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Court of appeal ruling 'absolutely correct'

The Ontario Court of Appeal has reversed a lower court decision that ruled that all of the unit owners of a new condominium project did not have to purchase the resident manager's unit from the developer.

The case involved the Lexington on the Green project on Lawrence Ave. W. in the Weston Village area. The developer's disclosure statement and the condominium declaration registered on title required the new unit owners to buy from the developer a management unit, parking space and locker for $240,000.

Before the developer's board of directors turned over control of the project to the new board elected by the purchasers, it passed a bylaw to authorize the acquisition of the management unit and signed a purchase agreement with the developer.

When the new board took over, it terminated the agreement.

The Condominium Act allows a condominium board to terminate an agreement for the provision of facilities or units to the condominium corporation if the agreement was entered into before the turnover meeting and the election of the new board, and if title transfer to the purchased unit has not already taken place.

Last year, the developer of the Lexington project applied to the Superior Court of Justice to determine whether the purchase agreement was binding. Justice Julie Thorburn ruled that the unit owners did not have to buy the resident manager's unit. She interpreted the Condominium Act to allow the board of directors to terminate a purchase agreement like the one in this case.

The Court of Appeal heard the developer's appeal last July and released its decision in November. Writing for a three-judge panel, Justice Dennis O'Connor overturned the trial decision. The court ruled that although the owner-elected board had the authority to terminate the purchase agreement with the developer, it did not have any right to alter or terminate the purchase obligation set out in the condominium declaration.

The purchase agreement was superfluous to the requirement in the declaration, the court ruled. "Terminating the purchase agreement did not terminate the pre-existing obligation" to buy the unit, O'Connor wrote.

Speaking to a program for real estate lawyers last month at Osgoode Hall, Harry Herskowitz called the ruling of the Court of Appeal in this case "absolutely correct." Herskowitz, a well-known and respected lawyer for local developers (including Tridel), said that the court properly balanced the consumer protection philosophy of the legislation with the commercial realities of the condominium development industry today. Having read the court's decision, I find myself agreeing with him and with the court, based on the facts of this particular case.

In the wake of the appeal in the Lexington on the Green case, post-turnover boards of directors no longer have the ability to terminate an obligation properly set out in the registered condominium declaration.

What this means to prospective buyers of new condominiums is that it is especially important to review not only the lengthy condominium agreement of purchase and sale, but the accompanying disclosure statement and proposed condominium declaration.

When reviewing condominium documents, it is especially important to look out for extra charges (sometimes called adjustments) which are set out in the agreement of purchase and sale and due on title transfer.

It is also very important to look for charges shared with all the other owners which are not set out in the agreement of purchase and sale but are contained in the developer's disclosure statement and proposed condominium declaration.

This second category of extra charges can apply to such items as the superintendent's suite, management office, guest suites, recreational facilities, amenity areas, green roofs or other energy-saving equipment. The amortized cost of these extras, with interest, is added to common expenses and repayable over a typical 10-year period.

My personal preference would be to require developers to set out maximum dollar amounts for all the extra charges in one place in their purchase agreements. Burying the charges in a ream of disclosure documents is woefully inadequate disclosure.
