Date: September 4, 2015
File No. SSAB 11-2014

Indexed as: BCSSAB 11 (1) 2014

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:	**THE DEVELOPERS**	APPELLANTS
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 of two decisions of the Registrar of the Homeowner Protection Office (the "HPO") dated July 17, 2014 (collectively the "Review Decisions"). The Review Decisions are substantively the same and varied the original decisions that denied the Appellant's request to sell the properties located in Sechelt, British Columbia (the "New Homes").

[2] The Review Decisions waived the requirement that the Developers be licensed as a developer and permitted the Appellants to sell the New Homes provided the following conditions were met with respect to sale and marketing of the New Homes:

a) the Developers may only market the New Homes to persons licensed as residential builders under the Act;
b) the Developers can list the New Homes for sale with a realtor and on the multiple listing service (provided the conditions are met);
c) the Developers can only entertain offers from licensed residential builders;
d) Any contract for the purchase and sale of a New Home must provide that the New Home will be enrolled with home warranty insurance prior to completion of the sale;

e) the HPO must be given notice of an intended completion of a sale of a New Home, together with evidence showing that the New Home is enrolled with a home warranty insurance provider;

f) the Developers will not transfer the New Home to any person without first receiving confirmation from the HPO that it is satisfied that the New Home is properly enrolled and registered with home warranty insurance; and

g) No further construction work will be performed on a New Home unless the New Home is first enrolled with home warranty insurance. This does not prohibit minor work necessary to facilitate inspections or that is reasonably required to protect or secure the New Home from theft or damage.

[3] In filing their Appeal the Appellants seek an order that they are permitted to sell the New Homes without a policy of new home warranty pursuant to section 22(1.2) of the Act, which permits the Registrar to allow new homes to be sold without home warranty insurance in place if the Registrar is satisfied that a person will suffer undue hardship. The Respondent opposes the Appellants request and states that the Review Decisions should be upheld.

ISSUES

[4] The sole issue to be determined in this Appeal is whether the Review Decisions should be upheld, set aside or varied. In order to answer this question the Board must determine whether the Registrar reasonably exercised her discretion in the Review Decisions and particularly whether the Registrar reasonably determined that the Appellants should not be permitted to sell the New Home without a policy of home warranty insurance in place.

HISTORY OF THE APPEAL

[5] Several Appeal Management Conferences were held in this Appeal. Eventually, it was determined that the Appeal would proceed via written submissions before a panel of the Board. The Board ordered the following schedule for the filing of evidence and submissions:

a) April 13, 2015 – the Appellants' written submissions and evidence to be served on opposing party and filed with the Board;

b) April 24, 2015 – the Respondent's written submissions and evidence to be served on opposing parties and filed with the Board; and

c) April 29, 2015 – the Appellants' reply submissions to be served on opposing party and filed with the Board.

FACTS

[6] Through the parties' submissions, it is clear that they agree on most of the facts in this appeal.

[7] The Appellant, ("the Developers") is the registered owner of both New Homes. Previously, both New Homes were enrolled with home warranty insurance coverage. However, the warranty provider withdrew its warranty on both residences leaving neither property insured.

[8] The Appellant, ("the Developers") was a licensed residential builder and was responsible for constructing the New Homes. However, when the Developers license expired it was not renewed by the HPO as the HPO had not received proof of acceptance by a warranty provider as required by the Act.

[9] The Appellant, is the sole officer and director of both of the Developers and owns 100% of the shares of both companies.

[10] On October 29, 2013, a Mortgage Corporation and an Investments Ltd. commenced foreclosure proceedings with respect to the New Homes.

[11] On February 21, 2014, the Appellants sought the permission of the Registrar to sell the New Homes without home warranty insurance pursuant to s. 22(1.2) of the Act. On February 28, 2014 the Appellants advised the HPO that they could not meet the deposit and fee requirements for other home warranty insurance providers and that they wished to sell to qualified buyers without home warranty insurance and that the buyers would be responsible for completing construction.

[12] On March 17, 2014, the Appellants wrote once again to the HPO and advised that their financial status and stability had been impacted by actions taken against them by the Canada Revenue Agency (the "CRA"). There is some dispute between the parties regarding the impact of the CRA on the financial status of the Appellant and their ability to obtain home warranty insurance on the New Homes. In its submissions, the Respondent states that it is unclear whether the Appellants have recovered some of the monies claimed by the CRA and that if they have recovered monies that their financial circumstances have improved and if not, presumably the monies were due and owing to the CRA. The Appellants on the other hand state that their dispute with the CRA remains ongoing with no end in sight and that significant monetary funds remain tied up in the audit/reassessment processes initiated by the CRA.

