



UNDERSTANDING THE CONCEPT OF OCCUPANCY

SAMUEL H. LEVINE
OF COUNSEL
DOWNEY & LENKOV LLC
30 NORTH LASALLE ST., SUITE 3600
CHICAGO, ILLINOIS 60602
(312) 582-2090 (DIRECT)
SLEVINE@DL-FIRM.COM

CORNELIUS F. RIORDAN
SENIOR COUNSEL
HAHN, LOESER & PARKS, LLP
200 W. MADISON ST., SUITE 2700
CHICAGO, ILLINOIS 60606
(312) 637-3064
CRIORDAN@HAHNLAW.COM

Today's Presenters

Cornelius F. Riordan

Cornelius "Con" F. Riordan concentrates his practice in the areas of contractors, sureties and lenders in both litigation and transactional aspects of construction and surety law. He has tried cases to verdict for contractors and sureties as well as representing them in appeals in both state and federal courts. He also has extensive transactional experience, including preparation of construction contracts, construction loan agreements as well as documents in default and termination cases, workouts, financing of principals, asset sales and acquisitions. As part of Con's construction practice, he has participated in mediation and arbitration proceedings. He is a member of the ISBA Construction Law Section Council and Insurance Law Section Council, member and past president of the Society of Illinois Construction Attorneys and member of American Bar Association's Fidelity and Surety Law Committee and Forum on Construction Law



Today's Presenters

Samuel H. Levine

Mr. Levine is of counsel to Downey & Lenkov LLC. He concentrates his practice in the area of construction law. His clients include contractors, subcontractors, developers and lenders. Samuel has tried and arbitrated construction law cases. He is also a former chair of the Illinois State Bar Association Construction Law Committee now known as the Construction Law Section Council and currently editor of its newsletter.

Samuel also practices in the area of real estate litigation focusing on real estate disclosure and title disputes.





Agenda

- **Substantial vs. Final Completion**
- **Certificate of Occupancy**
- **Warranties**
- **Insurance Considerations at Project's End**



