



Latent Defects: Ask Joe

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I am planning to list my home for sale next month, a couple of years ago I noticed a small crack in the foundation where a small amount of water was leaking through. It only leaks a very little bit during extremely heavy rainstorms. Can I tell my salesperson not to tell potential buyers about it?

What you are describing may be what is technically referred to as a latent defect. A latent defect is a physical defect that is not discoverable through a visual inspection by a buyer. If you do not disclose a latent defect that you are aware of, it may be discovered during a buyer's due diligence and could jeopardize the sale of your property, or worse, result in legal action being taken against you.

The law of latent defects is complicated. You should consult a real estate lawyer if you have any questions about what repairs or issues with the property you should disclose to buyers.

Generally speaking, latent defects often include problems that can be very expensive to repair. These problems can include repairs needed as a result of a seller not having followed the building code or not having secured the appropriate permits for renovations done to the property. They can also include repairs required by work orders issued to the seller by a municipal or provincial authority, such as a municipal building department or the Electrical Safety Authority. While some latent defects can be repaired, others can leave a property dangerous or unfit for habitation by mould or other contamination, which bring the greatest risks if they are not disclosed to the buyer.

As a seller, you have an obligation to disclose certain information to a buyer in the context of a real estate transaction, including latent defects that you are aware of. In some cases, the latent defects may be irrelevant, for example where the house is going to be demolished and a new home built.

As mentioned earlier, not disclosing latent defects could potentially result in the buyer taking legal action against you. I strongly recommend that you speak with your salesperson and real estate lawyer to fully understand your disclosure obligations.

Instructing your salesperson to not disclose information regarding a latent defect to a buyer, or to their salesperson, when asked, may not be in your best interest. Keep in mind, real estate salespeople have a Code of Ethics to follow that contains provisions about material facts and treating people fairly and truthfully. If a buyer makes specific inquiries about the property, your salesperson must seek your instructions about any latent defects. In such a situation, the salesperson may seek their own legal advice, to protect you both from any risk of misleading a buyer.

Even if the buyer's salesperson does their own due diligence, the nature of a latent defect is that it is not readily discoverable, that is largely why the courts have put the onus on the seller to disclose known latent defects.

For these reasons and more, honesty is the best policy. The legal doctrine of caveat emptor (let the buyer beware) may not protect you if you are found to have intentionally omitted or misled a buyer regarding a latent defect. If the sale were to proceed and close and it is later discovered that you did not disclose a latent defect that you knew about, the buyer could seek compensation in the courts for repairs or damages resulting from the undisclosed defect. Dealing with the issue up front will usually put your mind at ease.

If you have a question for Joe about the home buying or selling process, please email information@reco.on.ca.