



HOME BUILDERS ASSOCIATION OF CONNECTICUT, INC.

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*Your Home
Is Our
Business*

February 22, 2011

To: Senator Paul R Doyle, Co-Chairman
Representative Joseph J. Taborsak, Co-Chairman
Members of the General Law Committee

From: Bill Ethier, Chief Executive Officer

Re: **House Bill 5741, AAC New Home Construction Contract Written Disclosures**

The HBA of Connecticut is a professional trade association with 1,100 member firms statewide, employing tens of thousands of Connecticut citizens. Our members, all small businesses, are residential and commercial builders, land developers, home improvement contractors, trade contractors, suppliers and those businesses and professionals that provide services to our diverse industry. Our members build 70% to 80% of all new homes and apartments in the state each year.

Summary: We support HB 5741 if it is coupled with the first half of the proposal we requested to be raised, i.e., HB 5743, which is not on your agenda today. The two concepts are linked together and HB 5741 may not make sense without the other.

Please see the attached fully drafted bill intended to be a substitute for HB 5741 and HB 5743. It is our desire to benefit buyers of new homes by allowing them to discuss the construction of a home, its features and options, price and timeframes, materials and various construction possibilities, etc. with a home builder's employees who may not hold a real estate brokers or agents license yet are in the best position to provide the most accurate and useful information to consumers. This practice of allowing a builder's employees to talk with potential home buyers is illegal under current law unless such employees hold a real estate brokers or agents license. The change we request will also benefit home builders by smoothing and streamlining the new home construction, marketing and sales process.

Background: CT's real estate licensing law ensures that third parties (i.e., real estate brokers or agents) afford some level of protection to their clients (i.e., sellers or buyers of real estate). Under section 20-329, a property owner is exempt from real estate licensing when selling or renting their own property. Other exemptions from real estate licensing apply to an owner's employees who are on-site residential superintendents or custodians, and all employees of nonprofit housing developers.

Problem: A for-profit home building company's employees are not exempt from real estate licensing. And this prevents them from engaging in any activity that can be construed to be related to "negotiating or selling" the building company's own homes, such as 1) showing a model home, 2) explaining the builder's construction practices or designs, 3) walking a buyer through a subdivision showing site development practices, 4) answering questions about

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home features or available options, such as floor or wall coverings or a huge variety of other items, 5) answering whether a wall can be moved, a bonus room can be added, or many other changes, or 6) even to handing out a brochure to prospective customers. This is a tremendous burden on the effective management and operation of the for-profit home building business. It also makes no sense that a non-profit builder's employees, who work generally with lower income buyers, can engage in these activities, yet a for-profit builder's employees cannot.

It is simply unreasonable to expect that all an employee can do when working with prospective buyers of new homes is say, "I'm sorry, you can speak only with the owner of the company. Here's his card." Often, the owner of the company is not on site. They are out managing many other aspects of the business or at different home building sites. Deferring a prospective home buyer not only risks losing that buyer but also does a disservice to the buyer who expects and deserves immediate attention.

Reasons to Support HB 5741 and 5743 and the attached substitute: The problem above begs the question: Who is protected by requiring a for-profit building company's employees to have a real estate license in order to negotiate or sell their employer's own homes, the seller or the buyer? We submit neither is served by current law.

As for protecting the seller (i.e., the building company), all employees of a home building company, which includes the owner of the company, are in essence and reality the voice of the company. Each speaks for the company in the capacity for which they were hired. No employee is a "third party" in the same shoes as real estate licensees, who by law act in a third-party, fiduciary capacity in a property sales transaction. A home building company does not need fiduciary or statutory protection from its own employees. The interests of the company are protected through the employer-employee relationship. Unlike third-party brokers or agents, employees serve under the control and direction of their employer. A company's employees should not have to be licensed as real estate brokers or agents in order to "protect the interests of their own company employer."

As for protecting buyers, most buyers today come to new home sites unrepresented by a broker or agent. Even when an agent is involved, most must defer to the builder's employees to answer construction and pricing questions. If a builder's employee is licensed, they represent the seller, not the buyer. And, buyers can always hire their own buyer-broker.

