

# 2022-2023 General Update Course

## Section 1

# MATERIAL FACTS: Speak Up!



### *Is it a Material Fact?*

True or False. Indicate whether or not the following “facts” are material.

- a) Square footage error \_\_\_\_\_
- b) Synthetic Stucco that has been repaired or replaced \_\_\_\_\_
- c) The mere existence of polybutylene plumbing \_\_\_\_\_
- d) A structural issue that has been repaired \_\_\_\_\_
- e) A well recently contaminated with e-coli but current tests reveal no presence of bacteria \_\_\_\_\_
- f) A roof that leaks during severe rain \_\_\_\_\_

### ***“See No Evil, Say No Evil”***

Jake, a broker with A+ Realty, meets with Peter, a property owner, to provide a listing presentation. During the meeting, Peter says that he recently had a home inspection that indicated water leakage in the basement walls and crawl space, but that he has ordered no further inspections to verify the issue or determine repair needs. Jake tours the property and observes no moisture or standing water. Peter decides to list the property with Jake. On the *Residential Property and Owners’ Association Disclosure Statement (RPOADS)* Peter selects “No Representation” to all of the questions. Throughout the listing period, there is no visible evidence of moisture or water, so Jake does not mention Peter’s inspection report to any of the prospective buyers.

1. Did Jake fulfill his duties as a broker? YES/NO

2. Why or why not? Choose the best answer.
- Although Jake did not personally observe any moisture or standing water, he still had an obligation to disclose the water leakage in the basement walls and crawl space.
  - Because Jake has an obligation to disclose whether he personally saw any water or not.
  - Because the owner, Peter, already checked “*No Representation*” on the *RPOADS*.
  - Because Peter’s completion of the *RPOADS* relieved Jake of any additional disclosure obligations.

### **“Dues Surprise Party”**

Linda, a broker with X Realty, lists her personally owned residential condominium unit with her firm on March 1. The unit goes under contract on March 3 and the buyer submits the Due Diligence Fee and the Earnest Money Deposit in accordance with the terms of the contract. Linda receives notification of a proposed assessment from the HOA on March 5. If the assessment is approved, HOA dues will be temporarily increased starting in July to pay for various exterior repairs. Must Linda tell the buyer about the proposed assessment? Why or why not? Choose the best answer.

- No. Linda owns the property; therefore, she has no obligation to share the information about the assessment unless it is approved prior to closing.
- No. The proposed assessment is only for a temporary increase in dues, there is no obligation to disclose.
- Yes. Linda is a broker and must disclose the proposed assessment because it is a fact that is directly related to the property.
- Yes. Linda owns the property and is obligated to share the information about the assessment if it is approved prior to closing.

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## **LEARNING OBJECTIVES**

After completing this section, you should be able to:

- define a material fact;
- explain the categories of material facts;
- explain the responsibilities of a broker for discovery and disclosure of material facts;
- identify red flags that indicate possible material facts; and
- explain the responsibilities of a broker regarding a home inspection.

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## TERMINOLOGY

**Home Inspection:** An evaluation of the visible and accessible systems and components of a home which provides an understanding of the condition of the home.

**Home Inspection Report:** A written evaluation that describes the condition of the functioning and malfunctioning systems within the home.

**Material Fact:** Any fact that could affect a reasonable person's decision to buy, sell, or lease real property is considered a material fact and must be disclosed by a broker to the parties in the transaction and any interested third parties regardless of the broker's agency role within the transaction.

N.C.G.S. §93A-6(a)(1) indicates that brokers are subject to disciplinary action if they make any willful or negligent misrepresentation, or omission and/or failure in disclosing material facts to all parties in a transaction.

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## MATERIAL FACTS

### *Material Facts are Important*

The Commission analyzed all of the disciplinary cases published in the eBulletin for 2020-2021, to determine the most common violations under License Law and Commission rules. Although the Commission does not have *formal* categories for cases, some cases fall into more than one category which results in brokers having multiple rule violations.

The statistics below do not include cases which were investigated and closed, closed and warned, or voluntarily surrendered.

In 2020-2021, there were a total of 152 cases in the eBulletin. The statistics for the categories are as follows:

- 47% - Material Facts;
- 19% - Trust Accounts;
- 10% - Agency;
- 9% - Contracts;
- 6% - Property Management; and
- 9% - Other.

If we analyze cases dealing only with material facts and further evaluate the issues addressed specifically in those cases, the statistics are:

- 30% - Structural Issues and Items Presented on Previous Home Inspections;
- 15% - Square Footage;

- 15% - Lots/Subdivisions/Road;
- 10% - Permits;
- 10% - Sewage/Septic/Water; and
- 20% - Other Material Facts.

The statistics referenced above demonstrate the importance of brokers having a thorough comprehension of:

- material facts,
- red flags, and
- the mandatory requirement to discover and disclose material facts under License Law and Commission rules.



### **What is a material fact?**

A material fact is ANY fact that could affect a reasonable person’s decision to buy, sell, or lease.

What is considered “any” fact? Could the fact that a property:

- is located in a flood zone;
- has a malfunctioning electrical system;
- has an unpermitted bedroom;
- is located in a neighborhood with restrictive covenants; or
- has been previously occupied by a pet

be considered material facts? **Yes!** These facts are just a few examples of material facts that could affect a reasonable person’s decision to buy, sell, or lease property. A broker must volunteer and timely disclose the material facts to the parties in the transaction and any interested third parties regardless of the broker’s agency role within the transaction.



### **What are the four categories of material facts?**

The four categories of material facts are:

- facts about the property itself;
- facts that relate directly to the property;
- facts directly affecting the principal’s ability to complete the transaction; and
- facts that are known to be of special importance to a party.

