

REASONS FOR DECISION

[1] This is an appeal under the *Homeowner Protection Act*, S.B.C. 1998, c.31 (the "Act") concerning a decision of the Registrar of the Homeowner Protection Office ("HPO") dated February 16, 2012. The decision in question pertains to an application brought by the Appellant pursuant to section 20.1(2) of the Act to sell a new home within the prescribed 12 month period in which the sale of new homes built by owner builders are prohibited.

[2] The Appellant, applied to HPO for permission to sell her partially constructed home. The application was received by the HPO on September 6, 2011. In a letter dated September 21, 2011, the Manager of Licensing for the HPO, responded to this application by way of a letter that stated that HPO was relieving the Appellant of the requirement to become an HPO Licensed Residential Builder in order to sell her home on the condition that the new home be enrolled in a policy of home warranty insurance prior to selling or offering the home for sale.

[3] To summarize, the decision granted the Appellant permission to sell her home within the 12 month period in which the sale of new homes built by owner builders are prohibited pursuant to the Act, provided that she obtain a policy of home warranty insurance for the new home prior to the sale or offering of the sale of the home.

[4] Upon receipt of this decision, the Appellant requested, as she was entitled to do, a Registrar's review of the decision pursuant to section 29.1 of the Act. This request resulted in the Registrar for the HPO providing a decision dated February 16, 2012 in which the earlier decision was upheld (the "Decision"). It is this Decision that is the subject of this Appeal.

[5] During this Appeal, the HPO has questioned whether the within Appeal was brought within the appropriate timeframe for bringing an appeal pursuant to section 29.3 of the Act. The Decision was mailed to the Appellant on February 17, 2012 and the Appeal was filed on April 5, 2012. The HPO takes the position that the Appeal is therefore out of time.

Issues

- [6] 1. Is the Appeal made in time?
- [7] 2. If so, Should the Appellant owner builder have been permitted to sell her new home within the prescribed 12 month period in which the sale of new homes built by owner builders are prohibited?
- [8] 3. If so, should the Appellant owner builder have been required to enroll her new home in a policy of home warranty insurance prior to such a sale?

History of Appeal

[9] Further to a series of Appeal Management Conferences held in this matter, both the Appellant and the HPO have provided the Board with affidavit evidence and written submissions. In this regard, the Board is in receipt of and has considered the evidence set out in Affidavit #1 of the Appellant, sworn May 23, 2012 and Affidavit #1 of the HPO, Registrar, sworn June 6, 2012.

Position of the Parties

Summary of Appellant's Position

[10] The Appellant's position is that HPO ought to have permitted the Appellant to sell her home in Quatsino, British Columbia without the need for home warranty insurance, based on the considerations outlined in s.20.1(2) of the Act. The Appellant states that if she is not permitted to sell her home without a policy of home warranty insurance that she will suffer undue hardship.

[11] The Appellant acknowledges that the Appeal was filed on April 5, 2012. However, she states that this was due to a number of factors including her absence from home to attend a Cancer Clinic in Vancouver for a check-up and the length of time it takes mail to get to Vancouver or Victoria from her residence.

Summary of Respondent's Position

[12] The Respondent's position is that the Appeal was filed after the 30 day time period for filing an appeal and is therefore out of time.

[13] On the issues under appeal, the Respondent's position is that the Registrar's decision in question is entitled to deference, was reasonable and ought not to be varied or reversed on appeal.

Was the Appeal Brought in Time?

[14] Pursuant to section 29.3 of the Act, an Appeal to the Board must be made within 30 days after receipt of the Decision. The Decision was dated February 16, 2012 and was mailed to the Appellant on February 17, 2012. Section 31.1(2)(c) of the Act stipulates that the Decision was deemed to have been served on the Appellant 14 days after it was deposited with Canada Post, namely March 2, 2012. Accordingly, under the Act the Appellant had until April 1st to file her Appeal with the Board. However, as April 1st was a Sunday the Appellant in effect had until April 2nd to file her Appeal with the Board.

[15] As set out in the Affidavit evidence before the Board, on March 4, 2012 the Appellant sent a letter to the HPO entitled "Right to Appeal". On March 16, 2012 the HPO sent an email to the Appellant advising of her right to appeal to the Board and referencing the 30 day time limit for such an appeal. I note that while the email correctly referred to section 29.3 of the Act there was no mention made of section 31.1(2)(c) or the deemed deadline for making an appeal to the Board.

[16] At the first Appeal Management Conference in this matter the issue of whether the appeal was made in time was addressed by the parties. At that time, the Appellant advised that mail can take longer than normal to reach her remote destination and can take longer to reach its intended destination after being mailed. The Appellant also advised that she had been away visiting a cancer clinic in Vancouver during the period she should have been preparing her appeal.

[17] Pursuant to Rule 11 of the Board's Rules of Practice and Procedure the Board may extend the timeline for filing of an appeal if it considers that special circumstances exist. After hearing the Appellant's position with respect to the circumstances surrounding her filing of the Appeal and the Respondent's arguments against any extension the Board determined at the Appeal Management Conference that an extension was appropriate given the remote location of the Appellant and the personal

circumstances she was dealing with simultaneously to the appeal, namely attendance at the cancer clinic in Vancouver.

[18] Accordingly, it was the Board's position at the Appeal Management Conference, and it remains the Board's position, that the Appeal may proceed.