CT law and DCP already protect buyers of newly constructed homes by regulating all new home construction contractors (NHCC). NHCC, by definition, sec. 20-417a(5), "means any person [broadly defined to mean any form of company] who contracts with a consumer to construct or sell a new home or any portion of a new home prior to occupancy;" (emphasis added). Prohibiting a for-profit building company's employees from negotiating or selling the company's own homes conflicts with activity authorized by the NHCC act. A NHCC is also not relieved of responsibility under the NHCC registration act by the conduct of its employees, reinforcing the employer-employee relationship and ensuring all employees act within the bounds of the NHCC registration act. See 20-417b(a). The NHCC registration act

provides consumers with a multitude of protection, including payments into the NHCC guarantee fund, a statutory registration notice that must be provided to every prospective new home buyer, liability under the CT Unfair Trade Practices Act, and more. And DCP has reported to us there are very few complaints about NHCCs.

The practice of builders using licensed brokers or agents for marketing will not change with the employee exemption we seek. Many builders use real estate licensees for their marketing expertise, knowledge of markets in the area and, especially, to gain access to the MLS to better market their homes. But those are all marketing issues that have nothing to do with the seller's or buyer's protections contained in real estate licensing law.

In meeting with DCP over this proposal in 2009, the agency suggested adding a provision to the NHCC registration notice so consumers know they are not represented by the building company or its employees. This is drafted as HB 5741 and in section 2 of the attached substitute language. Again, however, it is connected with the real estate license exemption concept in HB 5743 and section 1 of our substitute.

Finally, a number of other states, including Rhode Island, fully exempt the employees of all owners. Our proposal is limited to employees of properly registered new home construction contractors, addresses the unique business of new home construction and sales, limits execution of sales contracts to owners and officers and removes a significant impediment on the home building business.

We strongly urge your support of this rational, reasonable exemption to the real estate licensing law and associated notice to new home buyers by favorably considering the attached substitute language.

Thank you very much for your consideration of this bill.

Attachment

Proposal to Amend Sec. 20-329 and 20-417d

Purpose: To Allow a Home Builder's Own Employees to Engage with Prospective Buyers During the Process of Selling and Building the Builder's New Homes and to Ensure the Integrity of the Buyer's Representation

(language to be deleted in [brackets]; language to be added is underlined – both are highlighted)

Section 1. Sec. 20-329 of the Connecticut General Statutes is repealed and the following is substituted in lieu thereof:

Sec. 20-329. Exceptions concerning the licensure of brokers and salespersons.

The provisions of this chapter concerning the licensure of real estate brokers and real estate salespersons shall not apply to: (1) Any person who as owner or lessor performs any of the acts enumerated in section 20-311, with reference to property owned, leased or sought to be acquired or leased by the person, or to the person's regular employees who are employed as on-site residential superintendents or custodians, with respect to the property so owned or leased or sought to be acquired or leased when such acts are performed in the regular course of, or incidental to, the management of such property and the investment therein; (2) any person acting as attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation by performance of any contract for the sale, leasing or exchange of real estate, or to service rendered by any attorney-at-law in the performance of the attorney-at-law's duties as such attorney-at-law; (3) a receiver, trustee in bankruptcy, administrator, executor or other fiduciary, while acting as such, or any person selling real estate under order of any court, or to a trustee acting under a trust agreement, deed of trust or will, or the regular salaried employees thereof; (4) witnesses in court as to the values of real estate; (5) persons in the employ of the federal or state government or any political subdivision thereof while acting in the course of such employment; (6) any employee of any nonprofit housing corporation that (A) has been certified as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended, and manages a housing project, or (B) manages a housing project assisted in whole or in part by the federal government pursuant to Section 8 of The United States Housing Act of 1937, as amended from time to time, while such employee is performing duties in the regular course of, or incidental to, the management of such housing project; (7) any person licensed to maintain or operate a mobile manufactured home park under chapter 412 who performs any of the acts enumerated in section 20-311, with reference to lots or mobile manufactured homes within the park or to the person's employees with respect to lots or mobile manufactured homes within such park when such acts are performed in the regular course of, or incidental to, the management of such property and the investment therein; (8) persons licensed as sellers of mobile manufactured homes under section 21-67; [or] (9) any person or such person's regular employee who, as owner, lessor, licensor, manager, representative or agent manages, leases, or licenses space on or in a tower, building or other structure for (A) "personal wireless services facilities" or facilities for "private mobile service" as those terms are defined in 47 USC 332, which facilities shall be unattended, and the installation and maintenance of related devices authorized by the Federal Communications Commission, and ancillary equipment used to operate such devices and equipment shelters therefor, in an area not to exceed three hundred sixty square feet for any one service established by the Federal Communications Commission in 47 CFR, as amended from time to time, by a provider of any such service, and (B) any right appropriate to access such

