

COURSE OUTLINE

OWNERSHIP: Real property characteristics, definitions, ownership, restrictions & transfer
Definitions, descriptions and ways to hold title; land use controls and restrictions;
transfer/alienation of title to real property.

APPRAISING: Property valuation – Principles, types and estimates of property value.

Additional topics: Leases, rents and property management

BROKERAGE: Federal laws governing real estate activities

Anti-Discrimination/Fair Housing Acts; Americans with Disabilities Act (ADA); restraint of trade (Sherman Act, etc.); Lending (Regulation Z, etc.); privacy (Privacy Act, etc.); marketing;

AGENCY: Insurance; record keeping; privacy, security & confidentiality.

Additional topics: Property Conditions and Disclosures

MASSACHUSETTS LICENSE LAW:

Duties and powers of the Board of Registration of Real Estate Brokers and Salespersons;
licensing requirements; requirements governing licensees.

MASSACHUSETTS PRACTICES AND PRINCIPLES: Additional topics.

CONTRACTS: Contracts and relationships with buyers and sellers

Contract elements; listing contracts; buyer representation agreements; sales contracts;
option contracts; agency relationships and responsibilities.

FINANCING: Financing the transaction & settlement/closing; lender requirements/obligations

Additional topics: Ethical and Legal Business Practices

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OWNERSHIP

(REAL PROPERTY CHARACTERISTICS, DEFINITIONS, OWNERSHIP, RESTRICTIONS, AND TRANSFER)

Property is everything subject to ownership (also known as title). Tangible (corporeal) means physical items such as furniture and buildings. Intangible (incorporeal) means rights such as copyright and appurtenances.

PERSONAL PROPERTY (personalty or chattel)

Movable; **not** attached directly or indirectly to land; conveyed from one party to another by an instrument called a **bill of sale**.

Two Exceptions: Trade Fixtures: attached and used in the ordinary course of business; by lease terms, tenant will remove them at expiration of lease – despite attachment, they remain personal property of tenant. **Emblements:** annual and semi-annual plantings (crops) which, although rooted in the land, are removable by seller by agreement with buyer or tenant farmer by agreement with landlord.

REAL PROPERTY (real estate or realty)

Land and anything either directly or indirectly permanently attached (affixed) to the land. Immovable, affixed, attached and annexed. Ownership of real estate includes the "**bundle of rights**" meaning owner may transfer, build, mortgage, control, possess, rent and devise any component of the realty. Realty is conveyed from one party to another by an instrument called a **deed**. Real estate includes:

Land: the surface material of the earth (a horizontal/surface interest).

Improvements: items permanently attached directly or indirectly, such as buildings.

Appurtenances: rights existing outside the four corners of the property such as a right of way across adjoining land of another (easements).

Air/Subterranean (subsurface) Rights: rights to space above/below the land (a vertical interest).

Mineral Rights: gravel, dirt, oil, gas, coal, minerals and water.

Riparian Rights: rights of owners of land adjoining waterways. Abutting a navigable river gives rights to edge or accretion line of the water and to the low water mark. Abutting non-navigable river gives rights to mid-point (thread).

Littoral Rights: rights of owners of land bordering lakes and oceans.

Four common tests as to whether property is personal or real: **Method of Attachment** - permanently affixed; **Adaptability** - custom-built to fit a particular space; **Agreement of Parties** - seller and buyer agree seller will remove an item of realty before transfer of title; **Intention** - owner intended to make it permanent.

All real estate is part of sale unless excluded in writing in the purchase and sale agreement. The real estate agent must discover from the seller what realty is **not** included and inform prospective buyers.

Changes in property: Annexation: personal to real. **Severance:** real to personal.

Full legal description of property location in the deed includes:

Address, Land description, Title reference: Book, Page, Date.

Methods of land description in America:

Metes and Bounds - monuments, natural or artificial may be point of beginning (p.o.b.). **Metes** is the number of feet from one point to another; **Bounds** pertains to the compass direction. The description returns to the p.o.b.

Government Rectangular Survey - **Base** lines run east and west and are crossed by **meridians** which cross them running north and south. **Townships** are 36 square miles (or ranges) which are divided into **sections** one square mile of 640 acres - the smallest land unit. Also known as Public Land Survey. Arrows point **north** on maps.

Lot and Block System - the recorded plat (plan) of subdivision divides the tract into **blocks** separated by streets. The blocks are divided into house **lots**.

Links and Rods – a link is equal to .66 feet and a rod equals 16.5 feet.

Area Calculations

1. A building measured 300' by 20'. Its footprint covered 25% of the lot. If 15% of the lot was sold, how much land would remain?

$$\text{Building is: } 300' \times 20' = 6,000 \text{ s/f [Answer]}$$

$$\text{Total Lot is: } \frac{6,000 \text{ s/f}}{[Answer] \ 24,000 \text{ s/f} \times .25}$$

$$\text{Remaining Lot is: } \frac{20,400 \text{ s/f}}{24,000 \text{ s/f} \times .85} \text{ [Answer]}$$

2. A 18' by 20' room was covered with wall to wall carpeting. The carpet cost \$6.75 per square yard. What was total cost of carpeting?

$$18 \times 20 = 360 \text{ s/f total carpet}$$

$$360 \div 9 \text{ (3 ft per yard in each direction [3 x 3])} = 40 \text{ square yards}$$

$$\$6.75 \times 40 = \$270.00 \text{ [Answer]}$$

TYPES OF ESTATES

The words "estates" and "interests" and "tenancies" are interchangeable. They refer to amount and duration of an individual's rights in a parcel of real estate. These estates are divided into two groups: freehold (ownership) and non-freehold (possession).

FREEHOLDS

Fee, Fee Simple or Fee Simple Absolute (interchangeable terms)

- Highest form of ownership; *indefeasible*
- Indefinite duration; unlimited
- Most common form of ownership
- Inheritable

Ownership is assumed to be fee unless deed states otherwise. Transferring title (ownership) is known as "granting" title. Grantor A - signs and delivers *deed* to Grantee B - Upon B's death, ownership passes to B's heirs.

Life Estate

Title passes from grantor to grantee by deed, but grantor states in deed who gets title after this grantee's death – not inheritable, a life-time stewardship of the property. Three variations:

Life estate in reversion – upon grantee's death, title passes back to grantor, who retains a future interest. If grantor is already dead, title passes to grantor's estate/heirs.

Life estate in remainder – the ordinary life estate (most common form). Upon grantee's death, title passes in fee to third party C – *remainderman* (or to his/her heirs).

Pur autre vie – Title passes from A to B. B owns the property for Z's lifetime. When Z dies, B loses title to C, who is originally named by A in the deed. Life tenant holds a **present** interest; remainderman holds a **future** interest; life tenant may not commit waste or fail to pay property taxes; life tenant may sell property but new owner holds title only as long as the original life tenant lives; life tenant may lease property but lease terminates on the death of life tenant; no lender will accept it as collateral.

TYPES OF CO-OWNERSHIP

One owner/one deed is ownership in **severalty** (a corporation or other legal entity counts as a "person")

Concurrent or Co-ownership: ownership by two or more persons (human or entity)

Tenancy In Common

- ◆ Equal or unequal interests (percentage interests)
- ◆ Equal right of possession
- ◆ Undivided interest in whole (interest in every part of property)
- ◆ Upon death of tenant in common, interest passes in probate to heirs
- ◆ Transferable when tenant in common is alive

Joint Tenancy

- ◆ Equal interests
- ◆ Equal right of possession
- ◆ Undivided interest in whole
- ◆ One deed with all parties named
- ◆ At death of a joint tenant, interest does NOT go to probate for distribution to heirs; it goes to **surviving** joint tenants equally
- ◆ Four Unities: Possession - equal right to possess
Interest - equal, undivided interest
Time - acquire title at same time
Title - acquire title in same deed
- ◆ Transferrable when joint tenant is alive, but converts transferred interest into tenancy in common

Tenancy By The Entirety

- ◆ A form of joint tenancy restricted to a married couple (they choose it, it is not required)
- ◆ Upon death of one spouse, the survivor becomes fee simple owner, without probate
- ◆ Neither party may alienate (sell or convey) without written permission of other
- ◆ Creditor shield against forced sale by unsecured creditors when only one spouse owes money
- ◆ Both parties must sign deed when selling
- ◆ Upon divorce, they own as tenants in common unless they choose to own as joint tenants

PUBLIC RESTRICTIONS - Government (federal, state, local) may take actions to promote public safety, health or welfare, but not against the public good.

THE FOUR (4) PUBLIC LIMITATIONS ON PRIVATE PROPERTY

Police Power - zoning ordinances and building (sanitation) codes.

Eminent Domain – right of government to force sale of private property through process of **condemnation** for the public good at a fair price.

Taxes - municipal ad valorem property taxes. The priority lien before lender.

Escheat - death of owner with no will and no heirs or abandoned property. Cash or cash proceeds put in state treasury.

Attachments

- ◆ A legal seizure by court action of a defendant's property as security for possible judgment; to prevent transfer and hiding of assets.
- ◆ Defendant remains owner and possessor of subject property.
- ◆ Final determination of rights of parties by a court.
- ◆ Writ of execution used to enforce a judgment or decree of court.
- ◆ A sheriff's sale takes place after a judgment is not paid.
- ◆ Recording a **homestead exemption** prevents this for primary residence

PRIVATE RESTRICTIONS - Run with the land; contractual limitations.

Private restrictions known as C, C & Rs (conditions, covenants and restrictions) are a form of private zoning. They must be deemed legal (for example, not a violation of fair housing laws or an abridgement of basic rights) and not intrude in public governance.

In a conflict between a private restriction and a public zoning ordinance, the stronger restriction will be enforced. For example, if public zoning permits two-family houses, but the deed only allows a single family house, the deed controls.

Conditions

- ◆ Created by deed of grantor.
- ◆ Restriction, if violated, may give grantor or heir the right to demand forfeiture of title (right of reentry).
- ◆ Grantee has **defeasible estate**. Fee Simple Defeasible (Fee Simple Subject to a Condition Subsequent/Fee Simple Determinable)
- ◆ Runs with the land - restriction passes to persons subsequently taking title.
- ◆ Examples: certain business activities not permitted.
- ◆ Not typically an arms-length transaction so no role for an agent to play

Covenants

- ◆ Developer of a subdivision records in county registry of deeds covenants binding upon property owners in the subdivision or owners sign a separate agreement.
- ◆ Covenants are either in the deed or through recording home owners' association (HOA) rules.
- ◆ Examples: yard care, prohibition of outbuildings; fence heights; types of exterior construction materials; no signs; painting/color.
- ◆ Enforced by developer or other home owners through court action (injunction prohibiting restricted activity or court order to force compliance); must be legal and consistently applied to all owners.

Mortgage (Deeds of Trust held by 3rd party in some states, title theory)

- ◆ Parties: mortgagor (borrower) and mortgagee (lender)
- ◆ Instruments: note and mortgage (Mass is a lien theory state)
- ◆ Mortgage instrument encumbers the title of new owner giving mortgagee **conditional title** (owner must do something wrong for lender to take title).
- ◆ When debt is paid in full, mortgage is null and void, no more conditional title.

Mechanic's Liens

- ◆ A form of protection for contractors, sub-contractors and material suppliers.
- ◆ A specific lien on a specific property for labor and/or materials contributing to the real property improvement.
- ◆ Does not refer to a **personal** property improvement, such as appliance repair.

TRANSFERS OF REAL ESTATE

Purchase

- ◆ Purchase and sale agreement encumbers the seller's bundle of rights by providing the buyer with **equitable title** (meaning buyer can ask a court to force seller to close). After delivery of deed, buyer has **legal title**.
- ◆ Installment Sales Contract, conditional sales contract, land contract, contract for deed. Seller (vendor) retains **legal title**; buyer (vendee) holds **equitable title**. Failure to maintain contractual payment schedule results in loss of equitable title and accumulated financial equity. After paid in full, a deed conveys **legal title**.

Death

- ◆ **WILL:** An instrument (testament) used to dispose property owned by a person upon death. **Testate.**
- ◆ **Executor** (MA uses the term Personal Representative) is named in will by **testator** to represent the estate.
- ◆ **Devise** - to give real property by will to devisee (heir); **Bequeath** - to give personalty by will to legatee (heir). Called a bequest or legacy.
- ◆ **Codicil** - an addition or amendment to a will; **Holographic** - a will in handwriting of testator.
- ◆ **Dower** - When disinherited or left token amount, surviving spouse can demand spousal elective/forced share (\$25,000 and 1/3 life estate if deceased had children or 1/2 life estate when no children).
- ◆ **Descent - Intestate** - no will or defective will. Administrator (Personal Representative) appointed by court. **Descent and Distribution** - law governing distribution to heirs (1/2 to spouse, 1/2 divided among children).

Dedication

- ◆ Devotion (gift) of land (fee simple or easement) (permanent or temporary) by owner with intent it be accepted for public use.

Accession

- ◆ Acquisition by union through natural actions (water or wind).

