

For most of us involved in the real estate industry the prospect of working on a new home construction file is not something we look forward to with any degree of enthusiasm. New home construction can be a very frustrating experience for all those involved and most particularly for a client, be the client the purchaser or the builder.

It has been my experience over the years that the entire process can be made much simpler and far less frustrating if we educate our clients at the beginning of the transaction as to the value of open and continuous communication among all the parties. The majority of difficulties appear to arise because of a breakdown of communication between the lawyers, the paralegals and/or the clients or a mixture of both. It is important that each of us set up our practice in our office in such a way to facilitate an open communication system which allows the client, the lawyer, and/or the staff member to direct any questions during the on-going nature of the file to get a quick and concise response.

It is the suggestion of the writer that when a purchaser is being represented on the purchase of new home construction that the purchaser be brought in for initial interview with the lawyer to set up the system and explain the system to the client. It is a further suggestion that the lawyer's legal secretary and/or paralegal be present during the meeting. It is important, in my view, that the client meets all those involved in the file so he or she feels comfortable with calling each or any of those persons at the meeting. It is at that initial meeting that the client should be advised as to the delights and pitfalls of buying a newly constructed home. Time should be taken to explain that the client is expected to participate in the procedure of inspections of the home on a regular basis and the lawyer or paralegal should facilitate this with a discussion with the builder's solicitor so that the builder is amenable to such an inspection process. I find that most builders are quite agreeable as it is better for all concerned if problems are discovered early in the construction stage as opposed to when complete and rectification would be terribly expensive. The client should also be advised that new construction can be frustrating because of the reliance of the builder on some trades to be prompt and attentive to the work which may not be the case on occasion during construction of this particular client's home. The client should be advised to contact your office if it appears the Project is not proceeding on a timely basis. The client should be further advised that any complaints as to the construction and/or the timeliness of same should be directly through your office and not directly to the trades people and/or the builder involved.

The client should also be advised that they will be expected to comply with the items in the Agreement that are required to be completed by themselves such as the choosing of fixtures and/or flooring, etc.,

and it is advisable not to wait until the builder contacts you to choose out the colors, etc., but to proceed prior the deadlines approaching so that they are not the cause of the delay thus giving the builder any reason to postpone the closing. When acting for the builder it is important to have the same discussions with the builder so they have an open and friendly communication directly with the purchaser on all aspects of construction and that it is imperative they keep the purchaser advised throughout the entire procedure. It has been the writer's experience when acting on behalf of Contractors that, in the majority of cases, if the Contractor is honest and open about delays and/or problems that may have arisen during construction, the purchaser is usually most understanding and the transaction proceeds somewhat smoothly. It is when the purchaser feels the builder is being untruthful and/or ignoring their property in order to get others finished that the arguments begin and the transaction becomes difficult to handle.

It is, therefore, very important that all those involved for either the purchaser or the builder meet with our clients initially as soon as possible on the file being opened to set the parameters and guidelines as to who will be handling what aspect of the file and what is expected of each and every person involved.

OCCUPANCY PERMITS

I note that the outline of this session addresses three specific items, the first of which being Occupancy Permits. I am going to look at the practicalities of obtaining same on new construction and ignore the question as to the requirement or lack thereof for Occupancy Permits on existing housing.

In reference to new construction our office contacted a number of building inspectors to get some ideas as to the practicalities of the situations they face on a day to day basis. The following information was gleaned from discussions with them and trust it is of some use to all of you.

Sources:

BEDFORD:	Glen Lelacheur, Building Inspector
COUNTY OF HALIFAX:	Mansel Eisan, Building Inspector
HALIFAX	Gerard Donahoe, Building Inspector
DARTMOUTH:	Ed Thornhill, Building Inspector

Notice:

Every inspector indicated they are normally able to do an inspection within one to two days of being contacted. The best bet is to call between 8:30 and 9:30 a.m. (when the inspectors are in the office) and arrange an inspection for that day.

Inspections:

PROVINCIAL MINIMUM - The Provincial Building Code Regulations, N.S. Reg 45/87, provide as follows:

PART 5: NOTIFICATION AND INSPECTIONS

5.1 Unless a council has provided for additional notification and inspections by by-laws under Section 7 of the Act, the authority having jurisdiction shall be notified and given an opportunity to inspect for compliance with the Building Code;

- (a) the site before commencing backfilling a foundation, and before a superstructure is placed on a foundation;
- (b) the framing, roof, plumbing and insulation before wall framing is covered;
- (c) before occupancy.

These regulations set out the minimum number of inspections required before occupancy. They are normally referred to as (1) prior to backfill; (2) prior to drywall; and (3) final. Still, municipalities are free to impose stricter requirements.

