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Deals turn raw in real estate

Surging prices prompt some sellers to renege

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Some investors who believed they made a killing in real estate in Lee County are getting a nasty surprise as developers refuse to sell for the agreed-upon price.

Real estate attorneys said they are being flooded with calls from would-be buyers trying to enforce their contracts and by developers frantically trying to find a way to break a deal because both prices and costs have risen dramatically in the past year.

And all this is happening in one of the fastest-growing areas of the country, where just last month permits for single-family homes soared to record levels for both unincorporated Lee County and Cape Coral. In Lee, which includes Fort Myers Beach and Bonita Springs, 865 permits were issued, beating the record set in February of 782. Cape Coral had 858 single-family permits in March, topping the record of 601 set in January.

Meanwhile, developers said they are being faced with higher construction costs that make it hard to honor earlier price estimates.

"This reminds me of the swamp deals in the 1930s and '40s," said Mark Weithorn, a printing company owner in Miami who put \$2,000 down on a home and lot in Lehigh Acres as an investment a year ago with Duke Properties. "It's a real shell game, what they're doing."

Weithorn has a contract to build a house for \$135,000 but said Duke refuses to honor it and now has the same property on the market for \$180,000. Duke officials did not return calls Wednesday, Thursday or Friday to their Cooper City headquarters.

Rose Marr of Keller Williams Realty in Broward County was Duke's selling agent for its Lehigh properties and said about 100 people are in Weithorn's shoes from sales made last year in the Greenbriar area.

"All of a sudden he (owner Terrell Duke) quit signing contracts after 30 contracts," she said. "He's not building them." Marr said she is suing Duke and trying to get clients such as Weithorn to join in the lawsuit.

"I don't think it's fair for a person to go into business and hurt people like that. The clients are having to spend more money to replace their purchases. I've spent \$125,000 in personnel and advertising."

In another dispute between builder and customer, Michael Mahony put \$1,000 down on a condominium at Gulf Reflections condominium on Pine Ridge Road in south Fort Myers last summer in a pre-construction agreement for an estimated \$194,900.

The developer sent him a contract to sign March 17 for that amount but two days later, selling agent Dan Miller of RE/MAX Realty Group called to tell him \$27,000 more would be required for the deal to go through.

"I said first of all I really question your integrity and it eats up a lot of the profit of what I was trying to do," said Mahony, who is a professional real estate investor based in Colorado. "He oversold the project; he couldn't live up to his construction. He just got rid of everybody on his books and replaced them with new customers."

But developer William Gallo, principal in GD Enterprises of Deerfield Beach, said he and partner Jerry DuBois, president of JWR Construction, didn't act unethically.

"I call this market a runaway freight train and we're the two people left standing on the tracks," Gallo said.

The cost of building the 116-unit project has risen 20 percent since last summer, about \$4.4 million, he said.

For example, Gallo said, he had estimated \$50,000 for a builder's risk policy but with insurance companies skittish after Hurricane Charley roared through Aug. 13, "the lowest bid came in at \$204,000 with a million-dollar deductible." If anything, he said, the extra \$27,000 he requested of Mahony didn't quite make up the additional costs and new buyers would pay substantially more. "It would have been up \$52,000 if he'd walked in the door" recently.

Of 30 people who were in Mahony's situation, said Miller, "18 of the 30 committed and some are on the fence."

Local real estate attorneys said rapidly escalating real estate prices are causing more and more such conflicts. For example, prices in Lee County have soared, with the median price of a single-family home sold by a Realtor recently hitting a record of more than \$235,000, up 37 percent in a year. The median is the price at which half the sales are higher and half lower.

"It's unbelievable the amount of contracts people are trying to renege on or trying to avoid closing on," Fort Myers-based attorney Kevin Jursinski said. "It's a direct result of the volatility of the market."

One factor is the part of the contract called the default clause, which spells out remedies both sides have if the other defaults. Some are written so the buyer's only remedy is to get back his or her deposit, Jursinski said.

But there has to be "mutuality of remedy" - basic fairness between the two parties - for the clause to be binding, he

said. "There's going to be a lot of litigation on those."

There is also sometimes an issue of good faith, Jursinski said. One Naples developer had a clause saying the deal was off if he couldn't successfully subdivide the property by a set time. The developer stalled on subdividing the property until the time was up, then easily subdivided a month later and sold to a new crop of buyers for more money. Disputes over contracts aren't the only sign of stress caused by skyrocketing prices. Numerous forged deeds have been showing up in Lee and Charlotte counties in response to a sizzling real estate market.

But even when the property in question is legitimate, problems can arise.

Christopher Shields, a partner in the Pavese Law Firm in Fort Myers, said it can be hard to force a seller to honor an agreement. Most pre-construction agreements, for example, have conditions and don't commit the developer to an exact price.

Also, he said, even in a case such as Mahony's where a developer sends someone a contract to sign, it's not binding until both sides have signed.

But there are gray areas in a lot of situations as people try to get out of deals they no longer want, he said.

For example, even if a developer hasn't signed a contract, if his real estate agent has, it still may be binding. "The question is whether the seller placed the agent in the position with the public" so that people would think he was authorized to sign.

Iverson Moore, a Washington-based spokesman for the National Association of Realtors, said he hasn't heard of widespread contract conflicts nationwide.

"From a business ethics point of view, we don't have a specific position," he said. "But we would say it's always a good idea to honor contracts and honor agreements."

BUYING PROPERTY

People who buy property pre-construction go through a two-part process:

PRE-CONSTRUCTION AGREEMENT

What happens: The purchaser pays the developer an escrowed deposit in exchange for buying a home for a favorable price before construction actually begins

What can go wrong: The price may be an estimate subject to change by the owner; details of construction may change, or the seller may do something to cause the contract to be breached, such as add an additional condition not originally agreed to by both parties. If the buyer wants out, he looks for mistakes by the seller such as not properly putting the deposit in escrow.

SALES AGREEMENT

What happens: The buyer and seller agree to the transaction for a specific price.

What can go wrong: This is a binding contract only after both sides have signed. Until then, either can back out or demand new conditions. There can be gray areas: If a developer hasn't signed but his real estate agent has, the contract may or may not be valid depending on whether the agent was represented as someone entitled to sign on the developer's behalf.

SOURCE: Christopher Shields, real estate attorney

MAPS NOT AVAILABLE