factual narrative in this case, i.e., in explaining why the Town officials took some of the actions that they did; however, again, given the manner in which the plaintiffs have pled their action, nothing legally relevant turns on whether the Town is or is not correct in its position on the environmental designation of the lands in question.

[107] That said, I should say in passing that I am somewhat concerned about what would appear to be the uneven enforcement measures adopted by the Town in relation to their understanding of the environmental designation of the lands in question. That is, the evidence is clear that the Town directed the Visnjics to cease cutting the grass behind their property. The Town took the position that because the lands were designated Natural Environment, they must remain in their natural state to be managed for wildlife enhancement and conservation purposes. In particular, the Town issued a written direction to the Visnjics dated July 4, 2008, directing them to stop cutting the grass on those lands. The state of the evidentiary record is incomplete and does not permit a finding as to whether other residents in the Todd Lane neighbourhood also received similar directives and written warnings from the Town. That said, it would appear clear from many of the photographs tendered at trial that other residents in that neighbourhood

were in fact cutting the grass behind their properties as well. Again, given the state of the evidence before me, I am unable to make any definitive findings of differential treatment by the Town. But the question surely arises in the mind of anyone viewing the photographs tendered.

Analysis

Proprietary estoppel

[108] Proprietary estoppel is a form of promissory estoppel and, in appropriate circumstances, may give rise to a cause of action. The essential elements of proprietary estoppel are:

a. an owner of land induces, encourages, or allows the claimant to believe that he has or will enjoy some right or benefit over the owner's property;

b. in reliance upon this belief, the claimant acts to his detriment, to the knowledge of the owner;

c. the owner seeks to take unconscionable advantage of the claimant by denying him the right or benefit that he expected to receive.[8]

[109] Where the essential elements are established, the court may grant relief that is either positive or negative in nature. In the former context, the court may order the owner to grant or convey to the claimant some estate, right, or interest in or over the land, to pay appropriate compensation to the claimant, or to act in some other way. In the latter context, the court may order that the owner be restrained from asserting his legal rights or prohibited from taking certain action.[9]

[110] In the instant case, the evidence does not support the finding that any of the essential elements have been met in this case.

[111] In closing argument, counsel for the plaintiffs submitted that the Town expressly induced the Visnjics to build the detached garage. I specifically asked counsel what was the inducement. The plaintiffs' position is that the inducement of the Town was, in effect, a representation to the plaintiffs that if they built the garage, they could use the Bondy Avenue unopened road allowance to access the garage.

[112] Respectfully, the evidence does not support that position; indeed, the evidence directly contradicts it.

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[8] *Schwark Estate v. Cutting*, 2010 ONCA 61, 316 D.L.R. (4th) 105, at paras. 16 and 34; and *Clarke v. Johnson*, 2014 ONCA 237, 371 D.L.R. (4th) 618, at para. 52. See also *Hawes v. Dave Weinrauch and Sons Trucking Ltd.*, 2017 BCCA 114, at paras. 30-31.

[9] *Eberts v. Carleton Condominium Corp. No. 396*, 2000 CanLII 16889 (Ont. C.A.), at para. 23, leave to appeal refused, [2000] S.C.C.A. No. 623.

[113] It cannot be said that, by issuing the building permit, the Town induced, encouraged, or allowed the claimant to believe that they would enjoy a right of access over the Bondy Avenue unopened road allowance. The Town made no such representation, express or implied. I have found that the Town was not aware that the Visnjics intended to access their detached garage using the Bondy Avenue unopened road allowance. I have found that the evidence overwhelmingly establishes that the plaintiffs did not indicate or make it clear to the Town that they intended to access the proposed detached garage from the rear Bondy Avenue unopened road allowance. The Town understood, consistent with the representations of the plaintiffs to Mr. Unis, that the Visnjics would be accessing the detached garage from Todd Lane, using the existing driveway on the west side of the property.

[114] The second element of the doctrine of proprietary estoppel is also not met here. It may be that the plaintiffs acted to their detriment in building the garage, and it may also be that the Town should be deemed to have at least constructive knowledge of the plaintiffs' detrimental acts, in that, by issuing a building permit for the detached garage, the Town could not disclaim any knowledge that the plaintiffs had gone ahead and actually built the detached garage.

[115] However, it cannot be said that the plaintiffs built the garage in reliance on the belief that the Town would permit them to use the Bondy Avenue unopened road allowance. I rather suspect that they knew that the Town would in fact not permit such use. In any event, reliance must be reasonable. Where, as here, the plaintiffs did not bring it home to the Town that they intended to access the garage using the unopened road allowance, they cannot argue that it was reasonable for them to have regarded the Town as having given tacit approval for them to use the unopened road allowance to access the garage. Moreover, where, as here, the plaintiffs advised the Town that they were going to access the garage from Todd Lane using the existing driveway on the west of the property, they cannot be said to have any reasonable belief that the Town was allowing them to use the unopened road allowance for access.

