Court of King's Bench of Alberta

Date: 20230710
Docket: 2304 00243
Registry: Grande Prairie

Between:

County of Grande Prairie No. 1

Applicant

Memorandum of Decision
of the
Honourable Applications Judge M. R. Park

Introduction:

[1] This is an application by County of Grande Prairie No. 1 (the "**County**") pursuant to section 48 of the *Land Titles* Act, R.S.A. 2000, c, L-4 (the "**LTA**") for an order discharging the Restrictive Covenants (as hereinafter defined) from title to the Lands (also as hereinafter defined). For the reasons that follow, I grant the relief sought by the County.

Facts:

[2] The County is the registered owner of several parcels of land the legal descriptions of which are as follows:

a. PLAN 1522133
BLOCK 1
LOT 130PULMR (PUBLIC UTILITY LOT)
EXCEPTING THEREOUT ALL MINES AND MINERALS

AREAS: 0.58 HECTARES (1.43 ACRES) MORE OR LESS

b. PLAN 1522133
BLOCK 1
LOT 134MR (MUNICIPAL RESERVE)
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREAS: 1.89 HECTARES (4.67 ACRES) MORE OR LESS

c. PLAN 1522133
BLOCK 2
LOT 119MR (MUNICIPAL RESERVE)
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREAS: 5.58 HECTARES (13.79 ACRES) MORE OR LESS

d. PLAN 2022282
BLOCK 1
LOT 131PUL (PUBLIC UTILITY LOT)
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREAS: 2.73 HECTARES (6.75 ACRES) MORE OR LESS

e. PLAN 9020859
BLOCK 3
LOT 24
EXCEPTING THEREOUT ALL MINES AND MINERALS

f. PLAN 9222225
BLOCK 2
LOT 77PUL (PUBLIC UTILITY LOT)
EXCEPTING THEREOUT ALL MINES AND MINERALS

g. PLAN 9222225
BLOCK 2
LOT 78PUL (PUBLIC UTILITY LOT)
EXCEPTING THEREOUT ALL MINES AND MINERALS

h. PLAN 9422530
BLOCK 1
LOT 76PUL (PUBLIC UTILITY LOT)
EXCEPTING THEREOUT ALL MINES AND MINERALS

i. PLAN 9821275
BLOCK 1
LOT 129MR (MUNICIPAL RESERVE)
EXCEPTING THEREOUT ALL MINES AND MINERALS

AREAS: 1.58 HECTARES (3.9 ACRES) MORE OR LESS

j. PLAN 9821275
BLOCK 1
LOT 130PUL (PUBLIC UTILITY LOT)
EXCEPTING THEREOUT ALL MINES AND MINERALS

(collectively the "**Lands**").

[3] This application pertains to the following restrictive covenants:

a. Restrictive Covenant 892 189 568 (the "**Golf Course Covenant**")
b. Restrictive Covenant 892 341 666 ("**Single Detached Dwelling Covenant #1**)
c. Restrictive Covenant 922 221 745 ("**Single Detached Dwelling Covenant #2**)
d. Restrictive Covenant 942 275 087 ("**Single Detached Dwelling Covenant #3**)
e. Restrictive Covenant 972 145 018 ("**Single Detached Dwelling Covenant #4**)
f. Restrictive Covenant 902 086 921 ("**Single Detached Dwelling Covenant #5**).

[4] These restrictive covenants will be referred to collectively as the "**Restrictive Covenants**".

[5] Single Detached Dwelling Covenant #1, Single Detached Dwelling Covenant #2, Single Detached Dwelling Covenant #3, Single Detached Dwelling Covenant #4 and Single Detached Dwelling Covenant #5 will be referred to collectively herein as the "**Single Detached Dwelling Covenants**".

[6] The Golf Course Covenants are registered against title to each of the parcels comprising the Lands.

[7] In some cases, the Golf Course Covenant is the only restrictive covenant registered against title. In other cases, the Golf Course Covenant is registered along with one or more of the Singe Detached Dwelling Covenants.

