

TALES FROM THE TRENCHES

BY BARRY C. MCGUIRE

©BCM 2011

Barry McGuire's Focus Series

DISASTER AT PENHORWOOD

The disaster at the Penhorwood Condominium Complex in Fort McMurray is another graphic illustration of huge potential problems in a condominium purchase. *EDMONTON JOURNAL, SUNDAY READER, APRIL 17, 'EVICTED AT MIDNIGHT'* (<http://bit.ly/fjzJdD>)

In March of 2011 on a cold winter evening, just before midnight all residents of were ordered to evacuate on 30 min. notice. The Condominium Board had requested the evacuation order after receiving an engineer's report fearful of a disastrous foundation collapse.

Here's some background. There are 168 units contained in seven buildings, located in the southeast corner of Fort McMurray's lower townsite. Units were offered on a pre-sale basis in May 2002, with prices starting at \$105,000. Construction started in August of 2002.

Serious problems were alleged in the fall of 2003 by a gentleman named Mr. Al Penner, who had been hired by the developer to market some of the units and form a rental pool. Mr. Penner told a meeting of owners in 2003 that the condominium units were unsafe and any occupants were at serious risk of injury and perhaps even death! These are very serious charges that resulted in the developer filing a defamation suit against Mr. Penner; that lawsuit was later settled out-of-court.

This was just the start of the controversy surrounding Penhorwood. Very soon after Penner's allegations the Penhorwood Condominium Board hired a lawyer to see whether or not there was enough evidence to sue the developer. Apparently there wasn't, so the board hired an engineer to look at their buildings.

The engineer's report was part of evidence in a 2007 lawsuit launched by the Condominium Corporation. That engineer's report was very scary and reported many deficiencies including, "structural, mechanical, electrical, building envelope and roofing" which led to the engineer saying there was a possibility of, "potential hazard to life, health, safety or building integrity".

There were further allegations of other engineer's reports setting out similar problems. The 2007 lawsuit specifically alleged failed roofs, water leaks, wiring mistakes and a cracked foundation, along with poor stucco, falling fences and dangerous in floor heating. Damages were claimed in the amount of \$4.1 million. After the evacuation order in March of 2011, the Condominium Corporation amended their lawsuit to claim the cost of knocking down and completely re-building all the units, total \$60 million!!

Fingers are being pointed everywhere. The Condominium Corporation blames the builders and the developers, the Regional Municipality of Wood Buffalo, project engineers, safety codes officers and the architect. Mayor Melissa Blake says the town has done everything they can to help homeowners and points out that any purchasers after 2007 got a reduced price. Purchase contracts were apparently amended to disclose the existence of the lawsuit. There had already been a \$25,000 per unit special assessment related to earlier problems. Statements of Defense deny all allegations and nothing has been proved in court. The lawsuit is likely to drag on for a few more years.

How could this possibly happen? Some say it's quick-buck artists who build, sell and disappear. University of Calgary professor Tang Lee is an architect who has been an expert witness in many court cases involving similar situations. According to Prof. Lee, consumers think that provincial or municipal inspectors are

TALES FROM THE TRENCHES

BY BARRY C. MCGUIRE

©BCM 2011

Barry McGuire's Focus Series

watching carefully over building projects to make sure they are properly constructed. Prof. Lee says there are no inspectors, only safety codes officers who make spot checks and might visit a project three or four times. If they see something, they can get it corrected.

According to Prof. Lee, responsibility should lie with the architect who has 20% of his fee allocated for "contract administration", which covers the architect coming to the site and taking a very close look at the quality of construction. He also thinks some developers tell the architect he never has to come on-site and they'll still give them half his fee. Anyone can put up a shingle and call himself a contractor, no qualifications required. Prof. Lee thinks lots are shady. Serious allegations!

