

Memorandum

TO: Christian & Missionary Alliance – Canadian Pacific District
Attention: Yvette Luke

FROM: Kuhn LLP, Kevin L. Boonstra

DATE: December 13, 2022

FILE NO: 107-0112

SUBJECT: Condition on Crown Grant - 2060 Broadway Street, South Hazelton, British Columbia

This memorandum outlines for Christian & Missionary Alliance - Canadian Pacific District (“**CPD**”) how the above referenced property could be restricted due to limitations imposed with the original Crown Grant.

FACTS

You have advised me of the following facts:

1. On February 22, 1984, the Province of British Columbia granted CPD an estate (“the “**Grant**”) for the lands and premises located at 2060 Broadway Street, South Hazelton, British Columbia, and more legally described as:

PID: 013-816-268

LOT A (PLAN 10786) BLOCK 26 DISTRICT LOT 851 CASSIAR DISTRICT
PLAN 974B

(the “**Property**”)

2. The Grant was provided to CPD “for so long as the land is used for public worship purposes” (the “**Condition**”).
3. At the time of the Grant, a “Possibility of Reverter” was also registered as a charge on the Property (the “**Reverter**”) which is held under registration number N2873 in favour of “HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA” (the “**Crown**”).



4. You have advised me that CPD wishes to understand how the Condition and Reverter impact the Property and have asked specific questions, which are set out below.
5. Specifically, CPD would like to be advised with respect to the following:
 - a. If the Condition is no longer met, will the Property revert back to the Crown?
 - b. Will the Condition and Reverter impact CPD's ability to sell the Property?
 - c. Will the Condition and Reverter impact CPD's ability to subdivide the Property?
 - d. Will the Condition and Reverter impact CPD's ability to re-zone the Property?
6. You have provided us with a copy of the South Hazelton Zoning Bylaw (the "**Bylaw**") which provides for several types of zoning such as Rural Agriculture, Hobby Farm, Town Commercial, Community, and others (collectively the "**Bylaw Zone**").

Please note, if any of the above facts are misstated or incorrect, please advise us of such as it may change our analysis and opinion.

ISSUES

1. If the Condition is no longer met, will the Property revert back to the Crown?
2. Will the Condition and Reverter impact CPD's ability to sell the Property?
3. Will the Condition and Reverter impact CPD's ability to subdivide the Property?
4. Will the Condition and Reverter impact CPD's ability to re-zone the Property?

ANALYSIS

Issue #1 If the Condition is no longer met, will the Property revert back to the Crown?

The Condition is an express limitation on how the Property can be used. If the Condition is no longer being met (i.e., CPD failing to use the Property for public worship purposes) the Reverter would be engaged resulting in the Property reverting back to the Crown.

Section 43 of the *Land Act*, RSBC 1996, c. 245, (the "*Land Act*") provides as follows:

- (1) If a person who holds a disposition of Crown land
 - (a) defaults in payment of money due to the government, or



(b) fails or neglects to observe or perform a covenant, stipulation or term required by the minister, or set out in the disposition,

the minister may send a notice by registered mail, addressed to the person at his or her last known address, requiring the person to pay the money due or to comply with the covenant, stipulation or term within 60 days after the notice is mailed.

(2) If the default, failure or neglect continues after the 60 day period, the minister may cancel the disposition. [Emphasis added]

The CPD is a holder of a disposition of Crown land (i.e., the Property). If CPD fails or neglects to observe the Condition, the minister may send notice for CPD to comply with the Condition within 60 days. If CPD does not comply within the 60-day period, the minister may cancel the Grant.

As such, the answer to the above question is, yes. If CPD fails to observe the Condition, this could engage the Reverter resulting in the Property reverting back to the Crown. However, the minister would first be required to advise CPD and allow 60-days for compliance.

Issue #2 Will the Condition and Reverter impact CPD's ability to sell the Property?

Despite the fact that the Property may be sold, the Condition and Reverter will remain with the Property.

