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IN THE MATTER OF THE *HOMEOWNER PROTECTION ACT, S.B.C. 1998 C. 31*

**AND IN THE MATTER OF an appeal to the
British Columbia Safety Standard Appeal Board**

BETWEEN:

A Home Owner

Appellant

AND:

Homeowner Protection Office

Respondent

**REASONS FOR DECISION
Denial of Application for Owner Builder Authorization**

Board Member:

Abigail Fulton, Vice-Chair

Appeal Description

[1] This is an appeal of a decision by the Homeowner Protection Office (the Respondent) to deny the Appellant's application to be approved as an Owner Builder under section 20 of the *Homeowner Protection Act, S.B.C. 1998 C. 31* (the Act) and section 4.1 of the *Homeowner Protection Act Regulations* (the Regulations).

[2] The appeal is based on the ground that the Appellant's circumstances, which involve property held by a Bare Trust Company, should be sufficient to satisfy the Act and Regulations for Owner Builder. The Appellant seeks a reversal of the decision to deny his application for an authorization to act as an Owner Builder.

[3] The appeal was heard by written submission in March, 2009.

Appellant's Position

[4] Title to the property in question is held by a numbered company in which the Appellant is the sole shareholder and director. The Appellant states that the company is actually holding title to the property "in trust" for him and that he is the sole beneficial owner with all the responsibilities, rights and obligations pertaining to it as though his name were on the title. He describes this trust relationship as a "bare trust". He also states that he performed or arranged and managed substantially all of the construction of the new home and that all permit applications were made in his name. He states that the house was not being built for re-sale, but that it was intended to be his principle residence and that it was being highly customized to meet the needs of a family member.

[5] The Appellant argues that a "bare trust" company should be recognized under the Act and Regulations as satisfying the title requirements for being an Owner Builder and that, therefore, the Respondent's decision to deny his application was based on a technicality rather than on the intent of the Act.

[6] The Appellant maintains that this "bare trustee" company has no right or interest in the land and that it simply holds title to the property in trust for him. He argues that this is sufficient to provide him with the required registered interest in the land under section 4.1(2)(e)(i) of the Homeowner Protection Act Regulation, B.C. Reg. 29/99 (the Regulations). It is therefore his position that he has met all the owner/builder requirements set out in section 4.1(2) of the Regulation as follows:

- i) he is an individual as required by section 4.1(2)(a);
- ii) he intended to use the new home for personal use for a longer period than required by section 4.1(2)(b);
- iii) he would not reside with a person who did not meet the criteria set out in section 4.1(2)(c) and,

- iv) in accordance with section 4.1(2)(c) he has not previously applied for authorization as an owner/builder.

Respondent's Position

[7] The Respondent states that the Appellant applied as an individual in keeping with section 4.1(2) (a) of the Regulation but does not have a registered interest in the land as defined in section 4.1(1) which requires a person to have a registered interest in land in his or her individual name to be eligible for an Owner Builder authorization. The fact that the Appellant's numbered company had a registered interest in the land is not enough to satisfy the requirements of the legislation.

[8] The Respondent argues that the "person" referred to in sections 4.1(2)(a) and 4.1(2)(e)(i) of the Regulation must be the same body and that an individual can not apply for an Owner Builder authorization and then rely on another entity to meet the other requirements of the legislation.

[9] Further, the Respondent states that the Appellant had been advised, that in order to satisfy the Owner Builder requirements, he should either transfer a small portion of the property to his individual name or register a long-term lease to himself from the company and register the lease on title to the property before applying for the authorization. Neither course of action was taken by the Appellant so the Respondent had to deny his application.

[10] The Respondent argues that the Appellant's reliance on having a "bare trustee" company provided no special circumstances to justify issuing the authorization under section 20(2) of the Act. Rather, the Respondent argues that the shielding of an individual behind a company name is exactly the type of situation the legislation was intended to address and that in order for a person to be truly responsible for building an exempt home and to provide a clear record of ownership on the land title system the owner should be both the beneficial and the legal owner of the property on which the new home is to be constructed. The Appellant chose to set out his business affairs in this manner and refused to alter those arrangements. Also, it would not be within the power of the registrar to alter the definition of the Regulation to allow a "bare trust" company to satisfy the criteria listed for being an Owner Builder.

The Law

[11] Section 19 of the Act states:

- 19** (1) An owner builder must not build a new home other than
- (a) a detached dwelling unit under one legal title, or
 - (b) a single dwelling unit in or attached to
 - (i) a pre-existing building, or
 - (ii) a new non-residential building that does not have another single dwelling unit in or attached to it
- (2) Subject to local bylaws, the new home referred to in subsection (1) may include a secondary suite.
- (3) to (6) Repealed.[B.C. Reg. 315/2007, s.9 (b).]
- (4) An owner builder must complete and file with the appropriate authority at the time of the building permit application or, if a building permit is not required, with the registrar before commencing construction, an Owner Builder Declaration and Disclosure Notice in the form set out in Schedule 4.
- (5) An owner builder must not sell a home to which subsection (1) applies unless
- (a) the home is covered by home warranty insurance, or
 - (b) the owner builder has provided to the person offering to purchase the home a copy of the Owner Builder Declaration and Disclosure Notice referred to in subsection (4)
- (6) Subsection (5) applies to the owner builder of a new home and any subsequent owner during the 10 year period commencing on the earlier of
- (a) the date that the new home is first occupied, and
 - (b) the granting of an occupancy permit or similar right to occupy by an authority having jurisdiction.

