

SCARBORO COMMUNITY ASSOCIATION

Anderson Caveat Enforcement Fund

Terms of Reference

Purpose

The Scarborough Community Association (“**SCA**”) considers the Anderson Caveat critically important to the preservation and continuation of the current character of Scarborough. The character of Scarborough includes single family detached homes, parks, green spaces and a substantial urban forest. The existing lower intensity housing also indirectly results in lower levels of traffic and parking problems in our neighbourhood.

Guidelines to access the Anderson Caveat Enforcement Fund are outlined in the Anderson Caveat Enforcement Fund Guidelines document. This Terms of Reference document in conjunction with the Guidelines document outline the creation, usage and oversight of the Fund.

Background

Title to most residential lots in Scarborough is subject to a restrictive covenant that imposes certain restrictions on development and use. The primary restrictive covenant in Scarborough is referred to as the Anderson Caveat (instrument number 7289AG) (hereinafter referred to as the “**AC**”).

The *Land Titles Act* (Alberta) (**LTA**) gives statutory protection to restrictive covenants, such that Scarborough home-owners are both subject to the AC and have the right to enforce the AC against other lots subject to the AC.

The AC operates as a “building scheme” separate from and in addition to municipal zoning by-laws.

The City of Calgary (the “**City**”) does not take the AC into consideration when it approves a development permit (“**DP**”) or a building permit (“**BP**”) for construction in Scarborough. This has resulted in situations where the City approves construction which is contrary to the AC.

The *Municipal Government Act* (Alberta) (“**MGA**”) requires that the City implement a statutory regulatory regime to control development within the City. The City has implemented a Municipal Development Plan (“**MDP**”) pursuant to the MGA. The City is now in the process of finalizing and implementing multiple levels of subsidiary statutory instruments, including Local Area Plans, that are informed by the Guide for Local Area Planning (the “**Guide**”) and new land use bylaws. All of these will be consistent with the MDP. The MDP and the Guide explicitly call for greater density and diversity of housing in Calgary. The Guide contemplates that the zoning for neighbourhoods such as Scarborough could be changed from single detached dwellings zoning (R-C1) to zoning which allows semi-detached dwellings, and row housing.

The MDP, the Guide and the City's ultimate proposed zoning for Scarborough contemplate forms, size and density of housing which are not permitted by the AC.

Section 48 of the LTA states in part that any restrictive covenant "may be modified or discharged by order of the court, on proof to the satisfaction of the court ... that the condition or covenant conflicts with the provisions of a land use bylaw or statutory plan under Part 17 of the Municipal Government Act, and the modification or discharge is in the public interest."

Case law in Alberta currently permits enforcement of a restrictive covenant where the restrictive covenant is more restrictive than the land use bylaw for the land in question. Greater restriction currently is not considered a conflict with the land use bylaw.

Because the City does not require that any DP or BP comply with the applicable restrictive covenants, it falls to affected home-owners to enforce the AC. The SCA has an established Planning Committee ("**Committee**") that monitors all DP and BP applications to determine compliance with the AC. The Committee communicates with owners and builders alerting them to the need for compliance with the AC. The Committee's mandate includes supporting property owners who may wish to enforce the AC..

The Committee has found that timely enforcement action – and especially before construction occurs – is critical to the successful enforcement of a restrictive covenant.

The SCA wishes to ensure that funding is in place and available on a timely basis should the need arise for protection of the AC. This would include but not be limited to (***subject to Board approval***) :

- injunction application to prevent non-compliant construction from commencing or continuing in Scarborough;
- opposition to any legal action commenced by a Scarborough property owner (including via a builder or developer) seeking to invalidate and discharge an AC from title;
- support for legal action in another Alberta community with substantially similar restrictive covenants, where the outcome of such case would be of great precedential value to our community; and
- obtaining legal advice to better understand and identify legal positions related to land use and the legislative regime..

(the situations described above being "**Protective Actions**").

For these purposes, it is proposed that the SCA approve the creation of a fund that would support Protective Actions, as described further in this document.

FUND CREATION

1. There is hereby established a fund (the "**Anderson Caveat Enforcement Fund**", or the "**Fund**") for the protection of the AC registered against titles in Scarborough
2. The Fund will be controlled and administered by the Board of Directors of the SCA (the "**Board**").
3. The Board will cause a separate bank account to be opened, and this account will receive and disburse all monies for the Fund's purposes.

4. The Board will designate account signatories for the Fund's bank account, which designations may change as the Board determines from time to time.

CONTRIBUTIONS TO THE FUND

5. All contributions to the Fund are, in all cases, non-refundable.
6. Contributions to the Fund are not eligible for any charitable contribution tax receipt.

FUND OPERATION

7. The Planning Committee will advise the Board of situations where it considers it appropriate to expend monies from the Fund for Protective Actions.
8. After consultation with the Planning Committee, and after such consultation as the Board considers appropriate in the circumstances with affected home owners in Scarborough, the Board, in its sole discretion, may decide to expend monies from the Fund for Protective Actions. For the first two types of Protective Actions, the Board in exercising its discretion must consider which particular Protective Actions will best achieve the goals of the Fund, without regard to financial contributions made to the Fund by particular affected home owners in Scarborough.
9. The Board, in its sole discretion, may engage legal counsel and other advisors, and pay them from the Fund.
10. The Board, in its sole discretion, may otherwise use the Fund in support of Protective Actions.
11. In each case where the Protective Action requires that legal action be commenced or defended in the name of a registered property owner in Scarborough, the SCA shall enter into a funding agreement with such owner on such terms as the Board considers appropriate, which terms might include but not be limited to provisions regarding choice of legal counsel, instruction of counsel, amount of funding, limit of funding, owner contributions to funding, and particulars of cooperation required of owner.

FUND REPORTING

12. The Internal Review Committee shall provide an annual report to the Board, sufficiently in advance of the SCA Annual General Meeting so as to permit such report to be circulated to all members of the SCA as part of the Annual General Meeting information package.
13. The Fund's annual report shall provide an account of all contributions to and expenditures from the Fund, and a summary description of all Protective Actions taken during the annual period in question.

FUND WIND-UP

14. The Board may terminate the Fund and transfer all monies in the Fund's bank account to the SCA's general bank account to be used for such other purposes as the Board determines from time to time, upon a Special Resolution of the members of the SCA to that effect. "Special Resolution" for this purpose has the meaning given to it in the *Societies Act* (Alberta), including the 75% voting approval level for special resolutions currently specified in the *Societies Act* (Alberta).

15. Reasons for wind up might include, but are not limited to:
 - a. the City embedding into its statutory plan recognition and enforcement of the RCs as an integral part of the land use classification, DP and BP process;
 - b. the RCs having been wholly discharged from all affect titles;
 - c. the amendment of the *Land Titles Act* (Alberta) so that the continued existence or enforcement of the RCs is not permitted or practicable.
16. Despite the wind up of the Fund, no contributor is entitled to any refund of any contribution, no matter when or why made.