The following excerpt is found in the case of *Mowat v. Dudas*, 2012 BCSC 454 at paras. 45-46:

Since the right of reverter constitutes a limit or condition on the original grant, subsequent transfers are all subject to the same limitation by virtue of *nemo dat* and s. 186 of the *Land Title Act*, R.S.B.C. 1996, c. 250. ...

Consequently, all subsequent transfers after the original transfer are subject to the right of reverter and the terms that are set out in the User Agreement and its schedules.

While we are not able to comment specifically on market conditions affecting the Property, we expect that the Condition and Reverter would reduce the number of potential purchasers should CPD wish to sell the Property. It is reasonable to assume that this could limit the price at which the Property may be sold.

Section 186 (6) of the *Land Title Act*, RSBC 1996, c. 250 (the "*Land Title Act*") provides as follows:



(6) Subject to subsection (8), if the transfer contains express **words of limitation**, the transfer operates to transfer the freehold estate of the transferor in the land to the transferee in accordance with the limitation.

The “words of limitation” that indicate duration such as “**for so long as**”, “during”, “while”, and “until” are used to create a “**determinable fee simple**”. Once created, the grantor (i.e., the Crown) has a “possibility of reverter” (i.e., the Reverter). The express words of the Condition are “**for so long as**” which creates a determinable fee simple interest in the Property.

Any respective sale of the Property would transfer with it the “words of limitation” (i.e., the Condition). If the Property were to be sold, the Condition would be set out in the Form A Transfer and deposited with the Land Title Office.

Additionally, s. 73(4) of the *Land Title Act* provides as follows:

(4) A person must not grant an undivided fractional interest in a freehold estate in land or a right to purchase an undivided fractional interest in a freehold estate in land if the estate that is granted to or that may be purchased by the grantee is

(a) a fee simple estate on condition subsequent, or

(b) a determinable fee simple estate

that is or may be defeated, determined or otherwise cut short on the failure of the grantee to observe a condition or to perform an obligation relating to a right to occupy an area less than the entire parcel of the land.

Unfortunately, there are no case authorities that provide useful analysis on how this section of the *Land Title Act* has been interpreted. The Continuing Legal Education Society of British Columbia provides commentary with respect to s. 73(4) of the *Land Title Act* as follows:

Section 73(4) [of the *Land Title Act*] is an absolute prohibition against the creation of a conditional or determinable fee for an undivided fractional interest in a freehold estate in land ...

Based on the foregoing commentary, our interpretation of s. 73(4) of the *Land Title Act* is that this section would prohibit any owner of the Property from granting or selling an “undivided fractional interest” (i.e. a tenancy in common or joint tenancy) in the Property. Again, this restriction could limit the potential purchasers of the property as those who wish to co-own the Property would not be prospective purchasers.

Another potential issue with respect to selling that Property is that, if the potential buyer(s) wish to place a mortgage against the Property, they will likely wish to take a mortgage against both the



“determinable fee simple” and the Reverter in order to best protect their interests (the “**Mortgage Issue**”). In other words, since the Property is “determinable fee simple”, if a mortgage was only subject to the “determinable fee” and the determining event occurred (i.e., the Condition no longer being observed) the mortgagee would not be protected as the “determinable fee” would revert back to the Crown in “absolute fee simple” to which the mortgagee would have no interest in. We expect this could limit the number of lenders who would be prepared to lend to mortgagees in relation to the Property.

The following excerpt is found in *Westsea Construction Ltd. v. Land Title Office*, 1995 CanLII 1087 (BC SC) at para. 56:

To grant a mortgage of a determinable fee priority over a possibility of reverter would not enhance a mortgagee's security because, if a determining event occurred, the determinable fee would cease to exist in the creation of an absolute fee simple held by whomever or whatever was entitled under the reverter. The mortgagee could be protected only if the mortgage holder also was mortgagee of the possibility of reverter.

Additionally, we have flagged the Mortgage Issue because any buyer wishing to register a mortgage against the Property and Reverter would likely require consent from the Crown. In such an instance, this could cause the Crown to consider whether the buyer is using the Property in accordance with the Condition and if they are not, could potentially trigger the Reverter.

