

Use of Restrictive Covenants in Residential Developments

Newsletter

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Restrictive covenants operate outside of – and in addition to – municipal zoning bylaws. The obligations associated with restrictive covenants “run with the land” and are binding on any future buyer of the property.

Historically, restrictive covenants have been used when a single person owned adjacent properties and wanted to control their use. As a condition on the sale to a new purchaser, the owner required the purchaser to promise the property would not be developed in a way that would diminish the value of the adjacent property. If the purchaser breached the covenant, the original owner was entitled to a remedy, often in the form of an injunction requiring the purchaser to bring the property back into compliance with the covenant.

Challenges to restrictive covenants, and problems regarding them, tend to arise most commonly (but not exclusively) in older inner-city subdivisions where old restrictive covenants registered on titles typically include restrictions on use and on the location of buildings.

In some instances, these restrictive covenants are stricter than the obligations set out under the existing zoning bylaws. Since municipalities are only concerned with their own regulations, it is entirely possible for a home or garage to be built in compliance with municipal regulations but in contravention of the restrictive covenant on the title. The property might even have a real property report with evidence of municipal compliance.

There is renewed interest in restrictive covenants given Edmonton and Calgary’s new focus on infills. Neighbourhoods and their residents can make restrictive covenants on their properties to prevent lot splitting, impose height or setback restrictions, or state that only single-family homes can exist on the property. We see this occurring in neighbourhoods, like Hardisty and Rio Terrace in Edmonton and Rutland Park in Calgary, where residents are putting restrictive covenants on their lots. These residents are requesting that their neighbours also adopt a restrictive covenant on their lot so that no significant change can occur within the area.

Once a restrictive covenant is registered against a title, it is difficult to remove. It requires all of the owners of every lot affected to agree, in writing, to remove it, or it requires a court order. In order to obtain a court order to discharge a restrictive Covenant, a Judge would need to be satisfied that the restrictive covenant is no longer relevant in the neighbourhood.

Restrictive covenants dovetail conventional land use bylaws by further limiting land use possibilities. The legal controversies pitting restrictive covenants against zoning bylaws are arising when covenants are challenged by property owners or developers seeking to introduce land uses that are permitted by zoning regulations but prohibited by restrictive covenants. In such situations, courts will generally rule in favour of restrictive covenants. This is because stricter obligations placed on an area by restrictive covenants do not contravene zoning regulations, since zoning prohibits and regulates but does not prescribe.

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Restrictive covenants, once attached to a Land Title, provide little leniency. We have seen that whereas in the past restrictive covenants converged with zoning to protect certain land uses from the negative externalities of other activities, such covenants may well foil emerging planning objectives. As the number of developments they burden increases, restrictive covenants make it increasingly more difficult to reach planning goals. For cities like Edmonton and Calgary that are changing and evolving, this is shaping up to be a growing issue moving forward.