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## Illegal basement flat proves costly mistake

Is a homebuyer entitled to know in advance whether a basement apartment is legal or not? Does a real estate agent have an obligation to disclose to potential purchasers if a second suite in a single-family home complies fully with zoning bylaws, building code and fire code?

I've spent some time recently reading realtor ads for Toronto-area homes with basement units. They present an interesting range of wording, from a simple statement that the home contains a "basement apartment," to the puzzling "basement apartment (non-retrofit)" and finally to the more definitive "basement apartment with retrofit."

Of course, what's missing in each case is one of two words, which I have yet to see in a real estate ad: either the word "legal" or the word "illegal."

For obvious reasons, homes are almost never advertised as having a basement apartment, which is either illegal (it's not a great marketing tool) or legal (no-one wants to sign a guarantee that the unit complies with all applicable laws and regulations).

As I pointed out in this column last week, there is no single government authority, which provides written certification that any given basement unit is legal. A fire code retrofit certificate is only one of a number of requirements necessary to certify legal status.

Owners must also be able to certify compliance with regulations of the Electrical Safety Authority and with all applicable zoning and housing standards bylaws. These relate to things like ceiling height, window size, parking spaces, smoke detectors, bathroom ventilation, and the fact that basement units cannot be created in homes less than five years old.

Something as simple as a loose or missing handrail down a staircase can turn an otherwise legal apartment into one which does not comply with housing standards regulations.

One real estate agent found out the hard way recently that the failure to reveal clearly that a basement bedroom was illegal can be extremely costly.

Back in 2001, James and Eila Morrison hired David Nelson as their real estate agent to find a house for them in Sault Ste. Marie, Ont. They specifically told Nelson that they required a house with four bedrooms.

Nelson was present with the Morrisons when they viewed a house on Berkshire Pl., which had a basement room containing a bed, a desk and a filing cabinet. Assuming this was a fourth bedroom, the Morrisons signed an agreement to buy the house.

Before closing, the Morrisons discovered that Sault Ste. Marie has a bylaw that prohibits bedrooms below ground level (Toronto does not have an equivalent bylaw.)

They refused to close the deal and were sued for damages by the owner Margaret Jean Malpass.

Before trial, James Morrison died and Eila Morrison settled the action with the seller Margaret Jean Malpass by paying her \$50,800 plus expenses.

Following the settlement, Morrison pursued her claim against the agent, Nelson, for negligence, breach of contract, and breach of his trust duty to her.

At trial last year, Morrison's evidence was that Nelson did not mention the bylaw that prohibited basement bedrooms, nor did he correct the impression she may have had that the basement room was a legal bedroom. The property feature sheet did not indicate four bedrooms.

Nelson, on the other hand, testified that he discussed the legality of a basement bedroom with the Morrisons, and he told them that the Berkshire Pl. house only had three bedrooms.

In November, last year, the court awarded Morrison more than \$62,000 representing the settlement she had made with the vendor.

Justice Peter Grossi ruled that Nelson owed the Morrisons a positive duty to tell them that he believed the basement bedroom might not comply with the municipal bylaw. He wrote in his judgment that an agent must fully and fairly disclose to his clients all material information regarding the property, which might affect their decision-making.

Applying this decision to the thousands of Toronto basement apartments may well mean that purchasers in this city are entitled to full disclosure from their agents of the legal - or illegal - status of below-ground units.

Wording like "basement apartment (non retrofit)" and even "basement apartment with retrofit" in real estate ads might not be sufficient any longer.

Do you have an interesting basement apartment story? I'd love to hear from you by fax or e-mail.

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