

10-1-2002

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### Recommended Citation

Hendricks, David P. (2002) "Silence Is Golden: The Case for Mandatory Disclosure of Coastal Hazards and Land-Use Restrictions by Residential Sellers in North Carolina," *North Carolina Central Law Review*: Vol. 25 : No. 1 , Article 5.  
Available at: <https://archives.law.nccu.edu/nclr/vol25/iss1/5>

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# **SILENCE IS GOLDEN: THE CASE FOR MANDATORY DISCLOSURE OF COASTAL HAZARDS AND LAND-USE RESTRICTIONS BY RESIDENTIAL SELLERS IN NORTH CAROLINA**

DAVID P. HENDRICKS, ESQ.

## I. INTRODUCTION

James and Winnie King lived in Illinois.<sup>1</sup> For many years, James toiled on a dairy farm and Winnie worked for the postal service so they could save enough money for retirement. In 1992, when they both reached the age of sixty-two, they had reached their goal. They retired and realized their dream of owning a retirement home at the beach. The Kings packed up their belongings and moved to Surf City, North Carolina. They enjoyed the serenity of the ocean for four years. Then, in 1996, Hurricane Fran relentlessly drove across the Atlantic Ocean and dealt the coast of North Carolina a devastating blow.

In the wake of the storm, the Kings' oceanfront house was more than half destroyed.<sup>2</sup> But more importantly, the beach had eroded significantly inland, effectively reducing the depth of their lot. The Kings applied for a construction permit under the Coastal Area Management Act (CAMA).<sup>3</sup> This permit was denied because, taking into account the setback from the street, the house would fall partially seaward of the setback line established by CAMA regulations.<sup>4</sup> For all practical purposes, the Kings would not be able to rebuild on this lot in the foreseeable future until the beach accreted sufficiently to build back the depth of the lot.

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1. Aaron Hoover, *Beach House Owners Make Appeal for Permit to Rebuild*, MORNING STAR (Wilmington, N.C.), Dec. 9, 1997, available in 1997 WL 16969633.

2. The percentage of the structure destroyed is significant because it is fundamental to determining the type of permit required if the property is located in the area regulated by the Coastal Area Management Act. Under N.C. ADMIN. CODE tit. 15A, r. 7J.0210 (February 2002), if the replacement cost of rebuilding exceeds 50 percent, then a CAMA permit must be obtained and all applicable restrictions of the Act must be met. Otherwise, only applicable local building permits would be required.

3. See generally, N.C. GEN. STAT. § 113A-118 - 19 (1999).

4. The setback line is established pursuant to N.C. ADMIN. CODE tit. 15A, r. 7H.0306 (February 2002), which establishes the line generally as 30 times the long-term annual erosion rate (measured in feet) landward of the first line of stable natural vegetation for structures of 5,000 square feet total floor area or less.

A year later, the beach rebuilt itself to an extent. However, the Kings were again denied a building permit because no stable vegetation had returned to the lot.<sup>5</sup> This vegetation line is the point from which the CAMA setback line is measured.<sup>6</sup> Without it, there is no reference point from which to measure the setback. The Kings were advised to plant sea oats and wait for a proper vegetation line to grow, then reapply. It was estimated that the vegetation line could take at least two years to establish itself,<sup>7</sup> or it may not return at all. In the meantime, the Kings, living on a fixed retirement income, have had their dreams buried in the sand.

Two years after Hurricane Fran destroyed the Kings' home, Hurricane Bonnie struck the North Carolina coast. In its wake, many areas of Topsail Beach were eroded and sand from the beaches and dunes was displaced. The oceanfront structures in these areas were left highly susceptible to further damage from the surf. As is typical after a hurricane, town officials bulldozed sand from the beaches at low tide and rebuilt the protective dunes.<sup>8</sup> The U.S. Fish and Wildlife Service promptly notified the town officials that they had not obtained the required permits before starting the bulldozing. At issue was the protection of sea turtle nests on the beaches. The U.S. Fish and Wildlife Service has issued a moratorium on bulldozing sand on beaches from May 1 to November 15, the nesting period for sea turtles. Before bulldozing, the beach must be inspected for viable sea turtle nesting sites.<sup>9</sup> If they are found, then bulldozing is not allowed.

A similar situation occurred the following year in Wrightsville Beach after Hurricane Floyd. There, nineteen property owners had sand bulldozed from their lots. However, without the requisite permits, each property owner faced fines of as much as \$2,500 per day.<sup>10</sup>

The Kings, like many coastal property owners, are aware that the ocean poses a unique set of hazards. However, it is arguable whether they were aware, or more importantly, advised before purchasing their coastal property, of the severe and devastating nature of these hazards.<sup>11</sup> In addition, few coastal property owners who have not al-

5. Hoover, *supra* note 1.

6. See *supra* note 4.

7. Hoover, *supra* note 1.

8. Brian Feagans & Victoria Cherrie, *Turtle Rules in Force; Need to Fix a Dune? First Get a Permit*, MORNING STAR (Wilmington, N.C.), September 3, 1998, available in 1998 WL 12700287.

9. These requirements arise from the Endangered Species Act, 16 U.S.C. § 1536 (2000).

10. Brian Feagans, *Sand Moved After Hurricane; Towns Cited for Turtle Nest Damage*, MORNING STAR (Wilmington, N.C.), October 22, 1999, available in 1999 WL 23237571.

11. For example, the Kings probably would have found it advantageous to know before purchasing their oceanfront property that barrier islands are the most dynamic land masses along the coast and have been steadily retreating landward for many years due to increasing sea levels. The typical beach erosion rate on the Atlantic coast is 2-3 feet per year. Steve Dunn, et

ready faced the situation are likely to be aware of the intense permitting maze awaiting them after suffering losses resulting from these hazards. This raises the question of whether the entities<sup>12</sup> involved in selling the property were under a duty to inform the buyer of the hazards and strict permitting requirements. If such a duty exists, then what is the extent of this duty? Finally, someone in the position of the Kings must decide if they have a viable cause of action against anyone who may have owed them this duty to disclose and failed to fulfill that duty.

In order to define any duty owed to buyers of coastal property, the information relevant to defining hazardous conditions and permitting requirements must first be determined. It is unreasonable to require disclosure of all zoning and restrictive ordinances that apply to the property due to the onerous burden this would place on the seller. What should be required are those permitting requirements, zoning restrictions, and hazards<sup>13</sup> that 1) are unique to coastal properties; 2) are not known to the typical buyer; and 3) could have a material impact on the buyer's decision to purchase the property. At a minimum, the following information meets this criteria: the existence of CAMA permits issued on the property; the location of coastal setback lines that cross or border the property; the local beach erosion rate for those properties bordering on the ocean; for properties bordering on the ocean, a concise, uniform statement of the North Carolina public trust doctrine,<sup>14</sup> the presence of beach erosion control structures<sup>15</sup> on

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al., *Coastal Erosion: Evaluating the Risk*, ENVIRONMENT, September 1, 2000, available in 2000 WL 18368272.

12. The entities involved in the sale of the coastal property are the owner and sales agents and may include lenders and attorneys.

13. Ocean hazard areas are defined in N.C. ADMIN. CODE tit. 15A, r. 7H.0301 (February 2002) as those areas in which "because of their special vulnerability to erosion or other adverse effects of sand, wind, and water, uncontrolled or incompatible development could unreasonably endanger life or property. Ocean hazard areas include beaches, frontal dunes, inlet lands, and other areas in which geologic, vegetative and soil conditions indicate a substantial possibility of excessive erosion or flood damage."

14. Beachfront property can be divided into three general areas: landward of the vegetation line, seaward of the mean high tide line (wet sand area), and the area in between these two (dry sand area). Beachfront owners have private rights to the area landward of the vegetation line. Under N.C. ADMIN. CODE tit. 15A, r. 7H.0207(c) (February 2002), the public has the right of access and enjoyment of the wet sand beach. The public trust doctrine states that private owners whose deeds show the property line extending to the mean high tide line took title to the dry sand area subject to public rights of use and access.

15. As stated in N.C. ADMIN. CODE tit. 15A, r. 7H.0308(a)(1)(A) (February 2002), permanent erosion control structures include, but are not limited to, bulkheads, seawalls, revetments, jetties, groins and breakwaters. Temporary erosion control structures are limited by N.C. ADMIN. CODE tit. 15A, r. 7H.0308(a)(2)(A) (February 2002) to sandbags placed above mean high water and parallel to the shore.

the property and any established dates for their removal,<sup>16</sup> and location of the property in the FEMA 100-year flood plain.

Part II of this paper examines the common law treatment of real property buyers in North Carolina, as well as regulatory protections under the Unfair and Deceptive Trade Practices Act and the Residential Property Disclosure Act. Part III provides an overview of the statutory disclosure laws in other states. Recommendations for change in the laws of North Carolina to provide the buyer more protection are presented in Part IV, and conclusions are presented in Part V.

## II. NORTH CAROLINA COMMON LAW AND STATUTORY LAW

North Carolina law provides the buyer of coastal property three possible means of legal recourse.<sup>17</sup> First, there is the common law doctrine of caveat emptor, which places the entire burden of determining suitability of the property on the buyer.<sup>18</sup> Absent fraud or breach of contract, the seller is under no obligation to disclose any information about the condition of the property or any other information that may be considered material in the buyer's decision. Because this doctrine is steadily being eroded in the North Carolina courts as it applies to residential sales, this paper will briefly introduce the doctrine, but will not discuss its applicability in detail.<sup>19</sup> Instead, the focus will be on the two statutory schemes, the Unfair and Deceptive Trade Practices Act and the Residential Property Disclosure Act. Under the Unfair and Deceptive Trade Practices Act, the buyer may have a cause of action if the seller or the seller's agent deliberately misleads the buyer with respect to a fact that is material to the transaction.<sup>20</sup> However, there are judicial restrictions limiting the application of this statute to residential home sales. North Carolina has established a disclosure mechanism for material facts surrounding the sale of residential property through the Residential Property Disclosure Act, but this disclosure is completely voluntary on the part of the seller.<sup>21</sup>

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16. N.C. ADMIN CODE tit. 15A, r. 7H.0308(a)(2)(A) (February 2002). Temporary erosion control structures in North Carolina must be removed at some set date.