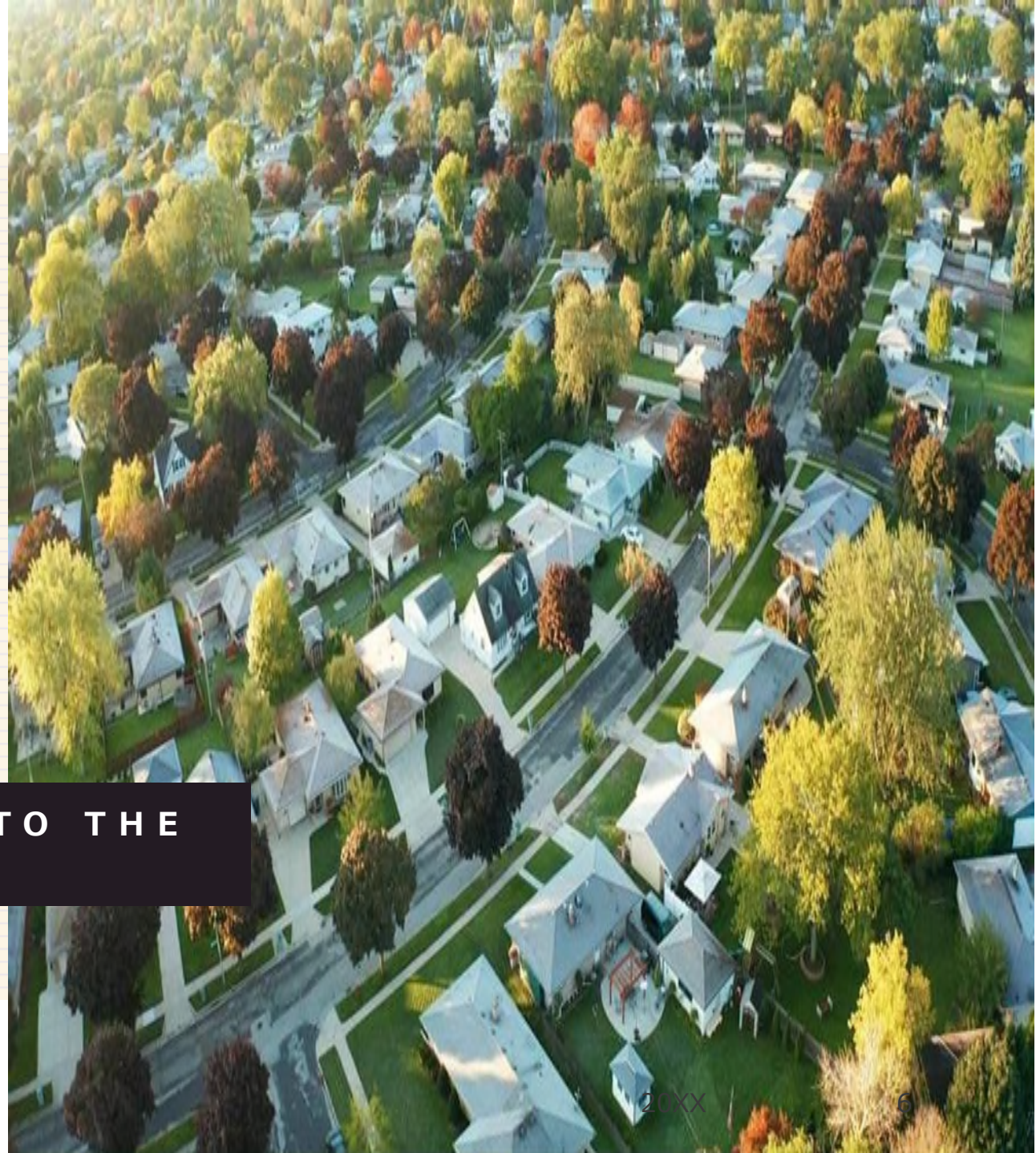


Introduction

As the project nears completion, the owner must consider the milestones that must be accomplished before use and occupancy of the finished product can be enjoyed. Today, we will provide you with information to consider when wrapping up the project.

Substantial vs. Final Completion

THE SIGNIFICANCE OF EACH TO THE
COMPLETION OF THE PROJECT



Substantial Completion

Substantial completion means that the building has progressed to the point where the owner can occupy the house. When the contractor feels that the work is substantially complete, the owner or architect is notified.

The owner or architect then inspects the work, and, if appropriate, issues a Certificate of Substantial Completion or similar document. The architect should not issue a Certificate of Substantial Completion unless the work conforms to the contract and, if the municipal codes or regulations so provide, the municipality has issued a certificate of occupancy after inspecting the property.

14 Ill. Prac., Real Estate § 6:58 (3d ed.)

Substantial Completion

The owner may occupy the home (or portion thereof) when it is substantially completed, subject to requirements of public authorities (such as obtaining a Certificate of Occupancy as required by all municipalities in Illinois), and insurance limitations, if any. The contract should provide that occupancy by the owner does not constitute acceptance of work that does not conform to the contract. The owner should be sure that the necessary homeowner's insurance is in effect before the owner takes possession.

14 Ill. Prac., Real Estate § 6:60 (3d ed.)

Substantial Completion

“(A)n honest and faithful performance of the contract in its material and substantial parts, with no willful departure from, or omission of essential elements of the contract”

Folk v. Central. Nat. Bank & Trust Co. of Rockford 210 Ill. App. 3d 43, 46-47.

Essential elements of the work have been completed so that owner can use work as intended

Incomplete, different, or defective part of the work must be minor or unintentional.

“Substantial Completion is the stage in the progress of the Work or when the Work or a designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.”

Substantial Completion AIA104 -2017

“When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete the Work in accordance with the Contract Documents.”`

AIA 1507 - 2017 Section 15. 6.2

Substantial Completion

Absent a contrary contract provision, substantial completion triggers:

- Contractors right to payment of the contract balance less reasonable amount to complete punch list items, *Mason v. Griffith*, 28 Ill. 246, 255 (1917)
- Contractor's warranties
- Cessation of any liquidated damages.
- With certificate of occupancy, owner's right to occupy and use the house/project.

Final Completion

The A201 addresses three (3) types of completion: (1) substantial completion, (2) partial occupancy or use, and (3) final completion.

On occasion, it is necessary for the Owner to use part of the project prior to Final or even Substantial Completion. So long as such occupancy or use is consented to by the insurer and authorized by the public body that provides certificates of occupancy, the Owner may occupy or use any completed or partially completed portion of the Work. A201, Art. 9.9.1. While such partial occupancy may commence prior to Substantial Completion, the Owner and Contractor must accept in writing their respective responsibilities for payments, retainage, security, maintenance, heat, utilities and damage to the Work. A201, Art. 9.9.1.

