Brokers Guide: Seller v. Listing Agent Disclosure Obligations

The Basics

- The purpose of this WorkSmart is to highlight differences between property condition disclosure obligations for sellers and listing agents.

- It will also discuss disclosure mechanics – Ex. Where does a listing agent disclose a material adverse fact?

- WorkSmart will also discuss seller disclosure requirements under the Residential Property Disclosure Act.

Key Definition

Material. Something is material if it could affect the decision of a reasonable purchaser.

Adverse fact. Contrast this with "defect." Consider the example of a residence having polybutylene pipes and fittings that haven't leaked yet. Their existence is probably (highly debated) an adverse fact (buyers will want to check it carefully, especially the fittings) but not a defect if everything is properly functioning now. In short, at least consider that "adverse fact" may be more broadly construed than "defect."

Pertaining to the physical condition of the property. The statute provides that "the term 'physical condition of the property' shall refer to the physical condition of the land and any improvements thereon, and shall not refer to: (i) matters outside the boundaries of the land or relating to adjacent or other properties in proximity thereto, (ii) matters relating to governmental land use regulations, and (iii) matters relating to highways or public streets" (section 54.1-2131B).

Actually known by the licensee. When do you actually know something? First, remember that only material issues are subject to the obligation to disclose. Remember that receipt of the entire inspection report probably imposes a duty to read it and determine what is and is not material. The report you receive may conflict with a prior report, and may be prepared by a "super-picky" inspector. With dueling inspectors, try to put the two together, which resolves a large majority of all conflicts. If the two still don't agree, a third opinion may be necessary.

Presentation Q&A

Q: My seller client told me that the roof is leaking in multiple places and the living room carpet is routinely soaked during rainstorms. Must the seller disclose this condition on the Residential Property Disclosure Statement?

A: The roof leaks and the resulting damage caused are "material adverse facts pertaining to the physical condition of the property which are actually known" by the listing agent. Therefore, the listing agent must disclose the condition to buyer agents or unrepresented buyers. However, the seller would have no legal disclosure obligation under the Residential Property Disclosure Act or on the Statement.

Q: For efficiency should the listing agent disclose material adverse facts pertaining to the physical condition of the property on the Residential Property Disclosure Statement?

A: A good practice is for the listing agent to disclose material adverse facts in writing on a separate document than the Residential Property Disclosure Statement to avoid confusion about who is making the disclosure. Again, the Residential Property Disclosure Statement is a seller disclosure/disclaimer vehicle and is separate from a listing agent's disclosure obligations.

Q: Does the seller really have any disclosure obligations? Isn't the Residential Property Disclosure Statement just a list of disclaimers?

A: The Residential Property Disclosure Statement does contain a long list of disclaimers. However, the Residential Property Disclosure Statement requires sellers to make disclosures to buyers in certain situations. Examples:

- Notice by a locality of a pending building code enforcement action or a zoning violation that has not been resolved.

- The presence of an unremediated methamphetamine lab.

- Disclosure pertaining to military air installations.

- Unremediated Defective Drywall.

It is critical that agents explain to their clients and unrepresented buyers they deal with of their obligations and rights under the Virginia Residential Property Disclosure Act. VAR Form SUM1 provides an excellent vehicle to accomplish this duty.