[13] On April 9, 2014 the HPO issued initial decisions that denied permission to sell the New Homes without home warranty insurance. On April 15, 2014 the Appellants sought a Registrar's review of the initial decisions. When seeking this review, the Appellants provided the Registrar with the Petition initiating foreclosure proceedings with respect to the New Homes. The Registrar of the HPO then issued the Decisions, which, as set out above, outline the conditions that must be fulfilled for the New Homes to be sold. The Appellants' appeal of the Review Decisions leads to this Appeal and reasons for decision.

[14] The Appellants submitted new evidence in this Appeal, which included details regarding the foreclosure proceedings, a letter from counsel for an individual named in the foreclosure proceedings (the "Guarantor") and a summary of medical issues faced by the Appellant. There is no dispute that the Appellants are facing foreclosure on the New Homes and depending on the outcome of those foreclosure proceedings, possibly a significant financial personal judgment against them. In fact, conduct of sale of the New Homes was granted to a mortgage corporation in the foreclosure proceeding on April 24, 2014. It is also clear that the Guarantor stands to be subject to a personal judgment in the approximate amount of $600,000.00 as he personally guaranteed the Appellants' mortgage. There is also no dispute that the Appellant was diagnosed with cancer in 2009 and received treatment between 2009 and 2012.

POSTION OF THE PARTIES

The Appellants

[15] The Appellants request to be granted an exemption pursuant to section 22 (1.2) of the Act, which would permit them to sell the New Homes without any policies of home warranty insurance in place. They say that the Review Decisions failed to recognize the hardship that the Appellants and the Guarantor are under. They state that the Review Decisions should be varied to permit the Appellants to offer the New Home for sale without policies of home warranty insurance in place.

[16] In support of this position, the Appellants state that the Developers have met all of its warranty insurer's terms and conditions since it received its licenced residential builder designation in 2009. As proof of this assertion the Appellants submitted copies of renewal certificates issued by National Home Warranty that state that from March 31, 2010 to March 31, 2014 that all of the insurer's terms and conditions have been met by the Developers. The Appellants state that they have always been appropriately licensed and insured as required by the applicable provincial legislation, but ran into issues in 2014 as National Home Warranty ceased to provide insurance coverage to them and without an insurer they were unable to obtain the requisite license from the HPO.

[17] The Appellants state that since 2009 they have constructed 10 residential units comprising approximately 19,000 square feet of residential living space. During this time, the Appellants note that their work was regularly inspected by architects, engineers, municipal building inspectors, warranty insurance inspectors and WorkSafe BC inspectors and that they never received any notice of defective work or non-compliance with the Building Code. Further, the Appellants note that they have no record of any warranty claims ever having been forwarded with respect to any construction involving the Developers.

[18] The Appellants submit that when the Registrar of the HPO grants an exemption pursuant to section 22(2) of the Act that the Registrar effectively grants the property owner status as an owner builder, with the restriction that the property must remain owner-occupied with no

marketing or sale eligibly for a ten year period. The Appellants submit further that this restriction can be overcome by a new owner arranging a policy of home warranty insurance at any point.

[19] With this backdrop setting the stage, the Appellants submit that more qualified owner-builders could not be found as the Appellants have history, experience and construction competence. Accordingly, the Appellants state that they ought to be granted the exemption they seek as it helps them out of an impossible situation and presents little risk to future consumers. In further support of this position the Appellants state that all of the construction of the New Homes to date has been done while the Developer was a licensed residential builder and while home warranty insurance was in place on the New Homes and further that only finishing work remains to be done on the New Homes. The Appellants submit that the Registrar's discretion ought to be flexible enough to overcome strict interpretation of "legislative nomenclature" so that solutions that resolve the Appellants' situation can be found despite not accurately fitting into the legislated requirements for obtaining an owner builder authorization.

