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Include floor plan in offer to avoid surprises

It never ceases to amaze me that would-be homebuyers will enter into an agreement to purchase a new home probably the largest single financial transaction in their lives without attaching a copy of the house designs and floor plans to the agreement of purchase and sale.

Most buyers of new homes in Ontario are given brochures and floor plans in the sales office. The house exterior is shown with full-grown trees and lawns, and measurements on the interior floor plans are shown to the nearest inch. But the plans and drawings are not part of the offer.

Virtually all offers contain an entire agreement clause, which states that any document not attached to the agreement as a schedule is not part of the deal. This includes the floor plans and elevation drawings.

The problem, of course, is that if the contract contains no details of the home being purchased, the builder can legally build whatever he wants.

There is considerable leeway to change the promised interior plans, room sizes, exterior look or elevation of the house, and the total size without the buyer's consent.

As a result, lawyers who review builder offers for their clients are forced to tell them that the house they think they bought and the house they actually get may be totally different. Any similarity between the two is probably because of the builder's reputation for delivering what was verbally promised, and not because the offer provided the purchaser with airtight guarantees.

The reason local builders don't attach floor plans to their offers may well date back to a court case between Paul and Dragica Pavlic and their builder.

The case has never been published but is available online to subscribers of two legal databases. I was not aware of it until I received an e-mail last week from my colleague William Clark, of CAW Legal Services in Oshawa.

Back in May, 1985, the Pavlics signed an agreement to purchase a particular model in a Mississauga subdivision. Detailed specifications and floor plans were incorporated into the agreement of purchase and sale.

Nine months later, the construction manager realized that the Pavlic house was too big for the lot they had chosen, and the existing zoning bylaw required a smaller building. Without notifying the purchasers, the manager decided to reduce the size of the house to fit the lot.

A year after they signed the agreement, the plaintiffs were told that the house size had been reduced and, when they measured it, they realized the full extent of the problem. The agreement called for a house of 3,335 square feet, but the actual gross area as built was 3,054 feet a reduction of 8.4 per cent. Eight rooms in the house were reduced in size, and the exterior design was altered as well.

The agreement of purchase and sale between the Pavlics and the builder contained a clause allowing the vendor to alter the plans if required by reason of municipal requirements or otherwise. In such case, the purchasers had obligated themselves to agree to the changes and close the transaction.

At trial, the evidence was that the builder knew at the time the contract was signed that the promised house was too big for the lot the couple purchased, and that there was no evidence the house size was reduced because of new zoning requirements. In fact, the zoning bylaw had been the same on the day the offer was signed.

In 1993, the trial judge awarded the Pavlics \$21,500, plus seven years' interest and costs for the reduction in the house size.

The builder appealed the case to the Ontario Court of Appeal, and its decision was released in 1997, 10 years after the case began, and 12 years after the contract was signed in the sales office. In its decision, the appeal court ruled that the trial judge was correct in finding a breach of contract by the builder.

Bulletin 22 of Tarion Warranty Corp. (formerly the Ontario New Home Warranty Program) states that a tolerance of 2 per cent on the total area measurement is acceptable for builders, but it is only advisory and not binding. When there is no attached plan to measure the 2 per cent allowance against, the builder has a wider leeway to deliver a smaller house. (See House size not guaranteed to buyers, Title Page, April 10, 2004 at <http://www.aaron.ca/columns/2004-04-10.htm>)

Buyers who receive a home significantly smaller than what was promised might discuss the Pavlic case with their lawyers.

Paul Vayda represented the Pavlics at the Court of Appeal. He told me last week that a builder should be required to put the size and room dimensions in the contract, and there should be clear penalties for a builder making the house smaller.

A builder can't breach a contract by building a different house if there are no plans attached to it in the first place.

Jim Watson is the new Minister of Consumer and Business Services in the provincial government. If he's serious about consumer protection, he might consider Vayda's advice.