ATTACHMENT #1

COURT FILE NO.: CV-08-368148
DATE: 20090227

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

SAMARKAND INVESTMENTS LTD., MARISA ABBATTISTA, SARRA AFP PROPERTY MANAGEMENT, ENRICO ARPA, JOANNE ARPA, LIEU PHAN, ANGELA SARGGESE, TERESA SARGGESE, GINA REA, LEA REA, MARIA CIOLINO, VINCENZO CIOLINO, VINCENT DE BELLIS AND LINA DE BELLIS

APPLICANTS

- and -

THE CITY OF TORONTO

RESPONDENT

REASONS FOR JUDGMENT

Stewart J.

Released: February 27, 2009

COURT FILE NO.: CV-08-368148
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B E T W E E N:	
SAMARKAND INVESTMENTS LTD., MARISA ABBATTISTA, SARRA AFP PROPERTY MANAGEMENT, ENRICO ARPA, JOANNE ARPA, LIEU PHAN, ANGELA SARGGESE, TERESA SARGGESE, GINA REA, LEA REA, MARIA CIOLINO, VINCENZO CIOLINO, VINCENT DE BELLIS AND LINA DE BELLIS	Joseph Markin, for the Applicants
APPLICANTS	
- and -	
THE CITY OF TORONTO	Andrew M. Stikuts, for the Respondent
RESPONDENT	
	HEARD: February 2, 2009

Stewart J.

[1] The Applicants seek a declaration that they enjoy an interest in certain land being part of property municipally known as 2965 Islington Avenue in the City of Toronto and being Part 73 of Reference Plan number 64R-1977 (the "land") on the basis that they have acquired possessory title to the land as a result of uninterrupted and unimpeded use since 1972. In the alternative, they seek a declaration that they have an unfettered right of way over the disputed land.

[2] At the outset of argument, it was noted that the Respondent municipality was incorrectly named. Accordingly, an amendment was granted to correct the error and change the name of the Respondent to The City of Toronto.

Background

[3] In March 1972, Samarkand Investments Limited ("Samarkand") deeded the ten-foot strip of land in dispute to the Borough of North York for a widening of Islington Avenue. In doing so, Samarkand released all claims upon the land but expressly reserved a right of way until the land was dedicated as a public highway.

[4] It is undisputed that the Committee of Adjustment for the Borough of North York required the transfer of the land as a term of approval for the development of the overall property as a shopping plaza and the severance of the land into smaller separate parcels for the proposed commercial establishments. The stated intent and purpose in requiring the deed of land from Samarkand was to permit the widening of Islington Avenue.

[5] The City argues that there had been public acceptance of this land as a highway since the transfer of the land to the municipality for the widening of Islington Avenue was required by the Committee of Adjustment of the municipality as a condition of approval of the subdivision and development proposal originally put forward by Samarkand. The Land Transfer Tax Affidavit which forms part of the registered deed describes the $2.00 consideration for the transfer as "nominal granted for road widening".

[6] Samarkand extended all standard covenants to the municipality including a covenant for quiet possession of the land.

[7] If there were any doubt as to the acceptance of the land by the municipality for road widening purposes, the City further submits that the land has been specifically dedicated, accepted and established as a public road by means of the passing of a by-law by the municipality. On July 24, 1972, the Borough of North York passed by-law No. 24554 which dedicated the land and established it "as a highway to be known as Islington Avenue".

[8] Since the deeding by Samarkand of the strip of land, the Applicants have used the disputed land for the purpose of parking cars, predominantly those cars owned by customers and clients attending at the shops and businesses in the mall which fronts onto Islington Avenue. The strip has been used for many years as a parking lot and not as a public thoroughfare, according to the evidence submitted on behalf of the Applicants which is not disputed by the City.

[9] In October, 2008, Etobicoke York Community Council passed a motion to recapture boulevards along a portion of Islington Avenue, including that portion in which the land is situate, for the purpose of a beautification program. As a result, the City took steps to outfit the strip of land in dispute with barriers to prevent any parking of cars on the land. I am advised that the City is prepared to entertain the possibility of granting licences to park on the land for a fee.

[10] Following the City's action, this Application has ensued.

Issues

[11] A. Can title by way of adverse possession be acquired over the disputed land?

B. If the answer to A is "Yes", have the Applicants demonstrated the necessary factual basis to support an entitlement to a declaration for adverse possession of the land?

