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Bob Aaron bob@aaron.ca

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Builder offers can conceal surprises

Make sure your lawyer checks it out

Despite constant advice from lawyers, real estate agents and the Greater Toronto Home Builders' Association, a significant number of new home and condominium buyers never get their agreements of purchase and sale reviewed by a lawyer before they become firm and binding.

Those who don't have the complicated document vetted in advance usually go into the transaction blindly unaware of the complexities of the deal. As well, they expose themselves to the small print in the offers, which often brings some very unpleasant surprises on closing day.

Unfortunately for homebuyers, the standard form purchase agreements of many, but not all, builders have new traps and legal land mines that impose significant and unexpected costs and risks on buyers. These increasingly sophisticated agreements continue to eat away at the protections that buyers of new homes have every right to expect.

Based on communications with my legal colleagues, I'm not the only real estate lawyer who feels this way. Recently, I received a letter from Pierre Marchildon, who practises real estate law in the city's west end. Under the heading "outrageous adjustment by builder," Marchildon wrote to complain about an agreement of purchase and sale used by a home builder in Mississauga.

Buried in the middle of a solid block of tiny type explaining the protection of the Ontario New Home Warranty is the standard requirement for the purchaser to meet with a builder representative just before closing to complete the usual pre-delivery inspection. Then comes this zinger: "On closing, the purchaser shall pay a pre-delivery inspection fee of $225."

Marchildon was incensed when he saw this clause. "It is offensive to me," he wrote, "that a charge of this nature should be foisted upon a purchaser for completing a document which the vendor has a statutory obligation to provide.

"Put another way," he added, "the purchaser is paying to list the vendor's building deficiencies outstanding at the time of closing on a new house purchase."

Marchildon's clients were not warned about this or the other extras in the agreement in the sales office.

As offensive as this extra is, it's just the tip of the iceberg when it comes to hidden costs in builder offers. In general, I have no objection to builders recovering their costs and profits from homebuyers. The issue is one of disclosure and honesty in the sales offices. Based on my discussions with many other real estate lawyers, it's obvious that in most cases, the extras are simply never explained or set out separately and clearly so that buyers will know the full cost of the home or condo before they leave the sales office.

In my experience, some of the common extras that are almost never clarified in the sales offices are:

The premium the builder pays for the Ontario New Home Warranty coverage.

A $25 charge for negotiating each deposit cheque.

$267.50 in builder's legal fees for negotiating any changes to the offer.

The legal fees involved with holding the buyer's deposit in trust prior to closing.

The builder's legal fees to pay off and discharge any construction financing.

The cost of excess deposit insurance where the deposit exceeds $20,000.

New taxes or levies imposed by any level of government.

Increases in existing levies or development charges imposed after the offer is signed.

All or part of any municipal development charges or levies.

Meters and connection charges for gas, hydro and water.

Provincial sales tax on included appliances.

Sewer "impost charges" (taxes to fund the city's sewer system).

Several petty charges, like the $25 cost of carbon monoxide detectors and the Law Society's $53.50 transaction levy.

Although not every offer contains all of these extras, even some of them could amount to thousands of dollars, and yet they are buried in tiny type and often scattered throughout the document.

But extra costs are just the beginning of the traps for the unwary. Purchasers should be aware that typical builder offers contain either dangerous clauses or gaping loopholes exposing them to some or all of the following:

Any verbal promises or representations made in the sales office are not part of the offer.

The builder has the absolute right to change the floor plans and the exterior look of the house without the buyer's permission.

Any representation of square footage is usually based on exterior measurements, not room sizes.

Square footage may be changed without any recourse by the buyer.

Purchasers cannot obtain copies of architect drawings; the tiny sketches attached to the offers are subject to change.

Furnaces are not included in many new homes; some builders require purchasers to lease them.

Home purchasers are usually unable to obtain builder assurances that hydro transformer vaults will not be placed on their front lawns.

There is no guarantee on views or sightlines (this one is contained in the offers in a downtown Toronto high-rise condo marketed largely on promises of location and view).

A ppliances may be supplied but not connected one builder just dumps them in the garage.

One of the most offensive of all clauses is the omission of any unconditional builder obligation to provide clear title to purchasers by discharging the construction financing after closing.

A common weasel clause only requires builder lawyers to promise to register discharges of construction financing after closing when they receive the discharges. If they never receive the discharges or something goes awry along the way, the builder and their lawyers are off the hook.

To me, the second most offensive clause is a very common one in new home offers. It is usually found on the extras sheet, which is marked as a "request" for extras and upgrades, but does not obligate the builder in any way to build or install the extras. If the extras are included in the purchase price at no charge and the builder omits them when the house is complete, there is no recourse and no refund.

Here are four recommendations on how to survive the battle of the sales office:

Ask the sales staff to write down and sign any promises or representations they make to you.

Ask for an itemized, written list of extra costs. Walk out if you can't get it.

Ensure that the extras and upgrades are unconditionally included, not merely requested.

Make sure, in writing, that the appliances will be installed.

And during the conditional period, always, always, always have your lawyer review the agreement of purchase and sale line by line and give you a written memo of the red flags it contains. This is the best way to avoid nasty surprises on closing day.

Bob Aaron *is a Toronto real estate lawyer. www.aaron.ca*