[20] With respect to the requirement to demonstrate undue hardship in order to potentially qualify for the exemption sought under the Act, the Appellants state that if they are not granted the exemption as requested that they and the Guarantor are almost certain to face financial collapse and bankruptcy. In support of this the Appellants note that the Developer was unable to attend to his business as needed between 2009 and 2012 due to a cancer diagnosis that required significant treatment. The Appellants also note that between November 2012 and March 2015 that the Appellants have been dealing with the CRA and have had significant cash flow issues as a result. Further the Appellants state that the Act does not define the term "undue hardship" and that in their submission the test for interpreting whether undue hardship is present should be to ask whether a reasonable bystander with knowledge of all the facts would see and accept that suffering is occurring. In support of this the Appellants quote a definition from Black's Law Dictionary, which reads as follows:

> a zoning ordinance as applied to a particular property is unduly oppressive, arbitrary, or confiscatory if granting a variance as required resulting in an impossibility or prohibitive expense is attempting to conform the property as its use to the existing zoning regulations – in such a case an exemption would be in order.

[21] Finally, the Appellants note that collateral matters to this Appeal are referenced in the Review Decisions, namely matters concerning the construction of another new home. The Appellants state that the construction of this home did not proceed and that they are not aware of any investigations into the construction. Accordingly, they state that any reference to such construction or investigation should not properly be included in the Review Decisions and should not be taken into account in this Appeal.

The Respondent

[22] The Respondent states that the Review Decisions were reasonable and should not be varied. In support of this position the Respondent submits that that none of the arguments put forward by the Appellants are sufficient to set aside or vary the Review Decisions.

[23] The Respondent points out that the Registrar did not refuse permission to offer the New Homes for sale without home warranty insurance. Rather, they state that the Registrar granted permission to offer the New Homes for sale on certain conditions. The Respondent states that the conditions help to ensure that the remaining construction of the New Homes will be completed by licensed residential builders and future consumers will still receive and be protected by home warranty insurance as contemplated under the Act.

[24] Further, the Respondent states that given that the Appellants' mortgage lender has applied for conduct of sale of the New Homes and has received the same via court order dated April 25, 2015, that it is inappropriate to vary the Review Decisions as the Appellants no longer have the ability to sell the New Homes.

[25] The Respondent submits that the fact that the New Homes have been inspected as constructed to date does not render the Registrar's conditions on the sale of the home unreasonable. In support of this the Respondent states that the legislative requirement is the presence of undue hardship not whether a home is constructed to a set level of quality. The Respondent submits that the Act does not achieve consumer protection through a system of quality inspections, but rather through mandatory home warranty insurance under section 22 of the Act and notes that the HPO is not an inspection agency and is not organized to assess and

take responsibility for the quality of construction. Further, the Respondent submits that the ten year length for policies of home warranty insurance ensures that it is not just the initial purchaser of the New Homes that benefits from home warranty insurance, but subsequent purchasers.

[26] With respect to the Appellants' submission that the granting of an exemption to them would be akin to treating them as owner builders under the legislation, the Respondent states that the Appellants do not qualify for owner builder authorizations for the New Homes for a number of reasons and that accordingly, owner builder authorizations have no relevance to this Appeal. First, the Respondent states that the wording of section 20 of the Act, which states that to be eligible for such an authorization that the applicant "intends to build, for personal use" means that such application is to be made prior to construction and cannot be made after construction is nearly complete. Second, the Respondent states that subsection 4.1(2)(a) of the *Homeowner Protection Regulation* (the "Regulation") requires an owner builder to be an "individual" and that this precludes both the Developers from obtaining an owner builder authorization. Third, the Respondent states subsection 4.1(2)(e) of the Regulation requires an individual to have a "registered interest in land" on which the new home is built and that this precludes the Developers from obtaining an owner builder authorization as the Developer is the registered owner of the land on which the New Homes are built. Fourth, the Respondent states that subsection 4.1(2)(b) of the Regulation requires that an individual intend to use the new home for personal use for at least one year. The Respondent states that this was never the Appellants' intention and further that it would be impossible for the Developer to treat both New Homes as his residence for one year. Further, the Respondent submits that the Appellants, via their submissions in this appeal, still seek to sell the New Homes as part of their proposed solution to their commercial financial problems. Fifth, the Respondent states that section 4.1(2)(c) of the Regulation precludes an individual from receiving owner builder authorizations for two new homes at the same time.

[27] With respect to the Appellants' assertion that the new owner of the New Homes can purchase home warranty insurance, the Respondent states that this is nonsensical as the Act is in place to protect consumers, not to require consumers to obtain their own home warranty insurance. Further, the Respondent states that the Review Decisions do not ban all sales without policies of warranty insurance being in place as the Registrar permits the New Homes to

be sold to licensed residential builders without home warranty insurance in place as they will be able to arrange for warranty coverage prior to any sale to a third party consumer.

