

Indexed as: BCSSAB 9 (1) 2016

IN THE MATTER OF THE SAFETY STANDARDS ACT, SBC 2003, Chapter 39
AND IN THE MATTER OF
an Appeal to the British Columbia Safety Standard Appeal Board

BETWEEN: **Homeowner/Builder** **Appellant**

AND: **Homeowner Protection Office** **Respondent**

REASONS FOR DECISION

Chair: **Emily Drown**

On Behalf of the Appellant: **The Appellant**

Counsel for Homeowner Protection Office: **Kevin Boonstra**

Introduction

[1] This is an appeal of a decision of the Registrar of the Homeowner Protection Office dated March 7, 2016 that upheld the decision to cancel the Owner Builder Authorization (“OBA”) issued to the Appellant for the home located at 67 Avenue, Surrey, British Columbia (the “Decision”).

Issue

[2] I must determine whether the Decision should be upheld, varied or set aside. To do this, I must decide whether the Registrar was correct in her finding that the OBA should remain cancelled due to the Appellant’s failure to comply with the terms of the *Homeowner Protection Act*, S.B.C. 1998, c. 31 (the “Act”).

Facts

[3] It is uncontested evidence that the Appellant applied for an OBA for the home located at 67 Avenue, Surrey, British Columbia (the “New Home”) on February 19, 2014 and that at the time of such application he acknowledged, as required by the Act, that he intended to use the proposed new home as his primary residence and would reside in the home for at least one year. The Appellant further agreed to not sell the New Home for at least one year after the New Home was built, unless exempted in writing by the Registrar, and that if he did sell the New Home within 10 years that he would provide to any prospective purchaser a copy of an Owner Builder Disclosure Notice obtained from the Homeowner Protection Office. An OBA was issued to the Appellant on March 13, 2014. The City of Surrey granted an occupancy permit for the New Home on June 29, 2015.

[4] The Appellant also constructed two other new homes on the lots adjoining that of the New Home. These homes were constructed by the Appellant as a licensed residential builder. Initially, they were enrolled with policies of new home warranty. They were then de-enrolled by the insurer. The Appellant applied to the Respondent to have permission to sell the homes without new home warranty policies in place, but that application was denied. Upon denial of that application, the homes were re-enrolled with home warranty insurance and were sold by the Appellant as a licensed residential builder with policies of new home warranty insurance in place.

[5] The Appellant entered into a contract of purchase and sale agreement to sell the New Home to (the “Purchaser”) on September 12, 2015 (the “Contract”). It was a term of the Contract that the Purchaser would receive in writing all terms of the home warranty insurance coverage to be provided and that the Appellant would complete additional construction in the New Home for the Purchaser. The Appellant transferred title in the New Home to the purchaser on October 30, 2015. The Appellant did not provide the Purchaser with a property condition disclosure statement or an Owner Builder Disclosure Notice. There was no policy of home warranty insurance in place with respect to the New Home.

[6] At some point, the Purchaser advised the Respondent that the New Home was sold to them as a “brand new home.”

[7] Upon learning of the sale of the New Home, the Respondent cancelled the OBA on November 27, 2015, stating that the Appellant transferred the New Home in contravention of s.20(1)(1) of the Act and was not qualified for the OBA under section 20 of the Act. The Respondent advised the Appellant that the Appellant could remedy the noncompliance by becoming licensed and arranging for home warranty insurance for the New Home. The Appellant sought the Registrar's review of this decision on December 15, 2015. As set out above, the Registrar upheld this decision and the Appellant brought this appeal to the Board.

Position of the Parties

Appellant

[8] The Appellant relies upon his letter dated April 3, 2016 and numerous emails to the Board outlining his position in this appeal. In them the Appellant states that the New Home was built with the intention of being a home for his whole family. He states that he wanted his children and family to reside in a good safe environment and that his previous neighbourhood in West Newton Surrey was violent with shootings occurring regularly.

[9] The Appellant submits that the Purchaser and the Appellant's realtor forged his signature on the contract of purchase and sale for the New Home and that there was collusion between the Purchaser and the Realtor.