[8] Among other things, the Golf Course Covenant provides that the lands to which it applies "will be developed only for use as a golf course and for no other use".

[9] The Single Detached Dwelling Covenants contain considerably more detail than the Golf Course Covenant. Broadly speaking, these covenants each require: (1) the construction on each relevant lot of a single detached residential dwelling and (2) the maintenance of the lots until they are built upon. Assuming a dwelling is built, there are additional covenants that ensue related to matter such as landscaping, roof covering materials, roofline slope rises and runs, etc.

[10] The Lands are located in the Wedgewood subdivision of the County of Grande Prairie. The Lands have not been developed and I understand that they consist primarily of green and treed areas.

[11] As is obvious from the wording of the Golf Course Covenant, at the time of initial subdivision, it was intended that a golf course would be developed on at least some of the parcels comprising the Lands. That development has not come to pass, and it appears that it never will.

[12] For those interested, a detailed history of the proposed golf course is set out in *Russell v. Ryan,* 2016 ABQB 526 ("***Russell***"). It is not necessary to repeat that history here.

[13] The impetus for this application was a capital grant given by the County to the Wedgewood Neighborhood Association to support the construction of an asphalt multi-sports court (the "**Sports Court**") on a portion of the property comprising the Lands. For obvious reasons, construction cannot proceed unless and until the Restrictive Covenants are discharged.

[14] To avoid the expenditure of any further resources associated with future court applications related to the removal of the Restrictive Covenants, the County seeks the discharge of all the covenants, not just those registered against title to the land on which the Sports Court is to be built.

Issues:

[15] The issue to be resolved on this application is whether the Restrictive Covenants should be discharged from tile to the Lands.

Applicant's Position:

[16] The County's primary position is that the Restrictive Covenants are positive in nature and, as such, are void and do not run with the Lands at common law.

[17] As a further and alternative position, the County argues that the Restrictive Covenants are ambiguous, vague and uncertain and are therefore void at common law. There were few or no submissions made by counsel to the County in relation to this position, and I have not considered it in arriving at my decision.

Respondent's Position:

[18] Strictly speaking, there are no Respondents to this application.

[19] However, I was informed by counsel to the County that a procedural order was granted in this action on April 20, 2023 (the "**Procedural Order**"), the terms of which directed the County to serve notice of the application on all affected landowners, namely those against title to whose properties the Restrictive Covenants (or some of them) are registered. I was told that service was effected pursuant to the terms of the Procedural Order in early May, 2023.

[20] No materials were filed in response to the County's application. However, several individuals who identified themselves as affected landowners appeared in Chambers to speak to the matter. None of them were represented by counsel.

[21] Those landowners who appeared in Chambers were unanimously opposed to the relief sought by the County, with one individual expressing tepid support for the construction of the Sports Court.

[22] Perhaps unsurprisingly, the submissions made by the landowners were not generally focused on the validity of the Restrictive Covenants. Rather, the submissions tended to emphasize issues such as the loss of greenspace, the potential for multi-family and/or commercial development on the Lands, lack of proper and fulsome consultation with affected landowners by the County and traffic-related concerns.

Analysis:

a. General:

[23] The County makes this application pursuant to section 48 of the LTA which, in part, provides as follows:

> **(4)** The first owner, and every transferee... is deemed to be affected with notice of the condition or covenant, and to be bound by it if it is of such nature as to run with the land, but any such condition or covenant may be modified or discharged by order of the court, on proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant or 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.
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> **(5)** The entry on the register of a condition or covenant as running with or annexed to land does not make it run with the land, if the covenant or condition on account of its nature, or of the manner in which it is expressed, would not otherwise be annexed to or run with the land.

[24] Under the LTA, the common law respecting restrictive covenants is maintained: *Russell* at para. 20.

[25] At common law, the conditions required for a covenant to run with land include that the covenant must be negative in substance and constitute a burden on the coventator's land analogous to an easement. No personal or affirmative covenant requiring the expenditure of money or the dome of some act runs with the land: *Russell* at para. 21.

b. The Golf Course Covenant:

[26] The validity of the Golf Course Covenant was considered by the Court in *Russell*.

