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Purchasing a Pre-Sale Condo - Things to Think About

So you are contemplating the purchase of a condo (in legal terms, a strata lot) before it is built or perhaps you have already signed the purchase and sale agreement. Either way, you want some insight into the key things you should know about or consider when purchasing a pre-sale condo.

First, if you are reading this before you have signed the purchase and sale agreement, congratulations! You are definitely in the minority group, clearly someone who does their homework before making a major decision. If you are reading this after you have signed the purchase and sale agreement, do not feel too bad, as we suspect 90% or more of buyers sign the purchase and sale agreement without receiving any legal advice about the proposed transaction.

As to the lengthy disclosure statement that is provided to a buyer when they sign the purchase and sale agreement, and with no evidence to support this comment other than casual feedback from developers and clients over the years, we suspect less than 5% of buyers actually read the disclosure statement from front to back. Try to read a disclosure statement and you will understand why. Of the determined 5% who actually read this tortured document, 99.9% of those will be confused by a few things set out in the disclosure statement. Bottom line, reading a disclosure statement is a mind numbing experience.

1. **Buyer's Remorse - Seven Day Rescission Period.** For those that have already signed the purchase and sale agreement, you can walk away from the deal and receive full return of any deposit you paid if you deliver a written rescission notice to the developer within seven days of the day you signed the purchase and sale agreement and received the disclosure statement. So if you are having a case of buyer's remorse and want out of the agreement, you have a time limited opportunity to get out.

2. **Other Events that Trigger a Buyer Cancellation Right.** If you are past the seven day rescission period it is possible you will have another opportunity to walk from the purchase and sale agreement if certain specific events occur, such as a change to a "material fact" with respect to the development (the term "material fact" is defined in the relevant legislation). Many disclosure statements are marketed before the developer has obtained a building permit or obtained financing to construct the proposed development. If the developer has not obtained the building permit or a financing commitment within twelve months of the date the original disclosure statement was filed

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with the Superintendent of Real Estate, the buyer has a time limited right to cancel their purchase and sale agreement and receive the return of their deposit in full, something to keep in mind if you are looking for an out.

3. **Understanding Your Obligation as a Buyer.** So what is the downside if you do not complete the transaction? Some buyer's assume all they are liable for is the deposit they have paid. As the purchase and sale agreement is drafted by the developer's lawyer, the buyer is typically responsible for all damages that the developer suffers as a result of the buyer's breach of the agreement. Let's connect that concept to some actual numbers.

The buyer signs the purchase and sale agreement for a condo for a purchase price of \$1,000,000 and the buyer pays a 10% deposit of \$100,000. The buyer then has a change in personal circumstances (loss of employment, transferred to a new city, divorce, etc.) and cannot close on the purchase of the condo. When it comes time to complete the transaction there is a downturn in the real estate market and the developer resells the unit for \$850,000. What damages could the developer sue the buyer for? The developer lost \$150,000 on the resale of the condo. In addition, the developer would likely claim the following damages from the buyer: (1) any commissions the developer prepaid to real estate agents on the first sale; (2) legal fees to terminate the original purchase and sale agreement and process the new purchase and sale agreement; (3) interest carrying costs (if applicable) for the development loan if there was a delay in re-selling the condo; and (4) any costs the developer incurred to customize the unit for the original buyer (i.e. hardwood floors, special cabinetry or any unit upgrades). So the collective damages payable to the developer could be much more than the \$100,000 deposit and even more than the \$150,000 loss on the resale purchase price to the second buyer.

4. **Who is the Buyer?** Put some thought into who you record as the "buyer" in the purchase and sale agreement. This can be difficult as the closing date may be several years out in the future. Most purchase and sale agreements are structured so that if the buyer wants title to be registered in the name of someone other than the buyer the developer has the right to charge additional fees on closing (even if the other person is a spouse, child, parent or holding company owned by the buyer) or the developer may be able to refuse to sign a transfer in favour of anyone other than the buyer. Inquire if the buyer can be described with some flexibility, such as "John Smith or a designated corporation". Alternatively, you may want to include an addendum/schedule to the purchase and sale agreement that the buyer can direct title to the condo to be registered in the name of the buyer's spouse, parent or child on closing without the payment of any additional fees to the developer.