## 1. Facts about the property itself

This category comprises issues about the property and its improvements, such as:

- structural defect(s),
- malfunctioning system(s),
- leaking roof, or
- drainage or flooding problem(s).

***Why is a leaking kitchen faucet or water in a crawl space considered a material fact?*** A leaking kitchen faucet and water in a crawlspace are material facts because they signify that there may be an issue with the plumbing system that needs to be repaired. This information is important for a broker to disclose because the plumbing system is needed in order for an individual to fully utilize a property. Therefore, clients/customers need to be aware of any issues with systems, leaks, or structural defects so they can make an informed decision as to whether they will request repairs or purchase the property, or use this information to negotiate the purchase price of the property and repair the issue themselves.

## 2. Facts that relate directly to the property

This category includes factors that are external to or outside of the property that affect the use, desirability, or value such as:

- a pending zoning change,
- existence of restrictive covenants,
- plans to widen a street, or
- plans to build a shopping center adjacent to a property.

***How can zoning affect a property?*** Zoning classifications will ultimately affect how a property can be used by a client/customer. For instance, zoning classifications affect whether or not a property is considered residential, mixed use, or commercial, etc. Therefore, brokers must analyze the zoning classification of a property to determine whether or not the property can be used for the intended purpose for which it is purchased. For example, if a client/customer purchases a lot with the intent to construct a home, the broker would need to ensure that the lot is zoned for residential purposes.

***How does the existence of restrictive covenants affect a property?*** The existence or nonexistence of restrictive covenants is a material fact. However, the specific restrictions within the covenants become material facts when they are of special importance to a party. For example, if restrictive covenants exist for a property, the covenants may prohibit a property from having certain animals, an in-ground swimming pool, and/or the parking of commercial vehicles in the neighborhood. If these covenants do exist, they may affect how desirable the property is to future buyers. Therefore, brokers must disclose the existence of restrictive covenants, advise consumers on where to obtain a copy, and recommend consumers seek legal advice regarding the

applicability of the covenants. It is not the broker's responsibility to interpret the covenants.

### **3. Facts directly affecting the principal's ability to complete the transaction**

This category includes any fact that might adversely affect the ability of a principal (seller or buyer) to consummate the transaction such as:

- a buyer's inability to qualify for a loan,
- a buyer's inability to close on a home without selling a currently owned home, or
- a seller's inability to convey clear title due to the commencement of a foreclosure sale or judgment lien on the property.

***Why is a buyer's inability to qualify for a loan a material fact?*** A buyer's inability to qualify for a loan is a material fact that must be disclosed to all parties in the transaction. This information is important because the buyer will not be able to consummate the sale of the property if they do not have financing from a lender. Further, another example of a material fact that must be disclosed to all parties is when a buyer initially makes a cash offer on a property but changes to FHA or VA financing during the transaction. This is a material fact because the buyer may not be able to meet all of the requirements for financing from the lender which may delay/prevent the consummation of the sale.

Lastly, if a buyer's financial situation has changed materially from their original loan application, a broker's failure to disclose this information may be a material fact violation and/or may lead to charges being filed for mortgage fraud for both the buyer and the broker.

Why is it a material fact that a buyer has to sell a currently owned home before they have the ability to close on another home? It is a material fact when a buyer has to sell a currently owned home before they can purchase another property because if a buyer does not sell their current home, they may not have the financial means to complete the transaction. Therefore, brokers who are aware of this fact must disclose its existence to all parties in the transaction.

### **4. Facts that are known to be of special importance to a party**

This category includes facts of special interest or importance to a party.

For example, a buyer may not wish to purchase a home that:

- has specific zoning restrictions,
- is within a neighborhood,
- is within the city limits, or
- has been previously occupied by a pet.

There are many facts relating in some way to a property that normally would not be considered “material” but because a broker knows they are of special interest or importance to a party, they become material facts that the broker must discover and disclose for that party. In plain words, if a buyer informs a broker of their specific interest for a property, the broker must discover and disclose all facts relating to this specific interest because it is of importance to the buyer and has now become a material fact.

For example, if a buyer informs their broker that they would like to purchase a property that would provide them with the ability to run a small, home-based business, the broker is expected to discover this information for the buyer because it will directly affect which property the buyer purchases.

In an effort to discover and disclose information of special importance to a party, brokers must research and review property specific information, such as zoning and restrictive covenants, if they exist. If restrictive covenants exist, brokers are not expected to read every word of the restrictive covenants or interpret it for the buyers. However, they are expected to be familiar with the restrictive covenants so they can discover and disclose the specific information that is requested by the buyers. If buyers have specific questions regarding the restrictive covenants for the property, the broker should advise the buyer to consult with an attorney.

**NOTE:** Any fact within the four categories of material facts must be volunteered and timely disclosed to the parties to the transaction and any interested third party as well, *regardless* of the broker’s agency role within the transaction. Additionally, there are many facts relating to a property that normally would not be considered material; however, because a broker knows they are of special importance to a party, they become material facts that the broker must discover and disclose.



### **How does a broker discover material facts?**

A broker has an affirmative duty to discover and disclose material facts to all parties in a transaction. Further, brokers are expected to take reasonable steps to discover all pertinent facts about a property that are necessary to serve their client’s interest.

For example, listing agents are expected to:

- accurately gather all information about a listed property necessary to effectively market the property; and
- comply with disclosure requirements to prospective buyers.

Moreover, buyer's agents are expected to:

- assist buyer-clients in obtaining any information related to the property; and
- gather specific property information that is of particular interest to the buyer-clients.

