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DISCHARGING A SECTION 219 COVENANT WITHOUT THE GRANTEE'S PERMISSION: AN APPLICATION OF SECTION 35 OF THE PROPERTY LAW ACT

Introduction

Section 219 of the *Land Title Act*[1] permits special covenants to be registered in the Land Title Office on title to land. These covenants (known as "Section 219 Covenants") can only be granted in favour of specific organizations and entities.[2] Section 219 Covenants must be in respect of the use of land or a building on or to be erected on land and, unlike common law covenants can impose positive obligations as well as restrictions on the landowner.[3] These covenants are often used in connection with developments and subdivisions—an approving officer or municipality's council may, as a condition of subdivision or rezoning, respectively, require the landowner to grant the municipality a Section 219 Covenant to secure, for example, the provision of access or the construction of works.

For a purchaser of property that is subject to a Section 219 Covenant or an owner of property that has had a Section 219 Covenant registered on title to that property for years or decades, one question may arise: can the Section 219 Covenant be discharged from title without the grantee's consent? As illustrated in *Watermark Developments Ltd v Kelowna (City)*[4] *("**Watermark**")*, the answer is yes, in certain instances.

Discharging a Section 219 Covenant

Where the grantee of a Section 219 Covenant consents to a discharge of that covenant, the process is straightforward—a Form C (Release) is prepared, executed by the grantee and filed in the Land Title Office. Where the grantee does not consent, in certain circumstances the grantor may have grounds to apply to the Supreme Court of British Columbia for a cancellation of the Section 219 Covenant pursuant to Section 35 of the *Property Law Act*[5]:

> 35 (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:
>
> …
>
> (e) a restrictive or other covenant burdening the land or the owner;
>
> …

Section 35(2) of the *Property Law Act* provides "an exhaustive list of grounds upon which a court can make… an order [cancelling a Section 219 Covenant]".[6] The five grounds are as follows:

> (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
>
> (b) the reasonable use of the land will be impeded, without practical benefit to

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others, if the registered charge or interest is not modified or cancelled,

(c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,

(d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or

(e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

As set out in *Watermark,* "[t]he Court only needs to find that one of the five grounds set out… is met in order to remove a covenant and the onus is on… the petitioner… to satisfy the Court that the relief [(i.e., the cancellation)] should be granted",[7] and to discharge a covenant requires the satisfaction of a "three-hurdle" test described in *Vida (Re)*[8] at paragraph 41:

> A petitioner must therefore **overcome three hurdles** to succeed on an application under s. 35: first, it must demonstrate that **the application is not premature**; second, it must demonstrate that **the application fulfils one of the five criteria** set out in sub-sections (a)-(e); and third, it **must persuade the court** that, considering all of the circumstances, the court **should exercise its discretion in favour of granting the application.**
>
> [*emphasis added*]

Watermark Developments Ltd. v Kelowna (City)

In *Watermark*, the Section 219 Covenant at issue was two "no build" covenants (the "**No-Build Covenants**") registered on title to 13 acres of land (the "**Lands**") owned by Watermark Developments Ltd. ("**Watermark**") in 2009.[9] These covenants were registered in connection with Watermark's applications to subdivide and rezone its property, which contained the Lands, on the premises that "the Lands… would be required entirely, or at least substantially, for the purpose of building… the Central Okanagan Multi-Modal Corridor",[10] which corridor was for a future roadway that would have resulted in a second crossing over Okanagan Lake and had since been "broken down into… the 'Clement Avenue Extension' or the 'Clement Extension' [which]… has [three] segments".[11] The third segment of the Clement Extension was to run through the Lands.

As the extension was "not currently planned to go further than… [the second segment, being] a municipal roadway located… several kilometers away from the Lands",[12] following Watermark's failed attempts at obtaining the City's consent to discharge the No-Building Covenants, Watermark filed a petition against the City to cancel the No-Build Covenants in 2024 pursuant to Section 35 of the *Property Law Act* "on the basis that the No-Build Covenants were obsolete and impeded Watermark's reasonable use of the Lands without practical benefit to the City and the removal of the No-Build Covenants would not injure the City".[13]

In support of its position, Watermark pointed to the City's 2040 Official Community Plan and 2040 Transportation Master Plan,[14] which did not include plans for a second crossing over Okanagan Lake or the third segment of the Clement Extension but did contemplate the first two segments of the Clement Extension, with the second segment projected to be complete in 2035.[15] While Watermark accepted that "the City [had]… *bona fide* intention to proceed with [the second segment] and [had] to plan and budget accordingly…", its position was that construction of the third segment was either abandoned or a remote possibility.

