

## MEMORANDUM

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### **Compulsory building-defects insurance in Denmark**

With effect from April 1, 2008, professional building owners in Denmark are required by law to arrange and pay for a building-defects insurance when they build new private dwellings.

The rules governing the compulsory building-defects insurance are set out in “Lov om ændring af byggeloven, lov om almene boliger m.v. og lov om bygnings- og boligregistrering (Lov nr. 575 af 6/6 2007)” (Danish Building Regulations (Amendment) Act, Danish Public Housing, etc. Act, and Danish Buildings and Dwellings (Registration) Act (Act no. 575 of June 6, 2007)).

Regulations have also been issued governing building-defects insurance, BEK nr. 1292 of 24/10 2007 (Regs. no. 1292 of October 24, 2007) laying down detailed rules for areas such as the scope of the building-defects insurance, definition of a building defect, inspection and publication.

The Act and Regulations can be found at [www.ebst.dk/byggeregler](http://www.ebst.dk/byggeregler).

#### ***What type of building work is affected by the compulsory insurance scheme?***

The building-defects insurance applies to new buildings which will be used mainly for permanent occupation.

The buildings concerned must be suitable for legal permanent occupation, irrespective whether there is a duty of permanent occupation. Summer dwellings, timeshare apartments for holiday purposes, etc., which cannot legally be occupied permanently on a year-round basis, are not subject to building-defects insurance.

The insurance applies only to completely new-build properties. Conversion and refurbishment of or extensions to existing buildings are not subject to a duty of insurance.

New-build of properties used for a combination of residential and business purposes are subject to a duty of insurance if the property is to be used primarily as a residence.

Properties built with a view to rental will be subject to a duty of insurance.

When an existing co-operative housing association, after its formation, arranges to have a property built, that housing association must arrange a building-defects insurance.

If on the other hand a professional offers a property for sale in the form of co-operative apartments, the professional must arrange building-defects insurance.

***Who has a duty to contract building-defects insurance?***

Section 25 A of the Act defines who has a duty to contract a building-defects insurance and for which types of building work.

The building-defects insurance must be arranged by the original owner who erects a new building with a view to sale, rental, etc., and by co-operative housing associations which erect co-operative dwelling units on behalf of the association's members.

There is no fixed legal definition of the term "original owner".

In the Act the original owner is determined as the person who has the building erected and who exercises an owner's normal rights and carries the owner's normal obligations. Normal rights include the right to make changes in the project and to exercise rights arising from the behaviour of a defaulting party. Normal obligations include those of making payments. Additional considerations can be who the other party to the agreement has been – and who has influenced the choice of consultants and contractors.

When a company, e.g. a builder of kit houses, builds with a view to sale or rental, the basic understanding is that that company is the original owner and therefore the party required to contract a building-defects insurance.

The following are exempt from the duty of insurance under s. 25 A (2) of the Act:

- public owners,
- owners who erect a new building which is subject to "Byggeskadefonden" (Danish Building Defects Fund, an insurance scheme relating to building defects in public-support housing)
- owners who erect a new building which is covered by the "Byggeskadefonden" in respect of building renovation, and
- owners who erect buildings which are not for permanent occupation.

Under s. 25 A (1) (5) of the Act, consumers are exempt from a duty of insurance when they themselves are responsible for the entire building process and enter agreements with different tradesmen for the construction of the dwelling, but see also pt. (3) discussed below.

In cases where a consumer enters an agreement with a tradesman stipulating that the tradesman will build or arrange to have built a building, that tradesman is regarded as the original owner and has a duty to contract building-defects insurance, cf. s. 25 A (3) of the Act.

The duty of insurance thus rests upon the professional owner if he is responsible for the entire building process and enters agreements with the contractors who are to build the dwelling. A duty of insurance thus exists both in cases where the consumer purchases the project and site at the same time and in cases where the consumer already owns the site.

If the professional owner with whom the consumer has entered an agreement stipulates that the consumer must enter an agreement with one or more named contractors for the construction of part of the dwelling, it remains the duty of the professional owner to contract a building-defects insurance, cf. s. 25 A (3) of the Act.

*Examples of situations in which building-defects insurance is necessary.*

If a consumer requests a builder of kit houses to build a dwelling for him, it will be the duty of the kit-house builder to arrange building-defects insurance as the kit-house builder will be regarded as the professional owner who enters into the different agreements with consultants and contractors.

If a design/build contractor is responsible for designing and executing the building project, it will be his duty to arrange building-defects insurance.

If a consumer contacts an architect, and the consumer subsequently enters into an agreement with one contractor to build or be responsible for building the dwelling, it will be the duty of the contractor to arrange building-defects insurance.

If a consumer contacts an architect, and the consumer subsequently enters into agreements with the various trades, there will be no duty to contract building-defects insurance.

***Can the future owner of the building undertake construction of parts of the dwelling?***

It is possible for the future owner of the building to assume responsibility for part of the construction of the dwelling, cf. Reg. no. 7.

It is required, however, that the agreement with the professional owner stipulates clearly which work will be done or arranged by the future owner of the building and that the insurance policy clearly states which work the owner of the building has done or arranged to have done.

