SUPREME COURT OF NOVA SCOTIA
Citation: *Hames v. Gardner*, 2024 NSSC 135

Date: 20240515
Docket: 525304
Registry: Halifax

Between:

Heather L. Allison Hames

Applicant

v.

Michael Gardner and the Registrar General of Land Titles

Respondents

and

Kevin James Pochlington and Leslie Nicole Robb

Intervenors

and

Gary Bliss and Nancy Bliss

Intervenors

Judge: The Honourable Justice D. Timothy Gabriel

Heard: November 16, 2023, in Halifax, Nova Scotia

Counsel: Alex Embree, for the Applicant
Robert G. Grant, K.C., for the Respondent and Intervenors

By the Court:

[1] The Applicant is Heather L. Allison Hames. She is the owner of real property located at 1180 Rockcliffe Street (Lot 3) in the south end of peninsular Halifax. The Respondent is Michael Gardner. He is the Applicant's next-door neighbour at 1186 Rockcliffe Street (Lot 2). The Intervenors, Kevin James Pocklington and Leslie Nicole Robb (the owners of 1190 Rockcliffe Street, Lot 1) and Gary and Nancy Bliss (the owners of 6600 South Street, Lot 4) were added by consent at the outset of the hearing.

[2] The Applicant is seeking declaratory relief. To be more specific, she seeks an order declaring that one of the restrictive covenants that are said to affect her property (which, in order to remain consistent with the parties' briefs, I will refer to as "restrictive covenant (59 feet)") be adjudged to be of no force and effect. She seeks a similar pronouncement with respect to a recorded statutory declaration (which, for the same reason, I will refer to as "statutory declaration (2005)"). Alternatively, she seeks a declaration that Mr. Gardner's real property next-door is not a dominant tenement with respect to the restrictive covenant (59 feet), and therefore that the covenant may not be enforced by him.

[3] Because the Applicant also seeks to have changes made to the land parcel register maintained pursuant to the *Land Registration Act*, she has named the Registrar General of Land Titles for the Province of Nova Scotia as a respondent in this proceeding. The Registrar has taken no position in this matter. As a consequence, only Mr. Gardner will be referred to herein as "the Respondent".

[4] Both the Respondent and the Intervenors (who are represented by the same counsel) oppose the application.

Background

[5] The Applicant has described the past and present owners of the lots in this subdivision in the following manner:

> 17. In 1943 James A. Harrison conveyed approximately 0.71 acres of land on the south-west corner of the intersection of South Street and what was to become Rockcliffe Street. In 1945 this land was conveyed to William H. Bowes.
>
> 18. In 1946 Bowes had a subdivision plan prepared, dividing the 0.71 acres into four building lots, Lot 1, Lot 2, Lot 3, and Lot 4. These lots were conveyed by Bowes as follows:

a. 1186 Rockcliffe deed (1948): April 29, 1948: Lot 2 to Dudley, now owned by the Respondent Michael Gardner. Current civic address is 1186 Rockcliffe.

b. 1180 Rockcliffe deed (1950): September 25, 1950: Lot 3 to Coade, now owned by the Applicant. Current civic address 1180 Rockcliffe.

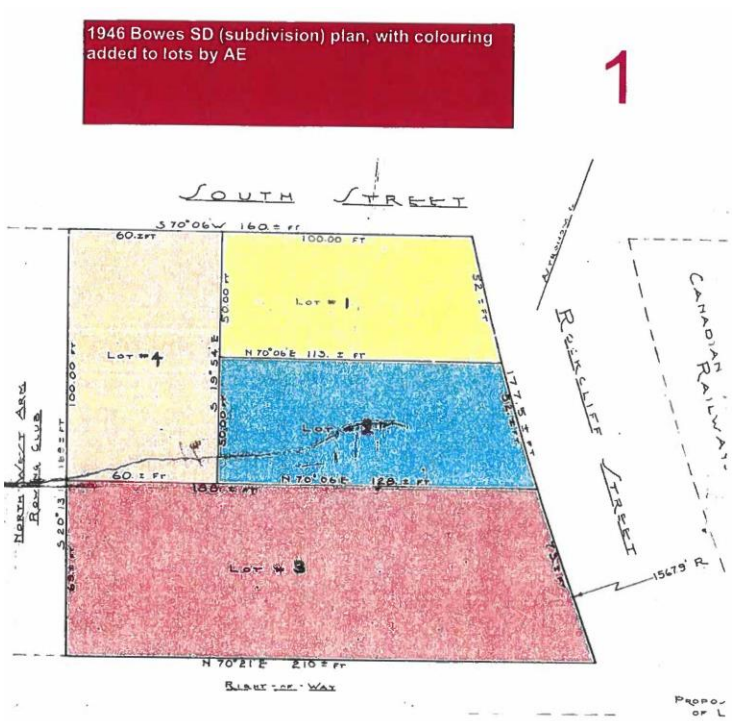
c. 1190 Rockcliffe deed (1950): November 22, 1950: Lot 1 to Tranton. Current civic address 1190 Rockcliffe (now owned by Pochlington and Robb).

d. 6600 South deed (1951): January 12, 1951: Lot 4 to MacDonald. Current civic address 6600 South (now owned by Gary and Nancy Bliss).

(Applicant's brief, June 29, 2023, paras 17 – 18)

[6] The above information, as provided by the Applicant, is uncontested by the other parties.

[7] By consent, a demonstrative aid was tendered showing the subdivision plan implemented in 1946 by Mr. Bowes. In order to assist the reader with spatial orientation, it is reproduced below:



[8] Lot 3, then, is 1180 Rockcliffe Street, currently owned by the Applicant. I will hereinafter refer to it as either "1180", "Lot 3", or "the Applicant's property". The Respondent currently owns Lot 2, which will henceforth be referenced as "1186", "Lot 2", or "the Respondent's property".

[9] The Land Registration View for 1180 maintained by the Land Registry depicts the Applicant's property as subject to the burden of "restrictive covenants described in book 1079, page 452." That deed, which was dated September 25, 1950, from William H. Bowes and his wife to Ada Marian Coade (one of the Applicant's predecessors in title) particularizes the covenants thus:

> The Grantee and the Grantors herein mutually covenant that when maintenance or repair work may be required on any part of the sewer or water pipes as the same have been installed, such maintenance work is to be carried out promptly and executed in a workmanlike manner by the owner of the lot where the work is required, and the cost of such work is to be shared equally by the owner or owners of the lot or lots being served by the section of the sewer or water pipes requiring repairs; that the cost of said work shall constitute a lien against such lot or lots; and that should the owner of any lot fail to do required repair or maintenance work the owner of either of the two remaining lots may after ten days notice in writing, enter upon the said lot with his servants or agents and cause the necessary work to be done;
>
> To the intent that the burden of this covenant may run with the land, the Grantors and the Grantee do hereby respectively covenant and agree with each other, and their, his or her respective Heirs, Executors, Administrators or Assigns that:
>
> (1) No further conveyance of the lands herein conveyed shall take place unless and until the purchaser offers to enter into an agreement with the then owner or owners of lots one and two in the Bowes Sub-division providing for the repairs and maintenance of the aforementioned sewer and water pipes in the manner set out in the preceding covenant hereof and providing against resale unless or until agreement is reached as to maintenance and repairs;
>
> (2) No building or any part thereof shall be erected on the lot herein conveyed nearer than Six Feet (6) Feet to the Northern boundary line of said lot or nearer than Fifty-nine (59) Feet to the Southerly projection of the Western Line of the lot known as Lot No. Two in the Bowes Sub-division and conveyed by the Grantors to James Earl Dudley by Deed dated April 29th, A.D. 1948.
>
> *(Affidavit of Jocelyn Lockhart, filed July 13, 2023, Tab 3, pp. 3 – 4)*

[10] The Respondent elaborates upon this in the Affidavit of himself and Evelyne Meltzer (since deceased) dated April 19, 2005, registered as document 81767775 at

the Halifax County Land Registration Office (the Statutory Declaration (2005)). The contents of this document are set forth below:

STATUTORY DECLARATION

We, Evelynne Meltzer and Michael Gardner, of Halifax, Halifax Regional Municipality, Province of Nova Scotia, MAKE OATH AND SAY:

1. THAT we are the deponents herein and have personal knowledge of a all matters deposed to save where otherwise stated to be by way of information and belief;

2. THAT we are the current owners of the property known as 1186 Rockcliffe Street, Halifax, Nova Scotia, having purchased the property in November of 1993. We are advised and do verily believe that our property is shown as Lot # 2 on Plan # 732 recorded at the Registry of Deeds in Halifax.