Involuntary Alienation – forced transfer

- ◆ **Adverse Possession:** Acquisition of title by possession for a statutory period (20 years) against owner's will, openly, continuously, without permission. Applies to **private** property evidenced by deed only (**not registered**).
- ◆ Tax sale due to delinquent municipal taxes; foreclosure due to defaulted loan; court ordered sale due to law suit; bankruptcy; suit for partition of property held in co-ownership; forfeiture of title in defeasible fee estate (condition)

THE DEED

- ◆ **Requirements:**
 1. Must be in writing.
 2. Legally competent grantor (if owner is not competent, someone with court approval must act for them).
 3. Grantee named.
 4. Valuable consideration (money) or good consideration (love).
 5. Complete and accurate description (more than a street address).
 6. Granting clause, such as words "grants to."
 7. Signature of grantor.
 8. Delivery and acceptance (final step).
- ◆ **Habendum Clause: ("to have and to hold")** defines the estate being granted, such as a life estate only. It is not necessary if grantor is conveying a fee simple.

BASIC DEEDS

- ◆ **General Warranty Deed** (Warranty Deed) - Grantor will pay for any loss if a claim is made against the title by third parties even if the claim originated prior to grantor's term of ownership.
- ◆ **Special Warranty Deed** - Grantor is liable for claims by third parties if the claim originated **only** during grantor's term of ownership.
- ◆ **Quitclaim Deed** - Grantor conveys only whatever interest grantor may have at time of conveyance. No warranties, expressed or implied, but neither grantor nor his/her heirs can return to claim ownership against grantee. Also used to correct mistakes in prior deeds. Most common deed in Mass. Mass also uses Release or Fiduciary Deed if conveyance is done by fiduciary (i.e., guardian, trustee, personal representative).
- ◆ **Bargain and Sale Deed** – (a/k/a Grant, Bargain and Sale Deed) Grantor implies a current or past interest in the property and conveys any such title which may exist without warranties, expressed or implied. Used for foreclosures, tax sales.
- ◆ **The validity of deed does NOT require the following: Witnesses** (not to the signing or delivery, **Signature of grantee**, **Date** (any date on the deed is the date of signing, not necessarily the date of delivery, so it means nothing important), **Seal** (a representation of the grantor but most people would not have one), **Acknowledgment** (i.e., notarization where notary public confirms the identity of grantor and that sign is a free act, although needed if recording) and **Recording** (although needed to establish mortgage lien, and gives public notice of transfer). Because most deeds are recorded, virtually all of the rest follows as a matter of routine. Sometimes a joint tenancy deed will even have the signature of the grantees to confirm they accept the rights of survivorship.

LAND COURT (TORRENS SYSTEM)

- ◆ A method of **registering** land. Upon petition, the Land Court conducts a thorough search of title called an action to quiet title to establish ownership. A Certificate of Title is issued as of a certain date. Future title searches only have to go back to this date. An owner can petition to deregister the property and return to the deed system. (Do not confuse registered land with recording of title at the registry of deeds.

TITLE INSURANCE

- ◆ An insurance policy for protection against occurrences that have already happened such as forged deeds, undisclosed heirs, parties lacking capacity, etc. that will not be discovered by title search. Title insurance company provides legal defense and financial protection to owner and lender. A one-time charge at closing. Occasionally used to cover defects found in title, or mistakes in municipal lien certificate. Will not cover issues known to insured but not to insurance company. Owner protection up to the full purchase price of property. Lender protection up to the outstanding loan balance.

APPRAISING (PROPERTY VALUATION)

An appraisal is the process and conclusion by an appraiser who arrives at an opinion or estimate of value, supported by data, of real estate at a certain point in time.

TYPES OF VALUE

Market Value - the probable price a willing, informed seller would accept and a willing, informed buyer would pay, neither being under pressure to act; an “arm’s length transaction”; value-in-exchange; fair market value.

Market Price - the amount actually paid in the market.

Value-in-Use - the value to a particular user of income property not offering it for sale (includes value of business).

Cost - the total amount to produce the property.

Investment Value - the value to a particular investor.

Insurable Value - the value of the real property for insurance purposes.

Assessed Value - the value for property taxes.

Liquidation Value - the value on a forced sale, such as a lender’s foreclosure auction.

ELEMENTS OF VALUE- what is needed to achieve value (D.U.S.T.)

(D)emand (Effective) -Ability of someone to buy; purchasing power of buyer.

(U)tility -Usefulness; with ability to satisfy wants and desires in the minds of others.

(S)carcity - increases value because buyers compete (Overabundance decreases value because sellers compete).

(T)ransferability – Seller must have good title free of “clouds on title”.

FORCES INFLUENCING VALUE

Social - Characteristics and customs of people; attitudes toward public education; life-styles; family sizes (but actual people living in the neighborhood are not an influence).

Economic - Price levels; employment trends; availability of credit; interest rates; supply and demand in housing.

Government/Legal -Zoning and land-use regulations; building codes; police, fire and health protection services; environmental laws.

Environmental/ Physical -Topography, climate, soil, natural resources and developed resources; highway and recreation systems.

PRINCIPLES OF VALUE

Anticipation: a forecast of expected benefits during ownership and at time of resale.

Change: real estate values always move up or down. Change includes business cycles, interest rates and neighborhood cycle -- growth, stability, decline and renewal.

Competition: excess profits attract competition that increases supply and choice, thus increasing price competition and lowered profits.

Conformity: maximum value is created when a reasonable degree of economic and sociological harmony is present in a neighborhood.

Contribution: added investment in a site is measured by added value to original value.

Increasing and Decreasing Returns: More money spent on the site may not add

more value (over-improvement), or not enough is spent (under-improvement).

Highest and Best Use: A site will be improved to its most profitable or optimal use in a competitive market over a period of time.

Substitution: When two or more like properties with more or less the same utility become available, the one with the lowest price attracts the greatest demand.

Supply and Demand: Increase of supply will lower prices; increase of demand drives up prices. Supply and demand intersect to form the price.

Regression: Value is reduced by the presence of nearby properties having lesser value. The opposite of progression.

Plottage: Acquisition through assemblage of one or more adjoining plots to form a larger parcel. Likely higher value of the new larger parcel is known as plottage value.

THE VALUATION PROCESS

DEFINITION OF THE PROBLEM:

- ◆ Identify real estate and property rights
- ◆ Effective date of value and objective of appraisal
- ◆ Definition of value and any limiting conditions

PRELIMINARY SURVEY & APPRAISAL PLAN

- ◆ Data and sources needed
- ◆ Personnel needed and time chart
- ◆ Fee proposal and contract

DATA COLLECTION AND ANALYSIS

General Data (Economic)

- ◆ Market analysis
- ◆ Forecast

General Data (Locational)

- ◆ Region and community
- ◆ Neighborhood

Specific Data (Appraised Property)

- ◆ Title and record data
- ◆ Physical characteristics of site and improvement

Specific data (Comparative Properties)

- ◆ Sales and rentals
- ◆ Listings
- ◆ Costs

HIGHEST AND BEST USE ANALYSIS

SITE VALUATION

THE THREE APPROACHES TO VALUE

- ◆ Sales Comparison Approach
- ◆ Income (capitalization) Approach
- ◆ Cost Approach

RECONCILIATION [Final Step] THROUGH WEIGHTED AVERAGING

ESTIMATE OF VALUE GIVEN IN THE APPRAISAL REPORT

- ◆ Narrative/Form – (Fannie Mae/Freddie Mac Form 1004)

THREE APPROACHES TO VALUE

SALES COMPARISON APPROACH

Useful for midlife residential properties and land sales. Formally known as Market Data Approach. Basic principle is one of **substitution** (informed buyers will not pay more for a property than they have to for a comparable substitute). Agent **CMA** (competitive market analysis) resembles this.

Sequence: Compilation, verification and analysis of comparable sales.

Financial adjustments for differences between subject and comparables.

Example: Subject property has two bathrooms and a one-car garage. Market indicates that public values a 1/2 bath at \$5,000, a full bath at \$10,000 and a one-car garage at \$20,000.

Market grid	Elements	Subject	Comp. #1	Comp. #2	Comp.#3	Comp.#4
	Price	?	\$100,000	\$ 85,000	\$110,000	\$115,000
	Baths	2	2	2 1/2	3	1 1/2
	Garage	1	1	0	1	2
	Adjustments		0	-\$5,000	-\$10,000	+\$ 5,000
				+20,000		-\$20,000
Adjusted Price			\$100,000	\$100,000	\$100,000	\$100,000

The value of the subject property is \$100,000 (use **weighted** averaging, not averaging).

Note: Adjustments are made to comparables, never to subject property.

INCOME APPROACH: SINGLE FAMILY HOMES

Sequence:

- Determine the gross monthly rent of recently sold single-family houses (adjusted as with sales comparison) that were rentals.
- Divide each sales price by gross monthly rent to determine gross rent multiplier (GRM).
- Examine all the GRM to find the best composite number (not the average).
- Using the GRM, multiply this number by the gross monthly rent probable of the subject property if it were rented today. (Note: utilities are not a factor in this approach.)

Example:	<u>Sale #</u>	<u>Sale Price</u>	<u>Gross Monthly Rental</u> (unfurnished)	<u>GRM</u>
	1	\$200,000	\$1,600	125
	2	\$225,000	\$1,800	125
	3	\$187,500	\$1,500	125

GRM of 125 is multiplied by the probable monthly rent (\$1,600) of the subject property if it were rented: $125 \times \$1,600 = \$200,000$ – value of subject property.

INCOME APPROACH: INCOME PROPERTY

EFFECTIVE GROSS RENTAL INCOME (APOD-annual property operating data, used by prospective buyers/lenders to see operations for a given year)

⇒ Potential Gross Annual Income:	\$
(-) less vacancy	-\$
⇒ Effective Gross Rental Income:	_____
(actually collected)	\$
(-) operating expenses	\$

⇒ Net Operating Income (NOI)	\$
(-) mortgage (debt service)	-\$

⇒ Cash Flow (before income taxes)	\$

Operating expenses are repeatable expenses to keep the property up and running, such as property taxes, insurance premiums, management fees and other salaries, utilities, maintenance costs, landscaping, snow removal, etc. In theory they are the same no matter who owns the property.

Annual debt payments are not operating expenses. Capital expenses, such as roof replacement, are improvements with multi-year value and not operating expenses.

NOI is the most important factor to buyers/lenders. The higher the rate of return, the higher the risk, and the lower the value. Cash flow divided by equity (downpayment) equals cash-on-cash return.

Capitalization refers to a method of estimating the market value of income property by taking the net **annual** income and dividing it by the appropriate rate of return.

Here is our model:
$$\frac{\text{net operating income (N.O.I.)}}{\text{market value} \times \text{capitalization rate (\%)}}$$

- ◆ A hotel has an annual net operating income of \$112,500. An appraiser has determined an appropriate rate of return for this type of investment is 7.5%. What is its maximum value for an investor?

$$\frac{\$112,500}{\text{market value} \times .075} = \$1,500,000 \text{ ANSWER – (Divide } \$112,500 \text{ by } .075)$$

- ◆ What is the expected net income of a property valued at \$1,500,000 with a rate of return (cap rate) of 7.5%?

$$\frac{\text{net income}}{\$1,500,000 \times .075} = \$112,500 \text{ ANSWER}$$

- ◆ Expected net annual income is \$112,500 and asking price is \$1,500,000. What would be the rate of return (capitalization rate) on the investor's purchase price?

$$\frac{\$112,500}{\$1,500,000 \times \text{cap rate}} = 7.5\% \text{ ANSWER}$$

COST APPROACH

Used for improvements that lack adequate sales comparison data, such as for unique buildings (churches) and new properties.

The procedure is to estimate the new cost of a **reproduction** or **replacement** of the subject property at today's prices and subtracting the depreciation. The value of the land is calculated using the sales comparison approach and added to the cost.

Reproduction creates a **replica**; **replacement** creates a property with **similar utility, current materials** and **design**.

Three main methods of estimating **reproduction/replacement** cost:

1. **Comparative-Unit Method** - the total value of recently constructed similar buildings are divided by the number of square feet to produce a dollar value per square foot. Used to estimate **replacement** cost.
2. **Unit-In-Place Method** - Various individual main systems and components (i.e., roof, electrical outlets, etc.) are priced often using available cost manuals. Used for both **replacement** and **reproduction** cost.
3. **Quantity Survey Method** - The quantity and quality of all materials plus labor, builder's profit, and cost of permits are used to arrive at a total **reproduction** cost.

Measurement for single-family is from the *outside* above the foundation to determine the Gross Living Area (GLA) per square foot of living space per floor. Space must be above grade, heated, enclosed, habitable.

Three methods of estimating **depreciation** cost:

1. **Deterioration** – physical depreciation, wear and tear, deferred maintenance, such as worn electrical wires, roof leakage, termite damage, sagging floors and faulty heating.
2. **Functional Obsolescence** - Loss of value due to original poor design or floor plan, changes in building standards and market preferences. Examples: well-maintained kitchen and bathrooms with old-fashioned fixtures, fieldstone foundation, four story building with no elevator or narrow elevator, four bedroom colonial with one bath on first floor, inadequate electrical service for contemporary demands, inadequate closets, inadequate parking.
3. **Economic Obsolescence** - Loss in value due to *external* (economic) factors that have a negative effect on value of subject property, such as inadequate street lighting, constant rubbish-strewn neighbor's yard, change in zoning, many for sale or rent signs in neighborhood, change of homes to rooming house use, loss of public transportation. Not curable (fixable).

