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Staff Report

Legal Services

Report To: **Committee of the Whole**
Meeting Date: April 6, 2021
Report Number: FAF.21.061
Title: No-Objection Clauses in Agreements of Purchase and Sale
Prepared by: Will Thomson, Director of Legal Services

A. Recommendations

THAT Council receive Staff Report FAF.21.061, entitled "No-Objection Clauses in Agreements of Purchase and Sale" for information.

B. Overview

At the October 19, 2020 Council passed the following Motion:

WHEREAS the Town of The Blue Mountains ("Town") often considers and approves plans of subdivision that allow for the developer to build out the approved subdivision in phases, and

WHEREAS developers may approach the Town for revisions to a registered plan of subdivision as the various phases are built out and modifications to the plan are requested, and

WHEREAS developers often require individual lot purchasers to agree to clauses ("SLAPP Clauses") in their purchase agreement that limit or prohibit the purchaser from objecting either directly or indirectly to any future official plan or zoning bylaw amendment that the developer may request, and

WHEREAS the Planning Act in Ontario provides all property owners in the Town of The Blue Mountains with the right to know of, and comment on, all planning matters that come before Council as these matters are of public interest, and

WHEREAS the Town often requires the developer to include certain provisions in their development agreement in the individual lot purchase agreements with prospective buyers so as to bind the prospective buyers with certain conditions imposed on the developer by the Town,

NOW THEREFORE, Council direct staff to report back to Council by the end of December 2020 on ways that the Town can prohibit the developer from using SLAPP clauses in their purchase agreements with prospective owners of the lots developed under an approved and registered plan of Subdivision,

As will be explored and outlined in this opinion/report, Staff are of the opinion that attempting to prohibit "gag" clauses via our Development Agreements is not the appropriate method to resolve this concern.

C. Background

Some property owners, typically when building out a multi-phase development, but potentially as part of smaller scale development or even routine real estate transactions, will include "gag" clauses in Agreements of Purchase and Sale with individual purchasers. These clauses vary, but typically preclude the purchaser from opposing or objecting to any official plan amendments, rezoning, or other land-use planning applications related to the property or future development. For the purposes of this report, these clauses will be referred to as "gag" clauses. This report will address whether or not the Town can, or should, regulate the use of gag clauses through development agreements.

D. Analysis

This is an extremely complex issue, one which has not been settled by Canadian Courts. This report will discuss several overlapping elements to this issue, including public policy considerations, restraint of trade, and practical enforcement.

The fundamental question posed by Council is *if* and *how* the Town can, via its Development Agreements with Developers, prohibit the use of gag clauses in Agreements of Purchase and Sale (APS). The first fundamental principle to consider is that Agreements of Purchase and Sale are private, civil contracts to which the Town is not a party. The Town has no right or ability to view such a contract, save for it being supplied to the Town by one of the contracting parties. In Canadian law we can be guided by some general principle of contract law when considering such Agreements; namely, that parties to an Agreement are entitled to contract freely, and a freely entered into contract, save for bad faith, will generally be binding on both parties. Secondly, with respect to APS specifically, we can be guided by the principle that a purchaser cannot be forced to close a purchase without clean title, *unless* they have specifically contracted otherwise. While gag clauses are not an issue of 'clean title' *per se*, the principle is sound that parties are fundamentally free to contract as they see fit, and onerous terms in an APS are first and foremost a factor in the market valuation of the property.

Restraint of Trade (Restrictive Covenants)

The general principle to freely contract with another is tempered by the *prima facie* prohibition on covenants which are in restraint of trade. Contract clauses in restraint of trade are most often "non-competition" clauses in commercial contracts, however the historic doctrine respecting restraint of trade is summarized as follows: "[A]ll restraints of trade were contrary to public policy and therefore prima facie void unless they could be justified as being reasonable with reference to the interests of the parties and the public."[1]

[1] Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., Ltd., [1894] A.C. 535 at 565
[2] Tank Lining Corp. v Dunlop Industrial Ltd. (1982) 40 OR (2d) 219; 140 DLR (3d) 659; 1982 Canlii 2023 (ONCA)
[3] Stephens v Gulf Oil Canada Ltd et al. (1976) 11 OR (2d) 129; 1975 Canlii 711 (ONCA)
[4] *Ibid*
[5] Ontario (Human Rights Commission) v. Etobicoke (Borough), 1982 CanLII 15 (SCC), [1982] 1 S.C.R. 202, at para. 19

The common law test when analyzing covenants in restraint of trade is a four-part test[2]:

1. Is the clause in restraint of trade?
2. Is the restraint contrary to public policy?
3. Is the restraint reasonable in the interests of the parties?
4. Is the restraint reasonable with reference to the public interest?

Fundamentally, the Courts have held that "a contract in restraint of trade is unenforceable unless the restrictions can be justified as being reasonable in the interests of both parties and the public."[3] Furthermore, with respect to real property, the Court of Appeal has held that "There is a fundamental distinction between a situation where a person accepts restraints on property that he owns and one where he purchases land which is already subject to restrictions. It is only in the former case that the contract is in restraint of trade. In the latter situation the purchaser is not giving up any freedom that he otherwise enjoyed."[4]

Absent any judicial clarity on the matter, I cannot say whether prohibiting gag clauses via development agreements *would* be in restraint of trade, but I am of the opinion that doing so *may* be in restraint of trade.