The answer to the above question is, yes. While the Condition and Reverter do not preclude or prevent a sale of the Property, they will likely impact CPD's ability to sell the Property by limiting the range of potential buyer(s) and possibly therefore the potential sale price. There could also be a risk associated with registering a mortgage against the Reverter as this could cause the Crown to consider whether the Condition is being observed.

Issue #3 Will the Condition and Reverter impact CPD's ability to subdivide the Property?

We are unable to find any express laws prohibiting subdivision of the Property. However, a subdivision would not defeat the Condition or Reverter. All subdivisions of the Property would remain bound by both the Condition and Reverter.

There could be a risk to CPD if it decides to subdivide. Although such a circumstance has not been expressly litigated, if CPD were to subdivide and a subdivided portion failed to observe the Condition, this could potentially cause the entire Property to revert to the Crown. In such a scenario CPD would likely have some compelling arguments as to why the Reverter should only be engaged with respect to the subdivided portion of the Property. However, there is still a risk that the entire Property could possibly revert to the Crown.



Issue #4 Will the Condition and Reverter impact CPD's ability to re-zone the Property?

In order to re-zone the Property, CPD would need to apply through the Regional District of Kitimat-Stikine (“**South Hazelton**”). This process is less likely to trigger an inquiry from the Crown in relation to the Condition than the Land Title Office which would have been engaged through the sale of the Property.

We have considered the Bylaw and the potential to re-zone the Property a Bylaw Zone. Although the Condition does not expressly limit CPD's ability to re-zone the Property, re-zoning could still have a negative impact. For example, if the re-zoning put CPD in breach of the Condition this could trigger the Reverter. On the other hand, if CPD re-zones and fails to follow the restrictions imposed by the applicable Bylaw Zone by observing the Condition, then CPD could be in breach of the Bylaw and may be subject to fines.

We recommend that CPD proceed with caution with respect to any applications to re-zone the Property as this could put CPD in contravention of the Bylaw or the Condition.

ADDITIONAL ANALYSIS

In our analysis we looked into the *Perpetuity Act*, RSBC 1996 (the “*Perpetuity Act*”) and considered whether there was a possibility the Reverter could expire. This principle is commonly referred to as “the rule against perpetuities” and limits how long a property can be “contingent” on the happening of a specified event. We found several sources which indicated that a determinable fee simple is considered “vested” (i.e., not contingent) which means that it is not limited with respect to time. Therefore, the rule against perpetuities does not apply to place a time limit on the Condition and Reverter.

Additionally, we looked into the issue of whether s. 186 of the *Land Title Act*, which requires that land being transferred be free from all encumbrances, would prohibit CPD from being able to sell the Property. In this regard we found an excerpt from the Continuing Legal Education Society of British Columbia that the Reverter is not an encumbrance as it does not diminish the value of the land.

SUMMARY

1. If the Condition is no longer met, will the Property revert back to the Crown?

Yes, if the Condition is not observed this could engage the Reverter which would revert the Property back to the Crown. However, before the Property is reverted, the minister must allow CPD 60-days to become compliant with the Condition.



2. Will the Condition and Reverter impact CPD's ability to sell the Property?

While the CPD could sell the Property, the Condition and Reverter will likely have a negative impact with respect to potential buyers of the Property and therefore the price. Additionally, there could be issues with respect to registering a mortgage against the Reverter as this could cause the Crown to inquire as to whether the Condition is being observed.

3. Will the Condition and Reverter impact CPD's ability to subdivide the Property?

No, the Condition and Reverter do not expressly limit CPD's ability to subdivide, but subdivision is not free from risk since the Reverter and Condition would continue with each subdivided parcel.

4. Will the Condition and Reverter impact CPD's ability to re-zone the Property?

No, the Condition and Reverter do not expressly limit CPD's ability to re-zone the Property. However, re-zoning could put CPD in breach of the Condition resulting in the Reverter potentially being triggered, or in the alternative, observing the Condition could put CPD in breach of the Bylaw which could result in fines.

Please do not hesitate to contact the writer if you wish to discuss this matter further.

Yours truly,

KUHN LLP

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Law Corporation