\$400,000	Reproduction cost at today's prices
- 50,000	Less accrued depreciation
<u>\$350,000</u>	Present improvement value
<u>+100,000</u>	Present site value
<u>\$450,000</u>	Market value

Straight Line Depreciation/Appreciation – changes in value

A property was worth \$100,000.

It depreciated 6.5% of the original value each year for 4 years. What is its new value?

$$.065 \times 4 = 26\% \quad \$100\% - 26\% = 74\%$$

$$\frac{\$74,000}{\$100,000} \times .74 \quad \text{[Answer]}$$

It appreciated 6.5% of the original value each year for 4 years. What is its new value?

$$.065 \times 4 = 26\% \quad \$100\% + 26\% = 126\%$$

$$\frac{\$126,000}{\$100,000} \times 1.26 \quad \text{[Answer]}$$

A property is now worth \$44,900.

This value represents a 5% gain each year for 5 years. What was its original value?

$$.05 \times 5 = 25\% \quad \$100\% + 25\% = 125\%$$

$$\frac{\$44,900}{\$35,920} \times 1.25 \quad \text{[Answer]}$$

This value represents a 5% loss each year for 5 years. What was its original value?

$$.05 \times 5 = 25\% \quad \$100\% - 25\% = 75\%$$

$$\frac{\$44,900}{\$59,867} \times .75 \quad \text{[Answer*]}$$

*Math answers on state exam may be approximate. Round up if necessary.

Income Property Tax Treatment - \$125,000 income property is purchased.

1. Separation of improvement value from land value (land does not depreciate).

$$\begin{array}{r} \$125,000 \\ - 25,000 \text{ land value} \\ \hline \$100,000 \text{ improved value} \end{array}$$

2. Using, for example, a 25 year economic life, divide 1 by 25 = .04. $\$100,000 \times .04 = \$4,000$ annual depreciation. After 25 years, the entire property has a basis (the amount against which taxable gain is measured) of \$25,000 (original value of land). **Note:** basis increases with capital improvements.
3. The property is sold at the end of 25 years for \$250,000. $\$250,000 - 25,000$ adjusted basis = \$225,000, amount subject to tax, which can be delayed through a 1031 Like Kind Exchange (buying another investment of equal or greater worth). Cash not reinvested is immediately taxable as boot.

Primary Residence Property Tax Treatment

Single-family owner-occupants may deduct **interest** on the mortgage loan and **municipal** property taxes. If you have lived in your personal residence for two of the last five years, single taxpayer shelters \$250,000 in gain, married couple shelters \$500,000.

LEASES, RENTS, AND PROPERTY MANAGEMENT

Non-Freeholds (possession and use of another's real property)

Leasehold

- ◆ Lease/tenancy for years/estate for years
- ◆ Lessor (owner/landlord) and Lessee (tenant)
- ◆ Must be in writing with expiration date

Tenancy At Will

- ◆ May be verbal or in writing, binding for 30 day increments

Tenancy At Sufferance

- ◆ Holdover tenancy *after* lease expires and tenant stays without permission

The Lease

A written contract and a conveyance of a possessory real estate interest. **Lessor** transfers **possession and use** to a **lessee** for a specific period of time under certain conditions in consideration of rent. Lessor retains reversionary interest - to recover at end of lease term.

If lessor sells before end of lease, new owner must honor remaining leasehold. If lessor dies before the end of lease, lease remains enforceable by lessee. A lease for more than 7 years should be recorded.

Essentials of Lease

1. Name of parties (who have capacity).
2. "Sufficient" description of premises (address).
3. Rental amount, time and manner of payment.
4. Term of lease.
5. Intention to rent must appear.
6. Signature of lessor.
7. Delivery of lease and acceptance by lessee (actual with signature or implied by actions of lessee).

Residential rental money – landlord is allowed to collect only the following at the beginning of the rental period:

- ◆ First month's rent and reasonable lock and key fee.
- ◆ Security deposit limited to **one month's** rent. Landlord's statement of condition required within 10 days of rental beginning. Landlord's itemized/notarized claim against deposit or its return must be made within 30 days of rental ending. Lesser of 5% interest or current bank rates on security deposit due each year to tenant within 30 days of annual tenancy anniversary.
- ◆ Last month's rent collected in advance. Interest earned due to tenant each year within 30 days of annual tenancy anniversary, but last month's rent does not have to be deposited, in which case 5% interest is owed.

Transfer of Lease

Lessee may sublet, assign or novate unless lease prohibits.

- ◆ Sublet - transfer portion of interest to third party such as 2nd year only of three year lease.
- ◆ Assign - transfer remaining interest to third party.
- ◆ Novation - a third party signs a new lease with the lessor, thereby relieving the original lessee of further responsibility.

Termination of Lease

1. Performance: automatically terminates at expiration with no notice necessary.
2. Surrender of premises by tenant: mutual cancellation before expiration.
3. Action of law: condemnation by law of eminent domain or bankruptcy.
4. Destruction: premises destroyed with no covenant to repair.
5. Foreclosure: prior lien holder has right to void lease and convert it to tenancy-at-will (federal law now gives a tenant 90 days to leave).
6. Eviction: court order on action by lessor.
7. Constructive Eviction: premises no longer fit for tenancy.

Lessee remains responsible at abandonment/sublet/assignment/title transfer.

Breach of Lease

When lessee has breached leasehold terms by creating a nuisance, non-payment of rent (even if late by one day, unless there is a grace period), committing waste, “holding over” or unlawful use of property – lessor may evict by court action of unlawful detainer after giving tenant 14 (7 if destruction) days’ notice to vacate (not to be confused with 30 day notice under tenancy-at-will).

When lessor has breached leasehold terms by not keeping property fit for human occupancy or not providing tenant with “quiet enjoyment” -- lessee may bring court action for compliance or vacate by **constructive eviction**. Obligation to pay rent ends.

Covenant of Quiet Enjoyment

Landlord Promises:

- ▶ Not to trespass (may enter upon reasonable notice for good reason (inspection, repairs, etc.)).
- ▶ Not to threaten expulsion.
- ▶ Not to attempt to lease or rent to others.
- ▶ To render premises fit or suitable for occupancy (habitable, clean, safe, meets Mass sanitary code).
- ▶ To provide for services included in tenancy.

Insurance

Lessor -- obtains insurance coverage for **common** areas and keeps common areas in good repair.

Lessee -- obtains insurance coverage for **leased** areas and remains responsible for third party claims arising from actions on leased premises.

TYPES OF LEASES

Gross Lease - lessee pays fixed rent and lessor pays expenses of ownership and operation. Residential means rent covers occupancy, heat, electricity and water. Commercial means rent covers occupancy and estimate of proportionate share of operating expenses.

Net Lease - lessee pays all or some of operating expenses in addition to base rent, thus giving lessor **net** income. Lessee rarely pays principal or interest (debt service) of any mortgage debt of lessor. Residential tenant pays for heat and electricity directly to utility company, landlord may collect reimbursement for water (for new tenants only and with water-saving devices installed). Commercial landlord will audit expenses for past year and any overpayment or underpayment will be made up at the beginning of next year.

Percentage Lease - rental with a monthly base amount (usually less than other tenants per square foot) *plus* percent of **gross** sales of lessee; used in mall especially for but no longer restricted to **anchor** tenants such as department stores.

Lessee pays monthly base rent of \$1,200 plus 2 1/2% of annual gross sales over \$150,000. What were annual sales if annual rent was \$22,000?

\$1,200 X 12 = \$14,400 annual base rent

\$22,000	<u> \$7,600 </u>	\$150,000
<u>-14,400</u>	? X .025	<u>+304,000</u>
\$7,600	[\$304,000]	\$454,000 [A]

Graduated Lease – rent schedule for some period of time is agreed to by landlord and tenant and stated in the lease for automatic changes.

Index Lease - provides for an increase (or decrease, although landlords typically will not agree to it going down) in rent annually, or after some period of graduated payments, using a cost of living index or some other acceptable outside economic indicator; an **escalator** (escalation) **clause** addresses this issue. For example, if index number goes up by 2%, then so does the rent. Favors landlords in an inflationary cycle.

Reappraisal Lease - increased rent based on independent appraisals of fair market rent if lessor/lessee cannot agree on new rent. Landlord and tenant each pick an appraiser and sometimes a third one is picked.

Sublease (Sandwich) Lease - lease between original lessee and sublet tenant. It refers back to original lease (now master or prime lease) and contains no terms contrary to it. Landlord always controls who is on property.

Ground Lease - lease of *land* only. Land improved by lessee and these improvements become security for lease or mortgage. Also known as a long-term land lease. Popular with fast food franchises. Improvement remains with the land once lease ends.

Sale-Leaseback – owner/user sells property and simultaneously leases it from new owner. Advantages to seller/lessee: retains possession, cash from sale for capital expenditures, future lease payments are tax deductible expense and no mortgage debt. Advantages to buyer/lessor: investment that hopefully will increase, possible pyramid financing (taking money out for another acquisition), tax deductions for building depreciation, built-in tenant for long term.

Property Manager is a *special agent* of owner and a *fiduciary* working in the best interests of owner who provides a monthly report of income and operating expenses. Compensation to management firms is usually a *percentage* of effective gross rental income (the amount of rent earned in a given year). Manager's responsibilities/authority defined in a management agreement.

PROPERTY MANAGEMENT REVIEW

1. A vacancy rate for an apartment building is calculated by dividing the number of vacant apartments by the total apartments.
2. A lessee is released from the obligation to pay rent if constructively evicted by lessor's failure to comply with lease terms.
3. If lessee defaults on unexpired lease and abandons the leased premises, the lessor can demand that lessee pay remaining lease payments.
4. A property manager's agreement with the owner of the property includes a description of manager's responsibilities with landlord's money, authority and compensation.
5. A lease is the strongest interest of possession and use for a tenant.
6. A clause in a lease requiring the owner to give the tenant an opportunity to meet landlord's terms for buying is called a **right of first refusal**.
7. An increase in interest rates usually makes home ownership less affordable, increasing demand for rental property.
8. A commercial lease allows the lessee to deduct rent as business expenses on lessee's income tax.
9. A lessee whose lease is interrupted by the property being taken by eminent domain must be compensated by the condemnor (cost or relocation and cost of improvements made by tenant, if any).
10. A clause in a lease providing the tenant with the right to purchase the leased property at a specific time frame is known as **lease option**.
11. An anchor tenant is a large retailer in a mall that typically makes the mall successful.
12. Lessor holds in fee simple (standard real estate ownership) and maintains a reversionary interest in possession during the term of the lease; lessee holds a leasehold interest during this period.

BROKERAGE

FEDERAL LAWS GOVERNING REAL ESTATE ACTIVITIES

FEDERAL FAIR HOUSING LAWS

- ◆ Civil Rights Act of 1866 prohibits discrimination on basis of *race*.
- ◆ Fair Housing Act of 1968 (Title VIII) prohibits discrimination by: Sex, Race, Color, Religion and National Origin. Fair Housing Act of 1988 Amendments (effective March 1989) adds: Disabled (mental and physical) and Children (familial status).
- ◆ Equal Employment Opportunity Commission (EEOC): federal commission that makes policy and approves most litigation.
- ◆ Americans with Disabilities Act of 1990 (Title 111) (**ADA**) addresses places of public accommodations, workforce accommodation and some rentals.

In regard to the protected classes, an agent (and principals of transaction) cannot:

- ◆ Refuse to sell, rent to, negotiate or deal with someone.
- ◆ Differentiate on terms or conditions (no disparate impact allowed where gatekeeping condition affects a protected class greater than others).
- ◆ Discriminate in **advertising**.
- ◆ Falsify availability.
- ◆ Solicit for sale or lease residential property on the grounds of **alleged change of value** due to presence or the prospective entry into the neighborhood of persons in a protected class. This is **blockbusting** creating **panic-selling** (panic peddling).
- ◆ Steer prospective purchasers/renters away from/to certain market areas - **steering**.
- ◆ Prohibit anyone the use or participation in any realty services, such as agent organizations and multiple listing services (MLS).

Redlining is presenting different terms or conditions if you are a commercial lender. Equal Credit Opportunity Act (ECOA) prohibits discrimination in credit/lending.

Appraiser may not write an appraisal report with any language which may indicate a protected class has played a **negative** (or positive) role in the estimate of value.

No discrimination allowed in *corporate-owned* housing.

Landlord may not refuse to permit, at **disabled person's expense**, reasonable modification of premises. After 3/13/1991, new (or rehab) residential construction of four-family or more units must include handicapped-accessibility and design features for all *first floor* units and any upper floors if they are served by elevators.

State/federally-approved age-restricted housing developments for elderly homeowners (only 62 or 80% occupancy by 55 years or older) are exempt from housing laws.

- ◆ Grab bars are a reasonable modification.
- ◆ Support animals must be allowed, but disabled tenant is responsible for damages.

- ◆ Disabled tenant must be given convenient parking and first floor units if available.
- ◆ Apartment complexes cannot be segregated into all adult or all family areas.
- ◆ Agent saying: “We can sell your home quickly while prices are still high” **may** be guilty of **blockbusting**.

