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Co-ownership deals offer special set of challenges

Scattered across the Toronto area are dozens, if not hundreds, of multi-unit residential complexes that have been organized as co-ownerships.

Unlike condominiums and co-operatives, which are the more accepted forms of shared living in larger buildings, co-ownerships are not well understood by most potential buyers and by many real estate agents.

I was reminded of this fact recently when a client of mine called and asked me to "look over" a resale condominium offer he had signed. When his agent delivered a copy of the offer along with the building documentation the next day, I was surprised to see that the unit my client had bought was not a condominium after all, but a co-ownership and no one had explained the difference to him.

It was easy to understand why my client, whom I will call Mike, was confused: The offer had been prepared on a standard OREA (Ontario Real Estate Association) condominium resale form.

When I spoke to Mike, I gave him the short version of the differences among the various forms of multi-unit ownerships.

Condominiums are creatures of legislation. Owners get a deed to their unit, plus an interest in the common elements. Units can be bought and sold easily using standard form agreements, and the concept is universally understood in the real estate industry.

Condominiums are as easy to finance as freehold homes, and if the owner of a condominium unit goes into default in payment of taxes, common expenses or mortgage, the other unit owners are not at risk.

Equity or ownership co-operatives can exist under a 1973 statute, but many pre-date that legislation. Their organizational framework was established by the developer of each project and its lawyers.

Co-op owners have been called something more than a tenant of his or her apartment, and something less than an owner. Typically, a corporation owns the building, and each purchaser receives a share in the corporation, together with an exclusive long-term right to live in one particular suite. That right is usually documented by an "occupancy agreement."

One downside to co-op ownership is the shared liability of all owners for taxes, utilities and payments on any mortgage on the entire building. If one owner defaults, the others must subsidize the shortfall until the arrears are paid. As well, approval of the co-op board is necessary before selling a unit a feature that is virtually non-existent in condominium projects.

Although a standard form purchase agreement is now available through OREA, financing co-op purchases is a challenge since the only asset to be mortgaged is a share certificate and not a deed.

By contrast, buyers in co-ownerships receive a deed, but to an undivided share of the building (for example, 1.8 per cent), rather than to a specific unit. They also receive long-term occupancy rights to the exclusive use of a particular unit.

Co-ownership owners share the joint liability and purchaser approval problems with co-op owners, and financing a co-ownership purchase is a challenge but not impossible. Some credit unions specialize in this type of financing.

When I pointed out to Mike that he was not buying a condominium, he realized that his bank pre-approval was useless since his bank does not finance co-ownerships.

I explained to Mike that the use of an OREA condominium resale form for the agreement of purchase and sale of a co-ownership was entirely inappropriate. Virtually every single paragraph in the agreement is relevant only to the statutory framework of condominium ownership. I told Mike that trying to squeeze a co-ownership purchase into a condominium document was not only wrong, but also highly risky since the actual terms of the deal were not clearly set out anywhere.

They were, in my view, an invitation to litigation.

When Mike confronted his agent, she explained to him that she prepared the offer on a condominium form because OREA doesn't have a standard form for a co-ownership deal, and the condo form was the closest one she could find.

After Mike invoked the lawyer approval clause to kill the deal, his agent became quite hostile, accusing me of giving my client wrong advice.

"You could show that offer to 100 other lawyers," she e-mailed him, "and they would not find a thing wrong with it." Somehow I doubt it.

The lesson to be learned from Mike's case is that documenting co-ownership deals presents a special set of challenges. Experienced agents and lawyers will not use standard form purchase agreements, but will locate offer forms which were customized for the project by the developer, or they will carefully adapt a new form for each deal, starting with generic co-ownership forms.

Caution, education, and good legal advice are the watchwords for every co-ownership deal.

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