

# When your pool becomes a carpark...

■ What are your rights as an investor when developers change the specs of communal areas?

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One of the few positives to come out of the recent downturn in the region's real estate market – at least from a developer's viewpoint – has been the reduction in raw material costs and construction costs.

Therefore, despite the drying up of sales revenues, those developers who have been fortunate enough to weather the storm have been able to utilise this ephemeral period to their advantage and maintain a healthy reputation by simply doing what they were paid to do in the first place: crack on with construction.

This is obviously good news for investors in off-plan developments, especially for those who intend to occupy the property. That is, of course, on the assumption that the property being delivered is in accordance with their expectations.

With disputes relating to late delivery having been well documented for sometime now, this column tries to take a fresh look at the less-familiar disputes arising out of developments that were delivered on time, yet differ in some way from the original conception.

## Changes in unit specification

In so far as unit specification is concerned, the purchaser's position is relatively straightforward, as most sales purchase agreements (SPAs) are rife with obligations on the developer's behalf, thus making the parties' respective positions reasonably clear. But what of the development's communal areas and facilities?

Unfortunately, most SPAs are silent on this front. This is surprising, bearing in mind that it is often this feature that attracts buyers to the development. Imagine, for example, being told that your new property's intended full lake



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view has been substituted with a less therapeutic four-lane highway. Or perhaps that the lush 18th green adjacent to your villa is now a visitors' car park.

## Higher prices for attractive views

Not only would this clearly impact upon your enjoyment of the property, chances are it would also have an adverse impact on your investment's value. It is after all no secret (and most real estate brokers will testify to this) that properties with an attractive view command higher prices. The same applies to properties in close proximity to certain conveniences such as the RTA's new Metro stations.

Unfortunately, the recourse available to buyers in such situations is inconsistent, to say the least. This is because it is conditional upon a number of factors such as the contractual documentation, the nature of the grievance, and any relevant written or oral representations made by the parties prior to entering into the transaction.

The first, albeit obvious, point to make is that the developer will invariably retain ownership of communal areas. Therefore, it is hardly surprising for SPAs to feature a clause seeking to fully reserve the developer an absolute discretion to deal with such areas as he deems fit. The question is whether this can really

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be regarded as a *carte blanche* for the developer to act without due regard for investors, especially in the current real estate market, where cost cutting is at the forefront of all business operations.

The answer to this question will ultimately be one of fact and degree. That is to say, one would need to determine whether the particular grievance is genuine and reasonable in the circumstances. Put into context, a judge or tribunal would invariably be more sympathetic towards claimants left without adequate vehicular access to their property as opposed to those, for example, who no longer have a street lamp outside their front door.

## Furnish clinching evidence

Clearly, the more difficult scenarios in which to predict an outcome are the ones that fall in between the above extremities. In those circumstances, the more evidence a purchaser is able to produce to justify his position, the better. For example, in order to be held as credible, the clinching evidence should ideally be in written form, such as a detailed masterplan annexed to the SPA, depicting the now absent feature, or perhaps even a side letter from the developer, assuring the existence of the same.

In some cases, it may also be possible to establish that a higher premium was paid for the property, considering the feature in question.

The appropriate remedies vary from case to case, and ultimately depend upon whether the grievance can be rectified without excessive disruption and cost.

If it is full reimbursement that the purchaser has his sights set on, those who bought from the secondary market would be well advised to check the terms of their agreement with the developer, as most were savvy enough to peg such agreements to the original purchase price in a bid to harness their future exposure.

In a nutshell, provided that the purchaser's grievance is genuine and reasonable, the chances of a judge or tribunal ruling in their favour are reasonably high. However, with the burden of proof in this regard resting firmly upon the purchaser, the importance of irrefutable documentary evidence supporting the position cannot be overstated.