

GOOD EASEMENT AGREEMENTS MAKE GOOD NEIGHBOURS

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When lawyers write about strata issues we often focus on the respective rights and obligations of the strata corporation, owners, tenants and occupants. However, the legal issues that strata corporations face are much broader than that.

While the proverb “Good Fences Make Good Neighbours”, may have some truth, a good fence is not enough to protect the rights of a strata corporation when the adjoining property is being developed. In fact, we are aware of a fence delineating the property line between a strata complex and a neighbouring development site falling into the excavation.

This article contains a discussion of some of the important matters to be considered when strata councils are negotiating an easement agreement with a developer who is building on an adjoining parcel of land.

When an adjoining landowner demolishes buildings and structures, excavates the land and constructs new buildings, some or all of these actions can negatively impact the stability of the soil at the adjoining strata complex. Generally, the soil and structures in the areas closest to the construction site are most at risk. The only way of knowing how the stability of the soil may be impacted by the adjoining development is to retain a geotechnical engineer, who will review the applicable documents. The geotechnical engineer will provide advice on whether there may be issues with the stability of the soil in the strata complex as a result of the demolition, excavation and construction that will take place on the development site. He or she may also recommend to the strata council that the strata corporation retain the services of a structural engineer to review whether the demolition, excavation and construction that will take place on the adjoining development may have a negative impact on the buildings in the strata complex.

Being next door to a construction site can also result in unwanted noise and vibration in the strata complex. The vibration, noise and damage may constitute a legal nuisance, which means an unreasonable interference with the use and enjoyment of land. If an easement agreement is not being negotiated, the strata corporation may have an action for nuisance against the adjoining landowner.

If the developer of the adjoining lands requires access to and/or the use of the strata corporation’s property, the adjoining landowner may ask the strata council to sign an easement agreement. In an easement agreement, a landowner of what is legally called the “servient tenement” gives an adjoining landowner of the “dominant tenement”, the right to use the servient tenement in the manner indicated. At least some of the rights under the easement agreement usually “run with the land”, meaning that they will bind future owners of the servient tenement.

The areas of the land that may be accessed and/or used may include the soil, the surface of the land or even the airspace above. The adjoining landowner will likely be excavating. To support the soil

during excavation there may need to be rods and other equipment, often described as the “Works”, placed in the soil on the strata corporation’s property. It may be necessary to leave some of these items in the soil permanently.

The adjoining landowner may also want to use the surface of the strata corporation’s common property. The strata corporation’s common property may be used to bring vehicles, equipment and materials on to the development site and to construct and install protective hoarding, (meaning a temporary wooden fence around the site), or for other purposes. The adjoining landowner may also ask to swing a crane over the strata corporation’s airspace when building on the adjoining lands.

As always in contract negotiations, the strata council must act in the best interests of all owners. In the case of an easement, the strata council should work to ensure that the expenses that will be incurred by the strata corporation will be reimbursed by the adjoining landowner. Also, the strata council should seek proper compensation for the problems that the construction may cause to the strata complex and ensure that the strata corporation’s expenses will be paid for by the neighbouring developer. These expenses will include legal expenses and engineering expenses. The expenses may also include the cost of retaining a surveyor. It is likely that there will be damage to some of the strata corporation’s property and these expenses should be paid for by the other side as well. The strata corporation may require the funds to be paid up front for expenses, and for the agreement to provide that further funds will be paid if there is damage to the strata corporation’s property.

The long-term potential value of the strata corporation’s land also needs to be considered. The rights granted in the easement agreement, may affect the strata corporation’s ability to successfully market the strata complex for re-development in the future. Conversely, the easement agreement may be reciprocal, meaning it allows the strata corporation the ability to also enjoy an easement to use the other site to swing a crane over it and so on. This may add some value to the strata corporation’s land.

The rights granted to use the strata corporation’s lands should be as narrow as possible. For instance, for an agreement regarding soil support, or to use the surface of the land, the area subject to the easement should be surveyed and the survey should be registered in the Land Title Office and will become a schedule to the easement agreement.

The time period that the easement is in effect should also be defined. For instance, if the adjoining landowner is asking for an easement that allows it to use the surface of the strata complex’s lands for the purposes of construction any time in the next 20 years, that is likely to be unreasonable and may interfere with the value of the strata complex if there is a dissolution and winding up of the strata corporation.

The easement agreement should also include other provisions. Your lawyer will consider including provisions regarding insurance, indemnities, notice provisions, monitoring of any settlement, having an engineer review any substantial change-orders of the Works, and so on.

Statutory right of way agreements have some similarities to easements, but they generally grant certain rights to use a property in favour of the Crown, a Crown agency, a municipality or a public utility.

Although the strata council may negotiate the easement agreement, the easement agreement cannot be entered into unless it is approved by the owners at a general meeting. Pursuant to section 79 of the *Strata Property Act*, entering into an easement agreement must be approved by a $\frac{3}{4}$ vote of the owners at a general meeting. The adjoining landowner may come over with a very informal agreement for the strata council to sign. Hopefully, if you are serving on a strata council dealing with an adjoining land developer, you will remember that good fences are not always enough to make good neighbours and the strata council will pass a motion to retain a lawyer to provide recommendations on negotiating a proper easement agreement.