# Buying From A Condominium Developer - - An Analysis of the Standard Provisions

by

**Harry Herskowitz of DelZotto, Zorzi LLP ***

**INDEX**



---

* This paper has been prepared for the Law Society's Continuing Legal Education Program entitled "**Condominium Law Update 2011**" held on October 25th, 2011.

**Buying From A Condominium Developer - - An Analysis of the Standard Provisions**

by

**Harry Herskowitz of DelZotto, Zorzi LLP**

---

## I. Introduction

I have always maintained that the agreement of purchase and sale is the "bible" or core document underlying any purchase and sale transaction involving real property, and this applies equally to the purchase of a proposed unit in a new condominium project, regardless of the fact that the agreement of purchase and sale is also augmented or supplemented by the disclosure statement (and the ancillary documents included therewith) mandated by the *Condominium Act 1998,* S.O. 1998, c. 19, as amended (hereinafter referred to as the "**Act**"). Accordingly, when buying a unit or proposed unit from a condominium developer (hereinafter referred to as the "**Declarant**" or the "**Vendor**"), it is essential for the purchaser's lawyer to understand the provisions in the agreement of purchase and sale, and the corresponding rights and obligations of the parties thereto so established thereby. The purpose of my paper is to highlight certain standard provisions typically included on behalf of the Declarant in a new condominium agreement of purchase and sale (hereinafter referred to as the "**Agreement**" or the "**APS**"), and to briefly explain why they are there, and what they mean.

Annexed as Appendix I to this paper is a sample Agreement that I have recently prepared on behalf of the Declarant for a new residential condominium project going to market, along with an index. The proposed condominium to which this sample Agreement relates, is similar to many other projects being developed in the Greater Toronto Area, and comprises the first of two residential phases of a twin tower complex, with each tower being linked at the ground floor or

podium level, sharing various recreational facilities and amenities, along with a shared underground parking garage, and with each tower to be registered as a separate standard condominium pursuant to the provisions of the Act, and not as a phased or incremental condominium under Part XI of the Act. All references to section numbers in my paper are intended to refer to those corresponding sections of the Agreement, unless otherwise indicated. Furthermore, please note that the Agreement deals with the sale of a "proposed unit", which is expressly defined in section 1(1) of the Act to mean the sale of a unit in a proposed condominium that has not yet been registered at the time that the agreement of purchase and sale has been entered into (as opposed to the sale of a unit in a registered condominium). Any reference to the sale of a unit in my paper is therefore intended to refer specifically to the sale of a proposed unit.

Annexed as Appendix II to this paper is the Tarion Warranty Corporation's Addendum, and specifically the Condominium (Tentative Occupancy Date) Form, to be attached to (and included as part of) the Agreement. Although my paper does not address any of the provisions of this Addendum specifically, I thought it would be helpful to include same with the Agreement, not only because certain provisions of the Addendum are expressly referred to in the Agreement itself, but also because the provisions of the Addendum will prevail over (and will supercede) any conflicting or inconsistent provisions outlined in the Agreement.

## II. **Definitions**

Typically, definitions are utilized in the standard Agreement for ease of reference purposes, so that detailed terms, phrases or concepts can be referred to simply by the defined terms ascribed to them at the outset of the Agreement. More importantly, the defined terms may help to ascertain

the type of project your client is buying into ... for example, in section 1.01(e) of the Agreement, the definition of the "Condominium" also refers to the condominium as the "Phase I Condominium", and there's also a definition of the "Phase II Condominium" in section 1.01(q), being the future adjacent condominium being developed by the Vendor, and a definition for the "Two Condominiums" in section 1.01(v) thereof. If nothing else, these defined terms should put you on notice that there may be reciprocal easements or cost-sharing arrangements between the Two Condominiums, which will financially impact the condominium project that your client is buying into. Finally, the definition of the "Closing Date" in section 1.01(d) is critically important, inasmuch as it confirms that in no event shall such date be later than 16 months from the firm occupancy date, or any extension or acceleration thereof established in accordance with the provisions of the Tarion Addendum. In other words, this definition establishes the outside date by which the final closing of the unit sale transaction must transpire, and the Vendor's inability or unwillingness to complete this transaction (and to correspondingly convey title to the purchased unit) on or before said date will, in the absence of the purchaser's outstanding default, constitute a fundamental breach of contract, entitling the purchaser to terminate the transaction and obtain a full refund of all deposit monies theretofore paid.

## III. **Allocation of Parking, Locker & Other Ancillary Units**

It's been my experience that for most condominium projects developed in suburban areas, the sale of a dwelling unit by the Declarant typically includes an ancillary parking unit and/or locker unit, for no additional consideration payable by the purchaser, and that the converse is true for projects developed in the downtown core, and in highly prized locations (such as Yonge & Eglinton,

Bloor West Village, Forest Hill, Yonge & Bloor, and Rosedale, to name a few). Accordingly, section 1.02(a) of the Agreement is intended to confirm that the purchaser is not entitled to any ancillary parking or locker unit, unless clearly indicated on page 1 of the Agreement. Moreover, at the initial marketing and sale stage of a condominium project, the detailed plans for the underground garage may not be fully completed, sufficient to enable the Declarant to assign or allocate any specific parking or locker unit(s) to the purchaser of a dwelling unit. Accordingly, where a parking or locker unit is intended to be sold and conveyed to the purchaser of a dwelling unit for no additional consideration, the letters "TBA" (which literally translate into "To Be Allocated" or "To Be Assigned") are invariably inserted in the space beside the verbal description of the parking or locker unit on page 1 of the Agreement, and the details of such allocation or assignment are outlined in section 1.02(b) of the Agreement. Finally, most municipalities require a certain minimum number of handicapped parking spaces to be created for disabled visitors to the condominium project, as well as a minimum number of handicapped parking spaces or units to be created to accommodate disabled unit owners or residents living in the condominium. Since there may not be enough disabled unit purchasers who wish to acquire a designated handicapped parking unit from the Declarant, the latter will not want to hold onto any handicapped parking units in perpetuity. Accordingly, section 1.02(c) is intended to enable the Declarant to sell and convey a handicapped parking unit to a non-disabled unit purchaser, and expressly confirms that if and when a non-disabled person owns or occupies a handicapped parking unit, then he or she will be obliged, upon notification by the condominium corporation, to exchange the use of such handicapped parking unit with a non-handicapped parking unit that has ben acquired by a disabled driver (who holds a valid disabled parking permit displayed in his or her vehicle), throughout the duration of such disabled

person's residency within the condominium project, all at no cost to the disabled driver/resident. Accordingly, the potential for this exchange should be pointed out to your client whenever your client is acquiring a designated handicapped parking unit that is customarily conveniently located closest to the elevator and is oversized (for easier access and egress into and out of the parking unit) and thereby more desirable than other parking units within the underground garage.

## IV. **Adjustments & HST Provisions**

Typical adjustments relative to the acquisition of a proposed unit in a new condominium project include outstanding realty taxes and common expenses attributable to the unit being acquired, as well as the monthly occupancy fees payable in connection with the interim-occupancy closing of the purchase and sale transaction, if applicable [and capped by section 80(4) of the Act, so that same cannot exceed the total of: (a) the projected monthly common expense contribution for the unit, determined in accordance with the condominium's proposed first year budget statement; (b) an amount reasonably estimated on a monthly basis for municipal realty taxes attributable to the unit; and (c) interest calculated on a monthly basis on the unpaid balance of the purchase price (if any) owing immediately after the interim-occupancy closing of the transaction, if applicable, at the prescribed rate outlined in section 19(1) of O'Reg 48/01, being the Bank of Canada's reported interest rate for a conventional one year mortgage, as of the first of the month in which the purchaser assumes interim-occupancy]. In addition, it's not uncommon for the Declarant to pass onto the purchaser the cost of enrolling the dwelling unit with Tarion Warranty Corporation, and the cost of supplying and installing any meters or check-meters for water, electricity, thermal energy and/or natural gas appurtenant to the unit, as well as the increase (if any) in the aggregate of all applicable

development charges or levies (inclusive of any park levies and any education development charges) payable by the Declarant in connection with the development of the condominium project, from the date of the Agreement to the date that a superstructure building permit for the condominium has been issued by the building department of the relevant municipality. The foregoing adjustments are more particularly outlined in section 1.04(a) of the Agreement. Be sure to review all of the adjustment provisions in the Agreement carefully, because there will often be other additional fixed and/or variable costs which the Declarant wishes to off-load or pass onto the purchaser, varying from project to project. For example, section 1.04(a)(ix) of the Agreement purports to charge the purchaser $150 (plus HST) for each deposit cheque returned NSF, while section 1.04(a)(x) purports to charge the purchaser $400 (plus HST) to reimburse the Declarant for: (a) the real estate transaction levy surcharge imposed by the Law Society and payable by the Declarant; (b) the cost of issuing all requisite certificates of compliance in connection with each deposit cheque received and placed in the designated trust account maintained in connection with the condominium project [pursuant to section 81(6) of the Act, in Form 4 as prescribed by O'Reg 49/01]; and (c) the cost of issuing a status certificate in connection with the purchased dwelling unit, and any parking and/or locker units ancillary thereto, on or before the final closing of the unit sale transaction [pursuant to section 76(1) of the Act, in Form 13 as prescribed by O'Reg 48/01].

If you have the benefit of reviewing the executed purchase agreement prior to the expiry of the ten (10) day cooling off period or statutory rescission period imposed by section 73(2) of the Act, you may want to:

(a) contractually extend your client's statutory right [under section 80(3) of the Act] to elect to pay, in full, the outstanding balance of the purchase price on or before the interim-

occupancy closing date, so as to reduce the interest component of the monthly occupancy fee otherwise payable by the purchaser; and

(b) negotiate deletions of, reductions in, or caps to, any or all of the fixed or variable adjustments to the balance of the purchase price due on final closing.

Please keep in mind that the Declarant's willingness to negotiate deletions of, or reductions to, any of the adjustable amounts contemplated by the Agreement, is often directly related to (and influenced by) the prevailing strength of the real estate market at the time of your desired negotiations, and with few exceptions (involving only exclusive and unique projects in the most desirable locations, which can withstand the most virulent recession) the relative bargaining power of the respective parties to the contract will invariably rise and fall with the real estate market. Naturally, in a strong "seller's market" where the demand for the Declarant's condo product is high, the Declarant will be less inclined to negotiate any changes to the contract whatsoever, let alone the adjustment provisions which will directly impact the Declarant's bottom line profit. Conversely, in a weak or tepid market known as a "buyer's market", like the one experienced during the early 90's, practically every provision is negotiable, including the deletion of some adjustable charges, and the capping or reduction of others. It's important to note that the development charges applicable to the project will only be quantified and levied by the municipality (and correspondingly payable by the Declarant) at the time that a superstructure building permit has been issued for the condominium project. In light of the foregoing, notionally the sale price of any unit sold after the building permit has been issued for the condominium ought to reflect or incorporate the aggregate of all development charges so levied and paid, and accordingly the Declarant may not balk at a request to delete the clause adjusting for development charge increases, in such circumstances. However, if the sale of the

proposed unit occurs prior to the date of building permit issuance, then unless the prevailing market strongly favours the purchaser, the Declarant will likely be exceedingly reluctant to delete this adjustment altogether, particularly since this adjustment may amount to several thousand dollars, but may nevertheless be willing to cap or limit the amount of this variable adjustment, if requested.

Typically, the sale price of a proposed dwelling unit (and any parking or locker unit ancillary thereto) is inclusive of the harmonized sales tax or HST exigible in connection with the completion of the purchase and sale transaction, less the respective federal and provincial new housing rebates, as applicable, and the contract will correspondingly oblige the purchaser to irrevocably assign and transfer the applicable new housing rebates to the Declarant, on final closing. The foregoing enables the Declarant to remit less overall tax to the Canada Revenue Agency following the final closing of the unit sale transaction, because the eligible provincial and federal new housing rebates so applicable will directly reduce the tax otherwise payable and ultimately remitted. Section 1.04(b) of the Agreement expressly stipulates that if the purchaser does not qualify for the new housing rebates applicable to the provincial and federal components of the HST, because the dwelling unit is not intended to be personally occupied by the purchaser, or by one or more of the purchaser's relations or qualified relatives (namely any one or more of the purchaser's spouse, parents, grandparents, children, grandchildren or siblings) as their primary place of residence, for the minimum period of time required by the *Excise Tax Act* (ie. a minimum of six consecutive months, as a rule of thumb), then the purchaser will be charged an amount equivalent to the aggregate of such new housing rebates (as applicable), in the statement of adjustments on final closing. Section 1.04(b) of the Agreement also provides for the purchaser's indemnity of the Declarant for any loss, cost, damage and/or liability (including an amount equivalent to the new

housing rebates otherwise applicable, plus penalties and interest thereon) which the Declarant may suffer, incur or be charged with, as a result of the purchaser's failure to qualify for such rebates, or as a result of the purchaser having qualified initially for same but subsequently being disentitled thereto (in whole or in part), or as a result of the inability to assign or transfer the benefit of the new housing rebates to the Declarant. The Agreement expressly contemplates the purchaser's execution and delivery of the rebate form required to be completed and submitted to the Canada Revenue Agency in connection with any claim for such new housing rebates, along with all requisite documents that the Declarant may reasonably require in order to confirm the purchaser's entitlement to (or continued eligibility for) same (eg. a statutory declaration sworn by the purchaser).