3. THAT the property known as 1180 Rockcliffe Street lies to the south of our property and is depicted as Lot 3 on Plan # 732 aforesaid.

4. THAT our property known as 1186 Rockcliffe Street is depicted on the Location Certificate annexed hereto as Schedule "A". Our house was constructed on an angle on the lot and has windows along its southern wall which look over the back portion of the property known as 1180 Rockcliffe Street and afford a view of the Northwest Arm and the Dingle.

5. THAT we are advised by our solicitor and do verily believe the Deed for Lot 3 (1180 Rockcliffe Street) from the original developer includes a Restrictive Covenant. Attached hereto as Schedule "B" is a transcription of the relevant portion of the Deed to Ada Marion Coade recorded in the Registry of Deeds in Book 1079 at Page 452.

6. THAT as successors in title to Lot # 2, we feel our property was and is intended to be benefitted by the Restrictive Covenant in the Deed to Ada Marion Coade aforesaid .

7. THAT attached hereto as Schedule "C" is another copy of our surveyors Location Certificate upon which we have marked the approximate location of the viewplane afforded by the Restrictive Covenant in our neighbours' Deed.

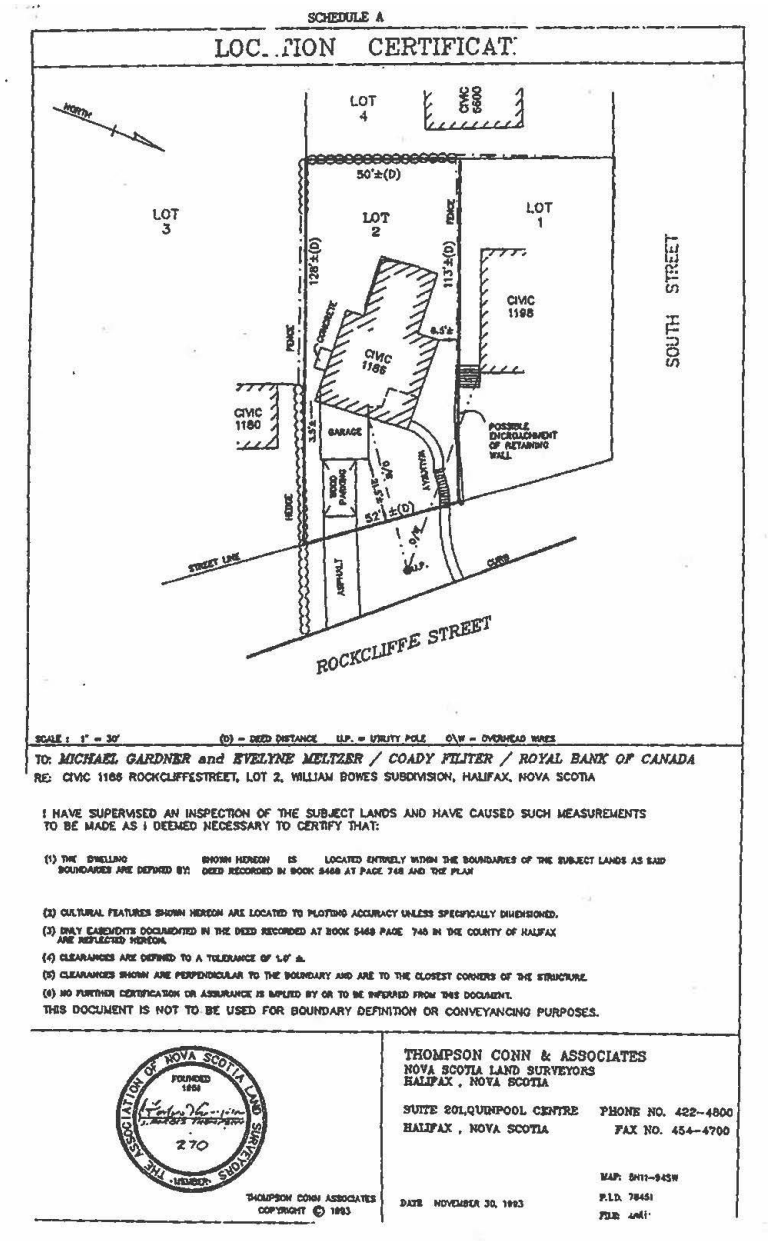
8. THAT the property at 1180 Rockcliffe Street has been for sale and that if any new owner were to construct an extension or a new building on that portion of the property, it would obstruct our view.

9. THAT we are recording this Statutory Declaration at the Registry of Deeds in Halifax in order to alert any prospective purchaser or owner of the property at 1180 Rockcliffe Street of the Restrictive Covenant. It is our opinion that the construction

of any building within the area in question will have a significant negative effect not only on our enjoyment of the property, but of its market value.

THAT we make this Statutory Declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act as amended.

[11] Schedules A, B and C to this document follow:



SCHEDULE A

LOC..TION CERTIFICAT.

LOT 4
CIVIC 6600
50'±(D)
LOT 3
LOT 2
LOT 1
FENCE
128'±(D)
113'±(D)
SOUTH STREET
CIVIC 1198
CONCRETE
8.4'±
CIVIC 1186
CIVIC 1180
3.3'±
GARAGE
POSSIBLE ENCROACHMENT OF RETAINING WALL
WOOD PARKING
5.5'±
0.6'
ASPHALT
52'±(D)
0.4'
HEDGE
STREET LINE
CURB
ROCKCLIFFE STREET

SCALE : 1" = 30' (D) = DEED DISTANCE U.P. = UTILITY POLE O\H = OVERHEAD WIRES

TO: *MICHAEL GARDNER and EVELYNE MELTZER / CODY FILITER / ROYAL BANK OF CANADA*

RE: CIVIC 1186 ROCKCLIFFESTREET, LOT 2, WILLIAM BOWES SUBDIVISION, HALIFAX, NOVA SCOTIA

I HAVE SUPERVISED AN INSPECTION OF THE SUBJECT LANDS AND HAVE CAUSED SUCH MEASUREMENTS TO BE MADE AS I DEEMED NECESSARY TO CERTIFY THAT:

(1) THE DWELLING SHOWN HEREON IS LOCATED ENTIRELY WITHIN THE BOUNDARIES OF THE SUBJECT LANDS AS SAID BOUNDARIES ARE DEFINED BY: DEED RECORDED IN BOOK 5468 AT PAGE 748 AND THE PLAN

(2) CULTURAL FEATURES SHOWN HEREON ARE LOCATED TO PLOTTING ACCURACY UNLESS SPECIFICALLY DIMENSIONED.

