

Indexed as: BCSSAB 14 (2) 2013

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 STANDARDS APPEAL BOARD**

BETWEEN: **A DESIGN CONSULTANT** APPELLANT

AND **HOMEOWNER PROTECTION OFFICE** RESPONDENT

REASONS FOR DECISION

INTRODUCTION

[1] This is an appeal under the *Homeowner Protection Act*, SBC 1998, c.31 (the “Act”) regarding a review decision of the Registrar of the Homeowner Protection Office (the “HPO”) dated July 5, 2013 (the “Review Decision”). The Review Decision dealt with the following:

- a) a request for review of a compliance order issued to the Appellant under section 28.1 of the Act on April 10, 2013 (the “Compliance Order”);
- b) a request for reversal of Owner Builder Authorization Suspension #81690 (the “OBA Suspension”); and
- c) a request to lift the condition on the Appellant’s license that required him to enroll a house in a policy of new home warranty (the “Conditional License”).

[2] In the Review Decision the Registrar upheld the Compliance Order, which required the Appellant to enroll the home in question with a policy of home warranty insurance pursuant to section 22(1) of the Act. With respect to the request for reversal of the OBA Suspension, the Registrar advised that the individual affected by the OBA Suspension had already requested a review of that decision and that the OBA Suspension had been upheld by the Registrar in November of 2012. With respect to the request to lift the condition on the Appellant’s license,

the Registrar determined that the Appellant was out of time to request such a review, the Conditional License having been issued on May 15, 2012 with more than a year passing before a request for review.

[3] Before the final hearing of this appeal proceeded, the Board received submissions from the parties regarding the issue of the Conditional License and issued Preliminary Reasons for Decision on November 25, 2013 upholding the Registrar's decision that the Appellant is out of time to appeal the issuance of the Conditional License.

ISSUES

[4] Accordingly, the issues that remain to be determined in this appeal are whether the Compliance Order should be upheld, varied or dismissed and whether the Appellant may appeal the OBA Suspension.

POSTION OF THE PARTIES

The Appellant

[5] In support of his appeal, the Appellant has provided the Board with a written statement outlining his position.

[6] The Appellant submits that in April 2012 he was asked to assist a client in building a duplex. He states that at this time he went to enroll as a licensed residential builder with the HPO. In filling out the appropriate application forms, the Appellant states that he had to advise regarding his previous experience with building houses and that he listed the work he had previously done with his Client's house.

[7] The Appellant submits that he should not be required to obtain a policy of home warranty insurance for the property in question and requests that the Owner Builder Authorization pertaining to his Client be reinstated.

[8] The Appellant submits that he was hired by the Client to design his house. He states that as part of his services he performed the following work for the Client:

- a. helped to obtain the building permit for the property;

- b. helped the Client choose the construction and finishing material such as tiles, flooring, roofing, etc;
- c. occasionally referred trades to the job; and
- d. visiting site during the framing stage to ensure the work was progressing as per drawings and to suggest some design ideas to the trades and the Client's family.

[9] In this regard, the Appellant submits that the services he provided to the Client were similar to those provided by architectural firms providing field reviews for a project and interior designers and not those of a general contractor or project manager.

The Respondent

[10] In support of its position, the Respondent has provided the Board with written submissions and the following affidavits:

- a) The Registrar of the HPO, sworn February 5, 2014 (the "Registrar Affidavit"); and
- b) The Licensing Officer's, sworn February 4, 2014 (the "Licensing Officer Affidavit").

[11] The Respondent submits that the evidence filed with the Board shows that the Appellant engaged in, arranged for or managed all or substantially all of the construction of the New Home and that accordingly, the Compliance Order was correctly issued to the Appellant. In the alternative, the Respondent submits that the Registrar's Decision is entitled to deference, was reasonable and should not be overturned.

FACTS

[12] An appeal before the Board is a new hearing pursuant to section 53 of the *Safety Standards Act*, which applies to appeals under the *Homeowner Protection Act*. In this regard, it is appropriate for both parties to provide the Board with evidence and submissions that they wish the Board to consider in the Appeal. However, problems arise when, as here, the new evidence provided by a party to an appeal contradicts evidence from earlier in the adjudication process when the matter was with the Registrar for review. The Board must then determine what in fact occurred and must make a determination of fact. Initially, the Appellant advised the HPO that he was substantially involved in the construction process. Much of this information is set out in the Licensing Officer Affidavit. However, before the Board the Appellant's statement minimized his involvement somewhat.

[13] Upon review of the materials filed with the Board, and particularly the submissions of the Appellant and the Licensing Officer Affidavit relied upon by the Respondent, I find that the Appellant was in fact engaged in or managing substantially all of the construction of the home in question. In this regard, I find that the Appellant was engaged to this extent because he was concerned about the homeowner's age, health and ability to manage the construction project on his own.