In light of the fact that the new housing rebate applicable to the provincial component of the HST is $24,000 alone, for any unit sold at or above $400,000, the rebate provisions of the Agreement are critically important to the Declarant. So much so, that section 1.04(b)(ii) expressly provides that if the Declarant believes, for whatever reason, that the purchaser does not qualify for such rebates, regardless of any self-serving statutory declaration sworn by the purchaser to the contrary, then the purchaser will be charged an amount equivalent to the new housing rebates in the statement of adjustments, and the purchaser will correspondingly have to pursue the rebates on his or her own, after final closing, directly from the Canada Revenue Agency. On countless occasions, I've had to change the statement of adjustments at the last minute, before final closing, despite getting the purchaser's statutory declaration confirming his or her eligibility for the new housing rebates, upon learning that: (a) the purchaser has rented out the dwelling unit to a third party tenant; (b) the purchaser has listed the dwelling unit for re-sale on the Multiple Listing Service of the Toronto Real Estate Board; or (c) the purchaser's address for service is not the same as the dwelling

unit's address, and the purchaser is unable to provide a drivers license confirming the dwelling unit as their place of residence, despite the fact that the interim-occupancy closing has already transpired, and the dwelling unit remains unoccupied by any family member or qualified relative. The new housing rebates are now so significant that the Declarant will endeavour to register a vendor's lien against the acquired dwelling unit, after closing, upon learning of any facts indicating that the purchaser was ineligible for the new housing rebates.

The foregoing discussion is closely tied to the frequent request made by purchasers to assign the Agreement to a third party before closing, or to add other parties as purchasers to the Agreement, or to direct title to one or more other persons on final closing, inasmuch as such requests may negatively impact the purchaser's continued eligibility for the new housing rebates. Therefore, before making any such request on behalf of your client, it is absolutely essential to bear in mind that an individual qualifies for the new housing rebates only if all of the following conditions are met, namely:

(a) the purchaser consists of one or more individuals (not a company, a family trust or a partnership);

(b) the unit is being acquired as the primary place of residence of the purchaser, or a qualified relation or relative of the purchaser (namely an individual related to the purchaser by blood, marriage, common law partnership or adoption within the meaning of the *Income Tax Act*, and therefore including any one or more of the purchaser's spouse, common law partner, parents, grandparents, children, grandchildren or siblings);

(c) for the new housing rebate applicable to the federal component of the HST, the total consideration paid is less than $450,000, before tax;

(d) ownership is transferred by the Declarant to the individual or individuals comprising the purchaser, and only after the unit has been substantially completed;

(e) no one has occupied the unit as a place of residence between the date of substantial completion of the unit, and the date of possession of the unit by the purchaser; and

(f) the individual or individuals comprising the purchaser, or their qualified relatives, are the first persons to occupy the unit as a primary place of residence.

In light of the foregoing eligibility requirements, any request to direct title on final closing to someone other than the purchaser (for example, because the purchaser no longer qualifies for mortgage approval and needs to have his or her spouse take title alone, in his or her place and stead) will clearly render the purchaser ineligible for the new housing rebates, leaving the purchaser scrambling to come up with the additional funds to complete the transaction on the scheduled final closing date (based on the provisions in the Agreement which entitle the Declarant to charge the purchaser in the statement of adjustments with an amount equivalent to the new housing rebates for which the purchaser is no longer eligible), unless the purchaser and his spouse (as the proposed transferee of title to the acquired unit), together the Declarant, sign an addendum to the Agreement which effectively makes the spouse or proposed transferee the new purchaser, in the place and stead of the original purchaser, and therefore enables the said spouse to qualify for the new housing rebates.

Finally, even though the purchaser may not qualify for the new housing rebates applicable to the HST, the purchaser may nevertheless be eligible for the new residential rental property rebates of the HST, which is equal to the amount of the new housing rebates otherwise applicable, as long as the new condominium unit is leased by the purchaser to a third party tenant who occupies the unit

as their primary place of residence for a period of at least one year. However, in such case, the purchaser will not be credited with the amount of the residential rental property rebate in the statement of adjustments on closing, but rather will be charged an amount equivalent to the new housing rebates in the statement of adjustments, and will have to pursue the residential rental property rebates on their own, after final closing, thus giving rise to a potential significant cash flow concern for the purchaser.

## V. **Prohibition on Purchaser Selling, Leasing or Assigning**

When the project is in its initial marketing stage, and particularly prior to the date that the Declarant has attained or achieved the required sales threshold sufficient to obtain a binding commitment for construction financing for the project from an institutional lender [which will usually require at least 75% or more of the total dwelling units in the project to be sold, at fair market value (or at no less than a stipulated price) to arms' length unit purchasers, as a condition precedent to the lender providing such a commitment or advancing any portion of the construction loan], any attempt by an existing unit purchaser to "flip" or re-sell (or to assign his or her interests in) the purchased unit, is anathema to the Declarant. The last thing that the Declarant wants, while retaining unsold inventory in its project, is to have to compete for potential buyers with existing unit purchasers who are endeavouring to sell their respective units, but who haven't yet paid 100% of their respective purchase prices, and correspondingly haven't finally closed their respective purchase and sale transactions with the Declarant. Many declarants are also loath to permit the leasing of the unit by the purchaser to a third party tenant, not only because they don't want the leasing aspect to be widely advertised, and thereby potentially dissuade a significant segment of prospective unit

purchasers who would be reluctant to buy into a project that's perceived to have a lot of tenants (as opposed to owner occupants) residing within the building, but also because of the concern that tenants who are not screened or approved by the Declarant's authorized leasing manager might have a poor credit/rental history and cause damage to the unit and/or the common elements in the course of residing within the leased premises (and may not have the financial resources to compensate or reimburse the Declarant for any resulting damages, either before or after a judgment). Accordingly, section 2.01 of the Agreement absolutely proscribes or prohibits the sale or lease, the listing for sale or lease, and even the advertising for sale or lease, of the purchased unit, including any assignment of the purchaser's interests arising under the Agreement, without the Declarant's prior written consent which may be arbitrarily withheld.

## VI. **Provisions Confirming the Purchaser's Financial Resources**

In today's condominium marketplace, lenders providing construction financing for the construction and completion of a condominium project want to be assured that the borrower/declarant will be obtaining more than enough funds on the final closing of the unit sale transactions from the outstanding sales existing as at the date of the financing commitment, sufficient to enable the borrower/declarant to fully repay the outstanding principal and interest indebtedness to the construction lender, and are accordingly loath to allow (or approve of) any vendor takeback mortgages by the Declarant as part of the purchase price payable by any of the respective unit purchasers. To this end, the Declarant wants the purchaser to warrant that he or she has (or will have), on or before the final closing of the unit sale transaction, the financial resources to complete the transaction on an all-cash basis with the Declarant, and section 2.02(a) of the Agreement

expressly confirms the foregoing. In addition, this section also confirms that if any deposit cheque is drawn on the account of someone other than the purchaser, then the Declarant is only obliged to issue the Form 4 Certificate to the purchaser, and not to the drawer of the cheque. Finally, this section expressly authorizes the Declarant to demand, from time to time, certain financial information from the purchaser to evidence and confirm the purchaser's financial ability to complete this transaction, including written confirmation of the purchaser's annual income and a copy of any mortgage commitment from a third party financial institution who will be financing the purchaser's acquisition of the dwelling unit on closing. This information is critically important to the Declarant, so that a unit is not sold, and does not remain sold and off the market, to someone who may not have the financial wherewithal to ultimately complete the purchase and sale transaction on an all-cash basis with the Declarant, once the condominium project has been completed and registered (often several years after the sale has transpired). The risk of a volatile marketplace for the Declarant is obvious, because if the market falls sharply at any time after the sale is consummated upon the execution of the Agreement, and prior to final closing (like it did in 1989, and once again in the fall of 2008), and if the purchaser's financial resources are deleteriously affected by the depressed or dampened economy, such that the purchaser is no longer able to qualify for mortgage financing in an amount sufficient to complete the transaction with the Declarant, then the Declarant may end up being stuck with the unit on final closing as a consequence of the purchaser's default. The obligation of the purchaser to provide his or her financial information to the Declarant does not obviate or avoid this risk, but it nevertheless allows the Declarant and its construction lender to get a comfort level about the purchaser's current ability to really afford the unit, and to complete the transaction down the road.

## VII. Purchaser's Failure to Provide Financial Information or to Procure Needed Financing

If the purchaser fails to submit, as and when required by the contract, the requisite documentation and information needed to confirm the purchaser's financial ability to complete the purchase and sale transaction with the Declarant on an all-cash basis on final closing, or fails to disclose any relevant facts pertaining to the purchaser's financial condition or mortgage approval, then the Declarant will want the right to unilaterally declare the Agreement terminated as a consequence thereof, so that the Declarant can immediately put the unit up for sale again, in an effort to mitigate its potential damages, and section 2.03 of the Agreement expressly confirms the foregoing. Section 2.03 also provides the Declarant with the option of taking back a first mortgage from the purchaser on final closing for the amount of any shortfall in the unpaid balance of the purchase price, having a term ranging between 6 months and 3 years in duration. While the construction lender will not want (nor approve) of any such vendor takeback mortgage, the Declarant may nevertheless have sufficient funds from the final closing of the other unit sale transactions in the project to fully repay the outstanding construction loan, and in those circumstance, the Declarant may then be willing to take back a mortgage on closing in an effort to salvage the transaction, particularly if the prospect of successfully re-selling the unit at anywhere near the original sale price is unlikely due to the decline in the housing market.

## VIII. Terms of Interim Occupancy

Section 80(1) of the Act provides that an agreement of purchase and sale may require the "interim occupancy" of a proposed unit, which is the occupancy or possession of the unit by the

purchaser before he or she receives a transfer of title to the unit, in registerable form, from the Declarant. This interim occupancy scenario invariably occurs when the condominium building has been substantially completed (ie. the structure of the building is fully completed, the roof is on, all exterior doors and windows are in place, and the heating, plumbing, mechanical and electrical systems are operable), and the purchased unit itself has been substantially completed sufficient to permit its lawful occupancy in accordance with the Ontario Building Code (as evidenced by the issuance of an occupancy permit by the building department of the relevant municipality), but the balance of the interior of the condominium building has not been completed to the stage required by the Act and its regulations (ie. not all the units on all the other floors within the building have been drywalled, taped and sanded) as a prerequisite to the Declarant's entitlement to submit the declaration and description for final approval and registration. Ordinarily, the Declarant will orchestrate its trades to complete the drywalling and interior finishing work within suites on a floor-by-floor basis, starting with the lowermost floor, and therefore, it's conceivable that the purchaser of a dwelling unit on level 1 may be able to move into his or her suite today, and remain in occupancy between approximately 5 to 8 months before all the suites on the uppermost floor in the 20 storey building have been drywalled, taped and sanded (at a rule of thumb rate of 1.5 weeks per floor, with 10 suites on each floor), so as to be entitled to submit the final declaration and description plan sheets to the planning authority for final approval. In addition, section 80(4) of the Act entitles the Declarant to charge the purchaser a monthly occupancy fee, which shall not be greater than the total of the following amounts:

(a) the projected monthly common expense contribution for the unit, determined in accordance with the condominium's proposed first year budget statement;

(b) an amount reasonably estimated on a monthly basis for municipal realty taxes attributable to the unit; and

(c) interest calculated on a monthly basis on the unpaid balance of the purchase price (if any) owing immediately after the interim-occupancy closing of the transaction, if applicable, at the prescribed rate outlined in section 19(1) of O'Reg 48/01, being the Bank of Canada's reported interest rate for a conventional one year mortgage, as of the first of the month in which the purchaser assumes interim-occupancy.

