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Municipality liable for faulty construction

Town inspector failed to spot building defects

When construction defects are found in a new home, a homeowner usually looks to the builder or the Ontario New Home Warranty Program for redress.

But ONHWP coverage typically applies only to homes where both the builder and the dwelling were initially registered for coverage under the program. Many new homes and condos are exempt from ONHWP coverage for various reasons.

The home may have been a major renovation of an existing structure, it may have been built on the foundations of a prior building, it may have been built by an unregistered builder, or the house may have been built by a builder for his own use. (Some coverage may be available even if the builder was unregistered.)

It has generally been accepted that the only remedy a homeowner had for defects in an unregistered house or a house where the ONHWP warranty had expired was against the builder or vendor of the home.

But an obscure decision of the Superior Court in Newmarket last year, which has recently come to light, opens up broad new possibilities for compensation for owners of defective homes without warranties or with expired warranties.

In 1990, Robert and Correne Larosee built a house for themselves in the mostly rural Township of Lake of Bays, near Baysville in Muskoka. By 1992, they decided to move elsewhere and put their home on the market.

Karen and Jeffrey Chapeskie were introduced to the Larosee home by their real estate agent. They had prepared themselves for the purchase experience by reading a book on home buying. Some conversations took place with the vendors about the quality and quantity of water available and the deal was eventually signed and closed in August 1992.

When the Chapeskies moved in, they discovered numerous defects with the footings, weeping tile, water quality, septic system and basement insulation.

They hired a geotechnical engineer who discovered that part of the house was subsiding into the ground because half of its foundations were resting on soft soil instead of bedrock or soil with regulation load-bearing capacity.

The engineer was able to reach under the footings and scoop out handfuls of soil. He found that there was no weeping tile to provide foundation drainage. There was no insulation in the basement, as required by the Ontario Building Code (OBC), and there were numerous other deficiencies.

Prior to the start of construction, a building permit had been obtained by the Larosees. No one had requested an inspection of the excavation and footings before the concrete was poured, despite the requirement for one in the township bylaws.

By the time the inspector made his first inspection, the defective footings and foundation were already in place. He noted on his report that there was no weeping tile around the foundations to carry ground water to the low point on the lot, but no further checking was made of the foundations.

On subsequent inspections, the township inspector failed to follow up on the missing weeping tile, and also failed to note the lack of basement insulation.

When the Larosees moved into the house in October 1990, they did not request a final inspection or an occupancy permit, as required by the bylaw and the building code. In fact, final inspections were not requested until just before the sale to Karen and Jeffrey Chapeskie in August 1992.

The township's building inspector visited the house before closing and issued a conditional occupancy permit stating, "complete building okay to occupy" and "partially completed and ready for residential occupancy" in accordance with the OBC. Some minor outstanding trim work was noted.

Following repeated complaints about the house by the Chapeskies after they moved in, the township inspector issued a formal order to comply in March 1994. Shortly afterward, the Chapeskies sued the Larosees for negligent construction and negligent misrepresentation.

They also sued the Township of Lake of Bays for negligent inspection and negligent misrepresentation in issuing the occupancy permit for a house that was clearly in violation of the building code.

It took five years for the case to come to trial, and 11 days at trial before Justice Peter Howden in Newmarket. When it was all over, the damages were assessed at \$28,500. The Larosees were held responsible for \$9,700 for a new well and related damages, as well as half of the remaining \$18,800 for the foundations and basement insulation.

But the interesting part of the case is the fact that the township was held responsible for the other half of the \$18,800

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In his decision, Justice Howden wrote that prospective buyers are entitled to the protections of the municipal bylaws and building code. It is reasonable, he said, to assume that if the law is not complied with, buyers may be injured. Once a municipality adopts a scheme of bylaws and inspections, it owes a duty of care to owners, builders and prospective buyers to perform those inspections with reasonable care as the law requires.

Justice Howden ruled that failure to exercise the required standards of care in construction inspections will result in liability on the part of the municipality, except for defects the inspector could not reasonably be expected to have detected.

The judge also stated that the issuance of the clear occupancy permit just before the closing of the Chapeskie purchase amounted to a representation that all of the Code requirements had been met, except for the few exceptions listed on the permit.

The court decided this representation by the township was negligent. For homeowners with defects in construction, resulting in part from a failure of the building inspector to make a proper inspection, the bottom line is that the municipality may now be exposed to liability for some or all of the damages.

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