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LAND TITLE INSTRUMENTS: NEW (AND OLD) ISSUES

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I. INTRODUCTION

This paper offers a primer on two statutory tools contained in the *Land Title Act* (British Columbia) frequently used by local governments: statutory right of ways and section 219 covenants. The first part of this paper will provide an overview and outline the basic legal principles of these instruments. The second part will examine how these instruments may be used by local governments and touch on issues that can arise in that context.

II. THE BASICS

A. Common Law Easements and Restrictive Covenants

1. Common Law Easements

To have a clear understanding of section 219 covenants and statutory rights of way, it is useful to first understand where these statutory charges are derived from: common law easements and common law restrictive covenants.

A common law easement is an interest in land that provides certain rights to a landowner to use the land of another for a specific purpose. The land that benefits from the easement is referred to as the dominant tenement and the land encumbered by the easement is referred to as the servient tenement. Easements may be granted in many circumstances, and some examples of easements include easements for access, utilities, parking, lighting, water, fencing, structural support, and to permit nuisances. While easements can be used for a broad range of purposes, they cannot give the holder exclusive possession or unrestricted use of the servient tenement, as such a grant essentially robs the owner of its proprietary and possessory rights in the property it owns.

Once registered in the Land Title Office, an easement "runs with the land" meaning it binds future owners of the servient tenement and benefits future owners of the dominant tenement until it is discharged or otherwise rendered ineffective (via means discussed later in this paper). After registration of an easement, the title search of a servient tenement subject to the easement shows the easement as a charge and the title search of the dominant tenement shows the easement as a legal notation.

Most easements are positive in nature, meaning they permit the owner of the dominant tenement to do something on the servient tenement. For example, an easement might allow one landowner to use a pathway or trail located on the property of another landowner. Less common are negative easements, which prevent the owner of the servient tenement from doing something they would otherwise have the right to do, permitting some benefit to flow to the dominant tenement. For example, an access easement may prevent the owner of the

servient tenement from constructing or installing anything on the easement area that would impair the access of the owner of the dominant tenement.

It is important to note that, while easements can grant positive rights to a dominant tenement owner, they cannot impose a positive covenant on the owner of the servient tenement. For example, a covenant from a servient tenement owner to repair or maintain an access pathway is an impermissible positive obligation on the servient tenement. While a covenant like this between the original servient owner and the original dominant owner may be enforceable between the parties as a contract, the positive obligation would not run with the land and bind subsequent servient owners. Positive obligations are discussed in more detail in section 3(A).

2. Restrictive Covenants

A restrictive covenant is similar to a negative easement in that it restricts the use of one property for the benefit of another. To have a restrictive covenant at common law, like an easement, there must be land that is burdened by the covenant (servient tenement) and land that benefits from the covenant (dominant tenement). In order for a restrictive covenant to effectively "run with the land", it must be restrictive or negative in nature and the restriction must restrict the use of the servient land, that is, it must touch and concern the dominant tenement. Examples of restrictive covenants include those that restrict the types of businesses that may operate on a parcel of land and those that restrict the size, height, or design of buildings that may be erected on a parcel of land.

B. Statutory Rights of Way

A statutory right of way created under section 218 of the *Land Title Act* is a type of easement that permits the grantee (equivalent to the dominant tenement owner in a common law easement scenario) the right of way to access the grantor's property for the operation or maintenance of the grantee's undertaking. As outlined in section 218, easements may only be acquired and held by certain entities, including municipalities, regional districts, crown or crown agencies, local trust committees under the *Islands Trust Act* and entities designated by the minister responsible for the *Land Title Act*. The main distinction between a common law easement and a statutory right of way is that section 218 permits the registration of a statutory right of way without requiring a dominant tenement. This allows for the creation of an easement for the benefit of the easement holder's undertaking generally, without the need to tie the benefit to another parcel of land. In this regard, section 218(6) requires a recital in the terms of the statutory right of way agreement to state that it "is necessary for the operation and maintenance of the grantee's undertaking".