Accordingly, sections 2.08 and 2.09 of the Agreement address this interim occupancy scenario, and confirm how the monthly rental or occupancy fee will be determined and paid, as well as outline all relevant provisions governing the purchaser's occupancy of the dwelling unit as a monthly tenant. Section 2.09(b) requires the purchaser, amongst other things, to execute and deliver, on or before the firm occupancy date (or any delayed occupancy date, as the case may be): (i) three copies of the Declarant's standard form of occupancy agreement [which is available for review by the purchaser or the purchaser's solicitor at any time, at the Declarant's sales office, or at the Declarant's solicitor's office, during normal business hours, the key provisions of which are highlighted in section 2.9 (a) of the Agreement]; (ii) a series of six (6) post-dated cheques to cover the monthly occupancy fees for the next six months following the purchaser taking possession of the unit; (iii) an irrevocable direction re: title, addressed to the Declarant and its solicitor, confirming the manner in which the purchaser wishes to take title to the acquired unit; and (iv) a clear and up-to-date execution certificate in respect of the purchaser's name, from the land titles office in which the project lands are registered (in order to ensure that there are no outstanding executions against the purchaser, or a person with a name similar or identical to that of the purchaser, which might impede

any third party financing sought or needed by the purchaser to facilitate the completion of the transaction on an all-cash basis with the Declarant on final closing).

Section 2.09(a)(vi) addresses the issue of any physical damage to the condominium building caused by a fire, flood or other insurable peril occurring before or during the purchaser's occupancy of the dwelling unit, which renders same uninhabitable, and ties directly into the definition of "Unavoidable Delay" set forth in sections 1 and 7 of the Tarion Addendum. Section 2.09(a)(vi)(B) specifically confirms that if the Declarant's construction lender elects to appropriate all (or substantially all) of the available insurance proceeds (if any) so triggered by such damage to reduce, *pro tanto*, the Declarant's outstanding indebtedness to it, and/or is unwilling to lend or advance any monies required to rebuild and/or repair such damage, or if such damage cannot be substantially repaired within one (1) year from the date of the damage occurring, as determined jointly by the Declarant and the project architect acting reasonably (and which determination shall be final and binding on all parties, and shall not be subject to challenge or appeal under any circumstances whatsoever), then in either case such damage shall be deemed and construed for all purposes to have frustrated the completion of the purchase and sale transaction, and if the purchaser has already taken possession of the unit at the time of such damage, then the purchaser's existing occupancy thereof shall thereupon be forthwith terminated, and all monies paid by the purchaser on account of the purchase price (inclusive of all monies paid for any extras and/or upgrades) shall be fully refunded to the purchaser, together with all interest accrued thereon at the prescribed rate, and the Declarant shall not be liable for any costs and/or damages incurred by the purchaser thereby whatsoever, whether arising from (or in connection with) the termination of the purchaser's existing occupancy of the dwelling unit, or the termination of the purchase and sale transaction, by virtue of the frustration of the contract occurring through no fault of the Declarant.

Some condominium declarants try to avoid any "tenancy" language when describing the purchaser's occupancy of the dwelling unit, in connection with (or consequent upon) the interim occupancy closing of the transaction, and often characterize or call the purchaser a "licensee" rather than a monthly "tenant", and use "license" language to describe the relationship, presumably based on the unfounded or unsupported fear that by doing so, the purchaser may have some greater "security of tenure", and that by describing the purchaser as a monthly tenant it may somehow strengthen or augment the purchaser's entitlement to remain in possession of the premises even after the purchaser's default and the termination of the purchase and sale transaction. However, it's important to know that if the purchaser's possession of the dwelling unit arises by virtue of (or collateral to) an agreement of purchase and sale of a proposed unit within the meaning of the Act, then whenever such agreement has been terminated as a consequence of the purchaser's default, the Declarant (as the landlord) shall be entitled to forthwith terminate such tenancy, and obtain vacant possession of the dwelling unit, pursuant to the summary application procedure contemplated under section 58(1)(4) of the *Residential Tenancies Act S.O. 2006, as amended*.

Equally importantly, section 2.08(b) provides that if the Declarant is unable to register the condominium within 18 months after the firm occupancy date stipulated in the Agreement, then the purchaser shall have the unilateral right and option of terminating the agreement, and obtaining a full refund of all deposit monies paid (inclusive of all monies paid for any extras and/or upgrades), together with all interest accrued thereon at the rate prescribed by the Act [and which rate, pursuant to section 82(1) of the Act, and section 19(2) of O'Reg 48/01, is 2% below the Bank of Canada rate, established on March 31st and September 30th in each year].

## IX. **Metering of Utilities**

Until about 12 years ago, all high-rise condominiums were exclusively bulk metered, so that the cost of all water, electricity and gas services consumed by each of the respective dwelling units, and by various common element areas, always comprised part of the condominium's common expenses, and by doing so, there was no direct monetary incentive for any particular owner or resident of a dwelling unit to conserve the amount of energy or water consumed by his or her unit. However, within the last 12 years or so, in an effort to keep the condominium's common expenses lower, and more competitive from a marketing perspective (and compared as x cents per square foot, from one condominium building to another), developers not only endeavoured to design and construct more energy efficient high-rise condominiums, but they also tended to install check or consumption meters for water, electricity, thermal energy and/or gas (as applicable), as an appurtenance to each of the dwelling units, in those instances where direct meters (along with direct invoicing or billing by the utility provider) were not available or viable ... the foregoing change encouraged energy and water conservation by individual unit owners, and significantly reduced the project's overall annual common expenses, by passing the cost of the consumption of utilities relative to the respective dwelling units (and their exclusive use common element areas) directly onto the shoulders of the respective unit owners, since each unit owner would now be solely and exclusively responsible for paying the cost of the check metered utilities relating to his or her dwelling unit, based on the periodic reading of the utility check meter(s) or consumption meter(s) appurtenant to his or her dwelling unit. Accordingly, section 2.10 of the Agreement confirms what utilities will be check metered, and outlines what the unit purchaser is responsible for paying (in terms of utility consumption), in addition to the monthly common expenses attributable to his or her

purchased unit. Since the providers of water, electricity and natural gas were (until very recently) unwilling to install direct meters to measure the consumption of their respective utilities by each of the dwelling units, and were also reluctant to issue invoices to (and implement collection procedures against) each of the respective dwelling unit owners, condominium developers had little choice but to install check or consumption meters appurtenant to each of the dwelling units, and to enlist the services of a third party utility monitor to read the check or consumption meters on a period basis, and to correspondingly invoice each of the dwelling unit owners from time to time, for the cost of their respective utility consumption, based on such check meter readings. Section 2.10(c) of the Agreement outlines the procedures to be followed for the meter reading, invoicing and payment of such utility consumption, including the monthly administration fee or charge payable by each dwelling unit owner directly to the condominium's designated utility monitor, to cover the cost of such reading and invoicing services.

Since the consumption costs of the check metered utilities so payable by a dwelling unit owner do not technically comprise part of the common expenses, the unit owner's failure to pay same would ordinarily not give rise to a common expense arrears lien in favour of the condominium corporation. Rather, the failure of any dwelling unit owner to pay the consumption costs of the check metered utilities appurtenant to his or her unit must be addressed and detailed in the condominium's declaration, and is often re-stated in the agreement of purchase and sale entered into by the declarant with every unit purchaser. Such is the case with sections 2.10 (e) and (f) of the Agreement, which outline the provisions for maintaining and enforcing a utility arrears lien against the defaulting owner's dwelling unit (for the amount of such unpaid check metered utilities), and to be registered in favour of (and enforceable by) the condominium corporation. In this regard, the decision of Justice McWatt, in the case of *Italiano v. Toronto Standard Condominium Corporation*

*No. 1507 (2008) Carswell Ont. 3951*, may be very helpful to the condominium corporation, in terms of elevating the priority status of the utility arrears lien. In the Italiano case, the court allowed a condominium corporation to collect the outstanding costs of an arbitrator against the defaulting unit owner who was a party to the arbitration proceedings initiated pursuant to section 132(1)(b) of the Act, in the same manner as common expense arrears, primarily because the declaration in that case deemed such costs to be additional contributions to the common expenses, and to be recoverable as such. The Italiano case is authority for the proposition that in addition to the common expenses set out in Schedule "E" to the declaration that will be allocated amongst all units in accordance with their respective stipulated percentages set forth in Schedule "D" to the declaration, other provisions in the declaration may outline or prescribe other common expenses, and can even specify that some costs which are intended to be exclusive to one or more units, but not to all units, shall nevertheless be "deemed to be common expenses", regardless of the fact that they may not necessarily be attributable or allocable to all unit owners rateably (in accordance with the percentages set out in Schedule "D" to the declaration), but rather may be specific to a delinquent unit owner or owners, and payable as their exclusive additional contributions to the common expenses, and recoverable as such, via a common expense arrears lien registered in favour of the condominium corporation against the delinquent owner's unit, having the priority status afforded to it by virtue of section 86(1) of the Act - - - namely a first priority position over every registered encumbrance existing before the lien arose, save and except for the claim of the Crown or a claim for taxes recoverable under the *Municipal Act* or the *Local Improvement Act*.

Finally, section 2.10(g) of the Agreement contractually obliges the purchaser to make all requisite payments owing to the condominium's designated utility monitor by way of a pre-authorized payment plan, and to provide an unsigned cheque marked "void" (from the purchaser's

bank account to be used for making all future utility payments to the utility monitor), along with a signed copy of the utility monitor's pre-authorized payment plan form, to the Declarant's solicitor on or before the interim occupancy closing of the purchase and sale transaction.

## X. Noise Warning & Other Special Notices

Most condominium projects developed in an urban area, and particularly in the Greater Toronto Area, will be subject to some form of site plan control, culminating in the local or regional planning department's issuance of Notice of Approval Conditions and/or the execution of a site plan agreement between the Declarant and the relevant municipality or regional authority (hereinafter referred to as the "**Site Plan Agreement**"). In addition, whenever the Declarant is seeking increases in the permissible height and/or density of the condominium project to be developed, invariably an agreement contemplated under section 37(3) of the *Planning Act R.S.O. 1990, as amended* will be entered into between the Declarant and the municipality (hereinafter referred to as the "**Section 37 Agreement**"), outlining the proposed development of the project lands and the provision of certain public benefits (eg. a public park or public art, or a daycare centre), or the payment of additional monies to ultimately fund the municipality's provision of such benefits, in exchange for increases in the height and/or density of the condominium project. Moreover, the Declarant's application for draft plan of condominium approval will be circulated to a number of governmental agencies or authorities, for their input and comment, and may consequently give rise to one or more draft plan of condominium conditions that must be fulfilled to satisfy the specific concerns of any such agency or authority, as a prerequisite to the registration of the condominium. If the proposed condominium project is (or will be) in close proximity to a source of potentially excessive noise, vibrations, electro-magnetic interference and/or stray current transmissions, or any other potential source of

concern that might disturb (or interfere with) the usual or customary use and enjoyment of the dwelling units by the residents of the condominium, such as a nearby subway, railroad track or light rapid transit line, or a nearby hydro vault, then despite the fact that the Site Plan Agreement and/or the Section 37 Agreement may be registered on title for all the world to see, most municipalities and various governmental agencies and school boards (including each of the Toronto Transit Commission, the Toronto Hydro-Electric System Limited, the Canadian Pacific Railway, the Toronto District School Board and the Toronto Catholic District School Board) will frequently insist on the Declarant inserting certain generic or site-specific warning clauses in the Agreement, so as to provide direct notice of such potential concerns to all prospective unit owners, in an effort to obviate any responsibility by them to respond to any complaints (or to defend any claims, whether for injunctive relief, compensation or otherwise) arising from such concerns, and to concomitantly disclaim any liability in connection with any such complaints or claims. Accordingly, sections 2.11 (a) and (b) (i), (ii), (iii), (iv), (vii), (viii) and (ix) of the Agreement outline all of the specific warning clauses required by the City of Toronto and various governmental agencies in connection with the development and construction of the condominium project. It is important to point out that some of these clauses (for example, the warning clauses about the potential for bussing students to schools outside of the neighbourhood, due to the potential for insufficient local school capacity, so mandated by the Toronto District School Board and the Toronto Catholic District School Board respectively), don't just require the Declarant to insert same in the Agreement to give notice thereof to each unit purchaser, but also oblige the purchaser to include the very same warning clause in any subsequent re-sale offer or subsequent agreement of purchase and sale, so that the purchaser's assigns will learn about this potential school bussing concern as well.