C. In the alternative, do the Applicants have an unfettered right-of-way over the land?

Law and Discussion

[12] As a general proposition, adverse possession cannot be had of a municipal road allowance. The law in this regard is summarized in Rogers, Law of Canadian Municipal Corporations, (2007) at pp. 1189-1190:

> The right of ownership in a highway held by the municipality for the common benefit of the Queen's subjects is of such public character that it cannot be lost by adverse possession over the prescriptive period. This general rule is expressed by the maxim "once a highway always a highway" and has been codified in the *Limitations Act*. There can be no claim of an easement by adverse possession over a road allowance used by adjoining owners for access to a beach since the exercise of such rights are the rights that the public is entitled to it by law. Such use is consistent with its character as a public highway. Adverse possession of Crown land may be recognized after 60 years and in the case of municipal land after 10 years, but this does not apply when the land is included in a road allowance. However, s.16 of the *Limitations Act* has modified the common law because it includes saving words which indicate that prior to 1922 it was possible for an individual to acquire title to road allowances through adverse possession. Thus, if a claimant proves adverse possession for 10 years of a road allowance vested in a municipality prior to 1922, then the claim will not be barred by s. 16 of the Act. But if he cannot meet these criteria, i.e., by failing to show that the road allowance was vested in the municipality, then the claim will be barred.

[13] The limitations provision to which reference is made is section 16 of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15, s. 16 which provides that the time within which a municipality must make an entry or distress, or bring an action in respect of a municipal road allowance or highway is not affected by the provisions of the *Real Property Limitations Act*, save only to any right, title or interest acquired by any person before the 13th day of June, 1922, as follows:

> s. 16 Nothing in sections 1 to 15 applies to any waste or vacant land of the Crown, whether surveyed or not, nor to lands included in any road allowance

> heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922. R.S.O. 1990, c. L.15, s. 16.

[14] As was stated even more bluntly in *Russell on Roads* (2nd ed.) (2008) at p. 176:

> A question frequently asked is: can a person obtain adverse possession (possessory title, squatter's rights), against a municipal public highway? The answer is no. Not since the *Limitations Act* amendment of 1922.

[15] In *Teis* v. *Ancaster (Town)*, the Ontario Court of Appeal summarized the protection afforded municipalities by this legislative scheme, as follows:

> In Ontario, streets, highways and road allowances have been protected from adverse possession or encroachment claims. In *Household Realty Corp.* v. *Hilltop Mobile Home Sales* (1982), 37 O.R. (2d) 508 at p. 515, 136 D.L.R. (3d) 481 (C.A.), Thorson J.Av. cited with approval the following passage from Rogers, Law of Canadian Municipal Corporations, 2nd ed. (1971), vol. 2 at p. 1096:
>
> > The right of ownership in real property, such as a highway, a market or a public wharf, held by a municipality for the common benefit or use of its inhabitants and of the Queen's subjects in general, is of such a public character that it cannot, as a general rule, be lost by adverse possession over the prescriptive period. It is expressly declared by the statute that road allowances cannot be extinguished by adverse possession.

[16] The "public character" of a road does not depend upon the actual use by the public of the entire road. The "road" includes not only the traveled portion but also the ditches and verges and the full extent of the road allowance. The principle "once a highway always a highway" applies to the whole of the land dedicated as a public highway and is not limited to the travelled portion thereof (see: *Re Stager and Township of Muskoka Lakes*, [1989] O.J. No. 3220 (Ont. Div. Ct.)).

[17] Although a private owner of land may dedicate a portion of his or her land to public use as a road in order to establish it as a public highway, and a municipality may by deed of a private party come to "own" the soil and freehold of a highway, the municipality has no resulting and necessary legal obligation to assume road allowances.

[18] Whatever other ways that land can be "opened" as a road, a municipality can do so expressly by passing a by-law to that effect and thus becomes responsible for the road and its maintenance (see: *Hislop* v. *McGillivray (Township)* (1888), [1888] 15 O.A.R. 687 (Ont. C.A.), affirmed (1890), 17 S.C.R. 479 (S.C.C.)).

[19] In my view, there is no doubt that the land in dispute became part of a highway with the passage of by-law No. 24554 on July 24th, 1972 and was accepted as such by the municipality. As a result, the principle of "once a highway, always a highway" applies to this case. The City's title to the road allowance cannot be extinguished or affected by the claims of the applicants, however longstanding and notorious their alleged use or possession might be.

[20] Accordingly, the City has the legal right to carry out its intended works on the land, which forms part of its highway, regardless of any previous use by the Applicants and/or other persons.

[21] Having ruled against the Applicants on their legal entitlement to claim for adverse possession, I consider it unnecessary to address the arguments advanced by the City as to the alleged factual underpinning of the claims of the Applicants. However, in passing, I observe that even if I am wrong in my understanding and application of the law as stated above, it will be a difficult challenge to the Applicants to demonstrate any entitlement to an easement in light of the checkered history of the property and its use by various persons since 1972. I would consider this question to be an issue that likely could only be determined following a trial.

[22] Finally, the Applicants' alternative claim for a right-of-way is equally untenable as a result of the law which protects the municipality from an unfettered or exclusive claim for adverse possession.

Conclusion

[23] For these reasons, I agree with the position advanced by the City that the prevailing law defeats the Applicants' claims. As a result, the application must be dismissed.

Costs

[24] If the issue of costs cannot be agreed upon, I will receive for consideration written submissions from the City within 15 days of the date of release of this decision, and from the Applicants within 10 days thereafter.

Stewart, J.

Stewart J.

Released: February 27, 2009