[12] Section 20 of the Act states:

- 20** (1) On application to the registrar, a person who intends to build, for personal use, a new home of a prescribed type may be issued an authorization if the person
- (a) meets the criteria prescribed for owner builders, and
 - (b) pays the prescribed fee.
- (2) The registrar may issue an authorization under subsection (1) to a person who does not meet the criteria referred to in subsection (1) (a) if the registrar is satisfied that special circumstances justify doing so.
- (3) An owner builder, with respect to the new home for which the owner builder's authorization is issued, is not required
- (a) to obtain home warranty insurance, or
 - (b) to be licensed under this Act.

[13] Section 4.1(2)(e)(i) of the Regulations state:

- 4.1** (1) In this section:

"registered interest in land" means any of the following interests in land, registered under the *Land Title Act*:

- (a) an interest in fee simple;
- (b) a life interest;
- (c) an interest under a lease with a term of at least 15 years;

"first occupancy" means

- (a) the date an occupancy permit with respect to the new home was first issued, or
- (b) if no occupancy permit has been issued with respect to the new home, the date the new home was first occupied.

(2) The following criteria are prescribed for the purposes of section 20 (1) (a) of the Act:

- (a) the person must be an individual;
- (b) the person must intend to use the new home for personal use for at least one year from the date of first occupancy of the new home;
- (c) if the person has previously been issued an authorization, the person must not have been issued an authorization for at least the following period of time, determined from the date of first occupancy of the new home built under the most recent previous authorization:
 - (i) 18 months, if the person has been issued only one previous authorization;
 - (ii) 3 years, if the person has been issued two previous authorizations;
 - (iii) 5 years, if the person has been issued three or more previous authorizations;
- (d) the person must not ordinarily be resident with a person who does not meet the criteria set out in paragraph (c);
- (e) the person must
 - (i) have a registered interest in the land on which the new home is to be built and intend to maintain that interest for at least one year from the date of first occupancy, or
 - (ii) be a director of a family farm corporation, within the meaning of the *Property Transfer Tax Act*, that
 - (A) has a registered interest in the land on which the new home is to be built, and
 - (B) has passed a resolution affirming that it will not dispose of the interest referred to in clause (A) for at least one year from the date of first occupancy;
- (f) the person must intend to engage in, arrange for or manage all or substantially all of the construction of the new home;
- (g) the person must not have made a false statement in a previous application for an authorization;
- (h) the person must not have failed to comply with sections 20.1 (1), 21 (2) and 22 of the Act or section 19 (1) of this regulation.

(3) A person may apply to the registrar for an authorization by providing, in a form acceptable to the registrar, all of the following:

- (a) particulars respecting the applicant, including
 - (i) name and address,
 - (ii) telephone numbers and fax numbers,
 - (iii) date of birth, and
 - (iv) driver's licence number;
 - (b) a list of the persons ordinarily resident with the applicant and the particulars of each, including the particulars set out in paragraph (a) (i) to (iv);
 - (c) the civic address, legal description and parcel identification number of the location of the proposed owner-built home;
 - (d) a statement
 - (i) identifying who will build the new home and who will manage the building of the new home;
 - (ii) identifying the type of new home to be built;
 - (iii) describing the applicant's intended use of the new home and the intended duration of that use;
 - (iv) describing the applicant's interests in the land on which the new home is to be built;
 - (v) affirming that the person has read the statutory protection provision of the Act and understands his or her obligations to future purchasers of the new home;
 - (vi) setting out how many previous authorizations, if any, have been issued to the applicant or a person ordinarily resident with the applicant;
 - (e) an undertaking by the applicant to notify the registrar of the following when first occupancy occurs:
 - (i) the date on which first occupancy occurred;
 - (ii) the names of the tradespersons who contributed to the building of the new home;
 - (f) the signature of the applicant.
- (4) The period of time prescribed for the purposes of section 20.1 (1) (b) is 12 months.
- (5) An application under subsection (3) must be accompanied by the fee set out in section 4.1 of Schedule 1.
- (6) In addition to the fee payable under subsection (4), an applicant must pay the fee set out in section 4.2 of Schedule I at the time the authorization is issued to the applicant.
- (7) An application under section 20.1 (1) of the Act must be accompanied by the fee set out in section 4.3 of Schedule 1.

