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"CAVEAT EMPTOR": THE NEED FOR QUALITY CONTROL IN HOUSING CONSTRUCTION

Too often the quality of new housing construction has been something less than adequate. Many builders skimp on materials where possible or pay less attention than they should to how well a building is put up. For the home buyer this poses an extremely difficult problem. To begin with, he (or she) is in almost every case anything but an expert in construction, and must rely heavily on what little he can see and on what he is told by the builder or his sales agent. However, as the Ontario Law Reform Commission has noted, "...it is axiomatic that the average potential homeowner knows less about the house he may buy and the land around it than about the car he drives."¹ Secondly, once the inner walls are completed, even an architect would not be able to know how well a unit was built. All he could accomplish would be an opinion based on any number of minor visible factors. Thirdly, legal avenues open to him for compensation for defects in newly constructed units are, in practice, essentially nonexistent.

Case Study: Edgeley Village

Because of the complexity of the structure, governmental agencies generally require an independent resident inspector for high-rise buildings, but such is not the case for low-rise units, including townhouse developments. At best there are sporadic checks made during the construction phase, and the quality of workmanship is not emphasized in these inspections. To illustrate the problem more clearly, it is useful to look briefly at the short history of a private townhouse development in Metro Toronto. This section of the overall Edgeley Village development is in conjunction with a number of Ontario Housing Corporation apartment units as well as detached single family dwellings built under the "Home Ownership Made Easy" plan. It must be remembered, though, that the difficulties experienced in this case are not confined to Toronto, for they are emerging with disappointing regularity in many urban centres across Canada.

The condominium townhouses were constructed during the late 1960's, and occupancy commenced in 1969. They sold for \$25,000 to \$30,000 according to size, not inexpensive housing by any means. The land was bought from Ontario Housing Corporation, with agreement from Central Mortgage and Housing Corporation to undertake the mortgaging. These townhouses were not financed under the H.O.M.E. scheme, but O.H.C. did undertake its normal inspection procedures as though it were financially involved.²

¹ Ontario Law Reform Commission, Report on the Trade Sale of New Houses, (Toronto: Queen's Printer, 1968), p. 8.

² O.H.C. officials, in a discussion on May 12, 1972, stated the reason for this unusual action was essentially because the townhouses, though separate, were but a part of the overall development in which it was heavily involved, and the Corporation felt certain standards should be applied throughout.

During construction the designing architects were not retained in a supervisory capacity, which left inspection of the work essentially in the hands of the government agencies. CMHC has a required minimum of three inspections for all housing in which it has a role: the first to check the soundness and wet-proofing of the foundation; the second to ensure proper drainage and safety of wiring and plumbing; the third to check the structural soundness of the unit in its finished state. At best there was an average of seven inspections by CMHC for each unit throughout the entire construction period, including re-inspections to ensure that infractions had been remedied. OHC also confined its inspections to the structural soundness of each unit and little else. There was no resident inspector from OHC; the sporadic inspections concentrated on the foundation areas up to the first floor deck; and generally there was heavy reliance on inspections by the first mortgagee (CMHC). The municipality involved performed no augmentative function of any consequence, since its purview was limited to structural safety, fire safety, and a modicum of health standards.

In all of the above instances, any consideration as to quality of workmanship was based on the appropriate reference in the Residential Standards supplement to the National Building Code. The only reference contained therein is the phrase "workmanship of a standard equal to good building practice". None of these terms are further detailed or defined.

Almost from the beginning problems resulting from workmanship began to appear. In several of the poured concrete walls in the underground garages and unit foundations serious cracks developed, and seepage resulted. A number of these cracks occurred in walls that were in common between basements and the subterranean garages. Numerous leaks appeared in roofs, largely from faulty caulking. In the rear gardens that are atop the garages, except for the very back portions, there is nothing but clay soil. In winter this earth (which has a maximum depth of two feet) freezes except for that part closest to the houses. When the ground thaws water collects outside the basement walls and gradually creeps in. There is no effective drainage away from the houses. These problems alone indicate a lack of soundness of structure, and point to inadequate inspection. Attempts by the residents, both individually and collectively, to contact the builder and get him to return and repair these and other faults met with no success. CMHC was contacted, sent out an inspector, and, on the basis of his findings, suggested to the builder that he return and rectify the major difficulties. The contractor then sent out a crew to undertake the repairs. There was no follow-up by CMHC's inspectors, and thus no control over the extent or quality of repairs.