MUNICIPALITY

The Municipality of Halifax County requires only the basic three. They will do extra inspections if they are notified about a particular problem.

BEDFORD

The Town of Bedford also normally requires only the three basic inspections.

DARTMOUTH

The Dartmouth City Charter requires six inspections to be done before issuing an occupancy permit.

These are as follows (additional requirements = *):

- (1) Site before excavation *;
- (2) Site after excavation *;
- (3) Prior to backfill;
- (4) Prior to framing *;
- (5) Prior to drywall;
- (6) Final

HALIFAX

Halifax inspectors will sometimes do more than the basic three inspections if they anticipate problems. They will arrange for their computer to bring a particular project forward periodically depending on what is being built and who is involved in the building. In some cases, if it is a contractor they have had trouble with, they will inspect on a daily basis. Normally, they will inspect every one to three weeks.

FLEXIBILITY

MUNICIPALITY - The municipality of Halifax County inspectors are given the discretion to make a notation on an occupancy permit saying that is issued "subject to...." the satisfaction of some work to be done in the future. Usually, this will be done only when there is a technical breach of the Code that does not represent a serious safety risk.

Also, the Municipality of Halifax County will issue permits that indicate the inspector was unable to perform a specific element of an inspection. For example, if the duct work was covered with insulation, an inspection could say on the permit "...unable to inspect duct work..." rather than tear apart the insulation.

BEDFORD

Town of Bedford inspectors are also able to include a "subject to" clause for minor problems that do not present a safety hazard.

DARTMOUTH

Dartmouth inspectors are not allowed to include any conditions on the occupancy permit. They are restricted to two options: (1) issue and (2) don't. One inspector indicated that the situation in Dartmouth is that many inspectors let a lot of things go but can only say "I'm issuing the permit...but you should do this..." He didn't think that this was necessarily a good thing because with a "...subject to..." clause an inspector can do a more official follow-up to make sure the work is done. Also, the occupier might feel more obligated to remedy the deficiency when it is on the permit.

HALIFAX

Halifax inspectors are able to issue permits with a "subject to" clause.

GENERALLY

The inspectors rely on the standards set out in the National Building Code 1985. The Provincial Act and Regulations interact with the City Charters and Town by-Laws.

Generally it would appear that much depends on the individual inspector and the specific problem surrounding the home they are inspecting.

MECHANICS LIEN HOLDBACK

Unless there is very strong evidence to the contrary for the necessity of a mechanics lien holdback it would appear to be the practice among real estate conveyancers at the present time to provide for and insist upon a mechanics lien holdback pursuant to the Mechanics Lien Act at time of closing. On occasion, the builder will be able to prove that the home had been substantially complete some three to six months prior to the purchaser submitting an Offer and that the only items to be completed were the items as particularly specified in the Agreement of Purchase and Sale which can be covered by a deficiency holdback and/or a lien holdback depending upon the value of the work done.

It was popular a number of year ago to see clauses in the Agreement of Purchase and Sale whereby the Purchaser waived the necessity for a mechanics lien holdback provided the builder provided a Statutory Declaration that all tradesmen and suppliers had been paid in full and this was sometimes accompanied with an indemnification by the corporate builder and occasionally a personal indemnification by the individual builder should a valid lien claim be filed. This is still seen occasionally and purchasers will still call asking whether or not this type of arrangement is sufficient to protect them in the event of problems. The short answer to this is obviously no. The indemnification and declaration are only as good as the corporate builder or individual who is signing the documentation and in most situations if the builder is in serious financial difficulties the Bank will have enough security in reference to the corporate client and the individual members of that corporate client to effectively negate any benefits and indemnifications that your purchaser may have secured prior to closing. Some builders will attach waiver of lien forms signed by subtrades and there is doubt among the practising Bar as to whether or not these waivers are effective under all circumstances. It is also difficult for a Purchaser to determine whether or not the waivers have been signed by the appropriate people who have worked on his or her particular unit.

As previously stated it is apparent in current practices that most of the present day builders have resigned themselves to the fact of a mechanics lien holdback and leave it to their solicitor to advise them as to the phraseology of the appropriate holdback clause in the Agreement of Purchase and Sale. It is the writer's opinion that the builder's solicitor should hold the lien holdback and that the date be determined on the closing date as to the date of release and the procedure for the release. I would recommend that the Agreement be clear, that the funds are to be held by the Contractor's solicitor for a specified period of time and that at the expiration of that period time the vendor's solicitor will contact the purchaser's solicitor and the purchaser's solicitor will then have a specific period of time to respond as to a subsearch for possible liens. No response within that time period by the purchaser's solicitor will automatically result in the release of funds to the contractor. I have found that if the purchaser's lawyer holds the funds this simply delays the process of fund transfer at the expiration of the lien period. Both parties are well protected by virtue of the Agreement at closing as to the holdback and the mechanics of who holds the money is of no consequence other than to facilitate its release. The amount to be held back is 10% of the actual work completed and materials supplied. It would appear to be the practice that the lot value is deducted from the total contract price prior to determination of the 10% holdback and this appears to be acceptable to all parties involved.