17. This excludes purely federal statutory measures.

18. *Gibson v. Lambeth*, 357 S.E.2d 404, 406 (N.C. App 1987) (the purchaser buys property at his own risk).

19. See generally, PATRICK A. HETRICK & JAMES P. McLAUGHLIN, JR., *WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA*, § 9-14 (4th ed. 1994).

20. *Torrance v. AS&L Motors*, 459 S.E.2d 67, 70 (N.C. App. 1995) (quoting the trial court's findings that the "statements were material to the parties' transaction and could have misled the plaintiff.").

21. The seller of residential real property must provide a completed disclosure statement to the buyer in accordance with N.C. GEN. STAT. § 47E-4(a), but the seller is allowed under N.C. GEN. STAT. § 47E-4(a)(2) to state that he makes no disclosure of the characteristics and conditions of the property. Thus, the disclosure is voluntary on the part of the seller.

A. *Common Law Doctrine — Caveat Emptor*

The common law doctrine in North Carolina,<sup>22</sup> as well as the United States,<sup>23</sup> is *caveat emptor*, or let the buyer beware.<sup>24</sup> Although this doctrine developed originally from horse trading,<sup>25</sup> it developed into an old English rule based on the premise that the buyer usually knew the property well.<sup>26</sup> The doctrine was acknowledged by the United State Supreme Court in 1870.<sup>27</sup> North Carolina courts have applied this doctrine to real property sales since 1877.<sup>28</sup> Under this doctrine, the buyer is responsible for examining and determining the suitability of the property before purchase. Any latent defects that the buyer discovers after the sale are the responsibility of the buyer. The North Carolina courts have followed the general trend in this country of softening the strict application of *caveat emptor* when it would result in an injustice to one of the parties involved.<sup>29</sup>

As applied to coastal property, an undeveloped beachfront lot may carry an implied warranty of suitability for the intended purpose if a structure cannot be built on the lot that satisfies the restrictive covenants applicable to the lot.<sup>30</sup> For example, the restrictive covenant may be that the house must meet a minimum square footage requirement. Given setback lines from the street and neighboring lots, the CAMA setback from the vegetation line, and building height limitations, it may be impossible to build a structure that meets the restrictive covenant. Such a lot would carry an implied warranty of suitability for the intended purpose.

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22. "In residential as opposed to commercial fact situations, the courts still cling to a legal approach based unrealistically on *caveat emptor* under circumstances where public policy ought to be more protective of a vendee of residential property." *Id.*, § 9-14 at 291.

23. Thomas D. Larson, *To Disclose or Not to Disclose: The Dilemma of Homeowners and Real Estate Agents Under Wisconsin's "Megan's Law"*, 81 MARQ. L. REV. 1161, 1164 (1998).

24. BLACK'S LAW DICTIONARY 222 (6th ed. 1990).

25. Walter H. Hamilton, *The Ancient Maxim of Caveat Emptor*, 40 YALE L.J. 1133, 1164 (1931).

26. *See, e.g.,* Peek v. Gurney, L.R. . 6 H.L. 377 (1873).

27. Bernard v. Kellogg, 77 U.S. 383, 388 (1870).

28. Shields v. Allen, 77 N.C. 375 (1877).

29. *See, e.g.,* Hartley v. Ballou, 209 S.E.2d 776 (N.C. 1974) (establishing an implied warranty of workmanlike quality for recently completed dwellings to the initial vendee).

30. Hinson v. Jefferson, 215 S.E.2d 102 (N.C. 1975). (Property subject to restrictive covenants which subsequent to the sale of the property is found not to be suitable for the purposes stated in the restrictive covenants, and which was unknown to and not reasonably discoverable by the buyer, carries an implied warranty. Here, the plaintiff purchased an undeveloped lot in a subdivision with the intent to build a house on the lot. However, the lot would not support a septic system, and the county would not issue a building permit. Plaintiff sued for return of purchase price of the lot claiming an implied warranty of suitability for the purpose of building a house on the lot.)

### B. *Unfair and Deceptive Trade Practices Act*

North Carolina's Unfair and Deceptive Trade Practices Act ("the Act")<sup>31</sup> was intended to make unlawful deceptive acts or practices associated with any trade or commerce in the state.<sup>32</sup> The language of section 75-1.1(a) is nearly identical to the Federal Trade Commission Act<sup>33</sup> (FTCA) and is meant to parallel and supplement the FTCA.<sup>34</sup> Accordingly, the North Carolina courts have interpreted the purpose of the Act as providing a civil legal means to maintain ethical standards of dealings between persons in business and the consuming public.<sup>35</sup> This enables persons damaged by deceptive acts or practices to recover treble damages from the wrongdoer,<sup>36</sup> and provides a means of redress for damages because common law remedies have proven ineffective.<sup>37</sup>

The North Carolina statute adds additional language from that in the FTCA, stating that "[f]or purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession."<sup>38</sup> The North Carolina Court of Appeals interpreted this provision to mean that the Legislature emphasized openness and fairness in those activities (bargain, sale, barter, exchange, or traffic) that characterize a party as a seller.<sup>39</sup> In essence, Chapter 75 represents the preeminent consumer protection statute in North Carolina.<sup>40</sup>

Because the statute is directed at consumer protection, as well as considering the wording of section 75-1.1 focusing on "commerce," it is evident that the statute is directed towards controlling the unfair and deceptive practices of those who are regularly engaged in business activities of any kind.<sup>41</sup> Thus, in the context of real estate sales, the

31. N.C. Gen. Stat. § 75-1.1 *et seq.* (1998). [Note for Natedawg: rule 3.4(b) pg. 38 in Bluebook says not to use *et. Seq.* Rather, should cite consecutive sections.]

32. Hardy v. Toler, 211 S.E.2d 809, *modified on other grounds*, 218 S.E.2d 342 (N.C. App. 1975).

33. 15 U.S.C. § 45(a)(1) (1999).

34. Hageman v. Twin City Chrysler-Plymouth, Inc., 681 F. Supp. 303 (M.D.N.C. 1988).

35. State ex rel. Edmisten v. J.C. Penney Co., 227 S.E.2d 141 (N.C. 1976), *rev'd. on other grounds*, 233 S.E.2d 895 (1977).

36. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

37. See, e.g., Bhatti v. Buckland, 400 S.E.2d 440 (N.C. 1991); Pinehurst, Inc. v. O'Leary Bros. Realty, 338 S.E.2d 918, *cert. denied*, 342 S.E.2d 896 (N.C. App. 1986).

38. N.C. GEN. STAT. § 75-1.1(b) (1999).

39. Cameron v. New Hanover Mem. Hosp., Inc., 293 S.E.2d 901, *cert. denied and appeal dismissed*, 297 S.E.2d 399 (N.C. App. 1982).

40. See, e.g., Bunting v. Perdue, Inc., 611 F. Supp. 682 (E.D.N.C. 1985); Linder v. Durham Hosiery Mills, Inc., 761 F.2d 162 (4th Cir. 1985); American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc., 575 F. Supp. 816 (W.D.N.C. 1983).

41. Numerous decisions discuss the scope of Chapter 75 and consistently define it as applying to those engaged in business. The implication is that Chapter 75 does not apply to one who does not regularly engage in the business of the kind. See United Virginia Bank v. Air-Lift

statutes would apply to the real estate agent and his employer because they are regularly engaged in the business of selling real estate.<sup>42</sup> Although the definition of commerce has been broadly interpreted by the courts, it has not been interpreted to apply to every wrong that occurs in a business setting.<sup>43</sup>

*Rosenthal v. Perkins* illustrates the differing application of the Unfair and Deceptive Trade Practices Act to the parties involved in a real estate sale.<sup>44</sup> In *Rosenthal*, the seller, listing agent, and the agent's employer all knew the property being sold had flooding problems but concealed the information from the buyer.<sup>45</sup> The buyer brought suit against all three alleging, in part, violation of section 75-1.1. The court allowed the action to proceed against the agent and the employer because they were both regularly engaged in the business of selling real estate and acting as a real estate agent. The court stated that "clearly [the listing agent and the agent's employer were] engaged in 'trade or commerce' within the meaning of G.S. 75-1.1."<sup>46</sup> For the homeowners, however, a cause of action was not stated under this statute even though they actively concealed the flooding problem because "they did not by the sale of their residence on this one occasion become Realtors."<sup>47</sup> Although the property involved in the *Rosenthal* case was not located at the coast, it is directly applicable to a similar situation where a coastal property is known to have instances of flooding.

In a case dealing with coastal hazards, the North Carolina Court of Appeals reaffirmed the *Rosenthal* homeowner's exemption to the Unfair and Deceptive Trade Practices Act in *Blackwell v. Dorosko*.<sup>48</sup> In this case, the buyer of a beachfront condominium was concerned about possible beach erosion that threatened the structure. The buyer made an inquiry about the erosion rate, and the listing agent responded that he did not know of any history of beach erosion in that area.<sup>49</sup> The agent offered to obtain more specific information, but the buyer declined the offer.<sup>50</sup> Subsequent storms eroded the beach such

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Assoc., 339 S.E.2d 90 (N.C. App. 1986) (dealings between persons engaged in business and the consuming public; applies to dealings between buyers and sellers at all levels of commerce).

42. Hetrick & McLaughlin, *supra* note 19, § 9-14(c) at 293.

43. HAJMM Co. v. House of Raeford Farms, Inc., 403 S.E.2d 483 (N.C. 1991).

44. *Rosenthal v. Perkins*, 257 S.E.2d 63 (N.C. App. 1979) (sale of residence on this one occasion did not make the homeowner a Realtor). See also *Robertson v. Boyd*, 363 S.E.2d 672 (N.C. App. 1988); *Johnson v. Beverly-Hanks & Assocs.*, 388 S.E.2d 584 (N.C. App. 1990), *rev'd on other grounds*, 400 S.E.2d 38 (1991).

45. *Rosenthal*, 257 S.E.2d at 65.

46. *Id.* at 67.

