

LIFE LEASE

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LIFE LEASES

FORWARD

The following is a series of articles written by Ronald A. Crane, Barrister and Solicitor.

It is not meant to be a complete or exhaustive analysis of all applicable legislation or of the legal issues, but a brief overview of the more significant legal principles and legislation. It will be a starting point for discussion and probably action, to respond to matters which are not adequately addressed in current legislation, or at all.

The object of these articles is to try and provide some basic understanding of life leases and not to provide specific legal advice. Reproduction of this material without consent of the author is not permitted.

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We hope you enjoy the articles and that they assist you by answering some of the questions you may have about life leases.

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SECTION 1 LIFE LEASE

You may have heard about a form of home ownership described as a life lease. The documents creating the life lease arrangement may be not be labeled as a “Life Lease”, but may be called a “Right to Occupy” or “Equity Agreement”. The important issues are not the labels that attach to this form of property ownership so much as the rights and responsibilities that go with the arrangement. You may also be interested to know, while life leases are relatively new in North America, the purchase of a long term right to occupy has been used as a form of ownership in Europe for hundreds of years.

For the purposes of this discussion I will simply refer to this type of property ownership as a “life lease”, because the terms “right to occupy” and “equity agreement” really are more descriptive of the characteristics of the arrangement. I’m not even sure where the term “life lease” started, but, it is now a generally accepted term to describe a form of property ownership. The most common form of life lease entails the right to occupy a residential unit for as long as you live and the right to the equity in the unit at the end of your occupation, whatever the reason for termination.

There are two very important ingredients to this arrangement, firstly the exclusive right to occupy the unit and secondly the right to equity when the right to occupy is terminated for any reason.

There are many variations on the theme, just as there are many variations on other types of property ownership. You may occupy a residential unit pursuant to a month to month lease, a lease for a set term of months or years, by owning a condominium unit or by owning what is described in legal terms as the “fee simple” right to the property. “Fee Simple” is the legal term used to describe so called full rights to the property.

I think it is helpful in understanding these different types of property rights to compare the rights and obligations attached to them rather than focus on the labels that are attached.

The fact that we own the fee simple or highest form of land rights does not necessarily mean that we can do with it as we like or that it responds to all our needs. What makes anything valuable to us and to others is what we can do or not do with that asset. If we buy a piece of raw land, what we can do on it depends on many factors. Some are physical such as location, availability of services, topography and size. Some are regulatory such as zoning, environmental rules, and building code requirements. The value of that fee simple owned property depends on all of the factors that effect our use and how those factors impact on what the “market” is willing to pay for those rights. As many people have found out, the fact that you have the highest form of ownership doesn’t mean you are going to get more money for the property or even be able to sell it. It doesn’t even mean you can do what you want with the property in the meantime.

As anyone who has bought land to develop in a particular way, either for profit or their own use, has found out, there are literally hundreds of rules, regulations and other factors that reduce your right to determine what you do with the land. Ultimately what a lender decides the property is worth for a loan and what a buyer thinks its worth to buy may not be what you as an owner think or even what you have already invested into the property. Value is determined by market. Market is simply what a willing buyer is prepared to pay a willing seller. We all know what has happened to real estate values in the last few years and realize the label you put on a type of ownership has very little to do with value.

I think it is helpful in understanding life leases then to examine the rights and obligations and to see that it is just one of many forms or variations on property ownership that may be right for you or someone you know in particular circumstances.

There are people who rent all their lives, some because they can't afford to buy, but others, because for whatever reason simply chose not to own. These people may in fact pay as much money over a lifetime as if they bought and have no equity at the end. On the other hand people may buy a property and not be able to do with it what they planned and in the end the market may dictate they can't sell it for what they paid for it. What the right form of home ownership is for you depends on more than just labels. Some of the factors you should consider are lifestyle, physical design, sense of community, whether you can or want to do maintenance, the opportunity to participate in ownership, the ability to influence the lifestyle and your present or anticipated need for additional services.

There are many variations of life leases, just as there are different forms of other types of ownership. The most common form is the purchase by the resident of the exclusive right to occupy a residential unit for as long as the resident wants or is able, in exchange for the payment of the purchase of that right and a monthly fee. That monthly fee covers the resident's share of all of those common costs which are part of any type of ownership, taxes, insurance, maintenance and repairs. The initial costs and the monthly fees are usually quite similar to those of other comparable accommodation. As well as having the right to occupy a unit the life lease owner, or their estate, has the right to the equity in that right when either they decide to terminate the arrangement or some event causes the termination. In that event it is the "market" that will determine what that right is worth.

