MCINNES COOPER

Aileen Furey
Direct +1 (902) 444 8445
aileen.furey@mcinnescooper.com

1969 Upper Water Street
Suite 1300
Purdy's Wharf Tower II
Halifax NS
Canada B3J 2V1
Tel +1 (902) 425 6500 | Fax +1 (902) 425 6350

Our File: 164815

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VIA EMAIL: stan@happyhollow.us

Stan Frantz
9 Astaak Point Road
Clam Bay, NS B0J 1Y0

Dear Mr. Frantz:

RE: Review of License Agreement and Restrictive Covenants for Lot 20 at Abbecombec Ocean Village

This is to confirm that I have reviewed the License Agreement dated October 19, 2001 and the Warranty Deed dated October 16th, 1989, associated with Lot 20 at Abbecombec Ocean Village in Clam Bay, Nova Scotia, both of which were provided to me by yourself.

You have requested that I review the above-noted documents to determine if the use of a common area by one Resident, who may be running a business out of said common area, is contrary to the License Agreement and Warranty Deed. You have also asked me to advise on whether the common areas can be sold to an individual, and the process for changing either the License Agreement or the covenants.

License for Use of Common Areas

As stated in the License Agreement, at paragraph 2, all owners will be subject to same terms. This means that every license agreement regarding use of the common areas should be the same.

The License Agreement allows the developer to make reasonable rules regarding the common areas, as outlined at paragraphs 8 and 19. This means that the use of the common areas is subject to changing terms and conditions, as long as they are reasonable.

Each owner has a license to use the common areas for access to the lot and for recreational purposes, such license being revocable upon a breach by an Owner. The license is then revoked by written notice, as per paragraph 15.

Schedule A1 describes the common areas that are subject of the License Agreement, so the developer cannot simply make a rule or change the designation of a building from a common-area to an exclusive-use area to avoid the terms of the License Agreement. However, at paragraph 2 of Schedule A1, it is significant to note that only the pool room and other reactional areas in the Administration Center are designated to be common areas. The building itself is not

designated as a common area. This means that other areas of the building may be used in an exclusive manner by one or more persons.

It is my understanding that some part of this building has been used for storage and possible business purposes by a resident of your community. If this is occurring in an area other than a designated “recreational area”, than he may have rightfully entered into an agreement with the developer to do so. If this resident’s exclusive use were happening in an arguably “recreational area”, it could be challenged.

You have also advised me that there has been some discussion of selling the building which contains the pool room and other recreational areas. Paragraphs 10-14 of the License Agreement only contemplate conveyance of the common elements to the Co-Op, for distribution to the owners, and not conveyance or sale to a third party. This conveyance would occur in the following circumstances:

- Upon final subdivision approval for each new phase and completion of the access roads to all lots in the new phase;
- If the developer determines the Project will not be completed;
- If the developer completes the entire development of all lands the currently own.

It is my opinion that a conveyance or sale to a party other than the Co-Op could be challenged.

Restrictive Covenants

There is no statement in the Covenants that all owners of all properties in the development are subject to the same covenants. For this reason, my comments below refer solely to the property known as Lot 20, to which the covenants I reviewed specifically apply.

From my review, Restrictive Covenant 4, which limits the use of the “Lands or any buildings erected thereon”, applies only to the Land identified in Schedule “A”, which is Lot 20. This restrictive covenant does not negate the ability to operate a business from the common areas, or the lands of the development at large. This covenant may not apply in the same way to other residential lots, as I have reviewed only the covenants specific to Lot 20.

Paragraph 21 of the Covenants document indeed states that “The Grantor may alter, waive or modify any of the foregoing building and other restrictions so long as their substantial character is maintained.” This gives the developer the ability to change the covenants, but the wording suggests that the ability to change them is not absolute, due to a qualifier that the covenants have to retain their “substantial character.”

In my opinion, if the developer were to waive a clause such that an owner could begin to run a business on Lot 20, that would not be a change that is in keeping with the “substantial character” of covenant 4, and it could be challenged on that basis.

Otherwise, a covenant can be terminated in one of 5 ways:

1. If it ceases to fulfill a function;
2. If a stated period of time has elapsed;
3. If terminated by dominant tenement due to delay and laches;
4. By agreement
5. Legislation.

It is my opinion that only option 4 above is relevant at this time. An agreement between the owner of Lot 20 and the developer would be necessary to change the restrictive covenants. An agreed change between both parties may not be subject to the same qualification noted in paragraph 21, as that paragraph relates to changes made unilaterally by the developer. However, such changes could be subject to challenge by neighbouring owners, who may oppose changes to the covenants.

Please do not hesitate to contact me to discuss further.

Yours very truly,

Aileen Furey