Statutory rights of way are obtained by local governments for many reasons, including public access (e.g., road, public trails, and walkways) and for utility construction, maintenance and operation (e.g., water, sewer, drainage and other related works and utilities). Statutory rights of way can be acquired by local governments as a condition of rezoning or at the time of subdivision, as a condition of a land sale, or by way of expropriation. Just as easements do,

statutory rights of way run with the land, burdening both the original grantor of the statutory right of way and subsequent owners of the land. Depending on the terms of the statutory right of way, the holder may be able to assign the right of way to another entity capable of holding rights of way under section 218 and may also be able to grant others a license to use the right of way.

As statutory rights of way are limited to portions of land, plans are often used to delineate the boundaries of a right of way and restrict it to the area shown on the plan. Often, these plans are survey plans that are registered in the Land Title Office concurrently with the statutory right of way itself. On a title search, if a right of way is limited to a registered plan, the plan will be referenced in the description of the right of way. Occasionally a statutory right of way plan may be registered in advance of the right of way agreement and will be shown on title to the affected lands as a miscellaneous note. However, registration of a plan without an accompanying right of way agreement does not create any interest in land, so the plan is essentially ineffective until joined on title by an agreement. Sometimes, in order to save survey costs, a statutory right of way may also be registered over an entire parcel of land, with the terms of the agreement including a 'back-end' clause to narrow the grantee's ability to use the lands to a surveyed area shown on a drawing or sketch plan attached as a schedule to the agreement. However, while this approach may save upfront costs, it is always prudent to prepare a survey plan to ensure the perpetual nature of the right of way and to avoid any uncertainty and any potential disputes regarding the area over which the local government is asserting its rights.

C. Section 219 Covenants

Section 219 of the *Land Title Act* serves as the basis for a certain type of covenants that have similarities to restrictive covenants but include two specific features that make them particularly useful for local governments: first, a covenant under section 219 can impose both negative and positive obligations on the owner granting the covenant; second, section 219 covenants do not require the covenant holder to own adjacent land that comprises a "dominant tenement" to the land subject to the covenant. While section 219 expands the application of covenants in some respects, their use is limited by the legislation, as they may only be granted to the Crown, a Crown corporation or agency, a municipality, a regional district, the South Coast British Columbia Transportation Authority, or a local trust committee under the *Islands Trust Act*. Additionally, section 219 covenants can only be used in the circumstances prescribed by their enabling legislation and may only include provisions:

- In respect of the use of land or the use of a building on or to be erected on land;
- Requiring that the land is to be built on in accordance with the covenant, is not to be built on except in accordance with the covenant, or is not to be built on;
- Requiring that the land is not to be subdivided except in accordance with the covenant, or is not to be subdivided at all;

- That parcels of land designated in the covenant and registered under one or more indefeasible titles are not to be sold or otherwise transferred separately; and,

- That land or a specified amenity in relation to it be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state in accordance with the covenant and to the extent provided in the covenant (in this case, an amenity includes any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land that is subject to the covenant).

In terms of enforceability, as with the other interests already discussed, section 219 covenants run with the land, binding the original covenantor and the original covenantor's successors in title who acquire or purchase the land or any interest in the land from the covenant.

III. USE BY LOCAL GOVERNMENTS

The next part of this paper will examine some common situations in which local governments use statutory rights of way and section 219 covenants and outline the issues that may arise in their use.

A. SRWs

1. Uses: Road, Public Access, Utilities

Rather than acquiring road by way of a formal road dedication, local governments may acquire land for the use of road by way of a statutory right of way. Often, a landowner may be reluctant to formally dedicate a road because they may lose the right to use the dedicated area for a non-public road purpose without the consent of the local government. Also, once a road is dedicated, the area is no longer a part of the owner's parcel, which may negatively affect the parcel's future development under applicable zoning. Statutory right of ways can also be used for public access over private land (such as trails or drive aisles), to allow for the construction and continued maintenance and operation of utilities and services such as water and sewage lines that run through private property.

