Calgary Real Estate Review
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What Are Restrictive Covenants?

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Imagine this scenario: you are a seller or a buyer of an inner city infill home. There is an RPR and has the City Compliance stamp on it. All's good, right?

Lou Pesta, a Calgary real estate lawyer with Walsh LLP explains the situation a buyer client found himself in:

> *A day before closing we discovered that a new built home contravenes the front yard set-back requirement set out in an old 1913 CP Rail Restrictive Covenant by seven feet. (The home is built seven feet closer to the front of the property than the Restrictive Covenant permits) This is both a title defect as well as a breach of a seller's warranty in the contract…*
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> *It should also be noted that seeing a Stamp of Compliance on the RPR is not to be taken as proof that everything is good with the restrictive covenant. Unfortunately in issuing compliance stamps (and building and development permits) municipalities are only interested in their own requirements and do not check restrictive covenants.*
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> *Possession and closing on my purchase has been delayed pending the seller bringing a court application to attempt to modify the restrictive covenant to bring the home into compliance. We have reserved all of the buyer's rights, including the right to back out of the contract and sue for damages, should the application not be successful.*

So what are restrictive covenants? Read **Lou Pesta's** article below:

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Restrictive covenants are "building schemes" that operate outside of—and in addition to—municipal zoning bylaws. They are designed by developers to maintain the value of the properties located in a given subdivision by ensuring consistency in the type or colour of roof, the exterior wall material or fences, for example.

These obligations "run with the land" and are binding on any future buyer of the property. If a homeowner disregards the restrictions when building a fence or replacing the roof, then any other person who lives in the community and has the same restrictive covenant registered on their title is entitled to go to court to enforce it. This could include a court order for the forced removal of the non-complying

structure. While most restrictive covenants are fairly harmless, occasionally a serious problem is identified on closing that can jeopardize a sale.

The more serious problems 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 (such as only a single family dwelling being permitted) and on the location of buildings (such as the setback from the street). 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.

Such a development would, however, still be considered to have a "title defect" and not be marketable if the non-compliance with the restrictive covenant was recognized at the time of closing. After all, what buyer would wish to purchase a home in circumstances where the neighbours could go to court at any time to demand its demolition! The most striking non-compliance that I have encountered in my practice is a fourplex constructed on a lot where the restrictive covenant specified that only a single family dwelling be built.

Municipal bylaw non-compliance applications for relaxations and encroachment agreements are fairly routine (and up to 99% of such applications are granted). However, fixing restrictive covenant noncompliance issues is an arduous, expensive and uncertain process involving an application to the courts.

Usually all affected neighbours having the same restriction on their titles will need to be served with notice of the court application, and if any one of the neighbours objects, the application will fail. As a result, only around 50% of such applications succeed. In some militant communities, the odds of success are even lower.

Due to this uncertainty and the fact that it can take several weeks for an application to be brought to the courts, most buyers who discover a restrictive covenant problem will choose not to take possession nor transfer the title and pay the purchase price until the problem is resolved.

Since the insertion of the clause 6.1(g) warranty in the standard AREA Residential Real Estate Purchase Contract in December 2010, any breach of any restrictive covenant registered on the title also constitutes a breach of the seller's warranty with accompanying remedies of rescission of the contract and/or compensation for damages. It should be noted that title insurance is not a solution to this problem. Any known title defect has to be disclosed to the title insurer and they will limit the owner's coverage by excluding loss of marketability protection (loss of resale value) from the policy. Due to these potentially very severe consequences what can industry members do to minimize their risks? First of all it goes without saying that both the Seller's agent and Buyer's agent should be searching and reviewing the title to any property that will become the subject of a sale or a purchase.

Copies of any restrictive covenant registered on title should be obtained and reviewed to see if there are any use or setback restrictions that could create a problem with the sale. In general, the older the restrictive covenant and community, the higher the risk of non-compliance. This rule is not, however, universal and some newer communities (such as Calgary's McKenzie Towne) also have setback restrictions registered on property titles.

This issue also exemplifies why Real Property Reports should be secured and reviewed as soon as possible in the process. Seller's agents should always obtain copies of RPRs from sellers at the listing stage and review them to ensure that all structures on the property are shown and also to ensure that the buildings comply with any restrictive covenant setback requirements. If the seller does not have an existing RPR, then a new RPR should be ordered immediately.

From a buyer's perspective extra due diligence is required in the purchase of infill homes in inner-city communities. In those instances it is not a bad idea to insert a term or even a condition obligating the seller to provide an RPR to the buyer for their review early in the process. This will enable the buyer to verify the home's compliance with restrictive covenants on title. If problems are discovered early, they are much easier to address at that point than on the closing day.

Conclusion

While restrictive covenants can be an issue in virtually any real estate transaction, the problems are much more prevalent and significant in inner-city communities and, in particular, with infill properties.

In representing either a seller or a buyer of a newly built infill home/duplex, or a developer intent on subdividing an existing property and building two or more homes on a lot, it is critical that any restrictive covenants on title be reviewed to verify that the structures (or intended use) are permitted. This will help to avoid unpleasant complications on closing.

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