Some brokers mistakenly believe that if they don't know of a material fact then they can't be required to disclose it. However, the duty of a broker to discover material facts eliminates a broker's option to avoid learning a material fact. For example, a broker may believe that they do not have to "walk around" a property to view its condition or inquire about stains on the ceiling. If a broker fails to visually inspect a property, how can they determine if red flags exist before they make any statements?

In plain words, a broker has a duty to investigate any issue or fact that could mean a potential problem to the property. Thus, a visual inspection should be performed to start the discovery process. The Commission is aware that the real estate market is very competitive at this time and offers are often submitted on properties without being seen. If a broker submits an offer on a property per the directive of their client without visually inspecting the property, the broker should advise the client that failure to visually inspect a property prior to submitting an offer creates risks such as not being able to discover obvious defects with the property.

Further, the broker should document in writing that they have disclosed to their client the risks associated with submitting an offer on a property sight unseen. It is important for brokers to understand that they **cannot** waive their duty to discover and disclose material facts.

Moreover, the Commission uses the *Reasonableness Standard* to evaluate a broker's duty to discover and disclose material facts. This standard dictates that a broker has a duty to discover and disclose *any* particular material fact if a **reasonably knowledgeable and prudent broker** would have discovered the fact during the course of the transaction and while acquiring information about the property.

### ***Examples to Consider***

The following examples can be found in the Commission article, [Intentional Ignorance](#). These examples display brokers who are not adhering to the *Reasonableness Standard* while conducting brokerage activity.

1. A buyer agent knows their client has respiratory issues and notices standing water in the crawl space of the property. The buyer agent does not inquire about mold or suggest to the buyer to hire a mold inspector.
2. A buyer agent knows their client wants to construct a barn and raise chickens and goats. The buyer agent does not obtain the restrictive covenants or zoning restrictions that may affect the buyer's intended use of the property or advise their client to do so.



3. A commercial broker represents a tenant, who wants to lease a space for a daycare center. The commercial broker fails to determine if the space meets the requirements for operating a daycare.
4. A property manager notices rust-colored stains in the sinks, toilets, and tubs but fails to inquire about the water quality, water filtration systems, or suggest that the owner tests the water quality.

Although a broker may not know a material fact, if the Commission determines that a prudent broker would know it, then the broker may be disciplined for failing to disclose the fact. N.C.G.S. §93A-6(a)(1) authorizes the Commission to pursue disciplinary actions against a broker who misrepresents or omits a material fact. Therefore, every broker must exercise reasonable care and diligence in discovering and disclosing all material facts to all interested parties in a timely manner.

**NOTE:** Brokers are also expected to discover material facts about properties that are being sold “As Is” and disclose this information to all parties in the transaction.



### **What other facts must be disclosed to a principal in a transaction?**

Under agency law, an agent must disclose to the principal *any* information that may affect the principal’s rights and interests or influence the decision of the principal in the transaction. Relevant information that a broker-agent must share only with their principal includes:

- the other party’s willingness to agree to a price or terms different from those previously stated,
- the other party’s motivation for engaging in the transaction, or
- any other confidential information that might affect the principal’s rights and interests or influence the principal’s decision in a transaction.

An agent acting as a dual agent owes the same fiduciary duties to both parties, namely, loyalty, obedience, skill, care, and diligence, confidentiality, accounting, and disclosure of all information. If a broker advises or advocates for one principal over the other, the other principal will be greatly disadvantaged. The broker must remember that although the parties have competing interests, both parties are owed identical fiduciary duties. Therefore, the agent cannot advise or advocate for either party. The agent must treat the parties fairly, impartially, equally and honestly, and not engage in conduct that would advance one party’s position over the other.

Dual agents essentially communicate the exchange of information between the parties and will assist the parties with satisfying the terms of the contractual agreement.

**NOTE:** An agent must communicate **relevant** information to the principal, even if the information does not rise to the level of being a material fact. However, an agent acting

as a dual agent cannot share information to either party about the other party's willingness to agree to different terms, motivation, or any other confidential information that may affect or influence their decision in the transaction.



### **Are there any facts that are statutorily not material?**

**Yes.** State and fair housing laws exempt the disclosure of certain facts that may seem material such as:

- the death or serious illness of a previous property occupant,
- a convicted sex offender occupying, having occupied, or residing near a property, or
- a current or former occupant's AIDS/HIV status.

For clarification, a broker may be asked about the death or serious illness of a previous property occupant or convicted sex offender occupying, having occupied, or residing near a property during a transaction. The broker may decline to answer the question(s); however, if the broker chooses to answer the questions, they must do so truthfully.

In contrast, if a broker is asked whether a current or previous occupant has/had AIDS/HIV, it should be treated as an impermissible question. The broker should respond that it is a violation of fair housing laws for the broker to answer the question.

#### ***Questions to Consider***

##### ***Must the broker disclose information regarding the death or serious illness of a previous occupant?***

**No.** According to N.C.G.S. §39-50,

..In offering real property for sale it shall not be deemed a material fact that the real property was occupied previously by a person who died or had a serious illness while occupying the property.

In plain words, a broker does not have to disclose that a property was previously occupied by a person who died or had a serious illness while occupying the property. Since this information is not considered a material fact, a broker may decline to answer a question about the death or serious illness of a previous occupant. However, if the broker chooses to answer the question, they must answer truthfully. The statute further indicates that it is not permitted for an individual to make a false statement about past occupancy.

***Must a broker disclose that a convicted sex offender occupies, has occupied, or resides near a property?***

**No.** It is not mandatory that a broker discloses this information. The N.C.G.S. §39-50, also specifies that this information is not a material fact; therefore, brokers are not required to volunteer to a prospective buyer or tenant information that a registered sex offender occupies, has occupied, or resides near a property being offered for sale or rent.

