Date Issued: September 21, 2011
File: SSAB 1-11-12

Indexed as: BCSSAB 1 (1) 2011

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:	**An Owner Builder**	**Appellant**
AND:	**Homeowner Protection Office**	**Respondent**

REASONS FOR DECISION
Appeal of Request for Review

Vice Chair: Emily Drown

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 ("the HPO") dated July 29, 2011.

[2] 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. After receiving this application from the Appellant, the HPO, in a letter dated March 7, 2011 granted permission for the Appellant to sell her home on the following conditions:

a) that a policy of home warranty insurance be obtained for the home prior

to selling or offering to sell the home;

b) that the Appellant provide a Disclosure Notice to prospective purchasers pursuant to section 21(2) of the Act.

[3] As required, the decision letter stated that the Appellant had 30 days of receipt of the decision letter to request a review of the decision by the Registrar. The Appellant did request a review of the decision, but the request for review was dated May 30, 2011 and was received by the HPO on May 31, 2011. Accordingly, the HPO Registrar denied the Appellant's request for review in a letter dated June 8, 2011. The reason given by the Registrar for denying the Appellant's request for review was that her appeal was out of time. The Appellant appealed this decision stating that the Registrar ought to have considered the Appellant's special circumstances and reconsidered the original decision of March 7, 2011. While unusual, at the initiative of the HPO Registrar after the commencement of this appeal, the June 8, 2011 decision was reconsidered by the Registrar for the reasons submitted by the Appellant. This led to a further decision dated July 29, 2011 being issued. This decision upheld the initial March 7, 2011 decision. In an effort to be expeditious and by consent of the parties the July 29, 2011 decision replaces the June 8, 2011 and is the decision at issue in this appeal.

Issues

[4] 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 without a policy of home warranty insurance?

History of Appeal

[5] In order to properly consider the Appellant's position I requested further evidence from both of the parties in a letter dated July 20, 2011. In particular, I requested the following:

a) the Appellant was to provide any evidence the Appellant wished the Board to consider by way of affidavit along with a written summary of the Appellant's position by August 2, 2011;

b) the Respondent was to provide its own affidavit evidence and written summary of position by August 10, 2011;

c) The Appellant was to provide any reply evidence by August 15, 2011.

[6] Surprisingly, neither party provided any further evidence or written summary other than that contained in the initial Appeal Record and the supplementary decision of the HPO Registrar dated July 29, 2011. Accordingly, this decision is made based upon the material included in the Appellant's initial appeal to the Board and the Respondent's response thereto.

Position of the Parties

Summary of Appellant's Position

[7] The Appellant submits that she cannot comply with the HPO requirement that she must have a policy of home warranty insurance in place in order to sell her home within the prescribed period of prohibition on new homes built by an owner/builder. In support of this position the Appellant states that she is suffering from significant financial hardship. By way of example she states that she has been unable to pay her mortgage payments on the house in question on time and that her credit card and line of credit are both maxed out. She further states that she has two children and is not working as she was on maternity leave until April 2011. Finally, the Appellant states that while she intended to return to work in May 2011, she received notice that her husband's immigration case was declined and that he was ordered to leave the country by the end of June, 2011 and that she has no other option other than to leave Canada with her husband since she cannot work with two children and cannot afford the mortgage on the home.

Summary of Respondent's Position

[8] The Respondent's position is that the initial decision and conditions put on the sale of the Appellant's home are reasonable. In support of this position the Respondent states that the value of the property in question far exceeds the mortgage on the property and other debts of the Appellant and that the cost of home warranty insurance could be obtained from the equity in the home.

Analysis

The Law: Standard for Review

[9] In considering this appeal, I must consider whether the decision under appeal is reasonable. The test for reasonableness is as set out in *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 S.C.R. 190 ("Dunsmuir"):

[10] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions in judicial review; reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[11] Accordingly, I must determine whether the July 29, 2011 falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and law.

The Law: Applicable Legislation

[12] 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).

[13] 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 his new home for a period of 12 months after the granting of the final occupancy permit.

[14] 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.

[15] 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]”.

[16] As set out above, the standard for review of this appeal is reasonableness, which means that I 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.

[17] 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.

[18] 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.

[19] Considering consumer protection and the quality of residential construction, a number of facts become relevant to this appeal. In particular I note that the Appellant knew or ought to have known about the one-year occupancy requirement when she 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 the HPO. I also note that the Appellant's notice of appeal states that if the house sells that she will be departing from Canada with her husband and family.

[20] In addition to the facts set out above, I am not entirely convinced that the financial and personal difficulties facing the Appellant 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 given the amount of equity in the home. In any event, the HPO granted the Appellant permission to sell her home before the expiry of the prohibited 12 month period, provided that she obtain a policy of home warranty protection. While I question whether there was in fact undue hardship, I give deference to the decision of the HPO in this regard.

[21] 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 of consumer protection and improving the quality of residential

construction.

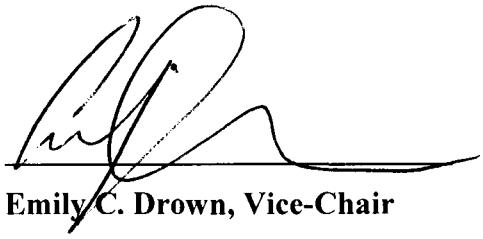
In this regard, I note that the decision in question does not prohibit the Appellant from selling or offering her new home for sale. In fact, the decision gives her permission to do so on the condition that she registers the new home with a policy of home warranty insurance prior to doing so and suggests that this could be done by using the Appellant's equity in the property.

[22] Accordingly, the Appellant's appeal is dismissed.

Conclusion

[23] Issue One: The HPO was reasonable in it's decision to deny the Appellant owner builder permission to sell her new home within the prescribed 12 month period in which the sale of new homes built by owner builders are prohibited without a policy of home warranty insurance.

Signed:



Emily C. Drown, Vice-Chair