

About Condo

INTERIM OCCUPANCY FEES

The *Condominium Act, 1998* (the “Act”) requires condominium developments to be constructed to a substantial level prior to registration of the condominium plan. Title to a unit cannot be transferred until the condominium is registered. As a result, it is typical for condominium units to be ready for occupancy well before any sales can close.

The Act permits developers and unit purchasers to agree that the purchaser may, or must, assume occupancy of the unit when it is ready for occupancy even though this is prior to registration and closing. This period of occupancy of the unit is called “interim occupancy”.

When a purchaser goes into interim occupancy, the developer is entitled to charge a monthly fee, sometimes inaccurately called “rent”. In the Act it is called the “occupancy fee”.

Usually, a purchaser will be required on the date occupancy commences (sometimes referred to as an “interim closing” date), to provide the developer with a number of post-dated cheques – usually 2 or 3 – covering the occupancy fee for the initial expected period of occupancy.

Subject to anything different included in the agreement of purchase and sale, if the sale closes before the period ends that is covered by those fees, an adjustment should be made on closing in favour of the purchaser for any amount of occupancy fees that are overpaid. (Likewise, if the purchaser is in interim occupancy for a period that exceeds the period covered by occupancy fee payments, an adjustment should be made on closing in favour of the developer.)

AMOUNT OF OCCUPANCY FEE

The Act does not specify an exact minimum or maximum occupancy fee. The developer can charge any fee the developer wants, provided only that such fee cannot be greater than the aggregate total of the following amounts:

1. where applicable, interest calculated on a monthly basis on the unpaid balance of the purchase price at a prescribed rate;
2. an amount reasonably estimated on a monthly basis for municipal taxes attributable to the unit; and
3. the projected monthly common expense contribution for the unit.

Although the Act does not expressly state that the occupancy fee is actually intended to be 'made up' of those three component costs, and although the developer is entitled to charge an occupancy fee that is less than, and therefore might not include, any of those component costs, the developer will need to calculate all three components in order to ensure that the occupancy fee being charged does not exceed the total of them when added together.

Also, there are other provisions of the Act (discussed in this memo) that rely upon those component amounts being treated as if they have the purposes specified (i.e., to pay municipal taxes or part of the common expenses of the condominium). Therefore, it will be necessary for the developer to properly calculate each component when determining the occupancy fee to be charged.

Each component of the occupancy fee is discussed individually below.

INTEREST COMPONENT OF FEE

One component of the occupancy fee is interest accruing on the unpaid portion of the purchase price for the unit.

Such interest must be calculated at the rate prescribed in the regulations to the Act, regardless of the actual interest that might be earned on that portion of the purchase price if it were otherwise to be set aside in trust for the developer.

Section 19 of Ont. Reg. 48/01 under the Act currently provides that the prescribed rate of interest is:

The rate of interest that the Bank of Canada has most recently reported as the chartered bank administered interest rate for a conventional one-year mortgage as of the first of the month in which the purchaser assumes interim occupancy of a proposed unit or is required to do so under the agreement of purchase and sale.

A purchaser can avoid paying this component of the occupancy fee if the purchaser elects instead to pay the full balance (i.e., after accounting for deposits) of the purchase price owing on the date of occupancy.

The purchaser is entitled to make this election notwithstanding any contrary provisions in an agreement of purchase and sale. However, in order to do this, the purchaser must make this election during the 10-day rescission period provided in subsection 73(2) of the Act.

If this election is made, and the purchaser pays the full amount of the balance of the purchase price upon assuming interim occupancy, the occupancy fee must be reduced by the amount of the interest component, if any.

However, if the developer had already decided not to include an amount for the interest component in its occupancy fee (i.e., if the fee is no greater than the total of the other two component costs) then there should be no need to reduce the occupancy any further.

MUNICIPAL TAX ESTIMATE COMPONENT OF FEE

It can be difficult to accurately estimate the municipal taxes that will be charged against a proposed condominium unit. Therefore, the Act provides as follows to account for the likelihood of error in this regard:

1. If the municipal tax component paid by the purchaser is greater than the actual municipal tax assessment against the unit, such that the purchaser has overpaid since the date of occupancy, the developer is required to refund the difference to the purchaser.
2. If the municipal tax component paid by the purchaser is less than the actual municipal tax assessment against the unit, such that the purchaser has underpaid since the date of occupancy, the developer may require the purchaser to pay the difference to the developer.

Note that it is mandatory for the developer to refund the purchaser where the purchaser has overpaid, but it is up to the developer's discretion whether to require the purchaser to reimburse the developer where the purchaser has underpaid.

In the event a refund is payable to the purchaser, it is to be paid at the time a registrable deed is provided by the developer (i.e., on closing) or "as soon as is practicable thereafter". The timing will depend in large part on how quickly an assessment is made by the municipal authority.

PROJECTED COMMON EXPENSE COMPONENT OF FEE

The final component of the occupancy fee is the projected common expense contribution to be paid on account of the unit.

The projected common expenses payable on the unit during the first year of operation of the condominium should be clearly set out in the budget statement that is to be included in the developer's disclosure package given to all purchasers of the units. Therefore, it should be easy enough to determine what this portion of the occupancy shall be.

Typically, this portion of the fee will include an amount designated as a contribution to the reserve fund of the proposed condominium corporation. Although the whole occupancy fee belongs to the developer and not the condominium corporation, an exception is made in the Act with respect to that portion of the occupancy fee that represents the contributions to the reserve fund of the proposed condominium.

This exception arises if interim occupancy lasts for longer than 6 months. If this occurs, then the amounts representing contributions to the reserve fund *for each month after the sixth month* are to be held in trust by the developer and remitted to the condominium corporation upon registration as part of its reserve fund.

PROVISIONS IN AGREEMENTS OF PURCHASE AND SALE

If interim occupancy is to be required, there should be a provision in the agreement of purchase and sale (or an amendment thereto) that requires it. It is not necessary but is

strongly advisable that the agreement also specifically indicate whether payment of a monthly occupancy fee will be required.

Such provision could, but need not, specify the amount of the occupancy fee. It could simply indicate as follows:

...The monthly occupancy fee will be the total of interest calculated on a monthly basis on the unpaid balance of the purchase price at the prescribed rate, plus an amount reasonably estimated by the Vendor on a monthly basis for municipal taxes attributable to the Unit, plus the projected monthly common expense contribution for the Unit as set out in the Vendor's first-year budget for the proposed condominium corporation included in the disclosure package...

with such additional details as are appropriate.

If the developer has decided not to include any of the allowed components in its calculation of the occupancy fee, this should be specifically stated.

For example, if no municipal tax estimate component is included in the occupancy fee (i.e., the fee is no greater than the total of the interest on the unpaid balance of the purchase price and the projected common expense contributions for the unit), this should be made clear to help avoid any claim by a purchaser for this reimbursement.

Likewise, if the developer proposes not to include a projected contribution to the reserve fund this should also be stated so that, even if interim occupancy lasts longer than six months, there is no basis for an expectation that a portion of the occupancy fee will be paid into the condominium's reserve fund by the developer upon registration.

In all cases where the developer has decided to exclude any component from its determination of the occupancy fee, it could be appropriate to set out in the agreement the manner in which the occupancy fee is calculated to help avoid uncertainty and argument in the future.

Michael H. Clifton (March 2007)