***How should a broker respond if they are asked about a convicted sex offender occupying, having occupied, or residing near a property?***

Brokers should remember that this information is not a material fact; therefore, they are not obligated to disclose any information. Brokers may very well decline to answer this question. However, if a broker chooses to answer, they must answer truthfully and to the best of their knowledge.

***If someone asks a broker about convicted sex offenders occupying, having occupied, or residing near a property, what resources might be recommended?***

A broker may recommend the county sheriff's registry or the [statewide registry](#) to access convicted sex offender information.

***What if someone asks the broker about the AIDS/HIV status of a current or former occupant? Can the broker answer the question?***

**No.** Under federal and state fair housing laws, a person with AIDS/HIV is considered to be legally handicapped and is protected from discrimination in housing. Therefore, if a broker is asked this question, they should indicate that it will be a violation of the fair housing laws if they respond.

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## **BROKER RESPONSIBILITY**



### ***“The Unexpected Tenants”***

Charlie, a seller-client, hires Teresa, an agent with 123 Homes, to list his property. Charlie informs Teresa that his family cemetery is located on the property. Teresa decides not to disclose this information to potential buyers because she does not want to scare them off and she wants the property to sell quickly. Fred, a buyer, purchases the property and realizes the existence of the cemetery after he moves into the home.

Fred contacts Teresa and expresses his anger with the cemetery not being disclosed prior to his purchase of the property. Did Teresa fulfill her duties as a broker? Why or why not? Choose the best answer.

- a) Yes. Because it was Charlie's duty as a seller to disclose this information to prospective buyers.
- b) No. Because Teresa did not advise Charlie to disclose this information in the seller's disclosure.
- c) Yes. Because Teresa did not represent Fred and had no duty to discover and disclose material facts to him.
- d) No. Because Teresa was aware of the cemetery prior to listing the property and should have disclosed this fact relating to the property to all parties in the transaction.



### What is a Broker's Responsibility?

A broker must discover and disclose material facts to all interested parties to the transaction, regardless of who they represent. This mandatory disclosure of material facts includes disclosure of:

- facts about the property that the broker *knows* exist,
- facts about the property they *reasonably should know exist*, and
- information that is considered *common knowledge*.

***For example, what if a broker notices a property has stains on the ceiling? Does the broker have to disclose this information?*** Yes. The broker must disclose the existence of the stains. The stains are considered a red flag and require further inquiry to determine the cause and discover if remediation of the issues has occurred.

***Does a broker have a duty to disclose the leaking roof even if they represent the seller?*** Yes. Although the broker represents the interests of the seller, the broker is still obligated to explain/inform the seller of the broker's obligation to disclose the leaking roof to all parties in the transaction.

***What if the seller instructs the broker not to disclose the leaking roof?*** If the seller instructs the broker not to disclose the leaking roof, the broker must not follow the seller's instructions because they are not lawful. A broker's discovery and disclosure of material facts is not contingent upon whether or not they receive permission from their client to disclose this information. The discovery and disclosure of material facts is a mandatory disclosure under N.C.G.S. §93A-6(a)(1). If the broker obeys the seller and does not disclose the leaking roof, they may be in violation of the statute.

***What if a buyer agent is informed of the leaking roof and the listing agent and/or seller if unrepresented, had no prior knowledge of this material fact? Must the buyer agent inform the listing agent and/or seller if they are unaware of this information?*** Yes. Although the buyer agent may reasonably rely on the property information that is provided by the listing agent, they are not absolved of the responsibility to discover and disclose material facts about the property. Therefore, if a buyer agent is made aware of any material facts during their research or inquiry of a property, they must disclose that information to all parties in the transaction.

***What if a buyer agent discovers an issue that might rise to the level of a material fact during a showing? Must the buyer agent inform the listing agent of this information?*** Yes. If a buyer agent discovers an issue during a showing, they should notify the listing agent of the potential issue. The listing agent should then investigate the issue and have it evaluated by a professional if needed.

If an offer is presented while the listing agent is actively working to determine if the issue is material, the listing agent should disclose the potential issue to the buyer agent and inform them that the issue is currently being investigated.

***Once a broker has determined that a material fact or potential material fact exists, what should they do?*** The broker must disclose the material fact or potential material fact to their client or customer so they can possess the adequate knowledge to:

- make an intelligent decision regarding the property,
- negotiate repair services, or
- decide to terminate the contract.

***Should a broker still disclose the material fact or potential material fact if it is going to scare off buyers?*** Yes. A broker does not have a choice regarding whether or not they disclose material facts to buyers. The statute states that material facts must be disclosed to all parties in the transaction.

If a broker is debating whether or not they should disclose the existence of material facts, they should ask themselves the following questions:

- Would you like to be the subject of a disciplinary investigation?
- Would you like to be a Respondent in a civil lawsuit?

A broker who thinks that a transaction will close quicker without disclosing material facts to all parties will more than likely become the subject of a disciplinary action or civil lawsuit due to their failure to follow the law. Brokers should disclose material facts to all parties during the transaction rather than possibly defending their license later.



### ***“The Raining Skylights”***

Cher, a seller, wants to list her property, so she hires Zack, a listing broker, with ABC Homes.

During the prelisting walkthrough, Cher informs Zack that she has completed the Residential Property and Owners’ Association Disclosure Statement and Mineral and Oil and Gas Rights Mandatory Disclosure Statement.

Zack asks Cher if she has any problems with the roof leaking because he notices several stains near the skylights. Cher states that the roof only leaks during heavy rainfall. She also states that the insulation surrounding her skylights is decayed and she does not have the extra funds to repair them before listing the property.