Exemptions (situations in which Fair Housing Laws will not apply)

- ◆ A private individual who owns 3 or fewer single-family houses. Limited to one sale of income house every two-years.
- ◆ Rentals in **owner-occupied** two - four family houses.
- ◆ Sale, rental or occupancy to its own members of dwellings owned or operated by a **religious organization** for non-commercial purposes if membership in that religion is not based on exclusion of protected classes.
- ◆ Sale, rental or occupancy to its own members of lodgings owned or operated by a **private club** for non-commercial purposes. (If the private club owned a motel or convention facility, the club’s commercial activities are under the Fair Housing laws.)
- ◆ **No** exemptions allowed on basis of **race**. No refusal for family in rentals because of lead paint. **No** exemptions allowed if a **real estate agent** is used in the transaction. **No** exemptions allowed if discriminatory **advertising** is used

Enforcement

- ◆ A federal complaint must be made within **one year**; anyone, including real estate agent can bring complaint; “testing” is allowed; investigated by Office of Fair Housing and Equal Opportunity (FHEO), part of Department of Housing and Urban Development (HUD), and/or bring action in local, state or federal court. One procedure provides for a hearing before an Administrative Law Judge (ALJ) who may award actual damages and legal relief. **Penalties: up to \$19,787** for the first offense, **\$49,467** for the second offense, and **\$98,935** for the third offense
- ◆ An Equal Housing Opportunity poster: Supplied by HUD and **must** be posted conspicuously in every real estate office (any place where a dwelling is offered for sale or rent).

Do-Not-Call, Privacy, Anti-Trust

- ◆ FTC National Do-Not-Call Registry (Do Not Call Implementation Act of 2003) allows buyer agent to call for sale by owner (FSBO), but not to solicit residential seller for hiring. List of numbers protected from disclosure for other reasons under **Privacy Act of 1974**. Fines of up to \$16,000. Existing relationships (under 18 months) are exceptions.
- ◆ Commissions are determined by the seller and broker (not multiple listing service). Uniform commissions among agencies imply price fixing which is against the **Sherman Anti-Trust Act**. Legally there can be no such thing as a set or standard commission among agencies. Price matching (lowering your price to meet a competitor’s is legal).

TRUTH-IN-LENDING (REGULATION Z OR TILA)

A law enforced by Federal Trade Commission (FTC).

Purpose: To provide full disclosure by lenders of all costs of credit. This gives public a method of comparing various lenders.

Method: It informs borrower of total cost of credit expressed in total dollars. These dollars are then expressed as an ANNUAL PERCENTAGE RATE (APR).

Annual percentage rate (APR) includes: interest rate, points, loan fees, finder's fees, and disclosure of any mortgage prepayment penalties. The APR does not include municipal taxes and attorney fees, credit reports, appraisal fees, survey fees, and other closing expenses.

The law covers any person or firm offering to extend credit in the ordinary course of business. Middlepersons such as mortgage brokers are also included.

Truth-In-Lending (TIL) law applies only to **consumer** loans.

Allows rescission by consumer within 3 business days for certain loans (not first mortgages for homes).

EXCLUDES:

- Commercial loans
- Construction loans to builders
- RE agents do not come under this law unless they receive a fee for arranging credit
- P&S because it is a realty contract, not instruments of credit
- Seller financing
- Buyer buying subject to existing mortgage

ADVERTISING

If specific credit terms are used, all terms and APR must be disclosed. Example: Financing available with 10% down. Advertising which does not trigger the APR requirements are: liberal terms, low downpayment, VA/FHA available, financing available at low interest rates

REAL ESTATE SETTLEMENT PROCEDURES ACT (RESPA)

Covers nature and costs of settlement services. It includes a Loan Estimate for TILA and RESPA given to potential borrowers within three working days of loan application (working days based on lender being open substantially for business). Closing Disclosure (all known charges under TILA and RESPA) must be given to buyer at least three working days before closing (working days based on federal recognized days). Combined forms known as TRID (TILA-RESPA integrated disclosures). Kickbacks and unearned fees through referrals are prohibited. The lender is responsible for reporting the transaction to the IRS.

ESCROW/TRUST ACCOUNTS

- ◆ The only person legally entitled to hold a deposit is **seller**. Usually parties agree seller's broker will hold it in escrow until closing. Broker does not have to do this – it is an accommodation for client. Deposits must be immediately deposited. Broker shall be responsible for such money with proper accounting, but has no personal claim to it. The account may be interest or non-interest bearing. If interest bearing, parties agree who gets the interest.
- ◆ 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. Every broker 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.
- ◆ A salesperson shall immediately turn over all deposit money received to the employing broker. No salesperson shall at any time hold client funds.
- ◆ A rejected or withdrawn offer and deposit must be returned to offeror.
- ◆ The form of deposit (cash, check, note or anything of value) must be clearly shown on all offers and sales contracts.
- ◆ Broker may not bring uncashed checks to closing. That means the checks have not cleared. Broker may not **commingle** escrow money with broker's own accounts.
- ◆ Escrow funds held by broker as **escrowee** or **escrow agent** have absolutely nothing to do with broker's commission, although seller and buyer can give permission for some or all of the deposit to be converted at closing to commission money.
- ◆ Both buyer and seller must agree when money is removed from escrow. A dispute requires a court order or settlement by the parties, not the discretion of the broker.

ADVERTISING

- ◆ Includes all written and verbal communication – newspapers, flyers, circulars, business cards, signs, internet/social media, and verbal statements
- ◆ 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.
- ◆ **Blind Advertising Prohibited** - Broker ads must include name of broker. Salespeople are prohibited from advertising under their own name but ads may name a salesperson as the contact for the agency.
- ◆ **Discriminatory Advertising Prohibited** - No ad shall indicate directly or indirectly unlawful discrimination against a protected class.

THE ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT (ESIGN)

- ◆ Federal law recognizes electronic signature for contracts and other transactional documents
- ◆ Allows for the electronic storage of documents and retention of records

ETHICAL AND LEGAL BUSINESS PRACTICES

MISREPRESENTATION - MASS GENERAL LAWS CHAPTER 93A

- ◆ Originally enacted in 1967 to protect against unfair and deceptive business acts and practices; revised in 1969 to allow private right of action. Does not apply to consumer-to-consumer (buyer against seller) law suits.
- ◆ Intent to deceive not required. Liability for failing to disclose what is required or providing false or misleading information, including opinion.
- ◆ Provides for up to triple damages and attorney's fees.
- ◆ Puffing is gross exaggeration (also not allowed).

IMPLIED DUTY OF GOOD FAITH

- ◆ The law requires agents to engage in ***fair and honest dealing*** with the principals (seller, buyer, landlord, tenant).
 - **Misrepresentation** - a misstatement of fact without intent to deceive.
 - **Fraud** - a deliberate misrepresentation of a material fact.
- ◆ An agent cannot offer property for sale or lease without permission of owner or on terms or conditions other than those authorized by owner.
- ◆ Seller must agree to accept vicarious liability (indirect liability) for actions of subagents (those agencies and agents working indirectly for seller through hired broker).

DUE DILIGENCE

- ◆ Seller's agent should obtain written information from seller about property's condition to ***avoid litigation***.
- ◆ Buyer's agent has a duty to disclose information about buyer which will adversely impact buyer's ability to purchase, such as buyer is about to declare bankruptcy.

UNAUTHORIZED PRACTICE OF LAW/SECURITIES

- ◆ A person must have a ***securities license*** to market/sell an interest in an investment (securities regulated by federal/state law) (Securities and Exchange Commission (SEC)).
- ◆ Agent ***cannot*** bind principal. Agent may accept or reject an offer/counteroffer on behalf of client ***only*** if agent holds written power of attorney and is now attorney-in-fact.
- ◆ No real estate agent shall advise against the use of the services of an attorney or provide legal advice/services (always recommend all parties to seek legal counsel).

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

MASSACHUSETTS LICENSE LAW

Massachusetts law provides that anyone who for another and for a fee, commission or other valuable consideration or in the expectation of receiving such, does any of the following must be licensed as a real estate agent: advertises and/or holds himself or herself out as engaged in the business of selling, renting, leasing, negotiation, exchanging, purchasing and dealing in real estate or options for real estate. Receiving anything of value as part of a transaction is enough to trigger requirement regardless of nature, amount or expectations. **Brokers** may work independently, but a **salesperson** must work under a broker as either an employee (W-2 income) or an independent contractor (1099 income).

BOARD OF REGISTRATION OF REAL ESTATE BROKERS AND SALESPERSONS 1000 Washington Street, Suite 710, Boston MA 02118 (617) 727-2373

Purpose of the law: To protect the public interest. The Legislature **enacts** the law (which is permanent unless otherwise stated); the Board or its agents **promulgates** and administers. The Board exists under the Division of Professional Licensure.

- ◆ Law effective January 1, 1960
- ◆ Five (5) member Board appointed by governor
- ◆ One of members appointed chairperson by governor
- ◆ Term of office of each member is 5 years, with one term expiring each year; members may be reappointed
- ◆ Three (3) members must be licensed brokers with at least seven (7) years experience each
- ◆ Two (2) members not licensed and represent the public
- ◆ All members serve without pay
- ◆ Board meets a minimum of four times a year wherever it chooses
- ◆ At least three (3) members must be present (quorum) to conduct a valid meeting at any place decided by Board
- ◆ All receipts and revenue collected by Board go to state treasury; Board expenses come from annual state budget
- ◆ Written record must be kept which is open to public inspection

QUALIFICATION FOR LICENSURE

Salesperson: 18 years of age or older; complete 40 classroom hour salesperson course at an approved school; pass the written state exam.

Broker: Be licensed as a salesperson and have been actively associated with a licensed broker or brokers for at least three years immediately prior (within last 5 years) to application for a minimum of 25 hours per week; complete 40 classroom hour course; pass state exam; be bonded.

A real estate candidate with a criminal conviction must request permission from the Board for licensing. Determination is case-by-case. An agent shall report to the Board within **thirty days** of his/her conviction of any crime including any misdemeanor or felony under state or federal laws.

1. Licenses are renewed every 2 years (biennially) on agent's birthday, except first license goes from date of passing the exam to licensee's third birthday. As of 1/1/1999, all agents must complete 12-hours Continuing Education (no exam) each renewal period to maintain an active license or reactivate one. If agent chooses to go in-active, they may still make referrals to agencies.
2. An agent who doesn't take CE or pay fee has an expired license and cannot work or receive commissions. License can be reinstated by taking CE and paying a fee.
3. A person may not hold a broker and a salesperson license at the same time.
4. The active experience as a salesperson begins when the Board is notified in writing of salesperson's association with a broker. Employing broker must furnish Board with names, addresses and license numbers of all licensees engaged by broker at commencement/termination of employment or association.
5. **Non-residents** may be licensed as agents if they file a written power of attorney with Chair of the Board to accept legal summons issued to the non-resident. A **resident** agent must maintain a legal address in the Commonwealth.
6. A licensed broker or salesperson shall display his/her license or copy conspicuously in his or her usual place of business or branch office.
7. **Reciprocity** means one state honoring the licensee of another state.
8. An entity (other than a sole proprietor) must hold a **broker** license in its organizational name, and a designated officer/partner authorized to act on its behalf must be broker of record (who may NOT operate independently without written permission of the entity). Upon death/disability/**severance** of sole designated broker, entity may continue to operate for 1 year if it diligently qualifies another.
9. **Death of sole proprietor:** Upon application by a legal representative, Board issues a temporary/non-renewable license to such person or someone designated by him/her and approved by the Board. Temporary license requires a fee and bond and is effective for not more than 1 year from **date of death**.
10. When two or more brokers occupy the same business offices, the Board must be informed of their non-financial contractual relationship.
11. A broker desiring to operate under a business or trade name must indicate proposed name to Board. A certified copy of doing-business-as (DBA) certificate on file in the city where such business is conducted must be sent to the Board.
12. A broker cannot offer property for sale or lease without permission of owner or on terms or conditions other than those authorized by owner. A "For Sale" sign may not be placed on property without written permission of owner.
13. A broker may not collect a commission from **both** buyer and seller without their prior knowledge and consent.
14. All compensation payable to salesperson must come from employing broker **only**. Anything given to salespeople by client must be accepted on behalf of broker.
15. No salesperson may work for more than one broker at the same time.
16. A broker may not hire an unlicensed **salesperson** (unlicensed clerical staff is fine).

17. An unlicensed person cannot recover a commission in court unless s/he was licensed at time realty services were rendered. A licensed salesperson may bring suit against an unlicensed broker, not client, for his/her portion of the fee.
18. Any legal action concerning unlicensed agents does NOT affect any contract between seller and buyer negotiated by unlicensed persons.
19. Whoever, without being licensed, acts as a broker or salesperson or advertises as such, shall be punished by a fine of not more than **\$500 by a court of law**.
20. A broker may not pay a "finder's fee" to someone who is not licensed.
21. No real estate agent shall advise against the use of the services of an attorney or provide legal advice/services (use preprinted forms only, do not change form and do not charge for filling it out).
22. **ALL** offers (and counteroffers), written or verbal, **must** be brought to the client (unless agent holds a power of attorney).
23. Real estate commissions are established by agreement of agency/client (multiple listing services (MLS) are private networks of agencies but do not set commissions).

