

## MEMORANDUM

May 12, 2023

TO: Blackburne Creek Homeowners Association

FROM: Duncan Craig LLP

RE: Blackburne Creek Homeowners Association (the “**HOA**”) – Frequently asked questions

FILE NO.: 208614

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**Q1:** Why do real estate developers place restrictive covenants on land titles and do such restrictive covenants expire?

**A1:** Restrictive covenants are registered against title to real estate properties forming part of a community (whether governed by a homeowners association or otherwise) to ensure that such properties contribute to the overall look and quality of the community. In general terms, this tends to lead to enhanced property values. Given these objectives, the intent is for such restrictive covenants to run with title to the properties forming part of the community for either a fixed period of time before expiring as stipulated in the wording of the restrictive covenant (less common) or an indefinite period (more common).

**Q2:** Can the HOA’s board of directors (the “**Board**”) decide what restrictions to enforce?

**A2:** With reference to the constating documents forming the HOA filed with the Alberta Registrar of Corporations, those documents include the following provision:

*“to enforce to the best of its ability the restrictive covenant and restrictive covenant caveat that is registered at the Office of the North Alberta Land Registration District by the Developer against the title of the Lots and Units located in the Subdivision.”*

Further, as the Board members are considered fiduciaries of the HOA, those individuals owe the HOA a duty of disclosure, honesty, loyalty, candour as well

as a duty to favour the HOA's interests over his/her own interests. This means that any facts or circumstances known to the Board which may impact the interests of the HOA must be disclosed and that the Board has a positive obligation to ensure that any restrictions governing the residences owned by the members of the HOA are properly enforced even if that means such enforcement may be contrary to the best interests of the individual who is a member of the Board.

**Q3-I:** Can the Blackburne Creek restrictive covenants be changed and/or removed?

**A3-I:** Ways to change/amend a restrictive covenant:

- 1. Amending agreement:
  - The amending agreement amends the terms of the restrictive covenant.
  - The amending agreement must be executed by all of the current registered owners of all lands affected by the restrictive covenant.
  - Attestation and Dower requirements are to be complied with to amend the restrictive covenant.
  - The amending agreement has to refer to the restrictive covenant's Land Titles registration number.
  - The legal descriptions of the affected lands are not required as all titles affected by the restrictive covenant will be amended.
- 2. Court Order:
  - Once a Court Order permitting an amendment to a restrictive covenant is obtained, a certified true copy of the Court Order must be registered at the Land Titles Office to amend the restrictive covenant.
  - Note: The application to the Court for such Court Order would need to include evidence. This evidence could be a copy of a unanimous or supermajority resolution of the HOA members agreeing to amend the restrictive covenant. If there is any opposition to the application (by one or more HOA members), this could create a significant obstacle regarding any application to amend the restrictive covenant, as the Court has confirmed the enforceability of the restrictive covenant in its current state.

**Q3-II:** Do restrictive covenants expire in Alberta?

**A3-II:** A restrictive covenant may expire if there is an express provision contained in the restrictive covenant to that effect (for example, the restrictive covenant expires in 2050).

The restrictive covenants governing the residents of the HOA recorded at the Alberta Land Titles Office do not contain any sort of expiration provision.

**Q4:** Did the *Blackburne Creek Homeowners Association v. Burt*, 2019 ABQB 608, ruling affect the future ability to change anything in the restrictive covenant in question?

**A4:** This ruling was to determine the correct interpretation of a specific clause in the restrictive covenant regarding the roofing materials to be used on homes comprising community governed by the HOA, and ultimately whether the restrictive covenant should be enforced through the granting of a mandatory injunction against three (3) of the members of the HOA.

As such, not all of the HOA members are governed by the Court Order. Rather, the Court Order only applies to the parties to the litigation – being, three (3) members of the HOA. While the Court did not grant a mandatory injunction against non-parties to the litigation, the decision of Justice Kraus would be directly applicable precedent if the issue arose again. So, while the HOA would need to enforce separately against other non-compliant homeowners, the HOA could also bring an application requesting to have the matter determined summarily based on the decision of Justice Kraus. That would be faster, and somewhat less expensive.

**Q5:** What if I do not agree with the *Blackburne Creek Homeowners Association v Burt*, 2019 ABQB 608, judgment? Can the ruling still be appealed?

**A5:** No, the period to file a notice of appeal has already passed which was one month after the date of the decision, August 8, 2019.

Further, for the reasons noted above, parties who were not part of the litigation leading up to the decision of Justice Kraus cannot appeal that decision in the ordinary course. A member of the HOA looking to overturn that decision would need to breach the restrictive covenant in question which would likely trigger a new piece of litigation which, in all likelihood, would not be successful. In turn, such member of the HOA could then try to appeal their losing decision. The typical standard of review on appeal would apply, meaning some level of deference, so having the decision overturned would be quite challenging, time consuming and very expensive.

**Q6:** What if I engage in a campaign to overturn/appeal the *Blackburne Creek Homeowners Association v Burt*, 2019 decision by promoting changes to the HOA restrictive covenant that will allow, for example, alternate roofing materials?

**A6:** As noted above, the period to formally appeal the decision of Justice Kraus regarding roofing materials of homes comprising part of the community governed by the HOA has run out so this sort of campaign will be futile.

If a member of the HOA wishes to promote amendments to the restrictive covenants, please refer to A3-I above for the ways and means for doing so.

Please note that changing the restrictive covenant would not be an appeal of the decision of Justice Kraus, nor would it overturn it. It would not impact that decision or its application to the present wording of the restrictive covenant. Changing the restrictive covenant to allow for alternate roofing materials, for example, would simply take it outside of the scope of what was decided by Justice Kraus.

**Q7:** What are the potential penalties if a member of the HOA engages in a campaign to promote changes to the HOA restrictive covenant to allow, for example, alternate roofing materials?

**A7:** There are no penalties *per se* other than those members of the HOA refusing to comply with the restrictive covenants being subjected to demands to comply issued by the Board, any resulting penalties stipulated by the HOA's constating documents, and worst case, litigation proceedings to compel compliance.

**Q8:** Can the Board or a member of the HOA bring action against another member of the HOA for engaging in contempt of Court Order granted by Justice Kraus?

**A8:** No, the only parties that can be in contempt of Justice Kraus' Court Order directly are the parties to that litigation. The Court will not hold someone in contempt of an order to which they were not a party, or an order that was not made against them specifically. With that said, if a member of the HOA breaches the restrictive covenant in the fashion that was dealt with in the Court Order, then the Order would serve as instructive precedent to quickly obtain a mandatory injunction against a new breaching HOA member. If an HOA member then breaches that injunction, a contempt application may be appropriate. It should be noted that any member (i.e. not just the Board) of the HOA can sue for a mandatory injunction.

- Q9:** The developer of the lands comprising the community governed by the HOA was initially responsible for approving changes to the Design Guidelines which form part of the restrictive covenant in question. How can this approval process be passed onto the Board?
- A9:** At the point where the HOA was formed in 1998, responsibility for enforcing the Design Guidelines transferred from the developer to the HOA (the Board). As per the Memorandum of Association (1991), there was no transfer for approving changes to the Design Guidelines since the purpose of the Design Guidelines forming part of the restrictive covenant is to ensure that there are no changes.
- Q10:** What if rising costs has made wood roofing unaffordable to me. What are my options as a homeowner?
- A10:** The only options are to: a) follow the proper procedures to amend or remove the restrictive covenant regarding roofing; b) comply with the restrictive covenant and therefore try and source a roofing contractor who will complete repairs or replacements of the roofs at a more reasonable price; or c) consider relocating outside of the neighborhood.