



The Corporation of the City of Courtenay

Staff Report

To: Council

File No.: 3010-01-2402/COV00002

From: Director of Development Services

Date: November 13, 2024

Subject: Response to Letter from Residents of Lambert Drive Covenant Removal Request

PURPOSE:

To provide Council with staff's recommendation to amend the existing Section 219 Covenants in order to permit the land owners to remove vegetation debris and undertake restoration of disturbed environmentally sensitive areas on their lots (private land) in compliance with a Condition and Impact Assessment prepared by a Registered Professional Biologist.

BACKGROUND:

At the June 12, 2024 Regular Council Meeting, Council approved the following motion:

THAT Council direct staff to determine implications related to the request for assistance removing the covenant on Lambert Drive and report back to Council on options related to the request.

The motion was in response to a letter from a number of residents of Lambert Drive requesting City's support in removing a covenant on a number of Lambert Drive properties to allow for clean-up of debris resulting from the unlawful tree cutting on their properties in 2021. The City of Courtenay investigated the unlawful tree cutting and was successful in ticketing the offender.

The environmentally sensitive area (ESA) is a channelized tributary (Tributary 9) of Piercy Creek. The tributary, along with provincially required riparian setbacks, are located within the rear yards of the subject Lambert Drive properties and western side yard of 2140 20th Street (Figure 1) which are protected by a section 219 covenant. The following restrictions and obligations apply to the properties affected:

Section 2

- (a) that there shall be no development and no building or structures shall be constructed within the Covenant Area;
- (b) The Covenant Area shall be left in its natural state and there shall be no alteration or removal of vegetation in the Covenant Area; and
- (c) that the southwest boundary of the Covenant Area must be fenced by the Grantor, to a minimum height of 1.2 meters, and the Grantor is solely responsible to maintain this fence in a reasonable state of repair, as directed by the Grantee.

Four residents of properties affected by the section 219 submitted a letter to Council seeking the removal of the covenant so they could remove the debris on their lots created by the unlawfully removal of trees. The letter contains a number of factors they request Council to consider including the outcome of Fisheries and Oceans (DFO) investigation, property value as a result of the covenant(s), lack of uniformity in covenants along Lambert Drive and a 2010 UBCM motion and provincial response on the topic of redundant covenants (Attachment 1). Figure 1 identifies the affected properties and covenant area.

Figure 1: Lambert Drive properties affected by unlawful tree cutting shown in red outline (2014, 2026, 2038, 2050, 2062, 2074, 2086 and 2100 Lambert Drive). Tributary 9 of Piercy Creek shown in blue line (line work is historical and approximate).



DISCUSSION:

Eight properties are subject to the referenced covenants, developed across two phases, resulting in slightly different restrictive covenant and other environmental permitting requirements across the two phases. All properties are zoned R-Small-scale Multi-unit Housing (R-SSMUH) and were previously zoned Residential-One D (R-1D) prior to Bill 44.

Phase 1 and Phase 2 are shown in Figure 2. The four authors of the letter representing four properties are shown with star icons. Each development phase is subject to a separate restrictive covenant for the protection of the riparian areas located on private land. Given differences in environmental permitting requirements between the two phases of development, and how adjacent drainage statutory right-of-way requirements were administered, different restrictive covenant setbacks were established for each phase: Phase 1 has a 10-metre restricted area that allows for a 3-metre drainage statutory right-of-way to be located within the area, while Phase 2 has a 7.5 metre restricted area and a 3-metre drainage statutory right-of-way adjacent it. Both covenants contain identical restrictive language.

Figure 2: Lambert Drive properties developed in two phases. Phase 1 is shown in purple outline (2062, 2074, 2086 and 2100 Lambert Drive). Phase 2 is shown in red outline (2014, 2026, 2038, 2050 Lambert Drive). The property owners represented in the residents' letter are shown with star icon.



Amendment of covenant

The residents' letter requests that the covenant(s) be discharged from each of their certificate of land title. Staff recommend amending the covenants to address the restriction that inhibits the debris removal and restoration while retaining the other environmental protection conditions. These conditions include not only not developing within the restricted area, but also maintaining a fence to act as physical deterrent to encroachment such as yard maintenance. Staff propose the following amended language as shown in red.

Restrictive covenant language proposed to be amended in Section 2 (b) FROM:

- (b) The Covenant Area shall be left in its natural state and there shall be no alteration or removal of vegetation in the Covenant Area; and

TO:

- (b) The Covenant Area shall be left in its natural state and there shall be no alteration or removal of vegetation in the Covenant Area, **unless undertaken under the direction of a qualified professional for the purposes of public infrastructure maintenance, safety or ecological restoration, and in accordance with any municipal or senior government regulatory requirements and to the satisfaction of the City;** and

The proposed amended language would permit the removal of debris as requested, and permit restoration of the ESA subject to a Condition and Impact Assessment (CIA) being satisfactorily completed by a Registered Professional Biologist (RP Bio).

Development works within an ESA generally require a City Environmental Development Permit (EDP) to be issued prior to undertaking the works unless otherwise defined as exempt. The works as requested by the residents could be exempt from an EDP provided they fall within the 'restoration activities' classification of exemptions, the definition of which is included here:

"Restoration activities only, including invasive species removal. The proposed works are ecological restoration and enhancement, in accordance with established best management practices and senior government approvals, as required, under the purview of the City of Courtenay. This includes: hand removal of invasive plants or noxious weeds on a small scale with appropriate disposal methods; planting and maintenance of native species trees, shrubs, or groundcovers for the purpose of enhancing the habitat values and/or soil stability. A restoration plan prepared by a Registered Professional Biologist must be presented to the City of Courtenay prior to these activities taking place."