The professional owner is required to point out to the future owner of the building that any building defects occurring in the work carried out by the owner of the building can be exempt from cover under the policy.

***What is the role of the local authority when application is made for planning permission and an occupancy permit or when building work is reported complete?***

When an application is made for planning permission by a professional owner, the local authority must check whether a duty of insurance exists and that an insurance quotation is enclosed, cf. s. 25 C (1), cf. Reg. no. 30 (1). The local authority cannot issue planning permission if the application is not accompanied by a quotation for building-defects insurance in cases where a duty of insurance applies.

It is the responsibility of the local authority to ascertain whether an insurance quotation has been obtained for the building work for which planning permission is applied.

When an application for planning permission for a single-family dwelling is submitted by a physical person, including a consumer, and it is not accompanied by a quotation for a building-defects insurance, the local authority must draw attention to the fact that planning permission is given but that there may be a duty to contract building-defects insurance.

When an application is made for an occupancy permit or when building work is reported to be completed, the local authority must check that it is documented that building-defects insurance has been contracted and that the insurance premium has been paid, cf. s. 25 C (4) of the Act, cf. Reg. no. 30 (2). An occupancy permit cannot be issued if the required documentation is not forthcoming.

It is not required that the quotation accepted is identical to that stated in s. 25 C (1) of the Act, provided that the new building-defects insurance complies with the statutory rules.

If an insurance policy has not been issued when an application is made for an occupancy permit or when the building is reported to be finished, the original owner can instead enclose a statement from the insurer to the effect that building-defects insurance has been arranged.

Documentation from the professional owner can take the form of the local authority receiving a physical or electronic copy of the insurance quotation and the final insurance policy, cf. Reg. 30 (4).

The professional owner is responsible for ensuring that a building-defects insurance complies with statutory requirements and that the insurance quotation was based on full and correct information, cf. Reg. 30 (3).

The local authority records the name of the insurer in “BBR” (Danish Central Register of Buildings and Dwellings) in connection with an application for planning permission and the commencement date of the insurance in connection with the occupancy permit or completion notice.

### ***What does the local authority do if there is no insurance quotation or insurance policy?***

The local authority cannot grant planning permission or an occupancy permit if no documentation has been submitted to show that an insurance company has issued a quotation for a building-defects insurance, and subsequently that a building-defects insurance has been effected, and that a premium has been paid.

Under s. 30 (1) of the Danish Building Act the local authority can impose fines on the original owner of a building who deliberately or negligently withholds or provides misleading information on matters significantly affecting whether building-defects insurance is required.

### ***Local authority can levy penalty payments***

The local authority has the power to levy penalty payments on the professional owner if the building is wholly or partly occupied without the necessary building-defects insurance or without submission of the required documentation in connection with sign-off of the building work, cf. s. 25 D of the Act.

The local authority can administratively impose daily or weekly penalty payments upon the original owner until the owner takes out a building-defects insurance or submits documentation proving that such an insurance has been arranged.

The local authority decides the size of the penalty payments. Administrative penalty payments must be of sufficient size to apply an effective element of compulsion to persuade the professional owner who has not fulfilled his duty to contract building-defects insurance to arrange a building-defects insurance as quickly as possible.

The option of levying penalty payments arises each time the professional owner is required to contract building-defects insurance and continues until a building-defects insurance has been contracted.

The decision of the local authority to levy penalty payments on the original owner cannot be appealed to any other administrative authority, and the owner must apply to a court of law to test the local authority's decision, cf. s. 25 D (2) of the Act. The owner retains the right to appeal to the State Administration against a refusal on the part of the local authority to grant planning permission or an occupancy permit.

#### ***Which defects are covered by the building-defects insurance?***

Building-defects insurance covers serious building defects occurring in the dwelling if these can be attributed to errors made in connection with the building work. The errors can relate to design, execution or materials.

Building defects must significantly affect the dwelling's useful life or substantially reduce the utility of the dwelling; they could, for example, include harmful occurrences of mould fungus. In assessing whether a building defect is serious, importance can be attached, for example, to whether the circumstances have or may be judged in future to have significance for personal safety and health, whether the work is of a correct professional standard, and whether public regulations have been observed.

Examples of building defects covered by an appropriate insurance policy and identified by an objective assessment may be: subsidence cracks in walls and foundations as a result of inadequate support, mould fungus on an area exceeding 400 cm<sup>2</sup>, a leaking sub-roof, or floors out of alignment as a result of subsidence damage.

Objectively assessed, examples of building defects which are not covered by building-defects insurance may be: floors and walls which are out of alignment but not due to lack of stability or inadequate support in the load bearing structures, defects arising from wear and tear, or floors which creak because they are incorrectly fastened.

The definition of a building defect is laid out in Reg. no. 5. More examples of insurable and uninsurable building defects are provided in appendix 1 accompanying the Regulations governing building-defects insurance. The list of insurable and uninsurable building defects is not exhaustive.