Zack creates the listing in the MLS and does not disclose the leaking roof. Sam, a buyer agent, and his buyer-client, Shannon, go to view Cher’s property. Sam notices the stains on the ceiling and discusses this information with Shannon. Shannon still expresses an interest in the property; however, Sam informs her that he needs to ask Zack some additional questions and conduct more research before he could assist her with making an intelligent, informed offer.

1. Did Zack fulfill his duties as a broker? Why or why not? Choose the best answer.
  - a) No. Because Zack is not a home inspector.
  - b) No. Because Cher made Zack aware of the leaking roof and he failed to disclose it to all parties in the transaction.
  - c) Yes. Because Zack did not verify any actual issues.
  - d) Yes. Because Cher’s comments are her opinions.
  
2. Did Sam fulfill his duties as a broker? Why or why not? Choose the best answer.
  - a) Yes. Because Sam told Shannon they needed further information regarding the property.
  - b) No. Because Sam should not have written the offer without an additional investigation.
  - c) Maybe. Sam did reasonably suspect there was an issue; therefore, the best practice would be for Sam to get the additional information from Zack, the listing agent, before assisting the buyer with her offer.
  - d) Yes. Because Sam did not know for certain if there were any problems with the skylights.



## How does the Commission determine if a broker reasonably knew a fact about the property?

In the Commission article, [“What is Common Knowledge?”](#), it states that the Commission determines whether or not a broker *knew* the existence of a material fact by analyzing documents, reviewing written correspondence, and interviewing individuals involved in the transaction. The Commission also examines public records and reviews applicable educational resources to determine whether or not a broker should have *reasonably known* a material fact about a property.

The article further explains that the Commission uses the *Reasonableness Standard* to evaluate a broker’s duty to discover and disclose material facts. This standard dictates that a broker has a duty to discover and disclose *any* particular material fact if a *reasonably knowledgeable and prudent broker* would have discovered the fact during the course of the transaction and while acquiring information about the property.

***If a listing agent lists a property sight unseen, do they have a duty to discover and disclose material facts? Yes.*** Every broker has a duty to discover and disclose material facts to all parties in the transaction. Therefore, brokers should recognize the inherent risk of possible disciplinary action when they list properties without a preliminary, visual inspection to determine whether or not material facts or red flags exist. Similarly, a buyer agent who writes an offer for a client may have a difficult time researching red flags and material facts without viewing the property. Therefore, by writing an offer on an unseen property, the buyer agent may not be adhering to their duty to discover and disclose material facts by evaluating the condition of the property or researching property specific information for their client.

A reasonably prudent broker would pay attention to red flags as they are conducting a visual, preliminary inspection of the property. A broker also has a duty to further investigate any issue or fact that could suggest a potential problem with the property.

**NOTE:** Regulatory Affairs considers a broker’s failure to conduct a visual, preliminary inspection of a property a red flag.



## **What is a red flag?**

A “red flag” is the presence of any fact or issue that should make a reasonably prudent broker working with a buyer or seller suspect that the information provided by another party may be incorrect or incomplete.



## **What are some examples of red flags?**

Some examples of “red flags” are:

- stains on the ceiling, floors, or in the cabinets;
- discoloration of flooring;
- absence of septic permits;
- unpermitted spaces;
- leaks;
- stream in the backyard;
- cracked foundational issues; or
- inconsistent or inaccurate measurements of square footage.



## **What should a broker do if a red flag is present?**

If “red flags” are present, a broker must conduct more research and use due diligence to determine the severity of the issue and the effect that these “red flags” will have on their client’s decision regarding the property.

As a best practice, brokers should complete additional research by:

- asking the owner about known issues with the property,
- measuring the property or hiring a vendor to measure the property if there is a discrepancy (e.g. red flag) in square footage,
- asking the owner to provide service records for repairs conducted on the property,
- researching the existence of septic permits and building permits with the local municipality, or
- advising the client to hire an inspector and/or contractor to estimate and/or repair issues.





### *“Slip Sliding Away”*

Maxine is the buyer agent for Alesha. Alesha is interested in purchasing a beach-front property. Maxine contacts Rob, a listing agent, for the property. During the conversation with Rob, Maxine asks the following questions:

1. Does the property have any storm damage from the hurricane last year?
2. What are the locations of the set-back lines for the property?
3. Can a structure be rebuilt on the lot if the existing structure was extensively damaged?

Rob tells Maxine that the hurricane caused cosmetic damage and is currently being repaired. He stated that even if a hurricane were to cause serious damage in the future, he saw no reason she couldn't rebuild. He also states that he will provide her with additional information later because he did not know the locations of the set-back lines. Maxine informs Alesha of the information she receives from Rob. Alesha tells Maxine she really likes the property and instructs her to submit an offer. Maxine submits the offer without receiving the additional information or verifying the extent of the damage to the property.

Alesha hires vendors to perform the inspection and survey soon after she goes under contract on the property. After the survey, she is informed to contact the Division of Coastal Management for more details. Maxine calls the Division and they tell her the lot has more than 50% damage; therefore, the existing structure on the property cannot be rebuilt using the current footprint.

Alesha does not want to proceed with the transaction and terminates the contract even though the due diligence period has expired. The seller, releases Alesha's earnest money deposit.

1. Should Rob possess common knowledge regarding the properties he lists?  
YES/NO
2. Did Rob fulfill his duties as a broker? Choose the best answer.
  - a) Yes. Because the owner told Rob it was being repaired.
  - b) No. Because Rob should have knowledge about common requirements in coastal management areas and should have known that damage beyond 50% would prohibit rebuilding in the coastal management area.
  - c) Yes. Because Rob may have been unaware of the actual damage to the structure.
  - d) No. Because Rob does not usually deal with coastal properties.