Provincial ministry staff advise that the preparation of a Condition and Impact Assessment (CIA) is required in circumstances of riparian area contravention, to be obtained through local government enforcement actions. The submission of and adherence to a CIA would satisfy the City's requirements for restoration, and allow the stated removal activities to be deemed exempt from requiring the EDP including associated application, fee and referral process.

The owners of the property would therefore be required to retain the services of a RP Bio to produce a CIA to the City and province's satisfaction, after which the proposed restoration works within the CIA would have to be completed. There is a drainage SRW that is located within the restrictive covenant area. The SRW stipulates that no large trees or shrubs may be planted within the SRW which must be considered by the RP Bio in the formulation of the CIA. The affected property owners may produce and submit a single CIA for all affected properties, for some properties, or individually.

Discharge of the covenants is not recommended as the covenants were conditions at time of subdivision of both phases, put in place to restrict development within the covenant areas, require the physical protection of a fence be maintained, collectively which meet Riparian Area Protection Regulations and City Environmental Development Permit Area guidelines.

Other concerns raised in residents' letter

The residents' letter includes a number of other supporting statements for the request for covenant removal, each of which staff provide a response to below.

1. Fisheries and Oceans Canada (DFO) have closed their investigation and will not be pursuing remedial works on the affected properties.

Staff response: DFO's mandate is specifically related to fish and fish habitat (usually fish-bearing areas). Whereas the provincial and local government riparian protection regulations apply more broadly in the regulation of the upland riparian areas and the wider environmental benefits they provide for water quality, flood protection/mitigation and wildlife habitat. The conclusion of the DFO investigation therefore does not conclude the interests of the province or the City.

2. Some sales of property have lost value because of the covenant

Staff response: Property values are influenced by a wide range of factors. The covenants have been registered on the titles since the creation of the lots and all owners would have full knowledge of their restrictions at time of purchase.

3. There appears to be no uniformity of covenant use and size along Lambert Drive

Staff response: Correct. The approval dates of different subdivisions have resulted in different regulatory standards reflected in the covenants.

4. The Union of BC Municipalities (UBCM) also provides some insights on the impact of redundant covenants

Staff response: The excerpt provided in the residents' letter is UBCM resolution number B141, 2010. The motion cites the concept of 'redundant' covenants that can contradict local government zoning and negatively impact development potential for private owned properties, and that approvals for release of the charges can be difficult to obtain. The provincial response acknowledges there are privately held covenants and statutory covenants (S.219) with each their different interest holders. In this case, the covenants are statutory and because amendments are proposed, each owner must agree to the amended language.

POLICY ANALYSIS:

Staff evaluate that the language of the covenants at time of drafting were too restrictive, and should have included additional clauses that allow for vegetation management for public infrastructure maintenance, safety or ecological purposes, under the direction of a qualified professional. The proposed amended language will allow for vegetation management to occur in order to satisfy the purposes of the residents, as well as for the City to access the drainage SRW located within Phase 1 covenant area.

These are clauses that will be included in future similar S.219 Covenants to reflect the dynamic nature of ESAs and provide ability to manage such areas as required. As this is viewed as an administrative change, and one that should have been included at time of covenant drafting, staff recommend that no fees be charged to the applicants for the amendment of the covenants listed.

FINANCIAL IMPLICATIONS:

Restrictive Covenant or Statutory Right of Way amendments or discharge applications are \$1,000 as per City of Courtenay Fees and Charges Bylaw No. 1673, 1992. Staff are recommending that Council direct staff to waive these fees for amending each restrictive covenant registered on the eight affected properties: 2014, 2026, 2038, 2050, 2062, 2074, 2086 and 2100 Lambert Drive along with the Land Title and Survey Authority of BC (LTSA) fees.

Staff estimates these costs to be \$8,800. The fees associated with LSTA would be paid from gaming.

ADMINISTRATIVE IMPLICATIONS:

Under the Land Titles Act Section 9(a), a registered covenant may be modified subject to both the holder of the charge and the owner of the land agreeing to the amendment. This authority can be delegated to the director of Development Services to amend the covenant. Both the City and owner are party to this covenant.

OPTIONS:

1. THAT Council direct the Director of Development Services to amend the Section 219 covenant CA242102 and FB457361 by deleting section 2(b) and replacing with section 2 (b) with *"The Covenant Area shall be left in its natural state and there shall be no alteration or removal of vegetation in the Covenant Area, unless undertaken under the direction of a qualified professional for the purposes of public infrastructure maintenance, safety or ecological restoration, and in accordance with any municipal or senior government regulatory requirements and to the satisfaction of the City; and"*; AND
THAT Council direct staff to waive the \$1,000 application fees for each property to amend the covenants; AND
THAT Council direct staff to pay the associated LTSA fees from the gaming fund; AND
THAT Council direct staff to send letters to the eight affected property owners (2014, 2026, 2038, 2050, 2062, 2074, 2086 and 2100 Lambert Drive) informing of Council's decision.
2. THAT Council provide alternative direction to staff.

ATTACHMENTS:

1. Lambert Drive Residents Letter
2. Phase 1 restrictive covenant CA2421202
3. Phase 2 restrictive covenant FB457361

Prepared by: Nancy Gothard, RPP, MCIP, Manager of Community and Sustainability Planning
Reviewed by: Marianne Wade, RPP, MCIP, Director of Development Services
Concurrence: Geoff Garbutt, M.Pl., MCIP, RPP, City Manager (CAO)