47. *Id.* Of course, any other cause of action for which the requisite elements may be proved, such as breach of warranty or breach of contract, may proceed against the homeowner.

48. *Blackwell v. Dorosko*, 377 S.E.2d 814 (N.C. App. 1989).

49. *Id.* at 816.

50. *Id.* at 816.



that decks and balconies on the property were damaged, resulting in a special assessment issued against the condominium owners by the homeowners' association.<sup>51</sup> The buyer then sued the seller, listing agent, and the agent's employer for fraud, negligent misrepresentation, and unfair and deceptive trade practices. The trial court granted summary judgment for the seller on the unfair and deceptive trade practices claim, and specifically cited the homeowner's exemption established by *Rosenthal*, which the Court of Appeals upheld.<sup>52</sup> The plaintiff also argued the listing agent and the agent's employer were liable under the Act because they were regularly engaged in commerce. However, the court also upheld summary judgment on the unfair and deceptive trade practices claim against the listing agent and the agent's employer, but for different reasons. The court stated that the agent did not "attempt to deceive the Blackwells through misrepresentations."<sup>53</sup>

A significant aspect of the *Blackwell* case was that the court did not consider whether the condominium was the seller's personal residence, which was the apparent critical test in *Rosenthal*. The North Carolina Supreme Court addressed this issue in *Bhatti v. Buckland*, the first case in which the court examined the homeowner's exemption.<sup>54</sup> In this case, the owner of two lots in a tract of land advertised the property for sale at a public auction.<sup>55</sup> One of the lots contained a residential house, but it was not the owner's private residence.<sup>56</sup> The advertised description of one of the lots incorrectly listed the size and road frontage.<sup>57</sup> The trial court found for the plaintiff but denied the plaintiff's motion for treble damages.<sup>58</sup> The plaintiff appealed the denial of the motion and the appellate court affirmed.<sup>59</sup>

Here, the North Carolina Supreme Court reversed, and disapproved *Blackwell* because the lower court did not determine whether the property was the personal residence of the seller.<sup>60</sup> Unfortunately, the court failed to consider whether an individual selling his personal residence met the definition of "commerce" as it is used in the Act. Thus, the court assumed that the exemption existed, made findings from that basis, and withheld judgment on whether the appellate court's interpretation of "commerce" was correct.

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51. *Id.*

52. *Id.* at 818.

53. *Id.*

54. *Bhatti v. Buckland*, 400 S.E.2d 440 (N.C. 1991).

55. *Id.* at 441.

56. *Id.* at 444.

57. *Id.* at 441.

58. *Id.* at 442.

59. *Id.* at 443.

60. *Id.* at 444.

Significantly, the court in *Bhatti* did not define “residence.” The seller in *Bhatti* did not live in the house located on the property being sold.<sup>61</sup> Similarly, it is unclear whether a “residence” includes a large portion of coastal property that is not occupied full-time but is only used as an occasional vacation property. It is still unclear whether such a part-time residence would qualify for the homeowner’s exemption, or, in the alternative, the extent to which one would need to reside on the property to qualify for the exemption. Although *Bhatti* makes clear that an owner who does not reside on the property does not qualify for the homeowner’s exemption, the court has not addressed the issue of part-time residence.

The North Carolina Court of Appeals has continued to acknowledge the homeowner’s exemption, with *Davis v. Sellers*<sup>62</sup> and *Stolfo v. Kernodle*<sup>63</sup> being among the most recent decisions. *Davis* involved the sale of the private residence of the seller, but the seller (a real estate agent), was given a \$395 referral fee from the actual listing agent.<sup>64</sup> The court ruled that acceptance of this fee moved the seller out of the classification of one-time seller and into a role where she affected commerce.<sup>65</sup> Thus, the seller could not use the homeowner’s exemption and could be subject to a claim under the Act. *Stolfo* held that an owner of rental property does not fit into the homeowner’s exemption.<sup>66</sup>

For disclosure of coastal hazards, the Act has two practical applications as the bases for a cause of action. The first application is when the seller does not reside on the property. As seen in *Bhatti*, the critical question is not whether the property is being sold by a private individual, but rather whether the seller actually resides on the property being sold. The second application involves the real estate agent, and the agent’s employer, where applicable. The agent is likely to know about conditions affecting the area in general, as opposed to the seller who is more likely to have knowledge about the specific property, and can mislead the purchaser about the area’s conditions, including its propensity to flood, its beach erosion rate, and the presence of beach hardening structures such as sandbags.

In addition, if it can be shown that the real estate agent did all of the following, then a cause of action will lie not only against the agent

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61. *Id.* at 444. (The opinion also cited Judge Greene’s dissent at the appellate court level that “no record evidence supports a finding that defendant was a homeowner selling his own home.” *Id.* at 442.)

62. *Davis v. Sellers*, 443 S.E.2d 879 (N.C. App. 1994), cert. denied, 454 S.E.2d 248 (1995).

63. *Stolfo v. Kernodle*, 455 S.E.2d 869 (N.C. App. 1995).

64. *Davis*, 443 S.E.2d at 881.

65. *Id.* at 884.

66. *Stolfo*, 455 S.E.2d at 871.

but the agent's employer as well where: 1) the agent committed an unfair or deceptive act or practice; 2) the action in question was in or affecting commerce; and 3) the act proximately caused injury to the buyer.<sup>67</sup> The key considerations in this analysis is whether it can be shown that the buyer detrimentally relied upon a statement or misrepresentation made by the agent and whether the buyer suffered actual injury as a proximate result of the agent's deceptive statement or misrepresentation.<sup>68</sup> The agent's acts need not be deliberate or in bad faith,<sup>69</sup> nor must they actually deceive, so long as they had the capacity or tendency to mislead, or created the likelihood of deception.<sup>70</sup> For example, consider beach front property that has been hardened against erosion through the use of sandbags that are buried and not visible. Suppose also that the agent knows the sandbags are temporary and must be removed at some point in the future. A potential buyer then inquires about possible beach erosion. In response, the agent makes statements that lead the buyer to believe there is no significant erosion, but fails to mention the sandbags. Even though there was no intention on the part of the agent to mislead the buyer in that the failure to disclose the sandbags was not deliberate, the statements had the potential or tendency to mislead. The buyer is left with the impression that the beach erosion rate is naturally low, not that the erosion is being kept at bay by something artificial and temporary. This lack of disclosure of known facts could subject the agent to liability. This liability can then be transferred to the agent's employer.

### C. Residential Property Disclosure Act

The Residential Property Disclosure Act<sup>71</sup> provides a uniform mechanism for disclosure of material facts affecting the property by the seller to the buyer. While there does not appear to be any case law in North Carolina dealing with Chapter 47E of the North Carolina General Statutes, the apparent purpose of the statute is to equalize the level of knowledge between the buyer and seller so that the buyer can make an informed decision about what arguably is the most substantial purchase of his life. This theory is buttressed by the fact that the statute applies only to residential property with four or fewer dwelling units,<sup>72</sup> the presumption being that commercial purchasers have at their disposal greater resources for investigating the history

67. *Pleasant Valley Promenade v. Lechmere, Inc.*, 464 S.E.2d 47 (N.C. App. 1995).

68. *Forbes v. Par-Ten Group, Inc.*, 394 S.E.2d 643 (N.C. App. 1990), *cert. denied*, 402 S.E.2d 824 (1991).

69. *Edwards v. West*, 495 S.E.2d 920 (N.C. App. 1998).

70. *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530 (4th Cir. 1989).

71. N.C. GEN. STAT. §§ 47E-1 to -8 (1998).

72. § 47E-1.

and characteristics of the property. Additionally, the statute requires the disclosure form to “[d]isclose those items which are required to be disclosed relative to the characteristics and conditions of the property and of which the owner has actual knowledge.”<sup>73</sup>

The statute provides exemptions for property transfers that are outside the normal purchase mechanisms of private individual buyers. These exemptions include transfers by court order, by fiduciaries, between co-owners, to a spouse or another in the lineal line of consanguinity, and because of failure to pay taxes. The first sale of a dwelling never inhabited is also exempted.<sup>74</sup>

The North Carolina Real Estate Commission is given the responsibility of creating the actual form to be used for the disclosure and requiring its use by its members.<sup>75</sup> By statute, the following items represent the minimum requirements of the disclosure form.<sup>76</sup>

- Water supply and sanitary sewer system.
- Roof, chimney, floors, foundation, basement, and other structural components.
- Plumbing, electrical, heating, cooling, and other mechanical systems.
- Infestation of wood-destroying insects.
- Zoning laws, restrictive covenants, building codes, and other land-use restrictions affecting the real property.
- Encroachment of the real property to or from adjacent property.
- Notice from any governmental agency affecting this real property.
- Presence of environmental hazards.

It is interesting to note the interpretation made by the Real Estate Commission of the legislative intent behind the disclosure of those items concerning zoning laws, restrictive covenants, building codes, other land-use restrictions, encroachment, and notice from governmental agencies.<sup>77</sup> The form created by the Commission (see Appendix A) asks whether the seller knows of any “*violations* of building codes, zoning ordinances, restrictive covenants, or other land-use restrictions.”<sup>78</sup> This addition of the word “violations,” found nowhere in section 47E-4, completely changes the character of this particular dis-

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73. § 47E-4(a)(2).

74. § 47E-2.

75. § 47E-4(b).

76. § 47E-4(b)(1)-(6).

77. § 47E-4(b)(5).

78. State of North Carolina Residential Property Disclosure Statement. North Carolina Real Estate Commission, Form 4.22, rev. 7/00 [hereinafter N.C. Residential Property Disclosure Statement] (emphasis added).

closure. Knowledge of the presence, versus knowledge of violations, imparts a completely different level of knowledge to the buyer, one that is unnecessarily restrictive. The wording of the statute supports the view of a less restrictive disclosure: "The disclosure statement shall provide the owner with the option to indicate whether the owner has actual knowledge of the *specified characteristics or conditions*."<sup>79</sup>

The disclosure itself is not mandatory; the seller may indicate "no representation" as to the characteristics or condition.<sup>80</sup> If the seller chooses to make no disclosure, then he is under no duty to disclose any facts pertaining to the property, even if the seller has actual knowledge.<sup>81</sup> Indeed, the disclosure form itself states: "[i]f you check 'No Representation,' you have no duty to disclose the conditions or characteristics of the property, even if you should have known of them."<sup>82</sup> This reflects the North Carolina common law doctrine that the seller of real property is under no affirmative duty to disclose any information about the condition of the property.<sup>83</sup> Of course, any disclosure that is made must be complete and truthful.

