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Standard contracts offer builder leeway to make changes

Substitutions, changes are allowed

Buyers may be surprised by how much

Decide what's crucial for you

It's the day before closing of your new house or condominium. After months of waiting, it's finally time to inspect the finished product, and you show up for the customary pre-closing inspection.

Then comes the shock. You notice right away that there have been numerous changes to the finishings, colours, or layout of the new home, without any advance warning. You call your lawyer to find out your rights. Since it's not what you bargained for, you want to know can you kill the deal, or force the builder to deliver what you thought was promised?

This was the subject of a talk presented last week by lawyer Mark L. Karoly to a sold-out Law Society of Upper Canada continuing-education seminar.

Karoly, who practises real estate law with the Toronto firm DelZotto Zorzi, told the lawyers present that builder agreements typically allow the builder wide flexibility in substituting materials and changing floor plans, subject to some limitations detailed in provincial regulations.

Any change in the home that might be a breach of the contract provisions, Karoly explained, will have to be carefully examined to determine the appropriate remedy available to a purchaser.

In the 1991 case of *Kates v. Camrost*, the purchaser came to inspect his new condominium apartment a week before closing and discovered that the builder had used the wrong colour tile or marble in the entrance foyer, the kitchen, the bathroom floor and the sides of the bathroom shower stall.

Kates immediately applied to court for an order that there was no "substantial completion" of the unit, and for the return of his deposit. Justice John Cavarzan decided that the major deficiencies meant that the condominium was not substantially complete. Since the builder refused to extend closing, he ruled that the agreement was terminated and the deposit had to be returned to the buyer.

Karoly also reviewed the 1993 decision in *Keen v. Alterra Developments Ltd.* In that case, the purchasers were seeking to buy their "dream home" which was a French, country-style house with a one- or two-step entry. When it became apparent that the grading of the lot required four steps up to the front door, the purchasers backed out of the deal and bought another home elsewhere.

The builder sold the house at a significant loss and sued for damages. The purchasers claimed their deposit back.

At trial, the builder argued that the contract provisions allowed it the right to make necessary changes in the plans and specifications, but Justice Eugene Fedak ruled that the changes made by the builder constituted a "fundamental breach" of contract. The court discovered that the builder knew in advance that extra steps would be required and failed to bring this to the attention of the buyers.

In the particular circumstances of the case, this knowledge and failure of disclosure was a breach of a fundamental term of the contract. The judge ruled that the builder was not entitled to hide behind the contract provisions permitting changes.

A different result was reached the same year in the case of *Town-Wood Homes v. Khanna*. The purchase agreement provided for a double door front entry, but the builder failed to build it in the mistaken belief that it violated the local zoning bylaw. The Khannas refused to close and the builder resold the house at a loss.

At trial, Justice Ellen MacDonald ruled that the builder had not breached a fundamental term of the contract. The purchasers were not entitled to cancel the contract and get their deposit back. As well, damages of \$61,000 were awarded against them, and the award was later upheld by the Court of Appeal.

In the 1994 case of *Israel v. Towngate*, the sales literature showed a solarium in the condominium unit having measurements of seven by 12 feet. The purchase offer, however, said room sizes were subject to change without notice.

When the unit was constructed with a solarium of only five by seven feet, the buyer realized her dining room table could not fit into the room and she refused to close. Justice Casey Hill ruled that the change in measurements of the solarium was not enough to allow the purchaser to back out of the contract. He awarded the builder damages exceeding \$100,000.

The lesson from these cases is this: Standard form offers allow builders significant leeway to make changes that buyers may not be happy with when the home is finished.

Purchasers of new houses and condominiums should determine what is and what is not critical to their purchase decision, and negotiate with the builder to limit the possibility that changes will be made to those most important aspects of the home.

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