2. Potential Issue: Including Positive Landowner Obligations

A statutory right of way allows a local government to use a right of way area for the purposes outlined in the right of way and prohibits a landowner from using the right of way area in a way that interferes with that purpose. For example, a right of way granted to a local government for use as road allows the local government to use the area as road while also prohibiting the landowner from constructing fences or other things that would obstruct the use of the right of way. However, local governments should be aware that, as with easements, positive obligations on a landowner contained in a statutory right of way may not run with the land. In this respect, when positive obligations are required from a landowner, such as, to use our last example, to

maintain or repair a road within a statutory right of way, local governments should acquire a section 219 covenant in addition to the statutory right of way (forming part of the same agreement) securing such obligations.

BC Courts have recently reinforced and confirmed that positive covenants contained in easements do not run with the land in *Strata Plan BCS 4006 v. Jameson House Ventures Ltd*, 2019 BCCA 144 *[Jameson House].* This case involved an appeal by a developer from an order declaring the respondent was not bound by any of the positive covenants contained in the easement registered with the Land Title Office. The easement agreement provided for the use and cost-sharing of a parkade on the property, purporting to create mutual obligations that would run with the land. The developer had executed the easement agreement with the City when the respondent strata did not yet exist but with an eye towards eventual stratification. The easement agreement was registered on title to each of the residential strata lots and the common property of the strata. The strata was not a party to the easement agreement and did not sign an assumption agreement where it assumed the positive obligations, but from 2010 and onwards, it did pay its share of the costs of maintaining the parkade as outlined in the easement agreement. Eventually, however, the strata sought a declaration that the obligation to pay the parkade fees was unenforceable against it because of the legal principle that free-standing positive obligations do not run with the land to bind successors in title (known as the "rule in Austerberry"). The developer argued it was time to recognize exceptions to the general legal rule that positive obligations can't run with the land and that, as a result, the strata remained obligated to pay the parkade expenses pursuant to the easement agreement.

The Court dismissed the appeal, opting not to adopt either exception to the rule in Austerberry proposed by the developer. To ensure the positive obligations in the easement ran with the land as intended, the original parties could have had the strata enter into an agreement under which it assumed the positive obligations (known as the chain of contracts approach) or by making the strata's parkade access and use rights under the easement conditional on its participation in the cost-sharing arrangement, but it failed to do either. As a result, the positive obligations did not run with the land despite the parties' intentions that it would be binding on subsequent owners, and the covenant to pay the parkade operating costs was unenforceable against non-parties to the original easement agreement. This decision reinforces the idea that, despite the intention of the original contracting parties, positive obligations in an agreement will not run with the land except in specific circumstances, even if one party, such as the strata, in this case, continued to benefit from other aspects of the agreement and such an arrangement seems equitable given that the strata had access to and use of the parkade but was not responsible for any of the related costs.

B. Section 219 Covenants

1. Use: Land Use Regulatory Tool

Local governments frequently use covenants as a regulatory tool in connection with the rezoning of land. When a landowner is unable to address a zoning requirement until the zoning

amendment bylaw is adopted, a local government may proceed with the amendment provided that a section 219 covenant is registered against title to the subject land concurrently with the adoption of the rezoning bylaw to help secure the satisfaction of the zoning requirements. For example, the council or board may require a road dedication or public trails as a condition of rezoning but might be willing to defer the actual dedication until a later stage, such as at the time of actual development of all or part of the development. In such an instance, a covenant may be granted at the time of rezoning which prohibits constructions on the lands until the dedication takes place.

As another example, in the case of density benefits for amenities under section 482 of the *Local Government Act*, a zoning bylaw may allow a landowner to obtain the density bonus zoning in advance of providing the amenities. This would be accomplished by registering a covenant restricting some aspect of its use of the land, such as a no-build, no subdivision or no occupancy covenant, until the amenities are provided.