No discussion about contractual warning clauses, and the Declarant's need for same, would be complete without mentioning the case of *Jaremko v. Shipp Corp. (1995) 47 R.P.R. (2d) 229* (hereinafter referred to as the "**Shipp Case**"), involving the purchase of a dwelling unit in a new condominium project, where shortly after closing, the plaintiff complained about the location of the "lay-by" (a temporary drop-off spot for moving vehicles), which was situate immediately outside of the bedroom window of her ground floor suite. The evidence indicated that trucks were allowed to park within five feet of her bedroom window, that moving personnel could readily see into her dwelling unit, and that the trucks blocked out light and created noise and fumes inside the suite, which required that the window blinds be closed on an almost permanent basis. Furthermore, a moving/storage room located adjacent to the plaintiff's dwelling unit also contributed to a high level of noise. The plaintiff sought damages against the declarant/vendor for the diminution in value of her suite (ie. caused by the proximity of the lay-by and moving/storage room, and the attendant noise, fumes, occlusion of light and other inconveniences and nuisances suffered as a result of same). The Court ultimately awarded the plaintiff approximately $60,000.00, on the ground that the developer breached its implied covenant of "quiet enjoyment", and partially breached the statutory warranty (arising under the *Ontario New Home Warranties Plan Act R.S.O. 1990, as amended*) that the unit was "fit for habitation". The damages amounted to a 15% discount in the purchase price of the suite, and a corresponding discount of all occupancy fees paid to the developer prior to closing (as well as damages equivalent to 15% of all realty taxes and common expenses paid by the plaintiff with respect to the suite, up to the date of trial). The Shipp Case provides an important reminder to developers to act reasonably and prudently in approving suite designs and suite locations throughout the project, and to ensure that: (i) suites are not located in areas that would pose an unreasonable

foreseeable nuisance to the occupants (ie. undue noise, smells, fumes, vibration, loss of sunlight, etc.); (ii) special attenuating features have been designed or constructed with respect to such suites, in order to prevent or abate the occurrence of the nuisance; or (iii) that any affected unit purchasers are expressly warned about any potential noise or other nuisance concerns relative to the use and enjoyment of their respective suites, which cannot be eliminated altogether or substantially mitigated, and which would not otherwise be known (nor reasonably foreseen) by such purchasers prior to closing. Accordingly, section 2.11(b)(v) and (vi) of the Agreement address specific potential nuisance concerns relative to certain suites within the condominium project. For example, section 2.11 (d) confirms the potential for window washing equipment to be attached to the exterior of the dwelling unit, and/or to any exclusive use common element area appurtenant thereto, for the purposes of facilitating the condominium's maintenance and repair of any exterior windows and other exterior building components.

Moreover, since the particular condominium project which is the subject matter of the Agreement will be sharing various recreational amenities, facilities, services and easement areas with a future adjacent residential condominium tower to be developed by the Declarant on the abutting lands, section 2.11 (m)(ii) of the Agreement outlines the two-way shared facilities, and the formula for sharing and allocating the two-way shared facilities costs. You will note that in this particular project, all of the two-way shared facilities costs have been "front-end loaded", so that all such costs will be borne and paid for entirely by the first condominium, until such time as the second condominium has been registered, whereupon the two-way shared facilities costs will then be allocated between each of the two condominiums on a pro-rata basis, predicated on their respective registered dwelling unit count. Therefore, the monthly common expenses attributable to the

purchased unit already reflects or incorporates a component involving a portion of the two-way shared facilities costs, so payable by the condominium corporation.

Furthermore, section 2.11(m)(i) of the Agreement puts all unit purchasers on formal notice that any of the dwelling units in the project may be used for providing short-term or transient residential rental accommodation, on a furnished or unfurnished suite basis (with or without ancillary maid, cleaning or laundry services), through short term or long term licence/lease arrangements, if permitted to do so by the provisions of the applicable zoning by-laws of the City of Toronto pertaining to the project.

Finally, section 2.11(m)(iii) of the Agreement lets all unit purchasers know that the declaration of the condominium will impose a duty on the condominium corporation to acquire the superintendent suite and the two guest suites from the Declarant for a stipulated price, inclusive of HST, and this provision emanated from the Ontario Court of Appeal's decision in the recent case of *Lexington on the Green Inc. v. TSCC No. 1930 (2010) 102 O.R. (3d) 737*, which confirmed that a duty set out in the declaration, such as a duty to acquire certain specific amenity units from the declarant at a specified price, which will provide some benefit to all present and future residents of the condominium, will prevail and be enforceable against the condominium corporation, independently of any ancillary agreement (such as an agreement of purchase and sale) for the provision of such facilities to the corporation that would otherwise be terminable by the post-turnover board under section 112 of the Act.

With respect to the superintendent suite and guest suites relative to the condominium project contemplated under the Agreement, the purchaser is expressly advised that the purchase price for these special units so payable by the condominium corporation is intended to be fully secured by a vendor takeback first mortgage to be registered against such units forthwith following

the registration of the condominium, having a term of approximately 11 years (the "**VTB Mortgage**"), bearing no interest in the first year, and with no payment on account of principal being due or payable during the first year (and thereby having no impact whatsoever on the first year budget). After the first year, the VTB Mortgage will bear interest at a stipulated rate, and will be repayable throughout the balance of the term of the VTB Mortgage by way of equal blended monthly installments of principal and interest, based on a 10 year amortization plan. The outstanding principal and interest indebtedness secured under the VTB Mortgage so existing at the time of the registration of the second or final phase condominium, shall be apportioned between the two registered condominiums, and shall comprise part of the two-way shared facilities costs, and will correspondingly be reflected in the two-way shared facilities budgets prepared annually thereafter throughout the balance of the term of the VTB Mortgage.

## XI. Purchaser's Consent to the Collection and Limited Use of Personal Information

There are two specific federal statutes that have an impact on the personal information of a purchaser involved in the acquisition of a dwelling unit in a new condominium project. The first is the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act S.C. 2000, as amended* (hereinafter referred to as "**FINTRAC**"), which requires the Declarant or the Declarant's agent to obtain certain personal information and documentation in order to be able to properly and independently confirm (and objectively verify) the identity of each individual or corporation comprising the purchaser, in an effort to thwart money laundering and/or the financing of any terrorist group or activity. In addition to the name, current home address, date of birth, and the principle business or occupation of each individual or corporation comprising the purchaser

(including the business registration number of any corporate purchaser with the Canada Revenue Agency), the Declarant or its agent will also require a copy of a validly-issued birth certificate, or an unexpired drivers license, passport, or government-issued record of landing or permanent resident card (together with a copy of a government-issued photo I.D. for each individual comprising the purchaser, or for each officer and director of any company comprising the purchaser), as well as a copy of the articles of incorporation, a current certificate of status, and a current certificate of incumbency, for each company comprising the purchaser. Section 2.13 of the Agreement specifically addresses the foregoing FINTRAC requirements, and also stipulates that if any deposit monies are provided by (or drawn on the account of) some other third party, then the purchaser shall also be obliged to forthwith provide all of the foregoing identity-confirming information and documentation from (and with respect to) said third party, in order to enable the Declarant or its agent to fully comply with all FINTRAC requirements.

The other federal statute is the *Personal Information Protection and Electronic Documents Act S.C. 2000, as amended* (hereinafter referred to as "**PIPEDA**"), which legislation governs the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information, and the need for those collecting, using or disclosing such personal information in the course of conducting a commercial activity or business, to do so in a manner (and for purposes) that a reasonable person would consider appropriate under the circumstances. Section 2.13(a) thru (k) of the Agreement expressly confirms that the Declarant shall be entitled to collect and use the purchaser's personal information [including without limitation, the purchaser's name, home address, e-mail address, telefax/telephone number, age, marital status, business registration number (where the purchaser is a corporation), residency

status and social insurance number (ie. for the limited purposes of being able to issue a T5 Interest Income Tax Information Return and/or NR-4 Non-Resident Withholding Tax Information Return with respect to the statutory interest earned or accrued on the purchaser's deposit monies, and required to be paid or credited to the purchaser, by the Declarant, in accordance with the Act), as well as the purchaser's desired suite design(s) and colour/finish selections], in connection with the completion of the purchase and sale transaction, and shall be entitled to disclose and/or distribute any or all of such personal information to certain named or identified entities for certain limited purposes outlined therein (for example to the condominium's cable television supplier, for future connection and billing purposes), on the express understanding that the Declarant shall not sell, disclose or distribute such personal information to anyone else, nor for any other purposes.

## XII. **Construction Matters**

When units are sold before the construction of the condominium has been substantially completed, both parties to the Agreement have diverse (if not diametrically opposite) interests to be protected, when it comes down to the size, design and layout of the dwelling unit. The purchaser naturally wants some certainty or assurance that the size, area, design and/or dimensions of the unit will, when substantially completed and ready for occupancy, be exactly as what's depicted or illustrated on the proposed floor plan layout of the suite attached as a schedule to the Agreement, without any qualification or variance whatsoever. Conversely, the Declarant will want to retain as much flexibility and variability as possible, due to the uncertainties and vagaries inherent in the development and construction process (eg. new requirements imposed by any governmental authorities or agencies impacting the size or design of the project, or any portion thereof) and/or any

potential unforeseen on-site conditions that might ultimately impact upon the final size, area, design and/or dimensions of the dwelling unit (or the floor plan layout of the suite), in an effort to avoid any allegation of a material change or a fundamental breach of contract that might entitle the purchaser to rescind the contract, and to expressly preclude any liability for damages (as a consequence of any variance in size that might negatively impact the market value or re-sale value of the purchased suite). The purchaser could conceivably wait until the condominium has been substantially constructed before buying his or her desired unit, and risk that the desired unit is still available for purchase at that later time, and that the purchase price hasn't increased substantially from the date of the initial launch of the marketing and sales campaign for the project. However, since unit prices in a steady or strong market tend to increase significantly over the course of the development and completion of the project, most prospective unit purchasers will be unwilling to wait until the construction of the project has been completed before they commit to the purchase, and accordingly accept this risk of potential changes down the road, to some extent.

In the first of two significant cases on point, namely the case of *Chapman v. HLS York Developments Ltd. (1988) 64 O.R. (2nd) 498,* the purchaser bought a new condominium unit where the size or area of the suite, as reflected on the floor plan layout, was represented to be 2,688 square feet, but after having moved in following closing, the purchaser discovered that the unit was only 2,166.5 square feet, and subsequently sued the vendor for damages for negligent misrepresentation regarding the size or area of the suite. Justice Donnelly confirmed that the size of the unit was of fundamental importance to the purchaser, and the vendor had negligently misrepresented the area of the condominium, and damages were therefore assessed against the declarant for the difference in value between the condominium unit agreed to be acquired, and the one that was ultimately

conveyed, commensurate with the proportionate difference between the actual size and the represented size of the suite, which ultimately resulted in a reduction or abatement in the total price equal to 16.25%. The second significant case on point is *Vitelli v. Villa Giardino Homes Ltd. (2001) Carswell Ont. 2648,* involving a motion for certification of all the original unit purchasers in this condominium project, as a class under the *Class Proceedings Act*, for the purposes of facilitating the pursuit of a claim for breach of contract and misrepresentation regarding the design and size of the purchased dwelling units. In this case, the sale materials included an artist's rendering, floor plans listing the floor area of each of the various model types, and a brochure setting out (in chart form) the various model types available, with the variances in the floor area being the most significant distinguishing feature between the basic model types. It was alleged before Mr. Justice Cumming that the building design of the condominium was changed without notice, resulting in a variance in floor area of the respective suites ranging between 14% to 16%. The defendants argued that the plaintiff's claims are based on the incorrect assertion that floor area, and net living space, are synonymous terms, and can be used interchangeably, contrary to the provisions of the agreement of purchase and sale under review, and contrary to the practice in the building industry. The defendants asserted that it was a common practice in Toronto to measure and sell new condominiums on the basis of the "floor area", being calculated so as to include surrounding walls and certain other areas or building components, as opposed to the floor area being the "actual living space". Justice Cumming observed that even if this was found to be a correct synopsis of the prevailing building industry practice, the issue nevertheless remained as to whether or not there was a misrepresentation of the size or area of the suite, based on the agreement of purchase and sale and the related sales materials. In the view of Justice Cumming, the critical question to be asked and resolved, looking

at the standard form of agreement of purchase and sale and the related sales materials, is what would a reasonable person on an objective basis understand himself or herself to be purchasing, in terms of the actual living space of the condominium unit? In the end, Justice Cumming certified the class proceeding due to the commonality of the alleged misrepresentations regarding the respective areas or sizes of the suites in this condominium project, and the fact that same raised issues relating to the knowledge and conduct of the defendants common to the class.

