



Know Your TITLE. What Are You Entitled To?

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Acquiring real estate for business or residential purposes is a desire of many Jamaicans. Whether you have already purchased, are about to purchase or hope to one day purchase real property, it is of importance to be aware of the *restrictive covenants* which govern the development of the property acquired or to be acquired.

A *restrictive covenant* is a contractual obligation imposed on purchasers by the original vendor of land in a subdivision or development which is intended to limit the purchaser's use of the land for the benefit of all land owners in the subdivision. A subdivision is the area comprising all the lots which were derived from the same parent title, commonly referred to as the neighbourhood.

Restrictive Covenants "run with the land", that is, successive owners will be bound by the same covenants as their predecessors in title, provided that the covenants have not been discharged or modified by the Court pursuant to the Restrictive Covenants (Discharge and Modification) Act. In the case of registered land, restrictive covenants are generally endorsed on the title or outlined in a Memorandum of Sale.

It is important that all prospective purchasers ensure that they understand all the terms of the sale and the restrictive covenants governing the property. If you already own land, after the sale was finalised, you may have placed the Duplicate Certificate of Title in a safe place (or if there is a mortgage on the property, a photocopy since the Duplicate Certificate of Title would be in the possession of the mortgagee) without properly reading and understanding the title. Today may be a good time to retrieve the title from its safe place and peruse it.

The three main types of covenants to consider are discussed below.

1. Building and Subdivision Covenants

Depending on the neighbourhood in which the land is located, there may be a covenant which limits the type of building that may be constructed on the land. For example, a covenant may provide that no building except a private dwelling house and relevant outbuildings pertaining to the dwelling house may be built on the land.

Further, a restrictive covenant which precludes the subdivision of the property would limit the owner's ability to legally construct a townhouse or apartment complex and obtain splinter title for each townhouse or apartment as the case may be.

It is easy to understand how breaches of these covenants may impact property value, density, noise and sanitation requirements in the neighbourhood. Being familiar with the covenants that govern your neighbourhood will not only prevent you from breaching the covenants but will also make you aware of breaches by your neighbours within the same subdivision who are generally governed by the same restrictions.

2. Boundary and Height Covenants

A restrictive covenant may stipulate that no building or structure shall be erected on the land nearer than X feet from any road boundary and Y feet from all other boundaries. Do you know your boundary covenants?

This may seem irrelevant for persons who have no intention of carrying out substantial improvement to an existing building on the land. However, boundary covenants must be borne in mind for even improvements which may seem

inconsequential such as the construction of columns to support a car port or a concrete dog kennel.

When purchasing land, the purchaser may have an idea of the type and size of building that he would like to construct on the property having regard solely to the overall size of the property. It is also prudent to consider the boundary covenants so that the actual available construction space may be ascertained.

The height of fences, hedges or any construction on the property may be curtailed by restrictive covenants. For example, a covenant may provide that within 60 feet of any road boundary, no structure is to be of a height of more than 4 feet 6 inches above road level.

In addition to having due regard to restrictive covenants, property owners must be mindful of legislation such as the Parish Councils Building Act and Regulations which set out additional guidelines for construction and prescribe that approval must be obtained from the relevant parish council prior to erecting, removing, altering or extending **any building** or any part thereof. If the necessary approval is not obtained, or construction proceeds contrary to the terms of approval obtained, the defaulting property owner may be liable to prosecution.

3. Covenants as to the use of the land

Another popular covenant is one which restricts the use of the land. For instance, a covenant may prescribe that “no building erected on the land shall be used for the purpose of a shop, school, chapel, church or nursing home or for racing stables and no trade or business whatsoever shall be carried on” upon the property or any part thereof.

When purchasing land, explain to your attorney-at-law the purpose for which the property is being bought and ascertain whether your intentions are compatible with the restrictive covenants. If your intentions are not facilitated by the covenants, it is important to ascertain details of the application process to have the covenant(s) modified or discharged, the concomitant time and costs associated with the application and the likelihood of success.

Take for example, Mr John Doe purchases residential property (strata or otherwise) for a reasonable sum with the intention of building a small supermarket to service the needs of the community, or selling the property as commercial property to someone who has the same intention so that he, Mr Doe, may fetch a good profit. Mr Doe is overjoyed that he was able to obtain the property at a great price. He does not contemplate the costs and time associated with applying to the Court to have the covenants modified to accommodate a commercial enterprise of the type desired or, alternatively, having the covenant discharged.

Mr Doe should consult an attorney-at-law who will guide him through the application process which includes filing in the Supreme Court an application to modify or discharge the restrictive covenants, advertising the application in a daily newspaper and attending Court to have the application heard. Factors considered by the Court in determining whether or not to grant an application include:

- (a) whether the nature of the community has changed so as to render the covenant(s) obsolete;
- (b) whether all persons entitled to the covenant have consented to the modification or discharge of the covenant(s);
- (c) whether the modification or discharge will injure persons entitled to the benefit of the covenant(s); or
- (d) whether the covenant in its current form prevents the reasonable use of the land without securing any benefit sufficient to justify the existence of the covenant.

If having advertised the application, persons in Mr Doe's neighbourhood who are entitled to the benefit of the covenant object to his application by filing a Notice of Objection in Court, Mr Doe may negotiate and consider monetary compensation for the affected neighbours, which may or may not be accepted by the objectors.

A project that seemed to be an easy one may eventually turn into months, or sometimes even years, of litigation and thousands of dollars in expenses. Prior to purchase, a cost-benefit analysis must be undertaken, having been made aware of all the relevant facts and considerations and recognising that there is no guarantee that an application to modify or discharge a restrictive covenant will be successful.

If having perused your title, you believe that you are currently in breach of a restrictive covenant you should consult an attorney-at-law who may advise you of your options.

It is important to note that the breach of a restrictive covenant may result in civil liability by virtue of which neighbours may sue a defaulting property owner with a view to obtaining compensation for damage/injury caused to their property or property rights as a result of the breach. A property owner may face additional difficulties when trying to sell land in respect of which restrictive covenants have been breached. For example, a purchaser may refuse to complete a sale or a mortgage institution may refuse to lend unless the breach is rectified or until it receives an undertaking that same will be rectified.

All in all, the pleasure of real property ownership is best maintained when you **know your title**, understand the restrictions and carefully assess what you are enTITLED to.

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