If there is to be partial occupancy or use which occurs prior to Final Completion the Owner, Contractor and Architect must inspect the area to be occupied or used in order to determine the condition and progress of the Work. A201, Art. 9.9.2. "Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents." A201, Art. 9.9.3.

24 Ill. Prac., Illinois Construction Law Manual § 6:13 (2022 ed.)

Final Completion

One of the most important issues in a construction project, including a new home purchase, is to ensure that construction items that are not completed or have not been completed correctly prior to the closing are in fact swiftly completed or corrected thereafter.

In the sale of a new home, the contract usually provides that the buyer is entitled to a pre-closing walk through during which the buyer develops a list of items to be corrected, called the “punchlist.” In addition, the contract may call for an additional punchlist to be submitted to the builder within a certain short period of time after the closing.

The developer may run into a “time crunch” in preparing a unit for closing, especially in a multi-unit development. The workers may be instructed literally to finish interior walls, install cabinets and mirrors, plaster, install baseboards, floor coverings, light fixtures and appliances, and paint, within two or three days. The pre-closing walk through should be as close to closing as possible to be sure this final work is properly done and completed.

14 Ill. Prac., Real Estate § 6:105 (3d ed.)

Final Completion

Once a Contractor considers the Work to be “finally” complete, the Contractor requests a final inspection and prepares a final Application for Payment. A201 Art. 9.10.1. If the Architect determines that the Work is acceptable and the contract has been fully performed, the Architect issues a Final Certificate for Payment. Prior to final payment, the Contractor must provide the Owner with:

- a. an affidavit that all bills have been paid;
- b. a certificate that insurance is still in effect;
- c. a written statement that the Contractor knows of no reason the insurance will not be renewable to cover the period required by the Contract Documents;
- d. a consent of surety, if necessary;
- e. documentation of any special warranties; and
- f. if required by the Owner, other data showing that all other obligations are satisfied. A201, Art. 9.10.2.

24 Ill. Prac., Illinois Construction Law Manual § 6:13 (2022 ed.)

Final Completion

The contractor must submit a number of other documents with the final Application for Payment, including the following:

- An affidavit generally called a “contractor's statement,” listing all work done under the contract by trade showing all prior payments and the allocation of the final payment between the trades, and showing no balance due other than the retainage.
- Contractor's full waiver of lien covering the cost of all work done and material supplied under the construction contract.
- Subcontractor's statements and full final waivers of lien from all subcontractors and suppliers to the extent they have not been supplied with earlier payout requests.

If a subcontractor refuses to furnish a lien waiver, as may be the case if a subcontractor is replaced on the job, the contractor may furnish a bond to indemnify the owner against the lien.

