



# New home? New obligations

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## Jacques Robert REAL ESTATE LAW

There is a known adage which states that “a man’s home is his castle”, meaning the owner can do as he pleases with the property. Although this adage is still applicable today, it is not always the case in real estate matters that the owner has free reign to do as he pleases. For example, new and experienced buyers alike may not be aware of restrictions or agreements which are registered on the properties they are buying. These are known as restrictive covenants. Future owners may also be unaware of the fact that they are bound by Common Elements or Joint Use Agreements which can require them to pay maintenance fees for a private road or repair adjoining walls in collaboration with their neighbours. All homeowners and potential buyers should be made aware of the

agreements and restrictions on their properties.

### Restrictive Covenants

Restrictive Covenants are a set of rules and clauses that are registered on a group of properties. The document lists things that a homeowner cannot do on their property even though they are the owners. Builders use Restrictive Covenants as a way to maintain the appearance of neighbourhoods/developments. In the case of townhomes, builders often include restrictions as to the colours of the garage doors and the front in the interest of uniformity amongst neighbours. Another less popular, but possible, restriction would be whether or not on above ground or in-ground pools are permitted. Restrictive covenants may also serve the pur-

pose of preserving a healthy environment by inhibiting the planting of certain types of trees that are prone to diseases. However, a homeowner who breaches a restrictive covenant should not expect to be notified by the builder, but rather from neighbours who are also bound by the same or similar agreements. Restrictive covenants are enforceable as any other contract is enforceable.

### Joint Use and Maintenance Agreements

In the case of townhomes, builders often include a Joint Use and Maintenance Agreement registered with the property. These agreements typically regulate the maintenance and repair of common roadways, water services, visitors parking and common walls. Homeowners called on to Issues regarding payment of repair costs are easily avoided by referring to the Agreement. The Agreements stipulate, in a detailed manner, the way in which costs should

be distributed but also how conflicts should be resolved between neighbours. Usually, the Agreements require disputes between owners to be resolved by way of mediation then arbitration, thus avoiding costly court battles. Generally, the owners that are directly affected by the damage will be solely responsible in covering the costs of the repairs.

For example, if the roof over units one and two is leaking, the owners of those units will be exclusively responsible in covering the cost of replacing the roof since they are the only two owners directly affected by the damaged roof. The owners of the other units will have no obligation in contributing to the repair costs as they are not immediately affected. However, in another example, all homeowners will need to equally contribute towards the maintenance cost of the common roads, water services and sewers as all the owners are affected by the damage. Fortunately, the costs of repairs must be approved by at least a majority of homeowners, thus ensuring that all

homeowners are in accordance.

### Common Elements Agreement

When considering the purchase of a particular property, buyers should always inquire as to the existence and the content of a Common Elements Agreement associated with the property. These agreements outline the Common Elements for the properties in question along with the separation of the costs. Contrary to Joint Use and Maintenance Agreements, these types of agreements always entail fees to be paid to a Common Elements Association (either managed by the homeowners themselves or by a management company). Maintenance of a private roadway or repairs to shared walls and roofs are the most common use for fees paid under agreements such as these.

It is important to note that Restrictive Covenants, Joint Use and Maintenance Agreements and Common Elements

Agreement do not operate in isolation. A Common Element Agreement is often accompanied by a Joint Use and Maintenance Agreement to serve as a base. Further, Restrictive Covenants typically include a clause which states that maintenance of townhomes, row houses or some-detached units should only be done in accordance with the provisions of those Maintenance Agreements. When considering the purchase of a home, whether it is a resale home or a new construction, it is always important to inquire whether there are Agreements that are connected with the property. These Agreements continue with the property despite future sales and therefore bind new owners to the Agreements’ rules and clauses.

*co-authored with Robin Goski, Gabrielle Robert and Martin Roy.*

**Jacques Robert is an Ottawa real estate lawyer. For more information, visit [www.jacquesrobert.com](http://www.jacquesrobert.com)**