Shortly thereafter the residents contracted with a firm of consulting engineers to undertake a preliminary study of the development. The report of the engineers³ notes a number of defects in the construction, making reference to such things as the masonry's exhibiting "very casual

3. Proctor & Redfern Ltd., "Condominium No. 17, Toronto: Report on Existing Buildings" (Toronto: Proctor & Redfern Ltd., 1971).

workmanship" with some of it "running out of bond", the grading in the garden area having been done "in such a manner that water is directed to the walls of some of the housing units", a free standing garden wall being "severely cracked to the extent that it was dangerous", "leakage of water into basements appeared to be common", and "the placing of the base plates for the steel beams across the basement has been done in such a haphazard fashion that in some cases the beams do not rest on the plates".^{4.} The report concludes with the following two statements:

It would seem obvious in view of the comment noted above that in many areas of the condominium development the workmanship is of poor quality and contributes directly to the problems experienced by the condominium development as a whole

and

faulty flashings and leaking basements are not normally difficult to remedy and apart from the possibility of a fair amount of regrading required we can think of no deficiency that could not be remedied in a matter of a few days and we note with some surprise that attempts by the condominium to obtain some satisfaction from the contractor have met with no results.^{5.}

Because the homebuyer is accorded no clear protection against such faults, or procedure of relief from the vendor, residents are faced with little option but the somewhat risky alternative of court action.

The Problem

Although a few of the details may differ from site to site, the basic problems surrounding the quality of housing construction are applicable virtually throughout the urban housing market. With regard to our case study, there was no adequate supervision of the building process, particularly in the context of quality. The typical inspection by CMHC tends to be very low-level rather than detailed. If infractions are noted, they can be ordered corrected. Even this measure of inspection provides little assurance to the buyer, since "a builder may ... have satisfied ostensibly the Corporation's requirements and still have built defects into the home."^{6.} Curiously, at no time is a buyer allowed access to the infraction reports. It must be noted, though, that even if these reports were made available they would only serve an informative purpose, because "...a purchaser has standing neither to enforce quality requirements laid upon a builder by CMHC nor to demand redress should a builder fail to live up to those requirements."^{7.}

4. Ibid., Pp. 4-5.

5. Ibid., p. 4.

6. Law Reform Commission, Report, p. 30.

7. Ibid., p. 6.

Builders are reluctant to work under architectural supervision because of the demands of the latter for quality. According to one architect, what few minimum standards exist in the Building Code are often treated as a maximum by many builders.

There is no protection after the fact for the home buyer, not even in the form of a bond or an effective warranty. Of the two largest investments an average Canadian normally makes, protection for the buyer in the lesser (the automobile) is much better than that in the greater (the house). As Professor W. A. Neilson of Osgoode Hall Law School noted recently in an article in Canadian Homes Magazine, neither CMHC nor the local building department make any inspections which are genuinely on behalf of the buyer. "Even if you find that the builder didn't meet the local building codes, that the house was passed with faulty wiring or incorrect construction, you still have no recourse to the local building department!"⁸. Current consumer protection laws are essentially useless in the housing field, particularly if the buyer signs a contract or purchase agreement whose typical wordings are heavily in favour of the builder. Indeed, in the legal context, the Canadian home buyer has virtually "near-zero rights".

CMHC, in whom a lot of Canadians have placed considerable trust over the years, has unfortunately not lived up to that trust; they have failed to insist on better quality of construction. Yet in all fairness CMHC can only enforce existing laws, and here is perhaps the fundamental problem in housing construction of all types in Canada -- a lack of detailed guidelines in the law regarding how well the materials must be put together. The federal legislators have not performed adequately in this context in the past, and should begin immediately to rectify this deficiency. Neither are provincial or municipal levels of government without fault. Why have they not moved to correct the "quality" gap in the National Building Code with an appropriate supplement?

