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Bob Aaron *bob@aaron.ca*

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Buyers had recourse for altered floor plan

Couple not informed about design changes

Grading required additional front steps

When you buy a house from a builder, is there any guarantee that you'll get the same house that was promised?

That was the question that prompted an interesting response from a reader of this column last month. In a July 5 column (*Ontario buyers deserve same rights as British*) I discussed the Property Misdescriptions Act of Great Britain. (See http://www.aaron.ca/columns/2003-07-05.htm). Under that legislation, a builder is forced to deliver to a purchaser the exact house that was promised.

In contrast to the British experience, most builder offers in Ontario allow the builder considerable leeway to alter the floor plans, room sizes, exterior design and colour, lot sizes, and other features.

These rights are reserved in case the municipality requires changes at the building permit stage, if the builder makes a mistake during construction or cannot or does not deliver what was promised for other reasons.

A typical clause used in an Ontario builder offer reads: "Materials, specifications and floor plans are subject to change without notice. All house renderings are artist's conceptions. All floor plans are approximate dimensions. Actual usable floor space may vary from the stated floor area."

When these clauses are present, can a purchaser back out of a deal if the home as built differs significantly from what was promised?

Prompted by last month's column, Hamilton real estate agent Gary Keen called me to talk about his tussle with a builder in the early 1990s, and how the Ontario Court of Appeal allowed him to terminate his new home deal after the builder changed the design. Keen's lawyer, George J. Parker of Hamilton, successfully argued that the design change was a "fundamental breach" of contract.

As we spoke, I recalled reading the trial and appeal decisions in Keen's dispute with Alterra Developments some years ago.

In early 1990, Gary and Patricia Keen signed a contract with Alterra to buy their $340,000 dream house, a French country-style home with a side entrance from a garage.

The sales manager assured them that the house would look just as it was shown in the sales brochure, with one step up to the porch and then one step into the house. When the house was finally built, two main-floor rooms and the front hall closet were lower than the rest of the house by one step.

The builder explained to the Keens that due to grading problems with the lot, the front door was three to four feet higher than ground level and there would be four steps up to the porch and stairs from the house down into the garage.

The purchasers were extremely unhappy with the look of the house and the loss of space in the garage and after some unsuccessful negotiations, terminated the transaction.

The Keens sued the builder for return of their $20,680 deposit and the builder sued for the loss of $48,700 when it resold the house at a lower price.

The offer signed by the Keens and Alterra allowed the builder the right to make "minor or necessary" changes in the floor plans and specifications. It required the purchasers to agree to those alterations and close the deal.

At trial, the evidence showed that the builder knew prior to excavation that three to four steps would be required at the front door, as well as three steps and a platform taking up part of the garage.

"The builder chose not to bring this to the attention of the purchasers," said the judge, and relied on the two exclusionary clauses without warning the purchasers of the potential changes.

In ruling in favour of the purchasers and against the builder, Justice Eugene Fedak wrote, "It is my opinion that the changes effected by the builder constituted a fundamental breach (of contract).

"The builders created a house fundamentally different from the French country-style "dream home" the purchasers thought they were getting. They got something different from what they contracted for."

Since there was a breach of a fundamental term of the contract, the builder was not allowed to hide behind the exclusion clauses allowing design changes. Justice Fedak concluded, "It would not be fair, nor reasonable, nor in the public interest, to allow the builder to do so."

In 1997, more than three years after the trial was over, the Ontario Court of Appeal dismissed the builder's appeal in three short sentences and upheld the finding of fundamental breach of contract.

Real estate lawyers often spend time listening to clients complain about changes to their own dream homes.

The Keen v. Alterra case gives unhappy homebuyers some hope that the exclusion clauses in their purchase agreements may not force them to take a different house from the one they thought they were buying.