5. **Restriction on Transfer.** Most purchase and sale agreements either prohibit the purchaser from transferring their agreement (legally known as assigning the agreement) to a third party before the closing or require the buyer to: (a) obtain the developer's consent to a proposed assignment; and (b) pay an assignment fee to the developer. So if a life changing event occurs (such as loss of employment or divorce) that will prevent a buyer from closing the transaction on time, the buyer should understand there may be obstacles and/or costs to transfer their agreement to a third

party. In a falling market, the developer is also less inclined to approve a transfer of a signed purchase and sale agreement because the developer views the assignment as a lost sale of one of the developer's unsold condos in the building.

6. **Buyer's Right to Terminate.** The time period between when a disclosure statement is filed and when the building is expected to be completed can be several years. Projects can be delayed for many reasons, such as a change in economic conditions, a strike at municipal hall or if the developer experiences financial difficulties. Review the purchase and sale agreement to determine if it includes a buyer's right to terminate the agreement and receive return of their deposit if the condo is not transferred to the buyer by a certain outside date. Buyers like to know they have a contractual right to walk away from the purchase and sale agreement and receive return of their deposit if the developer is taking forever to complete the project.

7. **Developer's Cancellation of the Project.** This scenario often causes buyers to feel cheated by the developer and by the government legislation. On occasion, a developer will cancel a project after it has launched the project for marketing and signed purchase and sale agreements with buyers. The developer will return the deposits to the original buyers (sometimes with interest) and then relaunch the project, typically at much higher prices. Buyers feel cheated because they did not receive the benefit of the upswing in the real estate market that has taken place since they signed their purchase and sale agreement, which the developer recaptures when they relaunch the project. The buyer may re-purchase in the new project, but the purchase price is now considerably higher. Although this is rare, it does happen from time to time and causes frustration, hardship and financial loss to the unfortunate buyers.

8. **Short Fuse Closing Window.** The closing protocol for each development project is unique. However, in many purchase and sale agreements the time period between the developer delivering a written closing notice to the buyer and the closing date can be very short – a matter of a few business days. Accordingly, if a buyer will require financing to complete the purchase of the condo, it is highly recommended that the buyer submit its mortgage application to its financial institution three or four months before the estimated closing date. It can easily take a lender three to four weeks to process a mortgage application. In addition, most lenders will secure an interest rate for a buyer for a period of 90 days, and hold that interest rate even if rates increase during the three-month period.

9. **Time is of the Essence.** Most purchase and sale agreements include a term that "time is of the essence". This means that if the buyer fails to perform an obligation, such as making a deposit payment instalment or paying the purchase price on the date required under the purchase and sale agreement, the developer has the right to terminate the agreement immediately, retain the buyer's deposit, sue the buyer for breach of the agreement and market the condo for immediate resale at a different price. The developer has no legal obligation to provide the buyer with an extension of time, even for a single day, to make a deposit instalment payment, wait for the transfer of funds from overseas or to delay the closing date so the purchaser can coordinate its financing for the purchase. This is a surprise to many buyers who assume the developer has a legal obligation to act

reasonably with respect to a request by the buyer for a small extension of time to complete the transaction.

10. **Move-In Madness.** This may be a small matter but it can be a very stressful matter. Give some thought as to when you schedule your move-in date. If there have been a large number of closings for a high rise building, then for the next few days there can be a number of move-ins scheduled for the building each day. Each buyer's allotted time to use the service elevator may be limited and this can make the move-in experience extremely stressful. If possible, schedule your move-in day to a day that does not have multiple bookings for the service elevator.

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