LOSS OF LICENSE

The Board may **suspend, revoke** or **refuse** to renew for the following reasons:

1. A license which it has found to have been obtained by false or fraudulent representation, or licensee knowingly made any substantial misrepresentation.
2. Licensee acted in **dual** capacity of agent and undisclosed principal (either sale or rental) in same transaction. An agent shall not buy, sell, rent, mortgage, or acquire any interest in property, or represent a client in which the agent or agent's kin (by blood, marriage, or business associate) has a personal financial interest, unless the agent fully discloses in writing to all parties the nature of her interest and parties provide the agent with written acknowledgment of such disclosure.
3. Act for more than one party to a transaction without knowledge and consent of all.
4. Failure within a reasonable period of time to account for or remit any monies belonging to others, which have come into his or her possession as an agent.
5. Paid commissions or fees to or divided the same with any person who, being required to be licensed as an agent in this or any other state, is NOT so licensed.
6. Accepted, given or charged any undisclosed commission, rebate or profit on expenditures for a principal – it is a potential conflict of interest.
7. **Induced** any party to break a realty contract for the personal gain of licensee.
8. Commingling the money of the principal with the agent's funds.
9. Failed to give to *both* buyer and seller a copy of any real estate contract.
10. Accepted a **net** listing - agreement to sell/lease where client gets fixed amount and agent keeps **excess**. The commission amount is unspecified.
11. Proved to have violated Massachusetts Fair Housing Law (automatic suspension).

REAL ESTATE \$5,000 BROKER SURETY BOND

- ◆ Every broker (not salesperson), whether a live person or entity, whether active or inactive, is required to file with the Board a surety bond of \$5,000, for the benefit of any person harmed by the loss of funds held by broker.
- ◆ This bond is provided by a bonding company (the surety or obligor) for a small fee paid by broker (principal) to be made payable to the Commonwealth (obligee) and collected by the Board.
- ◆ The bond money **cannot** be used to defray legal expenses incurred in the action. This bond must remain current in order to maintain an active or inactive broker license.

LICENSE NOT NEEDED

The following persons do NOT need a real estate license to perform these functions:

- ◆ People doing real estate transactions for themselves (not helping others), including the sale of multiple developments or renting in large complexes (residential or commercial).
- ◆ Purely salaried employees of the property owner, such as apartment managers.
- ◆ Attorneys, auctioneers, appraisers, home inspectors, mortgage brokers, insurance agents and other licensed professionals practicing their profession in a real estate transaction.
- ◆ Public officers or employees performing official duties; trustees or someone acting under a court order, such as executors, administrators or guardians.
- ◆ Attorney-In-Fact: person acting under a written instrument called **power of attorney**; notarized and recorded; is not valid after death.

BOARD PROCEDURES

The Board (or its agents) has the power to conduct public hearings upon written complaint or on its own initiative with reason:

- ◆ At least 10 days written notice before hearing and a copy of complaint or charges must be sent to accused party.
- ◆ Records may be ordered by subpoena and witnesses summoned.
- ◆ Party has right to counsel and to cross examine witnesses but is not legally **entitled** to have an attorney provided by the Board.
- ◆ Meetings are held at a location of the Board's choosing.
- ◆ Unfavorable decisions may be appealed within 20 days to a superior court
- ◆ While under appeal, license must be forwarded to Board within 7 days of receipt of notice of suspension or revocation.

CONSUMER PROTECTION LAWS

MASS GENERAL LAWS CHAPTER 93A

- ◆ Originally enacted in 1967 to protect against unfair and deceptive business acts and practices; revised in 1969 to allow private right of action. Does not apply to consumer-to-consumer (buyer against seller) law suits. Provides for up to triple damages and attorney's fees.
- ◆ Intent to deceive not required. Liability for failing to disclose what is required or providing false or misleading information, including opinion. Puffing is gross exaggeration (not allowed).

LEAD PAINT

- ◆ Landlord - All property constructed prior to 1978 and occupied by a child under six years of age shall be delead. 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.
- ◆ Seller - 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. The buyer may waive 10 day lead paint inspection provision. Buyer has 90 days to delead if child under six resides there.

OTHER HAZARDS

- ◆ Known hazards (i.e. underground fuel tanks, asbestos, UFFI, chlordane, mold or radon) must be disclosed – presence does not prohibit sale. Radon and mold are natural; radon is radioactive and seeps in through cracks and water; mold grows in moisture; both get trapped by weather-tight homes.
- ◆ 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.

SEPTIC

- ◆ Title 5 requires septic system to pass within 2 years prior to sale (3 if pumped every year) or 6 months after. Seller and buyer decide who brings it into compliance. Lender may be unwilling to close without septic in compliance.

SMOKE AND CARBON MONOXIDE DETECTOR LAWS

- ◆ Realty sales require a smoke detector/carbon monoxide certificate signed by local fire chief. Location and functionality depend on when building is erected and substantially renovated. New construction requires detectors to be hard-wired with battery powered back-up (must be both ionized and photoelectric). One on every level, outside and inside bedrooms, bottom of stairs. Photoelectric only needed within 20 feet of kitchen/bathrooms. As of 3/31/06, all properties must have carbon monoxide alarms on every habitable level. Battery-operated and plug-ins are acceptable for buildings prior to 12/31/06.

ESCROW/TRUST ACCOUNTS

1. The only person legally entitled to hold a deposit is **seller**. Usually parties agree seller's broker will hold it in escrow until closing. Broker does not have to do this – it is an accommodation for client. Deposits must be immediately deposited. Broker shall be responsible for such money with proper accounting, but has no personal claim to it. The account may be interest or non-interest bearing. If interest bearing, parties agree who gets the interest.
2. 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. Every broker 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.
3. A salesperson shall immediately turn over all deposit money received to the employing broker. No salesperson shall at any time hold client funds.
4. A rejected or withdrawn offer and deposit must be returned to offeror.
5. The form of deposit (cash, check, note or anything of value) must be clearly shown on all offers and sales contracts.
6. Broker may not bring uncashed checks to closing. That means the checks have not cleared. Broker may not **commingle** escrow money with broker's own accounts.
7. Escrow funds held by broker as **escrowee** or **escrow agent** have absolutely nothing to do with broker's commission, although seller and buyer can give permission for some or all of the deposit to be converted at closing to commission money.
8. Both buyer and seller must agree when money is removed from escrow. A dispute requires a court order or settlement by the parties, not the discretion of the broker.

ADVERTISING

- ◆ Includes all written and verbal communication – internet/social media
- ◆ 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.
- ◆ **Blind Advertising Prohibited** - Broker ads must include name of broker. Salespeople are prohibited from advertising under their own name but ads may name a salesperson as the contact for the agency.
- ◆ **Discriminatory Advertising Prohibited** - No ad shall indicate directly or indirectly unlawful discrimination against a protected class.

ADDITIONAL POINTS

- ◆ 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.
- ◆ A seller's agent may only give a buyer the list of **all** licensed home inspectors and state consumer protection brochure. A buyer's agent with a written agency agreement with the buyer may recommend a particular home inspector.
- ◆ MASSHOUSING is a state agency that sells tax free bonds and securities to investors to raise funds in order to assist financing for first-time home buyers.

PROMOTIONAL SALES OF OUT OF STATE PROPERTY

- ◆ **Filing requirement:** No broker shall offer for sale in the Commonwealth an interest in real property which is located in a land development of another state unless the owner/developer registers such property with the Board and pays a fee. Such registration shall be renewed annually.
- ◆ **Inspections:** The Board may inspect such, the costs to be borne by the owner/developer. The Board shall issue a written report kept on file with the Board and maintained by the owner/developer during the time the development is registered for one year thereafter.
- ◆ **Advertising Notice of Registration:** Once the Board registers the development, the owner/developer must note the fact in all its subsequent advertisements in the Commonwealth.
- ◆ **Sales By Brokers:** It must be offered for sale and sold by a licensed Massachusetts broker. Such broker shall notify the Board in writing of such status within seven days of accepting the client.

TENANT FEES:

- ◆ Agents renting residential property must provide prospective tenant with a written notice at the **first meeting** which states **whether the tenant will pay any fee** for such service, the amount, the manner and time in which it is to be paid and whether any fee will be payable if a tenancy is not created. The tenant must agree to pay the fee. The notice must be signed by the agent, contain his/her license number, be signed by the tenant and contain the date such notice was given. When tenant declines to sign, the agent must note on the notice the tenant's name and refusal to sign.
- ◆ A copy of the notice shall be maintained by the broker for **three years** from the date on which the notice was provided to the tenant. Real estate brokers shall furnish the notice to the Board, its investigators or other agents upon request.
- ◆ Brokers 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. Brokers 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**.

AGENCY DISCLOSURE

1. An agent shall provide to a prospective purchaser or seller of real estate a notice developed and approved by the Board which clearly discloses the relationship of the agent with the prospective purchaser or seller. The notice shall be provided at the time of the **first personal meeting** for the purpose of discussing a **specific property**. All such records and notices are subject to inspection by the Board.
2. Where the broker has obtained the informed consent of both the purchaser and seller to represent them both, such broker must at that time, provide written notice to them of the **consensual dual representation**. A broker shall request a prospective purchaser or seller to sign and date such notice, provide the original to them and maintain a copy all notices with their records for **three years** from date on the notice.
3. If a prospective purchaser or seller **declines** to sign the notice, the broker shall indicate the date the notice was given to them, that the person declined to sign it, and the reason therefor, if any, given by the person.
4. No written notice to each prospective purchaser or seller who comes to an open house is required, but agents, by sign, poster, distributed listing literature or property description form must disclose the agency relationship more conspicuously than any other written terms.
5. Designated agencies must ensure agents do not communicate client confidential information deliberately or accidentally through direct discussions, overheard phone calls, faxes or emails.

TYPES OF AGENCY REPRESENTATION

SELLER'S AGENT: Broker and its subagents represent seller. They owe seller all fiduciary duties: obedience, undivided loyalty, full disclosure, confidentiality, full account and reasonable care.

BUYER'S AGENT: Broker and its subagents represent buyer. They owe buyer all fiduciary duties: obedience, undivided loyalty, full disclosure, confidentiality, full account and reasonable care.

DISCLOSED DUAL AGENT: A broker can work for both buyer and seller on the same property if broker obtains the informed consent of both parties. Broker is then considered a disclosed dual agent. This broker owes seller and buyer the duties of confidentiality and full account.

DESIGNATED AGENT: When a broker (the appointing or designating agent) designates agent in broker's office to represent either seller or buyer, such agent is the agent for that party with all the responsibilities of a seller or buyer agent. If that designating broker also designates another agent in the same office to represent the other party, this broker becomes a dual agent with all of the limitations stated above. Seller and buyer must consent to this arrangement. Allows an agency to represent both seller and buyer clients.

FACILITATOR (Deemed a nonagent): An agent providing seller and/or buyer limited services, but does not act as a full agent. Such agent must act honestly and accurately by disclosing known defects on the property, has a duty of full account but has no duty of confidentiality unless agreed to by the parties. Implied agency means facilitator is accepting more fiduciary duties than full account and confidentiality and may be treated legally as a full agent.

MASSACHUSETTS PRINCIPLES AND PRACTICES

THE LAW OF AGENCY

Real estate agents owe the following *fiduciary* duties to their respective *clients*.

Obedience - Agent cannot exceed the authority given by the principal and must follow all lawful instructions. Obeying a client's order is not an acceptable defense for unlawful or unethical behavior. The agency must be refused.

Loyalty (Undivided) - Agent must put client's interests ahead of all others, including the agent's interests.

Disclosure (Full) - Agent must disclose affirmatively all information concerning the transaction that might affect the principal's best interests.

Confidentiality - Agent cannot disclose confidential information of the principal to others. For example, the agent may not disclose the lowest/highest price his/her principal may accept/pay nor any weakness in the principal's bargaining position.

Account (Full) - Agent is required to promptly report all money received and paid out and, upon request, to render an accounting and return all money and property to the principal.

Reasonable Care - Agent is required to protect the principal from foreseeable risks of harm; exercise care and competence to ensure the transaction of business to the best advantage and to recommend expert advice or assistance when the principal's needs are outside the scope of the agent's expertise.

The law also requires agents to engage in *fair and honest dealing* with the buyer. Information falls into three categories: that which *must* be disclosed, that which must *not* be disclosed, and that which must be disclosed upon *direct* questioning only.

Agents must inform the buyer of any material defects of the property (both title and physical) and anything permanent (rooted in the land) in the surrounding area which affects the use and enjoyment of the property which the average buyer would want to know. No more *caveat emptor* (let the buyer beware). Seller's agent should obtain written information from seller about property to *avoid litigation*. The buyer must be given this information up front and until the closing. When a buyer purchases a house on an "as is" basis, all known *hidden* defects must still be disclosed to the buyer by seller. The law does NOT allow the buyer to ignore obvious problems. 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.

The third category is **stigmatized** property – murders, suicides, paranormal activity. 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.