[28] The Respondent also submits that the Appellants do not claim that they cannot obtain home warranty coverage. Rather, they state that the Respondents have not obtained it due to deposit and fee requirements.

[29] With respect to the requirement of "undue hardship" in section 22(1.2) of the Act, the Respondent states that due to the discretionary language contained in this section of the Act that it is the Registrar's view of "undue hardship" that is determinative, provided that it is reasonable. The Respondent agrees with the Appellants that there is no definition of "undue hardship" in the Act. However, the Respondent disagrees with the use of the definition found in *Black's Law Dictionary* submitted by the Appellants and states that this is the definition for "hardship" rather than "undue hardship." The Respondent instead refers to BCSSAB 5(1) 2014, a previous decision of the Board, where the Board held that "undue financial hardship must have been intended to deal with hardship arising from unforeseen circumstances, beyond the Appellant's control, that have conspired to create the financial hardship" and *Warren v. Warren,* 2010 BCC 372, a decision in the family law context that states that "undue hardship" has been defined as hardship that is "excessive, improper, unreasonable, unjustified – not economic hardship that inevitably comes after divorce." Citing these two decisions the Respondent submits that undue hardship must constitute something more than hardship and cannot simply be the financial hardship that arises from time to time in unsuccessful commercial enterprises.

[30] The Respondent submits that the financial difficulties relied upon by the Appellants as causing them undue hardship are primarily from tax audits and assessments and states that taxes are inevitable and must be considered to be a normal part of any commercial enterprise. Further, the Respondent submits that other financial risks related to the construction of the New Homes are inherent to the construction industry and are not a proper basis upon which undue hardship should be found. In support of this submission the Respondent states that otherwise the least successful residential builders will be the ones most likely to avoid the statutory requirement to provide home warranty insurance, causing significant harm to consumers, who would lose home warranty coverage in circumstances when they are most likely to need it.

[31] With respect to the evidence submitted on behalf of the Guarantor, the Respondent states that he chose to guarantee a mortgage loan and must be taken to have understood the risk of underwriting the Appellants' commercial enterprise. Further, the Respondent submits that the Guarantor's financial hardship should be construed as separate from any hardship of the Appellants.

ANALYSIS

[32] The law governing the requirement for new home warranty insurance and particularly the Appellants' application for an exemption from the requirement to obtain new home warranty insurance is set out in section 22 of the Act:

> 22 (1) A person must not build a new home unless the new home is registered for coverage by home warranty insurance provided by a warranty provider.
>
> (1.1) Subject to subsection (1.2), a person must not sell or offer to sell a new home
>
> (a) while the new home is being constructed, or
>
> (b) within 10 years from
>
> (i) the date an occupancy permit was first issued with respect to the new home, or
>
> (ii) if no occupancy permit has been issued with respect to the new home, the date on which the registrar is satisfied the new home was first ready for occupancy,
>
> unless
>
> (c) the new home is covered by home warranty insurance provided by a warranty provider, or
>
> (d) the new home or the person is exempt by regulation from the requirement of this subsection.
>
> (1.2) On application to the registrar, a person may be permitted to sell or offer for sale a new home despite the requirements of subsection (1.1) if the registrar is satisfied that the person would suffer undue hardship if the permission is not granted.

(1.3) The registrar may impose conditions on a permission granted under subsection (1.2).

(2) Home warranty insurance for a new home must provide coverage for
(a) defects in materials and labour for a period of at least 2 years after the date on which the warranty begins,
(b) defects in the building envelope, including defects resulting in water penetration, for a period of at least 5 years after the date on which the warranty begins, and
(c) structural defects for a period of at least 10 years after the date on which the warranty begins.

(3) If required by the regulations, a person must not undertake a renovation or offer for sale or sell a renovated home unless the renovation is covered by home warranty insurance provided by a warranty provider.

(4) Subsections (1), (1.1), (1.2) and (3) do not apply to an owner builder [emphasis added].

[33] As can be seen by the wording of section 22(1.2), the legislature has given the Registrar discretion to grant an exemption from the requirements of the Act in cases where undue hardship can be shown. The fact that the Registrar has discretion with respect to such applications is apparent from the use of the word “may” rather than “must”. The Respondent correctly submitted that the Board must give deference to the discretion of the Registrar. However, each hearing before the Board is a new hearing. Accordingly, while the Board must grant deference to the discretion of the Registrar, such deference must be given in light of all of the evidence filed with the Board, not just that which the Registrar had before her when she exercised her discretion. The Board must therefore ask whether, in light of all of the evidence submitted to the Board, the decision of the Registrar was reasonable.