[116] Finally, the third element of proprietary estoppel is also not satisfied here. The Town did not seek to take unconscionable advantage of the plaintiffs by erecting the concrete barriers on the Ninth Street unopened road allowance and prohibiting the Visnjic's access to their garage from the unopened road allowances.

[117] Where, as here, the plaintiffs did not bring it home to the Town that they intended to access their garage from the Bondy Avenue unopened road allowance, they cannot be heard to complain of unconscionability. In taking steps to prohibit vehicular access over the unopened road allowances, including the enactment of By-Law No. 6807, the Town did not seek to take advantage of the plaintiffs. Rather, in my view, the Town utilized its legitimate powers under s. 35 of the *Municipal Act, 2001*, and acted in good faith to address its legitimate concerns regarding the numerous legal, financial, servicing, and insurance-related issues arising from the unauthorized use of unopened road allowances.

[118] As our Court of Appeal said in *Schwark Estate v. Cutting*, "there is nothing unconscionable about a property owner, who, having permitted his neighbour to use his property for a time, withdraws that permission."[10]

[119] A cause of action based on proprietary estoppel cannot succeed on the facts of the instant case.

Negligent Misrepresentation

[120] The alternative claim of negligent misrepresentation was neither pressed nor raised by plaintiffs' counsel in closing argument before me: however, I address it here for the sake of completeness because it was pled in the statement of claim.

[121] In my view, there is no merit to any claim based on negligent misrepresentation.

[122] In its seminal decision in *Queen v. Cognos Inc.*, the Supreme Court of Canada described the five general elements of the tort of negligent misrepresentation as follows:

a. there must be a duty of care based on a "special relationship" between the representor and the representee;

b. the representation in question must be untrue, inaccurate, or misleading;

c. the representor must have acted negligently in making said misrepresentation;

d. the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

e. the reliance must have been detrimental to the representee in the sense that damages resulted.[11]

[123] Leaving aside the other required elements, I reject the notion (as referenced in para. 15 of the statement of claim) that by issuing the building permit to the plaintiffs, the Town misrepresented to them that they would be able to access their garage by using the unopened road allowances. As I have explained in para. [113] above, the Town made no such representations.

[124] Further, as I have concluded in para. [115] above, the plaintiffs cannot say they reasonably relied on the alleged representations of the Town, when they did not bring it home to the Town that they intended to access the garage using the unopened road allowances.

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[10] *Schwark Estate v. Cutting*, at para. 38.
[11] *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, at p. 110.

[125] This court has said, in the municipal context, that responsibility rests with the plaintiff to ensure that there is a "full and frank" exchange of information with regard to a proposed project or development. Where a plaintiff does not fully share its intentions or omits a critically important factor that may jeopardize approval of their project, there will be no finding of negligent misrepresentation on the part of municipal officials.[12]

[126] The plaintiffs here have failed to establish the elements of negligent misrepresentation.

Punitive Damages

[127] The plaintiffs claim $25,000 in punitive damages because of the treatment they received by the Town.

[128] The Supreme Court of Canada has held that punitive damages should "receive the most careful consideration and the discretion to award them should be most cautiously exercised."[13] The courts should resort to punitive damages in exceptional cases only.[14]

[129] There is no free-standing cause of action for punitive damages. As the Supreme Court has said, "punitive damages are not at large."[15] Rather, an award of punitive damages can be supported only by a successful finding of liability on a cause of action.

[130] In that vein, in cases like *Vorvis* and *Whitten*, the Supreme Court has developed an "independent actionable wrong" requirement. The Court has said that, "[t]he only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff."[16]

[131] As I have found that the plaintiffs have not made out their claims for damages based on proprietary estoppel or negligent misrepresentation, I also dismiss the claim for punitive damages. In the circumstances of the instant case, there is no independent actionable wrong supporting the claim for punitive damages.

[132] Moreover, it is only an extreme type of conduct on the part of a defendant that merits an award of punitive damages. The nature of the conduct has been variously and colourfully described in the authorities,[17] but it must be "extreme in its nature and such that by any