[27] The Applicants in *Russell* sought an order pursuant to section 48 (4) of the LTA directing the Registrar of the Land Titles Office to discharge the registration of the Golf Course Covenant from title to their property. That application was brought primarily on the grounds that the Golf Course Covenant did not run with the land and conflicted with the provisions of a land use bylaw.

[28] More specifically, the Applicants' position was that the Golf Course Covenant was personal as between the initial covenantor and covenantee and contemplated that positive steps would be taken to construct a golf course. As a result, notwithstanding its express wording, the Applicants submitted that it did not run with the land and was invalid and unenforceable as against them.

[29] The Respondents, who were a group of landowners who owned properties adjacent to the lands that were to be developed into the golf course, sought a declaration that they had standing to enforce the terms of the Golf Course Covenant and for a permanent injunction enjoining the Applicants from constructing or developing any home, dwelling or building on the relevant land or using that land for that purpose.

[30] In support of their position, the Respondents stated that when purchasing their property (collectively the "**Affected Lands**"), they believed that the Golf Lands would remain green space. They opined that development of the land in question would diminish the value of their properties.

[31] The Respondents further noted that the Golf Course Covenant was stated to run with the land. They argued that it specifically limited the development potential for use as a golf course and for no other purpose and was therefore negative in nature, not positive. The Respondents argued that the Golf Course Covenant did not require a golf course to be built. Rather, it prevented development for any purpose other than as a golf course; it could either be developed as a golf course or, alternatively, the land could be left as undeveloped green space.

[32] In considering the application, Justice Goss provided the following helpful summary of the relevant law pertaining to restrictive covenants:

> 20 In *Kolias v. Condominium Plan 309 CDC*, 2008 ABCA 379, [2008] A.J. No. 1251 (Alta. C.A.) at para 10, the Court held that the *Land Titles Act* preserves the common law respecting restrictive covenants.
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> 21 V DiCastri, in *Registration of Title to Land* (Carswell, 1987-) at 10-3 to 10-5, lists the conditions required for a covenant to run with land as enunciated in various cases. One of those conditions is that the covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement; no personal or affirmative covenant requiring the expenditure of money or the doing of some act runs with the land.
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> 22 In *Potts v. McCann*, 2002 ABQB 734, [2002] A.J. No. 999 (Alta. Q.B.), cited with approval in *Kolias*, Slatter J. (as he then was) held at para 30 that s. 48(5) of the *Land Titles Act* preserves, indirectly, the common law referring, as an example, to the principle that the covenant must be negative in nature.
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> 23 DiCastri's list of conditions has been adopted in subsequent case law including *Westbank Holdings*

Ltd. v. Westgate Shopping Centre Ltd., 2001 BCCA 268, [2001] B.C.J. No. 852 (B.C. C.A.) at para 16, and *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd.*, 2009 BCCA 5, [2009] B.C.J. No. 22 (B.C. C.A.) at para 11.

24 A restrictive covenant is to be construed strictly and the parties' intention to create one must be shown in clear and unambiguous language: *Aquadel* at para 11. The Court will not extend it on the ground of presumed intention: *Nylar Foods Ltd. v. Roman Catholic Episcopal Corp. Prince Rupert* (1988), 48 D.L.R. (4th) 175 (B.C. C.A.) at 176, [1988] B.C.J. No. 307 (B.C. C.A.), citing RC Brown, *The Law Relating to Covenants Running with Land*, (London: Sweet and Maxwell, 1907) at 126.

25 A restrictive covenant is an agreement or contract. Courts are to take a practical, common-sense approach to the interpretation of a contract to determine the intent of the parties and the scope of their understanding; to do so, a court must read it as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para 47, [2014] 2 S.C.R. 633 (S.C.C.).

