



Bob Aaron bob@aaron.ca

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Look out for suspicious clauses

In the bottom drawer of my desk is a file in which I keep samples of troublesome clauses in builder offers for new homes and condominiums. The file has been bulging lately, so it's time to share some of these clauses for which buyers should be on the lookout.

THE \$12,000 GST SURPRISE: One of my clients recently closed a purchase on a new condominium priced at \$499,800. Goods and services tax was included, or so she thought. So did the lawyer who initially reviewed the contract.

Buried in the multi-page offer, at the bottom of a long section on GST rebates, was a 67-word sentence that matches the Income Tax Act for being utterly incomprehensible. Carefully analysed and stripped of its legal gobbledygook, the sentence said that if the purchase price of the unit exceeds the limits for eligibility for GST rebates, then the purchaser had to pay an additional 2.5 per cent surcharge in addition to the purchase price.

Since there are no GST rebates over \$450,000 (which the offer failed to clarify), the purchaser unexpectedly got hit with paying an additional 2.5 per cent of the net price, or \$11,677.57. No explanation was given as to why the full price was not clearly stated on the offer.

BOGUS CONDITIONAL CLAUSE: Another client recently came in with an offer that he thought was conditional for 10 days on his lawyer's approval. Most conditional clauses of this type are written in one short paragraph, but on this particular offer, the clause went on at some length to make it clear that any objections the lawyer might make to the offer could not have anything to do with a monetary item (like the purchase price or the cost of undisclosed extras), or the design or features of the house.

The problem was this was not explained in the sales office. By the time the client saw me, he had already decided to rescind the deal. But without being able to object to hidden costs, it was a challenge for us to find non-monetary items that jeopardized the deal.

Fortunately, the offer was full of objectionable, non-monetary terms. Eventually we got the builder to cancel the contract and refund the deposit money but it wasn't an easy task.

WAIVER OF ONHWP RIGHTS: Another objectionable clause I've seen in builder offers lately is this lulu: "The Purchasers agree to waive their rights under the Ontario New Home Warranty Program until the eleventh month after possession."

I always thought that the ONHWP warranty scheme was there to protect the public, but some builders are now getting buyers to postpone their warranty protection for 11 months after closing. If this isn't illegal now, it should be.

Presumably, the leaky roof, water in the basement, or lack of running water, heat or electricity will just have to wait 11 months for the convenience of the builder and its staff.

Walk away if you see this clause.

THE MUZZLE CLAUSE: The same builder who demands buyers postpone their warranty rights also prohibits them from complaining about the house. This builder reserves the right to terminate the deal if the purchaser or anyone on his or her behalf (including their lawyers) "makes any adverse representation to the municipality or anyone else in writing or otherwise with respect to the construction, grading or otherwise, prior to closing."

I take pride in living in a country with Charter-guaranteed freedom of speech, but this clause effectively muzzles the purchasers and their lawyers, agents and home inspectors from complaining about the quality of construction or anything else. I doubt it would stand up in court.

I wonder what this builder doesn't want the local municipality to know.

PROHIBITION ON RESALE: Another clause that would probably not survive a court challenge is a prohibition on resale for one year after the buyer takes title. Builder agreements typically prohibit resale of homes and condominiums before the purchaser actually gets a registered deed. But one builder, the same one responsible for the two preceding clauses, prohibits them from advertising, listing or reselling the house within one year after the purchase closes.

If, during that time, the owner receives an offer to purchase the house, he or she must offer it back to the builder at the same price, and the builder has 20 days to decide whether to buy it back.

The legal term for a prohibition on resale is a "restraint on alienation" and, over the years, the courts of Ontario have repeatedly ruled such clauses to be void as contrary to public policy.

Avoid a builder who uses this type of clause.

PROHIBITION ON LOCAL IMPROVEMENTS: When a group of area residents wants a local improvement such as sidewalks, fancy street lighting or buried hydro wires, they can petition the municipality and agree to have the cost added to their tax bills over a period of about 25 years.

The builder responsible for the previous three clauses prohibits purchasers from petitioning the municipality for construction of any sidewalks other than those the builder or subdivider agreed to install.

Personally, I find clauses like these offensive. They provide all the reasons necessary for the new Ontario government to become more involved in regulating the amount and type of disclosure in builder sales offices and the content of builder offers.

The new Minister of Consumer and Business Services is former Ottawa mayor Jim Watson. I'll be watching his performance in the consumer protection field.

