



Easements

Abandonment and “Non-Use” of Rights of Way— Signs to Watch For

In *Yekrangian v. Boys* 2021 ONCA 629, there was a right of way (“ROW”) registered in the property identification numbers (PINs) for 121 Massey Street, Toronto (“Massey”) and 174 and 176 Strachan Avenue, Toronto, respectively. This particular eight-foot-wide L-shaped easement ran along the north side of Massey, providing access for property maintenance purposes from the road where the street fronted to the rear of the homes on Strachan Road. The owners of the Massey property wanted to build a larger building on the site, which seemed a reasonable proposition for this neighborhood given that the Massey home was a detached bungalow surrounded by semi-detached three-story buildings. However, the proposed construction would have blocked access to the ROW. The Massey owners argued the ROW, although registered on title to all three properties, had effectively been abandoned by the owners of the Strachan properties and, therefore, the applicants sought entitlement to block it.

A right of way is a type of easement. In reviewing the legal test for abandonment of an easement, the court stated that abandonment of an easement must be by release, which may be either actual or intended. In the absence of an actual signed release, “non-use is essential to abandonment” and must include intent on the part of those benefiting from the easement to abandon it. Since no release had been signed, the Massey owners had to prove the Strachan property owners had intentionally abandoned the ROW. For such an intention to be established, a permanent structure would need to have been built on the ROW without the holder of the ROW objecting to its construction. As a corollary, the building of temporary and removeable structures such as a fence and sheds in a ROW does not constitute an intention to abandon a ROW.

On appeal, the applicants successfully argued that 174 Strachan Avenue owners had intentionally abandoned their portion of the ROW as the permanent extension of the rear of the Massey property left only a one-foot gap remaining of the easement. Since the Massey property could not have been extended without the explicit knowledge and agreement of one of the previous 174 Strachan owners, it follows that the said owners must have agreed to abandon the ROW as the resulting gap could no longer be used for servicing the 174 Strachan property. And even though the ROW portion used for servicing the 176 Strachan property was partially blocked by the Massey extension, despite there being a fence and trees blocking this ROW, it was still useable for servicing the 176 Strachan property. As a result, the appellate court ordered that the easement on 174 Strachan be deleted from title and the easement on 176 Strachan be slightly varied to the extent it was blocked.



In essence, when deciding to purchase a property, it is very important to discuss with your lawyer any possible rights of way that may be registered on title to ensure you're fully aware of all of the potential restrictions that may affect any future planned redevelopment of the site.

