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The Real Estate Seller's Obligation of Disclosure

By Andrew J. Wiegel

Most of the buildings in the Oakland- San Francisco area are of older construction and have a bit of "history." Often, they are less than perfect, or may need repair. The neighborhood may have an active street life. What must a seller disclose when the property is for sale?

Under general principles of law, the seller must disclose to a buyer any fact which would materially affect the value or desirability of the property which is not known to or readily observable by the buyer. In addition, California has enacted statutory disclosure obligations in the Civil Code¹. A Seller is required to fill out a Transferred Disclosure Statement, sometimes referred to as a TDS. But this form is not required in every transaction. Probate sales, non residential property and buildings with more than four units are exempt from the statute. There are also specific disclosure requirements for military training locations, industrial use zoning, window security bars and natural and environmental hazards.

In addition, many standard real estate purchase and sale contract forms allow a buyer to require that a seller provide a Supplement to the Transfer Disclosure Statement. This second form has been created within the real estate industry and is not legally required unless the parties agree in the purchase and sale contract.

The Transfer Disclosure Statement and Supplement to the Transfer Disclosure Statement contain specific questions which need to be answered, and further request that the seller provide additional information in response to questions resulting in disclosures. But the use of the forms does not always satisfy the seller's entire obligation to disclose.

Where the seller has knowledge of a fact materially affecting the value of the property which is not known to or observable by the buyer, and there is no question on the disclosure forms which appears to require that it be disclosed, the seller must never the less make the disclosure.

When a seller asks whether they have to disclose something about their property, the

¹ Civil Code Section 1102 et seq.

answer is almost always that they do. If the seller would prefer not to disclose a particular fact, it is probably because it would materially impact the value of the property. If you don't want to disclose it, that is a good indication that you must disclose it.

There is a difference between fact and opinion. While a seller has to disclose facts about the property, the seller does not have to share his or her opinion, or the opinion of others with regard to the significance of those facts. For example, in one case a seller knew that because his home was in a flood plane, it was a non conforming use which could not be expanded, or rebuilt if it burned down. He disclosed that it was in a flood plane and the buyer later sued when the consequences of that fact came to light. The court denied recovery holding that the disclosure of the fact was what was required, and the buyer, once he was advised of the fact, had the obligation to evaluate the consequences for himself.

In addition to disclosing facts about the building, the seller must also disclose facts about the neighborhood. For example, if there is a house across the street which is a source of drug traffic and neighborhood nuisance at night, that fact must be specifically disclosed by the seller.

If you are selling your property, we encourage you to make as thorough and complete a disclosure as possible. The real estate market in the Bay Area is strong enough to assure the sale of any property which is priced appropriately. But the consequences of being sued for non disclosure by a buyer who feels they have been defrauded are substantial. It is a risk well worth avoiding.

The information contained in this article is not intended to be exhaustive - instead it is provided to inform the real estate community of some important features of California law. The information in this article is general in nature; consult with an attorney for legal advice on any particular matter. © Copyright 2004, Wiegel & Fried, LLP.