(3) ONLY EASEMENTS DOCUMENTED IN THE DEED RECORDED AT BOOK 5468 PAGE 748 IN THE COUNTY OF HALIFAX ARE REFLECTED HEREON.

(4) CLEARANCES ARE DEFINED TO A TOLERANCE OF 1.0' ±.

(5) CLEARANCES SHOWN ARE PERPENDICULAR TO THE BOUNDARY AND ARE TO THE CLOSEST CORNERS OF THE STRUCTURE.

(6) NO FURTHER CERTIFICATION OR ASSURANCE IS IMPLIED BY OR TO BE INFERRED FROM THIS DOCUMENT.

THIS DOCUMENT IS NOT TO BE USED FOR BOUNDARY DEFINITION OR CONVEYANCING PURPOSES.

THE ASSOCIATION OF NOVA SCOTIA LAND SURVEYORS FOUNDED 1851 270 MEMBER

THOMPSON CONN & ASSOCIATES
NOVA SCOTIA LAND SURVEYORS
HALIFAX, NOVA SCOTIA

SUITE 201,QUINPOOL CENTRE PHONE NO. 422-4600
HALIFAX, NOVA SCOTIA FAX NO. 454-4700

MAP: 8H11-94SW
P.I.D. 78451
FILE: 4481

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DATE NOVEMBER 30, 1993

SCHEDULE "B"

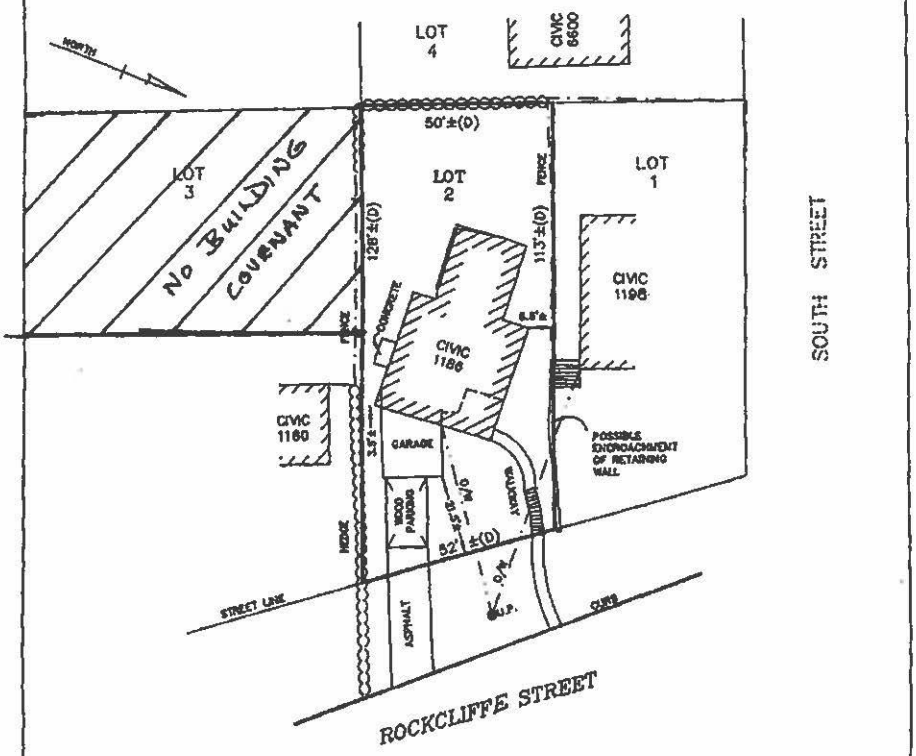
To the intent that the burden of this covenant may run with the land, the Grantors and the Grantee do hereby respectively covenant and agree with each other, and their, his or her respective Heirs, Executors, Administrators or Assigns that:

No further conveyance of the lands herein conveyed shall take place unless and until the purchaser offers to enter into an agreement with the then owner or owners of lots one and two in the Bowes Sub-division providing for the repairs and maintenance of the aforementioned sewer and water pipes in the manner set out in the preceding covenant hereof and providing against resale unless or until agreement is reached as to maintenance and repairs;

No building or any part thereof shall be erected on the lot herein conveyed nearer than Six Feet (6) Feet to the Northern boundary line of said lot or nearer than Fifty-nine (59) Feet to the Southerly projection of the Western Line of the lot known as Lot No. Two in the Bowes Sub-division and conveyed by the Grantors to James Earl Dudley by Deed dated April 29th, A. D., 1948.

SCHEDULE 'C'

LOC. TION CERTIFICAT.



SCALE : 1" = 30' (D) = DEED DISTANCE U.P. = UTILITY POLE O\W = OVERHEAD WIRES

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THE ASSOCIATION OF NOVA SCOTIA LAND SURVEYORS FOUNDED 1851 MEMBER 270

THOMPSON CONN & ASSOCIATES
NOVA SCOTIA LAND SURVEYORS
HALIFAX , NOVA SCOTIA

SUITE 201,QUINPOOL CENTRE PHONE NO. 422-4800
HALIFAX , NOVA SCOTIA FAX NO. 454-4700

DATE NOVEMBER 30, 1993

MAP: 6H11-84SW
P.I.D. 78451
FILE: 4661

[12] The Applicant does not deny that the above covenants appeared in the original conveyance of Lot 3 (1180), in 1950, and indeed were contained in her own deed when she acquired title. Rather, the substance of her argument centres around the fact that Mr. and Mrs. Bowes, the creators of the subdivision, had already conveyed Lot 2 (1186 – currently owned by the Respondent) in 1948, approximately two years earlier. She says that it was beyond the power of the Bowes' to extract a covenant in favour of a lot that they no longer owned. While it has been conceded that the benefit of the covenant could have (theoretically) run with respect to the lands which the Bowes' did own at the time (which is all of them except Lot 2), insofar as the latter is concerned, it is relegated simply to a personal agreement. As such, it does not run with the land, but rather lasts only as long as Mr. and/or Mrs. Bowes is/are alive. They are both deceased.

[13] The first part of covenant #2 deals with the prohibition against building "…nearer than six feet (6) feet to the northern boundary line" of Lot 3. This will be referenced as the "restrictive covenant (6 feet)". With respect to this covenant (as will be seen) the Applicant essentially takes no position.

[14] The Respondent and Interveners say that the restrictive covenant (59 feet) which precludes building on Lot 3 within 59 feet of the prolongation of the rear, western boundary of the Respondent Gardner's lot is a covenant forming part of an enforceable "building scheme". They argue that one of the purposes of that building scheme was to ensure that all four parcels within the subdivision would benefit from the view of the Northwest Arm and Dingle. Although the restrictive covenant (59 feet) is not mentioned in the conveyances of the other lots (the argument continues) it was clearly part of a building scheme intended to benefit them and Lot 2. The water view was clearly the major thing that this (very small) subdivision had going for it.

Issue

[15] The parties have worded the issue differently, albeit congruently. I prefer the manner in which the Respondent/Interveners have phrased it, and consequently reproduce it below:

> Is the restrictive covenant (59 feet) enforceable by Gardner, Pocklington/Robb and the Blisses, as the owners of lots within the Bowes' subdivision, of which Lot 3 is a part, by virtue of it being an enforceable building scheme covenant?

