

Real Estate Buyer Beware

What You Don't Ask May Come Back to Haunt You

By *TODD C. RATNER*

When purchasing property, most buyers consider such things as the neighborhood, school system and the fair market value of the property. However, how many consider whether or not a felonious act, such as murder or suicide has occurred on the property? How about if a registered sex offender's residence is in proximity to the property? What may be the legal implications of these facts, and whose duty is it to investigate or disclose this information?

The answer to these questions may be surprising.

Thirty states have disclosure statutes covering the sale and transfer of real property. Generally, real estate brokers are required to inform potential buyers of any material defects in the property for sale that a) the broker knows about; b) are not readily apparent to the buyer; and c) would affect the potential buyer's decision to purchase the property. These statutes are, for the most part, limited to material defects, such as leaking roofs, foundation problems, and intermittent basement flooding.

Non-material defects are sometimes called "psychological impacts" or "psychological impairments" and can include things such as a murder having taken place in the home, the presence of high crime in the neighborhood, barking dogs, a neighbor with a penchant for loud, midnight parties, or future plans to build a nearby power plant. Many states have passed statutes that define psychological impacts as non-material defects, effectively exempting sellers and brokers from having to disclose them.

Massachusetts does not follow the majority of states regarding disclosure statutes. In fact, in

Massachusetts there are no mandatory disclosure statutes at all. However, Massachusetts does offer protection to the buyer of real estate.

Massachusetts General Law Chapter 93A has been interpreted by the Attorney General as a means to protect buyers of real estate from a seller or broker's failure to disclose any fact that may influence a buyer's decision to enter into the transaction. So far, the statute has only been applied to the failure to disclose material defects. Because of M.G.L. 93A, Massachusetts realtors usually voluntarily provide seller disclosure statements to buyers. The content of these statements varies from realtor to realtor, but they generally deal exclusively with material defects that would not be readily apparent to the buyer.

Due to the interpretation of M.G.L. 93A, when a property undergoes a home inspection and potential buyers terminate the deal due to something revealed in their inspection, that fact must be disclosed to any potential future buyers. For example, if a home inspection reveals that the house requires a new roof, and the buyers decide not to purchase the property, it is required to go back on the market with a disclosure in the listing specifically stating that it needs a new roof. The most effective way to learn of any known physical defect is to ask the seller to complete a seller disclosure statement.

In Massachusetts, brokers and sellers of real estate are required by statute to inform potential

buyers of any psychological impairments attaching to the property only if the buyer asks. In fact, Massachusetts passed the Massachusetts Stigmatized Property Law in 1998, which applies to all commercial or residential real property. This statute protects sellers and brokers from damages against them for failing to disclose psychological impairments.

However, this statute also prohibits a seller or broker from making any misrepresentation or false statement regarding a psychological impairment. Therefore, if a



potential buyer asks whether a murder was ever committed in the house, and the broker happens to know that a previous owner was murdered there, the broker must answer the buyer's question honestly. But, absent a specific inquiry about the incident by the prospective buyer, there is no duty for the broker to either investigate or affirmatively disclose murders, suicides, allegations of ghosts or other potential stigmas. Similarly, and surprising to many, if a broker is aware that a registered sex offender lives next door to the property for sale, the broker is not required to disclose this fact unless the buyer asks.

Alternatively, Massachusetts joins thirty other states that have passed laws to ensure that the privacy rights of persons with HIV are respected. Therefore, a broker is not required to disclose this fact even if the buyer asks. The National Association of REALTORS® recommends that a buyer pursue this investigation on his or her own. HIV occupants are

a protected class of people, so any type of response by a broker as to the HIV status of any former or current occupant of a residential dwelling may be a violation of the federal fair housing laws.

Although a seller's broker has no duty to disclose a property's psychological impacts to a buyer, an exclusive buyer's agent does have such a duty. A broker who works exclusively for a buyer does have a duty to inform the buyer of everything the agent knows about the property, including psychological impacts and the seller's motivation for selling.

Massachusetts has increasingly clarified real estate disclosure requirements to better inform the seller as to what is required to be disclosed. However, only inquisitive and informed buyers can benefit from the state's disclosure requirements. Buyers should walk around the neighborhood where their prospective house is located at various times of the day, night and weekend. Buyers should talk to neighbors, drop in at the local police department, and check with the city or town about zoning and environmental matters, as well as any construction or development that may be in the works. Additionally, buyers should communicate any concerns that they may have about the property with the broker.

Real estate brokers can be an extremely valuable resource. Lackadaisical buyers risk being burdened with seriously defective houses.

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