

IN THE MATTER OF THE REAL ESTATE DEVELOPMENT MARKETING ACT

-AND-

BRIAN LYONS HAUFF

-and-

DEVAN EDWARD WILLIAM COOK

-and-

TUAN DEVELOPMENT INC.

-and-

SALTSPRING ISLAND INVESTMENTS LTD.

**ORDER UNDER SECTIONS 30(1)(a), 30(1)(b) and 32(1)
REAL ESTATE DEVELOPMENT MARKETING ACT**

Upon reviewing the results of Corporate Registry company searches for Tuan Development Inc. ("Tuan") and Saltspring Island Investments Ltd. ("Saltspring"); the results of Land Title Office searches of the registered titles of the properties being developed by Tuan; excerpts of the disclosure statement and amendments filed by or on behalf of Tuan; the Petition filed in the Supreme Court of British Columbia by Tuan and the resulting Orders; and the supporting documents submitted by staff, I am of the opinion that:

1. Tuan was registered as a company in the Province of British Columbia on May 30, 2000. Its previous company name was 607984 B.C. Ltd., and that name was changed on September 8, 2005. The registered and records office is 8560 Bowcock Road, Richmond, British Columbia. The sole director is Brian Lyons Hauff ("Hauff") of 1666 West 75th Avenue, 2nd Floor, Vancouver, British Columbia. Hauff is a discharged bankrupt.
2. Saltspring was registered as a company in the Province of British Columbia on October 12, 1988. The registered and records office is 1500 Royal Centre, 1055 West Georgia Street, Vancouver, British Columbia. The sole officer and director is Devan Edward William Cook ("Devan Cook").
3. Hauff owns 75% of the shares in Tuan and Saltspring owns the remaining 25%.
4. The *Real Estate Development Marketing Act* ("the Act") requires a developer who markets or intends to market a development to file with the Superintendent of

Real Estate ("the Superintendent") a disclosure statement in the required form and with the required contents before the developer commences marketing the development. The disclosure statement must, without misrepresentation, plainly disclose all material facts. The developer must not enter into a purchase agreement with a purchaser unless a copy of the disclosure statement has been provided to the purchaser. If a developer becomes aware that a disclosure statement contains a misrepresentation, the developer must immediately file with the Superintendent a new disclosure statement or an amendment that clearly identifies and corrects the misrepresentation.

5. The applicable sections of the *Act* are reproduced below:

Definitions

1 In this Act:

"developer" means a person who, directly or indirectly, owns, leases or has a right to acquire or dispose of development property;

"development property" means any of the following:

...

(c) 5 or more strata lots in a stratified building;

...

"development unit" means any of the following in a development property:

...

(c) a strata lot;

...

"market" means

(a) to sell or lease,

(b) to offer to sell or lease, and

(c) to engage in any transaction or other activity that will or is likely to lead to a sale or lease;

"material fact" means, in relation to a development unit or development property, any of the following:

(a) a fact, or a proposal to do something, that affects, or could reasonably be expected to affect, the value, price, or use of the development unit or development property;

(b) the identity of the developer;

(c) the appointment, in respect of the developer, of a receiver, liquidator or trustee in bankruptcy, or other similar person acting under the authority of a court;

(d) any other prescribed matter;

"misrepresentation" means

(a) a false or misleading statement of a material fact, or

(b) an omission to state a material fact;

"purchase agreement" means a contract of purchase and sale or a contract to lease;

"purchaser" means

(a) a purchaser, from a developer, of a development unit,

(b) a lessee, from a developer, of a development unit, and

(c) a prospective purchaser or lessee, from a developer, of a development unit;

Marketing of development property

3 (1) A developer who markets or intends to market a development unit must

...

(c) file and provide a disclosure statement in accordance with Division 4 *[Disclosure Statements]*.

Assurance of title

11 (1) A developer must not market a development unit unless the developer has made adequate arrangements to ensure that a purchaser of the development unit will have assurance of title or of the other interest for which the purchaser has contracted.