Analysis

(i) Elaboration upon the competing arguments

[16] As just noted, this is a very small subdivision. The four constituent lots, in total, comprise less than an acre (0.71 acres, to be exact). This small parcel, out of which all lots were created, has been referenced by the parties as "the parent parcel". As we have seen, it was conveyed by James Harrison to Mr. Bowes in 1945. The Bowes' subdivision plan, showing how these four lots were (and still are) situate, has earlier been reproduced.

[17] The chains of title with respect to each of the lots are set out in the Affidavit of Jocelyn Lockhart, as filed by the Applicant, dated June 28, 2023. All parties have indicated that they are in agreement with the chains of title thus depicted. In addition, an Affidavit of Marion Bryson was filed by the Respondent/Intervenors, and this provides context (as determined from the records at the public archives of Nova Scotia) particularly in relation to when houses were built on these lots.

[18] The topography of the land does not appear to be in dispute, at least with respect to those features which are most relevant to what is at issue in these proceedings. For example, it would appear that the entire 0.71-acre parent parcel is sloped. It descends from a high point at the northeast corner of Lot 1, and slopes downward generally in all directions across the parent parcel. Its nadir is found on the southwest corner of Lot 3. There is said to be a significant drop off at the western portion of Lot 3. It is this lowest portion of the parent parcel which is said to be subject to the restrictive covenant *(Gardner Affidavit, para 11)*. The practical effect of this is that a prohibition on building upon this portion of Lot 3 thereby preserves the view enjoyed by all of the other lots.

[19] As noted, Lot 2 was conveyed by Mr. and Mrs. Bowes in 1948. The grantee was James Earl Dudley, who was an architect. This Court is in the comparatively rare position of having been provided with his architectural drawings, which were prepared after he had acquired Lot 2, prior to construction of the home which was built upon it. This is the same house in which the Respondent, Mr. Gardner, currently resides. The dining room windows of Mr. Gardner's home, he says, are set at the very 59-foot mark from the prolongation of the southern boundary along Lot 3 *(Gardner Affidavit, para 17)*.

[20] Indeed, the Respondent (in his Affidavit filed on November 10, 2023) makes further note of the fact that:

> 13. Mr. Dudley [the first owner of Lot 2 after its conveyance by Bowes] is associated with the laying out and development of the Westmount Subdivision in Halifax. He was a follower of the craftsman style of architecture associated with Frank Lloyd Wright.
> 14. Mr. Dudley prepared plans for constructing a house on Lot 2. In purchasing our house, we received copies of the old blue prints prepared by him. Attached is Exhibit E and F hereto are two pages from these blueprints. Exhibit E is a foundation plan showing the layout of the house and the contours of the property sloping sharply downwards to the south and west. The foundation plan appears to me to be exactly as built. Exhibit F shows the elevation drawings of the house from the north and the south. These elevation drawings appear to depict the house as built when we acquired it.
> 15. I would note that the axis of the house is not square to the front property line or parallel to the side property lines. It is tilted on a diagonal. This achieves two purposes. Firstly, it affords a view from the south side of the house towards the Northwest Arm and the Dingle looking over the western portion of Lot 3. Secondly, it is designed to take advantage of passive solar heat which I understand to be a tenet of the craftsman school of architecture by tracking the path of the sun particularly in winter months.

[21] Mr. Gardner proceeds to reference the transfer of Lot 3 (the Applicant's property) to Ada Marian Coade in 1950, and adds that "during their tenure the area covered by the restrictive covenant restricting the erection of the building remained in its natural state" *(Gardner Affidavit, para 18)*.

[22] Next, he adds this:

> 19. By 2005, title to Lot 3 had been acquired by Jeff and Dorothee Rosen. Mr. Rosen had spoken to me before they acquired Lot 3. Mr. Rosen was aware of the existence of the restrictive covenant and was looking to negotiate a relaxation of its requirements. We had some discussions but after they stalled we elected to record a Statutory Declaration on Title and did so on April 20, 2005 to reinforce our position. A copy of this Statutory Declaration is attached as Exhibit H.
> 20. Sometime after we filed a Statutory Declaration, Mr. Rosen demolished the Coade house on Lot 3 and cleared the undisturbed land on the western portion of Lot 3.

[23] The Interveners' positions are to the effect that the Restrictive Covenant is valid and subsisting, and that they, too, purchased their respective properties with the expectation that they would have the benefit which that restriction confers not only upon Mr. Gardner, but upon all of them. This was a very important factor for them when they decided to purchase their properties. They have also described how important it was to them to have the unimpeded views of the Northwest Arm which

they felt that the existence of the covenant insured for all of them. *(Gardner Affidavit, paras 7 and 21, Bliss Affidavit, paras 7 and 14, Pocklington Affidavit, paras 9 and 16)*

[24] To be clear, the Applicant has stated that she does not have any plans to build upon what Mr. Gardner has referred to as the "restricted area". She does, however, intend to sell Lot 3, and is concerned that the existence of the burden of such a restrictive covenant would negatively impact the purchase price that she would otherwise be able to obtain.

(ii) What is a "building scheme" covenant, and is the covenant at issue of such a type?

[25] Both parties have made reference to *Sawlor v. Naugle* (1990),101 NSR (2d) 160, in which Tidman, J. (as he was then) canvassed the authorities and elaborated upon the three main categories of circumstances in which restrictive covenants may be imposed by vendors when land is sold. They may be covenants imposed by vendors for their own benefit, those imposed by the vendors *qua* owner of remainder lands of which the (sold) piece had formerly been part, and those imposed by them upon sales of pieces to various purchasers, all of whom are intended to benefit from, and be bound by, the covenant(s) imposed (*Sawlor*, para 17, see also *Re Lakhani v. Weinstein*, 1980 CanLII 1901 (ON SC) at pages 64 and 65). The Respondent and Intervenors contend that the covenant in question in these proceedings is an example of the third sort.

[26] In *Lakhani* (at pp. 1906-1907), the Court referenced the earlier decision of *Re Wheeler* (1926), 59 OLR 233 (at para 231 – 232) which, in turn, referenced the decision of *Elliston v. Reacher* [1908] 2 Ch 374. The requirements of that third class (which are generally referred to as covenants forming part of a building scheme) were described thus in *Wheeler* at pp. 398-399:

> In the case of Elliston v. Reacher, [1908] 2 Ch. 374, Mr. Justice Parker thus sums up the requisites of a building scheme (p. 384):--
>
> "It must be proved (1) that both the plaintiffs and the defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, <u>are consistent and consistent only with some general scheme of development</u>; (3) that these

> restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other lots retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors."
>
> [emphasis added]

[27] These criteria have been applied in Nova Scotia, as we have already seen (for example) in *Sawlor*. They have also been applied in other cases, some of which will be subsequently referenced.

[28] In this instance, while it is obvious that the first criterion has been met, the Applicant argues that the criteria specified in 2–4 are entirely absent. To paraphrase her argument, no general scheme of development (requisite #2) is identifiable, because the various (different) restrictive covenants appended to the other lots are not universal. Therefore, how could "...the purchasers of the lots in the Bowes subdivision...purchase their lots [under the expectation] that the various (different) restrictive covenants applied to the other lots in the Bowes subdivision" would benefit them as well *(Applicant's brief, para 30)*?

[29] Appositely, the argument continues, the original four deeds for the lots in the subdivision do not contain covenants "settled in a way that it can be known or ascertainable from the very beginning of the development" (per *Sawlor*, para 21) *(Applicant's brief, para 31)*.