facilities and connect or use utilities in connection with such facilities; or (10) any regular employee, as defined by the Internal Revenue Service, of a new home construction contractor, as defined in subdivision (5) of section 20-417a, provided that (A) any such employee who is not an owner or an officer of such contractor shall not sign a sales agreement with a new home buyer on behalf of such contractor, (B) any prospective buyer of a home from such contractor is provided a copy of the new home construction contractor registration notice required by section 20-417d of the general statutes, as amended by this act, (C) any such employee is listed on such new home construction contractor registration notice provided to the prospective buyer, and (D) the exception provided by this subsection applies only to the extent such employee engages in the following activities with prospective buyers exclusively on behalf of the registered contractor that is their employer: (i) walk through the contractor's properties with a prospective buyer, (ii) attend inspections or pre-closing walk-through, (iii) hand out sales brochures or other literature about the contractor's homes or construction business, (iv) host open houses, kiosks, home show booths or fairs and hand out materials about the contractor's homes or construction business at such functions, (v) meet with buyers and buyer's agents as needed, (vi) answer any question from buyers concerning the new construction building process, including pricing, (vii) explain the new construction building process, including pricing, of extras and options, (viii) explain the new construction building process, including pricing, of change orders requested by a buyer, (ix) accept any required deposit pursuant to a signed binder, (x) accept any applicable deposits as called for under an executed sales contract, (xi) accept payments applicable to an already executed sales contract or change order, (xii) present a sales contract to the buyer for the sale of a contractor's new home, and (xiii) execute a binder.

Section 2. Sec. 20-417d of the Connecticut General Statutes is repealed and the following is substituted in lieu thereof.

Sec. 20-417d. Copy of certificate and written disclosure notice to be provided to consumers. Advertising requirements. Contact by prospective consumers. Prohibited Acts.

(a) A new home construction contractor shall (1) prior to entering into a contract with a consumer for new home construction, provide to the consumer a copy of the new home construction contractor's certificate of registration and a written notice that (A) discloses that the certificate of registration does not represent in any manner that such contractor's registration constitutes an endorsement of the quality of such person's work or of such contractor's competency by the commissioner, (B) advises the consumer to contact the Department of Consumer Protection to determine (i) if such contractor is registered in this state as a new home construction contractor, (ii) if any complaints have been filed against such contractor, and (iii) the disposition of any such complaints, and (C) advises the consumer to request from such contractor a list of consumers of new homes constructed to completion by the contractor during the previous twenty-four months, [and] to contact several individuals on the list to discuss the quality of such contractor's new home construction work, and advises the consumer that the such contractor does not represent the consumer and that the consumer has the right to engage the services of a qualified representative if they wish to have third party representation. (2) state in any advertisement, including any advertisement in a telephone directory, the fact that such contractor is registered, and (3) include such contractor's registration number in any such advertisement. The new home construction contractor, or his agent, shall also discuss with the consumer the installation of an automatic fire extinguishing system in a new home.

(b) A new home construction contractor shall include in every contract with a consumer a provision advising the consumer that the consumer may be contacted by such contractor's

prospective consumers concerning the quality and timeliness of such contractor's new home construction work, unless the consumer advises such contractor, in writing, at the time the contract is executed, that the consumer prefers not to be contacted.

(c) The written notice required in subsection (a) of this section shall be in capital letters not less than ten-point bold face type, and may include a statement in substantially the following form:

"NEW HOME CONSTRUCTION CONTRACTOR

REGISTRATION NOTICE

A CERTIFICATE OF REGISTRATION AS A NEW HOME CONSTRUCTION CONTRACTOR DOES NOT REPRESENT IN ANY MANNER THAT THE CONNECTICUT DEPARTMENT OF CONSUMER PROTECTION ENDORSES THE QUALITY OF THE CONTRACTOR'S NEW HOME CONSTRUCTION WORK OR THE CONTRACTOR'S COMPETENCY TO ENGAGE IN NEW HOME CONSTRUCTION.