THE LISTING

1. An agent cannot show property unless allowed by seller. No commission earned merely by presenting buyer to seller, must be a prior agreement to pay. In for-sale-by-owner (FSBO), buyer can make agent's commission at term of the offer.
2. Asking price is set by seller; selling price is determined by both seller and buyer through process of offer and acceptance.
3. Only the agency is being hired – the legal agent in the deal. Salespeople may **negotiate** the agency agreement and sign documents on behalf of agency with permission. If a salesperson leaves the office, he or she may *not* take clients to another agency without broker consent. An agency agreement may be terminated by: Agreement between principal and broker; death or incapacity of human **principal** or **broker** (not by severance, death or disability of **salesperson**); destruction of property, bankruptcy of principal, foreclosure, expiration of hiring, performance (closing), abandonment by agent, eminent domain.

THE OFFER (Offer to Purchase)

The offer: listing is a solicitation for offers to be made by potential buyers – seller need not accept any offer, even one at terms requested by seller. Potential buyer makes an offer in writing.

Typical terms include:

- ◆ Purchase price
- ◆ Earnest money deposit
- ◆ Time and nature of results for home inspection
- ◆ Closing date
- ◆ Mortgage contingency clause
- ◆ Expiration date for Offer

Buyer is offeror; seller is offeree.

Offers may be terminated as follows:

- ◆ Death of offeror or offeree (**Not by death of agent**)
- ◆ At end of express time limit of offer
- ◆ Destruction of object of offer
- ◆ Revocation or withdrawal of offer *before* acceptance or before a set period of time
- ◆ By offeree making counter offer
- ◆ Signed acceptance of offer by offeree creates a real estate contract (not intended to be P&S)

The seller agrees to offer by **signature**. Acceptance constitutes a real estate contract binding the parties to voluntarily perform according to the agreed conditions. If Offer is not intended to be the P&S, it must so state. It creates legally enforceable duties, usually intended to get the parties through the home inspection process. All terms and conditions set forth must be met by the parties. Depending on how Offer is worded and the outcome of the home inspection, either the parties separate with the deposit returned to offeror or they negotiate the P&S in good faith.

COMMISSIONS

Commission is an "expense" or "loss" or "debit" to the seller. The commission is usually based on a percentage of the selling price; it is determined by seller and broker - agreement of parties. The key to brokerage questions is to divide each sales price into two piles of money only, both by dollar amount and percentage: what the seller receives initially and what the broker receives initially.

The Formula:

$$\frac{\text{seller's \$ or broker's \$}}{\text{selling price}} \times \text{seller's \% or broker's \%}$$

The most common problem:

You are a broker. Seller says to you that he wishes to clear \$47,500 **after** paying you a 5% commission. What should the property sell for?

Our Solution:

\$47,500 (95%)	seller share	<u>\$47,500</u>
<u>5%</u>	broker share	? x .95
100% selling price		\$47,500/.95 = \$50,000 [A]

Seller wishes to net \$36,000 on sale of land after paying you a 10% fee. What should the property sell for?

\$36,000 (90%)	seller share	<u>\$36,000</u>
<u>10%</u>	broker share	? x .90
100% selling price		\$36,000/.90 = \$40,000 [A]

Seller nets \$21,500 on sale of her home. She had expenses of 6% commission plus an expense of \$318 and another expense of \$84. What did the property sell for?

\$21,500	seller share	<u>\$21,902</u>
318	broker share	? x .94
<u>84</u>		
\$21,902 = 94% + 6% = 100%		\$21,902/.94 = \$23,300 [A]

A commission arrangement is 7% of first \$50,000 plus 3% of any selling price over that amount. What was the selling price if total commission is \$4,475?

\$4,475	commission	\$50,000
<u>-3,500</u> (.07 x \$50,000)	<u>\$975</u>	<u>+32,500</u>
\$ 975 (.03 x ?)	(32,500) x .03	\$82,500 [A]

MASS RECORDING STAMPS: (documentary, excise, revenue, transfer, conveyance)

- ◆ An expense typically paid by grantor at the recording of the deed. Any inaccuracies on the stamps do not affect the validity of title transfer because the stamps are a function only of the recording procedure, a form of tax.
- ◆ The fee is \$4.56 per every \$1,000 of sales price (or \$2.28 per \$500 or increment thereof) (Barnstable County is \$6.12 per \$1,000 or \$3.06 per 500). Dukes/Nantucket also collect 2% for land trust. The selling price is rounded up to the next highest \$500 increment. If a loan is assumed, the loan is netted out of the purchase price. Example: purchase price is \$100,000, seller still owes \$80,000, buyer assumes repayment of loan and pays seller \$20,000, then stamps are calculated on \$20,000.
- ◆ **Example:** A property sold for \$110,200. What is the transfer fee?
- ◆ Step 1. \$110,200 becomes \$110,500
- ◆ Step 2. Divide \$110,500 by \$1,000 = 110.5 **or** by \$500 = 221
- ◆ Step 3. Multiply 110.5 x \$4.56 = \$503.88 **or** 221 x 2.28 = \$503.88

MUNICIPAL TAXES

- ◆ Property is assessed annually according to value (**ad valorem**).
- ◆ Tax rate is an expression of annual municipal budget divided by total assessed value (tax base) of the community.
- ◆ Individual property assessment multiplied by community tax rate = **annual property tax**. Fiscal year for property taxes is July 1 to June 30. Tax is due **November 1** and **May 1**. Municipality can collect tax quarterly: August 1, November 1, February 1 and May 1.
- ◆ A property owner who feels his/her property is unfairly assessed must first pay the property tax and then file for an **abatement** within the statutory time.
- ◆ **Special Assessments**
 - ◆ Additional taxes for property enhanced by expenditure of public funds (a **Betterment**), increasing abutting property value. Examples: sewers, water lines, curbing, sidewalks, street paving.
 - ◆ These special taxes are usually paid to the municipality over a number of years at a reasonable rate of interest.

Municipal Tax Sale

Tax is the priority lien against real estate. Property owner who doesn't pay tax may lose property by tax auction. Buyer by tax sale doesn't take absolute title because, unlike a mortgage foreclosure, old owner of property may redeem ownership typically within one year of sale by paying back taxes with interest.

TAX MODEL – Determining Annual Property Tax

Question 1 – THE TAX RATE

A town requires \$20,000 for its budget for the following fiscal year. The total assessment of the community is \$1,000,000. What will be the tax rate?

		\$20,000 annual budget
total assessment	x	tax rate?
\$1,000,000		

ANSWER: .02 per \$1

\$20,000 divided by \$1,000,000

\$2.00 per \$100

\$20.00 per \$1,000 of assessed value per annum (per mill/millage)

The tax rate is .02 per \$1 which means that each taxpayer must give the tax collector two cents for each one dollar of assessed value.

To express a tax rate on a per \$100 of assessed value, **multiply** the .02 by 100 for an answer of \$2 per \$100 and if you multiply .02 by 1,000 you have a rate of \$20 per \$1,000.

The reverse is true: a tax rate of \$20 per \$1,000 becomes expressed on a dollar basis by **dividing** \$20 by \$1,000 ("per" means divide) or .02 per \$1

Question 2 – The ASSESSED VALUE

What is the assessed value of a \$100,000 house if each taxable house in a town is assessed at 60% of its market value?

		? assessed value
market value	x	tax ratio
\$100,000		60%

ANSWER: \$60,000

\$100,000 x .60

Question 3 – THE TAX

What is the quarterly tax on a \$100,000 house which is assessed at 60% of its value in a town with a tax rate of .02 per \$1 of assessed value?

		? annual tax
assessed value	x	tax rate
\$60,000		.02 per \$1

\$60,000 X .02 = \$1,200 (annual) divided by 4 = quarterly tax

ANSWER: \$300

POLICE POWER

Zoning Ordinances - are a means of regulating and controlling land and its use even though the property is privately owned. Mass law 40A provides legal framework for local zoning law. Limits: certain residential/commercial uses; heights; minimum setbacks from street; minimum distance from property lines; minimum lot sizes (40B overrides this); limitation on type of business allowed, hours of operation, etc.

Setbacks - a distance from frontage, side lines and rear lot lines before foot of building (foundation) is allowed.

Variance - a formal legal process to permit doing something that an existing zoning ordinance forbids.

Nonconforming Use - a legal use that existed prior to the enactment of the ordinance.

Conditional Use Permit (Special Permit) - allows a special use if deemed desirable for the public good or convenience.

BUILDING (sanitation) CODES - define basic requirements for construction, performance and maintenance standards, not specific materials or designs. Limit on number of people allowed in rental based on square footage.

EASEMENTS: An irrevocable right or interest one party has in the land of another; a non-possessory interest in land of another; a burden on the estate of someone; ***a right running with the land***

Examples: Right of way for pipes, walking/riding. Ingress: to go in - Egress: to go out.

Easement Appurtenant

- ◆ Two ***adjoining*** lots.
- ◆ Owner of one lot has right of way across next lot.
- ◆ ***Dominant tenement*** is the party with right; receives benefit - an ***appurtenance***.
- ◆ ***Servient tenement*** is the party whose property is burdened - an ***encumbrance***.

Creation of Easements Appurtenant

- ◆ By deed - a voluntary giving of a right.
- ◆ By prescription - adjoining owner uses land of neighbor openly, continuously, adversely and without permission for statutory number of years (20 years).
- ◆ By necessity (implied grant) - court orders a right of way for land-locked land.

Easements In Gross

- ◆ Owner gives ***personal*** right in writing, to another who does not own adjoining lot. Example: use of property to access a lake for a certain number of years.

LICENSES

- ◆ Personal, revocable (at any time) and non-assignable ***permission*** to enter upon land of another for a particular purpose. Example: business invitee; ticket holders to theaters or sporting events.

ENCROACHMENTS

- ◆ Unauthorized intrusion on land of another discovered by **survey**.
- ◆ Inaction may result in encroaching neighbor claiming a legal right to continue use (adverse possession). Doctrine of laches: claim against encroachment made too late given circumstances.
- ◆ Examples: mis-aligned fence; patio extending over lot line; tree branches overhang boundary and roots encroach underground.

CONDOMINIUMS

- ◆ **Master Deed** is the enabling declaration recorded at registry of deeds, describes all of the real estate in full and the form of the condominium association.
- ◆ **Bylaws Of Association** are recorded Rules and Regulations of self-government (buyer entitled to see these before deciding to buy – enforceable in court).
- ◆ **Unit Deed** describes individual unit of each owner, recorded at time of each sale.
- ◆ Individual ownership of single units in a multi-unit development, with common ownership of areas such as roof, outside walls, parking, recreational areas, etc.
- ◆ Each unit owner has a proportionate ownership interest in common areas. The owner may sell, lease and mortgage, although other owners may have right of first refusal. High rise condos are sometimes called vertical subdivisions.
- ◆ Unit owners also pay a monthly fee for operating expenses and reserve funds for common areas. Failure of unit owner to pay fee gives association a super-priority lien (for up to 6 months of fees) ahead of other private lienholders, like lender. 6D closing certificate confirms fees are paid to date. Individual unit owners are taxed separately, common areas are not taxed. Failure of unit owner to pay lender results only in unit foreclosure only.
- ◆ Risks: insufficient capital reserves for major replacements, more investor-owned units than owner-occupied units, lack of professional management for larger complexes. An apartment property changed to a condominium is a *conversion*.

COOPERATIVES

- ◆ A corporation that acquires realty to provide the shareholders with housing. Each shareholder receives: A **stock certificate** as ownership in coop (personal property); a **proprietary lease** as right of possession of a particular unit. A monthly fee is assessed against each party as a proportionate share of any mortgage debt, operating expenses, municipal tax and reserve fund. Risks: entire property is lost to foreclosure/tax sale if co-op liabilities are unpaid due to some coop owners not paying their share; shares are either sold back to coop or coop approves new buyer.

TIMESHARING

- ◆ Vacation ownership and possession for specific week(s) in fee simple and undivided interest in common areas (condo laws apply). Owner may trade for another period of time and/or location. Known as **interval ownership, prepaid vacation, floating use period, fractionals**.

MASSACHUSETTS FAIR HOUSING LAWS

- ◆ Discrimination prohibited based on the following **protected** classes: age, sex, marital status, sexual orientation, veteran status, race/color, religious creed, public assistance status, ancestry, disability (mental or physical), genetic information, national origin, familial status (having children), gender identity.
- ◆ If the client asks agent to break the law, agent must refuse the agency.
- ◆ HIV/AIDS is considered a disability (for federal level too).
- ◆ No sexual harassment of tenants/buyers.

EXEMPTIONS (situations in which fair housing does not apply)

- ◆ A private individual who owns 3 or fewer single-family houses. Limited to one sale of income house every two-years.
- ◆ Rentals in **owner-occupied** two family houses.
- ◆ Sale, rental or occupancy to its own members of dwellings owned or operated by a **religious organization** for non-commercial purposes if membership in that religion is not based on exclusion of protected classes.
- ◆ Sale, rental or occupancy to its own members of lodgings owned or operated by a **private club** for non-commercial purposes. (If club owned a motel or convention facility, the club's commercial activities are under Fair Housing laws.)
- ◆ **No** exemptions allowed on basis of **race public assistance status**. No refusal for family in rentals because of lead paint. **No** exemptions allowed if a **real estate agent** is used in the transaction. **No** exemptions allowed if discriminatory **advertising** is used

ENFORCEMENT

- ◆ Complaint with the Massachusetts Commission Against Discrimination (MCAD) must be made within 300 days. MCAD decision against an agent results in an automatic suspension of license for **60** days. A second violation within two years results in a 90 day suspension.