Assuming that the owner of beachfront property in North Carolina decides to make a complete disclosure according to the Residential Property Disclosure Act, the Residential Property Disclosure Statement would give the potential buyer only limited indication of the hazards inherent to this type of property. Items 1-12 on the Disclosure Statement identify specific structural and mechanical components of the property, but disclosure is required only if the seller knows of "any problem (malfunction or defect)"<sup>84</sup> associated with them. Item 11 (drainage, grading, or soil stability of lot) could be used to provide the buyer with notice of coastal erosion, but it would be difficult to classify natural erosion as a "malfunction or defect." Item 18 indicates knowledge of notice from any governmental agency (among other things), but only insofar as they affect title to the property. Any notice or permit issued under CAMA would not affect title and would not require disclosure here. Finally, Item 20 (flood hazard or that the property is in a federally-designated flood plain) is arguably the only disclosure that would be helpful to the buyer of coastal property.

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79. § 47E-4(b) (emphasis added).

80. § 47E-4(b).

81. § 47E-4(c).

82. N.C. Residential Property Disclosure Statement, *supra* note 78.

83. *Hartley v. Ballou*, 209 S.E.2d 776 (N.C. 1974). However, if an agency relationship exists between the parties, an affirmative duty to disclose does exist. *Starling v. Sproles*, 311 S.E.2d 688, 690 (N.C. App. 1984).

84. N.C. Residential Property Disclosure Statement, *supra* note 78.

### III. DISCLOSURE STATUTES IN OTHER STATES

A number of states have adopted statutes that require some type of mandatory disclosure of material information to buyers of real property. One recent study found eleven states with affirmative disclosure laws.<sup>85</sup> This section will examine those states whose statutes require some type of disclosure to potential buyers of residential property and assess specifically whether they help the buyer of coastal property become better informed of the unique hazards in these areas.

#### A. California

California has the most comprehensive requirements of any state for disclosure of natural hazards to real estate. Disclosure is required for Federal Emergency Management Agency (FEMA) special flood hazard area<sup>86</sup> (100-year flood plain),<sup>87</sup> dam failure inundation zone,<sup>88</sup> very high fire hazard severity zone,<sup>89</sup> wildland fire hazard area,<sup>90</sup> earthquake fault zone,<sup>91</sup> and seismic hazard zone.<sup>92</sup> In all cases, the disclosure is mandatory and the duty is incumbent upon the seller and the seller's agent.

Two methods of disclosure are allowed. The first is the Natural Hazards Disclosure Statement.<sup>93</sup> This form consolidates all of the hazard disclosures into a single prominent form to make the disclosure more conspicuous to the buyer.<sup>94</sup> The second method is the Local Option Real Estate Transfer Disclosure Statement.<sup>95</sup> The local option statement allows any city or county government to formulate its own disclosure statement.<sup>96</sup> All of the disclosure requirements specified on the Natural Hazard Disclosure Statement must be included on the local option statement.<sup>97</sup>

Of these natural hazard disclosures, only the FEMA flood hazard area is relevant to coastal areas.<sup>98</sup> No specific provision is made for

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85. Robert Kwong, Comment, *Fraud and the Duty to Disclose Off-Site Land Conditions: Actual Knowledge vs. Seller Status*, 24 B.C. ENVTL. AFF. L. REV. 897, 898 (1997).

86. CAL. GOV'T. CODE § 8589.3 (West 1999).

87. Steven T. Naumchik, *Seller Beware: More Hazard Disclosure Requirements in the Sale of Real Property*, 30 McGEORGE L. REV. 713, 717 (1999).

88. CAL. GOV'T. CODE § 8589.5 (West 1999).

89. § 51183.5.

90. CAL. PUB. RES. CODE § 4125 (West 1999).

91. § 2621.9.

92. § 2694.

93. CAL. CIV. CODE § 1103.2 (West 1999).

94. Naumchik, *supra* note 87, at 716.

95. CAL. CIV. CODE § 1102.6a (West 1999).

96. § 1102.6a(a).

97. *Id.*

98. In California, wildland, earthquake, and seismic areas may well be located in coastal areas. However, this would not apply in North Carolina, which is the focus of this paper.

other hazards or characteristics specific to coastal areas. For example, permits issued in accordance with the state's Coastal Area Management Act regulations are not required to be disclosed. Thus, the buyer of property in coastal areas of California have little more protection than do those same buyers in North Carolina, despite the heavy emphasis on disclosure in California. Of course, the buyer can always specifically negotiate with the seller the disclosure of any characteristics the buyer deems to be material to his decision to purchase the property, regardless of the affirmative disclosure duties.

### B. *Florida*

In order to protect the stability of the coastal beaches and adjacent coastal barrier dunes,<sup>99</sup> Florida has directed each coastal county<sup>100</sup> to establish coastal construction control lines to define that portion of the beach that is "subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions."<sup>101</sup>

Because the stated goal of the statute is to protect the coastal beaches from "imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access,"<sup>102</sup> construction on these lands will necessarily be impeded. Thus, it is of importance to potential buyers of coastal property in Florida to be aware of these restrictions before making the decision to buy.<sup>103</sup> The Florida statutes provides that

at or prior to the closing of any transaction where an interest in real property located either partially or totally seaward of the coastal construction control line . . . is being transferred, the seller shall provide to the purchaser an affidavit, or a survey . . . delineating the location of the coastal construction control line on the property being transferred.<sup>104</sup>

Considering that the consequences of violating the permitting requirements of the statutes are quite severe, removal of the structure<sup>105</sup> and being charged with a first-degree misdemeanor,<sup>106</sup> the potential buyer certainly should be apprised of these restrictions.

99. FLA. STAT. ANN. § 161.053(1)(a) (West 2000).

100. Coastal counties are those with sand beaches fronting on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida (§ 161.053(1)(a)), as well as the coastal barrier island ends contiguous to the sand beaches (§ 161.053(1)(b)(1)).

101. § 161.053(1)(a).

102. *Id.*

103. § 161.57(1).

104. § 161.57(2).

105. § 161.053(7).

106. § 161.053(8).

### C. *Hawaii*

The seller of residential real property<sup>107</sup> in Hawaii is required to provide the purchaser with a disclosure statement that fully and accurately discloses all material facts relating to the property.<sup>108</sup> Material facts are defined as “any fact, defect, or condition, past or present, which materially affects the value of the residential real property being offered for sale.”<sup>109</sup> Further, these material facts must be (1) within the knowledge or control of the seller; (2) disclosed by recorded documents; or (3) readily observable.<sup>110</sup>

The Hawaii statute is broadly drafted in that it potentially applies to anything that materially affects the value of the property. As applied to coastal property, the scope of the statute could be interpreted as encompassing such conditions as the beach erosion rate, setbacks that restrict development of the property, and susceptibility to flooding. A recent case in Hawaii involving interpretation of this statute found that the disclosure requirements extend to notice of a recorded easement allowing the public access to the beach across property sold for development.<sup>111</sup> The court found that nondisclosure of the easement constituted a breach of the seller’s promise to convey marketable title.<sup>112</sup>

The coastal property buyer’s burden is somewhat ameliorated by Hawaii Revised Statutes section 508D-15 (2000). This statute defines two specific conditions applicable to coastal property as “material facts” that must be included in the residential property disclosure statement.<sup>113</sup> The first condition is location within a special flood hazard area as designated on Flood Insurance Administration maps used to determine eligibility for emergency flood insurance programs.<sup>114</sup> These areas would include most coastal areas, particularly beachfront

107. HAW. REV. STAT. ANN. section 508D-1 (Michie 2000) defines residential real property as “fee simple or leasehold real property on which currently is situated: (1) From one to four dwelling units; or (2) A residential condominium or cooperative apartment, the primary use of which is occupancy as a residence.”

108. *Id.*

109. *Id.* Amendment effective June 13, 2001 changes this to read “any fact, defect, or condition, past or present that would be expected to measurably affect the value to a reasonable person of the residential real property being offered for sale.”

110. *Id.* Amendment effective June 13, 2001 changes sections 2 and 3 to read “(2) can be observed from visible, accessible areas, or (3) required to be disclosed under 508D-15.”

111. *Create 21 Chou, Inc. v. Southwest Slopes, Inc.*, 918 P.2d 1168, 1170 (Haw. Ct. App. 1996).

112. *Id.*

113. Haw. Rev. Stat. Ann. § 508D-15(a) (Michie 2000). Two additional conditions are also included in this statute. They are located within the noise exposure areas of any public airport and within certain areas around military installations. Because these conditions are not necessarily found within coastal areas, they are not discussed here.

114. § 508D-15(a)(1).



property. The second condition is location within anticipated tsunami inundation areas,<sup>115</sup> which for obvious reasons applies specifically to coastal areas. Each county is required to maintain maps that designate these areas and provide copies to the public.<sup>116</sup>

Hawaii's Coastal Zone Management Program<sup>117</sup> also fosters communication of hazardous conditions affecting coastal property. Among the stated policies to be furthered through administration of the program are to communicate adequate information about storm wave, tsunami, flood, erosion, subsidence, and pollution hazards.<sup>118</sup>

#### D. Maryland

Maryland statutes require sellers of single-family residential real property<sup>119</sup> to provide the purchaser with a disclosure statement.<sup>120</sup> This disclosure statement, which must be on a form provided by the state Real Estate Commission,<sup>121</sup> must disclose the physical condition of the major components of the property, including the water and sewer system, water treatment system, sprinkler system, insulation, structural components, plumbing, electrical, heating, air conditioning, and infestation of wood-destroying insects.<sup>122</sup> Interestingly, the statute also requires disclosure of any "land-use matters"<sup>123</sup> and leaves interpretation of what disclosure is required up to the state Real Estate Commission.<sup>124</sup>

These land-use matters appear in the disclosure form<sup>125</sup> in two areas that are of interest to buyers of coastal property. The first is Item 15 of the disclosure form<sup>126</sup> which requires disclosure of any zoning violations, violations of building restrictions, or violations of setback requirements. Although each of these violations cover very broad categories of land-use restrictions, building restrictions could refer to height limitations and square footage limitations of coastal property, and setback requirements could apply to setbacks from the stable dune line on oceanfront property. Disclosure of whether the property

115. § 508D-15(a)(4).