Planning Act

Council expressed concern that gag clauses limit a resident's ability to exercise their statutory right under the *Planning Act* to oppose development applications in certain circumstances.

On this issue, the Supreme Court has endorsed the principle that parties can contract out of benefits conferred by statute, unless it would be contrary to public policy or prohibited by the statute itself.[5] This opinion will not delve into whether or not gag clauses are contrary to public policy vis-à-vis the *Planning Act*; however the *Planning Act* does not include outright prohibitions unlike the *Consumer Protection Act,* for example, which states: *7 (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary. 2002, c. 30, Sched. A, s. 7 (1).*

The primary issue is that, in the event the Town were to prohibit gag clauses via our development agreements, it will be difficult to firstly even identify if a developer has breached the agreement by using a gag clause.

Secondly, the Town could take on a potential liability in the event that a resident, subject to a gag clause, discovers that the Town prohibited such clauses, but failed to enforce the prohibition, and now the resident has entered into a binding contract inclusive of a gag clause.

In staff's opinion, the Town should avoid inserting clauses into development agreements which we cannot readily track for compliance; doing so exposes the Town to indeterminate liability by a party who may be negatively affected by such clauses.

[1] Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., Ltd., [1894] A.C. 535 at 565
[2] Tank Lining Corp. v Dunlop Industrial Ltd. (1982) 40 OR (2d) 219; 140 DLR (3d) 659; 1982 Canlii 2023 (ONCA)
[3] Stephens v Gulf Oil Canada Ltd et al. (1976) 11 OR (2d) 129; 1975 Canlii 711 (ONCA)
[4] *Ibid*
[5] Ontario (Human Rights Commission) v. Etobicoke (Borough), 1982 CanLII 15 (SCC), [1982] 1 S.C.R. 202, at para. 19

Restrictive Covenants and Warning Clauses

The Town, in existing developments, typically requires that developers insert restrictive covenants or warning clauses onto title or into Agreements of Purchase and Sale.

Council has queried how these clauses are different from the gag clauses discussed herein. First and foremost, the Town has typically required only one restrictive covenant, which seeks to prevent a property owner from changing the grade of their property. Such a clause is different from the at-issue clause for two primary reasons: 1) it relates to land-use, which is the primary use of restrictive covenants, and 2) the compliance with the covenant is required to protect property interests of the neighbourhood and Town, creating a causal connection directly between the Town and the property owner. Contrarily, a proposed restriction on contractual terms does not relate to land-use, nor does it have a direct impact on any other property or the Town, nor is there an overarching public interest of the Town which would necessitate such a clause.

Notice and Warning clauses inserted into Agreements of Purchase and Sale are more conventional: they may warn buyers that the live near a golf course and they may be exposed to errant golf balls; that they live adjacent to a school or park and may be subject to the noise and activity associated thereto; or that they may live in a building-out neighbourhood and may be exposed to construction activity.

As such, Staff are of the opinion that there is a marked difference between conventional restrictive covenants or warning clauses, and an obligation limiting third party contractual rights.

Conclusion

Based on all the foregoing, staff are of the following general opinion that it is not in the best interests of the Town to try to prohibit gag clauses via development agreements.

It is staff opinion that the appropriate mechanism to address this issue is through legislative amendments to the *Planning Act.*

E. Strategic Priorities

1. Communication and Engagement
We will enhance communications and engagement between Town Staff, Town residents and stakeholders

3. Community
We will protect and enhance the community feel and the character of the Town, while ensuring the responsible use of resources and restoration of nature.

4. Quality of Life

We will foster a high quality of life for full-time and part-time residents of all ages and stages, while welcoming visitors.

F. Environmental Impacts

N/A

G. Financial Impacts

N/A

H. In Consultation With

Shawn Everitt, CAO

Nathan Westendorp, Director of Planning and Development

I. Public Engagement

The topic of this Staff Report has not been the subject of a Public Meeting and/or a Public Information Centre as neither a Public Meeting nor a Public Information Centre are required.

Any comments regarding this report should be submitted to Will Thomson, Director of Legal Services directorlegal@thebluemountains.ca

J. Attached

None

Respectfully submitted,

Will Thomson
Director Legal Services

Shawn Everitt
Chief Administrative Officer

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Report Approval Details

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This report and all of its attachments were approved and signed as outlined below:

Will Thomson - Mar 23, 2021 - 1:38 PM

Shawn Everitt - Mar 23, 2021 - 2:03 PM

[1] Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., Ltd., [1894] A.C. 535 at 565
[2] Tank Lining Corp. v Dunlop Industrial Ltd. (1982) 40 OR (2d) 219; 140 DLR (3d) 659; 1982 Canlii 2023 (ONCA)
[3] Stephens v Gulf Oil Canada Ltd et al. (1976) 11 OR (2d) 129; 1975 Canlii 711 (ONCA)
[4] *Ibid*
[5] Ontario (Human Rights Commission) v. Etobicoke (Borough), 1982 CanLII 15 (SCC), [1982] 1 S.C.R. 202, at para. 19