

PUBLICATION

LegalEase: New Construction Condominiums and the AREA Condo Resale Purchase Contract

April 1, 2015

LegalEase: New Construction Condominiums and the AREA Condo Resale Purchase Contract

Yes, I know it is just a 4-Plex and yes, I know you do this all the time. But when it is a condominium and it is new construction, there are a host of potential issues that you may be facing by using the standard AREA Condominium Resale Purchase Contract. Nine times out of ten, no issues arise. That one other time, however, can cause a lot of grief and legal issues for both the buyer and developer alike.

The Condominium Property Act, R.S.A. 2000, c. C-22 (the “Act”) is consumer protection legislation. It is intended to protect purchasers of new condominiums in the Province of Alberta. It does not matter if it is a 4-unit building or a 400-unit building. If you are assisting with the purchase of a newly constructed condominium, there are requirements of the Act that need to be adhered to in order to ensure that your contract is enforceable – requirements that aren’t covered in the condominium resale purchase contract.

These include:

- The documents a developer must deliver to the purchaser prior to reaching an agreement to sell;
- Notifications related to the rescission of the purchase agreement; and
- Other requirements for the purchase agreement.

Delivery of Documents

Section 12.1 of the Act states:

12(1) A developer shall not sell or agree to sell a unit or a proposed unit unless the developer has delivered to the purchaser a copy of:

- (a) the purchase agreement,
- (b) the bylaws or proposed bylaws,
- (c) any management agreement or proposed management agreement,
- (d) any recreational agreement or proposed recreational agreement,
- (e) the lease of the parcel, if the parcel on which the unit is located is held under a lease and the certificate of title to the unit or proposed unit has been or will be issued under section 5(1)(b),
- (f) any mortgage that affects or proposed mortgage that will affect the title to the unit or proposed unit or, in respect of that mortgage or proposed mortgage, a notice prescribed under subsection (2), and

(g) the condominium plan or proposed condominium plan..

In smaller projects, items (c) through (f) are rarely relevant. Items (a), (b) and (g), however, remain extremely relevant. With respect to each of these particular items, there is information your buyer will want to know which only a review of properly prepared documents will be able to disclose.

With respect to the purchase agreement:

- Does the purchase agreement state what will happen if the condominium plan is not registered on the set closing date?
- Does it provide that all deposits shall be held in trust with interest to accrue to the developer?
- Is there a proper deposit protection program as is required by the Act if deposits are to be released?
- Does the purchase agreement provide the relevant warranty information?

Note: The above identifies only a few of the potential issues.

With respect to the Bylaws:

- Do the Bylaws appropriately or adequately address the actual needs of the building and the people who are going to own it?
 - For instance, if the parking is not titled is it appropriately assigned as exclusive use space? What about the yards? If they are common property can my neighbour come and sit on my front porch?
Answer: s/he can if it is not appropriately assigned as an exclusive use area.
- Are the fees paid based on unit factor or on some other basis?
- Is the buyer going to automatically be a Board Member by virtue of ownership?
- How is the building insured? Are improvements and betterments included?

Note: Again, the above identifies only a few of the potential issues.

With respect to the Condominium Plan:

- Is the unit boundary centre line between the walls, creating the illusion of more square footage than is actually being sold? Or is it the interior finishing of the floors, walls and ceilings?
- How many unit factors are attributed to my unit? If I have less than 2500 unit factors and I am in a 4-unit project, how does this affect my voting rights, especially considering that most big decisions require a "special resolution" or being the vote of 7500 unit factors? What is my vote worth if it is less than 2500 unit factors?
- You must ensure the purchase contract your buyer enters into with the developer provides for the delivery of these items.