116. § 508D-15(a).

117. § 205A -1 through 64.

118. § 205A-2(c)(6)(A).

119. Md. Code Ann., Real Prop. § 10-702(a)(1) (2000) limits applicability of this section to "single family residential real property improved by four or fewer single family units." This same limitation is found in other state disclosure statutes, including North Carolina.

120. §10-702(b).

121. § 10-702(b)(1)(i).

122. § 10-702(d)(2)(i)-(iv).

123. § 10-702(d)(2)(vi).

124. § 10-702(d)(1).

125. State of Maryland, Department of Labor, Licensing and Regulation, Real Estate Commission Form DLL/REC/P/#10-B/10-95/MMD/96-217.

126. *Id.*

is located in a flood zone, conservation area, wetland, or Chesapeake Bay critical area is required pursuant to Item 16 of the disclosure form.<sup>127</sup> Each of these areas can be found in a coastal area, and specific disclosure of it, while not specifying the exact ramifications for the buyer, at least serves to put the buyer on notice that further investigation is warranted.

The statute limits the seller's liability to those conditions of which the seller has actual knowledge.<sup>128</sup> The seller is also not liable for errors, inaccuracies, or omissions in information supplied by a state agency<sup>129</sup> or a licensed or recognized expert.<sup>130</sup> The real estate agent representing the vendor has the duty to inform the seller of his rights and obligations under the statute.<sup>131</sup> If the agent fulfills this requirement, then he has no further duties to the parties to the transaction<sup>132</sup> and is not liable to the parties for a violation under this section.<sup>133</sup>

### E. *New York*

New York statutes direct the Commissioner of Environmental Conservation to identify erosion hazard areas along the state's coastline.<sup>134</sup> Once a final determination is made of these areas, each owner of lands within the erosion hazard area must be notified by certified mail.<sup>135</sup> While there are no provisions that subsequent purchasers of the land must be notified, the Environmental Conservation Commission must maintain maps or descriptions of all erosion hazard areas in their regional offices and make them available for public inspection.<sup>136</sup>

### F. *Oregon*

Arguably the most comprehensive real estate disclosure form was developed by the state of Oregon.<sup>137</sup> This form covers nearly every aspect of the condition and use of the property, ranging from whether it is subject to a life estate to whether it has ever been used as an illegal drug-manufacturing site.<sup>138</sup> Within this expansive coverage of conditions affecting the property are several directly relevant to

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127. *Id.*

128. § 10-702(d)(2), (d)(3)(iv), (h)(1) and (h)(2).

129. § 10-702(h)(2)(ii).

130. § 10-702(h)(2)(iii).

131. § 10-702(l)(1).

132. § 10-702(l)(3)(i).

133. § 10-702(l)(3)(ii).

134. N.Y. Env'tl. Conserv. Law § 34-0114(1) (McKinney 2000).

135. § 34-0114(3).

136. § 34-0114(5).

137. Or. Rev. Stat. § 105.465 (2000).

138. § 105.465(2)(b). The entire form is contained in this paragraph of the statute. All subsequent references to the contents of the form were taken from this paragraph.

coastal property. Section 1.C of the form asks whether there have been any “recent boundary changes.” While this is presented in the context of boundary disputes with neighboring property owners, it could also apply to a situation where recent beach erosion has encroached upon the property such that the seaward boundary has moved inland. Section 8 of the disclosure form deals with flooding and water problems associated with the property. Item A inquires about standing water and Item C about material damage from flooding. Item C also asks whether there has been material damage from beach movement, which makes the Oregon disclosure form the only one found in the U.S. to directly address this issue. Issues regarding location within a flood plain, obviously relevant to coastal property, are addressed in Item D.

While all of these disclosures will place the potential buyer of coastal property in a much more informed position about the hazards associated with the property, even Oregon’s disclosure form falls short of notifying the buyer of restrictive land use statutes specific to coastal property. Although Section 1.F asks whether there is any “governmental study, survey, or notices that would affect the property,” no case law was found addressing whether this would apply to limitations such as coastal setbacks or prohibitions against beach hardening. The disclosure form ends with a catchall provision for “other conditions or defects,” but it is worded such that only “defects affecting this property” are required to be disclosed. Restrictive land use statutes can hardly be termed “defects” and as such would escape disclosure.

As extensive as the Oregon disclosure statement is, the state courts have put limitations on its reach. In a recent case before the Oregon Court of Appeals, the plaintiff claimed negligent misrepresentation because the voluntary disclosure statement did not reveal that improvements encroached on a public road right-of-way.<sup>139</sup> The plaintiff claimed that a special relationship existed between himself and the seller as a result of the disclosure statement.<sup>140</sup> The court ruled that a voluntary disclosure statement did not establish any special relationship not already present between the parties.<sup>141</sup>

The statute makes no provisions affixing liability on the seller for false disclosure of a known defect or condition, nor is any duty or liability fixed on the real estate agent. However, the disclosure form does require the seller to certify that it represents his actual knowledge at the time of disclosure. Thus, if it can be shown that the information provided on the disclosure statement falsely represented the

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139. *Cameron v. Harshbarger*, 998 P.2d 221 (Or. App. 1995).

140. *Id.*

141. *Cameron*, 998 P.2d at 222.

seller's actual knowledge, then the buyer could presumably pursue a tort action against the seller outside of this statute.

### G. Rhode Island

Rhode Island statutes impose an affirmative duty on the seller of residential property to disclose material facts concerning the characteristics and conditions of the property.<sup>142</sup> The duty is imposed only on the seller and not on the seller's agent.<sup>143</sup> Included in the required disclosure are the typical structural and mechanical systems,<sup>144</sup> but Rhode Island requires an additional disclosure as to wetlands. The statute requires the seller to disclose "[t]he location of coastal wetlands, bay, fresh water wetlands, pond, marsh, river bank or swamp . . . and the associated buffer areas [that] *may impact future property development*. The seller must disclose to the buyer any such determination on all or part of the land made by the department of environmental management."<sup>145</sup> As to zoning, the statute requires disclosure only of historic district status and that buyers of real estate are legally obligated to comply with local ordinances.<sup>146</sup>

The wetlands disclosure requirements not only notify that such designation may affect how the property may be developed in the future, but also inform the buyer if such a wetlands determination has been made by the state. This is the type of material information that is crucial to the ability of the buyer of coastal property to make an informed purchasing decision. The Rhode Island buyer is placed on adequate notice that his freedom to use his property, even for normal residential purposes, may be impaired. Rhode Island does not require, however, the disclosure to the buyer of potential unregistered coastal area permits that may also affect the use of the property.

### H. South Carolina

South Carolina has no statute generally requiring disclosure for real estate transfers. However, the Coastal Zone Management Act<sup>147</sup> provides that "a contract of sale or transfer of real property located in whole or in part seaward of the setback line or the jurisdictional line must contain a disclosure statement that the property is or may be affected by the setback line [and] baseline . . . and include the local erosion rate."<sup>148</sup>

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142. R.I. GEN. LAWS § 5-20.8-2 (1999).

143. § 5-20.8-2(a) states "the seller of real estate shall deliver a written disclosure to buyer."

144. § 5-20.8-2(b)(2)(iii)-(xix).

145. § 5-20.8-2(b)(2)(xxviii) (emphasis added).

146. § 5-20.8-2(b)(2)(xxiii).

147. S.C. CODE ANN. § 48-39-10 *et seq.* (1999).

148. § 48-39-330.

This statute, apparently unique to South Carolina, provides a substantial step forward for the rights of coastal property buyers. By providing information regarding both the setback lines and erosion rate, the buyer at least has the most basic data needed to assess the viability of the tract of land to support a dwelling for the foreseeable future. This type of information is crucial in a coastal area, particularly to buyers unfamiliar with the area and who proceed under the misguided paradigm that the dry land present today will always be there. Unfortunately, South Carolina does not require a uniform disclosure for all real property transfers that may disclose natural hazards (such as flooding), or other land-use permits affecting the property.

### I. *Texas*

The Texas Natural Resources Code specifies that sellers of certain Gulf Coast property<sup>149</sup> must include a notification in any executory contract for sale<sup>150</sup> of that property that the public has a right to access the beach fronting the Gulf of Mexico. The statute provides that the following language is mandatory in any such executory contract:

The real property described in this contract is located seaward of the Gulf Intracoastal Waterway to its southernmost point and then seaward of the longitudinal line also known as 97 degrees, 12', 19" which runs southerly to the international boundary from the intersection of the centerline of the Gulf Intracoastal Waterway and the Brownsville Ship Channel. If the property is in close proximity to a beach fronting the Gulf of Mexico, the purchaser is hereby advised that the public has acquired a right of use or easement to or over the area of any public beach by prescription, dedication, or presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.<sup>151</sup>

The statute goes further to recommend that the buyer determine the rate of shoreline erosion near the property<sup>152</sup> and seek the advice of a qualified person such as an attorney as to the applicability of these statutes to the property in question. The purchaser is also advised to seek an opinion as to the effect of these statutes on the value of the property.<sup>153</sup>

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149. TEX. NAT. RES. CODE ANN. § 61.025(a) (West 2000) describes this area as "real property located seaward of the Gulf Intracoastal Waterway to its southernmost point and then seaward of the longitudinal line also known as 97 degrees, 12', 19" which runs southerly to the international boundary from the intersection of the centerline of the Gulf Intracoastal Waterway and the Brownsville Ship Channel."

150. § 61.025(a) (West 2000) limits the scope of applicability to "a person who sells or conveys an interest, other than a mineral, leasehold, or security interest."

