

Issues

1. Are the Appellants entitled to an Owner Builder Authorization with respect to the New Home under section 20 of the Act?

Facts

[2] The facts in this appeal do not appear to be in dispute between the parties. Accordingly, the only new evidence provided by the parties is a copy of a Trust Agreement between the Appellants and a family member, the registered owner of the land on which the New Home was built. Upon review of this agreement and the written submissions of the parties, I find the facts as follows:

- a) The Appellants constructed a home located in Golden, British Columbia;
- b) The Appellants were informed of the need to obtain an exemption from the licensing and home warranty insurance requirements of the Act;
- c) The Appellants constructed a second house, the New Home;
- d) The Appellants are not the registered owners of the land on which the New Home was built;
- e) The registered owner of the land on which the New Home was built was the Appellant's father; however, by way of a trust agreement between the Appellant and his Father, the Appellant was at all material times the beneficial owner of the land upon which the New Home was built;
- f) The Appellants constructed the New Home without obtaining a policy of home warranty insurance or an Owner Builder Authorization;
- g) On January 19, 2009, the Appellants became the registered owners of the land on which the New Home was built;
- h) On March 4, 2013, the Appellants applied for an Owner Builder Authorization;
- i) On April 8, 2013 the HPO denied the application in the Initial Decision;
- j) The Appellants sought a review of the Initial Decision; and
- k) On May 31, 2013, the Registrar confirmed the Initial Decision.

Position of the Parties

Appellants

[3] The Appellants submit that they need an HPO registration number in order to sell their house. They admit that they built another home in 2006 and that they were able to list that home without obtaining an HPO registration number. They state that upon selling the house they were notified by their realtor that they needed a registration number and that when then contacted their HPO office an inspector was sent out within a week and shortly thereafter they received an HPO number, without any issues or problems. They advise that they expected to be able to do the same thing this time and felt that they could apply for an HPO registration number when they went to sell their property.

[4] The Appellants advise that after six years of living in the New Home that they now wish to sell it in order to move closer to Golden as they have two daughters, ages eleven and six, that have many school and sport commitments there.

[5] The Appellants state that the HPO has advised them that they cannot retroactively apply for an Owner Builder Authorization for the New Home for the following reasons:

- a) They built their house without obtaining a policy of home warranty insurance or an exemption from the HPO contrary to section 22 of the Act, despite having previously been through the process with HPO with respect to the construction and sale of the earlier home; and
- b) They are not the registered owners of the land on which the New Home is built so they do not meet the criteria set out to qualify for an Owner Builder Authorization in section 4.1(2) of the Regulations.

[6] With respect to the contravention of section 22 of the Act, the Appellants submit that they mistakenly felt that they could apply for an Owner Builder Authorization if and when they ever wanted to sell as they had been permitted to do so by the HPO when they built their first home in 2006.

[7] With respect to the fact that they are not the registered owners of the land on which the New Home is built, the Appellants submitted a Trust Agreement that shows that the Appellant's Father was the beneficial owner of the land and was the registered owner of the land. The

Appellants submit that therefore they were owners of the land and that accordingly, they meet the criteria set out in the Regulations for the granting of an Owner Builder Authorization.

[8] The Appellants state that they have looked into getting a policy of home warranty insurance for the four remaining years of the 10 year term, but have been unable to do so due to the cost, which ranges from \$15,000.00 to \$30,000.00 based on the estimates that they have received for such policies. The Appellants state that the amount required to obtain a policy of home warranty insurance includes a sum for “deposit”, which they would see returned to them at the expiry of the warranty period.

[9] The Appellants state that they cannot wait four more years to sell their home as they need to be closer to Golden for their children and that waiting will defeat the purpose as their oldest child will then be getting ready to head off to post-secondary education.

Respondents

[10] The Respondent states that although this appeal is a new hearing that the applicable standard of review means that the Registrar’s Decision is entitled to deference on the standard of reasonableness.

[11] The Respondent states that the Registrar’s Decision is reasonable as the Appellants did not meet the criteria set out by the legislation that needed to be met in order to qualify for an Owner Builder Declaration under the Act. The Respondent relies heavily on the fact that the Appellants did not have a registered interest in the land until after the New Home was built and states that while there may be a trust agreement in place between the Father and the Appellant that this did not create registered ownership and does not serve to transfer title of the land to the Appellants.

[12] The Respondent further states that the Appellants breached s.22 of the Act by building the New Home (and the prior new home) without the house first being registered for coverage with home warranty insurance and before applying for an Owner Builder Authorization. The Respondent submits that the Appellants ought to have known better as they had experience with respect to the prior home they constructed.

[13] The Respondent submits that there is no compelling reason to exempt the Appellants from the criteria set out in legislation. The Respondent dismisses the Appellants concerns

regarding wishing to move closer to Golden and states that they built the home not long ago knowing its proximity to Golden.

[14] Finally, the Respondent submits that the Appellants are not without options as they are able to obtain home warranty insurance coverage on the New Home, albeit at a cost. The Respondent notes that a portion of this cost would presumably be returned to the Appellants on the expiry of the home warranty insurance coverage.