Lets look behind the life lease and examine just how it is put together. Someone has to own the fee simple in the property and in the case of a life lease project that is almost always a not for profit or charitable organization such as a Church group, community based group or an ethnic group which will own and manage the project (the "Sponsor Group"). The Sponsor Group in turn grants the life lease to individual residents, pursuant to a written agreement which details the cost, rights and obligations of the parties, and the regulations governing the use, termination and rights to equity.

If a project is well designed and run, the right to occupy one of those units will be desirable to the market and it will command a reasonable value both initially and when it is time to resell the right.

What makes life leases attractive is the sense of community, the ability to become directly involved in the Sponsor Group and the availability of additional services, in a setting allowing the mixture of independence and support that responds to changing needs.

Most projects provide that all residents become “members” of the Sponsor Group, which makes them voting participants in the project. Residents are, in a very real sense, collectively the owner and individually the resident of the project.

In a single family home you may control your own domain but you have little influence on the surrounding community and no influence on who are going to be your neighbours. In a life lease community the residents may become part of the Sponsor Group, participate in interviewing new residents and help plan and maintain a lifestyle shared by like-minded neighbours. They can feel secure that a Sponsor Group, in which they are members, is there for only one purpose, that is to create and maintain a quality lifestyle while someone lives there and ensure the best possible value when the right to occupy is resold.

Life leases have been around for many years in Ontario, but are spreading rapidly now because they respond to the needs of an aging population that may be quite independent today but may have more needs for support tomorrow. These people want to age in place, and not have to move every time their needs for some assistance, such as housekeeping, meals or medical support change. They also want value for their money and the ability to obtain market value for their investment when it is time to dispose of that investment.

We know that for some people a single-family house is no longer viable or desirable. Its either too much maintenance to handle or the design itself, size, stairs or other barrier to accessibility, make it no longer a viable option to keep.

There's always a condominium, but that only provides a temporary solution for some. There is no community in most condominiums, little flexibility and very seldom a project designed for aging in place, with additional services available organized by the project. For the most part, once a condominium is registered it is almost impossible, on a practical level, to change either the physical building or the way it is operated. The life lease form of ownership takes advantage of an exception to the Planning Act of Ontario, the legislation that governs the subdivision of land, which allows for long term leases of parts of buildings without having to get Planning consent. Combining this exception with the ownership by a Sponsor Group and a building designed and managed for the benefit of a specific target group makes a life lease project the choice of an increasing number of seniors.

The specific design of the project, the economics, and contractual arrangements have as many variations as single-family homes or condominiums. Just like other forms of ownership, its value to you and to others ultimately depends on the physical characteristics of the unit, the bundle of rights and obligations that attach to the unit and

what the market is. No matter what its worth to the market, the accommodation may no longer meet your needs.

Life leases are a form of ownership or a bundle of rights and obligations in property, that have been created to respond to the needs of a sector of the market in a way that other forms of ownership do not. A life lease arrangement is not a strange or unusual arrangement to be feared or avoided because it is different. Any form of property right should be examined with caution to determine its risks, value and appropriateness for you. Look at your own circumstances, the physical characteristics of the project, the price, the Sponsor Group, the maintenance costs, the contract and all of the other relevant circumstances. Seek your own advice from someone familiar with life leases. You may well conclude that a life lease provides you with the right mix of rights, obligations and price to suit your current and expected needs for now and the future.

A recent study by C.M.H.C. recognized the widespread existence of life lease projects and reviewed the experience of projects across Canada. The study recognized that any form of housing has advantages and disadvantages but life lease projects, sponsored by non-profit groups, are becoming an increasingly popular form of housing model. It is up to the individual to decide what's best for them, but a life lease community may be the right choice for you.

SECTION 2 FINANCING OF LIFE LEASES

Most Life Lease projects have not required extensive financing arrangements, interim or permanent, because of the general nature of the sponsor group and the clients.

The general pattern has been that a not for profit sponsor group (the “Sponsor”) owns the land and develops the project, usually with the assistance of a facilitator, using a combination of its own funds, deposits from the residents or some short term funding.

The typical project is designed for seniors, most of whom have homes free of mortgages and the equity from which is used to buy the right to occupy (life lease).