Clearly, the Declarant wants to avoid being embroiled in litigation similar to the foregoing cases, and wants to be sure that it will not be exposed to liability for any misrepresentation regarding the square footage or area of the suite being sold. In fact, some condominium developers will not put any specific total area measurement of the suite on any plans or brochures, but will only have the approximate dimensions of certain walls or rooms noted thereon. Accordingly, section 3.04(a) of the Agreement expressly confirms that:

a) the net suite area of the purchased unit, as may be represented or referred to by the Declarant's sales agent, is approximate only, and is generally measured to the outside of all exterior, corridor and stairwell walls, and to the centre line of all party or demising walls separating one dwelling unit from another, and that the purchaser should refer to Tarion's Builder Bulletin No. 22 for more information regarding such measurements;

b) the actual useable floor space may vary from any stated or represented floor area or gross floor area, and the extent of the actual or useable living space or net floor area within the confines of the dwelling unit may vary from any square footage or floor area measurement(s) so represented by or on behalf of the Declarant;

c) the floor area measurements of the suite are generally calculated based on the middle floor of the condominium building for each suite type, such that units on lower floors may have

less floor space due to thicker structural members and mechanical rooms, etc., while units on higher floors may have more floor space;

d) all details and dimensions of the proposed unit are approximate only, and that the purchase price shall not be subject to any adjustment or claim for compensation whatsoever, whether based upon the ultimate square footage of the dwelling unit, or the actual or useable living space within the confines of the dwelling unit, or the net floor area of the dwelling unit or otherwise, regardless of the extent of any variance or discrepancy with respect to the area (either gross or net) of the dwelling unit, or the dimensions of the unit; and

e) the ceiling height of the proposed unit (which may or may not be outlined or represented in Schedule "B" to the Agreement, describing the suite features and finishes), shall be measured from the upper surface of the concrete floor slab to the underside surface of the concrete ceiling slab, and that where ceiling bulkheads are ultimately installed within the unit, and/or where dropped ceilings are required (in areas such as foyers, hallways, closets, laundry rooms, storage rooms, bathrooms, powder rooms, dens, bedrooms, dining rooms, living rooms and/or kitchens), then the ceiling height of the dwelling unit in such areas will be less than the represented height, and the purchaser shall nevertheless be obliged to accept any such reduction in height without any abatement in the purchase price, and without any claim for compensation whatsoever, regardless of the significance in the height reduction.

The risk to the purchaser, in accepting the foregoing clause at a time when the unit has not been substantially completed and available for inspection by the purchaser to confirm the latter's satisfaction with the as-built condition, is that the purchaser might be legally compelled to accept a suite on closing that is different in size, design and/or ceiling height than what was originally

contemplated and bargained for, without having any right to a claim for compensation whatsoever, nor the right to resile from the transaction with impunity [unless the change is so significant that a court of competent jurisdiction would consider same to constitute a "material change" within the purview of section 74(2) of the Act]. Therefore, depending on the prevailing strength of the real estate market at the time of your desired negotiations, and the relative bargaining power of the respective parties to the contract, you might wish to consider inserting a clause that allows the Declarant to have a minimum stipulated variance in the ultimate size or area of the suite (ie. 2%, reflecting the tolerance permitted by Tarion's Builder Bulletin No. 22) and that provides for no compensation in such circumstances, and that expressly provides for a proportionate abatement in the purchase price for any variance in size that exceeds the aforementioned minimum threshold variance, along with the unilateral right in favour of the purchaser to terminate the transaction if the variance exceeds a maximum stipulated threshold variance (ie. 10%), such as the following proposed clause:

> "The vendor shall make all reasonable efforts to maintain the size, design and floor plan layout of the suite as per Schedule "*" annexed to this Agreement, and if the final or ultimate suite area is reduced by 2% or less from the proposed area of the suite as outlined, delineated or depicted in Schedule "*", then no compensation whatsoever shall be payable to the purchaser as a consequence thereof. However, if the final or ultimate suite area is reduced by more than 2% from the proposed area of the suite as outlined, delineated or depicted in Schedule "*", then the purchaser shall receive an abatement in the purchase price reflecting that percentage of the purchase price equal to the percentage of the disparity or difference in the ultimate size of the suite [eg. a variance of 3% in the

> ultimate size will result in an abatement equal to 3% of the purchase price], and which abatement shall be reflected or manifested as a credit to the purchaser in the statement of adjustments on final closing. Furthermore, if the reduction in the total size or area of the suite is more than 10%, then the purchaser shall have the unilateral right and option of either receiving an abatement in the purchase price as hereinbefore described and calculated, or alternatively rescinding the purchase and sale transaction and terminating this Agreement, whereupon the purchaser shall receive a full refund of all deposit monies paid to date (including all monies paid for any extras or upgrades), together with all interest accrued thereon at the rate prescribed under the Act."

The same formula can be utilized with respect to a reduction in the ceiling height, or any other objective measurement that would cause a reasonable purchaser to be concerned if it were to be substantially altered or reduced, to the ultimate prejudice of the purchaser. Keep in mind, however, that with respect to ceiling bulkheads or structural columns, and their location within the confines of the dwelling unit, the Declarant may have little or no flexibility to alter or modify same, because the placement of columns (if any) are often required by the structural engineer for additional structural support purposes, while bulkheads are the direct result or by-product of the specific engineering plans and specifications involving the mechanical and ventilation servicing systems designed for (and installed within) the project, in order to work optimally for the benefit of all the units in the condominium. Just like units facing a southerly exposure that will attract more direct sunlight tend to be more attractive in the marketplace and often garner a higher price as a consequence thereof, notionally the sale price of a unit containing significant bulkheads ought to

reflect the potential diminution in market value, if any, that such bulkheads might engender because they are not aesthetically pleasing, and tend to negatively impact the feeling of openness and/or impinge on the overall size of the suite. Nevertheless, in a strong real estate market or "vendor's market", the Declarant may be unwilling to concede to any abatements in the purchase price despite the existence of significant bulkheads situate within the suite, and the purchaser will be relegated to the choice of ultimately accepting the Declarant's stipulated price or rescinding the transaction with the initial 10 day cooling off period.

The balance of section 3.04 of the Agreement essentially deals with the completion of the project and the statutory warranties provided by the Declarant in accordance with the provisions and requirements of the *Ontario New Home Warranties Plan Act R.S.O. 1990, as amended*, including without limitation, the Tarion Warranty Corporation pre-delivery inspection, and how disputes concerning outstanding construction deficiencies will be resolved. Furthermore, section 3.04(e) of the Agreement comprises a "standard alteration clause" that purports to give the Declarant needed flexibility in completing the project, and the corresponding ability to:

a) change the municipal address or the unit and/or level number ascribed to the dwelling unit;

b) change, vary or modify the plans and specifications pertaining to the dwelling unit or the condominium project (including any change to the total number of dwelling units or other ancillary units intended to be created within the condominium, or to the number of levels or floors within the condominium, as well as any change to the design, style, size and/or configuration of any dwelling unit);

c) change, vary or modify the number, size and location of any windows and/or any heating, ventilation and/or air-conditioning equipment, fixtures and/or installations, as well as any

columns and/or bulkheads within (or adjacent to) the dwelling unit, from the number, size and/or location of same as displayed or illustrated in any sales brochure or floor plan layout delivered or shown to the purchaser; and/or

d) change the layout of the unit such that same is a mirror image of the layout illustrated in any schedule to the Agreement (or in any sales brochure or other marketing materials);

with the purchaser having no claim or cause of action against the Declarant or its sales representatives (whether based or founded in contract law, tort law or in equity) for any such changes, deletions, alterations or modifications, and without the purchaser being entitled to any abatement or reduction in the purchase price whatsoever as a consequence thereof, nor any notice thereof (unless any such change, deletion, alteration or modification to the said plans and specifications is material or substantial in nature, and significantly affects the fundamental character, use or value of the purchased dwelling unit and/or the condominium, in which case the Declarant shall be obliged to notify the purchaser in writing of such change, deletion, alteration or modification as soon as reasonably possible after the Declarant proposes to implement same, or otherwise becomes aware of same). Section 3.04 (e) of the Agreement also expressly provides that where any such change, deletion, alteration or modification to the said plans and specifications is material or substantial in nature, then the purchaser's only recourse and remedy shall be the termination of the Agreement prior to the closing date (and specifically within 10 days after the purchaser is notified of same, or otherwise becomes aware of such material change), and the concomitant return of the purchaser's deposit monies, together with interest accrued thereon at the rate prescribed by the Act. Furthermore, the Agreement expressly provides that if the dwelling unit is subsequently re-designed by the Declarant as a result of (or in connection with) the re-design of the entire condominium building or a portion thereof, then the purchaser will be offered the option of either transferring to

another suite, with an appropriate adjustment in the purchase price where required, or alternatively being released from the obligations arising under the Agreement and getting a full refund of all deposit monies theretofore paid (together with all statutory interest earned or accrued thereon, calculated at the prescribed rate), but under no circumstances shall the purchaser be entitled to claim any damages or compensation whatsoever for (or in connection with) any such re-design, or as a consequence thereof, nor shall the purchaser be entitled to any abatement or reduction in the purchase price whatsoever in connection therewith, regardless of how substantial, significant or material the results, effect or impact of the re-design may be to the purchaser.

Interestingly enough, a clause somewhat similar to the foregoing "alteration clause" was analyzed by Justice Sharp in the case of *Grinberg v. Law Development Group (Thornhill) Ltd. (1996) 2 R.P.R. (3d) 209,* where the purchaser of a dwelling unit in a new condominium project was disappointed to discover that the actual unit, as constructed, contained 9 fewer windows than the artist's conception drawing of the suite (comprising part of the marketing materials), which depicted that the unit would be built with 23 windows, because the condominium building was sited in close proximity to an adjacent building, and the Ontario Building Code did not permit windows along that entire side of the building. The purchaser applied for an order rescinding the contract, and for the return of all deposits paid, based on the developer's material misrepresentation regarding the number of windows to be included within the suite, which induced the purchaser to enter into the contract. In granting the remedy of rescission, based on the material misrepresentation contained in the marketing brochure regarding the number of windows, upon which the purchaser had reasonably relied, the court held that the developer knew, at the time that the contract was entered into, that due to the proximity of the condominium project to the adjacent building, there was a real risk that it would have to build these units without the windows as shown in its marketing brochure, and the

developer failed to take adequate steps to make the purchaser aware of such risk. Justice Sharp also reviewed the developer's "alteration clause" in the agreement of purchase and sale, which expressly permitted the developer to make unilateral alterations to the plans and specifications for the dwelling unit, and in respect of the condominium project. Justice Sharp concluded that the specific wording of the "alteration clause", taken as a whole, was insufficient to permit the developer to vary the construction of the unit to the extent it had, with respect to the windows. In other words, the language in the alteration clause judicially considered did not contemplate or address changes or variances in the number of windows, nor any change or variance of such significance. As you can see, section 3.04(e) of the Agreement does, in fact, specifically address changes to the number of windows in the suite, including changes that would be considered material or significant in nature, and from the Declarant's perspective, it is obviously hoped that such a "beefed up" alteration clause will successfully withstand judicial scrutiny, if and when challenged, even when the equities involved in the case being considered (based on the specific facts under review) may not be favourable to the Declarant.

## XIII. **Finishes, Appliances & Extras**

The main purpose behind the provisions outlined in section 3.05 of the Agreement which deal with the installation of suite finishes, appliances and extras, is to identify what specific suite finishes and/or appliances are included in the purchase price, and thereby relegate any other finishes or appliances desired to be installed within the unit as extras or upgrades that have to be specifically negotiated for, with the Declarant, and paid for separately by the purchaser. Since section 81(2) of the Act confirms that all monies paid on account of the purchase of personal property included in the proposed unit that is to be permanently affixed to land (such as any built-in appliances and/or

cabinetry, and any other fixtures) are impressed with a statutory trust, and must therefore be placed and held in a designated trust account monitored by a prescribed trustee, many condominium developers will deal with the purchase of extras and upgrades by way of an addendum to the agreement of purchase and sale, that effectively increases the total purchase price by the aggregate of all such extras and upgrades so ordered, and will correspondingly treat all monies paid for such extras and upgrades as additional deposits. The foregoing enables the unit purchaser to finance the acquisition of such extras and upgrades, as part of the increased purchase price for the unit (inclusive of such extras and upgrades), and at the same time, statutory interest will accrue and be payable by the Declarant with respect to all additional deposit monies so paid by the unit purchaser on account of such extras and upgrades.

