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# MEMORANDUM OF LAW

**TO:** Aspen Cliff Homeowners' Association (the "HOA")

**FROM:** Brian Twerdoff

**DATE:** September 4, 2017

**FILE NO:** AC1

**RE:** Obligation to maintain and/or repair retaining wall

## FACTS

There exists a retaining wall (the "Retaining Wall") located and attached upon lands municipally described as XX Aspen Cliff Close SW, Calgary, Alberta and legally described as Plan 0810400; Block 2; Lot 12; (the "Lands") that has shifted and, therefore, is in need of repair and/or replacement (the "Work"). The registered owners of the Lands are Xxxxx and Yyyyyy (the "Registered Owners"). The Lands are part of a residential subdivision project commonly known as the Aspen Cliff Estates (the "Project"). The Project was originally owned by 1169011 Alberta Ltd. (the "Developer"). The Developer registered a restrictive covenant against title to the Lands (instrument number 081187008) (the "Restrictive Covenant") to assure orderly and coordinated development of the Project as a homogeneous residential community. The Developer also registered a financial encumbrance against title to the Lands (instrument number 081187009) (the "Encumbrance") in order to secure payment of an annual charge (originally set in the amount of One Hundred ($100.00) Dollars) which the HOA has collected annually from the owners of lots within the Project in order to provide a fund (the "Maintenance Fund") to satisfy its maintenance obligations pursuant to the terms of the Encumbrance and its by-laws (the "By-laws").

The Registered Owners of the Lands have asserted that it is the HOA's responsibility to use the Maintenance Fund to perform the Work. The HOA's position is that it is not responsible to use the Maintenance Fund to perform the Work upon the Lands.

## ISSUE

1. Who is responsible for the maintenance and/or replacement of the Retaining Wall?

2. Is the HOA obligated by the Restrictive Covenant, the Encumbrance or its By-laws to use the Maintenance Fund to perform the Work?

3. Are the terms of the Restrictive Covenant enforceable?

4. Do the retaining wall maintenance provisions of the Restrictive Covenant run with the Lands?

## SHORT CONCLUSION

The Encumbrance and the By-laws do not provide that the HOA is responsible for the maintenance of the Retaining Wall. The terms of the Restrictive Covenant require that the Registered Owners maintain the Retaining Wall, however, these maintenance provisions are likely not enforceable as against the Registered Owners. In the case where a Court finds the retaining wall maintenance provisions of the Restrictive Covenant unenforceable as against the Registered Owners as they likely do not run with the Lands, in the absence of terms providing for the HOA's responsibility for the Retaining Wall in the Restrictive Covenant, the Encumbrance or the By-laws, the responsibility for the Work lies with the Registered Owner of the Lands or the Developer as the original party to the Restrictive Covenant.

## DISCUSSION

The Encumbrance charges the Lands as security for the payment by the Registered Owners of certain dues to the HOA pursuant to its By-laws thereby making up the Maintenance Fund. The Encumbrance provides at Section 1(a) that the HOA:

> "…may perform or cause to perform any of the following activities:
>
> (i) certain installations, maintenance, repairs, replacements, construction or re-construction, as the case may be, relating to the following:
>
> (A) fences; and/or,
> (B) entrance features;…"

and at Section 1(b) it provides that the HOA:

> "…may enforce or cause the enforcement of Restrictive Covenants against the Owner and its successors in title to the Lands;…"

I note that retaining walls are not provided for in the above and that this language is strictly permissive as to what the HOA may do while not importing obligations upon the HOA. At Section 2.2, the By-laws of the HOA provide that the HOA shall:

> "(a) …have such duties and obligations as shall be adopted and approved by resolution of the Members from time to time…; and
>
> (b) always and in any event assist the Developer to enforce against any Member and over the Lands, the provisions of any Restrictive Covenant."

Therefore, the HOA is currently required to assist with the enforcement of the Restrictive Covenant in the absence of an amendment to the By-laws by a Unanimous Resolution, pursuant to Section 2.4 thereof.