As more projects are developed, a greater variety of financial needs arise. Some residents need bridge financing to fund the deposits pending the sale of their homes. The existing home or other assets can usually provide the security for these bridge loans. A more difficult problem exists in the event that significant interim and take-out financing is required.

In a life lease project there is a singular title to the project. Individual units or lots are not created by way of a plan of subdivision or a condominium plan, so the financing of an individual purchase of a right to occupy can not be done by way of a traditional mortgage effecting only that unit.

I do not propose to deal with non-traditional funding of projects which may come from the financial resources of the Sponsor or private investors. My remarks will be limited to a broad outline of the way a lender can deal with life lease financing in the most frequently used format for life leases.

There is a value in the project itself, which is after all, land and buildings, but there is also a value to the life leases. The two main components of a life lease or right to occupy agreement are firstly the right to exclusive possession of the unit and enjoyment with others in the amenities and secondly the right to the equity in that arrangement.

When a right to occupy is terminated either by an event such as death or voluntarily, the right to occupy is re-marketed and the original resident, or their estate, has the right to the net proceeds of that sale. The market dictates what that price will be and the degree of involvement of the Sponsor in the selling process varies from project to project. Projects that have been around for some time have numerous units that have resold. The general experience has been that most projects are well run and sales of rights to occupy command prices equivalent or better to comparable condominiums. This is because it is not only a home being purchased, but also a lifestyle.

The interim or building financing is really fairly straightforward. The lending institution will have to assess the value of the land and buildings, cash flow, sales and all of the usual construction related issues. The real challenge is on permanent (take-out) financing

because the title to the property is in the name of the Sponsor and individual residents require different amounts of loans or, in many cases, none at all.

Here the lender has two main choices. Firstly, a lender may put a mortgage on the whole property with non-disturbance agreements for any resident who has paid for their unit in full and a scheme to recognize the different levels of financing. Secondly, the lender may deal with each resident requiring financing on an individual personal loan basis. In the later case other security may be available, but an assignment of the resident's right to the equity, registered under the Personal Property Security Act, is the suggested method.

The basics of determining value of the asset and the strength of the covenant remain. It really is a question of lenders getting comfortable with how these non-traditional (at least for North America) forms of home ownership work and, more importantly from their perspective, what the market is for them.

I also expect to see non-traditional forms of financing developed as more life lease projects with different circumstances are built. For example, in one project, we are looking at a resident paying on a monthly basis rather than the full capital payment up front method of purchase. The resident would, however, be able to buy an annuity for a lump sum, which would pay all housing costs including an inflation factor, for as long as they lived. The annuity payments would be assigned to the mortgagee who would agree to a non-disturbance agreement for that resident. Instead of the equity in the resale of the unit, the resident, or their estate, would be entitled to the remainder of the annuity which could even be life insured to provide the repayment of the full original premium for the annuity.

It is easy to see that lenders will soon recognize life lease financing as an opportunity to develop new business rather than an unfamiliar arrangement to be avoided.

SECTION 3

SENIOR'S HOUSING and LEGISLATIVE ISSUES

This paper is a brief outline of some of the significant legislative issues relating to Senior's housing.

BACKGROUND

As the population ages and Government cuts back on institutional support for traditional senior's housing, but more importantly, as greater numbers of healthy, active and financially independent seniors demand housing designed for them, pressure will mount for non-traditional responses to these needs.

Seniors are looking for independence, with the ability to call upon services or assistance when, and as needed or desired, and an environment where they can live with security and associate with like-minded and like circumstanced individuals. It should be emphasized it is neither healthy or desirable that such communities be ghettos or cut off from other age groups or the community at large. What is required is the balance of control of their environment, and the ability to live independently in their own home, but with the comfort of having the support and society of a caring community.

In this context I am focusing on the so called "life lease" form of housing and not nursing homes or other long term "care facilities".

LIFE LEASE

Life leases are one of a number of practical responses to seniors' housing. The concept is not new, being a common form of housing tenure in Europe for one general market. What is new is the fairly recent recognition that with a few variations to the basic concept, it is an ideal vehicle to respond to the needs and desires of seniors.