3. Did Maxine fulfill her duties as a broker? Choose the best answer.
- a) Yes. Because Maxine relied on the information from the listing agent.
  - b) No. Because Maxine did not have enough information and repeated a misrepresentation made by the listing agent.
  - c) Yes. Because Maxine is not a structural engineer.
  - d) No. Because Maxine must do a visual inspection of the property before writing an offer.



### **What is common knowledge?**

Common knowledge is defined as knowledge that is widely or generally known to everyone or nearly everyone in a community.

A reasonably prudent broker is expected to possess common knowledge regarding the area in which they practice brokerage. A reasonably prudent broker would ensure they possess the following common knowledge while practicing brokerage:

- geographic competence;
  - The broker should have knowledge of the geographic area including business developments, economic changes, and zoning and planning development. Brokers can develop geographic competence in a variety of ways like researching the area, taking continuing education courses, completing professional development classes, or possessing previous knowledge from residing in the area.
- market knowledge; and
  - The broker should have common knowledge regarding the market including information such as economic, social, and environmental influences that may affect the value of property. Also, knowledge of appreciation rates, property prices, and demographic statistics are important.
- industry standards for real estate specialty areas (e.g. residential, short-sales, commercial, etc.).
  - The broker should have knowledge of the typical transaction cycles for the types of specialties in which they practice. Also, the broker should be familiar with the terminology and transaction documents and/or forms that are used for each specialty area.

***Are there some ways that a broker can obtain common knowledge and stay current with their information?*** Yes. As a best practice, brokers should:

- read the local newspaper;
- watch the local news;
- attend city council meetings or review the agenda/notes;
- network and communicate with other brokers and professionals in the area; and
- consistently review information regarding zoning and local ordinances.



### ***“The HGTV Special”***

Pat, a listing agent with 123 Realty, is representing Joe in the sale of his property. Joe, an investor, tells Pat that he purchased the property seven months ago and his son, Sam, performed the renovations. The renovations included the addition of a bedroom, bathroom, deck and HVAC system. Pat asks Joe for a copy of the permits. Joe states that Sam is not a licensed contractor, and he did not obtain permits.

After receiving this information, Pat lists the property and advertises all of the new renovations. Buyer #1 offers to purchase the property. During their inspection, the home inspector states that the deck is not structurally sound. Buyer #1 terminates the contract during the due diligence period. Pat does not update the listing nor did Joe revise any seller disclosures.

Buyer #2 submits an offer and has the property inspected as well. The inspection report for Buyer #2 reveals the same deck issue noted in the inspection report submitted by Buyer #1. Buyer #2 submits a Due Diligence and Repair Addendum. Joe agrees to make the repair for Buyer #2. Buyer #2 has the property re-inspected after the repair was allegedly made and it had not been fixed. Buyer #2 terminates after the due diligence period. Joe refuses to release the earnest money deposit to Buyer #2. Also, he does not update any seller disclosures; and Pat does not revise the listing in the MLS.

Pat receives an offer from Buyer #3 who is represented by Sue, a buyer agent. After advisement from Sue, Buyer #3 offers to pay the full price in cash, close within seven days, and will not conduct an inspection. Joe accepts the offer and the property closes without incident. After closing, Buyer #3 discovers the house needs thousands of dollars in repairs.

1. Did Pat have knowledge of a material fact? YES/NO

2. Did Pat fulfill her obligations as a broker? Choose the best answer.
  - a) Yes. Because until the initial home inspections, Pat did not know if there were problems with the deck.
  - b) Yes. Because it was the obligation of Buyer #3 to get a home inspection.
  - c) No. Because Pat did not disclose the unpermitted additions nor that the work was done by an unlicensed individual.
  - d) No. Because Pat should have required the Joe to obtain the proper permits.
  
3. Should Sue, the agent for the 3<sup>rd</sup> buyer, have foreseen any red flags in this transaction? Choose the best answer.
  - a) Yes. Sue should have reasonably known there were some red flags due to the number of times the property was under contract. She should have asked additional questions.
  - b) No. Because Sue did not represent any of the previous buyers.
  - c) No. Because Sue's buyer-client chose not to get a home inspection.
  - d) No. Not unless Sue actually knew there were problems with the deck.



### **What are the responsibilities of a listing agent when acquiring a listing?**

The listing agent is responsible for verifying the accuracy of property data and the discovery of material facts when they acquire a listing.

A listing agent can compile accurate property data and discover material facts by:

- conducting a visual inspection of the property,
- asking the seller questions about the property, and
- obtaining copies of documentation regarding repairs and renovations.

In an effort to further receive accurate information, the listing agent should ask the seller if they have had a property inspection performed in the past. If they have, the agent should review the report to determine what, if anything, needs to be disclosed. Moreover, if the home inspection report lists issues with the property, the listing agent should inquire as to whether or not repairs have been made. If the listing agent is not able to confirm with written documentation that a repair has been made, then the listing agent must disclose the existence of these defect(s) to all prospective buyers and/or their agents.

It is imperative for brokers to know that the Commission will hold the listing agent accountable for the accuracy of the property information. This includes property information that is:

- communicated directly to cooperating brokers and/or buyers,
- placed in remarks of MLS, or
- included in advertisements.

**NOTE:** The seller(s) completion of the *Residential Property and Owners' Association Disclosure Statement* does not void a broker's duty to discover and disclose material facts. For instance, if a seller answers *No Representation* to a question, but the listing agent is aware of a material defect, the listing agent must still disclose the defect to prospective buyers and/or their agents.



### **When should a listing agent disclose material facts?**

A listing agent should ensure they are *timely* disclosing the existence of material facts to all parties in a transaction. *Timely* disclosure means that prospective buyers are provided the information in plenty of time to make an informed choice as to whether to make an offer on and/or purchase the property.

