



## WHEN OWNERS ARE “OWNERS”: A CLARIFICATION OF LIEN LIABILITY

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Over the last year, the Alberta Court of Queen’s Bench has made decisions that have suggested the existence of a gap in the lien liability of owners in Alberta who have work performed on new developments that would usually be subject to lien claims. These decisions were of particular concern to contractors working on new development construction.

In Alberta, an “owner” is specifically defined under the Alberta *Builders’ Lien Act* (the “*Act*”) to mean

“...a person having an estate or interest in land at whose request, express or implied, and

- (i) on whose credit,
- (ii) on whose behalf,
- (iii) with whose privity and consent, or
- (iv) for whose direct benefit,

Work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are required after the commencement of the work or the furnishing of the material.”

Although this definition seems relatively straightforward, these cases complicated the determination of whether a party was an owner for lien purposes. In particular, the Court stated that a purchaser/land developer may not always be considered an owner under the *Act*.

The case of *Acera Developments Inc. v. Sterling Homes Ltd.*, 2009 ABQB 494, demonstrates the unique criteria that the Court has referred to when determining an owner under the *Act*. Acera had entered into a lot purchase agreement with Sterling for 136 lots in Cochrane, Alberta. Sterling was to buy the subdivided land and serviced lots from Acera and build homes on them. The homes to be built by Sterling were for Sterling to sell for its own benefit. Acera was to register a plan of subdivision. However, Acera ultimately failed to get subdivision approval. The lots could not be transferred to Sterling and Sterling subsequently registered a lien for \$1.5 million against the lands owned by Acera.

Acera challenged the validity of the lien and argued that the fact that Acera had encouraged Sterling to build on the lots could not be interpreted as constituting a request to do so. While Acera knew and consented to Sterling commencing construction of the homes, the Court found that the work was not done for Acera’s benefit. The Court concluded that the lien was invalid, as Acera was not an owner.

This decision raised concerns because it significantly limited the definition under the *Act*. Before this decision, it seemed safe for a party, such as a contractor, to assume that a land developer would be considered an owner, and therefore be susceptible to liens being filed on the property for work



requested by the developer. An appeal of this decision by Sterling Homes was argued before the Court of Appeal of Alberta and the Court of Appeal overturned the Queen's Bench decision.

The Court of Appeal articulated the necessary inquiry to determine whether Acera had requested that work be done, or material be furnished, for an improvement to the lands. The Court also looked at whether the work done or the material furnished by Sterling was of "direct benefit" to Acera.

The Court of Appeal found that by its course of conduct, Acera had impliedly requested the work be performed by Sterling. The Court stated that it is not a condition precedent that there be direct communication amounting to an express request between an "owner" and a contractor, but something more than mere knowledge or consent of the owner must be present.

The Court of Appeal found sufficient interaction between Sterling and Acera to conclude that the home construction was started prior to subdivision at Acera's request. Acera knew construction was starting before subdivision approval and was actively involved in supervision of the construction. Sterling was contractually bound to Acera to construct to a specific standard and scope. Acera's architectural and construction guidelines required Acera to approve construction plans, and other services and materials, prior to construction. The construction was inspected by Acera as work progressed. In the Court of Appeal's opinion, this evidence supported the conclusion that the homes were constructed at Acera's request.

The Court also found that the work done and the material furnished by Sterling was a direct benefit to Acera, as Acera allowed Sterling to improve Acera's lands. The Court concluded that Acera was an "owner" under the *Act*, allowed the appeal and declared Sterling's lien to be valid.

The appeal decision should give some comfort to contractors performing work in new developments, and certainly more so than before the Court of Appeal's decision. Nonetheless, contractors should continue to be cautious when performing significant construction activity in new developments, and not automatically assume that a developer/purchaser will be considered an owner within the meaning of the *Act*.