In simple terms, a life lease is the granting, by the owner of the land, of the exclusive right for the occupant to use and enjoy as their home, a particular residential unit for their life or as long as they choose. There are many contractual variations on the theme but the most common characteristics are as follows:

1. payment for the right to occupy, up front;
2. payment of a monthly fee for maintenance, taxes, utilities etc. similar to condominium common expense fees;
3. the right to receive the equity (normally defined as market price, sometimes based on

- a formula) for the resale of the right to occupy on termination, less costs and administration fees;
4. influence on the lifestyle and type of resident that joins the community through an interview process, participation on boards, committees etc. and the physical and financial make-up of the project;
 5. most importantly, because of the nature of the communities and legislative shortcomings discussed following, the sponsorship of the project and ownership of the land and buildings by a non-profit group, either created for the specific project or an existing community, church or service organization.

GENERAL LEGISLATIVE IMPACT

While it is not wise to generalize, it can be said that life leases generally are simply not contemplated in existing legislation. This form of tenure is relatively new to North America and the format has taken advantage of certain parts of legislation not really written with life leases in mind. Much of the interpretation and impact of existing legislation is therefore untested and uncertain.

As government becomes more aware of this type of housing model, legislation will probably be amended or created to respond to needs or perceived needs for more certainty.

Being somewhat cynical, but perhaps realistic, I predict the first legislative thrust will be fiscal, that is, an attempt to recover revenues such as Land Transfer Tax, G.S.T. and other real estate related fees and taxes now missed because of a lack of recognition of this form of ownership.

There is nowhere that the term “life lease” appears in current legislation. It is a term created by those involved in the market and is governed by contractual agreements, between the occupant and the not for profit group. It has some characteristics of recognized forms of tenure and many more that don’t fit well into existing legislative definitions or regulations.

PLANNING ACT (ONTARIO)

The basic planning tool used to create the division of units for a life lease project is an exception in the Planning Act, which was admittedly not created or even remotely contemplated at the time for this purpose. Section 50 (9) of the Act allows long-term (in excess of twenty-one (21) years) grants of rights in parts of buildings without the usual consents or plan of subdivision required for parts of land.

There is another form of granting long term rights in parts of buildings being a condominium plan. Condominiums require long expensive approval processes, are basically set in stone when registered, and provide very little of the influence on lifestyle,

control of community and flexibility desired by the seniors of today.

G.S.T. (CANADA)

Long term residential leases are exempt from G.S.T. and, if we accept that a life lease is a residential lease, no G.S.T. is applicable (Excise Tax Act, Schedule V, Part 1,6). The fact the rent is a capital up-front payment or that there is no set term is not relevant to this issue.

LAND TRANSFER TAX (ONTARIO)

The L.T.T. Act provides for tax on the registration of leases for a term, including renewals, of fifty years or more. Since a life lease has no set term there is a question of how that term may fit into the guideline. The answer seems to be that the potential term is determined by actuarial data and the Ministry of Revenue readily admits someone moving in at fifty-five years of age or more is not going to be there over fifty years. The Ministry has tried to twist the definitions in the Act to catch the revenue loss in another manner, and this is one area where it is not too hard to predict legislative change or policy interpretation to try and ensure no revenue slippage.

THE TENANT PROTECTION ACT (ONTARIO)

The Tenant Protection Act (the “Act”) is a new piece of legislation, which replaces Part IV of the Landlord and Tenant Act (residential tenancies), the Rental Housing Protection Act and the Rent Control Act (although this act continues in effect for some purposes).

This is undoubtedly the legislation with the greatest potential for impact on the contractual arrangements that govern the relationship between the sponsor group and the resident, if a life lease is in fact a lease, which I will discuss later. If it is a lease I also have little doubt that the Act did not envisage a life lease when drafted and many of its provisions are ill suited and not desirable from either parties’ point of view.

In particular, the implied right to assign is, in a life lease situation, more of a hindrance than a right or protection. The tenant wants the right to have their interest terminated at will and the right to recover their equity. They also recognize the interest of the sponsor group and the residents to have some influence on the selection of new tenants. That influence or control protects the lifestyle and preserves and enhances the value of the right. There is a balancing of not wanting your own right of alienation fettered but appreciating that if everyone is under the same constraints the units will go to people suited to the community and your equity is enhanced..

Most life lease agreements, in fact, do not provide for any right to assign at all. After termination of the existing lease and re-sale to a new tenant, the not for profit

sponsor/owner enters into a new life lease or right to occupy agreement with the new tenant. The old tenant has no right to assign their lease to a new tenant but only the right to the equity in the unit, that is, the market sale price less such costs and fees as are set out in the agreement.