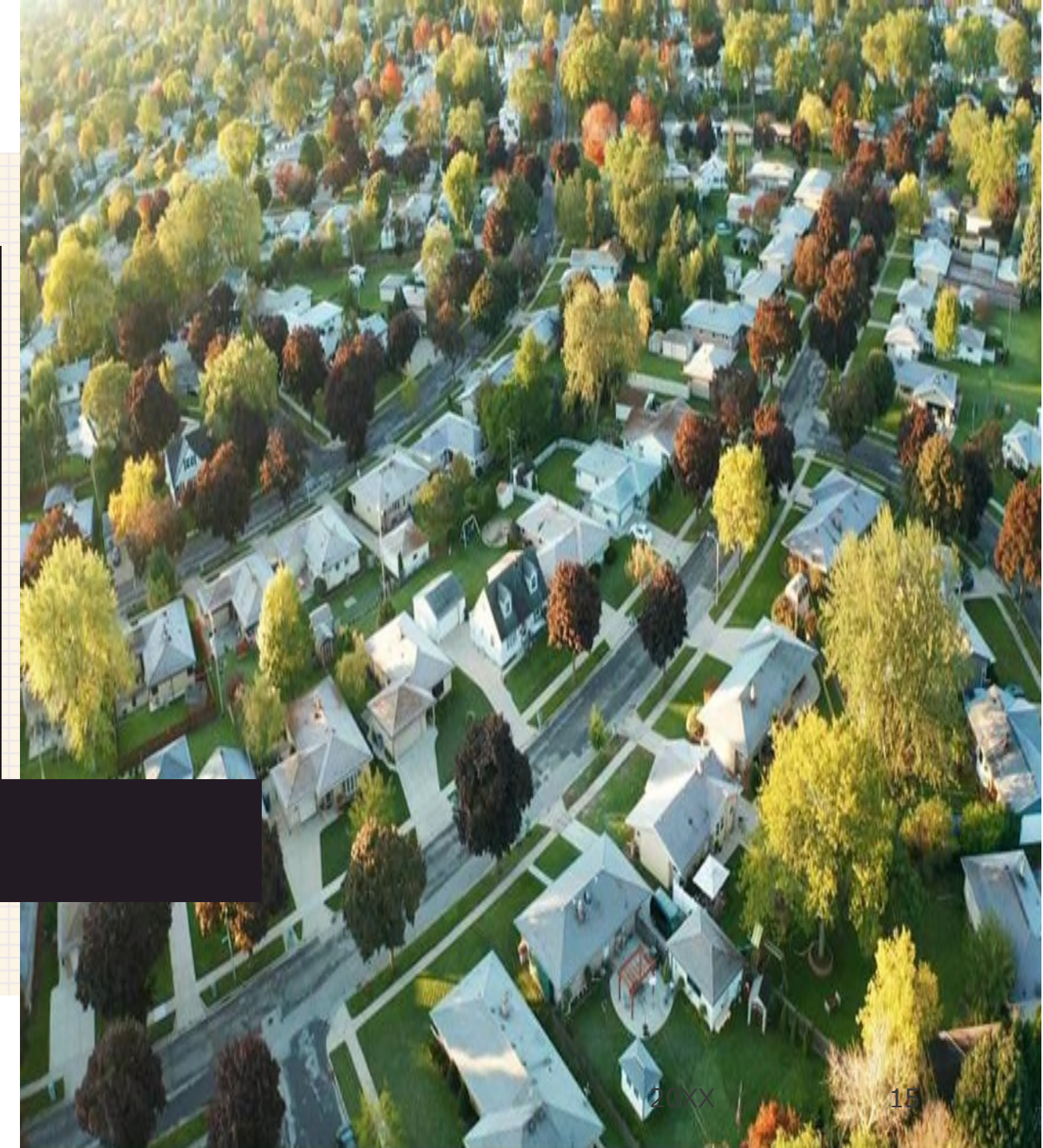
- If the contract so provides, a certificate evidencing that insurance required under the contract is currently in effect and will not be canceled or allowed to expire without 30 days advance notice to the owner.
- If the contract so provides, a written statement that the contractor knows of no reason that the insurance will not be renewable to cover the period required under the contract.
- The consent of the surety, if there is a construction bond, to final payment.

If final completion is materially delayed through no fault of the contractor or because of a change order, the contractor may obtain an additional progress payment as to the portion of the work completed.

14 Ill. Prac., Real Estate § 6:65 (3d ed.)

CERTIFICATE OF OCCUPANCY

WHAT IS IT AND WHY IS IT
REQUIRED?





A certificate of occupancy serves as proof that a property has complied with all standards and codes and is now fit for occupancy

Certificate of Occupancy

There are several things that owners must do to obtain a certificate of occupancy. For instance, the work must pass all required inspections, which may include the following rough and final inspections:

- Electrical Inspection
- HVAC Inspection
- Plumbing Inspection
- Fire Safety Inspection
- Mechanical Systems Inspection
- General Building Inspection

City of Chicago website - Certificates of Occupancy

- Usually governed by municipal or county ordinance.
- Practitioners should refer to the local ordinance for requirements of the jurisdiction

Certificate of Occupancy

- Most permitting ordinances will designate the applicant – property owner or contractor. Provide in the contract the party who will obtain and pay for the CO.
- The steps necessary to obtain a certificate of occupancy are governed by local ordinance. The City of Chicago has the following requirements:
 - Submit application for certificate
 - Submit results of building inspections
 - The applicant must schedule, be present for, and pass all required inspections as the work progresses.
 - The applicant must use the online Certificate of Occupancy Application to submit technical and contact information when work is nearing completion.
 - The applicant will be contacted by the Department to schedule certificate-of-occupancy-related inspections. The Department of Buildings will also provide contact information to schedule required inspections with the Chicago Fire Department, Fire Prevention Bureau, if required.
 - The owner must pay all outstanding inspection fees and pick up the hard copy certificate of occupancy before occupying the building or allowing others to occupy the building.