[30] The Applicant concedes that in *Sawlor,* the problem identified was that "the lots as set out in the original plan of subdivision were substantially altered in subsequent plans", and that in this case the lots were not altered. However, in this case, she points to the fact that "the various restrictions and easements were [altered], and were not consistent" *(Applicant's brief, para 31)*.

[31] As examples of such inconsistencies, the following are cited:

i) Civic number 6600 South St. (Lot 4 – Intervenors Gary and Nancy Bliss) has no covenants in any of the deeds that appear in the chain of title.
ii) As for 1190 South St. (Lot 3 – Applicant) while it presently has a restrictive covenant of no construction within 6 feet of its southern

boundary with 1186, it does not have a reciprocal benefit of no construction on 1186 and/or any covenants at all in relation to 6600 South.

iii) Civic numbers 1180, 1186, and 1190 Rockcliffe all contain a requirement for an agreement prior to their being sold (with respect to the repair of the water and sewer pipes), yet no agreement(s) was/were ever recorded, and there have been numerous conveyances since.

iv) The restrictive covenants in the deeds for the three properties noted above all state that they are between the grantor and grantee. As such (it is argued) they do not enure to the benefit of the lots themselves.

v) In the case of the restrictive covenant (59 feet), it was created in 1950 with the deed for 1180 Rockcliffe – the Applicant's property, at a time when the Respondent's property, 1186 had already been conveyed to Mr. Dudley two years earlier. Moreover, it is not mentioned in any of the deeds for the other lots in the subdivision. (Applicant's brief, paras 31 – 35)

[32] With respect to the restrictive covenant (6 feet), the Applicant says:

> 36. Although there is no "building scheme" there does appear to be a potentially valid restrictive covenant, being a restrictive covenant prohibiting buildings within six (6) feet of both the north and the south boundaries of 1186 Rockcliffe, on either side of those boundaries.
>
> 37. As per the **1186 Rockcliffe deed (1948)**, this restrictive covenant (6 feet) appears to make 1186 Rockcliffe a dominant tenement over 1180 Rockcliffe (servient tenement) and 1190 Rockcliffe (servient tenement). With this restrictive covenant (6 feet) being mutual, as 1186 Rockcliffe is burdened by a mirror image restriction six (6) feet inside its boundaries with 1180 Rockcliffe and 1190 Rockcliffe, both of which were still owned by the Grantor (Bowes).
>
> [emphasis added]

[33] However, the Applicant concludes this argument with:

> 38. Unlike the above noted six (6) foot building restriction (which is neither challenged nor admitted by the Applicant) the **Restrictive covenant (59) feet** exists only in the deeds for 1180 Rockcliffe, the **Statutory declaration (2005)**, and a textual qualification (TQ) in the parcel register for 1186 Rockcliffe (a non-binding note without legal effect, but one that affects the marketability of 1180 Rockcliffe).

> 39. While as per the **1180 Rockcliffe deed (1950)** and subsequent conveyances of 1180 Rockcliffe, including to the Applicant, the **Restrictive covenant (59 feet)** is to run with the land, it only specifies that this is with respect to the Grantor (Bowes)…
>
> [emphasis in original]

[34] The Respondent and Intervenors argue, on the other hand, that a Court of equitable jurisdiction will give effect to a discernible building scheme even in circumstances where the grantor(s) did not lay out same before beginning to sell the properties. By way of example, they reference *Baxter et al v. Four Oaks Properties Ltd.*, [1965] 1 All ER 906.

[35] *Four Oaks* dealt with a situation in which the vendor did not lay out his building scheme before selling lots from what would be described as a 288 acre "parent parcel", in modern parlance. The covenant in question stated that no dwelling house or other building shall be used "...other than as a private residence..." The lots at issue in the litigation were subject to the same covenant.

[36] The Court stated, at page 913 of *Four Oaks*:

> It is, of course, clear that a vendor who sells a piece of land to "A" and subsequently sells another piece of land to "B" cannot, as part of the later transaction, add to "A's" land the benefit of a restrictive covenant entered into by "B" if it was not part of his bargain with "A" at the time of the sale to him that "A" should have the benefit of it. On the other hand, for well over 100 years past where the owner of land deals with it on the footing of imposing restrictive obligations on the use of various parts of it and when he sells them off for the common benefit of himself (insofar as he retains any land) and of the various purchasers inter [se] so a court of equity has been prepared to give effect to this common intention notwithstanding any technical difficulties involved.

[37] Thus, it appears that the trigger (in the view of the Court in *Four Oaks*) for the invocation of such equitable relief would be the presence of a discernable intention of the parties that purchasers of the other lots in the subdivision and their successors should have certain common rights. That Court reconciled its view with what had been espoused in *Elliston v. Reacher*, and other earlier cases, in the following manner:

> In the early days it was not unusual for the common vendor to have prepared a deed of mutual covenant to be executed by each purchaser.
>
> ...

> With the passage of time [however] it became apparent that there was no particular virtue in the execution of the deed of mutual covenant – save as evidence of the intention of the parties – and what came to be called "building schemes" were enforced by the court is satisfied that with the intention of the parties that the various purchasers should have rights inter-say even though no attempt was made to bring them into direct contractual relations.
>
> ...
>
> It is, however, to be observed that *Elliston v Reacher* was not a case in which there was direct evidence, afforded by the execution of the deed of mutual covenant, that the parties in fact intended to implement a building scheme. The question was whether one could properly infer that intention in all of the circumstances. In such a case, no doubt the fact that the common vendor did not divide his estate into lots before beginning to sell it is an argument against their having been an intention on his part and on the part of the various purchasers that there should be a building scheme, since it is, perhaps, prima facie unlikely that a purchaser of a plot intends to enter into obligations to an unknown number of subsequent purchasers.
>
> (*Four Oaks*, pp. 913 – 914) [emphasis added]

[38] It will be recalled that the evidence in *Four Oaks* contraindicated the existence of a plan ascertainable from the very beginning of the development. As Tidman, J. said "… [in *Four Oaks*] the lots set out in the original plan of subdivision were substantially altered in subsequent plans" (*Sawlor*, para 21).

[39] Tidman, J. had appositely pointed out earlier in *Sawlor*:

> [20] Dealing with the second requisite, it is, first of all, questionable whether the vendor Federal has laid out a defined estate, but I will consider that question later. For now I will deal with the question of whether or not the covenant in issue, assuming it is intended to be imposed on all of the lots, is consistent only with some general scheme of development? The covenant states that only one dwelling is to be built on the lot. If interpreted to mean, as is alleged by counsel for the respondents, that the subdivision of the lot is prohibited then there is no comprehensible scheme as to the required size of the lots upon which only one dwelling may be placed. When the listed covenants were first imposed, or at least at the time the Naugles purchased their lot, only five lots were shown on the plan of subdivision, all of which ranged from 1 to 1 ½ acres in size. The same covenants were attached to the later conveyances when the applicants and the Eddys purchased their lots, but the Federal plan of subdivision then showed additional lots ranging in size from just over an acre, the size of the Naugle lot, to 19.62 acres, the size of lot 15 shown on the plan. Although there is no evidence as to whether or not the grantor Federal or its successor waived compliance with covenant No. 4 in relation to any other lots, no such waiver was granted to the applicants.
>
> [emphasis added]

[40] In *Rockingham Development Ltd. v. Highgate Village Ltd et al*. (1984), 65 NSR (2d) 439, the Court was faced with an application for an order declaring that certain covenants restricting the use of the lands in question did not constitute valid objections to title to that land because they were unenforceable. Specifically, the covenants in question read as follows:

> The said grantee, for itself, its successors and assigns, hereby covenants, promises and agrees, to and with the said grantor, its successors and assigns as follows, that is to say:
>
> > 1. No building erected or to be erected on the lands as herein before described or any part thereof shall be used for any purpose other than that of a private dwelling, but such dwelling may have outbuilding suitable or proper for dwelling of the class thereof.
> >
> > 2. No tree or trees on the said lands and premises are to be cut down without the permission in writing of the grantor or its successors or assigns.
> >
> > 3. All plans for buildings on the said lands are to be approved by the grantor, its successors or assigns before any building is commenced on the said lands.
> >
> > 4. Within 6 months after completion of the building all the said lands are to be graded and landscaped.
>
> And these covenants and agreements on the part of the grantee, are intended to be and shall be deemed to be covenants running with the said land.