(2) For the purpose of subsection (1), a developer has made adequate arrangements to ensure that a purchaser of a development unit will have assurance of title or of the other interest for which the purchaser has contracted if

(a) arrangements have been made for title to the development unit to be held in trust by a lawyer, notary public or another person, or class of persons, specified

by the superintendent until title or the other interest for which the purchaser has contracted is assured,

(b) the developer provides a bond to the superintendent or other person specified by the superintendent for the benefit and protection of purchasers, with surety in the amount and subject to the terms required by the superintendent, or

(c) the developer has made other arrangements that are satisfactory to the superintendent.

(3) Without limiting subsection (1) or (2), if a development unit may be affected by a mortgage, lien or other encumbrance that secures or evidences the payment of money,

(a) the mortgage, lien or other encumbrance must provide, without condition, that a purchaser who complies with the terms and conditions of the purchaser's purchase agreement obtains title, or the other interest for which the purchaser has contracted, free and clear of the mortgage, lien or other encumbrance, or

(b) the developer must make other arrangements, satisfactory to the superintendent, to assure title or the other interest for which the purchaser has contracted.

Utilities and services

12 (1) A developer must not market a development unit unless the developer has made adequate arrangements to ensure payment of the cost of utilities and other services associated with the development unit.

(2) For the purpose of subsection (1), a developer has made adequate arrangements to ensure payment of the cost of utilities and other services associated with the development unit if

(a) arrangements have been made for title to the development unit to be held in trust by a lawyer, notary public or another person, or class of persons, specified by the superintendent until the cost of utilities and other services associated with the development unit has been paid,

(b) the developer provides a bond to the superintendent or other person specified by the superintendent for the benefit and protection of purchasers, with surety in the amount and subject to the terms required by the superintendent, or

(c) the developer has made other arrangements that are satisfactory to the superintendent.

Deemed adequate arrangements

13 (1) The superintendent may publish, in accordance with the regulations, a policy statement setting out circumstances in which arrangements made under section 11(2)(c) and (3)(b) [*assurance of title*] or 12(2)(c) [*utilities and services*] are deemed adequate for the purpose of those sections.

(2) If the superintendent publishes a policy statement under subsection (1), a developer who has made the arrangements set out in the policy statement

(a) is deemed to have made adequate arrangements to ensure

(i) that a purchaser of a development unit will have assurance of title or the other interest for which the purchaser has contracted, or

(ii) payment of the cost of utilities and other services associated with a development unit,

as applicable, and

(b) must comply with the terms and conditions, if any, that are stated in the policy statement.

Filing disclosure statements

14 (1) A developer must not market a development unit unless the developer has

(a) prepared a disclosure statement respecting the development property in which the development unit is located, and

(b) filed with the superintendent

(i) the disclosure statement described under paragraph (a), and

(ii) any records required by the superintendent under subsection (3).

(2) A disclosure statement must

(a) be in the form and include the content required by the superintendent,

(b) without misrepresentation, plainly disclose all material facts,

(c) set out the substance of a purchaser's rights to rescission as provided under section 21 [*rights of rescission*], and

(d) be signed as required by the regulations.

(3) A developer must provide to the superintendent any records the superintendent requires to support any statement contained in the disclosure statement filed under subsection (1).

(4) Without limiting section 16 [*non-compliant disclosure statements*], if a developer markets development units in phases, the developer, before marketing each successive phase, must file with the superintendent an amendment to a disclosure statement submitted in respect of the previous phase.

(5) On a person's payment of the prescribed fee, the superintendent must

(a) permit the person to inspect, at the superintendent's office and during regular business hours, a disclosure statement filed under this section, and

(b) provide a copy of a disclosure statement filed under this section, or a copy of part of it, to a person who requests it.

Providing disclosure statements to purchasers

15 (1) A developer must not enter into a purchase agreement with a purchaser for the sale or lease of a development unit unless

(a) a copy of the disclosure statement prepared in respect of the development property in which the development unit is located has been provided to the purchaser,

(b) the purchaser has been afforded reasonable opportunity to read the disclosure statement, and

(c) the developer has obtained a written statement from the purchaser acknowledging that the purchaser had an opportunity to read the disclosure statement.

