

## AGENCY

### PROPERTY CONDITIONS AND DISCLOSURES

#### ENVIRONMENTAL LAWS

- ◆ **EPA** (Environmental Protection Agency) is federal agency
- ◆ **DEP** (Department of Environmental Protection) is state agency.
- ◆ Wetlands Protection Act (Mass act, buffer zone is 100 feet from river bank/shoreline, minor changes allowed after 50 feet).
- ◆ Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (**CERCLA**, federal superfund act) regulates assessment of damage to natural resources when hazardous substances released.
- ◆ CERCLA amended by Superfund Amendments and Reauthorization Act (**SARA**).
- ◆ Massachusetts Oil and Hazardous Material Release Prevention and Response Act (**21E**) is Mass superfund law. 21E Certificate certifies commercial property not contaminated.
- ◆ The Clean Water Act of 1972 (**CWA**) regulates pollution of navigable waters (federal).
- ◆ Property in high-risk flood zone must have insurance if community participates in National Flood Insurance Program and loan is through federally regulated lender.
- ◆ Endangered Species Act of 1973 can limit real property use and development (federal).

#### HAZARDOUS ISSUES

- ◆ **Lead Paint**
  - Rental: All property constructed prior to 1978 and occupied by a child under six years of age shall be delead.
  - Urgent lead hazard (chipping paint, windows) mitigation good for two years.
  - New tenants must be given a Lead Paint Notification and Tenant Certification Form. Landlord must delead for new or existing tenants with children. No parental waiver allowed.
  - No turning away qualified tenant because of children (children are not roommates and building/sanitation codes dictate square footage per person).
  - Sales: Prospective buyers of residential property built pre-1978 must be notified of their lead paint rights by Department Of Public Health Property Transfer Lead Paint Notification prior to signing P&S.
  - Buyer has 10 days after signing purchase and sale to do lead inspection. If it fails, buyer does not have to buy, but seller is not required to de-lead.
  - The buyer may waive 10 day lead paint inspection provision.
  - Buyer has 90 days to delead if child under six resides there.
- ◆ **Title 5** requires septic system to function at a particular level. It must pass inspection within 2 years prior to sale (3 if pumped every year) or 6 months after sale. Seller and buyer decide who brings it into compliance.

- ◆ Known hazards (i.e. underground fuel tanks, asbestos, UFFI, chlordane, mold or radon) must be disclosed – presence does not prohibit sale.
- ◆ **Radon** occurs naturally; radon is odorless, colorless, tasteless and radioactive. It seeps in through cracks in the foundation and water; gets trapped by weather-tight homes to build up to dangerous levels.
- ◆ **Mold** occurs naturally; it floats in and gets trapped by weather-tight homes long enough to find moisture and grow.
- ◆ Removal of hazards is regulated, may not be put in local dump. Fuel tank disposal requires fire department.
- ◆ Asbestos is dangerous in its friable state, requires encapsulation (as does lead) to remove.
- ◆ Mold is either scrubbed away or material must be removed.
- ◆ Radon can be vented out.

### HOME INSPECTION

- ◆ Home inspection is not a legal right of buyer. It has to be agreed to by seller contractually.
- ◆ All agents should give buyer the home inspection brochure from the Office of Consumer Protection.
- ◆ At buyer's request, seller's agent may give the list of **all** licensed home inspectors, but not less than all. Seller's agent cannot be trusted to recommend a good home inspector.
- ◆ A buyer's agent may recommend a particular home inspector, but best practice is to recommend more than one for buyer's choosing.

### PROPERTY DISCLOSURE

- ◆ The law requires agents to engage in **fair and honest dealing** with all principals in the transaction.
- ◆ In particular the buyer of residential property has the right to certain disclosures by all agents in the transaction, including seller's agent.
- ◆ Seller's agent's legal obligation to disclose overrides legal obligations to client.
- ◆ No more **caveat emptor** (let the buyer beware), but buyer cannot ignore obvious problems such as the property abutting a highway.
- ◆ Disclosable information falls into three categories:
  - that which **must** be disclosed
  - that which must **not** be disclosed
  - that which must be disclosed upon **direct** questioning only

- ◆ Agents must inform the buyer of any material defects of the property in the following categories:
  - title problems such as:
    - a neighbor having an easement over the land by deed, by prescription (adjoining owner uses land of neighbor openly, continuously, adversely and without permission for 20 years), or by necessity (court orders a right of way for land-locked land)
    - encroachments by neighbor (physical, stationary, usually accidental trespass)
  - physical problems serious enough to affect a buyer's decision to buy, such as contamination, infestation, leaks, flooding, inadequate electrical or plumbing, etc.
  - permanent conditions (rooted in the land) in the surrounding area which affects the use and enjoyment of the property, such as noise and smells (does not include disclosure of transient problems such as people, including sex offenders under Meghan's Law, although if asked, a seller's agent should refer them to public information)
  - buyer must be given this information up front and newly-acquired information must be disclosed until the closing
  - home inspection by buyer does not mitigate disclosure requirements, which are required for all **prospective buyers**
  - all known **hidden** defects must still be disclosed to the buyer by seller and buyer can choose to buy property "as is" (seller must disclose lead)
  - Buyer and the buyer's agent also have a duty to disclose information about buyer which will adversely impact buyer's ability to purchase, such as buyer is about to declare bankruptcy.
- ◆ Personal information about seller and/or buyer which do not impact the property or the ability of the party to proceed with the transaction (i.e., the lowest price a seller will take, or the highest price a buyer will pay) must not be disclosed by their respective agents.
- ◆ If an agent obtains **confidential information** regarding the other side, however, s/he must disclose it to his/her client.
- ◆ Stigmatized property – felonies, murders, suicides, paranormal activity.
  - Seller's agent does not volunteer information about stigmatizing event.
  - If asked directly by buyer or buyer's agent, seller's agent must answer truthfully.
  - The buyer's agent has an affirmative duty to disclose the information to the buyer under duty of full disclosure.