[34] Further, section 29.4(1) of the Act mandates that the Board must consider the purposes of the Act when making decisions. The relevant purposes of the Act for the purpose of this appeal are as follows:

1) to strengthen consumer protection for buyers of new homes

2) to improve the quality of residential construction, and
3) to support research and education respecting residential construction in British Columbia.

[35] As submitted by the Respondent, the Act contains the words “undue hardship” not just “hardship.” Accordingly, in order to qualify for an exemption the Registrar must be satisfied that the applicant is facing something more than hardship. Within a consumer protection mandate, it cannot be said that it is undue hardship when a builder finds him or herself in financial difficulty because of circumstances encountered during the construction process. There must be something more than just financial hardship encountered in the ordinary course of development. Otherwise, any licensed residential builder unable to complete a project with its lender closing in with foreclosure proceedings could qualify for an exemption from the legislated requirements of the Act. In many cases, these are precisely some of the construction projects where home warranty insurance is most needed. Further, it cannot be said that the requirement to pay taxes or to undergo an audit by the CRA is undue hardship. Taxes are a normal requirement of business and individuals involved in commercial enterprise. In addition to the Appellant’s own financial difficulties with the construction of the New Homes and cash flow issues from CRA matters, the Appellants also rely on those faced by the Guarantor. However, the Guarantor is not an owner qualified to receive an exemption for undue hardship under the Act. In any event, he knowingly provided a personal guarantee on a construction development and the possible loss of his funds could not have been completely unforeseen. The Appellants also rely on the Developer’s medical issues. Unfortunately, the evidence before the Board in this regard is scant. There is nothing to show to what extent the Appellants’ business ventures were impacted by his cancer diagnosis. Further, the evidence indicates that this matter was resolved by 2012, well before the issue under appeal came to light.

[36] The Appellants submit that the quality of the New Homes should be considered by the Registrar in the Review Decisions. It may well be that the New Homes are quality construction projects as submitted by the Appellants. In fact, there is no evidence to the contrary. However, the Respondents are correct in their submission that the HPO is not in the business of inspecting construction to ensure that minimum construction standards are met – that is the job of provincial and municipal building inspectors. It is important to note that the legislation gives “undue hardship” as the grounds for a possible exemption. The Act does not state that such

exemptions are to be given in situations where the Registrar is satisfied that quality construction exists.

[37] The Appellants also submit that granting the exemption sought would be akin to granting the Appellants or the Developer an owner builder authorization for the New Homes. However, as set out in the Respondent's submissions, the legislation expressly prohibits the granting of an owner builder authorization to the Appellants for a number of reasons and the Board finds this argument irrelevant to the Appeal.

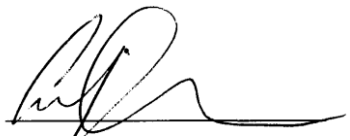
[38] It must also be remembered that the Registrar did not deny the Appellants' application for permission to sell the home without a policy of new home warranty insurance in place. As can be seen from the Review Decisions the Registrar permitted the Appellants to sell and market the home provided certain conditions were met. A review of the various conditions shows that the need to strengthen consumer protection and improve the quality of residential construction was balanced against the Appellants' need to sell the New Homes. The Registrar in fact provided the Appellants with an exemption from the legislation; the Appellants happen not to like the conditions of that exemption.

[39] Upon reviewing all of the evidence filed with the Board, the Board finds that the Registrar balanced the purposes of the Act with the Appellants' needs and struck a reasonable outcome in the Review Decisions. The Review Decisions are upheld as written.

CONCLUSION

[40] The Registrar reasonably exercised her discretion in the Review Decisions. As a result, this Appeal is dismissed.

Signed:



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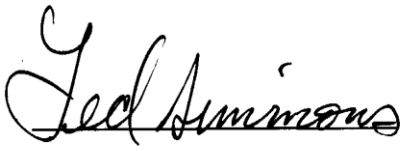
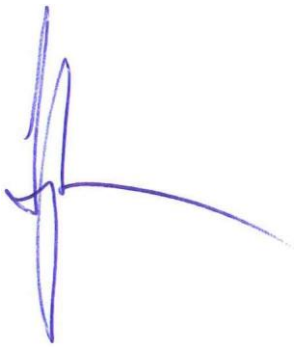


Ted Simmons, Panel Member



Terry Bergen, Panel Member