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Unfortunate ruling for home-buying public

The Granite Gates community is in the picturesque Sawmill Valley area of Mississauga.

It was marketed in the early 1990s as a multi-phased condominium development.

Each phase would have a different style and density (some high-rise and some townhouses) resulting in a unique urban community with a rural atmosphere.

Its original concept was as a woodland community with a recreation complex nestled among a grove of trees at its centre.

As many as 750 units would surround an Outdoor Recreation Area consisting of four tennis courts, an outdoor pool and a putting green.

Separate condominium corporations for each phase of the development were to acquire ownership and use of, and responsibility for, the recreation area. It was to be deeded to the various condominium corporations when the last condominium was registered.

Purchasers relied on representations made by the developer, Cam-Valley Homes, regarding the overall nature of the development around the recreation area and some even paid a premium for a view overlooking the recreation area.

With the soft real estate market in the early 1990s, the number of towers was reduced and the number of townhouses increased, such that the total number of units dropped to 440 from 750.

After the last building was registered, the developer decided that the recreational and social core of the development, the outdoor recreation area would be used for another townhouse development instead of recreational facilities.

The directors of the adjacent condominium corporations objected to the loss of the recreation area. On March 26, 1999, without any meaningful notice, Cam-Valley razed the forest on the recreation lands.

As is typical with condominium projects, potential buyers in each of the Granite Gates phases were handed a bulky package of materials required by the Condominium Act.

The top document, a "disclosure statement," stated that the participating condominium corporations would eventually be given ownership in the outdoor recreation area to be constructed on part of the land.

Buried in the midst of the materials was a proposed bylaw approving a reciprocal agreement among the various condominiums setting out what would happen if the developer did not finish any of the "common facilities," and adding in a schedule stating that the developer might in future construct another building or buildings on parts of the land.

Taken together, all the obscure portions of the condominium documentation could be interpreted to mean that the developer did not have to build the recreation area, but if it did, it would have to deed the area over to the participating condominium corporations.

In June, 1999, two of the corporations applied to the Superior Court of Justice for an injunction, an order declaring they had an interest in the outdoor recreation area and for payment of damages.

Four months later, Madam Justice Gloria Epstein handed down her ruling, which prohibited the developer from altering the lands except to build a recreation facility if it chose to do so. She ruled that the developer should not be allowed to rely on escape clauses buried away in obscure or unclear provisions in the "voluminous documentation."

Each side appealed. The Court of Appeal decision was released two weeks ago.

Since the issues in the case were of vital importance to developers and home buyers, two groups were granted intervener status to present their views: the Greater Toronto Home Builders' Association and the Ontario Real Estate Lawyers Association (which I chair.)

Writing for the majority of the three-judge panel, Mr. Justice George Finlayson struck down the decision of the trial judge, along with the injunction. The court ruled that a developer only owes a purchaser a good faith obligation or duty to carry out the terms of the contract. A developer does not owe any trust or fiduciary duty.

Although she agreed with the reasons of the other two judges in the Court of Appeal, Madam Justice Karen Weiler in a separate judgment said that a developer owes purchasers only a duty of good faith an obligation to consider the interests of purchasers honestly and reasonably before exercising its power under the contract.

Unless the condominium corporations appeal to the Supreme Court, Cam-Valley is now free to build on the outdoor recreation area site.

Ted Rotenberg is a Toronto litigator who represented the Ontario Real Estate Lawyers Association. He highlighted the impact of the decision.

First, he says, when a developer makes a discretionary promise in future, one, which it has only the option to fulfil, it is not a promise and there is no longer any legal duty to abide by the spirit of the promise.

Second, purchasers and real estate lawyers will no longer be able to rely on the disclosure statement to alert them of features of the project buried in the extensive documentation. Someone will have to read it, all of it. Finally, when an agreement states that a developer can, or may, or has the option to redevelop part of the site, purchasers should consider themselves warned.

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