(2) A developer must

(a) retain a written statement obtained under subsection (1)(c) for a period of 3 years or a longer period prescribed by regulation, and

(b) produce the written statement for inspection by the superintendent on the superintendent's request.

Non-compliant disclosure statements

16 (1) If a developer becomes aware that a disclosure statement does not comply with the Act or regulations, or contains a misrepresentation, the developer must immediately

- (a) file with the superintendent, as applicable under subsection (2) or (3),
 - (i) a new disclosure statement, or
 - (ii) an amendment to the disclosure statement that clearly identifies and corrects the failure to comply or the misrepresentation, and
- (b) within a reasonable time after filing a new disclosure statement or an amendment under paragraph (a), provide a copy of the disclosure statement or amendment to each purchaser
 - (i) who is entitled, at any time, under section 15 [*providing disclosure statements to purchasers*] to receive the disclosure statement, and
 - (ii) who has not yet received title, or the other interest for which the purchaser has contracted, to the development unit in the development property that is the subject of the disclosure statement.
- (2) A developer must file a new disclosure statement under subsection (1)(a)(i) if the failure to comply or misrepresentation referred to in that subsection
 - (a) is respecting a matter set out in paragraph (b) or (c) of the definition of "material fact" in section 1 [*definitions*],
 - (b) is respecting a matter set out in paragraph (d) of the definition of "material fact" in section 1, and the regulation prescribing the matter specifies that a new disclosure statement must be filed if subsection (1) of this section applies, or
 - (c) is of such a substantial nature that the superintendent gives notice to the developer that a new disclosure statement must be filed.
- (3) A developer must file an amendment to the disclosure statement under subsection (1)(a)(ii) in any case to which subsection (2) does not apply.
- (4) A developer who is required to file a new disclosure statement or an amendment under subsection (1) must not market a development unit in the development property that is the subject of the new disclosure statement or amendment
 - (a) until the developer has complied with subsection (1)(a), or
 - (b) unless permitted by the superintendent.

6. Tuan is the named developer of a development property marketed under the name Saltspring Island Village Resort located at 315 Robinson Road, Saltspring Island, British Columbia ("the Saltspring Resort"). A disclosure statement was

filed with the Superintendent by Tuan on June 2, 2006 ("the Disclosure Statement"). An amendment to the Disclosure Statement was filed with the Superintendent on August 22, 2006. A further amendment to the Disclosure Statement was filed with the Superintendent on September 13, 2006. No new disclosure statements or amendments to the Disclosure Statement have been filed with the Superintendent subsequent to that date.

7. The Disclosure Statement indicates that Tuan's business address and address for service is 1008-510 West Hastings Street, Vancouver, British Columbia. A search of the Corporate Registry reveals that the mailing and delivery address for Tuan is actually 8560 Bowcock Road, Richmond, British Columbia. Tuan is required to file an amendment to the Disclosure Statement to disclose the change in the address of the developer pursuant to section 16 of the *Act* and the Superintendent's Policy Statement 1. No such amendment has been filed.
8. The real estate brokerage for Tuan is listed in the Disclosure Statement as Roger McKinnon & Associates Ltd. ("McKinnon & Associates"), Suite 1 – 1351 Estevan Road, Nanaimo, British Columbia. In a letter dated April 26, 2007 to Gibraltar Mortgage Ltd. ("Gibraltar"), a Calgary based mortgage brokerage company, Hauff states that Tuan's real estate brokerage is now Sutton Centre Realty.
9. Pursuant to section 16 of the *Act* and the Superintendent's Policy Statement 1, Tuan is required to file an amendment to the Disclosure Statement to disclose the new real estate brokerage. No such amendment has been filed.
10. The Saltspring Resort was initially developed by Saltspring Island Village Resort Inc. ("Island Village") in 1997. Hauff was the director, president and secretary of Island Village. The initial development was financed by Multimetro Mortgage Corp. ("Multimetro"). Multimetro financed the development by raising funds from numerous small investors via a syndicated mortgage. During the initial development, Hauff, Island Village and the realtor involved in the project were subject to a cease marketing order issued by the Superintendent on December 3, 1997. The order was issued because the financing for the initial development was conditional and the disclosure statement filed with the Superintendent at the time did not conform to Policy Statement 6, which sets out restrictions for marketing with conditional financing.
11. The initial development ultimately went into foreclosure. Hauff, through Tuan, purchased the development property back from the receiver for \$8,500,000. Tuan financed the purchase with mortgage funds raised by Gibraltar. Tuan is now continuing the development initially started by Island Village in 1997.
12. Darrell Wayne Cook ("Darrell Cook") is the president, director and principal of Gibraltar. He is also the father of Devan Cook. Gibraltar is a registered mortgage broker in British Columbia. Darrell Cook is a registered submortgage

