

# TALES FROM THE TRENCHES

## BY BARRY C. MCGUIRE

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*October, 2011*

### **Who Needs A Real Property Report? Part Two**

This is Part Two of the previous Tale From The Trenches. The facts were that a developer bought an old, small property in my neighbourhood. He knocked it down and poured a new foundation. As I'm going for my evening walk and observing the new construction, I take a look at the West side of the property. This is one of the long sides of the lot and the length is about 130 feet. There is a 4-foot frost fence along the whole West side of the lot. It actually looks really good, various vines and vegetation growing in the fence are pleasing to my gardener's eye. But wait, what's that jog in the fence that I couldn't see before the demolition occurred?

Snoopy guy that I am, and with tape measure in hand, I take a closer look. Coming from the front of the lot about two thirds of the way towards the alley all of a sudden the fence takes a right angle turn into the lot where the new home is being built. Then the fence carries on to the alley. What the heck?! And then I see why. The neighbour house is at least 75 years old and was built when the city was much more relaxed about where on a lot you could build a home. This neighbouring house is built two feet from the alley.

It's the first house I've ever seen built like this and it certainly would not be allowed under today's city bylaws. Their back door is really not a backdoor because it comes out the side of their house facing the new construction lot. As you exit the side door, you have a tiny landing and steps. The frost fence is right up against the landing. "Ah," I say to myself, "that's why there's a 4 foot jog in the fence." Without that jog, the fence would have gone right through the landing and made the backdoor useless because there wouldn't have been enough room to get out.

Now, I'm a real estate lawyer and, as I said, a snoopy guy. First we had the obvious problem on the other side of the lot with the diminished side yards. Now I'm wondering if the fence line with its 4-foot jog is the property line or if something else has occurred. What is the exact legal situation here?

There is a lady raking leaves so I stop, introduce myself, tell her I'm a real estate lawyer in the neighbourhood and ask about the fence and the property line. It turns out she is the owner and thinks that she has a written agreement with the previous neighbour that allowed the fence to be placed where it is. "That's good," I say. "With the new construction next door to you, this is a good time and I recommend that you review that agreement to make sure you are covered. I'll take a look at your agreement if you want, no charge, I think it's really important."

She agrees and the next night on my walk around the neighbourhood she stops me and says that after searching her files, she can't find any agreement, it was a handshake deal. She has her brown envelope with paperwork and gives it to me. I pull out the Real Property Report that was done when she refinanced her home... and guess what the RPR shows? Yes, there is the fence with the 4-foot jog. But, the actual legal property line is as straight as an arrow. The front two thirds of the frost fence is a couple of feet into her yard. The back third of the fence is about 2 feet into the neighbour's yard.

I explain that the legal way to look at this situation is that the front two thirds of the fence encroaches 2 feet into her yard. For the back one third of the lot, the fence encroaches 2 feet into the neighbour's yard.

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Here's the way it works with encroachments. Each party has the right to have the encroaching fence removed from their property. If the new construction homeowner insisted on moving the fence to the property line, my neighbour would lose about 2 feet of her 4 foot side yard for the back 1/3 of the lot and it would be very difficult for her to use her back door. The front 2/3 of the fence would move 2 feet the other way and my neighbour would regain some of her front yard. That wouldn't really have any effect on the new construction lot because the surveyor properly located the foundation and therefore the new home is properly placed with adequate side yards.

I suggest to her that now is the time to try and solve this problem; most likely by an encroachment agreement between the two owners rather than by re-subdividing the land, which would make the fence line the property line. I tell her I will call the developer. When I make that call and explain who I am and suggest that now is the time to solve the problem, the developer is very defensive. He insists he's doing everything right and that his new home is properly placed. I agree that is probably true but it could be an issue. He then tells me that he is only the builder and not the owner of the lot. I ask him if the owner knows about the fence/property line issue. He says, "No!" I asked him if he is going to advise the owner and he doesn't have a straight answer. Unbelievable!

So, that's where it stands at the current time. What does it mean for us buying investment properties or, really, any kind of property?

### **LESSONS LEARNED:**

1. Fence lines are not legal property lines. A fence might be on the property line but there is a better chance it isn't. Don't rely on a fence to demarcate the boundaries of your lot.
2. NO HANDSHAKE DEALS! All real estate matters must be in writing.
3. And, let's repeat our lesson learned from the first Tale regarding this property. For any home purchase (not a condominium other than a bare land condominium) your first, basic and best position is, "I require a current Real Property Report and written evidence of municipal compliance."

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