

TALES FROM THE TRENCHES™

by Barry C. McGuire

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“Secondary Suite Grudge Match”: Restrictive Covenants vs. City Bylaws

Would-be Calgary Landlords’ Attempt to Build Legally Approved Secondary Suite Gets Stifled by Restrictive Covenant on Neighbourhood’s Single-Family Dwellings

And now for the main event! This Real Estate Regulation League title fight is scheduled for five rounds in the heavyweight division. At stake is the Secondary Suite Championship Belt! The reigning, defending, undisputed champion, Restrictive Covenant, is the long-time king of title encumbrances, boasting a hundred-year track record of steamrolling opposition. The challenger is Calgary City Hall, sporting a feisty new bylaw that allows secondary suites in RC-1 zoning areas.

What Is a Restrictive Covenant?

Often ignored—but hugely powerful—restrictive covenants are registrations against a title that prevent the titleholder from taking certain actions. They are described as ‘running with the land,’ meaning they bind the current owner and all future owners. Restrictive covenants can be very old, but they don’t usually expire automatically, so don’t ignore them because of age. While restrictions on title can be altered, it’s time consuming and tough to amend them—even tougher to remove them.

Restrictive covenants are common in new subdivisions where developers file them against all individual titles during the subdivision process. Restrictions on title can govern many aspects of what a homeowner can do with, or how they can use, their property. They can also specify what kind of siding, shingles, and landscaping are required (these are only examples, read a particular covenant for exact details). Every property owner can enforce them, as we will see in the following Tale, where some titleholders didn’t approve of legal secondary suites being built in a subdivision where a restrictive covenant prohibited them. First, let me set the scene.

A Tale of Two Alberta Cities: Secondary Suites in Edmonton and Calgary

In Edmonton where I practice law, City Hall fairly recently turned their secondary suite policy upside down. By secondary suites, I mean self-contained living spaces in basements, garages, back gardens, etc. The City is actively encouraging legal suite development and the legalization of currently illegal suites

Old Policy: no secondary suites allowed in most areas.

New Policy: secondary suites are allowed in most areas.

Calgary resisted Edmonton's wholesale rezoning by taking a more cautious approach. Applications for secondary suites were dealt with on a one-off basis. With many applications and much demand for safe secondary suites, Calgary made a number of attempts to find a comprehensive policy that would satisfy numerous stakeholders. Tough sledding for Calgary! There was huge opposition to any wholesale rezoning. In March 2018, the City of Calgary finally took the bull by the horns and amended its bylaw to allow land zoned as RC-1 to have secondary suites.

The Fighters Square Off: When Secondary Suites Are Legal, but a Restrictive Covenant Stands in the Way

Set in Calgary, here begins our Tale from the Trenches. In a very recent Court of Queen's Bench decision from April 2020, we have two parties. Defending are the Suite Owners/Landlords, pensioners who in September 2019, shortly after the bylaw changed, applied for and were granted permits to install a secondary suite in their University Heights property.

Suing we have one Homeowner representing a group of University Heights residents who are united in their opposition to secondary suites. The Homeowner says the secondary suite is contrary to the restrictive covenant. He asked the Court to grant an interim or permanent injunction requiring the Suite Owners/Landlords to comply with the restrictive covenant, halt any further construction on the secondary suite, and to stop renting the secondary suite.

The parties are in court, because the first appeal by the Homeowner to Calgary's Subdivision and Development Appeal Board (SDAB) was denied. The SDAB said they didn't have the authority to enforce or determine the validity of a restrictive covenant. So, off to the Court of Queen's Bench for further argument.

In defending, the Suite Owners/Landlords said there was no clear breach of the covenant, and that the restrictive covenant has not been enforced previously or was largely ignored. In the alternative, they argue that the character of the University Heights community has changed. They say that both non-enforcement or change of character of the community render the restrictive covenant unenforceable.

Let's Go to the Judge's Scorecard for a Decision on Round One

After much legal argument, Justice C. S. Anderson said, "I find that the applicant (Homeowner) has met all parts of the tripartite test for an interim injunction requiring the respondents (Suite Owners/Landlords) to comply with the restrictive covenant pending the outcome of trial."

Translation: The Suite Owners/Landlords have to get rid of the secondary suite.

But, just as in the world of combat sports, no defeat is the end of the line and retirement is rarely permanent, Justice Anderson postponed enforcement of the interim injunction for six months. Why?

Because the Suite Owners/Landlords are applying to the City of Calgary to discharge or modify the restrictive covenant. Furthermore, there is a tenant with a six-month lease.

First round to City Hall and its flexible new bylaw. But the Secondary Suite Championship Belt is still at stake! Does Restrictive Covenant have the endurance to outlast bylaw changes? Or will City Hall pull off a tricky submission to take the title?

Stay tuned for an update once the parties move on to the next step.

Lessons Learned:

1. **Title Searches:** When buying a property, a title search is basic diligence. This type of document investigation means requesting the deed to the property from the municipality.
2. **Title Review:** You and/or your realtor and/or your lawyer need to actually review and consider anything registered against the title and particularly restrictive covenants.
3. **Restrictive Covenants:** Where normally the content of a restrictive covenant doesn't affect what most purchasers would do with a property, it might. And, restrictive covenants are very difficult to remove or modify. If the restrictive covenant says you can't do something, then the odds are way more in favour of, you can't do it!

p.s., A great case to read. It's only seven pages long and very instructive on how restrictive covenants work: <http://canlii.ca/t/j6fdf>

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