

Additional pre-construction costs depend on agreement of purchase and sale

By **James R.G. Cook**

Law360 Canada (November 18, 2025, 3:51 PM EST) -- The purchase of a pre-construction townhouse or other home often involves a written agreement of purchase and sale (APS) that is signed years before the completion of construction and occupancy of the property. Buyers may be surprised if the developer imposes additional charges at the time of closing relating to changes to materials and supplies or other expenses that have arisen during the course of construction. Whether such charges are permitted generally depends upon the specific wording in the APS, as illustrated by the Ontario Superior Court of Justice decision in *Taheripouresfahani v. Dormer Bond Inc. (c.o.b. Dormer Homes)*, 2025 ONSC 5833.



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This arose from a dispute between the buyers and the developer of a newly built property in Richmond Hill, Ont.

In 2020, the buyers entered into an APS with the developer for the purchase of the property for \$761,490. The buyers paid instalments of more than \$114,000 as a deposit and \$11,540 for additional upgrades. The final closing date was to be designated by the developer's lawyer upon at least 14 days' notice.

Pursuant to the terms of the APS, the buyers were allowed to move into their unit before the final closing date once occupancy was permitted in exchange for making monthly occupancy payments. In April 2023, the buyers moved into the property as permitted and began to make monthly occupancy payments of \$3,782.

On July 31, 2023, the developer delivered a notice scheduling the closing date of Sept. 15, 2023.

On Sept. 7, 2023, the developer delivered a statement of adjustments to the buyers' lawyer, which

included additional charges totalling almost \$60,000. The charges were stated to be for:

- Development charges/increased levies
- Meters (hydro/gas)
- Vendor's legal and administrative fees
- Alternative materials cost

A flurry of correspondence ensued between the lawyers over whether the charges were permitted under the APS. The developer offered to reduce some of the charges but demanded a mutual release in return. The buyers refused and demanded that all the additional charges be removed. The transaction was not completed by the scheduled closing date, but the lawyers continued to exchange correspondence in the following days concerning the statement of adjustments and additional charges.

On Sept. 26, 2023, the developer's lawyer confirmed that the transaction had been terminated. The developer demanded that the buyers vacate the property.

Litigation ensued, with each party moving for summary judgment. The motion judge noted that a buyer is generally entitled to proof of figures contained in a statement of adjustments: *Bellisario v. 2200 Bromsgrove Development Inc.*, 2025 ONSC 2546, at para. 61.

The motion judge further noted that the APS specifically stated that the balance due on closing would be adjusted to include "any development, education, park or other levies or imposed charges or taxes by Government Authority." Accordingly, while the development charge (\$8,000) was potentially allowed by the APS, the developer had an obligation to explain how the charge was calculated. The developer had failed to provide any evidence to substantiate the charge, referring only to an unexplained "formula" used by the municipality.

Further, while the APS permitted adjustments for the cost of hydro and gas meter installation, the developer did not provide any documents to the buyers or the court on the motion to demonstrate how the amounts were determined.

A similar issue arose regarding the legal and administrative fees. While the APS provided such fees to be added to the statement of adjustments under specific conditions relating to NSF or "stop-payment" cheques, these did not apply in this case.

Lastly, the motion judge found that none of the "alternative materials cost" charges (more than \$27,000) were provided for in the APS and that there was no evidence to support the amounts claimed.

The motion judge concluded that it was not the buyers who breached the APS but the developer, who tried to close for more than the agreed-upon price in the APS by adding approximately \$60,000 in charges that were either unjustified or not authorized. The developer's attempt to claim any one of these charges was a violation of the APS.

As a matter of law, the motion judge determined that the demand for additional payment as a condition of closing was an anticipatory breach of contract based on the principles discussed by the Court of Appeal for Ontario in *Spirent Communications of Ottawa Limited v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, at para. 37.

The motion judge decided that buyers were therefore entitled to the return of their deposit and amounts paid for upgrades to the property.

While that result would have ordinarily been determinative of the dispute, the case was also notable due to the fact that the buyers had taken possession of their unit in April 2023 and resided in it for at least a year thereafter. By the time of the hearing in 2025, they still had furniture in the property and continued to pay for internet and security cameras. Even though the buyers refused to pay the agreed-upon monthly occupancy amount, they also refused to consent to an order of possession in favour of the developer.

The motion judge found the buyers' refusal to pay the developer for their possession of the property to be an untenable position.

In the result, therefore, the buyers were found to be responsible for the monthly occupancy of \$3,782 up to the date of the decision in October 2025 (totalling \$68,076), as well as for reimbursement of property taxes of \$6,586 paid by the developer during that period and unpaid condominium fees of \$3,882.

Costs of the litigation based on the divided success of the summary judgment motions are to be determined.

The decision illustrates the consequences of a seller's attempt to imposed additional charges at the time of closing that were not expressly provided for in the APS. Buyers who were not expecting such charges will need to carefully assess the wording of the APS to determine whether they are justified in refusing to close. If interim occupancy has been granted, however, buyers cannot expect to maintain possession of the property without compensating the seller for the amounts they had agreed to pay for occupancy prior to closing.

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