Code Amendments

Many changes in the current situation must be forthcoming immediately. First, the Urban Affairs Secretariat should prepare amendments to the Code to strengthen the section on workmanship. The doctrine of "caveat emptor" (literally "let the buyer beware") arose in fifteenth century England, and in this context it was essentially adequate when applied to real estate since land rarely changed hands, and when it did it occurred primarily between parties who knew and understood it.⁹ Conditions have, however, altered drastically to a point where land and housing transactions are now an essential part of life for most of society. Unfortunately the law has not kept pace with these changes, and provides no redress or solace for a buyer who is confronted with defects in quality that require what often amount to expensive repairs. Left entirely to his own devices, the purchaser is at a serious disadvantage since, as the Law Reform Commission stated:

⁸. W.A.W. Neilson, "You're on Your Own, Home Buyers", in Canadian Homes Magazine, April 1972, P.6.

⁹. See Law Reform Commission, Report, Pp. 6 & ff.

inspection by the ordinary purchaser...is unlikely to reveal more than the most patent of defects, and it is perhaps expecting a great deal of a man of small or average means to hire a builder to go with him to inspect the premises of a new house.^{10.}

The buyer desperately needs greater protection in the law through an extension of the consumer protection laws into the housing field and clearer statements regarding the quality of construction in the Building Code to support actions if these become necessary. The phrase "good building practice" is insufficient. It is unfortunate that many (though by no means all) builders cannot perform to the spirit of this phrase, and that further government activity appears to be required as a step towards rectifying the problem. On the other hand, it is unacceptable that Canadian home buyers should have to suffer unnecessarily any longer.

Inspections

With this step achieved, an alteration in the inspection practices of CMHC, the provincial housing authorities, and municipal building departments must be effected. An improved Code (allowing, of course, sufficient flexibility for environmental differences as they occur across the country) could be adopted by the three levels of government for all provinces. Said standardization would be of obvious benefit to all parties concerned. Considering the anguish, inconvenience, and expense involved in the normal channels currently available for seeking remedial action, certainly preventive measures would be infinitely more desirable as the means towards eliminating defects in house construction. Co-ordination of inspection practices should be sought as far as possible, not the least of whose purpose could be to alleviate a shortage of qualified manpower required for frequent if not resident inspection. Consultation with architects and engineers should be encouraged as a standard practice.

CMHC has often claimed that it conducts its inspections to protect its investments rather than the consumer.^{11.} With regard to the latter, CMHC argues essentially that it is a case of "buyer beware". Such a position by a Crown corporation is, however, insufficient. First, CMHC does have an obligation to protect the mortgage investment, but hardly to the extent of callous disregard of the plight of the consumer. As Professor Neilson argues, "it should tighten up its inspections to benefit the buyer as well as itself."^{12.} Secondly, no Crown corporation should be allowed to seal itself from reasonable public demand in the manner that CMHC has done. What is the sense, after all, in providing long term mortgages for dwellings which may not even be structurally sound or fit for habitation through the duration of those mortgages? Improved inspection for quality not only would provide a drastically needed service to the Canadian public, but also would serve to protect better the investments CMHC makes with public funds.

10. Ibid., P.10.

11. See Neilson, Canadian Homes, p.6.

12. Ibid., p. 6.

Warranty or Security Deposit

Serious consideration should be given to a warranty or security deposit system for housing construction since defects may still get by inspections. In the case of the former, there would appear to be no justifiable reason why automobile manufacturers offer more protection for their consumers in warranties than do house builders. A more buyer-oriented warranty from the Housing and Urban Development Association of Canada (which is currently undertaking a revision of its standard housing warranties due in part to their previous ineffectiveness vis-a-vis the consumer), along the lines of present British practice,¹³ should be pursued with input from CMHC and concerned provincial agencies. Priority should be given to establishing claims funds as well as smooth-flowing mechanisms for arbitration of those claims in an equitable manner.

Retention of part of contract prices is standard procedure in capital construction projects in most if not all municipalities. Extending this practice into housing construction in the form of a security deposit, therefore, should pose no great administrative difficulty. A bond of approximately 5% of the selling price of each unit could be required at the time the building is sold. This amount should be deposited with the municipality concerned for a period of not less than one but not more than four years, and approval of claims by local or provincial building inspectors should suffice for payment from the fund if the builder fails to undertake the repairs himself. For those builders who have traditionally produced quality units, there would be little cause for concern. For people caught in new accommodations of lower calibre, there would be at least some relief from the unnecessary burdens caused by poor or substandard workmanship.

¹³. For a detailed treatment of the British scheme, see Law Reform Commission, Report, Pp. 10-18 and 31-32.