Frequently, the Declarant's model suite contains many upgrades and special finishing materials to show prospective purchasers what the dwelling unit might ultimately look like with all the bells and whistles, and accordingly it's important for the Agreement to expressly confirm that any finishing materials contained in any model suite or sales office are for display purposes only, and may not reflect the actual type, quality or grade of materials and/or finishes that will ultimately be included in the dwelling unit.

To expedite the orderly completion of the condominium, and correspondingly avoid delays in the scheduled occupancy dates, it is imperative that the colour and finish selections for each suite be finalized by the respective unit purchasers on or about the time that the condominium building reaches the roof completion stage, because the interior suite finishing work is ordinarily conducted and coordinated on a floor-by-floor basis, moving up the building as the finishing work progresses. Accordingly, the Agreement will invariably oblige the purchaser to notify the Declarant within a specified time from the date of the Declarant's request, as to the flooring, paint colours and/or

cabinet finishes (or any other colours and finishes) so selected or chosen by the purchaser from the Declarant's samples, failing which the Declarant may, at its option, make such selections on behalf of the purchaser, and the purchaser shall be deemed to have accepted same without qualification. The provisions of sections 3.05 (b) and (c) of the Agreement reflect the foregoing, and confirm that the Declarant shall have no obligation to make any such selections, and shall not be held liable for any delays in having the dwelling unit substantially completed by the firm occupancy date due to the purchaser's failure to make such colour and finish selections in a timely manner.

When it comes to extras and upgrades to the suite so desired by the purchaser, the main issues or concerns revolve around the liability for the quality of the extras or upgrades so installed, and any delays encountered with respect to the installation of same, or the inability to ultimately install same altogether. Sections 3.05(d), (e) and (f) of the Agreement are designed to specifically address what will happen if and when the purchaser chooses to make changes to the standard materials and specifications for the dwelling unit which are otherwise provided by the Declarant, and expressly confirms that:

a) if the purchaser is acquiring extras or upgrades to the unit, then the Declarant shall not be held liable for any delays in having the dwelling unit substantially completed by the firm occupancy date, provided such delays are as a direct result of such up-grading work (or any necessary revised work in connection therewith) not being completed in time;

b) the Declarant shall not be responsible or liable in any way for the quality of (and/or the workmanship with respect to) any extras or upgrades, unless same are supplied and/or constructed directly by the Declarant, and then only if the Declarant specifically agrees in writing to be responsible or liable for same (in recognition of the fact that many extras and/or upgraded work, especially with respect to high-end luxury suites, are often supplied

by third party contractors retained directly by the purchaser, or through the purchaser's design consultant, rather than by or through the Declarant); and

c) if any of the extras or upgrades ordered by the purchaser, through the Declarant, are not supplied or completed, for whatever reason, by the scheduled closing date, then the Declarant shall refund to the purchaser, either before or after the closing date (but in any event forthwith following the Declarant's determination that the extras or upgrades cannot reasonably be supplied or completed by the closing date, or within a reasonable period of time thereafter) all amounts paid by the purchaser in connection with same, and the amount so refunded (or for which, at the Declarant's option, the purchaser shall receive a credit in the statement of adjustments on closing) shall be accepted by the purchaser as full and final settlement of any claim that the purchaser may have with respect to the extras and/or upgrades.

In those instances where the extras and upgrades are not ordered directly from or through the Declarant, it is imperative that the purchaser provide the Declarant with all required details regarding same, so that the Declarant is in a position to assess whether any revisions to the plans and specifications for the dwelling unit are needed, and/or whether any additional up-graded materials or changed items are required from other tradesmen or suppliers, in order to facilitate or expedite the completion and installation of the extras or upgrades. Section 3.05(e) of the Agreement addresses the foregoing concern, and provides that if any such revisions or additional up-graded materials or changed items are required, as determined by the Declarant in its sole and unfettered discretion, then the purchaser shall be obliged to pay for all such additional costs and expenses attributable to (and/or incidental to) the completion and installation of same.

Occasionally, a purchaser may have the desire or inclination, as well as the necessary resources, to finish his or her suite using the purchaser's own trades, and wishes to complete the finishing work prior to the final closing of the unit sale transaction. This scenario is fraught with risks to the Declarant, because the purchaser may be installing finishes that do not appeal to other potential buyers, and said purchaser may ultimately default in his or her contractual obligations to the Declarant (ie. by not being able or willing to pay the entire balance of the purchase price due on the scheduled final closing date), thereby compelling the Declarant to find another purchaser of the suite who is content to accept (and live with) the former purchaser's finishing work, failing which the Declarant may have to remove same altogether (at more cost to the Declarant). Alternatively, the purchaser's trades may cause physical damage to the unit (or to other units or common element areas) in the course of undertaking and completing the purchaser's desired finishing work, or the purchaser may fail to pay the trades for the finishing work so completed, and consequently outstanding construction liens may be claimed against the purchased unit or the project lands in connection therewith. The purchaser's finishing work may also negate Tarion's warranty coverage for the unit, at least with respect to the finishing work so directed and undertaken by or on behalf of the purchaser or the purchaser's own trades. Section 3.05 (f) of the Agreement is intended to address the foregoing concerns, and confirms that prior to the final closing of the transaction, the purchaser shall not make or undertake any work or improvement to the dwelling unit (or to any exclusive use common element area appurtenant to the unit), whether in the nature of an addition, alteration, improvement or otherwise, without the prior written consent of the Declarant which may be unilaterally and arbitrarily withheld, and where any such work or improvement has been so approved, the purchaser shall then be obliged to promptly pay all outstanding accounts and invoices issued by any of the purchaser's tradesmen, contractors or material suppliers who may be lawfully

entitled to register a construction lien against the dwelling unit and/or the project lands. In the event that any such lien is registered on title, then the purchaser shall be obliged to forthwith discharge and remove same at the purchaser's sole cost and expense. Typically, as a prerequisite to the Declarant ever consenting to such finishing work desired to be undertaken by the purchaser prior to closing, the Declarant will demand a complete indemnity from the purchaser, for all costs, claims, damages and/or liabilities which the Declarant may suffer or incur in connection with, or as a consequence of, such work being undertaken, including an indemnity with respect to all construction lien claims arising therefrom, and with respect to any damage caused to any other units or common elements thereby, together with an acknowledgement that the purchaser's finishing work will not be warranted or covered by Tarion Warranty Corporation, and the purchaser shall not make or pursue any claim to or with Tarion in connection therewith.

Although I'm not an expert with respect to wood, marble or granite, I've learned over the years that wood finishes, carpeting and tiles (including marble or granite slabs used for flooring, walls or counters) often experience minor colour variations or different shades in dye lots, when such materials are produced, assembled or manufactured, including variations in the natural grain or veins of such materials, and when unit purchasers are selecting such materials from small or individual samples, it's extremely difficult form them to discern (or to anticipate) such variations or shading differences. Accordingly, section 3.05(g) of the Agreement is intended to obviate any claims for compensation that might otherwise be pursued against the Declarant, as a result of any such variations in the colour, texture and/or shading of the finishing materials so selected from the Declarant's samples, which the purchaser may find unappealing or objectionable, but over which the Declarant has little or no control. In particular, section 3.05(g) of the Agreement confirms that:

a) the colour, finish, grain and/or veining of wood products (including hardwood flooring) and/or natural stone materials may vary slightly from that of the wood and/or stone materials selected by the purchaser from the Declarant's samples, inasmuch as wood and stone are natural materials which inherently cannot be precisely replicated or matched with other pieces or samples, thereby accounting for variations of colour, finish, grain and/or veining, even within the same lot or section of wood or stone (as the case may be);

b) the various types of flooring that may be installed within the unit (such as carpeting, marble, granite, ceramic tile and/or hardwood floors, etc.) may result in different floor heights or levels between rooms (or areas within) the unit having different flooring materials (for example, a height or level differential between ceramic floor tiles in the kitchen, and hardwood flooring in the adjacent livingroom), and in this regard the Declarant shall be entitled to use or install appropriate reducers in the transitional areas between rooms having different flooring materials; and

c) the purchaser shall be estopped from claiming any entitlement to an abatement in the purchase price, or any replacement (in whole or in part) of the carpet, hardwood flooring, tiles, kitchen cabinetry, manufactured finishing materials or wood products or flooring so installed, or any other relief or claim for compensation from or against the Declarant or Tarion Warranty Corporation, as a result of the variations hereinbefore described or contemplated.

XIV. **Title**

The process of developing a residential high-rise condominium project, particularly a twin tower or multi-phased project with shared facilities that is the subject of the Agreement under review

by this paper, necessarily entails the examination and input of numerous governmental authorities or agencies (at both municipal and provincial levels), and the corresponding potential for numerous agreements to be registered on title governing the servicing, siting and ongoing maintenance and repair of various facilities or matters pertinent to the condominium project, not to mention one or more reciprocal agreements governing the use and enjoyment of various shared recreational amenities, facilities and/or easement areas, and the cost-sharing arrangements relative to the operation, maintenance and repair of same. In light of the foregoing, the title provisions in the standard form of agreement for the sale of a new condominium is, invariably, extremely broad and expansive, and section 4.01 of the Agreement is no exception to that rule. Simply put, from the Declarant's perspective, the title proviso clause is intended to cover every reasonably foreseeable or conceivable type of document or instrument that might be registered on title to the purchased unit, as a permitted encumbrance, by the time the condominium is registered, and which the purchaser must be contractually obliged to assume, so that the Declarant cannot be compelled to discharge or remove same in whole or in part ... in other words, the title must practically be requisition-proof. The foregoing reflects the commercial realities of the condominium development process, and not only the Declarant's inability to avoid the imposition of various agreements, easements, potential encroachments and/or restrictions on title, as and when required by various governmental authorities, agencies or adjacent land owners, but also the Declarant's corresponding inability to discharge or remove same (in whole or in part) from the title to the project lands. Accordingly, while section 4.01 of the Agreement is intended to deal with certain permitted encumbrances in a generic sense, section 4.02 of the Agreement is designed to deal with agreements or instruments that are more project-specific.

Most, if not all, condominium projects are currently financed by a construction lender (or a lead construction lender that acts as an agent on behalf of a group of lenders who are participating in the financing of the construction of the project), and the security for such financing typically includes, amongst other things, a first fixed charge against the project lands, often collaterally secured by a general assignment of rents and leases registered against the property concurrently with the mortgage. In addition, for new residential condominium projects that are warranted pursuant to the *Ontario New Home Warranties Plan Act R.S.O. 1990, as amended,* frequently a warranty bond securing various obligations of the Declarant to and in favour of Tarion Warranty Corporation will be provided by a surety company (which may also be providing excess condominium deposit insurance coverage for the purchasers' deposits), and in such case, the surety company will be obtaining a second mortgage or charge against the project lands, subordinate only to the construction financing security. In addition, there may be one or more other secured lenders involved in the financing of the construction and completion of the project, including perhaps a mezzanine lender, or other equity lenders (including any of the joint venture partners comprising the Declarant who have contributed funds into the project, either in connection with the acquisition of the project lands or to defray various projects costs), whose mortgage security will rank behind both the construction lender's security and the surety company's mortgage or charge. Furthermore, prior to the commencement of any construction loan advances, there will often be a priority and postponement agreement in place that's been entered into by the Declarant with all of the outstanding blanket mortgagees, confirming the relative priorities of their respective security against the project lands (and all other assets of the Declarant), and outlining the respective obligations of such secured parties to one another in connection with the construction and completion of the condominium project, and the ultimate application and distribution of all net closing proceeds received in connection with the

final closing of the unit sale transactions. In order to ensure the orderly completion of the project, and the successful final closing of the unit sale transactions, the aforementioned priority agreement will invariably confirm that the net closing proceeds received by the Declarant's solicitor on the final closing of each unit sale transaction will be distributed in the following order of priority, namely to the construction lender in first position, until such time as the entire outstanding construction loan indebtedness has been fully repaid, and the construction lender's security has been fully discharged; thereafter to the surety company in second position, until such time as all outstanding obligations of the Declarant to the surety have been fully secured and/or paid; thereafter to any subordinate lender or equity lender (as the case may be), until such time as the entire outstanding indebtedness of the Declarant to such party has been fully repaid, and its outstanding mortgage security has been fully discharged; and thereafter to the Declarant, for its own use and purposes. In order to successfully close all the unit sale transactions, each of the secured parties must commit (once the condominium has been completed and registered, and on the precipice of final closings) to provide partial discharges of their respective mortgage security to the Declarant's solicitor, on a per unit basis (or an e-reg authorization permitting the Declarant's solicitor to register a partial discharge on a per unit basis, on their respective behalf) following the Declarant's solicitor's receipt of the balance due on closing from each unit purchaser, in accordance with the statement of adjustments prepared by or on behalf of the Declarant in connection therewith. In exchange, the Declarant's solicitor must commit to the respective blanket mortgagees that it shall remit the net closing proceeds so received on the final closing of each unit sale transaction to the respective outstanding blanket mortgagees, but only in the order of priority described above. Therefore, the Declarant's solicitor should be in possession of the requisite partial discharges (or the required e-reg authorization) from each of the outstanding blanket mortgagees, on or before the final closing of each unit sale transaction, so that

the Declarant's solicitor can properly provide (and will be in a position to fulfill) his or her personal undertaking to the purchaser's solicitor regarding the discharge of all outstanding mortgages against the purchased dwelling unit (and any ancillary parking or locker units), in order complete the unit sale transaction.

