

## law of the land... and lay of the land™ bulletin

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### courts continue to broaden developers obligations under REDMA

A decision of the Supreme Court of British Columbia, released on January 26, 2011, has further expanded the obligations of developers who wish to market and sell development properties in British Columbia and the ability of individual purchasers who wish to terminate their pre-sale contracts.

In *Ulansky v Waterscape Homes Limited Partnership*, the court heard 3 separate actions involving 12 plaintiffs who were seeking to have their pre-sale contracts terminated and deposits returned. The project, known as the "Skye Project" (the "Development") was a 188 strata unit high-rise tower that was phase 3 of a 9-phase strata development.

At issue was whether the developer failed to comply with the requirements under the *Real Estate Development Marketing Act* ("REDMA") by failing to disclose all potential secondary uses of the units in the development to each purchaser, specifically that the units could be used as short-term rental units. The disclosure statement and amendments filed by the developer (the "Disclosure Statement") provided that the units in the Development were "intended for residential purposes only."

The position of the plaintiffs were that short-term rentals were being permitted in the Development which were not disclosed as a potential use by the developer. Facts were lead by the plaintiffs demonstrating that not only were there advertisements for short-term rentals within the Development occurring, but that the City of Kelowna was also issuing business licenses to allow short-term rentals in the Development and that the strata council was adopting criteria for owners to engage in such rentals.

The plaintiffs refused to complete the purchases of their units and argued that the developer failed to disclose all "material facts" relating to the Development as such term is defined in REDMA. Their position was that the developer misrepresented a material fact by omitting from the Disclosure Statement that the zoning of the Development allowed for short-term rentals. The plaintiffs further argued that the failure to disclose a material fact constituted a breach of section 14(2)(b) of REDMA and that as a result the pre-sale contracts are unenforceable by the developer pursuant to section 23.

The position of the developer was that it was not in breach of its disclosure obligations. The developer stated that short-term rentals of units was not intended by the developer and is not permitted under the applicable zoning. Further the developer argued that since the building was not designed, approved or built to meet the requirements for a hotel/motel or short-term rental the disclosure of such potential was neither relevant nor required. The position of the developer was that it was not required to list all of the potential possible uses but rather only the principle usage intended for the project.

The court, after first concluding from a review of all applicable zoning that it was open for owners to rent their units for short periods of time, turned to whether this possible use should have been disclosed in the Disclosure Statement.

Following recent REDMA decisions that held that a material fact would be something that “affects or could reasonably be expected to affect the price, value, or use of a unit” the court held that a reasonable person would consider the fact that some units can be used as short-term rentals a material fact, since it affects the “use” of a development unit.

Further, the court held that the “use” of a development should be broadly interpreted given the purpose of disclosure duties under REDMA, which includes consumer protection, and that all potential uses must be disclosed, not just those that are intended or primary. Rejecting the developers argument that listing all possible uses would mislead and confuse, the court held that it would instead assist a potential purchaser in making a purchasing decision and that “a potential purchaser should know of all uses for that particular development which are permitted.”

Since the developer failed to disclose the potential short-term rental use, the court held that the developer breached its obligations under REDMA, thereby rendering the contracts unenforceable with the plaintiffs being entitled to the return of their deposits.

This decision confirms the trend of the courts in interpreting the obligations of developers under REDMA broadly on the basis that it is consumer protection legislation. Developers will now need to address all potential uses in their disclosure statements but also must revisit all other areas of their disclosure statements to ensure that they strictly adhere to the requirements of REDMA and all applicable policy statements issued thereunder.

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#### **a cautionary note**

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