Residential rental money – landlord is allowed to collect only the following at the beginning of the rental period:

- ◆ First month's rent and reasonable lock and key fee.
- ◆ Security deposit limited to **one month's** rent. Landlord's statement of condition required within 10 days of rental beginning. Landlord's itemized/notarized claim against deposit or its return must be made within 30 days of rental ending. Lesser of 5% interest or current bank rates on security deposit due each year to tenant within 30 days of annual tenancy anniversary.
- ◆ Last month's rent collected in advance. Interest earned due to tenant each year within 30 days of annual tenancy anniversary, but last month's rent does not have to be deposited, in which case 5% interest is owed.

CONTRACTS

(AND RELATIONSHIPS WITH BUYERS AND SELLERS)

CONTRACT ESSENTIALS

Contracts are **express written agreements** between two or more parties who agree to do or not to do some act. It must describe the basic elements of the agreement, but number of words or even whole sentences are not mandated). **Electronic**, pdf and fax signatures are binding.

- (A) There must be **offer** and **acceptance** (mutual assent) evidenced by signatures.
- (B) There must be **consideration**; something exchanged that the party receiving it deems **sufficient** but actual worth is not important; **valuable** consideration is money and **good** consideration is love and affection.
- (C) Object of contract must be **legal**.
- (D) Parties must have **legal capacity** (no party is under 18, mentally incompetent, or intoxicated, suffering from dementia, etc.); competency of parties (an inability to understand the agreement, not illiteracy, which is inability to read).
- (E) **Reality of Consent** - Freedom from the following:
 - Misrepresentation** - an innocent misstatement of fact without intent to deceive.
 - Fraud** - a deliberate misrepresentation of a material fact.
 - Undue Influence** - a mixture of fraud and force by taking unfair advantage of another because of the relationship of the parties.
 - Duress** – overt threat to a party, typically the threat of personal injury.

GENERAL TYPES AND CHARACTERISTICS

- Valid:** Contains all **essential** elements and by its terms is legally binding on all parties.
- Void:** Has forms and words of a contract but is not legally binding by its terms; for example a contract to commit an illegal act.
- Voidable:** **Valid** but contains a factual weakness exploitable by one of the parties. Lack of capacity, misrepresentation, fraud, or duress, etc. The party the law intends to protect may seek a court order to void the contract. It is not automatic.
- Unilateral:** One party promises to do something upon the completed act of another which is not promised absolutely to occur (i.e., agency contract, reward poster).
- Bilateral:** Two parties simultaneously and mutually exchange promises, as when seller promises to sell and buyer promises to buy - (P&S).

Executory: Signed agreement, but not yet closed, it is incomplete.

Executed: A contract that is closed, completed. When the deed is delivered at the passing, the provisions of the P&S merge into the deed. None of its provisions survive the delivered deed unless specifically noted in writing.

Assignment

of Contract: A party may transfer his/her rights/obligations to another party. Old party is *assignor* and new party is *assignee (or nominee/designee)*. Assignment does not relieve assignor of obligations if assignee does not perform. A substitution of parties. Contract can specifically disallow assignment by one or both parties. Parties can agree that assignee will be liable and assignor will be relieved of obligations.

Power of

Attorney: A written power of attorney creates an attorney-in-fact who has the authority to sign on behalf of one of the parties. A proxy/stand-in for a party. Electronic signatures will make this less necessary as the law expands the type of documents that can be signed electronically.

Amendment: After the signing of a contract, any changes are agreed by parties by signatures or **initials** of the changed conditions on the contract; additional contract conditions may be added by a signed **rider** or **amendment** to original contract.

BREACH OF CONTRACT

Breach or default by one of the parties gives the innocent (injured) party certain rights:

- (A) **Rescission** - both parties agree to terminate the contract.
- (B) **Specific Performance** - breaching party forced by court to fulfill promise.
- (C) **Damages** - aggrieved party seeks actual monetary damages incurred.
- (D) **Forfeiture** - breaching party gives up all or a portion of deposit according to terms of contract (a form of liquidated damages).
- (E) **Liquidated Damages** - a sum of money specified in the contract to be paid in event of breach of terms by one of the parties.

THE AGENCY CONTRACT (listing agreement for seller or landlord, representation agreement for buyer or tenant).

A personal services agreement (Statute of Frauds does not automatically require it to be in writing). Seller typically pays their agency. Buyer may agree to pay the agency directly, or seller's agency shares commission based upon negotiation between the two agencies (agencies may be in a multiple listing service (MLS) together). In rentals, payment varies between being made by landlord or tenant or both.

PRINCIPAL: Client, Seller/Vendor, Buyer/Vendee, Landlord, Tenant

SPECIAL AGENT: Broker, Property Manager – works directly for the client

SUBAGENT: Salesperson, Co-Broker – works indirectly for the client

THE AGENCY CONTRACT (seller or buyer)

October 1, 20- [Date here not necessary to contract]

In consideration of the services of Apollo Realty ("Broker") [a defined term to shorten drafting] to be rendered to the undersigned ("Client") and of the promise of Broker to make good faith efforts to obtain a purchaser/locate property [a unilateral contract], Client hereby lists with Broker the real estate and all improvements thereon ("Property")/agrees to work with Broker. Client grants to Broker the **exclusive right to sell/exclusive right to represent** [this type of agency gives the Broker the most protection.] the client from 12:00 p.m. on October 1, 20 - until 11:59 p.m. on January 1, 20 - ("Period of Time"). [The exact period of time agency exists.]

[For seller]: The price is \$100,000 or for such price and upon such other terms as Client may authorize during the Period of Time. [The parties leave open the possibility that the price will change over the Period of Time. Any change must be approved by Client.] [For buyer]: Broker shall locate and show property as described by Client.

[For seller]: It is understood by Client that the above sum or any other price authorized by Client shall *include* a cash fee of _% [making clear that this is not an illegal net listing.] payable by Client to Broker upon transfer of title to any purchaser of the Property during the Period of Time whether or not Broker was a procuring cause of any such sale. [The essential element of an exclusive right to sell listing.] [For buyer]: Client shall pay Broker a fee of _% of purchase price if listing agent or seller does not.

If Property is **sold** by any person to any purchaser [or Client if it's buyer agency] to whom the Property was shown by Broker or any representative of Broker, within 120 days [an arbitrary period of time] after the expiration of the Period of Time mentioned above, Client agrees to pay Broker the same fee as mentioned above. [The protection clause prevents broker from loss of earned commission if the principals try to out-wait the Period of Time.]

Broker is authorized by Client to place a "For Sale" sign on the Property during the Period of Time. [Specific written permission is required.]

Client agrees to make the Property available to Broker at all reasonable hours for the purpose of showing it to prospective purchasers. [Cooperation from Client is necessary for the Broker to fulfill its promise.]

Client agrees to convey Property to the purchaser by **Deed** with the usual covenants of title and free and clear of all encumbrances, tenancies, liens (for taxes and otherwise) but subject to applicable **restrictive covenants** of record. [Client is promising that property can be conveyed.]

Client acknowledges receipt of copy of this Agreement.

Client's signature [This binding agreement between Client and Broker establishes legal relationship and must include all conditions of hiring. This is NOT a real estate contract. It is a personal services contract and does not come under the Statute of Frauds. It comes under the LAW OF AGENCY.]

Broker's signature and Company name [The sales agent may sign and bind only with written permission of Broker.]

THE PURCHASE AND SALE AGREEMENT

This agreement made as of December 13, 20- among R.B. Buyer ("BUYER"), J.A. Seller ("SELLER") and Apollo Realty ("BROKER") provides that BUYER agrees to buy through BROKER as agent for SELLER and SELLER agrees to sell the real estate and all improvements thereon, located at 771 Main Street, Waltham, Massachusetts ("Property").

[Surveyor Property Description from deed or reference to deed recorded at Registry]

The purchase price is \$100,000 and shall be paid as follows: \$5,000 earnest money deposit; \$15,000 at closing and \$80,000 mortgage loan.

BUYER has made a deposit of \$5,000 with BROKER, receipt of which is acknowledged and such deposit shall be held by BROKER in **escrow** until date of settlement and then applied to purchase price. **[The reason why Broker is included as a party to this agreement. Broker is responsible for the safety of this money.]**

SELLER agrees to convey to BUYER by deed with the usual covenants of title and free and clear from all monetary encumbrances, tenancies, liens (for taxes or otherwise), except as may be otherwise noted, but subject to applicable covenants of record. SELLER agrees to deliver possession of Property on date of settlement. **[If Seller is unable to do so, Seller is in breach of this agreement.]**

Settlement **[closing]** shall be made at Middlesex South Registry of Deeds, Cambridge, Massachusetts on or before 10 a.m., February 1, 20-. Time is of the essence. **[The parties are expected to perform exactly on time as specified.]**

All taxes, interest, rent and impound escrow deposits, if any, shall be **prorated** as of date of settlement. **[Proration clause directs parties to apportion certain charges.]**

All risk of loss or damage to property by fire, windstorm, casualty or other cause is assumed by SELLER until date of settlement. **[Makes clear who bears the risk of loss.]**

BUYER and SELLER agree that BROKER was the **procuring cause** of this contract of purchase and SELLER agrees to pay BROKER % of purchase price (Buyer's broker also often stated to be paid at closing).

If either party defaults under this contract, such party shall be liable for the fee of BROKER **[liquidated damages]** and any expenses incurred by the non-defaulting party in connection with this transaction **[actual damages]**. If BUYER defaults under this contract, he/she shall forfeit the deposit **[forfeiture/liquidated damages]**.

SUBJECT TO: BUYER obtaining loan of \$80,000 at prevailing rates, such commitment from the lender to be obtained no later than 12 noon, January 2, 20-. **[Mortgage Contingency Clause: the contract of sale is conditional while Buyer uses good faith (bona fide) efforts to secure financing. Buyer is released from this agreement if turned down by lenders.]**

This agreement is subject to a home inspection satisfactory to BUYER. **[Deleted if inspection occurred with offer.]** The Property shall be left in broom clean condition.

This contract constitutes the entire agreement among the parties and inures **[becomes]** to the benefit of the heirs and **assigns** of the parties.

THE OPTION

A **written** contract by which an owner, in exchange for consideration gives another party the **right** to purchase (or lease) property within a certain time and other certain agreed conditions, but without imposing any obligation to lease or purchase.

- **Optionor** is owner who gives right. Enforceable against the estate if the optionor dies.
- **Optionee** is potential buyer or lessee who receives right. If optionee is a lessee, the clause is a *lease option*.
- **Consideration** (note, cash or property) is usually retained if option is not exercised.
- May be assigned without consent of optionor.
- A unilateral contract, lack of mutuality of obligation, a voluntary encumbrance on owner.
- **Advantage** in an option contract goes to **optionee**. Options buy time for developer to gain control of the parcels while gathering support such as financing.
- The purpose of the option for the owner is to keep open an offer to sell.
- Agent who is hired to bring a ready and able buyer but instead brings an optionee, does not earn a commission unless optionee becomes a buyer by exercising his/her option to buy, executes a sales agreement and completes the sale.
- A right of first refusal may benefit an owner more than an option by giving the owner the power to decide when and if to sell and ensuring any sale will yield fair market value.

TYPES OF AUTHORITY

EXPRESS

Directly stated

IMPLIED

Principal and agent act as if it exists

APPARENT

Situation gives appearance of authority to others

THREE TYPES OF EXPRESS AUTHORITY

Open Listing/Open Agency: Principal hires multiple brokers (working independently/competitively) to earn commission based on the terms specified in the listing agreement (verbal or written). No commission is earned if the seller procures a buyer unassisted or buyer finds property without agent help.

Exclusive Agency: Principal hires only one agency that can earn the commission by being the “efficient and procuring” cause of the sale and may share with other agencies and with agents within in it. The agency agreement is typically in writing and contains an expiration date of the hiring. No commission is earned if the seller procures a buyer unassisted or buyer finds property without agent help.

Exclusive Right to Sell/Exclusive Right to Represent: Exclusive agency earns the commission **even** if owner sells through another or sells unassisted or buyer finds property without agent help. **Must be in writing per Mass law.**

FINANCING

THE LOAN/MORTGAGE SEQUENCE

1. Buyer applies to lender - Savings Associations, Mutual Savings Banks, Cooperative Banks, Commercial Banks (the **Thriffts**); Mortgage Companies, Credit Unions, Life Insurance Companies; Sellers, Other Private Lenders
2. Lender requires: credit history (FICO score), income verification (non-discretionary payment obligations are factored into debt/income ratio, e.g., 28%/36%), record of cash for downpayment, property description/appraisal for **collateral** (security) for loan. Fair market value of property drives loan value (standard loan-to-value ratio in residential is 80% loan to 20% cash downpayment). Lender approves loan in **letter of commitment** to Buyer (borrower).
3. Lender gives **loan** to borrower. Borrower gives **Note** and **Mortgage** to lender (mortgagee) securing **Note**.
4. Borrower repays loan. Mortgagee returns Note and Mortgage to Borrower (mortgagor) with a Discharge of Debt instrument. Or borrower fails to pay off loan according to terms of Note, and lender has power to *foreclose*.