If a listing agent becomes aware of a material fact after a listed property has gone under contract, the fact should be disclosed *immediately* to all parties to the transaction.



### **Where can the listing agent disclose material facts?**

Currently, there is no rule that mandates *where* the disclosure of material facts must take place; however, brokers have several options for disclosure.

**Can a broker use the Residential Property and Owners' Association Disclosure Statement to disclose material facts? No.** The Residential Property and Owners' and Association Disclosure Statement is a seller's disclosure regarding their property. Brokers should not complete this form.

**So, where can a broker disclose material facts?** The broker can disclose material facts in the Multiple Listing Service. The disclosure in the MLS can take place in the remarks section and/or brokers can attach supplemental documents regarding material facts to the listing. It is possible that brokers may not be aware of material facts upon listing the property. If this is the case, once brokers are made aware of material facts, they have a duty to disclose it and should update the listing to make all parties aware of this information.

**Can a broker disclose material facts via email communication and/or text message? Yes.** A broker can disclose the existence of material facts via email communication and/or text message.

In summary, a broker can disclose material facts in the MLS, via email communication, and/or text message. As a best practice, brokers should ensure that material fact disclosures are in writing.



## **What are some best practices for a listing agent prior to listing a property?**

Some best practices for a listing agent to consider prior to listing a property are to:

- state their duty to discover and disclose material facts under License Law and Commission rules to their clients and/or consumers,
- evaluate and conduct a preliminary inspection of the property to determine if any “red flags” exist before making any statements,
- research any issues on the property to determine if they were repaired and the likelihood of the issue existing in the future,
- interview the seller about repair timelines and prior records of completion,
- determine the seller’s willingness to repair a defect if it exists, and
- disclose the material fact to all parties in the transaction.

**NOTE:** The **Doctrine of Caveat Emptor** cannot be used by a broker as a defense not to disclose material facts. North Carolina is a “buyer beware” state; however, a broker must disclose all material facts that the broker knows or reasonably should know to all interested persons in the transaction in a *timely* manner.



### ***“The Garage Has Feet”***

Jessica, a buyer agent, represents Sue. Sue is interested in a residential property in an older, established neighborhood. Jessica and Sue view the property.

While viewing the property, Jessica is concerned because Rachelle, the listing agent, describes the property as having 3264 square feet in the MLS. Jessica tells Sue that she believes the square footage wrongfully includes 576 square feet from the garage. Jessica does not advise Sue to have the property professionally measured, and she does

not notify Rachelle of the misrepresentation. Sue purchases the property and is later informed that the property is actually 2688 square feet.

Did Jessica fulfill her duties as a broker? Why or why not? Choose the best answer.

- a) No. Because she did not inform Rachelle of her misrepresentation of the square footage.
- b) Yes. Because she made Sue aware of the misrepresented square footage.
- c) No. Although she advised Sue that the square footage may be inaccurate, she did not advise her to have the property professionally measured or notify Rachelle of the inaccuracy.
- d) Yes. Because she did not have a duty to inform Rachelle about her misrepresentation of the square footage.



### **What are the responsibilities of a buyer agent?**

The buyer agent has a responsibility to inquire about the presence of material facts for their client. A buyer agent may generally rely on the accuracy of the property information provided by the listing agent, whether it is provided on a listing information sheet or in a Multiple Listing Service. Further, a buyer agent is not expected to personally verify the accuracy of information provided by the listing agent in most instances.

However, the buyer agent must still adhere to the *reasonableness standard*; therefore, they are not automatically relieved of responsibility by relying on data provided by the listing agent. Thus, if the buyer agent reasonably suspects that the information may be inaccurate, they cannot rely on it and must conduct further research.

Also, buyer agents have a duty to verify issues that their clients have identified as being material to them, such as whether or not the property has restrictive covenants or has been previously occupied by pets. Additionally, a reasonably prudent buyer agent would ask the listing agent whether the property has been previously inspected. If it has, the buyer agent should inquire about any defects listed in the home inspection report.

If a buyer is considering a property that has been owned for a short period of time, the buyer agent should ask if the seller is an investor or flipper. If that is the case, the buyer agent should ask for copies of all invoices for the renovations, and whether the renovations were performed by licensed contractors and vendors with appropriate permits obtained.



## What are some best practices for a buyer agent?

As a best practice, a buyer agent should:

- research zoning codes/requirements of a property,
- determine facts of special importance or relevance to their client,
- research property-specific information,
- evaluate and visually inspect a property for issues, and
- inquire with the listing agent about the presence of material facts.

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## HOME INSPECTIONS

Brokers are often asked whether or not conducting a home inspection is a mandatory requirement prior to purchasing a property. The short answer is no. However, the Commission encourages brokers to advise their clients to hire a home inspector to evaluate the condition of the property on the day that it is inspected.

If a client does purchase a home inspection, the broker must then review the contents of the home inspection report with the client. While reviewing the report, the broker should not attempt to interpret it. The home inspector interprets the report. However, brokers must review the home inspection report with their clients so they can advise them on possible repairs and/or price negotiation.

Before, during, and after the home inspection, brokers may have questions like:

- Where are the common places for material facts in a home inspection report?
- What should a broker do when their client receives a home inspection report that contains material facts?
- What information should a broker disclose from a home inspection report?
- How does a broker disclose material facts?
- Can a broker share the actual home inspection report?

The next set of questions will reiterate what a home inspection is, why a home inspection is important, and provide guidance to brokers on how to discover and disclose material facts arising from a home inspection report.





## What is a home inspection?

According to N.C.G.S. §43-151.45, a home inspection consists of a written evaluation of two or more of the following components of a residential building: heating system, cooling system, plumbing system, electrical system, structural components, foundation, roof, masonry structure, exterior, and interior components, or any other related residential housing component.