[10] The Appellant submits that he had to sell the New Home because of financial trouble. The Appellant states that the two adjacent homes he built were well built and passed inspection with the City of Surrey on the first attempt and that the New Home was also well constructed and easily passed municipal building inspections. The Appellant submits that there were issues with the inspector for WBI Home Warranty pertaining to the two adjacent new homes and that due to such issues he fell behind his construction schedule and WBI Home Warranty became difficult to work with, ultimately de-enrolling the two adjacent new homes from home warranty coverage. The Appellant states that due to the de-enrollment of the adjacent new homes that he was unable to sell them. The Appellant states that he applied to the Respondent to be able to sell the adjacent new homes without warranty insurance in place, but was told that he was prohibited from doing so. The Appellant states that the delay in getting the two adjacent new homes re-enrolled in policies of home warranty coverage led to significant financial hardship with many bills overdue and that he was forced to sell the New Home.

[11] The Appellant states that he did not know that he needed to get permission from the Respondent in order to sell the home. He states that it was his understanding that he couldn't buy another house for twelve months, but that he was free to sell the home.

[12] The Appellant states that his realtor and the Purchaser knew the house had been lived in and was not new residential construction. Further, the Appellant states that the buyer knew that the New Home was not covered by a policy of new home warranty insurance. However, emails from the Purchaser to the Respondent included in the appeal record indicate otherwise. In support of the above, the Appellant submitted numerous photographs to the Board showing alternations done to the New Home by the Purchaser and advises that since the New Home was sold that it has undergone renovations with over 800 square feet of additional living space added. The Appellant states that these additions have made obtaining home warranty insurance impossible. In this regard, the Appellant submitted proof that Travelers, Aviva, WBI Home Warranty and Pacific Warranty have denied new home warranty coverage for the New Home.

[13] Unable to obtain a policy of new home warranty insurance for the New Home, the Appellant states that he has arranged financing to re-purchase the New Home from the Purchaser. However, there is no evidence before the Board that the Purchaser wishes to give-up the New Home.

Respondent

[14] Counsel for the Respondent provided written submissions outlining its position in this appeal along with the Affidavit of the Registrar sworn February 20, 2017 (the "Affidavit"). In the Affidavit, the Registrar deposes that she reviewed all of the information available to her from the Respondent's files and records and has confirmed that:

- a) at no point did the Appellant seek or receive permission to sell the New Home prior to the end of the 12 month period legislated by s.20.1(2) of the Act;
- b) the Appellant was a licensed residential builder under the Act; and
- c) the New Home was not covered by a policy of home warranty insurance.

[15] Counsel for the Respondent notes that the Appellant does not dispute that he did not seek or receive permission to sell the New Home, was a licensed residential builder, nor that he

did not enroll the New home in a policy of home warranty insurance. Further, counsel for the Respondent submits that the only evidence of financial hardship that the Appellant has provided to the Board in support of the Appeal indicates clearly that any such hardship resulted from his own failure to provide quality work on the three adjacent homes under construction (the New Home and the two adjacent homes) and the financial ramifications of that. In support of this submission, counsel for the Respondent points to the email the Appellant provided from the WBI Home Warranty to the Appellant dated July 30, 2015:

Needless to say, I am extremely disappointed based on what I read in the report and saw in the pictures; I have included the pictures as well.

...Given the work you demonstrated, after I specifically advised you to ensure that all required work be done in a proper fashion prior to calling for an inspection, the terms have changed – I had warned you of this in point 3 in my email below on June 12, 2015. As much as we would not like to –re-enroll these homes based on their poor quality, given the parties involved we based on certain, **non-negotiable conditions** as we are essentially buying ourselves a guaranteed claim...[emphasis in original]

[16] Counsel for the Respondent also refers to the referenced June 12, 2015 email, which states:

The more times we visit and continue to question your ability to perform and demonstrate quality work, we will either no longer be interest at all OR our requirements for fees and security will become EVEN HIGHER. So know, you dictate this ... The situation you are in now is created by you. [Emphasis in original]

[17] In this regard, counsel for the Respondent relies on the Board’s decisions in *A Homeowner v. Homeowner Protection Office*, BCSSAB 5(1)2014 and *The Developers v. Homeowner Protection Office*, BCSSAB 11(1)2014 and submits that where financial distress has not been clearly shown to arise “suddenly or unexpectedly” and is related to improper financial planning, a refusal to allow an owner builder to sell prematurely has been upheld, even when a warranty insurance provider has refused to provide home warranty insurance due to “poor construction practices”.