As a practical matter, therefore, the tenant is not so much focused on the right to assign as on the terms and conditions of their right to termination and the procedures and costs associated with the re-sale of the right to occupy the unit. They want the unit resold at the best price and with reasonable costs, not just the right to have someone step into their shoes with respect to the obligations of the agreement. The life lease tenant is concerned with obtaining their equity in their home not assigning their right to occupy it and to that extent is not like a renter, the person the legislation was designed to protect.

There were no significant challenges to the predecessor legislation and obviously none yet under the new Act relating to life leases. What has kept challenges and potential confrontation to a minimum is the nature of a life lease community. There is a shared vision, a collective desire to protect the lifestyle and the protective and focused will of the sponsor group to make it work. Such a setting tends to treat people with equity and fairness and most people respond to that treatment by respecting the rules. The other fact that has mitigated against challenges is the market. Life leases have been around for long enough that there is empirical evidence that, despite the fear that they don't work, they are resold to a growing market for prices which are competitive to more traditional forms of housing.

With respect to the more fundamental issue of whether these arrangements are in fact leases or some other form of legal relationship between the parties, there is still no definitive answer. A recent case in Ottawa, which did not directly address the issue of the type of arrangement we are reviewing here, suggests that a life lease may not be a lease at all. The court made the distinction between a lease for a certain term and a so-called lease for life, which does not have a specific term. In the latter case, the arrangement is a life interest in land and an interest in the fee (ownership rights). Because the case did not directly deal with life leases in this context and, as one of my law professors used to say, any case can be distinguished even if its just the spelling of the name of the parties, not too much can be concluded at this time. The jury is still out.

Each case would have to be reviewed on its own facts to determine if the Tenant Protection Act applies and if so, to what extent. In many projects the residents are members of the sponsor group which is a not for profit corporation. Members are the equivalent of shareholders in for profit corporations and probably would not be considered a "tenant" under the definition in the Act.

Many projects provide or even require residents to purchase certain services such as meal plans, housekeeping or other services which may make the nature of the arrangement fall into the definition of a "Care Home".

In short, a general discussion of life leases cannot draw conclusions on the application or

impact of legislation in the abstract..

HUMAN RIGHTS CODE (ONTARIO)

This legislation is also one that I think could be classed as lacking definition relevant to a life lease situation. Residents of these projects want some control of the community, not to discriminate but to ensure people are comfortable with the lifestyle and that there are sufficient numbers of a similar age group, to facilitate the critical mass for programs and services.

Section 1, 2 and 3 of the Act contain the basic rights of everyone to enjoy equal treatment with respect to goods, services, facilities, accommodation and to contract, without discrimination.

There is an exception with respect to accommodation where the requirement is an age of sixty-five years or older. This does not help in the usual senior's project where a mix of older and younger seniors is desirable for many reasons, and where many, so-called "empty nesters", move in at an age much younger than sixty-five.

Some overlapping of meaning between "facilities" "accommodation" and "contract" appears to open the possibility to argue that some exceptions to one apply to the other. I would not put too much weight on such arguments and without changes to the Act, reliance will have to be on design, lifestyle, interview and program to encourage some and discourage others to join the community.

As a practical matter human rights issues have not been a problem. While one cannot totally discount a challenge to the attempt to restrict access to the project, it is hard to conceive of a situation where a young person or a family would consider it that important to spend the time, money and effort to challenge the matter so they could live in a complex designed for seniors.

CONCLUSIONS

There are many significant pieces of legislation that may have application to this type of housing model, however, life leases and other innovative housing models used for seniors housing were not generally known, understood or taken into account when the legislation was passed. That is quite frankly still true, but the proliferation of such projects, which respond to the needs and wants of this market, will be exerting pressure on the government to recognize that there are legitimate and desirable forms of housing models that it has not taken into account as yet. I hope the response will be to recognize these forms of housing as a legitimate response to a need, regulate to the extent necessary to protect people where necessary, but not over regulate and make this form of housing prohibitively expensive or unmanageable.

Whether or not life leases are finally determined to be leases or an interest in the fee of the land will not resolve all questions, it will just raise different ones. The most important facts to date are that life lease projects have been around for some significant time and they are generally delivering value to a growing segment of the market. The most important considerations in assessing life lease projects are not much different than any other form of housing, the people involved, the product, the location, the market, how are monies such as deposits handled, etc. Those issues for which other forms of housing rely on legislation are normally handled by practical checks and balances in life lease communities. There are problems, no guarantee of market value and other unresolved issues with any form of housing. In my opinion you should be no less cautious when examining any housing choice, but no more fearful if it is a life lease.