FEDERATION OF ONTARIO LAW ASSOCIATIONS
FÉDÉRATION DES ASSOCIATIONS DU BARREAU DE L'ONTARIO

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FOLA Submissions

Federation of Ontario Law Associations Response to the Consultation on Regulation Proposals to Improve Information and Strengthen Protections for Ontarians Buying a Unit in a New/Pre-Construction Condominium Project.

Submitted to: NewHomes@Ontario.ca
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Introduction

The Ministry of Government and Consumer Services (the "Ministry") has sought comment on its proposed regulatory revisions to various provisions of the Condominium Act, 1998, New Home Construction Licensing Act, 2017 and Ontario New Home Warranties Plan Act and regulations thereunder to address interest on deposits and remedial actions or consequences if a builder/vendor cancels a condominium project. The Federation of Ontario Law Associations (FOLA) offers this response in connection with those proposals.

Together with our associate member, the Toronto Lawyers Association, we represent approximately 12,000 lawyers. Most of our members are in private practice across Ontario, largely in sole practice and small- to medium-sized firms. We have canvassed our membership in connection with this submission.

The Questions Asked

A. Proposed Changes to Interest Rate Calculation

Question 1: Do you think the proposed changes to the interest rate calculation under the Condo Act are appropriate? Why/why not?

FOLA Response: The proposed changes to the interest rate calculation is reasonable as it will result in interest being imposed on pre-construction sales, when interest has not been payable over the past several years due to the current calculation and definitions. This will enable homebuyers to realize some interest accumulation on agreements that are often several years between execution of agreement and completion of the transaction.

Question 2: Do you have any recommendations for how the draft regulation should be implemented? What are some of the key considerations for implementation (e.g., with respect to developer financing, ease of administration, perceptions of fairness)?

FOLA Response: The implementation of the new interest rate calculation should be grandfathered in some way. Although the new home construction industry has benefited from years of not having had to pay interest to homebuyers, a sudden requirement to pay interest could have an effect on many projects that are suffering from market increases in the cost of construction and labour. Payment of interest could be a cash-flow issue. The payment of interest should be recognized as effectively made as a closing adjustment on occupancy or completion of the transaction. Where interest is payable when a project is cancelled or terminated, payment will need to be made in cash. It would be reasonable to require interest to be incurred commencing on a fixed date, such as the date the new rate takes effect, but not retroactively.

Question 3: What amount of time do you think is sufficient to allow the sector to prepare for these potential changes?

FOLA Response: The sector should have some time to prepare for the new rate, particularly for those projects that are nearing completion and will need to address the administrative elements of calculating and implementing interest. Some deposits may not be held in interest-bearing accounts or vehicles and may need to be moved to suitable accounts. Closing adjustments will need to be revised to reflect interest earned to closing. T5 tax reporting will need to be prepared for buyers earning interest income. The industry should have at least 60 days to be educated and aware of the change and obligation and to implement it.

Question 4: Is there anything else you wish to note with respect to this proposal?

FOLA Response: Although not raised in the context of the consultation, there are two additional items the Ministry may wish to address. Firstly, regardless of the calculation and implementation date, no interest should be payable if interest accruing on a deposit is less than a certain amount, such as $15.00.

Secondly, there is a concern that builders are increasingly requiring home buyers to contribute deposits well in excess of the thresholds set by Tarion for deposit protection warranties on condominium unit purchases ($20,000). In some cases, buyers are paying over $80,000 on condo unit deposits, having to rely on insurance deposit protection obtained by the Builder. Builders should be constrained by having an upper limit on deposits (a specified threshold) unless the buyer voluntarily agrees to it by separate acknowledgement.

B. Proposed Regulations to Require Condominium Information Sheet

Question 1: Are there any concerns with making the Condominium Info Sheet a regulatory requirement under the Licensing Act?

FOLA Response: The provision of the Condominium Information Sheet should be a regulatory requirement under the Licensing Act, as should it be to attach a completed Addendum. Some smaller builders/vendors still do not have these important documents attached to their agreements for newly constructed homes. If these deliverables were connected to regulatory compliance or sanction, it may act as an incentive for builders or vendors of newly constructed units to ensure they are compliant with the terms of their licence. There are still many homebuyers that are not aware of how condominium lifestyle, obligations and rights work and most will not get legal advice until they have signed the agreement or are ready to take occupancy. At that point in time, it is too late.

The expectation, however, is that tying the Condominium Information Sheet into a regulatory requirement does not mean that a builder should lose its licence to build or sell new homes. The punishment must fit the crime and this should be a means by which the Regulatory Authority may sanction a builder, but it should be in proportion.

Question 2: Should the Condominium Info Sheet be a requirement for both pre-construction condo units as well as those new condo units where the description has been registered?

FOLA Response: It would be administratively easy to require production of the Condominium Information Sheet for all new condo purchases. The Information Sheet mostly has commentary and explanations for projects that may not get registered, so the true benefit of this Sheet is for projects that have not been registered. Much of the information is repeated in the Addendum, which is already a requirement for all purchases of new condo units. It is our submission that the production of the Condominium Information Sheet, if tied to licensing compliance, should therefore only be mandated to be delivered for pre-construction condominium projects whose description has not been registered.

