

**New Jersey Lawyer, April 12, 2004 "Suing Builders: Must Dwellers Go It Alone?"
by Robert G. Seidenstein**

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It's not unusual for homeowners - after finding construction flaws in the houses they recently bought - to converge on municipal council meetings, demanding local officials go after the builders.

After all, the angry and frustrated homeowners generally reason, the town approved the building plans and issued certificates of occupancy.

On the other hand, builders essentially counter that's an issue for homeowners to fight, not town officials.

Now, a case that would thwart municipalities from pursuing house builders for shoddy work - effectively barring the towns from coming to the aid of aggrieved homeowners - is headed for the New Jersey Supreme Court.

The justices will review DKM Residential Propertie Corp. v. Township of Montgomery, an Appellate Division ruling that said a municipality couldn't slap a builder with a code violation notice after construction has been completed and title passed to the owner.

The appellate decision said dissatisfied homeowners must pursue builders on their own in civil court; municipalities can't use the code enforcement process on homeowner's behalf.

Michael A. Lampert of Princeton, the lawyer for the building, has stated the ruling "makes sense." The question, he said, is "can you give a notice [of violation] to someone no longer in the position to remedy the situation?"

Montgomery is arguing the state Department of Community Affairs (DCA) had long interpreted the construction code statute as permitting enforcement actions by municipalities against builders after title has passed.

In court papers for the town, Trishka Waterbury of Princeton notes the Uniform Construction Code Act grants DCA - in the words of the statute - "all the powers necessary or convenient to effectuate the purposes" of the law.

She says the appeals court "has deprived state and local construction officials of one of their tools for ensuring a builder's obligation to build homes in compliance with the Uniform Construction Code."

She argues that DCA, not the courts, "is vested with the discretion to decide how best to further the purposes of the act " and that the appeals court made its ruling "with no expertise and no factual information to support its action."

Lampert, the attorney for the builder, said the ruling would take "political pressure" off municipalities from residents who complain about builders. In light of DKM Residential Properties, residents are limited to bringing their own civil actions against builders, he said.

In short, they had better have the money to finance the litigation and can't count on the local public officials to intercede.

The case concerns a high-end development of 475 homes constructed by DKM Residential Properties Corp. At issue was the exterior, synthetic, stucco-like finish. Its allegedly defective installation allowed moisture to enter the homes.

The town issued notices of violations for 61 homes. They were served on DKM, not the homeowners, according to the court.

But Waterbury says the court was mistaken - homeowners did receive copies of the notices. The owners "were responsible for correcting the violations themselves if DKM failed to do so or was prevented from doing so," she says.

In any event, the town's construction board of appeals ordered the builder to prepare a remediation plan.

A trial judge affirmed the board's order against DKM, which faced penalties if it did not comply.

Owners' burden

But in the appeals court ruling, Judge Barbara Byrd Wecker wrote, "The means of enforcing the construction code ... after completion of construction and passage of title is to cite the owner of the property and hold the owner directly responsible for compliance." (Emphasis in original.)

She said, "Nothing in the language of the [Uniform Construction Code Act] suggests a grant of authority to pursue a builder years after its construction work has been completed, certificates of occupancy issued and titles conveyed."

The owner, in turn, may seek civil remedies against the builder, she said.

Wecker said there was "potential abuse of the regulatory enforcement procedure" if towns bring actions against builders after title has passed.

"By utilizing the public enforcement proceedings to advance their cause, affected homeowners can impose the costs of pursuing private claims upon unaffected taxpayers in their municipality," she added.

Waterbury counters, "The decision about what costs to impose or not impose on a municipality's taxpayers is for that municipality's elected representatives to make, not the judiciary."

In a short concurring opinion, Judge Dorothea O'C. Wefing wrote, "The understandable desire as a municipality to afford prompt relief to its residents, taxpayers and voters cannot serve as a predicate for jurisdiction in a dispute such as this, which is essentially private in nature.

Waterbury says DKM received the notices of violation in part because it had certified to the town "that all of the work had been performed in accordance with the requirements" of the code.

She also says the ruling conflicts with last year's Appellate Division ruling *Cyktor v. Aspen Condominium Assn.*, issued before DKM Residential Properties.

Cyktor held that a statute precluded DCA from bringing an enforcement action against the builder of a condominium complex more than 10 years after its completion.

Waterbury says DKM Residential Properties, by ruling the builder's exposure to liability stops when there is a new owner, renders *Cyktor* "utterly meaningless."