The foregoing information is exceedingly relevant, when considering the manner in which outstanding mortgages (that are not intended to be assumed by the unit purchaser on or after closing) are specifically dealt with in the title provisions of the Agreement. Section 4.01(e) of the Agreement expressly obliges the unit purchaser to accept title, on final closing, subject to one or more outstanding mortgages and any security collateral thereto (such as any general assignments of rents and/or leases), whether institutional mortgagees or otherwise (since the surety company providing the Tarion Warranty bond, and some or all of the subordinated equity lenders holding mortgage security against the project lands, may not technically qualify as "institutional lenders"), and to accept the Declarant's solicitor's personal written undertaking to obtain and register a partial discharge of the said outstanding blanket mortgages in respect of the purchased dwelling unit (and any ancillary units acquired in connection therewith), within a reasonable time after the later of the final closing date, or the date that all monies owing on account of the purchase price (including the balance due on closing as per the statement of adjustments prepared by or on behalf of the Declarant) have been paid in full by the purchaser. Furthermore, as an added assurance or comfort to the purchaser's acceptance of the Declarant's solicitor's undertaking, the Agreement also obliges the Declarant to provide the unit purchaser, on or before final closing, with a letter from each of the outstanding mortgagees (or from their respective solicitors) confirming that within a reasonable time after the final closing date and the purchaser's payment of all monies owing on account of the

purchase price, a partial discharge of the outstanding mortgage security in respect of the dwelling unit shall be delivered to the Declarant's solicitor for the latter's registration on title (or alternatively, an irrevocable e-reg authorization and direction will be executed and delivered by the said mortgagee to the Declarant's solicitor, entitling the latter to electronically register such partial discharge). Please note that unlike the OREA form, there is no requirement in the Agreement for the Declarant to provide a mortgage statement for discharge purposes from each outstanding mortgagee, because the outstanding indebtedness secured under each of the outstanding blanket mortgages will invariably exceed the balance due on closing from any unit purchaser, and frankly the need for such a statement is totally obviated by the Declarant's solicitor's personal undertaking, which is not at all qualified by any reference to certain monies payable pursuant to a mortgage discharge statement. If, for some reason, the agreement of purchase and sale that's been entered into by your client does not provide or contemplate the Declarant's solicitor's personal undertaking to discharge each of the outstanding blanket mortgages shortly after final closing, but rather only provides for the Declarant's undertaking in that regard, then you might wish to consider negotiating an appropriate amendment to the contract during the 10 day cooling off period, because the undertaking of the Declarant's solicitor may be preferable to the undertaking of the Declarant, inasmuch as the solicitor's undertaking is more easily enforceable, through the auspices of the Law Society.

Furthermore, despite the fact that the construction lender will only commit to provide construction financing for the project based upon a threshold level of unit sales in the project (usually approximately 75% of the total number of dwelling units in the project) having been obtained, at prevailing market prices or at stipulated sale prices approved by the lender, and notwithstanding the fact that the agreements of purchase and sale will have been entered into prior to the construction

lender's security being in place, the construction lender will nevertheless always insist on having its mortgage security (and all loan advances to be made thereunder from time to time) take absolute priority over any such agreements. The foregoing is reflected in section 4.02(c) of the Agreement, and thereby allows the construction lender to subsequently exercise power of sale proceedings in the event of a default by the Declarant under the construction lender's security, which would effectively cut out the interests of all existing unit purchasers arising under all outstanding agreements of purchase and sale. Since such a clause is ordinarily demanded by the construction lender, as a prerequisite to the Declarant obtaining a binding commitment for construction financing, the Declarant has no real flexibility to delete, restrict or amend this clause whatsoever, while the construction loan is still outstanding.

Finally, leaving aside any registrations involving municipal agreements or development-related requirements imposed in connection with the project (such as the Site Plan Agreement or the Section 37 Agreement as hereinbefore described) which may be registered after the construction lender's security is in place, as encumbrances expressly permitted by the construction lender, I wish to point out that any other registrations on title thereafter may inhibit, restrict or delay the construction loan advances by the construction lender, and correspondingly delay the payment of the trades and the concomitant completion of the project, which the Declarant will want to avoid at all costs. Consequently, section 4.02 (d) of the Agreement expressly prohibits the purchaser from registering any notice, caution, certificate of pending litigation or other similar instrument on title, until after the completion of the purchase and sale transaction. Such a prohibition should be enforceable in light of the remaining provisions of this section, which expressly confirm that the purchaser shall be deemed not to have any legal, equitable or proprietary interest in the purchased units and/or the project lands (or any portion thereof) whatsoever until the entire purchase price has

been paid to the Declarant's solicitors, and that the purchaser's only remedy against the Declarant for the latter's breach of the Agreement so committed by the Declarant shall be the rescission of the contract, and a claim for the return of the purchaser's deposit monies (inclusive of all monies paid for any extras or upgrades to the dwelling unit), together with all interest earned or accrued thereon at the rate prescribed under the Act, but not a claim for specific performance and/or damages. Any registration by or on behalf of the purchaser in contravention of the foregoing will constitute a fundamental breach of contract, entitling the Declarant to exercise any or all of the rights, remedies and/or powers stipulated in section 5.06 of the Agreement.

## XV. **Tender - General**

The purpose underlying the tender clause in any agreement of purchase and sale is to confirm the general parameters of the tender process, regarding the exchange or delivery of documents and/or monies between the parties to the agreement, in connection with the completion of the purchase and sale transaction contemplated thereunder, and to confirm the form of money or legal tender to be delivered, as well as where and when the tender should take place. Accordingly, section 4.04 of the Agreement confirms that any monies payable by the purchaser must be tendered or delivered by way of a certified cheque made payable to the Declarant's solicitors in trust, and drawn upon the trust account of the purchaser's solicitor [rather than by way of any cheque(s) issued by the purchaser directly, or by bank draft, in light of LawPRO's notices to the profession about the increasing frequency of fraudulent personal cheques and bank drafts involved in real estate transactions], and that the tender must take place between the hours of 1:00 and 2:00 p.m. in the afternoon of the firm occupancy date or final closing date (as the case may be), at the office of the Declarant's solicitor. Section 4.04 of the Agreement also confirms that keys to the dwelling unit

need not be personally tendered upon the purchaser or the purchaser's solicitor, but rather shall be released to the purchaser directly from the Declarant's sales office or construction site office, as soon as the transaction has been completed, either on an interim occupancy or outright final closing basis.

## XVI. **Electronic Registration of Documents & Tender**

The tender process involving registerable documents in connection with the purchase and sale transaction must reflect the advent of the Teraview Electronic Registration System in Ontario, and the rules adopted by the Law Society of Upper Canada in connection therewith, including the Law Society's protocol surrounding the document registration agreement exchanged between the solicitors for the respective parties to the agreement of purchase and sale. The Declarant will want to impose a degree of certainty regarding what will constitute a valid, sufficient or effective tender, in order to ensure that once such a tender has been performed by the Declarant's solicitor, the onus will then be placed squarely on the shoulders of the purchaser to rectify any outstanding default or risk the termination of the transaction as a consequence thereof. Accordingly, section 4.05 of the Agreement confirms exactly what either party is obliged to provide to the other on the closing of the purchase and sale transaction, and section 4.05 (f)(i) of the Agreement outlines precisely when an effective tender shall be deemed to have been validly made by the Declarant upon the purchaser, in light of the electronic registration regime and the document registration agreement governing both parties. Specifically, an effective tender will be deemed to have been made by the Declarant when the Declarant's solicitor has:

a) delivered all closing documents and/or any requisite funds (if applicable) to the purchaser's solicitor in accordance with the provisions of the governing document registration agreement;

b) advised the purchaser's solicitor, in writing, that the Declarant is ready, willing and able to complete the transaction in accordance with the terms and provisions of the Agreement, and that the keys to the dwelling unit have already been (or will be) made available for pickup by the purchaser at the Declarant's sales office or site office forthwith following the interim occupancy closing or final closing of the transaction (as the case may be) completed in accordance with the provisions of the Agreement; and

c) completed all steps required by the Teraview Electronic Registration System that can be performed or undertaken by the Declarant's solicitor without the cooperation or participation of the purchaser's solicitor, in order to complete the transaction, and specifically when the Declarant's solicitor has electronically "signed" the transfer/deed for "completeness" and has granted access thereto to the purchaser's solicitor (but without the Declarant's solicitor, or his or her law clerk, releasing the transfer for registration by the purchaser's solicitor);

without the necessity of personally attending upon the purchaser or the purchaser's solicitor with the aforementioned documents, keys and/or funds, and without any requirement to have an independent witness evidencing the foregoing.

In addition, section 4.05(d)(i) of the Agreement confirms that any extension of the interim occupancy closing date or final closing date (as the case may be) due to the purchaser's inability or unwillingness to complete such closing on the date so scheduled, will correspondingly entitle the Declarant to charge interest, on a per diem basis, for every day of the agreed-upon extension period, at the rate of 12% per annum, calculated annually not in advance (keeping in mind that the Declarant will continue to be obliged to pay the construction lender interest on the outstanding construction

loan at its stipulated rate, and will not have had the benefit of using the closing proceeds owing by the purchaser to pay down the construction loan indebtedness, *pro tanto*).

Finally, in recognition of the fact that the Declarant should logically not be further penalized when the purchaser is in default under the Agreement, under those circumstances where the Declarant has agreed to provide the purchaser with an opportunity to rectify his or her outstanding default, section 4.05(d)(ii) confirms that the Declarant shall likewise be entitled to charge interest at the rate of 12% per annum, calculated annually not in advance, on the entire outstanding amount that is due and owing (or otherwise payable) on the interim occupancy closing date or final closing date (as the case may be), to and until the date of the full rectification of the purchaser's outstanding default.

## XVII. **Requisitions**

Typically, the intent behind the requisition clause in any agreement of purchase and sale is to confirm the date by which the purchaser must submit to the vendor, in writing, any requisitions with respect to title or outstanding work orders (or regarding any other matter or concern pertaining to the transaction), and to confirm the resultant termination of the transaction in the event that the vendor is unable or unwilling to remove, remedy or satisfy (or alternatively unable to obtain title insurance for, or in respect of) any outstanding title encumbrance or other matter so requisitioned, through no fault or neglect of the vendor (which provision is often called the "**Annulment Clause**"). Naturally, the propriety of any outstanding title requisition submitted on behalf of the purchaser will be governed by the title proviso clause, in terms of what the purchaser is contractually bound to accept or assume on closing, as a permitted encumbrance. Where an outstanding title requisition is

not covered or adequately addressed by the title provisions of the contract, and where the vendor cannot answer or satisfy any such requisition, after making all reasonable efforts (and engaging or applying all reasonable resources) to do so, then the vendor may be entitled to resile from the transaction by relying on the Annulment Clause, as long as the vendor is not doing so arbitrarily or capriciously, inasmuch as there is a common law duty of good faith imposed upon both parties to the contract, requiring each of them to act, at all times, in a *bona fide* manner with respect to the performance and fulfillment of all of their respective outstanding obligations under the contract, including the satisfaction of all outstanding requisitions [see the Supreme Court of Canada decision in *Mason v. Freedman (1956) 4 D.L.R. (2d) 576*, and the Ontario Court of Appeal decision in *LeMesurier v. Andrus (1986) 25 D.L.R. (4th) 424*].