[14] In addition to those tasks the Appellant admits to doing with respect to the construction of the new home in the Appellant's written submissions, I find that the Appellant also did substantially more work as deposed in the Licensing Officer Affidavit. In this regard, I find that the Appellant did the following with respect to the construction of the new home:

- a) He was on site every day;
- b) He managed the trades;
- c) He was responsible to make sure inspections passed;
- d) He suggested about half of the trades to the home owner;
- e) He was responsible for maintaining the construction schedule and lining up the work of the trades; and
- f) He was responsible for arranging some materials to be delivered to the construction site.

THE LAW

[15] With respect to the OAB Suspension, there is a 30 day window of opportunity to bring an appeal to the Board upon receiving a review decision from the HPO's Registrar as set out in the Act. Pursuant to the legislation, if an appeal is not brought to the Board within that time frame, an appeal may not proceed to the Board unless the Board finds that there are special circumstances justifying a late appeal.

[16] With respect to the Compliance Order, the relevant law is set out in the Act and its associated regulations.

[17] Section 1 of the Act defines "residential builder" as a "person who engages in, arranges for or manages all or substantially all of the construction of a new home or agrees to do any of

those things, and includes a developer and a general contractor.” A “general contractor” is further defined to be a person that is “engaged under contract by an owner...to perform or cause to be performed all or substantially all of the construction of a new home, and includes a construction manager and project manager.”

[18] Section 14(1) of the Act prohibits a person from carrying on the business of a residential builder unless licensed under the Act.

[19] Section 22(1) of the Act states that a “person must not build a new home unless the new home was registered for coverage by home warranty insurance provided by a warranty provider.” Section 22(1) does not apply to an owner builder.

[20] Section 29.4(1) of the Act requires that the Board must consider the purposes of the Act, which are:

- 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) the administration of the reconstruction loan portfolio.

ANALYSIS

[21] As set out in the Review Decision and the Acheson Affidavit, the owner referred to in the OBA Suspension has already requested a registrar’s review of the OBA Suspension. The Registrar upheld the OBA Suspension and the owner did not appeal that decision to the Board. Accordingly, the issue of the OBA Suspension is not properly before the Board and the Board does not have jurisdiction to look at the OBA Suspension in this Appeal absent evidence of special circumstances justifying the late filing of an appeal.

[22] The Board was not provided with any explanation as to why there should be late filing of an appeal of the OBA Suspension and in any event the Appellant before the Board in this appeal is not the subject of the OBA Suspension. Accordingly, the OBA Suspension is not properly before the Board and the Board lacks the jurisdiction to deal with an appeal of the OBA Suspension by the Appellant.

[23] With respect to the issue of the Compliance Order, I find that the actions of the Appellant on the construction site put him firmly within the ambit of the definition of a residential builder under section 1 of the Act. Due to the extent of the Appellant's involvement with the construction of the home, it was inappropriate for the home in question to continue to be built under an Owner Builder Authorization. Accordingly, the exemption from the requirement to obtain a policy of home warranty insurance was appropriately revoked along with the OBA Suspension.

[24] While admirable, the Appellant's reasons for becoming more involved in the project than first anticipated do not absolve him of the requirement to register the home in a policy of home warranty insurance.

[25] As set out above, one of the criteria that the Board must consider is the enhancement of consumer protection for purchasers of new homes. The owner of the home in question, along with any subsequent purchasers of that home, is entitled to have the benefit of a policy of home warranty insurance. To hold otherwise would weaken consumer protection in British Columbia.

[26] I find that section 22(1) of the Act does apply to the Appellant and a policy of home warranty insurance for the home is required.

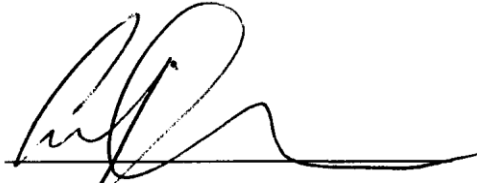
CONCLUSION

[27] With respect to the OBA Suspension, I find that the Appellant does not have the ability to bring an appeal with respect to the OBA Suspension before the Board. The Registrar upheld the OBA Suspension and the owner did not appeal that decision to the Board and no application has been made suggesting why the Appellant should now be permitted to appeal the OBA Suspension when the owner did not.

[28] With respect to the Compliance Order, based on the materials provided to the Board it is clear that the Appellant engaged in significant work on the construction of the Client's home. I am satisfied that the work he performed was such that he ought to have complied with the provisions of the Act and registered himself as a licensed residential builder with respect to the construction of the new home and ought to have registered the New Home in a policy of home warranty insurance. Accordingly, the Compliance Order was appropriately issued by the HPO

and reasonably upheld by the Registrar in her Review Decision. The Appellant's appeal is dismissed.

Signed:

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a horizontal line extending to the right.