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Wrong brick colour used for couple's dream home

What happens when a builder constructs your dream home, but uses the wrong colour brick?

That's what happened to Thinkh Nguyen and he's not happy about it.

In April 2003, Nguyen and his wife visited their builder's sales office to sign the offer for their new home.

They weren't impressed with the architecturally approved brick package and told the sales representative that if they could not get a different brick package, they would not buy the house.

Eventually, Nguyen and the builder agreed on a different brick-colour scheme and both signed off on the deal.

Several months before closing, the Nguyens drove by the site and noted that the original brick colour scheme had been installed.

The builder admitted the mistake and offered a free kitchen backsplash as compensation, which the buyers rejected.

The builder then took the position that the contract allowed him to install an alternative brick package without any compensation.

The builder's lawyer later advised the Nguyens that the builder had the unilateral right to make changes to the elevation (exterior design) of the house, including the brick colours.

Virtually all builder offers contain similar clauses, allowing the builder to change the design, floor plan, elevation, layout and anything else about the house for any reason, including a direction from the municipality's architectural control gurus or the builder's construction lender.

The Nguyens asked for compensation of \$20,000, representing the cost to re-brick the house.

The builder offered to return their deposit instead. But with the value of the house having increased by \$30,000 to \$40,000 since the offer was signed, that was not acceptable.

What would a court do in this situation?

The answer may be in a 2002 Divisional Court decision in the case of *Ashcroft Homes v. Timothy Fuller, Patricia Swick and the Ontario New Home Warranty Program* (the text is available at <http://www.canlii.org> and type "Ashcroft Homes" in the search bar).

Swick and Fuller signed an agreement with Ashcroft to buy a new home with an antique rose exterior siding, rather than the standard grey colour.

The house was built with the grey siding and the purchasers complained to what was then the Ontario New Home Warranty Program (ONHWP, now Tarion).

ONHWP initially declined the claim for the wrong colour siding, but reversed its position and awarded the buyers compensation based on section 18 of Ontario Regulation 892.

According to that regulation, if a buyer is entitled to make a selection, the builder will not make substitutions without the consent of the purchaser.

Even though the Ashcroft offer form stated that all exterior material, elevations and colours are subject to architectural control, the Licence Appeal Tribunal said that the regulation trumped the substitution clause.

It awarded the buyers compensation of \$2,835, which was an average of Ashcroft's original offer of \$1,800 and the buyers' written quote of \$3,870 from a supplier a rather puzzling saw-off, since there was no stated basis for the Ashcroft offer.

Unhappy with the decision of the appeal tribunal, Ashcroft appealed to the Divisional Court. Writing for a three-judge panel, Justice Peter Cumming dismissed Ashcroft's appeal and upheld the tribunal's ruling.

The court's decision makes it clear to future home purchasers and their builders that when a contract entitles the buyers to make a selection of siding, brick, or anything else, their selection becomes a contractual obligation of the builder.

No substitution can be made without the written consent of the purchasers.

Where does that leave the Nguyens? If future courts and appeal tribunals follow the decision in *Ashcroft v. Fuller and Swick*, it seems that the Nguyens' builder might well have to cough up the cost to change the brick package on their new house although that seems like an expensive solution in the circumstances.

What do you think? Should the Nguyens' builder have to pay \$20,000 to re-brick the house? Email newhomes@thestar.ca or fax us at 416-865-3635. Builder comments are especially welcome.

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