Analysis

[15] 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 fees.

(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.

[16] The criteria referred to in section 20 of the Act are set out in section 4.1(2) of the *Homeowner Protection Act Regulation* (the "Regulation"), which states:

4.1(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;
- the person must not have made a false statement in a previous application for an authorization;
- the person must not have failed to comply with sections 20.1(a), 21(2) and 22 of the Act or section 19(1) of this regulation.

[17] Interestingly, neither party referred to section 20(2) of the Act in any detail. This section authorizes the registrar to issue an owner builder authorization to a person who does not meet the criteria referred to in subsection 20(1)(a) if the registrar is satisfied that special

circumstances justify doing so. The Appellants, who are self-represented, did not refer to this section of the legislation at all and the Respondent only mentioned in passing that they could see no reason to exempt the Appellants from the criteria set out in the legislation.

[18] It is generally said that ignorance of the law is no excuse. However, in this case it cannot be said that the Appellants were ignorant of the law. The evidence before the Board suggests that they knew that a new home constructed by them would need to comply with the requirements of the Act.

[19] Despite having previously constructed a new home and being aware that registration with the HPO was required, the Appellants proceeded to build the New Home without attention to the requirements of the legislation. The Appellant was treated leniently when he failed to comply with the legislation when he built his first house. He expected to be treated the same a second time.

[20] Failure to comply with section 22 of the Act is itself reasonable grounds for the Registrar to deny an application for an Owner Builder Authorization. Despite knowing the requirements of the legislation, the Appellants chose to build their New Home without obtaining either an Owner Builder Declaration or a policy of home warranty insurance.

[21] In addition to the Appellants' failure to comply with section 22 of the Act, they do not meet the criteria enumerated in section 4.1(2) of the Regulation because they were not the registered owners of the land on which the home was built at the time of construction. In this regard, I am sympathetic to the Appellants. They had a trust agreement in place with the Appellant's Father, the registered owner of the land, and believed themselves to be the owners of the land. I find that as a result of the trust agreement, they were the *beneficial* owners of the land at the material time. However, the legislation clearly requires applicants to be *registered* owners. In this regard, the Act goes so far as to stipulate that an applicant must have a "registered interest in land" and states that this means an interest in fee simple, a life interest or an interest under a lease with a term of at least 15 years, *registered under the Land Title Act*. While it is clear that the Appellants had a beneficial interest in the land, such interest is not a *registered* interest. Accordingly, the Appellants, in addition to failing to comply with section 22 of the Act do not meet the conditions of the legislation.

[22] While I am limited by the clear wording of the legislation, I question whether the situation the Appellants find themselves in with respect to the requirement to be a registered owner was

intended by the legislature. In a close family where substantial land is owned, it is not unusual or unheard of for parcels of land to be subdivided and given or sold to family members. The Appellant's Father could not have obtained an Owner Builder Declaration as he was not the builder of the Home and the Appellants could not obtain an Owner Builder Declaration as they were not the registered owners of the land. Regardless of the legislature's intention, this conundrum highlights the importance of builders registering with the HPO *before* construction commences. Had the Appellants contacted the HPO at the outset, they would have learned that they needed to be registered owners and perhaps could have arranged to have the land transferred the property into their name before construction commenced.

[23] Pursuant to section 29.4(1) of the Act, the Board must consider the purposes of the Act when hearing appeals. The purposes of the Act are as follows:

- 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.

[24] A further purpose of the Act is to administer the reconstruction loan portfolio, but that purpose is not relevant to this appeal.

[25] If the only issue was whether the Appellants were the registered owners of the land, I may have found that the Registrar acted unreasonably in failing to find the existence of special circumstances pursuant to section 20(2) of the Act that would allow an Owner Builder Authorization to be granted to the Appellants. The Appellants have school aged children and it now suits their lifestyle to live closer to Golden and I can see how this creates an urgent desire to relocate. However, the Appellants also failed to comply with section 22 of the Act and despite knowing of the requirements of the Act, felt that they could be ignored until such time as they chose to comply. While, as the Appellants state, the Home may be well constructed, there is no consumer protection in place if an Owner Builder Authorization is not obtained or a policy of home warranty insurance is not provided for the Home. Accordingly, I find that the Registrar was reasonable in her decision to uphold the Initial Decision.

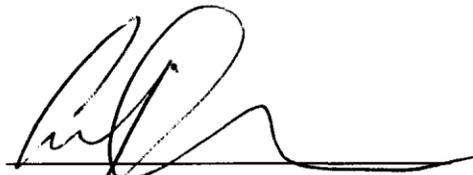
[26] The Appellants are not without recourse. They have stated that home warranty insurance is available to them at a cost of \$15,000.00 to \$30,000.00. They could purchase such a policy and move to Golden as they wish to or they can remain in their home for four more

years. However, I would be remiss not to notify the Appellants that without a policy of home warranty insurance in place that they would continue to remain in default under the Act and could be liable to further sanctions from the HPO as a result.

Conclusion

[27] For the reasons set out above, the Appeal is dismissed.

Signed:



Emily C. Drown, Vice-Chair