Application of Law to the Facts

[14] It is clear upon review of s.20 (1) and s. 20(2) of the Act that a person can only be authorized as an Owner Builder if they meet the criteria prescribed in the Regulation and pay the prescribed fee, unless the registrar can be satisfied that special circumstances exist to justify doing so despite an inability to meet the criteria. The issue at hand therefore, is twofold:

- 1) Have the criteria been met? If yes, then authorization as an Owner Builder should follow.
- 2) If the criteria are not met, are there special circumstances that would still allow for Owner Builder authorization?

[15] The first issue can be dealt with by reviewing the criteria outlined in section 4.1 of the Regulation. Section 4.1 (2) (a) requires that “the person” applying for authorization must be an individual. The use of the word “must” means that it is imperative that this be so. The balance of the section lists further criteria to be met by “the person”, and it can only reasonably be interpreted that the Regulation is referencing the same person throughout. Section 4.1 (2) (e) (i) goes on to require that the person, already identified as having to be an individual, must have a registered interest in the land upon which the new home is to be built. The regulation defines a “registered interest in land” to include either an interest in fee simple, a life interest, or an interest under a lease with a term of at least 15 years. The Appellant’s property is registered in fee simple in the name of a numbered company. No one disputes this fact. The company is not an individual. Therefore, regardless of whether the rest of the requirements listed in the Regulation have been met by the Appellant, this one has not.

[16] The Appellant argues that a “bare trustee” company should be recognized as being the equivalent of an individual as he is the sole beneficiary and director. The Board does not agree with such an interpretation. If the intent of the Regulation was to recognize that a duly incorporated company could satisfy the requirements to be an Owner Builder then it would not have clearly stated that “the person” must be an individual. While the Appellant may be the sole beneficiary and director of the company in question, that does not change that corporate entity into an individual for the purposes of this section of the Regulation.

[17] For these reasons the Appellant has not satisfied the criteria necessary to enable authorization of the Owner Builder designation under section 4.1(2) of the Regulation.

[18] The second issue in question is whether there are special circumstances in this instance that would justify the authorization of the Appellant as an Owner Builder despite his inability to meet the criteria required under the regulation. Section 20 (2) of the Act provides the registrar with the discretion to make such an authorization. Clearly it is the intent of the legislation to allow for the possibility that there may be instances when authorization as an Owner Builder is appropriate regardless of whether the criteria listed

in the Regulation have been met. Such latitude however could not be so broad as to negate the purposes of the Act stated in section 2 (1) as follows:

- 2 (1)** The purposes of this Act are
- (a) to strengthen consumer protection for buyers of new homes,
 - (b) to improve the quality of residential construction, and
 - (c) to support research and education respecting residential construction in British Columbia

[19] The requirement for licensing and home warranty protection within the Act speak to both (a) and (b) noted above and are intended to strengthen consumer protection and improve the quality of residential construction. An Owner Builder is exempt from these requirements as long as it can be shown that the home is not being built specifically for resale purposes.

[20] Section 20.1(1) 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).

[21] The Act recognizes the right of an individual to build their own home if they, in fact, plan to live in it themselves. However, it is careful to provide rules around such a right so as to prevent any abuse that may in fact compromise consumer protection, such as, the sale of a new home without the protection of home warranty protection or adequate disclosure of the lack thereof.

[22] In considering what might constitute “special circumstances” to justify the authorization of an Owner Builder who has not met the requirements outlined in the Regulation, the registrar would have to ensure that consumer protection was not negatively effected. This would include an ability to monitor resale of the home through the land title registration process and to attach penalties if the requirements of the Act and Regulation are not complied with.

[23] Title to the Appellant's home is registered in the name of a corporation. A corporation can be sold with no impact on that registration. A corporation also provides a limitation to liability that an individual would not be able to rely on in the event of any legal action by a subsequent purchaser. Allowing such an entity to be authorized as an Owner Builder would clearly circumvent one of the purposes of the legislation and therefore ought not to be recognized as a "special circumstance" within the meaning of the Act.

[24] The Appellant argues that the corporation holding title to the property in question should be given special consideration due to the fact that he is the sole shareholder and director of the entity, however, this argument is not persuasive as there is nothing in the materials provided by the Appellant to indicate any restriction on the sale of the existing shares or loss of limited liability protection. While a trust relationship may have been created between the corporate entity and the Appellant this relationship is to the benefit of the Appellant and does not effectively reinstate the consumer protection that has been lost by the corporate ownership. Therefore the existence of a trust relationship such as indicated by the Appellant is not helpful to his appeal in this instance.

Appeal Board Decision

[25] For the reasons stated above, the Board denies this appeal. The decision of the Registrar of the Homeowner Protection Office to deny the Appellant's application to be approved as an Owner Builder under section 20 of the *Homeowner Protection Act* (the Act) and section 4.1 of the *Homeowner Protection Act Regulations* (the Regulations) is upheld.

Signed by:



Abigail Fulton,
Vice-Chair, Safety Standards Appeal Board