2. Use: Highway Reservation Covenants

A highway reservation covenant will essentially provide for a portion of land to be dedicated as a highway in the future and that such portion may not be built upon in the interim. Such a covenant is a useful tool in preserving a future highway area, however, it does not obligate an owner to dedicate road, nor does it ensure any particular price to the municipality if it wishes to acquire the road. In this case, in order to secure a road dedication, an option to purchase is required.

3. Potential Issue: Is the Covenant Directed at Land Use?

It is important to consider and understand that for a covenant to be binding on a subsequent owner of land, the obligation must fall within the provisions permitted by section 219. As such, when considering the possible use of a covenant, one should closely examine section 219 and to ensure the proposed terms of the covenant are clearly based in the section and thus will be enforceable as a covenant and avoid including terms that will not run with the land. A common point of confusion when determining if the content of a covenant falls within section 219 comes in relation to transferring land. An obligation to transfer a part of land to the local government is not related to the use of the land and thus is not a valid section 219 term. Such an obligation should be obtained through a purchase and sale agreement or an option to purchase. Alternatively, such an obligation could be made a condition related to the removal of a no-build covenant.

4. Potential Issue: Use v. User

Section 219 of the *Land Title Act* authorizes restrictions on the use of land and not on the user of land. Accordingly, a restriction on the use of land should be distinguished from a restriction on who may use the land. For example, one may prohibit bars on a property but may not prohibit bartenders from using a property. The former restriction is aimed at the use of the land, while the latter restriction is aimed at the user.

Recently, a BC Court touched on the issue of use versus user by upholding a covenant that required the units within a building, which were hotel-type accommodations, to be managed by a single operator and the individual owners of the units within the building to enter into an agreement with a single operator, the rental pool manager (*1120732 B.C. Ltd. v. Whistler (Resort Municipality),* 2020 BCCA 101).

In this case, the matter arose from a zoning bylaw of the Resort Municipality of Whistler that was adopted in furtherance of rental pool covenants to promote a "warm beds" policy that maximized public beds available to accommodate tourists. The covenants required residential units in certain properties in the municipality to be made available (when not being used by owners) for temporary accommodation through a collective rental system operated by a single professional manager. The appellants who owned residential units that were covered by the bylaw filed a petition seeking judicial review of the rental pool covenant and that the bylaw was *ultra vires*, and that their use of the residential units in violation of the bylaw constituted a legal non-conforming use. This petition was dismissed by the BC Supreme Court and the appellants appealed.

The BC Court of Appeal dismissed the appeal and affirmed the lower court's dismissal of the claims that the appellants' use amounted to lawful non-confirming use and that the covenant was vague or uncertain by virtue of requiring the appellants' units to be placed in a rental pool. The Court of Appeal indicated that the provisions of the covenant related to the use of land (or building), and the covenant did not exceed the statutory authority contained in section 219. In addition, the BC Supreme Court stated that any regulation of users, in this case, was incidental to the regulation of land. At this level, the petitioners argued that section 219 only permitted a municipality to regulate use through a restrictive covenant. However, the Court held that even if such a distinction was implicit within section 219, the decision of *North Vancouver (District of) v. Fawcett* (1998), 162 D.L.R. (4th) 402 (B.C.C.A.) [*Fawcett*] governs: "a covenant is valid and enforceable with respect to users unless the consequences would never have been intended by the legislature". In *Fawcett*, the Court of Appeal held that covenant, pursuant to what is now section 219, requiring that each dwelling unit on a property be occupied exclusively by persons over the age of 19 and by at least one person 50 years or older. In this respect, the Court held the covenant was not invalid because it had provisions that made reference to the user of the land.

This case highlights that the underlying concern of the courts is whether the regulation of the user is reasonable or whether distinctions are based on irrelevant considerations regarding the purpose or manner of use. In other words, every use of land involves a user and there is no binary distinction but a continuum of use that must be decided in each case.