[41] Richard, J. (as he then was), when dealing with whether he had been satisfied that a building scheme had been made out with sufficient clarity in order for the above to be treated as covenants running with each of the lots in the subdivision under consideration, had this to say:

> [9] I find that at the time of the MacKenzie-Gould convenance the land was not defined with sufficient particularity to support and enforce a building scheme. There were parcels of land conveyed in the MacKenzie-Gould deed which were located within areas previously developed by MacKenzie. It may well be that these isolated parcels may have been subject to a building scheme already in place which may have affected that immediate area. However, these building schemes, if they did exist, would not extend to the lands of the three properties purchased here.
>
> [10] It would appear that the law in Canada remains that as set out by Parker, J., in *Elliston v. Reacher*, [1908] 2 Ch. 374, where the learned justice stated at p. 384 (it is obviously that the following passage formed the basis for the proposition contained in *Anger and Honsberger*, supra):

> "It must be proved (1) that both the plaintiffs and the defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other lots retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors."

[11] In the present case there was no definition of the lots which were subject to the restrictions. One variation from the strict rule in *Elliston v. Reacher* respecting the requirement that the lands have to be subdivided before being sold off is illustrated in the case of *Baxter et al. v. Four Oaks Properties, Ltd.*, [1965 1 All E.R. 906. In that case, Cross, J., found it was not necessary to have the land laid out in definite lots in order to establish a building scheme. That case involves special circumstances and cannot be taken as overruling the general proposition set out in *Elliston v. Reacher*. Among other things, Cross, J., in the *Four Oaks* case said at p. 912:

> "The defendants had the clearest possible notice of the existence of the covenants in question when they purchased No. 143, Lichfield Road, and there can be no doubt that they are bound by them. They further concede that the benefit of Mr. Rawlins' covenants with Lord Clanrikarde contained in the conveyance of Dec. 14, 1894, and the Lichfield Road deed of covenant were annexed to any part of the estate fronting on Lichfield Road or Four Oaks Road, which was still owned by Lord Clanrikarde at that date, and that accordingly the third plaintiff and the fourth and fifth plaintiffs, who derive title to 139 and 135, Lichfield Road respectively from persons who bought plots from Lord Clanrikarde after Dec. 14, 1894, and were entitled to enforce the covenants against the defendants."

It may have been that finding which prompted Cross, J., to depart from the general principles set out in *Elliston v. Reacher*, supra, by Parker, J.

[emphasis added]

[42] Interestingly, we see Richard, J. at one point referring to *Four Oaks* as a "variation" from the strict rule in *Elliston* (para 11). Later, in the same paragraph, he refers to that case as a "departure" from the general principles in *Elliston*.

[43] Nonetheless, and in the result, Justice Richard concluded that the vendor had established that there was no valid objection to title: "... from the comments of Cross, J. in the *Four Oaks* case, *supra*, I conclude that the covenants would be unenforceable against the subject lands" (para 12).

[44] I have not been referred to another case that has referenced *Rockingham Development*.

[45] In fact, the subsequent case of *Cleary* v. *Pavlinovic*, (1987) 80 NSR (2d) 22 (NSSC) may be viewed as somewhat of a retreat from *Four Oaks*. There, the Applicants owned property in the subdivision and sought a declaration that the restrictive covenants prohibiting further division of the lots in the subdivision were enforceable against the Respondent. The original owner, Sperry, had subdivided the land in 1944 and sold several lots subject to restrictive covenants, which included a prohibition upon further subdivision. Sperry subsequently transferred the remaining lands to Atlantic Realties Limited, without including restrictive covenants. Atlantic Realities proceeded to sell lots, subject to covenants identical to those in the original Sperry deeds.

[46] Nathanson, J. (in *Cleary*) began his analysis by referencing the foundational principles set out in *Elliston*. He observed that, because Atlantic Realties had been the subdivider (or vendor) for some of the lots in question, and Sperry for others, there had been no common vendor (see paras 15 – 19). He then proceeded to consider a line of argument that had been advanced which seems to rely on the rationale espoused in *Four Oaks*:

> [20] It is submitted on behalf of the applicants that a building scheme will be seen to exist if one looks at the intention evidenced by the existence of deeds of mutual covenant rather than the intention expressed in the provisions of various deeds on record. In other words, the applicants request that the court take a more liberal view of the time when the prerequisites a building scheme are established.

[47] One of the authorities which Nathanson, J. considered, in the course of his analysis of this submission, was *Re Dolphin's Conveyance*, [1970] 2 All E.R. 664 (Ch. D.), which had involved a broken chain of title to land received by a nephew through the operation of his Aunt's will. In that case, Stamp J. had referenced the *Four Oaks* reasoning at page 671:

> "… Moreover, where deeds of mutual covenant have fallen to be considered, effect has been given not to the deed of mutual covenant itself as such but to the intention evidenced by its existence. **Baxter v. Four Oaks Properties Ltd.** is such a case.

> As Parker, J., in **Elliston v. Reacher** pointed out in a passage quoted by Cross, J., in **Baxter v. Four Oaks Properties Ltd.**, the equity arising out of the establishment of the four points which he mentioned as the necessary concomitants of a building scheme has been sometimes explained by the implication of mutual contracts between the various purchasers and sometimes by the implication of a contract between each purchaser and the common vendor, that each purchaser is to have the benefit of all the covenants by the other purchasers, so that each purchaser is in equity an assign of the benefit of those covenants; but the implication of mutual contract is not always a satisfactory explanation. As Parker, J., said:
>
> > 'It may be satisfactory where all the lots are sold by auction at the same time, but when, as in cases such as Spicer v. Martin, there is no sale by auction, but all the various sales are by private treaty and at various intérvals of time, the circumstances may, at the date of one or more of the sales, be such as to preclude, the possibility of any actual contract.'
> >
> > [emphasis added]
>
> "And he points out that a prior purchaser may be dead or incapable of contracting at the time of a subsequent purchase, that in any event it is unlikely that the prior and subsequent purchasers are ever brought into personal relationship, and yet the equity may exist between them.
>
> "There is not, therefore, in my judgment, a dichotomy between the cases where effect has been given to the common intention inferred from the existence of the concomitants of a building scheme and those where effect has been given to the intention evidenced by the existence of a deed of covenant. Each class of case, in my judgment, depends on a wider principle. Here the equity, in my judgment, arises not by the effect of an implication derived from the existence of the four points specified by Parker, J., or by the implication derived from the existence of a deed of mutual covenant, but by the existence of the common interest and the common intention actually expressed in the conveyances themselves."
>
> [emphasis added in *Pavlinovic*]

[48] With respect to the argument that cases like *Re Dolphins Conveyance* and *Four Oaks* permitted a more liberal interpretation of the criteria specified in *Elliston* v. *Reacher*, Nathanson, J. had this to say:

> [27] . . . the decision in **Re Dolphin's Conveyance** is distinguishable on its facts from the present case. Even if it was not, there is doubt as to whether it should be relied upon as authoritative. In that regard, see **Lund v. Taylor** (1975), 31 P. & C.R. 167 (C.A.), at p. 177; **Dorrell et al. v. Mueller et al.**, 16 O.R. (2d) 795 (Ont. D.C.), at p. 808; and **Re Lakhani et al. v. Weinstein** (supra), where it is stated at p. 68:
>
> > "Attractive as is the theory that one looks to all evidence in order to consider whether there is that community of interest and reciprocity of obligation

> that defines a building scheme and that the requirements in **Elliston v. Reacher** are only evidence which would be conclusive, I have to consider that **Elliston v. Reacher** has been followed so often in our courts that the confusion a change of the law would give should occur only as a result of the decision of a higher court. It is for this reason that I would follow the decision in **Pinewood** and hold that the absence of a common vendor is fatal to the existence of a building scheme."
>
> [28] No Nova Scotia case was cited to me, so that it appears that the point has not previously been considered by the courts of this province. Over and above other considerations mentioned in the foregoing cases, I am concerned that it might become impossible for those searching titles to certify the title of properties if they are required to base their opinions upon facts which are not on record in a registry office and which may have to be inferred from the mere existence of documents. For all those reasons, I am not inclined to rely upon **Re Dolphin's Conveyance** as authority.
>
> [emphasis added]

[49] A more recent case is the oft cited *Moorhouse* v. *Black*, 2014 NSSC 13 decision. Therein, Moir, J. again articulated the four prerequisites for a building scheme as specified in *Elliston* v. *Reacher*, in a manner consistent with the *Cleary* and *Sawlor* cases:

> [16] There has been no change in the case law of this province on the subject of a purchaser enforcing restrictive covenants against other purchasers of lots in a subdivision since *Cleary v. Pavlinovic*, [1987] N.S.J. 193 (Nathanson J.) and *Sawlor v. Naugle*, [1990] N.S.J. 409 (Tidman J.). These decisions refer to decisions of the Supreme Court of Canada, which in turn refer to English authorities.
>
> [17] The courts distinguish covenants imposed for the developer's benefit, covenants imposed to protect remaining lands only, and covenants imposed by the developer on the lots sold to the various purchasers for them to enjoy the benefits of the covenants and to be bound by them as well. The third kind makes for a building scheme. See, *Sawlor* at para. 14.
>
> [18] Building scheme covenants are enforceable among the purchasers only if four requisites are met. The requisites are discussed in the authorities referred to in *Sawlor*, also at para. 14. I would state them this way:
>
> 1) The parties derive title under a common vendor, the developer.
>
> 2) The vendor laid out its lands, or a part of them, for sale in lots, including the lots now owned by the parties, subject to restrictions imposed on all the lots, that may have varied in details but were consistent only with some general scheme of development. That is to say, the "scheme must be

> set out in a way that it can be known or ascertainable from the very beginning of the development": *Sawlor*, para. 18.
>
> 3) The developer intended the restrictions to be for the benefit of all the lots in the subdivision and they were, in fact, for the benefit of each of the lots.
>
> 4) The parties, or their predecessors in title, purchased their lots on the footing that the restrictions were to enure for the benefit of other lots in the subdivision.
>
> [emphasis added]

[50] He then specifically discussed the third criterion, namely, reciprocity, in the following terms:

> [19] The third requisite, the requirement for reciprocity, was elaborated in *Sawlor* in light of a provision allowing the developer to waive the application of a restrictive covenant to any lot in the building scheme. At para. 19, Justice Tidman said:
>
> > It is also questionable whether the covenant in issue, which restricts building to one dwelling per lot, was intended by the common vendor Federal to be and was for the benefit of all the lots intended to be sold. To so conclude, one must, as a matter of equity, find an implied mutual contract by which each purchaser is to have the benefit of the promise by all the other purchasers. In this case, there is no express term that the covenants are to enure to the benefit of or be binding upon each purchaser. If a mutual covenant is to be found, then it must be implied from the express covenant between the grantor Federal and the individual purchasers. Covenant 14, however, provides that the grantor without notice and, thus, without the consent of the owner of any other lot, has the power to waive, alter or modify the so-called protective covenants in their application to any other lot. The protection of the covenant seems to me to be for only the vendor and not for the various purchasers. A prospective purchaser upon reading that clause could hardly be said to believe, to the extent that it should be implied in equity, that he would by virtue of purchasing a lot enter a mutually binding contract with every other lot owner that only one house will be placed on each lot.
>
> On that basis, Justice Tidman found that the third requisite had not been met: Para. 20.

[51] In *Gandhi* v. *Liao*, 2021 NSSC 208 and *FH Development Group Inc.* v. *New Bright Homes Limited*, 2021 NSSC 246, Justice Ann Smith had occasion to consider *Moorhouse*. In *Gandhi* she found, among other things, that the developer claimed, "to retain a unilateral power to waive, alter, or modify the covenants even after all

the lots have been sold", which would be contrary to the principle that the developer loses the ability to enforce covenants once the lots have been sold, and would purport to allow him to change the original "building scheme" virtually at will. Moreover, the covenants obliged the grantee "to obtain a new covenant from the purchaser, not to merely inform the purchaser that the property is subject to the covenants..." (para's 46 – 47).

[52] Justice Smith observed:

> [48] The Applicant's supplementary submissions do not convince this Court that *Moorhouse* is inapplicable. In essence, counsel for the Applicant submits that the restrictive covenants govern here by virtue of the mere use of the word "assigns" in the preamble, along with the obligation of grantees to obtain covenants from subsequent purchasers in section 32 (which was not done here).
>
> [49] However, it is apparent from *Moorhouse* that in the highly technical area of the applicability of restrictive covenants, it is not sufficient to point to such isolated indicators of the developer's subjective intentions if the full context of the document does not meet the necessary prerequisites. Crucially, in this Court's view, as in *Moorhouse*, these covenants do not meet the "reciprocity" requirement.
>
> [50] The Applicant says the use of the word "assigns" is of great significance. However, counsel does not explain why this is different from *Moorhouse*, where identical language appeared in the covenants (*Moorhouse* at para 5). The decision in *Klenman v Isman*, 1924 CanLii 82 (SKCA) that counsel relies on is of no relevance; it stands the proposition that "the meaning to be given to the word "assigns" must, in each case, depend upon the context of the enactment or covenant in which the word is found and the subject-matter to which it relates" (*Klenman* at para 49).
>
> [51] While counsel for the Applicant says that the Restrictive Covenants in this case are of the third class described by Justice Moir in *Moorhouse* – being "covenants imposed by the developer on the lots sold to the various purchasers for them to enjoy the benefits of the covenants and to be bound by them as well", in other words, a "building scheme" – counsel does not, in this Court's view show why these circumstances are distinguishable from *Moorhouse*. Contrary to counsel's submission, the mere use of the phrase "run with the lands" is not decisive; the same language was found in the Moorhouse covenants (para 15).
>
> [52] The Applicant's counsel also says that reciprocity in the application of the covenants is apparent from the preamble's statement that the benefit of the restrictions "shall run with each of the lots" and be binding on assigns. But essentially identical language appeared in the *Moorhouse* covenants; Justice Moir regarded these as "statements of intent" rather than actual terms, and held that these intentions were not borne out in the rest of the document (para 37).