He doesn't know anything about Penhorwood but says the only real solution is a big change in the way the Province of Alberta manages building development generally. The province of Alberta has been looking at this problem for number of years and got a first report in April of 2008. That report recommended a mandatory, new-home-warranty-program, better warranty coverage, stiffer penalties for builders who violate provincial building codes, better training for homebuilders and more frequent inspections of homes under construction. The minister of municipal affairs rejected that report and asked for additional information. Apparently a new report is complete and in the process of being implemented but that report is not public and will only help going forward.

Where does all this leave you as an investor looking to buy a condominium unit? Here are some thoughts to go along with our Tale, 'Condo Reserve Fund Studies'. As part of due diligence and before writing an offer or removing conditions:

- Ask what special assessments (extra fees) owners have paid in the past five years. Some special assessments are unavoidable, but repeated or expensive assessments could be a red flag about the condition of the building or the board's financial practices.
- Find out if the project is involved in a lawsuit. If the builders or homeowners are involved in a lawsuit, financial reserves can quickly dwindle. Ask: Why are they in litigation?
- Hire a qualified home inspector who specializes in the type of condominium you are thinking of buying. Ask for credentials and proof of errors and omissions insurance. Be sure to get a detailed written report that lists the estimated cost of any repairs that are necessary.
- Ask if the developer is reputable. Find out what other projects the developer has built and visit one if you can. Ask residents what they think of their homes.
- Find out how much money the condo association keeps in its financial reserve fund? Is there a reserve fund study? Is there a separate reserve fund plan? Smart boards raise assessments a certain percentage each year to build reserves to fund future repairs.
- For new condominiums, be sure to understand what the new-home warranty program covers. Ideally, any defects in or omissions of warranted elements will be listed and the developer may be obliged to correct them. Long-term warranties on major components such as structural elements can run for as long as five to seven years after a building is completed. (Be sure you understand what a structural element is, i.e. decks are usually NOT, stucco is usually NOT) At that point, a performance or technical audit may be conducted to identify deficiencies before the warranty expires.

TALES FROM THE TRENCHES

BY BARRY C. MCGUIRE

©BCM 2011

Barry McGuire's Focus Series

- For existing condominiums, the condition of the unit and building you are considering buying can be determined by a review of technical audits (essentially a building-wide inspection) done in conjunction with reserve-fund studies.
- These audits will provide you with an overview of the condition of the building and common elements, but not necessarily of any of the individual units.
- A technical audit may be available as a part of the reserve-fund study in some provinces. Avoid any surprises and ask to see these reports before you make your decision.
- If you find it difficult to get information about a condominium corporation or a particular unit, you may also want to reconsider purchasing a unit. This may indicate problems with the building or condominium management.

Source: CMHC's Condominium Buyer's Guide and edmontonrealestateblog.com.

Understand clearly that condominiums are a complicated purchase from many perspectives. There's a lot to learn. There is more diligence that goes into more detail.

Consider obtaining a copy of the 'additional plan sheet'. You get it from the Land Titles office in the same way you get a title search. This document shows, among other things, changes to bylaws, changes of directors, Builders Liens and perhaps notices of lawsuits against the Condominium Corporation. For lawsuits filed by the Condo Corporation, do a Court of Queen's Bench 'actions search' in the applicable Judicial District. If you have gone this far, get help from your lawyer.

Don Campbell says that when he finds there is any kind of a lawsuit attached to any kind of a property, he walks. It is just too much danger and trouble to take a chance in most cases. Penhorwood is a classic situation where all the research in the world would not have allowed anyone to make an informed decision on the merits of the charges and counter charges. This would have been the very appropriate place to say, "Lawsuits? Thanks, but I'm out!" (with thanks to Dragon's Den).

LET US HELP YOU BUY & SELL REAL ESTATE IN ALBERTA!

Barry C. McGuire (BA, LLB)
Field Law
Enbridge Centre
2500 – 10175 101 St. NW
Edmonton, AB, Canada

Phone: 1-780-423-3003
Fax: 1-780-428-9329
Toll Free: 1-800-222-6479
bmcguire@fieldlaw.com