The City's position included the claims that: (1) while the third segment of the Clement Extension was not included in its 2040 plans, it "[remained] committed to certain components of the… Clement Extension within the 20-year horizon contemplated by the 2040 [p]lans…"[16] and that having components beyond the 20-year horizon "[was] simply a recognition that the 20-year planning horizon [did] not capture the longer-term components of the [extension, being the third segment]";[17] and (2) releasing any covenants, including the No-Build Covenants would "compromise the City's eventual realization of a continuous road".[18]

The Court applied the three-hurdle test from *Vida (Re)*

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to determine whether the No-Build Covenants could be discharged.

Three-Hurdle Test

First, the Court assessed whether Watermark's petition was "premature", meaning that "anticipated circumstances have not yet materialized or that there are existing reasons to defer the application".[19] The Court found that, given the City could not "articulate reasons to defer [Watermark's petition]",[20] its petition was not premature.[21]

Second, the Court assessed whether there were grounds (set out in Section 35(2) of the *Property Law Act*) to cancel the No-Build Covenants. The primary ground advanced by Watermark was that No-Build Covenants were obsolete, meaning that it "has ceased to have currency because of a change in circumstances, or due to disuse".[22] The Court concluded that the No-Build Covenants were obsolete on the basis of: (1) the long timeframe for construction of the third segment, and (2) "the City's effective abandonment of the historical vision of the [corridor] in favour of a patchwork extension";[23] therefore clearing the second hurdle.

The third and final hurdle was whether the Court should use its discretion to remove the No-Build Covenant. Under this analysis, the Court was permitted to consider if it would be equitable to discharge the No-Build Covenants.[24] To that end, the Court reviewed the *quid pro quo* between the City and Watermark, as it would have been inequitable to discharge the No-Build Covenants if Watermark was "attempting to avoid the *quid pro quo* of the parties' agreement".[25] The Court noted that mere existence of *quid pro quo* did not make cancellation inequitable, and "the public nature of the charge [did] not change how the Court should balance the equities when determining how to exercise its discretion".[26] Given the speculative nature of the construction of the third segment, the Court concluded that "it would be equitable for the Court to exercise its discretion to discharge the No-Build Covenants" and that "it [was] not a scenario where Watermark took the benefits of [its] transaction with the City and [was] now [seeking] to inequitably avoid its obligations for its own benefit". [27]

Conclusion

While Section 219 Covenants generally cannot be discharged without the grantee's consent, there are some instances where it can be cancelled pursuant to Section 35 of the *Property Law Act*, and *Watermark* is a recent case that illustrates the considerations a court makes when determining whether to permit the cancellation of a Section 219 Covenant.

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1 RSBC 1996, c 250.

2 See *ibid,* ss 219(1), (3).

3 See *ibid,* ss 219(2), (4).

4 2024 BCSC 2188.

5 RSBC 1996, c 377.

6 *Watermark, supra* note 1 at para 68.

7 *Ibid* at para 69

8 2021 BCSC 1444.

9 *Watermark, supra* note 1 at para 6.

10 *Ibid* at para 6.

11 *Ibid* at para 7.

12 *Ibid* at para 8.

13 *Ibid* at para 9.

14 See *Ibid* at para 46.

15 See *Ibid* at paras 48-51.

16 *Ibid* at para 62.

17 *Ibid.*

18 *Ibid* at para 63.

19 *Ibid* at para 73.

20 *Ibid* at para 75.

21 See *ibid* at paras 74-75.

22 *Ibid* at para 79.

23 *Ibid* at para 91.

24 *Ibid* at para 111.

25 *Ibid* at para 112.

26 *Ibid* at para 115.

27 *Ibid* at para 119.

This article is intended for the general information of organizations in British Columbia. If your organization has specific issues or concerns relating to the matters discussed in this article, please consult a legal advisor.

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