5. Potential Issue: Enforcement of Positive Covenants

In order for a covenant to effectively achieve its purpose, a local government should be diligent in monitoring compliance with the covenant. While the extent of monitoring will depend on the nature of the covenant, local governments should be cognizant of the fact that monitoring

covenants imposes an administrative burden on staff. This burden potentially increases depending on the nature of the covenant because, as noted above regarding the use of the covenants as part of rezoning or amenity zoning, enforcing positive obligations may be more difficult in practice than enforcing negative covenants. For example, if a covenant prohibits construction of a building before the developer has entered into an agreement to provide for a public walkway, the local government can use building permit requirements to monitor whether the developer has begun construction of the building, and the desire to begin construction can act as an incentive to comply with the covenant.

On the other hand, let's say a covenant only contains a positive obligation to construct a public walkway without any accompanying restrictions on the land. If the landowner subject to the covenant begins building without constructing the walkway, it may be difficult to obtain voluntary compliance with the covenant, and the local government will have to continue to monitor the development of the site to try to ensure the walkway is built. Digging into this scenario further, if enforcement action is required, the typical remedy is to commence a proceeding in the BC Supreme Court to seek relief for a breach of covenant. This relief could be in a form of an order compelling the owner to perform a positive obligation, an order requiring the owner to cease a prohibited activity or an order permitting the local government to carry out the obligation the owner has failed to do at the owner's expense. In the case of a negative obligation, such as restricting some use of the land, a local government will typically be in a position to obtain an injunction from the court requiring it to stop its breach of the covenant (such as by requiring it to halt construction). However, with positive obligations, a local government will be less likely to receive an order of the court requiring the owner to take positive steps to perform a non-restrictive obligation.

6. Use: Covenants as a Form of Notice

Covenants are useful tools to ensure future owners of a property are aware of certain requirements made by local governments regarding the property. For example, under section 56 of the *Community Charter,* if a building inspector considers that construction on land is subject to or is likely subject to natural hazards (e.g., flooding, mud flows, debris flows, debris torrents, erosion, land slip, rockfalls, subsidence or avalanche) the building inspector may require the owner of the land to provide a professional report on the land from a professional engineer or geoscientist (defined in the act as a "qualified professional"). If the qualified professional determines that the land may not be used safely for the use intended, the building inspector cannot issue a building permit unless the owner covenants to only use the land in the manner certified by the qualified professional and a covenant is registered to require compliance with the report. The registration of this covenant provides notice of such hazards and any use conditions to future owners.

The registration of housing agreements under section 483 of the *Local Government Act* is another example where a covenant is a useful tool to provide assurance that a landowner is aware of certain local government restrictions. Although a covenant is not required to be registered and only a notice of the agreement needs to be filed as a legal notation in order for

the agreement to run with the land, housing agreements are oftentimes also registered as section 219 covenants. Registration has numerous benefits in this scenario: first, it gets the entire housing agreement into the Land Title Office, so it can be easily referenced and retrieved by landowners, local governments and potential buyers. Because these agreements are highly restrictive and include restrictions on who may occupy a dwelling unit, the resale price of a dwelling unit, and rental rate restrictions, it's advisable to make these agreements easily available for review, if possible. Second, many housing agreements contain terms that are properly categorized as 219 covenants (such as requirements to construct a building to certain specifications) and should be registered as such to ensure enforceability.

Sometimes covenants can also be used to provide notice of the existence of an encroachment agreement and the existence of an encroachment, such as a landowner's encroachment onto a municipal road, acting as a way to get such agreements on title where potential buyers or local governments can find and retrieve them. However, these covenants need to be carefully drafted to create a registrable land-use covenant concerning the lands from which the encroachment originates. While these types of covenants put future owners of the land on notice of the encroachment and related agreement, on their own, any obligations the agreement purport to impose may not run with the land. It is also important to note that the land title office examines these kinds of covenants very carefully and in some cases has refused registration.