City of Chicago website

Certificate of Occupancy

- Owner could be fined if he/she occupies his/her new home without a certificate of occupancy
- Utilities may require a CO to have a legal connection
- Insurance company may require proof of the certificate of occupancy to provide coverage for the property.
- Because it is an occupancy certificate and not a storage certificate, personal property can be moved in ahead of occupancy. Owner/Buyer should arrange to have stored property insured against loss even without a CO.
- Some jurisdictions may require a certificate of completion for designated improvements such as a garage, elevated patio/porch/deck or dormer.
- Some local governments require a certificate of occupancy for construction that changes the occupancy of the property or the way in which you exit the property.

Certificate of Occupancy

It is illegal to occupy or permit others to occupy a building or portion of a building which requires a certificate of occupancy before obtaining the certificate of occupancy or a partial/temporary certificate of occupancy.

A certificate of occupancy may be requested for other projects, including single-family homes, but the request must be made online and approved before any construction work begins.

City of Chicago website - Certificates of Occupancy

Certificate of Occupancy

Village of Lombard

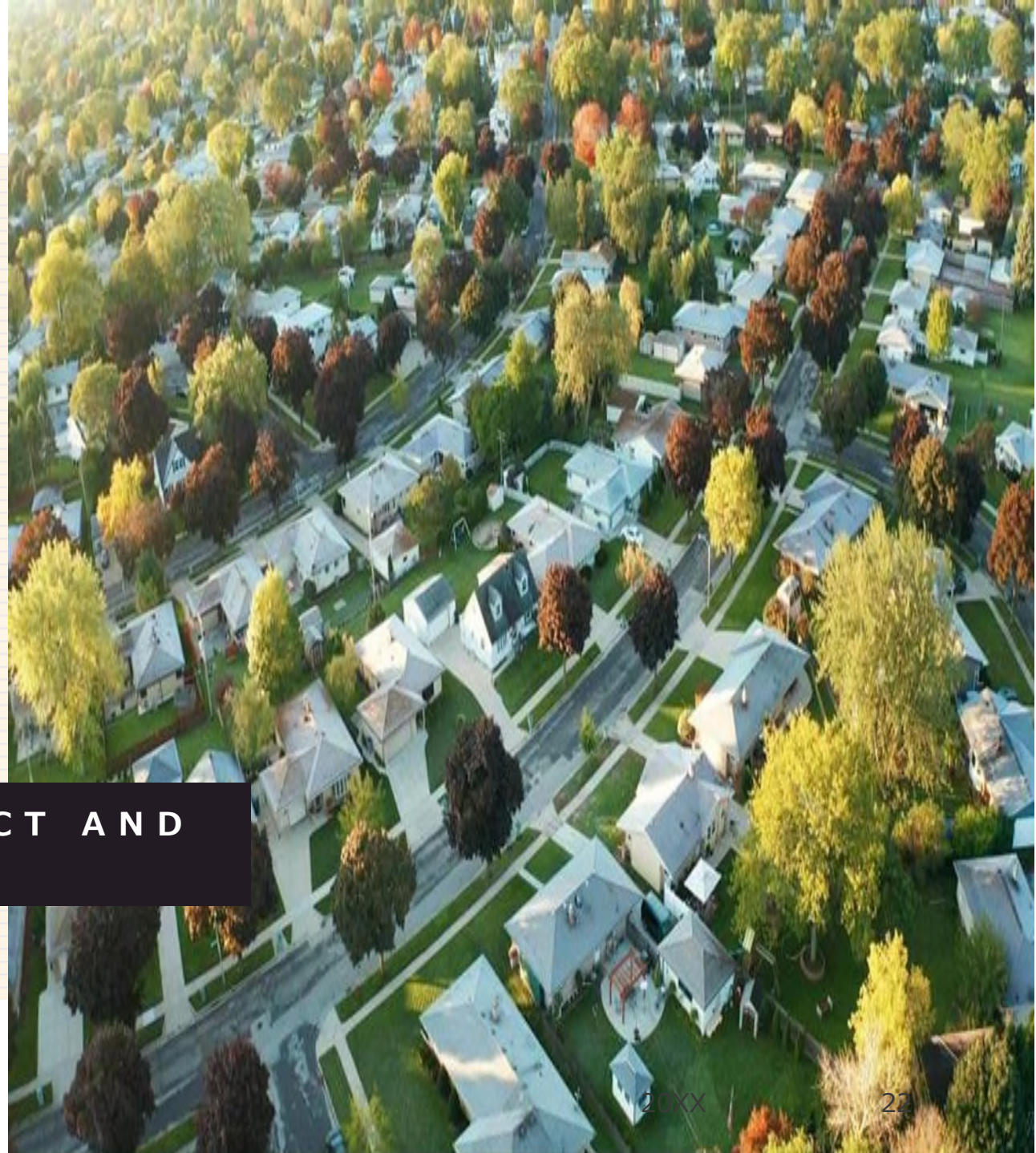
A Certificate of Occupancy/Zoning Certificate is required prior to occupancy for all new commercial buildings, new residential buildings, new tenant spaces, fire restorations, new owners and change of business names. A Certificate of Occupancy/Zoning Certificate application must be completed in order to obtain a Certificate of Occupancy/Zoning Certificate.

