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## House size not guaranteed to buyers

Laws governing this need reform

### *Home warranty of little help*

I recently received an e-mail from a Star reader asking about the calculation of total square footage in the sizes of new homes and condominiums. Mike had entered into a contract for a new house in Markham and wanted to know if he could rely on the builder's representation of house size.

In very tiny print, the typical builder contract states that the area of the dwelling is calculated by the vendor's surveyor or architect in accordance with the requirements of Ontario New Home Warranty Program bulletin 22 (see <http://www.newhome.on.ca> under Builder Bulletins).

The contracts typically state that the dimensions or floor area of the house or unit as represented to the purchaser, or as shown in any sketches or advertising material, is approximate only and may differ from the actual as-built boundaries and sizes.

Most offers state that the purchaser consents to any variation in advance, and that the purchaser further confirms that all details and dimensions for the dwelling are approximate only. The offer and the purchase price are not subject to any adjustment based on the ultimate size of the dwelling.

Mike quoted these sections of his offer to me, and then cited an apparent discrepancy with ONHWP builder bulletin 22. Published April 1, 1990, that bulletin states that a tolerance of 2 per cent on the total area measurement is acceptable.

What Mike wanted to know was which document had priority.

At this point, it's important to understand that virtually no local builder agreements for new homes contain any sort of warranty that the house will be a minimum size. Purchasers may leave the sales office with a full-colour drawing of the house, complete with floor plans, individual room measurements and the house size.

But in most cases, the offer does not contain those measurements, and specifically prevents the brochures and plans from being deemed part of the agreement. Builder offers contain an entire agreement clause, which states that anything written anywhere outside the offer or stated verbally is not part of the agreement. In other words, if it's not part of the offer, it doesn't exist. In condominium agreements, the attached floor plans often display total sizes but typically have a disclaimer that allows the builder full discretion to build and deliver a unit with different plans and a totally different size.

As a result, when I review agreements for clients, I am forced to tell them that any similarity between what they believe they are getting and what is actually delivered may be a coincidence. Purchasers are forced to rely on the builders' reputation for delivering what was promised.

Unfortunately, the warranty program is no help to consumers on this subject.

I sent Mike's e-mail to ONHWP spokesman Kevin Macintosh. He replied that ONHWP bulletin 22 tells builders how to measure dwelling area, but it is only an advisory.

The bulletin, Macintosh told me, is silent on what happens if the builder exceeds the tolerance and builds the house or unit substantially smaller than promised. The common law on contract interpretation would come into play in this case, and the contracts are worded so that the homebuyer has considerably less than a 2 per cent chance of winning on this point.

Macintosh conceded that the typical offer clause seems to exclude any remedy if the builder deviates from the estimated square footage, regardless of the seriousness of the deviation.

In the case of a promised 3,300-square-foot house built at 3,200 feet, the impact on the buyer would be minimal. But a promised 600-square-foot condominium delivered at 500 square feet would create one very unhappy buyer.

Macintosh pointed out this is why purchasers are always reminded to have their deals thoroughly reviewed by a lawyer prior to signing, or at least during the conditional period.

My experience, however, is that builders are extremely reluctant to sign anything that guarantees buyers a minimum-sized dwelling.

When agreements themselves are silent on the size of home or condominium unit being purchased, it is difficult to argue after the fact that there has been a significant size deviation, or a fundamental breach of contract that would entitle the buyer to a rebate or to back out of the deal.

All of which points out the need for law reform in this area. In my view, the ONHWP legislation should be amended to require full, binding disclosure of the minimum size of home being delivered.

It's another item to put on the agenda for the Liberal government at Queen's Park.