> [53] Counsel for the Applicants also suggests that Justice Moir misinterpreted the preamble, which stated that "[t]hese restrictions shall be binding upon and ensure to the benefit of the heirs, executors, administrators, representatives, successors and assigns of the Grantor and the Grantee." Justice Moir said this "suggests that the scheme is not binding on others" (*Moorhouse* at para 5). Counsel purports to "disagree with Justice Moir's finding that this phrase suggests that the scheme is *not* binding on subsequent purchasers" and submits that the use of the word "assigns" is all that is necessary to do so. However, this ignores the context: Justice Moir was talking about the absence of any statement "that other lots already sold have similar restrictions..." (*Moorhouse* at para 5). This is what he meant by "others", I believe; he wasn't talking about assigns or other successors in title.
>
> [54] Counsel goes on to submit that the use of the word "assigns" would be redundant "if the restrictive covenants were to benefit the developer only...". Once again, the covenants in *Moorhouse* likewise used the word assigns (para 5).
>
> [emphasis added]

[53] As has been noted earlier, the Respondent/Intervenors have supported their argument in furtherance of the existence of a building scheme by reference to extrinsic evidence (including the topography of the parent parcel, and Mr. Dudley's architectural drawings). They point out that "case law indicates" that such evidence is admissible in relation to the question of whether the intention for "building scheme" existed at the relevant time. They cite *Concerned Citizens of Westwood Subdivision v. McCutcheon*, (2000) 226 NBR (2d) 13 as an authority for that position.

[54] In *McCutcheon*, there does not appear to be any actual discussion of the evidentiary point. However, it does seem clear that the Court received evidence from the developer respecting his intentions (see, for example, para 8).

[55] We also observe reliance upon extrinsic evidence in *FH Development*, where Smith, J. expressly stated that the evidence of the Applicant developer's principal "was to the effect that the Applicant intended to impose restrictive covenants in order to protect its own preferred layout for the subdivision. On cross-examination he said that he understood the covenants to have been intended to protect the developer's own interests" (para 10).

[56] The Respondent/Intervenors have also pointed out that the restrictive covenants in the 1950 deed are expressed therein to "run with the land". However, Courts have not treated such wording as decisive. As has been seen in *Ghandi*, it was noted that "contrary to counsel's submission, the mere use of the phrase 'run

with the lands' is not decisive; the same language is found in the *Moorhouse* covenants" (para 51).

[57] The Respondent/Intervenors submit that the "reciprocal easements in covenants established by the Bowes with respect to Lot 2, Lot 3 and Lot 4" demonstrate the intention to establish a building scheme (see brief, para 50). While this may be arguable with respect to the restriction on the conveyance connected to sewer and water pipe maintenance (although there does not appear to be any evidence of a written agreement with any subsequent owners of the lots as they were re-conveyed over the years) and, in some limited respects, with respect to the 6 foot covenant, the restrictive covenant (59 feet) against building on the lower end of Lot 3 is expressly referable only to Lot 2. Nothing in the language of the deed suggests this particular restrictive covenant is intended to benefit Lots 1 and 4.

[58] The argument that this latter covenant is intended to benefit the entire subdivision is an inferential one, based upon the downward sloping topography of the parent land parcel, and the fact that Lot 3 (the Applicant's property) sits at the bottom, and that the prohibition on building upon that portion of Lot 3 does, in practical terms, benefit all of the other lots as a consequence. Nonetheless, the respective deeds themselves cannot be said to have consistent covenants aside from the restriction on conveyance with respect to the sewer and water pipes.

[59] The Respondent/Intervenors submit that a valid building scheme may exist despite a variation in the restrictions for a single lot. They again rely on *McCutcheon*, where the Court found that an enforceable building scheme existed notwithstanding the evidence that the developer had specified that one single lot out of 30 would not be subject to restriction against placing any mobile homes on the property. The developer had done this because he had already placed a mini home on that lot before the building scheme was drawn up. As a consequence, the Respondent has submitted that it follows that, despite the fact that the restrictive covenant (in our case) only binds a single lot, this particular fact, when illuminated by extrinsic evidence, does not prevent a finding that the covenant was intended to benefit not only Lot 2, but Lots 1 and 4 as well *(Respondent Brief, paras 68 - 72)*.

[60] This argument, although attractive, does not assist the Respondent/Intervenors. Most notably, in *McCutcheon*, the variation was incorporated into the building scheme as it was being drawn up. In this case, the covenant alleged to form part of a building scheme is not alleged to have come into existence until after the developer had already sold Lot 2.

[61] The Respondent/Intervenors have also placed some emphasis upon the fact that, despite the lack of reference to the restrictive covenant (59 feet) in the conveyances of the other properties, the reciprocal easements in respect of sewer and water pipe maintenance would have made it evident "that the original owners of [all Lots] would have been aware of the building scheme and aware that the restrictions were intended to run with the land" (para 75). As we have seen, they point to the topography of the land, the positioning of the Respondent Gardner's house, and the plans which were implemented by the original owner of Lot 2 when that house was built, so that it could benefit from the water view over the southern portion of Lot 3. There is the additional evidence from current owners of the other lots that when they purchased, they were aware of the restrictive covenant attached to Lot 3 (paras 76 – 79).

[62] This argument culminates with the observation that the Applicant was on notice of the covenants when she purchased Lot 3, since they are referenced on the parcel register and the deed for her property (para 80). This may be accurate, as far as it goes, but the Register (and the deed) say no more than the property is "subject to restrictive covenants as set out in" the 1950 Bowes – Coade deed.

[63] Moreover, if mere notice of an alleged covenant to the purchaser is sufficient to establish that it is part of a valid building scheme, there would not be any need for the four-part analysis mandated by the existing case law.

Conclusion

[64] The technical requirements for establishing a building scheme in Nova Scotia remain relatively strict. The Respondent/Intervenors have buttressed their arguments with heavy reliance upon a combination of New Brunswick case law (with very distinguishable features compared to those at bar) and some arguments based upon the doctrine articulated in the *Four Oaks* case, which may be an outlier. In my view, the Respondent/Intervenors argue for a much more robust "equitable" power to dispense with the strict prerequisites of a building scheme, than the current state of the law would support.

[65] It is true, as briefly discussed above, that *Sawlor* and *Moorhouse* (at least) imply that the third prerequisite – reciprocity – may be satisfied in equity by "an implied mutual contract whereby each purchaser is to have the benefit of the promise of all the other purchasers" and which is "implied from the express covenant between the grantor...and the individual purchasers" (*Sawlor*, para 19, cited in *Moorhouse* at

para 19). Even if this were so, the Respondent/Intervenors have not provided a convincing argument for the invocation of such equitable relief, not the least of which is because (to repeat yet again) Lot 2 had clearly been sold off from the "common parcel" before the covenant which purports to bind Lot 3 in its favour was created. As Justice Moir observed in *Moorhouse* "... equity will not, without statutory reform, enforce a restrictive covenant between common purchasers unless the four requisites are present in the beginning, including reciprocity" (para 23).

[66] The application is granted. The Applicant shall receive an order declaring that one of the restrictive covenants that affects 1180 Rockcliffe Street, which has been referred to in this application as the "restrictive covenant (59 feet)" is of no force and effect. To the extent that the Statutory Declaration (2005) of the Respondent Michael Gardner (and registered with the Halifax County Land Registration Office) asserts the contrary, it is also declared to be of no force and effect. The parcel register for 1180 Rockcliffe Street shall be amended accordingly.

[67] If costs are requested, and the parties are unable to agree, I will receive written submissions within 30 days.

Gabriel, J.