broker in British Columbia. Gibraltar owns or controls Saltspring, which owns 25% of the shares in Tuan. Darrell Cook and Devon Cook were both directors and officers of Tuan from May 24, 2005 until September 20, 2005.

13. Hauff sent two letters to Gibraltar, dated April 26 and May 15, 2007, regarding the status of development activity, and seeking a new \$10,000,000 first mortgage. The letters indicate the difficulties the project will face if the funds are not advanced, and the work not completed. The Disclosure Statement as amended does not disclose the requirement for further financing in the amount of \$10,000,000.
14. The April 26, 2007 letter states that Tuan will close on sales of development units when the water permit certificate is obtained, which Tuan expected to occur within one week.
15. Tuan was served with two demand letters from Gibraltar dated May 9, 2007 demanding repayment of the mortgage funds advanced. It is alleged in the letters that Tuan has defaulted on its loan obligations to Gibraltar. At the time, the two mortgages in favour of Gibraltar amounted to approximately \$30,000,000.
16. As a result of the demand letters, Tuan petitioned the British Columbia Supreme Court ("the Court") for protection pursuant to the *Companies' Creditors Arrangement Act* on May 18, 2007. In its petition ("the Petition"), Tuan stated that the Saltspring Resort was delayed by as much as 11 months because Gibraltar had difficulty in raising funds on a timely basis. Tuan also stated that in the summer of 2006, sales were lost as it could not deliver title to purchasers because sewer, water and furnishings were not then finished or delivered.
17. On June 8, 2007, the Court ultimately granted Tuan a stay under which no action could be taken against Tuan until October 15, 2007 to allow Tuan an opportunity to restructure its business. The Court ordered that Tuan was authorized to borrow a further \$13,500,000 from Gibraltar to complete the development.
18. The Disclosure Statement states that "the Developer is unaware of any outstanding or anticipated litigation or liabilities affecting the strata plan." Pursuant to section 16 of the *Act* and the Superintendent's Policy Statement 1, Tuan is required to file an amendment to the Disclosure Statement to disclose the outstanding or contingent litigation and liabilities in respect of its Petition for creditor protection and loans from Gibraltar. No such amendment has been filed.
19. On June 8, 2007, the Court ordered that Gibraltar was granted a lender's charge ("the Lender's Charge") on Tuan's property. The Court also ordered that Gibraltar may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect its Lender's Charge.

20. The Disclosure Statement states that "No further encumbrances are proposed or anticipated to be registered or filed in respect of the Development other than rights-of-way in favour of utilities as aforesaid.". Pursuant to section 16 of the *Act* and the Superintendent's Policy Statement 1, Tuan is required to file an amendment to the Disclosure Statement to disclose proposed encumbrances. No such amendment has been filed to disclose Gibraltar's Lender's Charge.
21. Pursuant to section 16 of the *Act* and the Superintendent's Policy Statement 1, Tuan is required to disclose particulars of the water and sewerage services, including the required permits, who is responsible for obtaining the permits and installing the services, whether those permits have been obtained, and the expected date of completion for the servicing. The Disclosure Statement has not been amended to disclose whether a water licence and sewage discharge permit are required or have been obtained, and the expected date of completion for the water and sewerage services.
22. On June 14, 2007 Hauff advised one of the Superintendent's investigators that Tuan was not marketing at this time but was expected to resume marketing soon. Hauff further advised that he would file a new disclosure plan when he was ready to sell.
23. I agree with staff that a hearing of this matter would require at least 4 days of time and that scheduling of the parties and the hearing officer would mean that the hearing would not take place until at least two or three months from now. I find that such a delay would be detrimental to the public interest since the property may be marketed before such a time without an order in place.