Section 4.06 of the Agreement gives the purchaser up to 15 days prior to the closing date within which to submit all outstanding requisitions. This time frame is exceedingly extensive in favour of the purchaser, in recognition of the fact that the parcel pages for the purchased units will not be created by the Land Titles Office and available for review until approximately 2 weeks after the condominium has been registered, thereby leaving only a few weeks thereafter before the final closing is scheduled to transpire. Moreover, the Declarant ought not to be concerned with any outstanding title requisitions, since the title proviso clause in the Agreement (outlining the permitted encumbrances which the purchaser is contractually oblige to assume or accept, on closing) should be sufficiently extensive to obviate or preclude any serious concern about last minute requisitions that cannot be answered or satisfactorily addressed.

Finally, in light of the fact that all units in the condominium project will be encumbered by the same registrations at the time of the scheduled bulk final closings of the unit sale transactions,

it makes logical sense (from a time-efficiency and ease of administration perspective) for the Declarant's solicitor to be able to respond to any requisitions submitted by any purchaser's solicitor, by way of a common or standard title memorandum or title advice statement, which will often include copies of all clearance letters and certificates obtained by the Declarant's solicitor in connection with the project. Accordingly, section 4.06(a) of the Agreement expressly confirms that the Declarant shall be entitled to respond to any and all requisitions so submitted through the use of a standard title advice statement.

## XVIII. **The Vendor's Electronic Closing System**

Most law firms acting for condominium developers, particularly in the Greater Toronto Area, employ some form of computerized document production software, which not only pre-populates the requisite information about the project, the purchaser, the specific dwelling unit (and ancillary units) being acquired, and the purchaser's solicitor, in all of the relevant interim-occupancy and final closing documents, and forms, prepared or provided by the Declarant's solicitor, as and where required, but also electronically transmits that information to a designated portal through an internet-based or web-based system, so that the completed documentation for closing can be accessed (through the purchaser's solicitor's personal security pass code), and thereafter downloaded and reviewed by the purchaser's solicitor, for ultimate execution by the purchaser. Accordingly, section 4.07 of the Agreement confirms that the Declarant's solicitor will be using an electronic closing system for the completion of the purchase and sale transaction, and the purchaser expressly acknowledges and agrees that the Declarant's delivery of all of the interim and final closing documents (including the condominium documents, and any corrigenda to the disclosure

statement, any revised budget statement and/or status certificate, along with the accompanying documentation mandated by the Act) may be delivered electronically through the Declarant's solicitor's electronic closing system. The foregoing requires the purchaser's solicitor to become a registered user of the aforementioned electronic closing system, at no cost or expense to the purchaser or the purchaser's solicitor, in order to obtain a secure personal pass code so as to access and download the relevant documents from the electronic closing website. Should the purchaser's solicitor be unable or unwilling to do so, thereby requiring the closing package to be prepared manually and couriered to the office of the purchaser's solicitor, then the purchaser will be charged a fee (in the statement of adjustments) to reimburse the Declarant for all additional legal fees and ancillary disbursements incurred in order to implement such additional time-consuming non-electronic procedures to complete the transaction.

## XIX. **Consent to the Delivery of Documents in Electronic Format**

The *Electronic Commerce Act 2000, S.O. 2000, as amended*, establishes formal rules for the exchange of information and documentation electronically (using e-mails, faxes and other electronic means of communication), that effectively gives (with some limited exceptions) electronic documents the same legal force and effect as their paper-based counterparts, provided that the parties who use, provide or accept such electronic documents consent thereto (and such consent may be expressed in writing, or implied or inferred from a person's conduct). One of the express exceptions to the electronic format is an agreement of purchase and sale which creates or transfers an interest in land, and requires registration to be effective against third parties. Although the agreement of purchase and sale itself must be in paper format, all of the interim and final closing documents may,

with the consent of both parties, be completed and transmitted electronically. Section 4.08 of the Agreement is intended to simply confirm the purchaser's express consent to the delivery by the Declarant or the Declarant's solicitor of all condominium documents, together with all closing documents contemplated by the Agreement, in electronic format.

## XX. **Execution of Documents**

Several issues need to be addressed or confirmed when considering the execution of documents, including the Declarant's ability to expeditiously implement any prescribed security for the purchaser's deposits, so that such deposit monies are properly secured or insured, and can correspondingly be accessed by the Declarant, as soon as reasonably possible. Since the purchaser is legally the "insured" party, the purchaser's execution of the deposit receipt issued by Tarion Warranty Corporation (in connection with the first $20,000 of deposit monies so paid), and any excess condominium insurance policy (issued by the Declarant's designated surety provider, in respect of all deposit monies paid in excess of the first $20,000), may be required to give effect thereto, and in lieu of getting the purchaser to physically execute same, the Declarant will want to have the power and authority to do so on the purchaser's behalf. Section 5.01(a) of the Agreement expressly provides for the foregoing. Moreover, in today's condominium marketplace, many unit purchasers are non-residents, and to obviate any hardship or inconvenience to the purchasers that would be experienced if they were compelled to physically attend in Ontario to sign all closing documents, frequently powers of attorney will be utilized. However, since the transaction involves real property in Ontario, and the purchase and sale transaction will be completed in Ontario, it is essential that any power of attorney utilized by the purchaser must be expressly made (and duly executed and witnessed) in accordance with the requirements of the *Substitute Decisions Act S.O.*

*1992, as amended*, or alternatively the *Powers of Attorney Act R.S.O. 1990, as amended* (as the case may be), and not any power of attorney form drawn or made pursuant to the laws of any other province or country. Section 5.01(b) of the Agreement confirms the foregoing, and also expressly confirms that a legible copy of such duly executed and properly witnessed power of attorney shall be delivered to the Declarant's solicitor on or before the interim occupancy closing and/or final closing of the transaction to which such documents relate. Furthermore, in light of the increased potential for fraud whenever a power of attorney is being utilized, and the corresponding duty imposed upon the respective solicitors involved in a transaction where a power of attorney is employed, as enunciated by Justice Macdonald in the case of *Reviczky v. Meleknia (2007) 88 O.R. (3d) 699*, section 5.01(b) of the Agreement also requires the delivery to the Declarant's solicitor of a statutory declaration duly sworn by the purchaser's solicitor, confirming:

a) that to the best of the purchaser's solicitor's knowledge, information and belief, and after having made due inquiries of the donor, and relying on the donor's responses for the purposes of making the statutory declaration, the purchaser's solicitor expressly confirms that:

   (i) the power of attorney was properly executed and witnessed;

   (ii) the power of attorney was lawfully given, is still in full force and effect, and has not been revoked; and

   (iii) the attorney is the lawful party named in the power of attorney, and is acting within the scope of the authority granted to him or her under the power of attorney;

or alternatively:

b) that to the best of the purchaser's solicitor's knowledge, information and belief, and after having made due inquiries of the donee [because the donor has not responded to the

telephone calls, telefax and/or e-mail inquiries made by the purchaser's solicitor] and relying on the donee's responses for the purposes of making the statutory declaration, the purchaser's solicitor expressly confirms that:

(i) the power of attorney was properly executed and witnessed;

(ii) the power of attorney was lawfully given, is still in full force and effect, and has not been revoked; and

(iii) the attorney is the lawful party named in the power of attorney, and is acting within the scope of the authority granted under the power of attorney.

Finally, section 5.01(g) of the Agreement confirms that the Declarant's provision of any notices and/or documents that may be required to be signed or executed, as well as the condominium corporation's execution of any status certificate prior to the condominium's turnover meeting may, at the Declarant's sole option, be made or manifested by way of an electronic signature on any such documents (undertaken by or through a computer program, or by any other electronic means), as expressly provided or contemplated by the *Electronic Commerce Act 2000, S.O. 2000, as amended*.

## XXI. **Default**

If the purchaser is unable or unwilling to deliver all of the requisite executed closing documents and certified funds on the date scheduled for the final closing of the purchase and sale transaction, then the law is clear that the purchaser will be considered in default of his or her contractual obligations. Moreover, the Ontario Court of Appeal has confirmed in the case of *1473587 Ontario Inc. v. Jackson (2005) 29 R.P.R. (4th)*, that with respect to an agreement of purchase and sale involving real estate, which contains an express provision making time of the essence (such as the Agreement being analyzed by this paper), the purchaser's failure to comply with a time-

sensitive or time-related obligation may be viewed as a fundamental breach of contract, entitling the non-defaulting vendor to rescind the contract and to treat the purchaser's breach as discharging or relieving the non-defaulting party from further performance, so long as the non-defaulting party did not, through words or conduct, either:

a) contribute to the delay or the default of the other party;

b) waive the default, or extend the time provision that was breached;

c) lead the defaulting party to believe that the contract was still in existence (or continued to subsist and be binding on both parties) after the breach was committed; or

d) act in bad faith, or abuse his or her position (relative to the delay or the default of the other party) so as to unfairly injure or prejudice the rights of the defaulting party.

However, even though there may not be a strict obligation to provide the defaulting purchaser with an opportunity to rectify his or her outstanding default, it may nevertheless be prudent, reasonable and cost-effective for the Declarant to do so, in an effort to avoid the cost, trouble and inconvenience of having to terminate the transaction, forfeit the deposits paid to date, and endeavour to re-market and re-sell the unit to a third party purchaser, so as to mitigate the vendor's damages. Section 5.06(a) of the Agreement expressly provides for such a rectification period in favour of the purchaser, and proceeds to outline the various rights and/or remedies available to the Declarant in the event the purchaser fails to remedy or rectify his or her outstanding default under the Agreement.

Finally, it is not unusual for major condominium developers, whose parent name is branded and widely recognized in the marketplace, to operate as an umbrella organization, with a separate subsidiary "stand-alone" company being created for each new condominium project being developed, and to hold title to the project lands. The foregoing is clearly intended as a way of limiting or circumscribing the potential liability emanating from any particular project under

development or construction, so that the liabilities incurred with respect to project A will not directly affect or impair project B, nor the parent or umbrella company. At the same time, the Declarant may wish to have the name or brand of the parent company somehow associated or linked to the project, so that prospective unit purchasers will draw some comfort knowing that the wealth of knowledge and condominium development experience residing with the parent and its principals, along with its proven track record in customer service, will be applied to this new project. Nevertheless, strictly from a liability perspective, such a link between the Declarant and the parent company (or with any other company within the umbrella group) can be potentially prejudicial, particularly in the aftermath of the Ontario Court of Appeal decision in *Trident Holdings Ltd. v. Danand Investments (1988) 64 O.R. (2nd) 65*, where the court held that a company holding title to land for one or more third parties, in its capacity as a trustee on behalf of said beneficial owners may, depending on the circumstances and the degree of control exerted by the beneficial owners over the actions and decisions of the trustee, also be acting (and be considered as) an agent on behalf of said third parties, as principals, in which case the agency relationship can predominate over the trust relationship. While the beneficiaries of a trust are not personally liable to third parties, regarding obligations incurred by the trustee in the administration of the trust, an agent acting within the scope of its agency appointment, can and will expose or subject its principals to personal liability, both in contract and in tort, even where the identity of the principals is undisclosed (except where the contract is under seal, or deemed to be a sealed contract). Accordingly, in an effort to thwart and preclude any possibility of the purchaser being entitled to join any other parties in any law suit against the Declarant relating to the purchase and sale transaction, section 5.06(c) of the Agreement expressly prohibits the purchaser from asserting any rights, or pursuing any claim arising under the Agreement, or in connection therewith (whether based or founded in contract law, tort law or in equity, and whether

for innocent misrepresentation, negligent misrepresentation, breach of contract, breach of fiduciary duty, breach of constructive trust or otherwise), against any person, firm, corporation or other legal entity, other than the Declarant, even though the Declarant may be (or may ultimately be found or adjudged to be) a nominee or agent of another person, firm, corporation or other legal entity, or a trustee for and on behalf of another person, firm, corporation or other legal entity, and the purchaser's express agreement to the foregoing may be pleaded as an estoppel or bar against the purchaser in any action, suit, application or proceeding subsequently brought by or on behalf of the purchaser.

**********