151. § 61.025(a).

152. § 61.025(a)(1).

153. § 61.025(a)(2).

If the seller fails to provide the above language in the contract for conveyance, the buyer has grounds to terminate the contract.<sup>154</sup> If there is no such contract, the seller is still under an obligation to deliver the statement to the buyer and obtain acknowledgment of receipt from the buyer prior to closing.<sup>155</sup> The seller's failure to comply with these statutes is considered a deceptive act<sup>156</sup> and does not impair the public's right of access that has been acquired through statute or under common law.<sup>157</sup>

### J. Virginia

The Virginia Residential Property Disclosure Act<sup>158</sup> is essentially identical to North Carolina's disclosure statute. Like North Carolina, the seller may choose to make no disclosure.<sup>159</sup> However, Virginia uses a different mechanism to notify the buyer that the seller makes no disclosure. The Virginia Real Estate Board devised two forms to carry out the dictates of the Residential Property Disclosure Act. The first is a list of characteristics and conditions concerning the property, these being the expected list of structural and mechanical components, for which the seller checks either "yes," "no," "unknown," or "does not apply."<sup>160</sup> The second form is a disclaimer statement and is used when the seller makes no representations or warranties about the condition of the property and notifies the buyer that he is purchasing the property "as is."<sup>161</sup>

Like that of North Carolina, the Virginia statute calls for the disclosure statement to divulge "land-use matters."<sup>162</sup> The Virginia Real Estate Board interpreted land-use matters to be "any zoning violations, nonconforming uses, violations of building restrictions or setback requirements, or any recorded or unrecorded easements."<sup>163</sup> Virginia took the same approach as North Carolina in that only disclosure of violations of these "land-use matters," other than unrecorded easements, is required. For coastal property, this limited disclosure does not inform the buyer of the potential natural hazards associated

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154. § 61.025(c).

155. § 61.025(b).

156. § 61.025(d).

157. § 61.025(e).

158. VA. CODE ANN. § 55-519 (Michie 1999).

159. § 55-519(A)(1).

160. Official Homepage of the Commonwealth of Virginia, Department of Professional and Occupational Regulation, Board for Real Estate, Virginia Residential Property Disclosure Statement (last modified October 10, 2000) <[http://www.state.va.us/dpor/reb\\_consumer.htm](http://www.state.va.us/dpor/reb_consumer.htm)>.

161. *Id.*

162. § 55-519A.1(vi). The North Carolina equivalent is somewhat more expansive, requiring disclosure of "the zoning laws, restrictive covenants, building codes and other land-use restrictions affecting the real property." (N.C. GEN. STAT. § 47E-4(b)(5) (1999)).

163. N.C. Residential Property Disclosure Statement, *supra* note 78, item number 16.

with coastal areas, nor does the buyer obtain any notice that there may be restrictive land-use permits issued against the property.

#### K. *Wisconsin*

Wisconsin's disclosure form<sup>164</sup> is very similar to that used in North Carolina, requiring disclosure of the typical characteristics and conditions relevant to residential property such as defects in the roof, electrical system, plumbing, heating and air conditioning system, water and sewer systems, and mechanical equipment. However, Item 11 on Wisconsin's disclosure form states: "I am aware that the property is located in a floodplain, wetland *or shoreland zoning area*."<sup>165</sup>

While this specific disclosure of the location of the property in a shoreland zoning area does not state the existence of actual land-use permits affecting the property, it does give sufficient notice to the buyer that there may be unusual conditions relating to this property. The words "zoning area" should be sufficient to notify even the most unsavvy buyer that additional investigation is warranted before purchasing the property.

### IV. SUGGESTED REMEDIES FOR NORTH CAROLINA

The intent of any changes to the laws of North Carolina should be to explicitly define what constitutes material facts to the buyer of residential property in general, including coastal property in particular, and then require the buyer be fully informed of these facts. Any amount of new legislation could be dreamed about on these pages; however, practical realities must be taken into consideration. It is far easier to affect small changes or amendments to existing laws than to build the legislative consensus needed to pass a new bill. Four such changes are discussed below, along with a recommendation for additional outreach efforts.

#### A. *The Unfair and Deceptive Trade Practices Act*

The common law exclusion for residential sellers from the Act removes the primary legal means for buyers to recover damages resulting from nondisclosure of material facts. While the buyer may bring an action for fraud, this is a higher legal hurdle for the buyer.<sup>166</sup>

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164. The disclosure form is found at WIS. STAT. ANN. § 709.03 (West 1999). The disclosure requirement itself is found at § 709.02.

165. *Id.* (emphasis added).

166. *Hardy v. Toler*, 218 S.E.2d 342 (N.C. 1975) (proof of fraud necessarily constitutes a violation of Chapter 75, but an unfair and deceptive trade practice does not necessarily amount to fraud). "Fraud on the part of the vendor or the vendor's agent becomes very difficult to prove in North Carolina . . . . Proving unfair or deceptive trade practices is often the residential ven-

The plaintiff in a suit for fraud must prove intent on the part of the defendant.<sup>167</sup> In an action under the Act, the plaintiff need not show that he was even deceived, so long as the defendant's statements had the capacity to deceive.<sup>168</sup> Thus, the plaintiff's burden to carry his case is much lighter under the Act, as opposed to an action for fraud. However, the state courts have made it clear that they consider the Act to apply to only those practicing a "trade;" that is, one who is regularly engaged in the practice of a business.<sup>169</sup>

Considering that this statute is the predominant consumer protection legislation in the state,<sup>170</sup> the legislature should expand it to allow suits against private residential sellers. In order to accomplish this, the definition of commerce<sup>171</sup> in the Act would have to be modified to specifically include private residential sellers. One possible modification of section 75-1.1(b) that would include private residential sellers is as follows (new language shown in italics):

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

(1) *An individual selling real property, whether improved or unimproved, for which that individual is listed as an owner of the property on the deed of record, constitutes commerce for the purpose of this section.*

(2) *The sale of personal chattel by an individual does not constitute commerce.*

The modification applies to developed and undeveloped real property to reverse the holding in *Bhatti*. The provision concerning personal chattel is meant to make it clear that the modification is to apply only to the private sale of real property and is not to be extended to items such as automobiles, trucks, boats, or other personal property.

Expanding the reach of the Act can be limited to the characteristics and conditions of which the seller has actual knowledge. There would be no need to so extend the duty of the seller to the point where he feels obligated to hire experts in the field of zoning, permitting, hazardous waste disposal, and geology just to make sure he will not be

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dee's most realistic theory of recovery in terms of probable success." Hetrick & McLaughlin, *supra* note 19, § 9-14 at 291.

167. CHARLES E. DAYE & MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS, §27.30, p. 487 (1991).

168. See, e.g., *Bailey v. LeBeau*, 339 S.E.2d 460 (N.C. App. 1986), *modified and aff'd* 348 S.E.2d 524; *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530 (4th Cir 1989).

169. Rosenthal, 257 S.E.2d at 67.

170. Daye & Morris, *supra* at note 168, § 27.60, at 496. "Indeed, this consumer legislation is the most viable choice for a vendee who has been damaged in some way by a vendor or vendor's agent in a real estate transaction." Hetrick & McLaughlin, *supra* note 19, § 9-14(c) at 293.

171. N.C. GEN. STAT. § 75-1.1(b) (2000) defines commerce as "all business activities, however denominated."



sued after selling his house. That is not the intent of this recommendation. Rather, that information that the seller possesses should be disclosed so that the buyer can make an adequately informed decision.

This disclosure should be managed through state legislation (see below under the Residential Property Disclosure Act). Simply calling for the disclosure would open up each and every residential seller to suits based on misleading forms of disclosure. Only through an organized, uniform means of disclosure could the seller be guaranteed any sense of closure concerning future lawsuits connected to his disclosure. Inevitably, however, this proposal will give rise to increased litigation. To counter this potential flood of lawsuits to recover "damages," any amendments to the Act should raise the bar for establishing a prima facie case against a private seller in residential property sales. For example, a showing of intent to deceive could be included for suits involving residential property. The evidentiary standard for proving this intent could be set at a preponderance level in order to keep it below that of a showing of fraud (which requires clear and convincing proof). This should help deter frivolous lawsuits by those who had notice of hazardous conditions but failed to perform due diligence before purchasing. Although American courts are typically loath to do so, a mandatory award of attorney's fees to the prevailing party<sup>172</sup> would also help curb the less meritorious claims.

### B. *The Residential Property Disclosure Act*

Combined with the reforms of the Act discussed above, a few changes to the Residential Property Disclosure Act would be a simple means to give buyers adequate notice of the most significant characteristics and conditions concerning residential property that should be considered before purchase. First, the disclosure should be mandatory. The option for the seller to indicate "no representation" should be eliminated. The seller would then be forced to make an affirmative disclosure of knowledge one way or the other. Failure to do so, such as indicating that there is no problem with flooding on the property when in fact it floods any time there is a heavy rainfall, would open the seller to litigation under the Act.

Second, the Disclosure Statement should be revised to include a broad range of property characteristics. The California statutes serve

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172. The court in its discretion may award attorney's fees to the plaintiff in an action under N.C. GEN. STAT. 75-1.1 (2000), but they are not mandatory. *Canady v. Crestar Mtg. Corp.*, 109 F.3d 969 (4th Cir. 1997). For the plaintiff to be eligible for an award of attorney's fees, the defendant's actions must be willful and oppressive, and the plaintiff must show an unwarranted refusal by the defendant to resolve the dispute, or that the defendant knew or should have known that the action was frivolous and malicious. N.C. GEN. STAT. § 75-16.1 (2000); *United Lab., Inc. v. Kuykendall*, 437 S.E.2d 374 (N.C. 1993).

as examples of the extent of disclosure that is feasible in actual practice. Thus, the list of information relevant to the buyer's decision to purchase coastal property detailed in Part I of this paper should be added to the Disclosure Statement.

