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Controversial Ottawa house has new owner

Home built too close to road may have to be moved back

Unlike the concrete jungle which borders the Toronto waterfront, the waterways of Ottawa are lined with more than 40 km of scenic parkway which offers wonderful cultural landscapes for the residents of the capital.

The National Capital Commission (NCC) goes to great lengths to protect and enhance the historic Queen Elizabeth Driveway, the Rockcliffe Parkway, Colonel By Dr., the Ottawa River Parkway and two newer paths developed in the last 15 years.

The parkways serve as public parks, bike paths, scenic lookouts and tranquil havens from today's urban chaos.

Strict legal guidelines maintain the NCC's standards for the parkways, and residents who violate them do so at their peril.

When an Ottawa judge ordered Sonny Badaan and Jo-Anne Badaan B langer to tear down their new house bordering on the Ottawa River Parkway, they found out the hard way that it just doesn't pay to tangle with the NCC.

Back in March, 2001, the couple purchased a lot at 432 Lochaber Ave. for \$240,000 and proceeded to build a luxury 5,000-square-foot house on the site. Badaan is a successful builder and entrepreneur, and was represented by an Ottawa law firm when he bought the land.

Title to the Lochaber Ave. property is subject to a registered restrictive covenant which requires the main wall of any house on the street to be a minimum of nine metres away from the Ottawa River Parkway.

Through no fault of their own, Badaan and his wife began construction of the house with its main wall only 4.8 metres away from the Parkway rather than the required nine metres.

Badaan's position is that his lawyer failed to disclose to him the existence of the NCC restriction, so he was not aware of the setback requirement.

In April, the NCC took Badaan and B langer to court asking for a declaration that the construction of the nearly finished house was in violation of the restrictive covenant and for an order requiring that the house be demolished or removed to make it comply with the covenant.

By the time work stopped on the project, Badaan had spent \$500,000 on the construction, and could have completed the house for another \$250,000. It was fully framed and virtually complete except for the brickwork and the floors.

When the city of Ottawa issues building permits, it ignores private restrictions like the NCC covenant. As far as Ottawa was concerned, the Badaan house complied with the city's bylaws.

Hoping to avoid the ultimate penalty, Badaan asked the court to vary the restrictive covenant, and offered to pay a substantial fine to express his regret.

Justice Dan Chilcott was obviously troubled by the situation in which the owners found themselves. "I am fully cognizant of the hardship and the mental distress of the respondents [the Badaans]," he wrote in his decision, "as well as the great cost that will follow if the application is granted, and that has given me great concern in arriving at my decision."

Justice Chilcott looked at pictures of the house and decided that if it was allowed to remain standing, its negative impact on the surroundings would be significant. The restrictive covenant, he said, was created in the public interest. Even though the house would still be visible from the parkway if it was moved back another 4.2 meters, the judge decided that it would be "less visible and intrusive than it is in its present location."

In some circumstances, courts have the power to vary or cancel restrictive covenants when they offend the public interest.

Back in 1950, for example, the Supreme Court of Canada voided a restrictive covenant in a 1933 deed which provided that lakefront land in Grand Bend on Lake Huron could never be sold, used, occupied or rented "by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood."

This occurred after the Ontario Court of Appeal approved the restriction, saying it was in place just to assure that the residents were "of a class who will get along together" and did not offend against public policy.

(See "Why racist restrictions no longer apply in land deals," Title Page, March 3, 2001, at <http://www.thestar.com>)

In the Badaan case, however, Justice Chilcott refused to vary or cancel the restriction, or give the owners an exemption from complying with it, saying the NCC's interest and the public interest in the restriction were far greater than that of the owners.

Badaan recently filed an appeal of the court order and the house is still standing today. The latest twist to the tale is that the property has been sold as-is with a closing date of Sept. 28.

The new owner has assumed the problem and rather than demolishing the entire house, may choose to lift it up and move it backward, or demolish about 18 per cent of the main floor to correct the setback requirement.

A source familiar with the case told me earlier this week that Badaan will claim damages against his real estate lawyer for failing to advise him of the restriction.

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