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February 14, 2004

## Selling unregistered condos can be complex

### Lack of standard forms a problem

#### *Mortgage, GST can complicate*

Last week I had the opportunity to act for two different clients involved in negotiating pre-closing resales, or flips, of unregistered condominium deals.

One young woman whom I will call Susan was negotiating the sale of a downtown unit she had signed to buy in 1999. After waiting five years and with registration still some time away, the condominium no longer suited her needs.

The other clients, a young professional husband and wife, were moving downtown from a suburban house they had sold. Tom and Penelope had found a unit in an unregistered high-rise condominium. The original buyer wanted to sell so he could take out his profit before incurring closing and financing costs not to mention interim occupancy (rental) costs.

As the negotiations in each deal dragged on, it became apparent to me that the resale of unregistered condominium units and freehold houses before final registration is one of the most complex type of real estate transactions.

Negotiating to buy or sell a house or condo that has not yet closed with the builder involves a three-way, rather than a straightforward buyer-seller, transaction. At this stage, even though the original purchaser and the new purchaser are involved, it's the builder who holds all the cards.

This stems from the fact that, for years, virtually all builder offers have contained a clause prohibiting the purchaser from listing, advertising, leasing, selling, transferring or assigning his or her interest in the purchase agreement without the consent of the builder. The agreements also provide that the builder can arbitrarily withhold consent.

A few builder offers permit the sale or transfer of the agreement prior to closing, on certain conditions, and with payment of a transfer fee of between \$1,500 and \$2,500.

Another difficulty in negotiating this type of transaction is that there is no standard contract that can be used to paper the deal. Neither the Toronto Real Estate Board nor the Ontario Real Estate Association have pre-printed forms to cover new-home flip deals. As a result, the wheel must be reinvented for each transaction.

In Susan's case, her real estate agent prepared an offer between buyer and seller on a standard condominium resale agreement of purchase and sale. Even though it was conditional on builder and lawyer approval, it was clearly unacceptable because it contemplated an immediate title transfer, when no deed would be available for several weeks or months.

In a resale agreement for an unregistered new home or condominium, the original purchaser typically wants to assign all of his or her interest in the deal to the new buyer, take the profit if any, and walk away from the deal. The ultimate buyer just wants to get the unit, and doesn't care whether it comes from the original buyer Susan or directly from the builder.

After rejecting the agent's offer in Susan's deal, the buyer's lawyer and I exchanged several draft offers. We finally agreed on a contract but the builder's lawyer rejected that offer and instructed us to prepare a new one in which Susan waits until the final closing and remains responsible to the builder if the new buyer fails to close.

The builder's lawyer explained to me that his client's construction financing is based on approval of each original purchaser, and the builder is prohibited by its mortgage arrangements from letting any original buyer off the hook. As well, there are GST issues if either the original buyer or the resale buyer is not going to live in the unit.

Our final agreement provides that Susan doesn't get her money until the final closing and registration date. At that time, a three-way closing takes place: Susan's buyer gives us the money, we give it to the builder, the builder's deed goes directly to the new owner.

In Tom and Penelope's purchase of an unregistered unit, where the original buyers no longer live in Canada, the real estate agent had verbally negotiated an agreed-upon purchase price with the parties.

When it came to putting everything down on paper, the issue of extra charges arose. The real estate agent had presented Tom and Penelope with a copy of the proposed flip agreement without a copy of the underlying builder offer, which disclosed the extras. When we finally submitted an offer in a form that the agent assured us would be acceptable to the vendors, their lawyer bounced it and is now redrafting the deal as an option to purchase.

Clearly, the lack of standard forms in this area is a problem, and only adds to the complexity of negotiating each deal anew. If everyone was willing to wait until the day after the original purchaser gets title from the builder, none of the problems would arise. But not everyone can wait.