



Blaneys on Building



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CONSTRUCTION LIEN ACT AMENDMENT IMPACTS CONDOMINIUM DEVELOPMENTS

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On July 1, 2011 an amendment to the *Construction Lien Act* (CLA) will come into force which will have an impact on condominium developers. The amendment creates a new notice system for the benefit of contractors who may want to register a lien claim against a developer's condominium property before the condominium units are conveyed to the end user or "home buyer". The operative provision of the amendment is subsection 33.1(2) of the CLA which requires owners of land intended to be registered as a condominium to publish a notice of impending registration in a construction trade newspaper at least five days and no more than fifteen days, excluding weekends and holidays, before the description is submitted for approval to the municipal authority.

Once a condominium is registered and the individual condominium units have been created as separate parcels in Ontario's land registration system, a lien claimant can no longer conduct a search and lien the property as a whole, except by searching each unit and registering a lien against each unit in that particular condominium. This type of registration against all units in the project can be problematic where a particular unit or units has been transferred to the home buyer, as these interests are not properly the subject of the lien claim. The CLA protects home buyers from lien claims that should be

properly brought against the developer/builder. Under the CLA, the end user home buyer is not the 'owner' with an interest in the property who made the request for the contractor's work, therefore the home buyer is not a person whose interest can be the subject of the lien claim.

Further, in order to lien the common elements of the condominium, the contractor must lien each condominium unit as each such unit enjoys its appurtenant interest in the common elements with all other units. So even if the claim relates only to, or the lien claimant prefers only to lien the common elements (rather than a particular unit or units) to avoid the excessive search and review costs, this is not possible, as there is no longer a separate parcel (or register) for the common elements of a condominium.

Therefore, the lien must be registered against individual units, but only the units sitting in the developer's inventory should be subject to the lien. Units that have been transferred to the end user homebuyers should not be included.

Pulling the land registration records for each unit in the condominium to ascertain whether ownership in any unit has been transferred out to a home buyer can be a lengthy and expensive process for the lien claimant, especially in the case of a large development. As the intent of the new amendment is to provide early notice to contractors who may have a lien claim that their ability to lien the development as a whole and before condominium registration is about to expire, this notice does benefit the lien claimant by alerting it to the impending registration, so

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that it may determine whether or not to register a lien claim prior to condominium registration and transfer out of the condominium units.

It is important to note that the legislature chose to place this obligation on the “owner” as defined in the CLA - rather than on the “declarant” as that term is defined in the *Condominium Act, 1998*. Therefore, all parties considered owners under the CLA are caught under this new provision. This may include mortgagees, general contractors and investors in addition to the developer/builder. The contents of the notice are also specified in the amendment, with a standard format to follow by Regulation. The notice must include: (a) name and address of the owner; (b) description of the property (eg. municipal address, project name) including the legal description; and (c) the names and addresses of any contractors, who in the owners’ knowledge, have supplied materials or services during the 90 days before the description is submitted for approval.

The consequence of an owner not publishing a notice is that the owner will be liable to any lien claimant who suffers damages as a result of the owner’s failure to notify. This liability provision raises many questions, for example, what damages would flow, particularly where lien rights have a statutory expiry date that is, in the normal course, strictly interpreted? Does this amendment in some way conflict with or extend the strict interpretation of Part V of the CLA with respect to expiry and preservation of the lien? Who will monitor for compliance? Who will enforce against the owner for failing to comply with the notice requirement? Is this a separate cause of action to be commenced by the con-

tractor, in addition to the lien claim? How will a lien claimant know when the clock starts to run on the required notice period? How will a developer/builder know the name of all sub-contractors to add to the list? Does the owner have to make enquiries of the contractor? What if a subcontractor is missed on the list? Is this fatal to the notice? What incentive does the owner have to comply? In the writer’s view, while aiming to target an area of admitted frustration for lien claimants and developers alike, this amendment misses the mark. It creates an additional administrative burden for the developer, without any associated benefit or protection.

It will be interesting to canvass the industry in six months or so to see where it sits with compliance. Notwithstanding the concerns noted above, we do advise developers to assemble the required information and publish the notice in the time required to do so, in order to comply with the CLA and avoid any potential negative consequences. ■

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