There have also been situations where a local government wishes to register a covenant as a form of 'political notice'. For example, if a new development will be adjacent to a local government landfill, which may cause odour or other nuisances, the local government may wish to register a covenant acknowledging this. For such a covenant to be registrable, it must be drafted as a valid land use restriction concerning the land that will be subject to the odour. However, it is important to understand that while a local government can claim to a complaining public member that they purchased the land with full knowledge of the nuisance, such a covenant likely has little legal value. If a local government is concerned with the potential impact of its land-use activities on adjacent land, the local government should consider acquiring a nuisance easement or statutory right of way, which may legalize what would otherwise be a common law interference with another landowner's use and enjoyment of their land (i.e., nuisance).

7. Use: Securing Private Third-Party Arrangements

Often, covenants are used in an effort to ensure that parking or access easements between two or more properties remain registered and unmodified in perpetuity. For example, where a building permit or a subdivision approval is provided on the basis that a parking bylaw or legal access requirements are met by way of a private arrangement involving the subject property and another property, the local government or approving officer will usually require an appropriate easement be registered. In these cases, local governments and approving officers may require the owners of the affected property to also grant a covenant to the local government to ensure the easement remains registered. In order to be registrable under

section 219, such a covenant could provide land use restriction that would come into effect once the parking or easement is discharged. The covenant could also include a provision that the owners will not discharge or modify the easement without the consent of the local government. However, the legal usefulness of these kinds of covenants is questionable as some provisions do not run with the land and some may be difficult to enforce. For example, while a covenant may require that residences on the subject land can't be occupied if a parking or access easement is discharged, it may be difficult, in practice, to actually enforce this provision when the lands are already occupied. In addition, a provision to not discharge or modify the easement without the consent of the local government will not be enforceable against a subsequent owner.

Notwithstanding these issues, the inclusion of the covenant may be useful in that it clarifies to future owners that the easement is not simply a private arrangement but is required to meet a bylaw or *Land Title Act* requirement.

8. Use: The Use of Indemnities & The Potential Issues with Releases

Section 219(6)(a) of the *Land Title Act* permits the registration of a covenant that includes an indemnity of the local government party "against any matter agreed to by the covenantor and the covenantee". As with all covenants, it is important for local governments to keep in mind that a covenant containing an indemnity, in order to be registerable, needs to fall within the scope of section 219 by affecting the use of the land. Additionally, notwithstanding the broad wording under section 219(6)(a), it is likely that a section 219 covenant indemnity must directly relate to the land use subject matter of the covenant, as it may not be enforceable otherwise.

Releases from liability, on the other hand, while viewed as similar to and sometimes part of indemnities (or at least indemnity clauses), are a different story, as shown recently by the BC Supreme Court in *Goy v. District of Sechelt*, 2020 BCSC 1242. This case considered whether section 219 authorizes releases to be included in section 219 covenants as it does indemnities. In this case, the plaintiffs purchased lots in a residential subdivision in the District of Sechelt (the "District"). A section 219 covenant was filed against each lot in the development. Section 7 of the covenant included the following provision:

> 7. The Covenantor, for himself and his successors and assigns, hereby releases, saves harmless and indemnifies the Municipality for any damage, loss claim, demand, cost (including legal cost), whether as a result of injury or death to any person, or damage to property of any kind, including any claims by third parties, arising from or in connection with the construction of any structures on the Lands or use of the Lands, whether or not construction is in accordance with the geotechnical assessments referred to herein, including without limitation any subsidence, settling of any structure including any utility or road infrastructure, loss of slope stability, or any similar matter.

In 2019, the Mayor of the District issued a Declaration of State of Local Emergency order due to an immediate danger resulting from land subsidence and geotechnical instability in the subdivision. This resulted in all the residents residing in the subdivision being ordered out. The plaintiffs, a number of subdivision residents, sued the District, among others, in negligence for approving the development and for issuing permits, injurious affection, negligent conduct and other complaints.

This decision involved two applications, one of which dealt directly with releases included in section 219 covenants that burdened the properties in the subdivision. The plaintiffs argued, among other things, that the *Land Title Act* did not authorize the inclusion of a release in a section 219 covenant, because, as mentioned previously, section 219(2) holds that a covenant may include one or more of the provisions outlined in 2(a) – 2(d), all of which deal with land use and land development but make no mention of a release.

