



Women's Council *of*
REALTORS[®]

The Foghorn

San Francisco Chapter

Nov, 2006

Vol. 1 Issue 3

Legal Lines

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Transfer Disclosure Statements – Beware of Form Over Substance

Whether you are the listing agent or the selling agent, special attention must be given to the transfer disclosure statements which are required by California Statutes in the sale of all residential buildings of four units or less. The ubiquitous transfer disclosure statements (TDS) contain substantial risks for the unwary.

The listing agents should explain to the sellers the function and purpose of the TDS forms. The TDS forms were designed to ensure that information known to the sellers which may impact the value and desirability of the property would be made available to the buyer prior to contingency removal and close of escrow. Information known to the sellers, which would be relevant to a reasonably prudent buyer, which is not otherwise addressed in the TDS questionnaires, must nonetheless be disclosed to the buyer. The listing agent should emphasize to the sellers to err on the side of over-inclusiveness when disclosing information about the property.

If the property is co-owned, all owners must participate when filling out the TDS forms. The memory or knowledge of one owner may be superior to that of another owner. Moreover, the dialogue among owners that will naturally evolve when completing the task together may assist in jogging their respective memories about potentially relevant information.

Sellers need to understand that in a volatile real estate market, the TDS forms often become the *cause célèbre* for disgruntled buyers. As the market cools, the very same buyers who were prepared to waive virtually all contingencies, are the ones who now, riddled with buyers' remorse, seek a scapegoat. The TDS forms provide the buyers a stable platform from which to launch threats of litigation.

The TDS questions calling upon the sellers' legal knowledge are perhaps the most problematic. Questions regarding zoning, easements, code compliance, and "necessary" permits implicitly assume

that the sellers have a basic understanding of the laws affecting their property. When the responses offered on the TDS forms are limited to "Yes" or "No," the sellers will often check a box even when "I don't know" is their best, most accurate response.

Left on their own, the sellers often attempt to minimize the impact of their "yes" answers. For instance, a seller may check "yes" to the question "were any improvements done without necessary permits" and then proceed to elaborate that while the work was done without permits, the work was nevertheless done to code. Because the sellers are not code experts, in the absence of a written sign-off from the department of building inspection, the sellers should never affirmatively state that improvements were done to code.

Listing agents provide an invaluable service to their clients when they advise their clients to limit any affirmative representations to only those facts which they independently know to be true. If they have relied on third party information to supply the answer, then they do not have independent knowledge of the fact at issue. As a result, their representations are only as accurate as the information received from the third party.

Notably, the questions on the TDS forms regarding code compliance contain an inherent ambiguity. Is the question asking about compliance with contemporary codes or the codes then in effect when the improvements were performed? The seller should not hesitate to write "I don't know, I defer to the appropriate local agency." Similarly, when asked whether or not the seller pulled all "necessary permits," seller should refer the buyer to the permit history on file with the city and provide a list of all known work performed on the property. Furthermore, unless the city has confirmed that the unpermitted work was performed to code, the sellers should make no affirmative representations that the work was code-compliant.

The selling agent should remind the buyer that once an issue is raised by the sellers, the burden shifts to the buyer to fully investigate the matter. While the standard disclosure packets may be replete with warnings to the buyer to hire their own experts and conduct their own due diligence, the selling agent would be well served to expressly remind the buyer that the sellers are not experts, may not have exhaustive memories, may be harboring mistaken beliefs about code compliance and may be applying codes applicable back when the improvement occurred rather than contemporary codes.

Notably, a disgruntled buyer will often threaten everyone involved in the sale with legal action: the selling agent and broker, the property inspector, the listing agent and broker, and the sellers. Although the sellers may have the most intimate knowledge of the property, the listing agent and broker have fiduciary relationships with the buyer, the highest duty recognized in the law.

A selling agent who sits down with the buyer to review the TDS forms and affirmatively instructs the buyer to conduct his/her own legal investigations dramatically reduces the possibility of buyer's remorse and the associated risks of litigation. While boilerplate provisions in the disclosure forms that repeatedly warn the buyer to thoroughly conduct his/her own due diligence may stave off liability, the ultimate objective is to avoid costly litigation altogether.

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