



Easements:

Respect Easements Before you Build...or Face the Legal Consequences

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In the case of *Town of Oakville v. Sullivan*, argued before both the Ontario Superior Court of Justice and the Ontario Court of Appeal, there was a dispute over a pool and deck (collectively, the “Pool Amenities”) that was built by the property owners (the “Respondent”) without municipal approval and encroached on an easement owned by Oakville Hydro Electricity Distribution Inc. and the Town of Oakville (collectively, the “Applicant”) and whether said Pool Amenities were required to be removed. The Respondent was aware of the easement on the westerly 10-foot strip of their property but believed it had either been abandoned or actually never used despite it housing an underground hydro conduit.

The language of the easement stated the Applicants had the right in perpetuity to “construct, operate, maintain, replace and repair underground sewers, drains, pipes, conduits, wires and services generally with such above ground accesses, manholes, catch basins, hydrants, service boxes.” At the same time, the property owner was granted the right “to use the surface of the said land for any purpose which does not conflict with the town’s rights hereunder and specifically excluding the planting of any tree and the erection of any building or structure.”

For its part, the Respondent argued that in spite of the easement’s language expressly prohibiting the erection of any building or structure, the Pool Amenities in question did not conflict with the Applicant’s easement rights and, as such, they should not be required to remove them. Moreover, they argued the easement only housed an underground hydro conduit that could be repaired or replaced even with the Pool Amenities being in place. In response, the Applicant disagreed, arguing that the express language of the easement specifically prohibited the construction of any building or structure and, therefore the Pool Amenities should be removed.

The trial judge concluded that as construction of the Pool Amenities was expressly prohibited by the language of the easement, these had to be removed, even though they did not substantially interfere with the Applicant’s easement rights. The appeals court not only agreed with the trial judge’s determination but further noted that the



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easement existed in perpetuity and, therefore, could be used for items, such as underground sewers, that may require use of the easement's surface rights. However, the Court of Appeal disagreed with the trial judge's opinion that the built structure did not constitute substantial interference. The Court of Appeal concluded the language of the easement defined what constituted substantial interference, and its prohibition of the erection of any building or structure should be taken to mean exactly that – any construction whatsoever would substantially interfere with the easement.

The Respondent further argued the Applicant had, in fact, abandoned their rights to the easement's surface since the easement had only ever been used for an underground hydro conduit. This argument was rejected by the Appeal Court since the Applicant continued to use the easement for a hydro conduit. It was also argued that the Applicant had been estopped from enforcing their right to the easement, an argument rejected by both courts as the Applicant had no knowledge of the Pool Amenities construction and, therefore, could not have encouraged their construction.

At De Francesca Law, it has always been our practice to encourage clients to review closely legal title to property to determine specifically what easements to which the property is subject. If an easement exists that may interfere with an intended development, steps should be taken to secure a release of the easement. This often proves to be a time-consuming process as the municipality or other jurisdiction must confirm with multiple city departments whether a particular easement is being used, or if it has, in fact, been abandoned. This Court of Appeal decision makes it abundantly clear that property owners must respect easements and pay attention to the letter of the easement language. To do otherwise will likely result in substantial interference.