Issues Under Appeal

The Law – Applicable Legislation

[19] The Appellant's appeal is brought pursuant to section 20.1 of the Act. This section of the Act states:

- 20.1 (1) Subject to subsection (2), an owner builder must not sell or offer to sell a new home
- (a) while the new home is being constructed, or
 - (b) within the prescribed period of time after the new home has been built, unless the registrar permits the sale or offer under subsection (2).
- (2) On application to the registrar, an owner builder may be permitted to sell or offer for sale a new home despite the requirements of subsection (1) if
- (a) the registrar is satisfied that the person would suffer undue hardship if the permission is not granted, and
 - (b) the person pays the prescribed fee
- (3) The registrar may impose conditions on a permission granted under subsection (2).

[20] Accordingly, an owner builder is prohibited from selling or offering for sale a new home for the time prescribed unless the registrar otherwise permits when presented with an application for permission to offer the home for sale. For this purpose the *Homeowner Protection Act Regulation* states that the prescribed length of prohibition on the sale of a new home is 12 months. This means that unless otherwise permitted by the Registrar that the Appellant is prohibited from selling her new home for a period of 12 months after the granting of the final occupancy permit.

[21] As can be seen from the wording of the applicable legislation, the prohibition against the sale of a new home is not without some relief: an owner builder may apply to the registrar for permission to sell the home within the 12 month period and the registrar may grant such permission if he or she would suffer undue hardship if the permission was not granted. In the event that the registrar grants such permission, the legislation clearly states that the registrar may impose conditions on any permitted sale or offer for sale.

[22] In my review of the wording of section 20.1 of the Act it is clear that the power of the registrar to grant such permission is discretionary. The Act states that “an owner builder may be permitted to sell or offer for sale a new home despite the requirements of subsection (1) if the registrar is satisfied that the person would suffer undue hardship if the permission is not granted [emphasis added]”.

[23] The Board must give deference to the discretion the legislation grants to the Registrar in coming to decisions regarding applications to sell or offer a new home for sale.

[24] In addition to granting deference to the discretion of the Registrar, pursuant to section 29.4(1) of the Act, when considering an appeal, the Board must also consider the purposes of the Act. The purposes of the Act are set out in section 2(1) and (2) of the Act as follows:

- a) to strengthen consumer protection for buyers of new homes;
- b) to improve the quality of residential construction;
- c) to support research and education respecting residential construction in British Columbia; and
- d) to administer the reconstruction loan portfolio, as defined in section 24.1, in accordance with Part 9.

[25] Clearly, items c) and d) from this list of purposes do not apply to situations such as the one before the Board as whether or not the Appellant’s appeal is successful will have no impact on either research and education respecting residential construction or the administration of the reconstruction loan portfolio. However, items a) and b) do apply and accordingly, in making my decision, I must consider them.

Application of the Law to the Facts before the Board

[26] Considering consumer protection and the quality of residential construction, a number of facts become relevant to this appeal:

- a) The new home was originally intended to be owner-built and occupied;
- b) The Appellant knew or ought to have known about the one-year occupancy requirement when he chose to become an owner builder. In fact, having the intention to reside in the home for at least one year is required in order to qualify for an owner builder authorization from HPO;
- c) The home in question has not been fully finished. Accordingly, any new owner would be moving into a property where at least some work needed to be done to finish the property.

[27] In addition to the facts set out above, I find, as did the Registrar for the HPO, that the Appellant has financial difficulties that would amount to undue hardship if she were not permitted to offer her new home for sale before the expiry of the twelve month prohibited period. That being said, while it is difficult to know what the home might sell for, especially given its partially completed nature, I find that the debts in question are considerably less than the assessed value of the home. Further, the Appellant owns not only the home in question, but also another home.

[28] All of these facts suggest that the Registrar was reasonable to uphold the decision permitting the sale of the new home as well as ensuring that there was some mechanism in place in her decision to ensure that consideration was given to the strengthening consumer protection and improving the quality of residential construction. In this regard, I note that the decision in question does not prohibit the Appellant from selling or offering her new home for sale. In fact, the decision gives her permission to do so on the condition that she registers the new home with a policy of home warranty insurance prior to doing so.

[29] The Appellant has provided some evidence that she is unable to obtain a policy of home warranty insurance on the home in question. In this regard, National Home Warranty Group Inc. has provided a letter to the Appellant indicating that they will not

warranty the home due to its lack of foundation. I find this indicative of the consumer protection concerns that the legislation in question is designed to address.

[30] I find that the Registrar in her decision did consider the Appellant's financial circumstances. As stated above, the Registrar has discretion and deference must be given to her decision by this Board. Considering all of the circumstances, I find that the Registrar was reasonable in her decision to uphold the initial decision; a decision which I find strikes a balance between providing relief to the Appellant in that it permits the Appellant to sell her home during the 12 month prohibited period while providing consumer protection to future purchasers of the home in question by requiring a policy of home warranty insurance be in place if the home is in fact sold.

Conclusion

[31] Issue One: The Appeal was brought in time given the Board's exercise of discretion pursuant to Rule 11 of the Board's Rules of Practice and Procedure extending the timeframe for bringing an appeal in light of the Appellant's special circumstances.

[32] Issue Two: The Appellant should have been permitted to sell her new home within the prescribed 12 month period where the sale of new homes built by owner builders is prohibited.

[33] Issue Three: The Appellant should have been required to enroll her new home in a policy of home warranty insurance prior to such a sale.

[34] Accordingly, the Registrar's decision under appeal is upheld. For the reasons set out above, the appeal is dismissed.

Signed:



Emily C. Drown, Vice-Chair