ACCORDINGLY, YOU ARE ADVISED TO:

(1) REQUEST FROM THE CONTRACTOR A LIST OF CONSUMERS OF NEW HOMES CONSTRUCTED TO COMPLETION BY THE CONTRACTOR DURING THE PREVIOUS TWENTY-FOUR MONTHS,

(2) CONTACT SEVERAL INDIVIDUALS ON THE LIST TO DISCUSS THE QUALITY AND THE TIMELINESS OF THE CONTRACTOR'S NEW HOME CONSTRUCTION WORK, AND

(3) CONTACT THE DEPARTMENT OF CONSUMER PROTECTION TO VERIFY THE REGISTRATION INFORMATION PRESENTED BY THE CONTRACTOR AND TO ASCERTAIN THE CONTRACTOR'S COMPLAINT HISTORY WITH THE DEPARTMENT.

IN ADDITION, YOU ARE ADVISED TO DISCUSS WITH THE NEW HOME CONSTRUCTION CONTRACTOR:

(1) WHETHER THE CONTRACTOR HAS A CUSTOMER SERVICE POLICY AND IF SO, THE IDENTITY OF THE PERSON DESIGNATED TO ASSIST YOU IN RESOLVING ANY COMPLAINT ABOUT THE CONTRACTOR'S WORK,

(2) WHETHER THE CONTRACTOR WILL HOLD YOU HARMLESS FOR WORK PERFORMED BY ANY SUBCONTRACTOR HIRED BY THE CONTRACTOR, AND

(3) THE INSTALLATION OF AN AUTOMATIC FIRE EXTINGUISHING SYSTEM.

IN ADDITION, YOU ARE ADVISED THAT:

(1) NEITHER THE NEW HOME CONSTRUCTION CONTRACTOR, NOR ANY OF SUCH CONTRACTOR'S EMPLOYEES, REPRESENTS YOU IN ANY NEGOTIATION OF THE SALE OF A NEW HOME FROM SUCH CONTRACTOR;

(2) IF YOU WISH TO BE REPRESENTED BY A THIRD PARTY, YOU HAVE THE RIGHT TO ENGAGE THE SERVICES OF A QUALIFIED REPRESENTATIVE; AND

(3) THE NEW HOME CONSTRUCTION CONTRACTOR HAS AUTHORIZED ONLY THE FOLLOWING LISTED EMPLOYEES TO SPEAK ON BEHALF OF SUCH CONTRACTOR REGARDING THE NEGOTIATION AND SALE TO YOU OF A NEW HOME FROM SUCH CONTRACTOR:

THIS NOTICE DOES NOT CONTAIN AN EXHAUSTIVE LIST OF THE INQUIRIES YOU SHOULD MAKE BEFORE CONTRACTING WITH A NEW HOME CONSTRUCTION CONTRACTOR. ADDITIONAL INFORMATION TO ASSIST YOU IN YOUR SELECTION OF A NEW HOME CONSTRUCTION CONTRACTOR MAY BE OBTAINED BY CONTACTING THE CONNECTICUT DEPARTMENT OF CONSUMER PROTECTION."

(d) No person shall: (1) Present, or attempt to present as such person's own, the certificate of another; (2) knowingly give false evidence of a material nature to the commissioner for the purpose of procuring a certificate; (3) represent such person falsely as, or impersonate, a registered new home construction contractor; (4) use or attempt to use a certificate which has expired or been suspended or revoked; (5) engage in the business of a new home construction contractor or hold himself or herself out as a new home construction contractor without having a current certificate of registration under sections 20-417a to 20-417j, inclusive; (6) represent in any manner that such person's registration constitutes an endorsement of the quality of such person's work or of such person's competency by the commissioner; or (7) fail to refund a deposit paid to a new home construction contractor not later than ten days after a written request mailed or delivered to the new home construction contractor's last known address, if (A) the consumer has complied with the terms of the written contract up to the time of the request, (B) no substantial portion of the contracted work has been performed at the time of the request, (C) more than thirty days has elapsed since the starting date specified in the written contract or more than thirty days has elapsed since the date of the contract if such contract does not specify a starting date, and (D) the new home construction contractor has failed to provide a reasonable explanation to the consumer concerning such contractor's failure to perform a substantial portion of the contracted work. For purposes of this subdivision, "substantial portion of the contracted work" includes, but is not limited to, work performed by the new home construction contractor to (i) secure permits and approvals, (ii) redraft plans or obtain engineer, architect, surveyor or other approvals for changes requested by the consumer or made necessary by site conditions discovered after the contract is executed, (iii) schedule site work or arrange for other contractors to perform services related to the construction of the consumer's new home, and (iv) do any other work referred to in the contract as a "substantial portion of the contracted work".