On occasion when an Occupancy Permit is not available on new construction for closing it is the writer's practice to (1) ask for a report from the building inspector as to what is required to be completed prior to the issuance of the occupancy permit; (2) insure that the items that are not done are the responsibility of the builder to complete and the builder has acknowledged this fact; (3) insure that sufficient funds are held back at closing so that the purchaser is protected on non-completion by the builder (4) and as an additional incentive I have asked that the contractor's solicitor, on the expiration of the mechanics lien period, if the occupancy permit has still not been issued on the unit, that they will continue to hold the mechanics lien holdback until such time as the permit has been issued.

I appreciate that that procedure of the continuance of the holdback does not give immediate protection to the purchaser on closing because any liens filed, of course, could quickly eat up the holdback leaving nothing to protect for the un-issued occupancy permit. It does, however, give the builder an incentive in the long term once the lien period has expired and no liens have been filed to complicate the issue.

DEFICIENCY HOLDBACK

Deficiency holdbacks have become much more the responsibility of the purchaser's solicitor than in the past since CMHC has waived the requirement for their inspectors to view the property prior to closing. As we all know, it was the practice of CMHC to inspect the property prior to release of any funds on a CMHC insured loan and they would then determine the amount of the holdback which in most cases was unreasonably high for the work that remained to be completed. This upset builders which in turn complicated the closing as the amount of deficiency holdback is always a matter of argument between the builder and the purchaser.

CMHC now simply requires the Certificate of Possession to be completed by the builder and purchaser and to be faxed to them prior to the advance of funds and at that point they authorize the release of monies. It would seem from the writer's experience that because CMHC has taken a much more relaxed attitude to these things that the Banks are not as concerned with sticking their nose into the amount of deficiency holdback unless there are some serious deficiencies on closing date. The Banks appear to leave the job of determining the amount of adequate protective holdback to the lawyer that is looking after the purchaser and, of course, the lender.

It is important to educate your purchaser as to the purpose of a deficiency holdback. On most occasions I find the purchaser feels that the holdback should be two to ten times the amount of the actual value of the work to give the builder a "incentive" to complete the work as soon as possible. This is a wonderful idea in an ideal world but at law the purchaser is only entitled to holdback sufficient funds to complete the work should the builder not attend to the deficiencies within a reasonable period of time. It is important at the outset of the determination of deficiencies to explain this carefully to your purchaser so that realistic values can be put on the deficiency items.

It is the writer's suggestion that the purchaser and the builder meet at least three or four days prior to closing to go through the home to agree on the initial list of deficiencies. This gives the builder an opportunity to complete the majority of these items prior to the actual closing date. I think we would all agree that the smaller the list and the smaller the holdback the happier both parties are come closing day. The purchaser can then make arrangements to go through the home with the builder on a final occasion just prior to closing to finalize the deficiency list. I would also suggest that the builder and purchaser agree, if at all possible, at that time as to the value of the deficiencies and each deficiency should be listed separately with a separate value as to that deficiency, calculated at that time. The lawyer for the builder and purchaser should then agree as to the way in which the deficiency is to be held and the way in which the deficiency holdback is to be disbursed. It is the writer's opinion that the contractor's solicitor should hold the deficiency holdback and that the funds would then be released on the consent of the purchaser's client and solicitor as the work is done. I would also suggest that the parties agree as to a deadline when the work is to be completed and if not completed provide that the purchaser will then be a liberty to take the funds and complete the work themselves and/or make further arrangements directly with the builder to either extend the deadline or whatever other agreement can be mutually accepted between the parties.

When acting for the builder it is very very important to explain to that builder that the longer he or she waits to complete the unit the more difficult it is going to be to secure the deficiency holdback. It has been my experience over the years that a builder who makes every effort to complete that home as quickly as possible and within a few days or a week of the actual closing will normally secure 100% release of the deficiency holdback immediately. The builder who waits and procrastinates will get portions of the deficiency holdback released in due course and in some cases some of the deficiency holdback seems to be held up forever. The purchaser will start to confuse warranty items with deficiency items as time goes on and although the builder has completed all of the listed deficiencies items that were

agreed to on closing the purchaser and the purchaser's solicitor are refusing to authorize release of the deficiency holdback because of a number of other items which have arisen since closing date. These items would, of course, be warranty items and not deficiency items but the purchaser will be very reluctant to release the deficiency holdback until these items have been completed to their satisfaction.

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