26 Any ambiguity about whether a restrictive covenant should apply to prevent the construction of a dwelling house on a new lot, or should not do so, ought to be resolved in favour of the free use of the land: *Noble v. Alley* (1950), [1951] S.C.R. 64, [1950] S.C.J. No. 34 (S.C.C.), citing *Anderson v. Dickie* (1915), 84 L.J.P.C. 219 (U.K. H.L.) at 227.

27 Restrictive covenants intended to preserve the character of land to be laid out and used in a particular way will not be enforced if the land has already been laid out or used so that its preservation as intended is no longer possible: *Knight v. Simmonds*, [1896] 2 Ch. 294 (Eng. C.A.) at 297-98.

28 Public and private restrictions on the use of land can co-exist, except when compliance with mandatory requirements in a land use bylaw necessitates non-compliance with a private restrictive covenant: *Tanti v. Gruden*, 1999 ABCA 150 (Alta. C.A.) at para 7, (1999), 74 Alta. L.R. (3d) 110 (Alta. C.A.).

[33] In reviewing the Golf Course Covenant, Justice Goss noted that it contemplated that the relevant lands *would be developed* [emphasis added] for use as a golf course and further noted that the wording of that portion of the Golf Course Caveat was clearly positive in substance, in that it imposed a positive obligation to develop the lands as a golf course.

[34] Justice Goss also considered the wording of the Golf Course Covenant providing that the lands were to be put to no other use whereby the enhancement in value and enjoyment by the owners from time to time of the lands, including the Affected Lands, might be diminished.

[35] Assuming that portion of the covenant was negative and severable from the positive wording, Justice Goss considered the question of what uses might diminish the enhancement in value and enjoyment by the owners of the Affected Lands and concluded:

42 ...it would be virtually impossible to determine with any certainty what development of the land, within the range of developments possible under the then-current bylaw, might "diminish the enhancement in value and enjoyment" by the owners of the Affected Lands. The answer would necessarily depend to some

> extent on the purely subjective views of those owners. I find that even if this were severable, it would be unenforceable as it is too vague and uncertain.

[36] In the result, Justice Goss concluded that the Golf Course Covenant did not run with the relevant lands and granted the relief sought by the Applicants.

[37] I am bound by decisions of Justices of this Court unless they have been overruled by our Court of Appeal or by the Supreme Court of Canada, or unless there are contrary decisions of Justices of this Court. To my knowledge, *Russell* has not been overruled, nor have decisions been made by other Justices of this Court which contradict it. Accordingly, for the reasons given by Justice Goss in *Russell*, I conclude that the Golf Course Covenant must be discharged.

[38] Even if I am not bound by the decision in *Russell*, I find Justice Goss' reasoning to be sound and would adopt it as my own for the purpose of addressing the issue of the Golf Course Covenant.

c. The Single Detached Dwelling Covenants

[39] As counsel for the County noted in his submissions, the Single Detached Dwelling Covenants each include a "building requirement clause" and a separate "maintenance clause". As I indicated above, assuming construction on a lot proceeds, additional positive, construction-related obligations come into play.

[40] When boiled down to their essence, the Single Detached Dwelling Covenants **require** an affected landowner to either build or maintain, with additional obligations imposed if/when construction ensues. Read as a whole, these covenants are positive in nature. They are void and do not run with the land at common law. Accordingly, they are to be discharged.

Conclusion:

[41] There will be an order directing the Registrar of Land Titles to discharge the Restrictive Covenants from title to the Lands pursuant to section 48 (4) of the LTA and notwithstanding section 191 (1) of that legislation.

[42] I want to emphasize that I very much appreciated hearing the submissions made by the affected landowners. These reasons should not in any way be read so as to dismiss or minimize the concerns raised by those individuals. Simply put, there was a fairly narrow legal issue put to

the Court on this application and the submissions made by the affected landowners were not generally germane to that issue.

Costs:

[43] The County did not seek costs of this application, and none are awarded.

Heard on the 08th day of June, 2023.
Dated at the City of Grande Prairie, Alberta this 10th day of July 2023.

M. R. Park
A.J.C.K.B.A.

Appearances:

Ben Throndson
for the Applicants