INSTRUMENTS OF FINANCING

The Note (also known as promissory or mortgage note)

1. The Note is the **primary** financing instrument (an I.O.U. (I owe you)), a personal obligation signed and dated by borrower (payor).
2. **Acceleration clause:** gives lender right to declare unpaid balance due in full because of default in payments: calling in Note; acceleration of maturity date. Penalty for late payment charged after 14 days.
3. **Prepayment penalty clause:** requires debtor to pay a penalty for paying all or part of debt substantially before maturity date (date of the last payment under the Note).

The Mortgage

1. A **lien** which can only exist as **security** for Note; it cannot exist by itself. Mortgagee (lender) has **conditional title**; mortgagor (borrower) redeems title by paying off loan or sells with lien in place (no mortgagee permission needed for sale).
2. **Defeasance clause:** renders mortgage null and void upon discharge of debt (lender records **Discharge** to give public notice of this event).
3. **Due-on-Sale (alienation/assumption) clause:** accelerates maturity date upon conveyance of property. Prevents mortgage take-over without lender's approval.
4. **Partial release:** lender releases part of collateral so builder may deliver clear title to buyer. Used in **blanket** mortgages.
5. **Power of sale:** clause empowering the mortgagee to sell the property because of failure of borrower to comply with terms of Note and Mortgage covenants.
6. **Mortgage covenants:** Borrower agrees to pay **Principal/Interest**; not to commit waste/remove improvements; pay property **Taxes**; keep property **Insurance**; upon default, Mortgagee can inspect/appraise, take possession (mortgagee in possession).

FEDERAL HOUSING ADMINISTRATION (FHA)

- ◆ Established in 1934 for any qualified buyer.
- ◆ FHA **insures** lender if borrower defaults and there is deficiency after foreclosure.
- ◆ Insures generally the riskiest part of the loan.
- ◆ FHA caps dollar amount it will insure based on location of property within U.S.
- ◆ Loan comes from approved lender, NOT from FHA.
- ◆ FHA approves lender, property and credit of borrower, but allows lender to underwrite under the Direct Endorsement Program.
- ◆ No prepayment penalty by lender is allowed.
- ◆ Loans are for 1-4 family owner occupied homes (FHA 203 (b) Program) (some condo/coops included).
- ◆ Property may be sold by take-over financing. No due-on-sale clause allowed.
- ◆ Rate of loan interest is set by market conditions, NOT by FHA.
- ◆ FHA **requires** downpayment by borrower.
- ◆ The Federal Housing Act of 1934 introduced the fully amortized loan and low downpayments.

DEPARTMENT OF VETERANS AFFAIRS (VA)

- ◆ Established in 1944 for veterans. May be used repeatedly.
- ◆ VA **guarantees** lender if borrower defaults and there is deficiency after foreclosure.
- ◆ Guaranty is on the riskiest part of the loan.
- ◆ VA caps dollar amount it will guaranty.
- ◆ Loan comes from approved lender, NOT from VA.
- ◆ VA approves lender, the property and the credit of borrower.
- ◆ No prepayment penalty by lender is allowed.
- ◆ Loans are 1-4 family owner occupied homes (some condo/coops included).
- ◆ A non-veteran may assume a veteran's mortgage debt, but veteran remains liable in event of a foreclosure deficiency, unless previously **released** by lender and VA.
- ◆ Certificate of Reasonable Value (CRV) is issued by appraiser. If CRV is **less** than purchase price, buyer may withdraw from sale or make up difference in cash. Seller may also reduce price. Second mortgages not allowed at closing.
- ◆ Rate of loan interest is set by market conditions.
- ◆ 100% financing allowed by VA. This is the highest loan-to-value ratio possible.
- ◆ VA requires a funding or guarantee fee from the veteran.

PRIVATE MORTGAGE INSURANCE (PMI)

A method of protecting lender in conventional (non-FHA/VA backed loans) loans over 80% of selling price. Example: Loan is for \$90,000 on \$100,000 sale. This is \$10,000 of debt exposure more than lender wishes. If the property is foreclosed and auctioned at \$75,000, the lender's loss of \$15,000 would be moderated by a \$10,000 typical PMI policy provided by a private company. Thus, the lender's loss would be \$5,000.

Buyer pays premiums usually monthly on this policy until there is a 20% spread between the debt and the value of the property. Sometimes referred to as **MGIC** financing. **NOTE:** Lender is insured, not the homeowner.

SECOND MORTGAGE

Buyer of \$100,000 property borrows \$80,000, needing \$20,000 at closing. Suppose buyer has only \$15,000. The \$5,000 must come from another source.

At the passing, buyer gives seller \$80,000 from lender (first mortgagee), \$15,000 in cash and \$5,000 from another lender. Borrower signs a Note for the first lender and gives the same lender a first mortgage lien on the property. Then borrower signs a second Note for the other lender, securing it with a second mortgage lien. This **second** mortgage is the junior lien.

In event of foreclosure, first mortgagee has claim on assets; next in priority is second mortgagee. Naturally, since risk is higher for second mortgagee, interest on that Note is usually higher and repayment period is usually shorter.

BALLOON MORTGAGE

A method of repaying a loan by making monthly payments of interest and some principal until maturity. On that last date the outstanding balance is due. This last payment is the "balloon." Payments of interest only with the principal due on the last payment is a **straight mortgage**.

PURCHASE MONEY MORTGAGE (PMM)

Seller finances part or all of the sale of own property by receiving from the buyer a Note and a Mortgage.

CONSTRUCTION FINANCING

Developer/builder arranges financing from lender who releases loan in installments as building phases are completed. When building is complete, loan is paid off (taken out) by a new long-term lender or transforms into an amortized loan with first lender. The short-term lender may charge a higher rate of interest than the permanent mortgagee.

PACKAGE MORTGAGE

A package mortgage includes not only the real estate interest but items of personal property such as furniture and appliances. Chattel mortgage is secured by personal property only.

Advantages: one loan instead of several; one lender/one payment; longer payback; lower rate of interest; immediate use of amenities.

Disadvantages: equipment loses value before payments end.

OPEN-END MORTGAGE

This mortgage loan allows the borrower to obtain additional funds on the original loan terms or other terms. The additional borrowing cannot exceed the original loan amount. For example, if the original loan was for \$80,000 and it had been repaid down to \$60,000, the open-end mortgage provision would allow the loaning of \$20,000. The loan amount would go back to the original loan of \$80,000 at the current rate of interest or the original rate of interest. ***Equity Loan/(Home) Equity Line of Credit***

REVERSE (ANNUITY) MORTGAGE (RAM)

A method of freeing equity in the home of a home owner 62 or older and borrowing against a primary residence. A non-recourse loan (Lender may only foreclose, not sue on note for deficiency). Amount up to a certain limit loaned by lender against the equity. Loan and interest is repaid in full upon buyer no longer living in collateral (death, sale of property, or moving to nursing home). Can be used to buy a primary residence.

SECONDARY MORTGAGE MARKET

Refers to organizations which buy notes and mortgages from primary lenders, bundles them with other paper and sells it as an investment to investors. After selling the loan, the primary lender may receive service fees for collecting monthly mortgage payments. Certificate of no defense or estoppel certificate is a verification instrument signed by the parties confirming the debt owed (mortgagor permission not needed to sell paper).

Major Secondary Mortgage Organizations: **Fannie Mae** - Private but government regulated and sponsored. Specializes in conventional, VA and FHA loans; **Ginnie Mae** - Government entity specializing in FHA low income housing; **Freddie Mac** - Private, specializes in conventional mortgages.

TAKE-OVER MORTGAGES

New buyer takes over the debt of the seller. Buyer pays the seller the equity - the difference between the selling price and the assumed debt. Buyer receives a new deed and the right to redeem the original note and mortgage instruments upon paying the remaining indebtedness to lender. Title changes; original mortgage remains. Methods of taking over seller's lien:

Subject to - original mortgagor is always responsible for debt and is liable in event of deficiency after a foreclosure auction. Favors new buyer.

Assumption of - original mortgagor and new owner are **both** responsible in event of deficiency after foreclosure. Favors original mortgagor.

Novation - a new note is written between original lender and new buyer, original owner is released from indebtedness and is not liable for debt.

SHORT SALE

Home owner cannot make loan payments but outstanding debt is more than fair market value of the property. Owner lists property (with or without an agent), signs a purchase and sale agreement with a ready, willing and able buyer. Lender agrees to accept less than what is owed and forgives the remainder of the debt. Avoids foreclosure.

FORECLOSURE

A public auction through court oversight (judicial) or in accordance with legal requirements (statutory). Mortgagor's equity of redemption extinguishes. Mortgage changes from being a **conditional** title to being a fee simple. Lender gives good title to the highest bidder (which may be the lender itself) by signing and delivering a new deed. If the auction brings in more than debt and expenses, mortgagor receives excess money. If the auction does not bring enough, the borrower is liable for the deficiency. If no one bids enough to satisfy lender, lender bids on property and takes ownership and possession – bank owned or REO (real estate owned by the lender). Lender then sells like any other real estate transaction.

DIRECT REDUCTION LOAN

An amortized loan in which the monthly payments do not vary, but the amounts applied to interest and principal do. Interest is recalculated every month. Final monthly payment results in discharge of debt.

For a loan of \$50,000 at 9% fixed annual rate of interest, what is this interest rate expressed in annualized dollars?

$$\frac{(\$4,500 = \text{answer})}{\$50,000 \quad X \quad .09}$$

With a loan repayment period is 25 years, the monthly payment of principal and interest \$419.60. After the first payment is made, what is the outstanding loan balance?

$$\frac{(\$4,500)}{\$50,000 \quad X \quad .09} \quad \$4,500 \div \text{by } 12 = \$375 \text{ first month interest}$$

First payment	\$419.60	\$50,000.00
Lender's interest	<u>- 375.00</u>	<u>- 44.60</u>
	44.60	\$49,955.40 [answer]

Using the data from the above problem, what is the outstanding amount owed to the lender after the second monthly payment has been made?

$$\frac{(\$4,495.99)}{\$49,955.40 \quad X \quad .09} \quad \$4,495.99 \div \text{by } 12 = \$374.67 \text{ 2nd month interest}$$

Second payment	\$419.60	\$49,955.40
Lender's Interest	<u>- 374.67</u>	<u>- 44.93</u>
	44.93	\$49,910.47 [answer]

POINTS

One point = one percent (.01) of the **loan** amount. A property sold for \$100,000 with a lender loaning \$80,000. The lender required the borrower to pay two points. How much were the points expressed in dollars? $\$80,000 \times .02 = \$1,600$

DISCOUNT POINT

If a loan is to be sold to an investor, the interest rate on the note may be lower than the investor requires. Upfront discount points charged to the borrower would make up the difference and make the loan saleable. A borrower may **buy down** the loan rate by paying additional points.

CONVEYANCE SEQUENCE – TRANSFER AT CLOSING – PASSING OF PAPERS

- ◆ Lender lends some portion of the purchase price to buyer (borrower). Buyer gives lender a note to evidence debt and a mortgage to secure it. Seller's broker brings the deposit to closing. The loan, deposit and the rest of the downpayment brought by buyer make up the purchase price. The seller (as grantor) delivers the executed deed to the buyer (as grantee).
- ◆ Closing attorney hired by lender: secures municipal lien certificate; searches title at registry; discharges all liens (obtains pay-off/offset statement from seller's lender); records new instruments; distributes funds. All documents and checks are held by them in escrow pending release of all documents and payments simultaneously a moment before recording the first of document.
- ◆ S/he updates the title search to ensure mortgagee receives first priority lien. If no problems are found, s/he closes and records. Discharge of old mortgage, the new deed and the new mortgage are the main documents recorded. Recording tells the public there has been a transfer of title, acceptance by the buyer and notice the lender is the first lien holder.
- ◆ After recording, the attorney gives the Note to the lender, the commission to the broker, who then pays any co-broker or buyer's broker (each broker will share part of the commission with his/her salesperson) and any equity is distributed to seller. The actual recorded instruments are left at the registry for duplication; some time later originals will be sent to the appropriate parties: deed to buyer, mortgage discharge to seller and mortgage to lender.

PRORATION MODELS

EXPENSES PREPAID = CREDIT TO SELLER

Example: A seller prepaid annual property tax of \$1,200 on January 1 for the entire year. Property is sold on July 15. How much must be returned to the seller as a credit?

Analysis: Count *time* owed the seller from the date of sale forward to the end of the period. For the exam, each month has 30 days and exam will say who gets the closing day (typically seller).

July 16 to July 30 = .5 months
Aug/Sep/Oct/Nov/Dec = 5 months
Total: 5.5 months prepaid
The monthly tax owed is \$100 ($\$1,200 \div 12$)
 $\$100 \times 5.5 = \550 credit to seller

If closing is on the 6th day of a month, ($6/30 = .20$ (20%)) is seller's responsibility, 80% is buyer's responsibility.

EXPENSES OWED IN ARREARS = DEBIT TO SELLER

Example: A seller property tax of \$1,200 per annum was in *arrears* on sale date of July 15. Tax year began January 1. How much must be charged to the seller as a debit?

July 15 back to Jan 1 = 6.5 months in arrears
The monthly tax owed is \$100 ($\$1,200 \div 12$)
Answer: $\$100 \times 6.5 = \650 debit to seller