[18] Counsel for the Respondent states that section 20.2(a) of the Act allows the Registrar to cancel an OBA “for any reason that would disqualify the owner builder for an authorization under section 20” and that the Registrar cancelled the Appellant’s OBA as the Appellant was no

longer qualified to have an OBA given that did not intend to maintain an interest in the New Home for one year from the date of occupancy. Counsel for the Respondent relies on evidence from the Purchaser contained in the appeal record that the New Home was brand new when it was purchased.

[19] Further, counsel for the Respondent states that the Appellant also failed to comply with his obligation under section 21(1) of the Act to provide the Purchaser with an approved form of owner builder disclosure notice. The Respondent states that had the Appellant sought such disclosure notice from the Respondent that the Appellant would have discovered that he was legally unable to offer the New Home for sale or sell it when he did.

[20] With respect to the Appellant's assertion that he has been unable to obtain home warranty insurance for the New Home, counsel for the Appellant submits that the issue on Appeal is whether the OBA was properly cancelled, not whether the Appellant is now able to obtain home warranty insurance and states that at no time has the Appellant challenged that the OBA was properly cancelled. Counsel for the Appellant states that based on the fact that the Appellant was able to arrange for home warranty insurance on the two adjacent homes that the Appellant would have been able to have obtained home warranty insurance on the New Home when it was constructed, but instead attempted to avoid his legal obligations.

[21] Counsel for the Respondent submits that the Appellant wrongfully sold the New Home in contravention of the Act and failed to provide the Purchaser of the New Home with a disclosure notice stating that the New Home was not covered by home warranty insurance. The Respondent submits that the Purchaser has complained of defects in the home and states that the Appellant's own evidence indicates that the construction is poor. Counsel for the Respondent notes that section 29.4(1) of the Act requires the Board to consider the purposes of the Act when hearing an appeal, which purposes include strengthening consumer protection.

Analysis

[22] Subsection 20(1) of the Act permits that a person may be issued an OBA if he or she meets the prescribed criteria. The prescribed criteria are set out in section 4.1 of the Regulation. The criteria applicable to the Appellant in this Appeal is set out in subsection 4.1(2)(b), which states:

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;

[23] “First occupancy” is defined in section 4.1(1) of the Regulation as “(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.” It is uncontested that an occupancy permit for the New Home was issued by the City of Surrey on June 29, 2015.

[24] Accordingly, the Appellant, having been issued an OBA, was unable to sell the New Home until June 29, 2016. The Appellant breached the Act when he sold the New home on September 12, 2015. The Appellant did not seek permission to sell the New Home on the grounds of hardship as permitted under section 20.1(2) of the Act, although as the Respondent states in its submissions such permission would likely have been denied given the facts at hand. Section 20.2 of the Act permits the Registrar to cancel an OBA:

The registrar may suspend or cancel an authorization

- (a) for any reason that would disqualify the owner builder for an authorization under section 20 if the owner builder were an applicant under that section,
- (b) if the owner builder has made a false statement on a material matter in the application or refuses to provide information on a material matter when requested to do so by the registrar, or
- (c) if the owner builder fails to comply with a compliance order or to pay a monetary penalty as required under section 28.3 (10).

[25] Without determining whether the Appellant made a false statement about whether he intended to reside in the New Home for the period of one year when he applied for the OBA, it is clear that upon selling the New Home within three months of occupancy that the Appellant no longer qualified for the OBA. Accordingly, pursuant to section 20.2(a) of the Act the Registrar had the discretion to cancel the OBA as she did.

[26] The Appellant’s submissions refer to financial hardship. Had the Appellant applied for permission to the sell the New Home on such grounds pursuant to section 20.1(2) of the Act, I would have to determine whether the Appellant had proven sufficient grounds for financial hardship. However, the Appellant did not make such an application and chose to simply sell the

New Home in contravention of the Act. Accordingly, whether or not he faced financial hardship is immaterial to the outcome of this Appeal.

[27] As set out in the Appellant's submissions, the Appellant seeks to re-purchase the new Home from the Purchaser. There is no evidence before the Board that the Purchaser wishes to give-up the New Home. Further, such an order is well outside the jurisdiction of the Board to make. Accordingly, there will be no order in this regard.

Conclusion

[28] For the reasons set out above, this appeal is dismissed.

Signed By:

A handwritten signature in black ink, appearing to read 'Emily C. Drown', with a long, sweeping horizontal line extending to the right.

Emily C. Drown

Chair, Safety Standards Appeal Board