Section 2.1 of the Restrictive Covenant states that:

"[the] Grantor, as owner of the Servient Lots, does hereby covenant and agree to…observe, adhere to and be bound by those covenants, restrictions and prohibitions in respect of the Servient Lots… being namely that:

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(h) The Grantor shall not construct of allow to be constructed a retaining wall on any Retaining Wall Lots unless the retaining wall is installed pursuant to the Architectural Guidelines and provided that such retaining wall shall be maintained and neither removed, altered or otherwise disturbed except if and when replaced, and in such case the retaining wall will be replaced in accordance with good engineering practise in compliance with appropriate engineering standards and with approval of The City of Calgary;

(i) The Grantor shall not alter or reconstruct any retaining wall constructed on any Retaining Wall Lot by [the Developer],….except in accordance with good engineering practise in compliance with appropriate engineering standards and with approval of The City of Calgary, and having first consulted with (and having such work approved by) qualified engineers, licensed to carry on practise in the Province of Alberta;…"

The Registered Owners fall within the definition of the Grantor and the Lands fall within the definition of Retaining Wall Lots within the Restrictive Covenant, therefore the Restrictive Covenant clearly and unambiguously attempts to assign the responsibility for the maintenance and replacement of the Retaining Wall to the Registered Owners. By the terms of the Restrictive Covenant the Registered Owners shall maintain the Retaining Wall, however, this positive obligation may not be enforceable as against successors in title to the Developer in light of the common law in Alberta as they may be found to not "run with the land".

Section 48 of the *Land Titles Act*, RSA 2000, c L-4 (the "Act) states;

"48(1) There may be registered as annexed to any land that is being or has been registered, for the benefit of any other land that is being or has been registered, a condition or covenant that the land, or any specified portion of the land, is not to be built on, or is to be or not to be used in a particular manner, or any other condition or covenant *running with or capable of being legally annexed to land.*

. . .

(4) The first owner, and every transferee, and every other person deriving title from the first owner … 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 ….
>
> (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. (emphasis added)

As a result, a covenant does not run with the land so as to bind future owners of such land by reason only that the terms of a restrictive covenant say they will. What is required for a covenant to run with land at common law was summarized by V DiCastri in *Registration of Title to Land* (Carswell, 1987) at 10-3 to 10-5 where it is stated "that the covenant must be *negative in substance . . .*; *no personal or affirmative covenant requiring the expenditure of money or the doing of some act runs with the land*" (*Russell v Ryan* 2016 ABQB 526 (CanLII) at para 21, emphasis added). The key question in this case was whether or not the covenant in the Restrictive Covenant to maintain the Retaining Wall is negative in substance. I view the covenant contained in Section 2.1(h) of the Restrictive Covenant to contains three elements:

1. The Grantor shall not construct of allow to be constructed a retaining wall on any Retaining Wall Lots unless the retaining wall is installed pursuant to the Architectural Guidelines;

2. Any such retaining wall shall be maintained; and

3. Any such retaining wall shall neither removed, altered or otherwise disturbed except if and when replaced, and in such case the retaining wall will be replaced in accordance with good engineering practise in compliance with appropriate engineering standards and with approval of The City of Calgary.

The first and third of these elements could be characterized as negative covenants (i.e., they could be complied with without "the expenditure of money or the doing of some act."), however, the second, requiring that a retaining wall be maintained, would likely be found by a Court in Alberta to be positive in substance. Such covenant would therefore not run with the land and be unenforceable as against the Registered Owners as successors in title to the Developer.

In *Qureshi v. Gooch,* 2005 BCSC 1584, the plaintiff asked the Court to find an implied term in an agreement for purchase and sale of land that the defendant had the obligation to repair a retaining wall and that such obligation should run with the land. In finding that the obligation does not run with the land the Court stated at paras 22 and 23:

> "He says a term that the obligation to repair must be assumed by subsequent purchasers until 2018 should be implied as a result. I do not agree. In my view the obligation to repair the wall is a positive one in that it requires Dr. Qureshi to expend money or do some act, i.e. repair the wall…

Accordingly, the requirements for a covenant which runs with the land are not met."

## Summary

The HOA are not obligated by the terms of the Restrictive Covenant, the Encumbrance or the By-laws to maintain and/or replace the Retaining Wall. The terms of the Restrictive Covenant are clear that, if a retaining wall is constructed on the Lands, it shall be maintained by the Grantor, which was originally the Developer. It also purports to run with the land and be binding upon successors in title to the Lands thereby requiring the Register Owners to maintain the Retaining Wall given that fact that it was constructed thereon. However, a Court in Alberta would likely characterize this as a positive obligation to maintain the Retaining Wall and therefore not a covenant running with the land. As a result, this obligation may not be enforceable as against the Register Owners.

## Recommendation

As a result of this analysis, the HOA should provide notice in writing to the Registered Owners that, pursuant to the terms of the Restrictive Covenant, Registered Owners are responsible for the maintenance of the Retaining Wall.