Arguing for the release to stand as a valid provision, the District submitted that, because subsection 219(2) includes the words "may include one or more of the following provisions", the list that followed was not intended to be exhaustive, meaning a release can properly be included in a covenant. In response, the Court turned to the "implied exclusion" principle, which holds that whenever there is reason to believe that the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly in the legislation. Additionally, the Court found that the word "may" in section 219(2) is not permissive because it's limited by the term "to include one or more of the following provisions". Based on this, the Court held that sections 219(2)(a) – (d) "simply do not contemplate a release as something that can be inserted" in a 219 covenant. Furthermore, the Court noted that subsection 219(6), which expressly authorizes the inclusion of an indemnity in a covenant, illustrates the Legislature's intention when a government entity is permitted to receive a form of statutory protection in a subdivision approval covenant.

The *Goy* decision is currently being appealed, but as it stands, when drafting covenants, local governments should be aware of the potential issues surrounding releases and should not rely on them completely as protection from potential covenant-related liability.

C. General Comments

1. Covenants and Rights of Way Intended to be Perpetual

As covenants and statutory rights of ways are intended to have an effect for several years, often in perpetuity, it is important to ensure they are clear, certain and enforceable. In addition, to be effective, the covenant or statutory right of way needs to not only be enforceable against the owner who executes the covenant or statutory right of way but also against subsequent owners of the property, including lenders who may take over or wish to sell the property on foreclosure.

At the same time, developers, who are often asked to provide the form of covenant or statutory right of way, do not necessarily share the same interest in its contents as the local government. A developer may see the requirement of these instruments as a necessary 'hoop' to jump through, but do not necessarily have any interest in ensuring the covenant or statutory right of way are effective over the long term. Section 26(2) of the *Land Title Act* states that the registration of a charge is not a determination of its enforceability. Moreover, section 219(9) states the same rule specifically with respect to section 219 covenants. As such, acceptance of a covenant by a developer and registration of the covenant is not indicative of whether the covenant will work for the local government. As a result, to ensure the critical provisions of these agreements run with the land, local governments should draft their own agreements so that their provisions are firmly rooted in the enabling legislation and carefully review landowner or developer provided agreements to make sure they are valid.

Another important thing to be aware of is that, while a covenant or a statutory right of way may be intended to perpetually apply to a property, there are means for an owner of the land to have a covenant or a statutory right of way to be discharged or modified. Pursuant to section 35 of the *Property Law Act*, an owner of land that is subject to a covenant or a statutory right of way may apply to the Supreme Court for an order to modify or cancel the charge if, on application, the Court is satisfied that:

- 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;
- The use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled;
- 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;
- Modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest; or
- The registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

These considerations make it very important for a local government to consider a legal review of these instruments at a relatively early stage. It is not uncommon for a proposed covenant to be sent for legal review on the eve of an important council vote, and for there to be significant changes required in order to ensure the covenant is enforceable and effective.

2. The Use of Precedents

The use of standard form templates can be useful in terms of keeping time commitments and legal costs down. However, one size of agreement does not fit all circumstances, and in some cases, a standard form template may not be entirely effective, may include unenforceable terms or fail to address relevant issues. While templates can be fashioned to include key terms that a local government routinely requires and serve as a useful starting point for a draft agreement, each agreement should be individually considered and legally reviewed to ensure their legal validity and effectiveness in a given situation.

3. Registration and Priority

Before obtaining a covenant or a statutory right of way, it is always crucial to review the legal title to the subject lands. A title review will show whether there are any registered charges that may impact the proposed covenant or statutory right of way. In addition, the title will show whether there are any mortgages, liens, or other potentially relevant charges that affect the lands, in which case, the local government may require the landowner to obtain and register a priority agreement to ensure the covenant or statutory right of way remains registered against title in perpetuity. If a priority agreement cannot be obtained by the landowner, the local government may want to reconsider its options. For these reasons, it is important to conduct and examine a title search early on in the process to identify any problematic charges registered on title.

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