Question 3: Do you agree with a potential future regulatory proposal that would with permit, or require, developers to disclose information to the regulator regarding increases to the purchase price of a new home?

FOLA Response: There should be a balance between reporting or disclosing price increases in the normal course and those that occur outside of regulated norm. Reporting every price increase is an unreasonable burden on both builders/vendors and the licensing authority. Price increases can occur at various times throughout the home building process: upgrades, rebates, credits, materials becoming unavailable; these are all reasons why

the price may be adjusted in the normal course and does not warrant having to report or disclose to the licensing authority.

The Addendum sets out Schedules that require itemization of actual and prospective adjustments to the costs of the unit. Where a cost is incurred by a buyer and is not contemplated by express mention in these schedules, the price increase should then be required to be reported to the licensing authority (by the builder and/or the buyer). It would then be up to the licensing authority to determine if the increase was the result of a unique event or a pattern of behavour that requires sanction against the builder/vendor.

Question 4: Do you agree with a potential future regulatory proposal to restrict vendors from selling or transferring, or offering to sell or transfer, a new home for a specified period after a purchase agreement has been terminated?

FOLA Response: The licensing authority should have the power to sanction builders/vendors in the way contemplated, such as providing restrictions on when certain units in certain projects may be resold following unauthorized practices by the builder/vendor. It is not reasonable to place a general restriction on resales of all terminated agreements. For instance, there should be no restriction if a purchaser terminates, rescinds or cancels an agreement of purchase and sale. There should be no restriction if a unit is resold by a lender, receiver or creditor in the course of realizing upon an asset or security interest. The sanction should fit the violation, so the timing of the prohibition on resales should be commensurate with addressing the harm to the public, market or homebuyers. Restrictions on resales could impact a builder/vendor's obligations to lenders, possibly compromising any number of projects if they could not be effectively put on the market. By contract, builders/vendors who are seeking to cancel entire projects en masse may be subject to administrative 'freezes' on reselling as part of a licensing review or investigation into the legally of the cancellation. It should be a power of the licensing authority to wield in the context of the violation.

C. Response regarding Clarifying and Improving Ontario Builder Directory about Condominium Cancellations

Questions 1-4: Do you think the proposed information about condo projects that would need to be published on the builder directory is appropriate? Why/why not?

Where a condo project has been entirely cancelled, and therefore no units were built, should the number of residential units in the project be listed on the directory as zero, not applicable, or something else?

Do you agree with the proposal to include the number of agreements that were terminated in a project even if the project is still in progress or completed (that is, where the project was continued despite the vendor having terminated some or all of the initial agreements)?

Is there any other information about a vendor's prior and current condo projects that should be published on the builder directory in order to better inform consumers who are considering the purchase of a new condo?

FOLA Response: The builder/vendor should be required to disclose much of each project to the HCRA. The HCRA should publish on the directory the status of the project; the maximum number of proposed residential units in the project, over each phase (regardless of the number actually sold or constructed); the number of residential purchase agreements terminated by the vendor for that project, expressed by category (1=permitted under agreement; 2=failed to get municipal approvals; 3=failed to get financing; 4=default of purchaser; 5=mutual agreement of parties).

Publication of cancellations is a helpful factor for the public to understand about a specific builder/vendor or project, particularly if there is a pattern of cancellations.

The proposed maximum number of residential units should be disclosed even if a project is cancelled before construction occurs. This would demonstrate the proposed density of a project and an indicator that it would not be proceeding, particularly if the reason for cancellation was lack of municipal approval.

The total number of cancelled contracts should be disclosed; however, the number of cancellations against the reason for the cancellation will enable builder/vendors to explain why those were cancelled. For instance, a project with 20 cancellations explained as 5 mutual terminations, 5 default by buyer and 10 permitted by agreement, may help identify cancellations arising from specific circumstances rather than bad faith.

Generally, the builder directory has sufficient public-facing information to enable buyers to understand a builder's history, experience and patterns of construction in Ontario.

We also want to mention that many projects have been sought to be cancelled outside of any Vendor Condition period or contractual timeframe under an agreement. It may be because of lack of financing or municipal approvals, rather than market changes; however, it does not appear that there is sufficient transparency by the licensing authority or the current legislation to govern or sanction where a builder seeks to cancel a project without contractual justification. The Addendum suggests that the buyer has a right to terminate after the outside closing date, but the Vendor does not have a right to cancel if the buyer does not elect to terminate within 30 days of the outside closing date. This uncertainty will lead to frustration and costly litigation for homebuyers in trying to reconcile their rights without any meaningful accountability. We encourage the Ministry to consult on this scenario and work with the licensing authorities to outline a mandated process in those circumstances where builder/vendors seek to cancel projects outside of the critical dates set out in the Addendum and/or beyond any identified Vendor Conditions.

We thank the Ministry for allowing us the opportunity to comment on these important proposals.

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