Village of Mt. Prospect

Single-Family Dwelling Building Permits: No occupancy certificate shall be issued unless and until the entire residence or residential structure or addition thereto shall have been completed; and then, such occupancy certificate shall only be issued pursuant to the ordinances of the village.

WARRANTIES

WHAT COME WITH THE PROJECT AND
WHEN ARE THEY TRIGGERED?



Warranties

Most, if not all construction contracts for the sale of a newly constructed home or a home improvement project, contain express limited warranties by the builder/contractor. Such warranties may include:

- One year workmanship and materials
- 2 years systems, such as HVAC
- 10 years of structural coverage

Such warranties usually limit obligation to replacement of defective work and exclude all other damages.

Many new home builders will purchase warranty coverage from a third party provider and assign to buyer.

Contract should provide that Contractor/Builder will provide manufacturer's warranties for appliances, furnace, air conditioner, etc.

Warranties

Every new house is deemed to be sold with an implied warranty of habitability. *Petersen v. Hubschman Construction Co.*, 76 Ill.2d 31, 27 Ill.Dec. 746, 389 N.E.2d 1154 (1979).

The implied warranty of habitability was created to avoid the harshness of *caveat emptor* and the doctrine of merger where the purchasers of new homes discover latent defects in their home. *Board of Managers of Village Centre Condominium Ass'n, Inc. v. Wilmette Partners*, 198 Ill. 2d 132, 260 Ill. Dec. 203, 760 N.E.2d 976, 46 U.C.C. Rep. Serv. 2d 412 (2001))

Warranties

The builder normally includes language in the contract to the effect that any implied warranties, including the implied warranty of habitability, and any express warranties other than the builder's limited warranty are disclaimed.

Assuming the disclaimer is valid, the intent of the builder is that the purchaser must rely solely on the builder's express limited warranties. The builder will rarely, if ever, negotiate the scope or wording of a disclaimer of the implied warranty of habitability. The buyer may be able to negotiate stronger express warranties, however.

14 Ill. Prac., Real Estate § 6:111 (3d ed.)

Warranties

A disclaimer of the implied warranty of habitability must specifically use the phrase "implied warranty of habitability."

Board of Managers of Village Centre Condominium Ass'n, Inc. v. Wilmette Partners, 198 Ill. 2d 132, 260 Ill. Dec. 203, 760 N.E.2d 976, 46 U.C.C. Rep. Serv. 2d 412 (2001))