AND WHEREAS I am satisfied that:

1. Tuan failed to file an amendment to the Disclosure Statement to disclose a change of address.
2. Tuan failed to file an amendment to the Disclosure Statement to disclose that its real estate brokerage had changed from Roger McKinnon and Associates to Sutton Centre Realty.
3. Tuan failed to file an amendment to the Disclosure Statement to disclose the fact that Gibraltar has alleged that Tuan is in default under the terms of the loan agreements and has demanded repayment of approximately \$30,000,000, which is a material fact.
4. Tuan failed to file an amendment to the Disclosure Statement to disclose Tuan's Petition seeking the Court's protection from its creditors, and the Court ordered protection that was granted, which are material facts.

5. Tuan failed to file an amendment to the Disclosure Statement to disclose Gibraltar's proposed Lender's Charge encumbrance which may mean that Tuan will not be able to assure title to purchasers and which is a material fact.
6. Tuan failed to file an amendment to the Disclosure Statement to disclose whether a water licence and sewage discharge permit are required or have been obtained, and the expected date of completion for the water and sewerage services.

I AM THEREFORE OF THE OPINION that Hauff, Devan Cook, Tuan and Saltspring are, or have been, non-compliant with the *Act*.

I AM FURTHER OF THE OPINION that the length of time that would be required to complete an investigation or hold a hearing, or both, would be detrimental to the public interest. Tuan is preparing to market development units in the Saltspring Resort to potential purchasers soon and has not amended its Disclosure Statement to provide accurate disclosure which the purchasers are entitled to receive and which Tuan is required to provide. Tuan is not restricted under the *Companies' Creditors Arrangement Act* proceedings from selling or marketing the units. The fact that Tuan is under court ordered protection to allow it an opportunity to restructure could very well have an impact on the value or price of the development units and on the decision by the potential purchaser on whether to purchase the unit. Hauff has a history of non-compliance with the regulation of marketing developments in 1997. Additionally, on April 26, 2007, Hauff told Gibraltar that Tuan will close on sales of development units when the water permit certificate is obtained, which Tuan expected to occur within one week.

IN ADDITION, I am of the opinion that the Disclosure Statement's failure to comply with the *Act* and its omissions and misrepresentations with respect to the disclosure matters described above, are of such a substantial nature that I should give notice to Tuan that a new disclosure statement must be filed, rather than an amendment to the existing Disclosure Statement.

I CONSIDER IT in the public interest to make the following Orders pursuant to sections 30(1)(a), 30(1)(b) and 32(1) of the *Act*.

I THEREFORE MAKE the following Orders:

1. That Brian Lyons Hauff, Devan Edward William Cook, Tuan Development Inc. and Saltspring Island Investments Ltd. shall refrain from marketing any and all development units in the development property named Saltspring Island Village Resort located at 315 Robinson Road, Saltspring Island, British Columbia prior to the filing of a new disclosure statement as set out below.

2. That Tuan Development Inc. shall file a new disclosure statement, rather than an amendment to its existing Disclosure Statement, to plainly disclose all material facts as required under section 14 of the *Act* before resuming the marketing of any and all development units in the development property named Saltspring Island Village Resort located at 315 Robinson Road, Saltspring Island, British Columbia.

TAKE NOTICE that Brian Lyons Hauff, Devan Edward William Cook, Tuan Development Inc., and/or Saltspring Island Investments Ltd. may, pursuant to section 37(1)(f) of the *Act*, appeal the Orders pertaining to each to the Financial Services Tribunal, or require a hearing before the Superintendent pursuant to section 32(4) of the *Act*.

Dated at the City of Surrey,
Province of British Columbia
this 25th day of June, 2007.



W. Alan Clark
Superintendent of Real Estate
Province of British Columbia

TO: Brian Lyons Hauff

[REDACTED]
[REDACTED]

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