In addition, an addendum to the disclosure statement could be required for all property transfers in the counties covered by the Coastal Area Management Act.<sup>173</sup> For example, this disclosure could read:

This property is located in a county within the jurisdiction of the Coastal Area Management Act. The stated purpose of the Act is to "provide a management system capable of preserving and managing the natural ecological conditions of the estuarine system, the barrier dune system, and the beaches, so as to safeguard and perpetuate their natural productivity and their biological, economic and esthetic values." Accordingly, the Coastal Resource Commission has the authority to require the issuance of permits before any development, whether new construction or rebuilding of existing structures, may occur in these areas. Your ability to develop this property may be limited by the action of the Coastal Area Management Act. Before purchasing this property, it is recommended that you contact the Coastal Resources Commission to determine if any land-use restrictions have been issued for this property and the likelihood that future development may be restricted. Any future land-use restrictions placed on this property may be imposed without any compensation to the property owner.

California has demonstrated that such comprehensive disclosure requirements can operate effectively in actual practice. The latest expansion of the disclosure requirements in California was met with resistance by some within the real estate industry because it was thought that the statutes placed an onerous burden on real estate agents to disclose information known only to experts.<sup>174</sup> However, the state was able to reduce the burden placed on the real estate industry by establishing a coalition of interested parties, including the state agencies charged with making the information available, while drafting the regulation. In this way, the state was able to take the necessary actions to assure that the information is available in a usable form, and encourage the state agencies to work together to coordinate their efforts to maintain hazard maps.<sup>175</sup> By enlisting the input of the real estate industry and the state and local governments and agencies affected by this type of disclosure, an orderly transition to a substantive and comprehensive disclosure system can be accomplished.

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173. The Coastal Area Management Act is codified at N.C. GEN. STAT. § 113A-100 *et seq.* (1999). The specific statute defining the areas within the jurisdiction of the Act is § 113A-113.

174. Naumchik, *supra* note 87, at 720.

175. *Id.*, at 720-721.

### C. *Registration of Permits*

In coastal areas, the single biggest unknown to real estate purchasers is the Coastal Area Management Act permit. It is relatively unknown to the general public and has the potential to make reconstruction of a significantly damaged structure in certain areas all but impossible. Given the severe ramifications to coastal homeowners from these permits, a systematic means of discovering these permits is needed.

The most direct and accessible means of making this possible is to require all such permits to be registered at the county Register of Deeds office under the name of the current landowner. Prospective buyers can then search the title to the property in the normal manner and ascertain whether a Coastal Area Management Act permit has been issued for the property in question. Since the registrar already compiles all property transfers and various liens issued against the property, the addition of one permit that potentially affects only a very minor portion of the properties in any one county should not be an onerous burden.

It is important to have these permits available in the grantee/grantor indexes to allow the prospective buyer to ascertain the history of the property. For example, a past history of CAMA permits to reconstruct after damage from hurricanes would alert the buyer to this hazard. Similarly, a CAMA permit for the temporary use of sandbags to control erosion could alert the buyer to beach hardening structures that are not visible, but would have to be removed at some point in the future.

### D. *Modification of Standard Offer to Contract and Purchase Form*

In conjunction with registering Coastal Area Management Act permits, a significant tool that can be used to inform buyers of the unique permitting requirements in coastal areas is the Offer to Contract and Purchase Form developed jointly by the North Carolina Bar Association and the North Carolina Association of Realtors.<sup>176</sup> This form includes two sections that, with minor changes, can inform the buyer of coastal area permitting requirements applicable to the property. The first section is concerned with the conditions associated with the sale of the property.<sup>177</sup> One provision of this section states: "There must be no restriction, easement, zoning, or other governmental regulation

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176. The Offer to Contract and Purchase Form is typical of the form used in North Carolina to make a formal offer to purchase a residential property. The form can be obtained at <http://www.ncrealtors.org/open/sampleforms.html>.

177. *Id.*, at Section 5. This section covers the type and terms of the loan, restrictions and easements, physical condition, deeds of trust and liens and title.

that would prevent the reasonable use of the Property for \_\_\_\_\_ purposes.” While this section could arguably on its face include CAMA permits, it would be much more functional as a disclosure tool for the buyer if the following addition (shown in italics) was made: “There must be no restriction, easement, zoning, or other governmental regulation, *including permits issued pursuant to the Coastal Area Management Act*, that would prevent the reasonable use of the Property for \_\_\_\_\_ purposes.”

The second section of the Offer to Contract and Purchase Form that can be used to disclose permit restriction information is the disclosure and inspections section.<sup>178</sup> By adding a new subparagraph (b) to this section, in conjunction with the permit disclosure statement described above, a full disclosure of coastal area restrictive permits related to the property will be disclosed to the buyer. This new subparagraph could read as follows:

**(b) Properties Located in Coastal Areas:** For properties located in the counties regulated under the Coastal Area Management Act (see North Carolina General Statutes § 113A-103(2)), the Seller certifies that: (i) no CAMA permits are currently in effect for the Property; (ii) the Seller has never been denied a CAMA construction or reconstruction permit; and (iii) there are no permanent or temporary erosion control structures located on the Property, except as follows:

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#### E. *Public Outreach Efforts and Information Sources*

The North Carolina Real Estate Commission has realized the need to inform their customers of the unique hazards associated with coastal property. In response, the commission has sponsored seminars for their members in coastal areas to inform them of disclosure requirements and erosion rates and control.<sup>179</sup> They have also produced a brochure, in conjunction with North Carolina Sea Grant, to inform the public of significant issues concerning the purchase of coastal property.<sup>180</sup> This brochure covers the following issues:

- Unusual hazards along ocean shorelines.
- Causes of shoreline erosion, erosion rates, and whether property owners are informed about erosion rates.

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178. *Id.*, as Section 12. This section covers the disclosure made under the North Carolina Residential Property Disclosure Statement, inspections, wood-destroying insects, repairs and acceptance.

179. North Carolina Real Estate Commission Workshop: “Your Place at the Beach.” North Carolina Real Estate Commission website (visited on April 16, 2000) <<http://nrec.state.nc.us>>.

180. North Carolina Real Estate Commission, Questions and Answers on: Purchasing Coastal Real Estate in North Carolina (January 1, 1998). Also available online at <<http://www.nrec.state.nc.us/coastal.htm>>.

- Where construction can take place on oceanfront property, both for new construction and reconstruction after storm damage.
- Whether measures can be taken to combat erosion and what measures may be taken.
- What insurance coverage is available to coastal property.

Publications such as this one can be used to inform the public in a cost-effective manner of the unique hazards and permitting requirements associated with coastal property. Expansion of this brochure to cover the complete list of factors important to the purchaser of coastal property presented in Part I of this paper could accomplish the same goals as modifications to the North Carolina Unfair and Deceptive Trade Practices Act and Residential Property Disclosure Act. Making distribution of such a publication mandatory to all potential buyers of property located in the counties within Coastal Resources Commission jurisdiction would solve the vast majority of problems associated with disclosure of coastal hazards. Combined with registration of CAMA permits, buyers of North Carolina coastal property would have a comprehensive consumer protection program to protect their interests.

The federal government can also use existing programs to make information available to the public. One recent suggestion was to require FEMA to produce and publish erosion hazard maps in much the same way they currently provide flood hazard maps.<sup>181</sup> These maps could be made available to the public through both print and electronic media, and could combine flood and erosion hazards on a single map.<sup>182</sup> FEMA has estimated that such maps would be necessary for approximately 12,500 miles of ocean coastline and Great Lakes shoreline and would cost \$44 million to produce.<sup>183</sup> While it may be unreasonable to require the seller to disclose the availability of such maps, it could be incorporated into lending and insurance practices for coastal property.

## V. CONCLUSIONS

There is no one single solution to the problem of disclosing hazards and land-use restrictions for potential buyers of coastal property. Recording CAMA permits with the Registrar of Deeds, by itself, provides minimal protection because the title is searched only after an offer has been made and accepted. The title is then searched typically in response to the mortgage lender's requirements. Thus, the buyer

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181. Dunn, *supra* note 11.

182. *Id.*

183. *Id.*

would then have to rescind his offer if the title search showed CAMA permit restrictions that the buyer was unwilling to assume. In this situation, the buyer may lose any earnest money given with the offer to purchase. It is rare indeed that a private buyer would institute a title search on his own prior to making an offer. Thus, the additions detailed in the previous section to the Offer to Contract and Purchase Form are critical to protecting the buyer's financial interests, even in the CAMA permits are registered. Because failure to disclose the recommended additional information would amount to breach of contract on the part of the seller, the seller could be forced to forfeit all earnest monies.<sup>184</sup>

The Residential Property Disclosure Statement provides the single best protection of the solutions offered here, but needs the backup provided by a title search should the seller be less than truthful or simply neglect to disclose pertinent information. While the buyer may still lose his earnest money, at least he has the choice of minimizing losses rather than continuing with the sale.

In order to provide the best opportunity to provide notice to the coastal property buyer without making the burden on those required to make disclosure so complex that it opens the door to a flood of litigation, a three-pronged approach is required. First, the Residential Property Disclosure Statement must be mandatory, the option of no representation eliminated, and the required disclosures expanded to include typical coastal hazards and land-use restrictions. Second, land-use permits such as those issued through CAMA must be registered in a uniform, publicly accessible system such as that already used by every county for registering deeds, and the standard Offer to Contract and Purchase form should require their disclosure. Third, the state must promote educational and outreach efforts to foster wide distribution of concise, easy to understand material focused toward buyers of coastal property such as the "Questions and Answers" pamphlet produced by the North Carolina Real Estate Commission.<sup>185</sup> This approach would rely heavily on established systems already in place and accepted by the real estate industry to make implementation quick, reduce the burden placed on any one segment of the real estate industry, and greatly enhance consumer protection in North Carolina.

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184. See *supra* note 177. Section 4(a) of the form specifies that seller forfeits all earnest monies upon his breach.

185. North Carolina Real Estate Commission, *supra* note 181.

Appendix A  
North Carolina Residential Property Disclosure Statement  
STATE OF NORTH CAROLINA  
RESIDENTIAL PROPERTY DISCLOSURE STATEMENT

Instructions to Property Owners

North Carolina General Statute 47E requires owners of residential real estate (single-family homes and buildings with up to four dwelling units) to furnish purchasers a property disclosure statement. This form is the only one approved for this purpose.

