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## Buyers told it's illegal if they occupy home

Can a homebuyer be forced to move into a home when an occupancy permit has not been issued and the home fails to meet the Ontario Building Code?

Last summer, a couple signed a contract to purchase a new home from a builder in London, Ont.

Their lawyer advised that the builder had not completed six critical Ontario Building Code inspections on the house. These included the preliminary and final inspections of the foundations, heating, insulation, vapour barrier, interior and ultimately, the whole house itself.

Under intense pressure from the real estate agent and the builder to close, the buyers wisely decided to meet with the local building inspector in charge of the project. He told them that the Ontario Building Code prohibited occupancy of the house until the final inspection had cleared all the health and safety issues in the building. Having just taken all their possessions out of storage following a move across the continent, the couple decided to put it all back into storage again.

When they were told by city officials and their lawyer that they could not legally occupy the house on closing, the couple refused to close.

Despite a firm closing date of Aug. 19 last year, the house did not, in fact, receive final approval from the city until Sept. 21, after two previous failed attempts.

The couple quickly found a brand new house ready for immediate occupancy.

Meantime, the couple tried to get their \$5,000 deposit money back from the builder, claiming they could not legally move into the house on closing. The builder refused, so they went to the Tarion Warranty Corporation office in London.

Even though they had written proof from the City of London that the house could not legally be occupied, Tarion told them they should have closed, moved into the house and submitted a "30-day form" listing the incomplete items.

Tarion eventually issued a formal decision to the couple denying their claim. That decision is now under appeal to the Licence Appeal Tribunal.

Without discussing this specific case, Rob Mitchell, director of industry and government relations at Tarion, advised that Tarion cannot force a homebuyer to move into a home or not move into a home. That, he said, is a contractual matter between builder and buyer. Tarion's function is to guarantee the warranties or provide deposit protection in the event of cancellation of the contract, builder bankruptcy, or a fundamental breach of contract.

"In some circumstances, a homeowner may legitimately refuse to close the deal if they believe that what they are getting is fundamentally not what they bargained for," Mitchell told me. This involves an assessment of whether the vendor has committed a "fundamental breach" of contract, and the facts will be different in every case.

In cases like these, a vendor will typically say he or she was ready, willing and able to close, with deficiencies covered by the Tarion warranty. At the same time, a purchaser will argue that the failure to have final inspections is a "fundamental breach of contract," requiring the builder to return the deposit.

Mitchell noted that it is Tarion's position that a failure to meet Ontario Building Code does not automatically mean the builder has breached the contract. In some cases, a building code violation will be treated at common law as a breach, and in some cases it would not.

Tarion recommends that homeowners and their lawyers should determine in each case whether they have a legal obligation to close or not. Based on the circumstances, purchasers will have different protections under the legislation.

In my view, Tarion's rules are simply not clear enough to enable a buyer or a lawyer to choose one alternative or the other when faced with a house that hasn't had the necessary final inspections on closing day and when the Ontario Building Code says occupancy is illegal under those circumstances.

For a lawyer or purchaser-client to make a decision on whether there has been a fundamental breach based on common law principles is simply too risky. What would happen, for example, if a city inspection after closing determines that the foundations are defective and must be replaced? If reconstruction costs exceed the Tarion warranty limit of \$150,000, the buyer might be out of luck.

And what happens if the builder and buyer are willing to close, but the mortgage lender insists on final inspections and refuses to advance the mortgage funds?

Buyers, sellers and lawyers eagerly await the decision of the Licence Appeal Tribunal in this case to clarify this murky area.

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