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[12] *Gatta Homes Inc. v. St. Catharines*, [2009] O.J. No. 5058, 90 R.P.R. (4th) 40 (S.C.J.), at paras. 165-166.
[13] *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, at pp. 1104-5. See also *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 68.
[14] *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 69. See also *Honda Canada Inc. v. Keays*, at para. 68.
[15] *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 200; and *Whiten v. Pilot Insurance*, at para. 98
[16] *Vorvis v. Insurance Corp. of British Columbia*, at p. 1106. See also *Whiten v. Pilot Insurance*, at para. 78; and *Honda Canada Inc. v. Keays*, at para. 68.
[17] "These include malicious, high-handed, arbitrary, oppressive, deliberate, vicious, brutal, grossly fraudulent, evil, outrageous, egregious, callous, disgraceful, wilful, wanton, in contumelious disregard of the plaintiff's rights, or in disregard of 'ordinary standards of morality or decent conduct.'" S.M. Waddams, *The Law of Damages*, loose-leaf (updated to release no. 25, November 2016), (Toronto: Thomson Reuters, 2016), at para. 11.210

reasonable standard it is deserving of full condemnation and punishment."[18] In *Honda Canada Inc. v. Keays*, the Supreme Court held that "punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own."[19]

[133] The facts of the instant case demonstrate no such conduct. While the plaintiffs may have perceived that they were being singled out for treatment, the critical acts of the Town, in placing the concrete barriers on the Ninth Street unopened road allowance at Todd Lane and in passing its By-Law No. 6807, were motivated by numerous concerns that Town officials held in good faith for the legal, liability, financial, servicing, and insurance-related implications arising from the unauthorized use of the unopened road allowances.

[134] As such, the claim for punitive damages must also be dismissed.

Limitation Period

[135] In para. 40 of its statement of defence, the Town pleads that the plaintiffs' action is statute-barred by the two-year limitation period provided in s. 4 of the *Limitations Act, 2002*.[20] Although the issue was neither pressed nor raised in the defendant's closing argument before me, it is appropriate to address the limitations issue for the sake of completeness.

[136] In my view, there is no merit to the Town's reliance on the limitation period.

[137] It is common ground that the building permit was issued on September 29, 2003. In para. 40 of its defence, the Town pleads that construction on the detached garage was completed in 2003. However, the evidence of Bob Visnjic at trial was that they finished the siding on the garage in June 2004; I accept his evidence that construction of the garage was completed in 2004.

[138] That said, the question of when the construction was completed is beside the point.

[139] That is, I reject the apparent position of the defendant that, for the purposes of the commencement of the limitation period, the relevant date is when the construction of the garage was completed. Respectfully, that submission is misplaced.

[140] The plaintiffs' cause of action did not arise upon completion of construction of the garage. Rather, the gravamen of the plaintiffs' claim is that the injury they suffered was caused by their inability to access their garage from the rear of their property using the Bondy Avenue unopened road allowance.

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[18] *Vorvis v. Insurance Corp. of British Columbia*, at p. 1108.
[19] *Honda Canada Inc. v. Keays*, at para. 62.
[20] *Limitations Act, 2002*, S.O. 2002, c. 24.

[141] Thus, in my view, for the purposes of the limitations period, the relevant date is the implementation of the Town's decision to prohibit use of and entry upon the Bondy Avenue and Ninth Street unopened road allowances. It is common ground that the Town placed the concrete barriers on the Ninth Street unopened road allowance adjacent to Todd Lane on or about January 3, 2007. That is when the injury was sustained, accepting the plaintiffs' theory of the case. In my view, that is when the two-year limitation period began to run.

[142] As such, the two-year period under s. 4 of the *Limitations Act, 2002* did not expire until January 3, 2009. Again, the plaintiffs commenced their action by statement of claim issued July 10, 2008. They did not run afoul of the limitation period.

[143] Accordingly, even if I had found that the plaintiffs had otherwise made out their claim on its merits, I would not have found that the plaintiffs' claim was statute-barred by the *Limitations Act, 2002*.

Conclusion

[144] For all of these reasons, the action of the plaintiffs is dismissed with costs, if demanded.

[145] If the defendant wishes to pursue the issue of costs, and if counsel are unable to agree on the issue, they may file brief written submissions with the court, of no more than five (5) double-spaced pages (exclusive of any costs outline, bill of costs, dockets, offers to settle, or authorities), in accordance with the following schedule:

a. the defendant shall deliver his submissions within twenty (20) days following the release of these reasons;

b. the plaintiffs shall deliver their submissions within twenty (20) days following service of the defendant's submissions;

c. the defendant shall deliver his reply submissions, if any, within five (5) days following service of the plaintiffs' submissions;

d. if any party fails to deliver their submissions in accordance with this schedule, they shall be deemed to have waived their rights with respect to the issue.

Original signed "*Howard J.*"
J. Paul R. Howard
Justice

Released: April 3, 2017

CITATION: Visnjic v. Town of LaSalle, 2017 ONSC 2082
COURT FILE NO.: 08-CV-11411CM
DATE: 20170403

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE ESTATE OF BOGOLJUB VISNJIC and MILENA VISNJIC

Plaintiffs

– and –

THE CORPORATION OF THE TOWN OF LaSALLE

Defendant

REASONS FOR JUDGMENT

Howard J.

Released: April 3, 2017