

CLIENT ALERT!



Amendments to Disclosure Statement Rules – *Real Estate Development Marketing Act*

The failure or refusal of several property developers to complete sales of pre-sold condominium units, ostensibly caused by the unprecedented recent increases in construction costs, made front-page news in the summer of 2007. In response, the Financial Institutions Commission (“FICOM”) of British Columbia recently released Policy Statements 14 and 15 to strengthen the disclosure obligations of developers. These Policy Statements became effective on November 1, 2007, and will govern every disclosure statement or amendment filed after that date. They touch on two main areas.

1. PURCHASE AGREEMENT CONTENTS.

Policy Statement 14 requires that the form of purchase agreement intended to be used for any pre-sale unit (defined loosely as a pre-subdivision, incomplete, or unserviced real estate unit) must be attached to the disclosure statement. Additionally the disclosure statement must specify and describe any provisions allowing for termination of the purchase agreement or extension of time for closing, assignment provisions and provisions dealing with interest on deposit monies.

Policy Statement 14 further provides that any significant change in a developer’s form of purchase agreement would require the filing of a further amended disclosure statement. While it is not yet clear how significant those changes must be, developers would be well advised to ensure that disclosure statements are drafted to ensure the maximum possible flexibility regarding the terms of the developer’s form of purchase agreement.

2. PERSONAL/CORPORATE DISCLOSURE.

Policy Statement 15 requires that the developer, its directors and officers and “principal holders” provide detailed disclosure of previous development experience, any previous penalties or sanctions relating to real estate activities within the previous ten years, and any bankruptcy or receivership within the previous five years. The requirement to disclose penalties and insolvency issues also extends to any other entities with which a director, officer or principal holder of the developer was associated within the previous five years. Finally, the developer, directors, officers and principal holders are required to disclose any existing or potential conflicts of interest which could “reasonably be expected to affect the purchaser’s purchase decision”.

A “principal holder” is any person (which presumably includes a company) holding “directly or indirectly” more than 10% of any class of voting securities of the issuer. In other words, not only is this level of disclosure required from any holder of more than 10% of any voting shares of the developer, but it is also required from any director or officer of such principal holder. Even more startling is the possibility that the words “or indirectly” could be construed to include entities further up a corporate ownership chain. While unlikely to present problems to smaller developers, this has the potential to prove hugely onerous for more sophisticated business structures. Developers may wish to consider revising their corporate structure to attempt to minimize the impact of these policies.

It may be anticipated that over time the stringency of these requirements (particularly Policy Statement 15) will be tempered by some consideration of relevance within the context of the developer’s obligation of “full, true and plain disclosure.” However, the office of the Superintendent of Real Estate of FICOM currently indicates that they will be on the lookout for strict compliance at this time.

FOR MORE INFORMATION CONCERNING THIS MATTER, PLEASE CONTACT

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