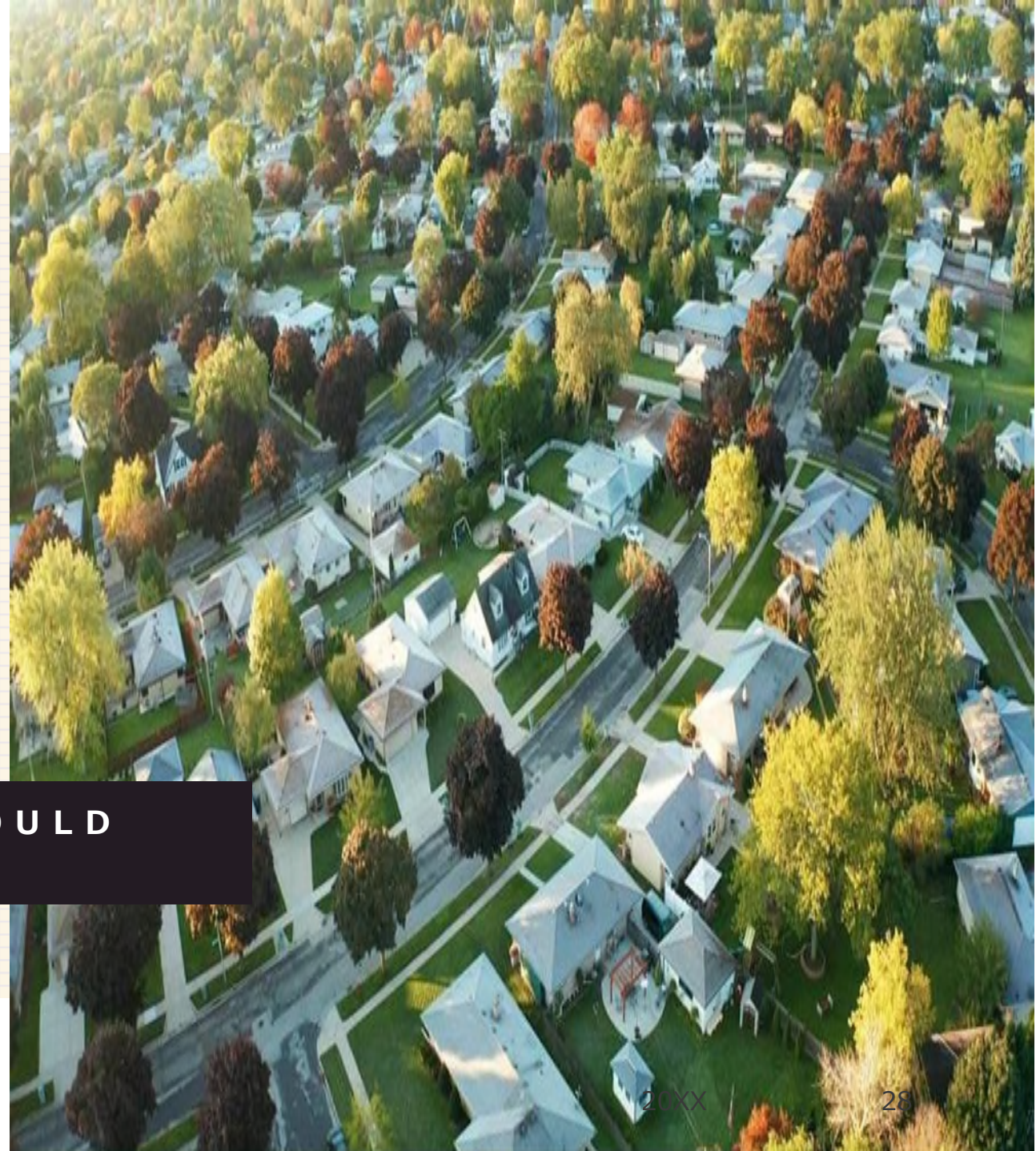
Warranties

The contract normally contains a clause excluding the requirement that the builder warrant against or correct certain types of flaws, such as bows in the walls that are less than a certain size, nail pops and cracks in the walls appearing after the closing, less than perfect seals around windows, etc. The attorney should insist on a provision for at least a limited correction period after the closing as to such defects.

14 Ill. Prac., Real Estate § 6:110 (3d ed.)

INSURANCE ISSUES

WHAT THE OWNER/BUYER SHOULD
CONSIDER AT PROJECT'S END



Insurance Issues

Homeowner's Insurance

- The Owner should evaluate the amount and scope of casualty insurance coverage so that the value of the home, as improved, is fully insured.
- Increase amount of coverage to match the value of the home as improved.
- Failure to do so could violate mortgage loan insurance covenant
- The perils insured against should be reviewed. e.g., additional coverage for water damage (usually by endorsement for an additional premium). This is not flood insurance.

Insurance Issues

Contractor's Insurance

- The contract should provide that the Builder/Contractor provide proof (declaration page from each policy) to the Owner/Buyer at time of final payment or at closing that the bargained for insurance coverages are in force and will be for the time period specified in the contract.
- Obtain identity and address of each carrier so that in the event of claim, the Owner/Buyer can send claim notice to Contractor/Builder and its insurance company.
- In the event of a claim, provide notice to Builder/Contractor and insurance company as soon as possible.



Thank you