## Insurance

- ◆ Errors and omissions (E&O) is for liability based on agent malpractice – such as misrepresentation, fair housing violations, negligence, etc. Limited liability companies and limited liability partnerships **must** have E&O in Massachusetts.
- ◆ Agency's E&O covers all agents working for agency (agency must obtain insurance, individual agents cannot).
- ◆ Agency should have general liability (slip and fall, fire, etc.).
- ◆ Agency should have directors and officers (D&O) for mismanagement.
- ◆ Every broker (not salesperson) must have a surety bond to practice.
  - ◆ human brokers and entity brokers
  - ◆ actively practicing or on inactive status
  - ◆ obtained prior to taking broker's exam
  - ◆ put on file through testing service with the Board of Registration of Real Estate Brokers and Salespersons
  - ◆ coverage of \$5,000 for the benefit of any person harmed by the loss of funds held by broker
  - ◆ renews every five years based on issuance
- ◆ Property in high-risk flood zone must have insurance if community participates in National Flood Insurance Program and loan is through federally regulated lender (a disclosable issue to buyer).
- ◆ Landlords insure for common areas and landlord liability; tenants insure for occupied premises and tenant liability.
- ◆ Home warranty/home protection plan - insurance covering mechanical problems, built-in appliances.

## Record Keeping

- ◆ Agencies voluntarily holding other people's money must have an escrow account.
- ◆ Escrow records shall indicate the date and from whom broker received the money, date deposited, check number, date of withdrawal and name of the person receiving it, and other pertinent information concerning the transaction.
- ◆ Agency shall also keep a copy of each check deposited into and withdrawn from the account for **three years** from the date of issuance.
- ◆ All funds and records shall be subject to inspection by the Board of Registration for Real Estate Brokers and Salespersons (the "Board").
- ◆ A copy of all mandatory notices shall be maintained by the broker for **three years** from the date on which the notice was provided to the principal.
- ◆ Agency shall furnish notices to the Board, its investigators or other agents upon request.

- ◆ Agencies shall maintain all rental listings and written documents that demonstrate the availability of an apartment at the time it was advertised for **three years** from the date on which such apartment is rented.
- ◆ Agencies shall maintain a copy of any check, money order and written cash receipt for any fees, deposits or payments made by a prospective tenant or actual tenant for **three years**.

### **Privacy, Security, and Confidentiality**

- ◆ A broker shall not engage in false or misleading advertising. Records of advertising must be kept to prove property was available – no bait and switch.
- ◆ Advertisement Includes all written and verbal communication – internet/social media. Agency should have a policy for use of the internet, including websites and social media.
- ◆ Agent cannot disclose confidential information of the client to others without client's permission.
- ◆ Open houses are best conducted by two agents and house should be secured for breakables, valuables and medicines.
- ◆ Seller is entitled to know the names of all parties shown the property.
- ◆ Agencies representing both sellers and buyers must secure information within agency and ensure agents do not improperly disclose information to one another.
  - No free discussions between agents
  - No overheard phone calls (use mobiles, not landlines)
  - No stand-alone fax machines (use email system)

### **Scope of Expertise**

- ◆ No broker or salesperson shall violate, or attempt to violate, directly or indirectly, or assist or abet the violation of, or conspire to violate any provision of the relevant licensing law, the regulations or orders of the Board.
- ◆ No agent shall practice while his/her ability to do so is impaired for any reason.
- ◆ Agent shall only assume duties and responsibilities for which s/he had adequate preparation and for which competency has been acquired and maintained.
- ◆ A real estate *broker* who is employed by **another broker** shall not engage any realty salespersons within that same agency.
- ◆ Seller's agent should obtain written information from seller about property to **avoid litigation** for those matters legally required to be disclosed by agent.
- ◆ Brokers may work independently (set up their own agency). Salespersons are licensed as individuals and work for agencies as either an employee (W-2 income) or an independent contractor (1099 income).

## Form Of Business Operations (also used for investments or syndications)

- ◆ Trusts – formed for benefit of beneficiaries and run by trustees
- ◆ Corporations
  - ◆ formed with state
  - ◆ owned by stockholders or shareholders
  - ◆ managed overall by board of directors elected by stockholders
  - ◆ managed daily by officers elected by directors
  - ◆ stockholders have limited liability, **cannot be sued** by creditors
  - ◆ agency must have broker license in own name
- ◆ partnerships
  - ◆ private contractual relationship
  - ◆ two or more general partners
  - ◆ partners **can be sued** by creditors of partnership
  - ◆ partnership must have broker license in own name
- ◆ limited partnership (LP)
  - ◆ formed with state
  - ◆ one or more general partners who manage partnership
  - ◆ multiple limited partners
  - ◆ general partners **can be sued** by creditors of partnership
  - ◆ limited partners **cannot be sued** by creditors
  - ◆ limited partnership must have broker license in own name
- ◆ limited liability company (LLC)
  - ◆ formed with state
  - ◆ owned by members
  - ◆ members can manage or choose manager (including board and officer positions if desired)
  - ◆ members **cannot be sued** by creditors of LLC
  - ◆ LLC must have broker license in own name
- ◆ sole proprietorship
  - ◆ single broker acts an agency, although they can hire other agents, too
  - ◆ must operate under a business or trade name and file a doing-business-as certificate (DBA) in the city where such business is conducted must be sent to the Board of Registration of Real Estate Brokers and Salespersons