



Bob Aaron bob@aaron.ca

March 19, 2011

Builder, purchasers fight over increase in closing charges

A Toronto-area builder has filed a notice of appeal after losing two small claims court cases to new condominium buyers who sued to recover thousands of dollars in “unreal” closing charges.

The successful plaintiffs were among as many as 244 purchasers in the Rouge Residences project at 57 Upper Duke Cr., in Markham.

The builder’s agreement of purchase and sale contained a price adjustment clause typical of those used by local builders.

It provided that in the event of an increase in any existing municipal levies or development charges after the document was signed, “the purchaser shall pay the increase . . . as an adjustment” on closing.

Just after the purchase agreements were signed in the fall of 2006, the developer, a subsidiary of Remington Homes, decided to prepay to the Town of Markham more than \$4 million in development charges at the then-current rates. By prepaying the charges, the developer was able to ensure that it would not have to pay any increases which might be imposed before the condominiums were completed.

Toronto lawyer Stephen Shub represented a number of purchasers in the Markham project. He told me that on closing, his clients were shocked to see that they were being charged between \$7,680 and \$11,283 for increases in existing levies.

Shub discovered that the builder had not actually paid the increased amounts set out in the schedule. Prior to closing, the town had imposed thousands of dollars in higher levies, but the builder was exempt because the increases were not retroactive.

Shub’s clients took the position that the builder had no right to charge purchasers for levies it had neither incurred nor paid. The disputed clause in the agreement, he said, “can only apply to monies paid by the builder to the Town of Markham and not to monies never paid by the builder.”

Despite Shub’s objections, the builder insisted it was entitled to recover levy increases that had been implemented by Markham but that it had not been required to pay.

Chris Rose sued Rouge Residences for \$7,487.48, and Voula and Slave Sterjovski claimed \$11,037.48 in their court case.

The cases were tried together before deputy judge Morris Winer in January. In his oral decision, Winer discussed the wording of the agreements of purchase and sale, and the fact that the builder prepaid the development charges.

“In my view,” the judge said in his decision, “what is collectively referred to as ‘the existing levy’ never increased. Indeed it appears to me there never was a levy. . . . The charges that the defendant is seeking to impose on the plaintiff are hypothetical because there never were any of these levies.

“The rates did increase after the agreements were signed. But these were rates; they weren’t actual levies of taxes. They were never, as the clause provides, imposed on the defendants. The whole clause is somewhat ambiguous and I adopt a(n) . . . interpretation that I believe makes sense and is fair and just.”

Winer awarded the Sterjovskis \$11,037.48 plus costs, interest, a preparation fee of \$100 and attendance fee of \$500. He awarded Chris Rose \$7,487.48 plus costs, interest, a \$100 preparation fee, and \$400 for an attendance fee.

Richard Tripodi, Remington Homes’ highrise vice president, declined to comment on the case while it is before the courts.

In its notices of appeal, Rouge Residences cites what it claims are a dozen errors made by the trial judge. A date for hearing of the appeal in the Divisional Court has not yet been set.

If the trial decisions are upheld on appeal, the Sterjovski and Rose cases may just be the first two in as many as 242 other cases of purchasers who would like refunds of the charges paid to the builder. Toronto lawyer Michael Carlson is representing Sterjovski and Rose on the appeals, and is also coordinating a class action against the developer.

In the wake of the claims made in this case, and my column about it in November, 2009, the Ontario government passed a regulation effective Jan. 1, 2011, which prevents builders from charging purchasers for extra charges they did not incur.

[LINK TO THE Court endorsement in the case of Sterjovski v. Rouge Residences](#)

Bob Aaron is a Toronto real estate lawyer. www.aaron.ca ©Aaron & Aaron. All Rights Reserved.