

## News-Press

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### Developers dropping land contracts

*Deals break as prices, costs soar in area*

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Deals break as prices, costs soar in area

By Dick Hogan

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Some investors who thought they made a killing in Lehigh Acres real estate are getting a nasty surprise as the developer refuses to build their homes.

Real estate attorneys say they're 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.

"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.

Rose Marr of Keller Williams Realty in Broward County was Duke's selling agent for its Lehigh properties and said about a hundred 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." But Terrell Duke, owner of Cooper City-based Duke Properties, said he never authorized Marr to make any deals with customers after the 30 contracts he signed.

Marr said she's 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."

But Duke disputed that, saying that "The only person laying money on this project is me. I've got more than \$3 million in this project. She had nobody here; I manned this office (in Lehigh)."

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

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's 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'd 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 say rapidly escalating real estate prices are causing more and more such conflicts.

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

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

#### INFORMATION

##### 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; the 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