Rescission of the Purchase Agreement

Moving on to even more excitement (only a lawyer would call this "excitement"), we look at Section 13 of the Act which says the following:

Rescission of purchase agreement

13 Every developer who enters into a purchase agreement shall include in the purchase agreement the following:

(a) a notification that is at least as prominent as the rest of the contents of the purchase agreement and that is printed on the outside front cover or on the first page of the purchase agreement in bold face, in upper case

and in larger print than the rest of the purchase agreement stating as follows:

“The purchaser may, without incurring any liability for doing so, rescind this agreement within 10 days after its execution by the parties to it unless all of the documents required to be delivered to the purchaser under section 12 of the Condominium Property Act have been delivered to the purchaser not less than 10 days prior to the execution of this agreement by the parties to it.”;

An AREA resale Contract, by design, will not fulfill the above requirement, and furthermore, the current AREA Contract suggests a different purchase contract should be used, when working with a new construction, which provides this notification.

Requirements of the Purchase Agreement

At 13(b),(c)&(d), the Act states the following:

13 Every developer who enters into a purchase agreement shall include in the purchase agreement the following:

- (b) where the units and the common property are not substantially completed at the time that the purchase agreement is entered into, a description, drawing or photograph showing:
 - (i) where there is a building, the interior finishing of and all major improvements to the common property located within a building,
 - (ii) all major improvements to the common property, other than those to which subclause (i) applies,
 - (iii) any significant utility installations, major easement areas, retaining walls and other similar significant features,
 - (iv) the recreational facilities, equipment and other amenities to be used by the persons residing in or on the residential units,
 - (v) the equipment to be used for the maintenance of the common property,
 - (vi) the location of roadways, walkways, fences, parking areas and recreational facilities,
 - (vii) the landscaping, and
 - (viii) where there is a building, the exterior finishing of the building, as they will exist when the developer has fulfilled the developer’s obligations under the purchase agreement;
- (c) the amount or estimated amount of the monthly unit contributions that has been determined on a reasonable economic basis in respect of the unit;
- (d) the unit factor of the unit and the basis of unit factor apportionment for all units comprised in the condominium plan.

If the developer neglects to provide the above documents, do you have an enforceable contract? Likely not. The word “shall” means something very specific in legislative interpretation. It means the same as “must”, or “has to”. It does not mean “can” or “may”.

What About My Existing Contract?

But, you say, you have drafted a contract! The parties are free to negotiate the deal that they choose on the terms that they choose! Until we see Section 80 of the Act:

Application of Act

80(1) This Act applies notwithstanding any agreement to the contrary and any waiver or release given of the rights, benefits or protections provided by or under sections 12 to 17 is void.

Which then leads us to Section 79 of the Act:

Offences and penalties

79(1) A person who fails to comply with section 12(1) or (5), 13, 14 or 21 is guilty of an offence and liable to a fine

(a) of not less than \$200 nor more than \$15 000 in the case of a person who is not a company, and

(b) of not less than \$500 nor more than \$25 000 in the case of a company.

(2) Subject to subsection (1), a person who fails to comply with this Act is guilty of an offence and liable to a fine of not less than \$200 nor more than \$5000.

(3) If a corporation fails to comply with this Act, each member of the board who is knowingly a party to that failure is guilty of an offence and liable to a fine of not less than \$200 nor more than \$5000.

Conclusion

All of the above creates a minefield of potential issues. In today's market, purchasers and sellers seeking to enforce technical legal rights are not the norm. But all we have to do is flash back to the late 2000's, and we are reminded of how quickly things can go wrong.

Bottom line: always use caution with condominiums, particularly new construction. And, when it comes time to assist a buyer with the purchase of a new condominium, remember – the AREA Condominium Resale Purchase Contract should not be used. You are much better off using a developer's purchase contract or a contract drafted by a lawyer for this specific purpose.

AREA Note: This article speaks to situations where you are representing a buyer on the purchase of a new condominium. It is equally important that, when representing the developer (seller), the developer knows the AREA Condominium Resale Purchase Contract is not suitable for new construction. Suggest the developer use their own contract or have a lawyer draft an appropriate contract.

- See more at:

http://www.areahub.ca/About-AREA/AREAHub/sept14-legal-article.aspx?utm_source=Condominium+Law+Update%3A+New+Home+Construction+Transactions&utm_campaign=Condominium+Law+Update+-+April+2015&utm_medium=email#sthash.GNMyINgh.dpuf