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BLOG

Ontario Court of Appeal Declines to Enforce "Building Scheme" Restrictions

Commercial Real Estate | Development | Land Title Act | Litigation | Litigation & Dispute Resolution | Ontario | Ontario Court of Appeal | Real Estate | Restrictive Covenant

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A recent decision of the Ontario Court of Appeal dismissed a developer's attempt to enforce a "building scheme" restricting the construction of an outbuilding: *Lone Oak Properties Ltd. v. Baillie*, 2020 ONCA 614 (CanLII), aff'g 2019 ONSC 4667 (CanLII).

A "building scheme" is a concept pursuant to which all owners in a development have similar benefits and burdens relating to limitations on property use. The concept has received limited judicial consideration in Ontario in contrast to British Columbia where building schemes are regulated by section 220 of the *Land Title Act*. In Ontario, restrictive covenants are strictly interpreted as they are viewed as interfering with the free use of land. Restrictive covenants must be precise in terms, and if they are vague and indefinite in meaning they will not be enforced: *Noble et al. v. Alley*, 1950 CanLII 13 (SCC), [1951] SCR 64.

In *Lone Oak Properties,* the applicant developer sought a court order removing a shed built by the respondent home owner which exceeded the approved size. The lands in issue were part of a subdivision subject to various restrictive covenants. The home owner built the shed to a size of 60 x 30 feet, while the developer had approved a smaller shed of 48 x 24 feet. The developer argued that the size of the shed contravened the restrictive covenants in a building scheme for the development.

In order to establish an enforceable "building scheme," the applicant must show:

- The applicant and respondent obtained title from a common vendor;
- Prior to selling the lands, the vendor had laid out the estate, including the lands purchased by both the applicant and respondent, for sale in lots subject to restrictions intended to be imposed on all the lots that are consistent with the general scheme of development;
- The restrictions were intended for the benefit of all the lots intended to be sold; and
- The applicant and the respondent, or their predecessors in title, purchased their lots from the common vendor on the basis that the restrictions were to enure for the benefit of the other lots included in the general scheme.

In one of the few other Ontario cases addressing a building scheme, the Court held that the interpretation of a restrictive covenant that is part of a building scheme must take into account the "community of interests," recognizing the burdens imposed upon and the benefits shared by all owners in the community, and considering the building scheme as a whole: *Chapadeau v. Devlin*, 2019 ONCA 767 (CanLII), aff'g 2018 ONSC 6456 (CanLII). In that case, the Court enforced a restrictive covenant in a building scheme which prohibited the construction of a rooftop deck. The Court turned to the British Columbia case law and noted that a building scheme remains important to ensure that a neighbourhood's established character is preserved, citing *Paterson v. Burgess*, 2017 BCCA 298, 100 B.C.L.R. (5th) 271.

In *Lone Oak Properties*, the application judge was critical of the vague and arbitrary nature of the restrictive covenant which provided broad discretion to the developer regarding scope and enforcement according to its whims. In the Court's view, when a developer reserves the unfettered right to waive or modify restrictions with respect to any lot in the subdivision, those restrictions cannot and do not constitute an enforceable building scheme (citing a 1951 decision of the Ontario High Court of Justice: *Re Lankin*, 1951 CarswellOnt 333, which in turn cited a 1926 decision of the Ontario Court of Appeal, *Re Wheeler*, 1926 CanLII 406 (ON

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CA), [1926] 4 D.L.R. 392).

In the case at hand there was evidence that the developer had previously exercised its discretion with respect to the construction of outbuildings and other deviations from the building scheme restrictions, and there was no certainty with regard to how the restrictions would be enforced. The restrictive covenant therefore offered the property owners no assurance that the developer’s discretion would be exercised equally, reasonably, or consistently. In the Court’s view, such vagueness and uncertainty rendered the restrictive covenant unenforceable.

The Court was also satisfied that the home owner had gone to great expense to successfully ensure that the shed was in keeping with the aesthetic characteristics of the neighbourhood notwithstanding its size, and was not an “eyesore.” Finally, the Court considered the original purpose of the restriction regarding ancillary buildings and found it to be obsolete since a historical concern over septic systems was no longer relevant due to the installation of a sewer system in the development. The developer’s application to enforce the restriction as being contrary to a building scheme was therefore dismissed.

The developer appealed the decision to the Ontario Court of Appeal. Unfortunately for the developer, the restrictive covenant in issue had expired on 15 September 2019, and so by the time of the appeal in 2020 the issue was held to be moot. The developer argued that the Court of Appeal should still consider the merits of the appeal since there were “community interests” at stake. However, the Court of Appeal held that the tangible and concrete dispute between the parties had disappeared, there was no evidence that it would recur, and there was no issue of public or constitutional importance. As a result, the appeal wasdismissed.

A lesson to developers from the few Ontario decisions regarding building schemes is that any restrictive covenants should be precise and uniformly apply to all properties, and the process for anyone to obtain permission to deviate from the building scheme must have fixed and certain rules to follow rather than being subject to the developer’s unfettered discretion.

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