A disclosure statement must be furnished in connection with the sale, exchange, option and sale under a lease with option to purchase (unless the tenant is already occupying or intends to occupy the dwelling). A disclosure statement is not required for some transactions, including the first sale of a dwelling which has never been inhabited and transactions of residential property made pursuant to a lease with option to purchase where the lessee occupies or intends to occupy the dwelling. For a complete list of exemptions, see N.C.G.S. 47E-2.

You must check one of the boxes for each of the 20 questions on the reverse side of this form.  
a. If you check "Yes" for any question, you must describe the problem or attach a report from an engineer, contractor, pest control operator or other expert or public agency describing it. If you attach a report, you will not be liable for any inaccurate or incomplete information contained in it so long as you were not grossly negligent in obtaining or transmitting the information.

b. If you check "No", you are stating that you have no actual knowledge of any problem. If you check "No" and you know there is a problem, you may be liable for making an intentional misstatement.

c. If you check "No Representations", you have no duty to disclose the conditions or characteristics of the property, even if you should have known them.

\* If you check "Yes" or "No" and something happens to the property to make your Statement incorrect or inaccurate (for example, the roof begins to leak), you must promptly give the purchaser a corrected Statement or correct the problem.

If you are assisted in the sale of your property by a licensed real estate broker or salesman, you are still responsible for

completing and delivering the Statement to the purchasers; and the broker or salesman must disclose any material facts about your property which they know or reasonably should know, regardless of your responses on the Statement.

You must give the completed Statement to the purchaser no later than the time the purchaser makes an offer to purchase your property. If you do not, the purchaser can, under certain conditions, cancel any resulting contract (See "Note to Purchasers" below). You should give the purchaser a copy of the Statement containing your signature and keep a copy signed by the purchaser for your records.

In the space below, type or print in ink the address of the property (sufficient to identify it) and your name. Then sign and date.

Note to Purchasers

If the owner does not give you a Residential Property Disclosure Statement by the time you make your offer to purchase the property, you may under certain conditions cancel any resulting contract and be entitled to a refund of any deposit monies you may have paid. To cancel the contract, you must personally deliver or mail written notice of your decision to cancel to the owner or the owner's agent within three calendar days following your receipt of the Statement, or three calendar days following the date of the contract, whichever occurs first.

However, in no event does the Disclosure Act permit you to cancel a contract after settlement of the transaction or (in the case of a sale or exchange) after you have occupied the property, whichever occurs first.

Property Address:

Owner's Name (s):

*Owner (s) acknowledge having examined this Statement before signing and that all information is true and correct as of the date signed.*

Owner Signature:

Date

Owner Signature:

Date

*Purchaser (s) acknowledge receipt of a copy of this disclosure statement; that they have examined it before signing; that they understand that this is not a warranty by owner or owner's agent; that it is not a substitute for any inspections they may wish to obtain; and that the representations are made by the owner and not the owner's agent(s) or subagent(s). Purchaser(s) are encouraged to obtain their own inspection from a licensed home inspector or other professional.*

Purchaser Signature:

Date

Purchaser Signature:

Date

Property Address/Description:

(Note: In this form, "property" refers only to dwelling unit(s) and not sheds, detached garages or other buildings.)

Regarding the property identified above, do you know of any problem (malfunction or defect) with any of the following:

FOUNDATION, SLAB, FIREPLACES/CHIMNEYS, FLOORS, WINDOWS (INCLUDING STORM WINDOWS AND SCREENS), DOORS, CEILINGS, INTERIOR AND EXTERIOR WALLS, ATTACHED GARAGE, PATIO, DECK OR OTHER STRUCTURAL COMPONENTS including any modifications to them? .....

a. Siding is Masonry Wood Composition/Hard board Vinyl Synthetic Stucco Other.....

b. Approximate age of structure?.....

ROOF (leakage or other problem)?.....

a. Approximate age of roof covering?.....

WATER SEEPAGE, LEAKAGE, DAMPNES OR STANDING WATER in the basement, crawl space or slab?.....

ELECTRICAL SYSTEM (outlets, wiring, panel, switches, fixtures, etc.)?.....

PLUMBING SYSTEM (pipes, fixtures, water heater, etc.)?.....

HEATING AND/OR AIR CONDITIONING? .....

a. Heat Source is: Furnace Heat Pump Baseboard Other.....

b. Cooling Source is: Central Forced Air Wall/Window Unit(s) Other.....

c. Fuel Source is : Electricity Natural Gas Propane Oil Other .....

WATER SUPPLY (including water quality, quantity and water pressure)? .....

a. Water supply is: City/County Community System Private Well Other.....

b. Water pipes are: Copper Galvanized Plastic Other..... Unknown.....

SEWER AND/OR SEPTIC SYSTEM?.....

a. Sewage disposal system is: Septic Tank Septic Tank with Pump Community System Connected to City/County System City/County System available Other.....

BUILT-IN APPLIANCES (RANGE/OVEN, ATTACHED MICROWAVE, HOOD/FAN, DISHWASHER, DISPOSAL, etc.)? .....

PROBLEMS WITH PRESENT INFESTATION, OR DAMAGE FROM PAST INFESTATION OF WOOD DESTROYING INSECTS OR ORGANISMS which has not been repaired? .....

PROBLEMS WITH DRAINAGE, GRADING OR SOIL STABILITY OF LOT? .....

OTHER SYSTEMS AND FIXTURES: CENTRAL VACUUM, POOL, HOT TUB, SPA, ATTIC FAN, EXHAUST FAN, CEILING FAN, SUMP PUMP, IRRIGATION SYSTEM, TV CABLE WIRING OR SATELLITE DISH, OR OTHER SYSTEMS? .....

ROOM ADDITIONS OR OTHER STRUCTURAL CHANGES? .....

ENVIRONMENTAL HAZARDS (substances, materials or products) including asbestos, formaldehyde, radon gas, methane gas lead based paint, underground storage tank, or other hazardous or toxic material (whether buried or covered), contaminated soil or water, or other environmental contamination?.....

COMMERCIAL OR INDUSTRIAL NUISANCES (noise, odor, smoke, etc.) affecting the property? .....

VIOLATIONS OF BUILDING CODES, ZONING ORDINANCES, RESTRICTIVE COVENANTS OR OTHER LAND-USE RESTRICTIONS? .....

UTILITY OR OTHER EASEMENTS, SHARED DRIVEWAYS, PARTY WALLS OR ENCROACHMENTS FROM OR ON ADJACENT PROPERTY? .....

LAWSUITS, FORECLOSURES, BANKRUPTCY, TENANCIES, JUDGMENTS, TAX LIENS, PROPOSED ASSESSMENTS, MECHANICS LIENS, MATERIALMEN'S LIENS OR NOTICE FROM ANY GOVERNMENTAL AGENCY that could affect title to the property? .....

OWNERS' ASSOCIATION OR "COMMON AREA" EXPENSES OR ASSESSMENTS? ..

FLOOD HAZARD or that the property is in a FEDERALLY DESIGNATED FLOOD PLAIN? .....

If you answered "yes" to any of the above questions, please explain (Attach additional sheets, if necessary):



LEAD BASED PAINT OR LEAD BASE PAINT HAZARD ADDENDUM

It is a condition of this contract that, until midnight of \_\_\_\_\_, Buyer shall have the right to obtain a risk assessment or inspection of the Property for the presence of lead-base paint and/or lead-based paint hazards\* at Buyer's expense. This contingency will terminate at that time unless Buyer or Buyer's agent delivers to the Seller or Seller's agent a written inspection and/or risk assessment report listing the specific existing deficiencies and corrections needed, if any. If any corrections are necessary, Seller shall have the option of (i) completing them, (ii) providing for their completion, or (iii) refusing to complete them. If Seller elects not to complete or provide for completion of the corrections, then Buyer shall have the option of (i) accepting the Property in its present condition or (ii) terminating this contract, in which case all earnest monies shall be refunded to Buyer. Buyer may waive the right to obtain a risk assessment or inspection of the Property for the presence of lead-based paint and/or lead-based paint hazards at any time without cause.

Disclosure of Information on Lead-Based Paint and Lead-Based Pain Hazards

\*Intact lead-based paint that is in good condition is not necessarily a hazard. See EPA pamphlet "Protect You Family From Lead in your Home" for more information.

Address of Property:

Lead Warning Statement

*Every Buyer of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The Seller of any interest in residential real property is required to provide the Buyer with any information on lead-based paint hazards from risk assessments or inspections in the Seller's possession and notify the Buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based hazards is recommended prior to purchase.*

Seller's Disclosure (initial)

(a)

Presence of lend-based paint and/or lead-based paint hazards (check one below):

Known lead-based paint and/or lead-based paint hazards are present in the housing (explain).

Seller has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

(b)

Records and reports available to the Seller (check one)

Seller has provided the Buyer with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below).

Seller has no reports or records pertaining to lead-base paint and/or lead-based paint hazards in the housing.

(c)Buyer has received copies of all information listed above.

(d)Buyer has received the pamphlet

*Protect Your Family From Lead in Your Home*

(e)Buyer has (check one below):

Received a 10-day opportunity (or other naturally agreed upon period) to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards; or

Waived the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards

Buyer's Acknowledgement (initial)

Agent's Acknowledgement (initial)

(f) Agent has informed the Seller of the Seller's obligation under federal law and is aware of his/her responsibility to ensure compliance.

Certification of Accuracy

The following parties have received the information above and certify, to the best of their knowledge, that tile information provided by the signatory is true and accurate.

Buyer: \_\_\_\_\_ (SEAL) Date: \_\_\_\_\_

Buyer: \_\_\_\_\_ (SEAL) Date: \_\_\_\_\_

Agent: \_\_\_\_\_ (SEAL) Date: \_\_\_\_\_

Seller: \_\_\_\_\_ (SEAL) Date: \_\_\_\_\_

Seller: \_\_\_\_\_ (SEAL) Date: \_\_\_\_\_

Agent: \_\_\_\_\_ (SEAL) Date: \_\_\_\_\_