#### ***Duration of the insurance***

The building-defects insurance is contracted in favour of the building owner and runs for a period of 10 years. The building-defects insurance follows the dwelling for which the insurance is contracted, and the insurance will run for 10 years regardless of whether the dwelling changes hands.

The insurance comes into force when the contractor hands over the building to the original owner, cf. s. 25 B (3) of the Act.

In situations where a professional owner builds a rental property which is not intended for sale, the insurance comes into force on the day the first tenant moves into the first apartment under the terms of the tenancy agreement.

Where a co-operative housing association is the original owner, the insurance comes into force on the day the contractor hands over the property to the owner. Where a co-operative housing association on the other hand purchases a completed property from the original owner, the insurance comes into force on the day the first member of the association takes up his share.

If the owner ascertains serious building defects in the dwelling, he can choose to contact either the original owner or the insurer. The insurer then raises a claim against the responsible party and arranges to have the building defect repaired, if it is covered by the policy.

When a building defect is ascertained, the building owner must react within a reasonable time, as the claim can otherwise be forfeited on account of passivity. A building defect must be reported to the insurance company not later than the day on which the insurance expires.

In the case of rental properties, it is the owner of the property who is the policyholder. In the event, therefore, of a building defect occurring in the rented premises, the tenant must bring a claim before the landlord for repair – after which the landlord reports the defect to the insurer.

In the case of housing associations, it is the housing association which is the policyholder. In the event, therefore, of a building defect occurring in a housing-association dwelling, the individual resident member must bring a claim before the association – which must then report the defect to the insurer.

### ***Building-defects insurance takes precedence over other property insurances***

A building-defects insurance is the primary insurance in cases where the building-defects insurance and another property insurance can cover the same building defect. In cases where the insurer has covered a building defect, the insurer cannot demand recovery from the other insurance company, cf. s. 25 B (6) of the Act.

### ***A building defect must be repaired***

If a building defect is covered by the building-defects insurance, it must be repaired, cf. Reg. no. 15.

After a building defect has been reported to the insurance company or if the building defect is ascertained in connection with an inspection of the dwelling, the insurer will inform the professional owner and request the owner to repair the building defect within a reasonable time, cf. Reg. no. 16.

If the professional owner has gone bankrupt or otherwise fails to initiate the repair of the building defect, the insurer will be responsible for repairing the building defect.

The insurer can refuse to pay for repair work if the work is started before the owner of the building has been notified whether the building defect is covered by the policy, unless the work has been necessary in order to prevent or limit a building defect, cf. Reg. no. 11.

### ***Inspection during years 1 and 5***

The dwelling must be inspected twice during the 10-year duration of the insurance, cf. s. 25 E (1) of the Act.

The inspection can be performed on a random-sampling basis to an extent which ensures that the inspection is representative of the building or for several identical buildings, cf. Reg. no. 23 (6).

Inspection will be made during Year 1 and Year 5. Inspection during Year 1 will take place not earlier than five months after the insurance has come into force, and inspection during Year 5 will take place not earlier than four years after the insurance has come into force, cf. Reg. no. 19.

Based on these inspections, the property surveyor will compile an inspection report detailing defects and damage ascertained in the property.

Based on the inspection reports, the insurer will compile a defects list, which is a list of building defects covered by the insurance and ascertained in the building.

The inspection report and defects list will be forwarded to the owner of the building, to the insured and to those persons who have executed or taken part in execution of the work in which has been found a building defect covered by the policy.

### ***The insurer's collection of an uninsured risk on the reporting of a building defect***

In cases where a dwelling is found to have a building defect, the insurer can opt to demand payment for an uninsured risk if this is stipulated in the insurance policy, cf. Reg. no. 14. Any excess paid under another property insurance will be included in the calculation of the uninsured risk, cf. (2).

The insurer cannot charge more than a maximum of DKK 10,000 in uninsured risk per building defect. If several building defects are reported during the period of insurance, the total amount of uninsured risk payable by the insured cannot exceed DKK 20,000.

Building defects associated with individual components of the building – e.g. roof, foundations or common room – will be calculated at a rate of DKK 10,000 times the number of dwellings in the whole property.

The amount of uninsured risk follows the dwelling. This means that if the maximum of DKK 20,000 is reached under a previous owner of the building, the insurer cannot demand further payment of uninsured risk from a subsequent owner of the building if another insurable building defect arises.

***Public notice scheme***

The Danish National Agency for Enterprise and Construction will publish on the Internet information relating to companies who have executed or taken part in execution of work in which has been found a building defect covered by the policy, cf. Reg. no. 32.

The public notice will include the company's name, address and cvr.no. (Danish Business Reg.no.), a description of the building defect that has occurred in the building, and the area post code in which the building is located. The information will remain in the public domain for a period of two years.

Publication will be postponed or suspended if action is brought before a court of law or if a statement of complaint is presented to a court of arbitration concerning liability for a building defect. Subsequently, the information will not be published if it is documented that a final ruling has been issued to the effect that the company concerned was not responsible for the building defect.

The information will not be published if a building defect is ascertained and repaired within 12 months of the inspection.

The insurer has the power to amend the inspection report or defects list if the insurer receives new information concerning the building work.

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