Price Escalations and Consumer Protections Related to New Home Purchase Agreements

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Submitted by: Ontario Bar Association

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
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Executive Summary

The Ontario Bar Association (**"OBA"**) appreciates the opportunity to provide comments to the government on price escalations and consumer protections related to new home agreements.

The following is a summary of our comments, which are more fully set out below:

- Any caps on price increases should consider whether the increase was within the builder's control and ensure that builders are not allowed to profit to the detriment of new build purchasers. The risk of a price increase post-purchase should be clearly and prominently written into all new build agreements, and builders should be required to flag the risk and strongly encourage purchasers to seek legal advice within a 10-day cooling off period.

- A formula for calculating damages could be mandated for inclusion in agreements to assist the parties in better understanding their respective rights and the risks of making any changes to the agreement.

- Mandatory arbitration provisions should be removed in favour of voluntary arbitration, and class actions should be explicitly permitted to provide buyers with options when seeking recourse.

Ontario Bar Association (OBA)

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and

the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA's Construction & Infrastructure Law, Real Property Law, Business Law, and Class Actions Law sections, which include lawyers who practice in every region of Ontario. Members of these sections include barristers and solicitors in large, medium, and small firms that represent a wide range of clients including builders and purchasers and are highly experienced and experts in new build transactions, consumer protection and class actions law.

Comments & Recommendations

Price Escalations - General

Price escalation clauses are commonplace in agreements of purchase and sale ("agreements"), most often to account for higher construction costs. They can take the form of fixed pricing, cost+ pricing, or otherwise by virtue of contractual negotiations.

While some price increases may be viewed as unfair, builders are grappling with rapid increases in the costs of building materials. Cost estimates that may be fair and accurate at the time of signing an agreement can quickly rise due to fluctuations in the cost and availability of materials. In many cases, cost escalations are outside of the builder's control.

At the heart of this issue is the lag between entering into an agreement, construction, and moving into a property. Policies aimed at minimizing the delay between these events would increase the likelihood that initial estimates remain accurate throughout the process.

Caps on Price Increases - In Agreements

Statutorily imposed caps on price increases in agreements come with risks and could lead to unintended consequences that could negatively impact builders and purchasers. Additional

risks could make some builders less likely to undertake significant construction projects. Small-scale builders could be pushed out of the market completely.

Mandatory caps on prices increase could result in higher prices for new builds; builders could seek to cover potential losses by inflating the home price from the start. Builders could also construct alternative ways to terminate the agreement, if needed, to avoid incurring losses on a project.

Some builders lock in prices with their suppliers at the start of a project. This should be encouraged and/or required where possible, as it could alleviate many of the potential unintended consequences associated with a cap to any cost increases post-purchase.

Conversely, purchasers should not be left with the possibility of sanctioned open-ended price increases, nor should they be discouraged from buying a new build to avoid potentially unlimited price increases. Many purchasers take out loans and max out their finances to buy a new home and have little to no financial flexibility to deal with cost overruns. It is important to strike a balance that considers the impact on all parties for any statutorily imposed caps on price increases.

The possibility of a price increase should be clearly and prominently stated in the agreement to ensure that potential purchasers are aware of, and fully understand the risks before entering into a new home agreement. Builders should be required to outline when and how price increases could occur, and in the case of a price increase, clearly explain the reasons for the increase to the purchaser.

Caps on Price Increases - Outside of Agreements

In cases where an agreement has been terminated due to unreasonable cost increases or bad faith on the part of the builder, and then re-listed at a higher price, the focus should be on making the purchaser "whole". Builders should not be rewarded for cancelling a sale to make

more money, while a purchaser is potentially faced with additional costs incurred to secure another property at a similar cost.

Regulations could set out a formula for the calculation of damages, and mandate that it be included in any new home agreement. Such a formula for the calculation of damages could serve as a disincentive to builders who may be seeking an opportunity to capitalize on increases in property values.

In cases where a builder terminates an agreement, changes the design (for example, doubles the square footage of the build), and re-lists the property at a new higher price, builders should not benefit from a cancelled contract to the detriment of the original buyer.

Measures to Facilitate Class Actions

Mandatory arbitration provisions should be removed in favor of providing buyers with the option of seeking a resolution through class action proceedings. Buyers should have the option to choose their method of seeking recourse, and builders should not be permitted to include clauses that limit or prohibit class actions in agreements.

Currently, mandatory arbitration provisions make class actions virtually impossible in the new home context. Allowing class actions would be particularly helpful in the case of a cancelled development or subdivision where a large group of buyers have a similar set of factual circumstances. It would also work to reduce the power imbalance that is most often in favor of the builder by permitting purchasers to work together and share the costs of litigation.

Publication Requirements

More consumer-facing information is needed both to better inform potential buyers of the risks associated with purchasing a new build, and to provide more transparency to the process. For example, information about cancellations and price increases should be

available and easily accessible by the public on the Ontario Builder Directory, and on the builder's website.

Builders should also be required to be transparent about the different names of forms of their business entities which are used for different projects over time. Builders often use single purpose corporations for each project, and so disclosure that Corporation A cancelled or raised prices does not adequately inform the public if they are dealing with Corporation B in the future, which in essence is the same builder.

Cooling-Off Period

A 10-day cooling-off period is reasonable and would align new freehold homes with the current cooling-off period for new condominiums. A 10-day cooling-off period is short enough to avoid serious impacts to the builder, and long enough for purchases to obtain legal and financial advice.

Builders should be required to include clear information about the cooling-off period and the purchaser's right to rescind the agreement without incurring any financial penalty.

A true cooling-off period should allow a purchaser to cancel for any reason without paying a fee.

Mandatory Legal Review

The OBA does not support forcing buyers to obtain legal advice on their agreements; however, to ensure that purchasers are aware of their rights and the risks associated with purchasing a new build, builders should be required to let purchasers know that they have a right to obtain legal advice, and to strongly recommend that legal advice be obtained during the cooling off period.

A 10-day cooling-off period would provide sufficient time for purchasers to seek legal advice after signing an agreement. Builders should not be permitted to discourage people from seeking legal advice (for example, there should be no threat that the purchaser may lose the

property while seeking legal advice, nor should there be any fees or penalties associated with seeking legal advice). Builders found to be pressuring buyers to waive their rights to legal review before the expiry of the cooling-off period should be subject to penalty. It is in everyone's best interest to ensure that purchasers have the opportunity to be fully informed of their rights, and the risks of purchasing a new build – including price increases post agreement.

If the government decides to incorporate a pre-purchase legal advice requirement, there should be a corresponding restriction on the builder during this period to ensure buyers are not pressured to waive this requirement for fear of the builder entering into an agreement with a different party.

As always, we welcome the opportunity for further input as you move forward.