## Why is a home inspection important?

A home inspection is important because it evaluates the condition of a property on the day it is inspected. It also provides preliminary information to a seller or a potential homebuyer so they can make a determination on what repairs to make or whether to proceed with the purchase of the property or to terminate the contract based on the findings in the home inspection report.



## Does the Commission require buyers to hire a home inspector prior to purchasing a property?

The Commission does not require a buyer to hire a home inspector. Although a home inspection is not required, a homebuyer can gain an understanding of the condition of the property (i.e. defective systems) by hiring a licensed home inspector.

Also, a broker who represents a prospective buyer should encourage the client to conduct a home inspection during the due diligence period even if the home is new construction, or if the seller indicates they are selling the property “As Is,” or a seller performed a prelisting inspection. Moreover, differences in home inspection report details should be expected.

Even if a broker advises a client to perform a home inspection, the client may still waive the inspection. If a client chooses to waive an inspection, the broker should document the client’s waiver in the transaction file.

**NOTE:** All home inspectors are not created equal. Homebuyers should understand that property inspectors have varying levels of experience with systems within the home (i.e. HVAC, plumbing, electrical, etc.).

**NOTE:** An appraisal is not the same as a home inspection. An appraisal is an opinion as to a property’s value, marketability, usefulness, or suitability.



### ***“The NOT So New HVAC”***

Jason, a BIC and listing agent with XYZ Realty, lists his personal residential property. Jason indicates in MLS that the property has new carpeting, wood flooring, and a new HVAC system. Further, he writes in the MLS remarks that the property qualifies for conventional financing although his community consists mainly of rental properties.

Jason uses the square footage in the tax records to enter the property in MLS. During the listing period, Jason has three buyers contract to purchase the property but all of the contracts were terminated after a property inspection indicated material defects with the HVAC system. Jason does not update the listing with this new information from the home inspection report.

Chad, the fourth buyer, enters into an agreement to buy the property and hires a vendor to perform a home inspection. His inspection report also indicates that the HVAC system has material defects. Chad is no longer interested in purchasing the property and terminates the contract during the due diligence period. Jason updates the *MLS after* Chad terminates the contract.

1. If Jason is an unlicensed individual, does he have to disclose material facts?  
YES/NO
2. If Jason is an unlicensed individual, does he have to disclose material facts on the *RPOADS* form? YES/NO Why or Why not?
3. As a licensed broker selling his own property, has Jason violated License Law and Commission rules? Choose the best answer.
  - a) Yes. Because in this transaction, Jason is in the role of a private seller.
  - b) No. Because home inspection reports can vary and the previous reports were just opinions.
  - c) Yes. Because he relied on tax records for the square footage and failed to disclose a material fact regarding the HVAC.
  - d) No. Because he did not attempt to represent the buyers and owed them no obligations.



## Where are material facts commonly found in a home inspection report?

Home inspection reports may reveal that a property has several issues that may need to be repaired and/or replaced. Once brokers are accustomed to reviewing home inspection reports, they may realize that there are some common places that material facts may exist in the report.

Brokers should read and review the entire home inspection report with their clients and become familiar with the common places material facts may exist such as:

- Roof
  - damaged boots
  - rotted fascia and soffit boards
  - missing or torn shingles
- Attic
  - damaged trusses
  - lack of insulation
- Crawlspace
  - lack of vapor barrier
  - damaged floor joists
  - water intrusion
  - damaged vents
  - termites
  - lack of foundation for piers.



## What should a broker do when their client receives the home inspection report and it contains material facts?

They should thoroughly review the home inspection report with the client. If the broker or client has any questions about items discussed in the report, the broker should ask for clarification or an explanation from the home inspector. The broker also has an affirmative duty to disclose any and all material facts identified in the inspection report.

**NOTE:** During the review of the home inspection report, the broker should not attempt to step outside of their area of expertise by interpreting the condition of the property. If the broker or client has any questions about items discussed in the report, the broker should ask for clarification or an explanation from the inspector regarding the issues/defects. Also, a broker should also encourage clients to order specialized inspections when these types of reports are suggested by home inspectors.



## What information should a broker disclose from a home inspection report?

The broker must disclose ANY defect and/or issue regarding the property that is listed in the report to ALL parties in the transaction.

Let's say a broker advised a seller to perform a home inspection before listing their property and the inspection report revealed several material facts. According to N.C.G.S. §93A-6(a)(1), the broker must disclose all material facts to all parties in the transaction.

***What if the seller-client tells the broker not to disclose the material facts in the home inspection report?*** If the seller tells the broker not to disclose the material facts, the broker must inform the seller-client that they have a mandatory obligation to disclose it and proceed with the disclosure.

***What if a broker represents a buyer-client?*** If a broker represents a buyer-client and discovers upon review of their home inspection report that a material fact exists, the broker must inform all parties to the transaction and this includes the listing agent and/or seller, if they are unrepresented. As stated previously, if a buyer-client also instructs the broker not to share the information, by law the broker cannot follow the unlawful instructions from the buyer and should proceed with the material facts disclosure.

In plain words, a broker must disclose all material facts in the home inspection report to all parties in the transaction regardless of who they represent.



## How does a broker disclose material facts?

As mentioned previously, brokers have several options to assist them with disclosing material facts. Brokers may choose to include this information in the listing description, in the remarks section of the MLS, via email communication and/ or text message.

Regardless of the method the broker uses to disclose this information, the disclosure should be in writing.



## Can a broker share the actual home inspection report?

**It depends.** When a client orders a home inspection, the findings within the report are considered confidential information; however, if the report is shared with the broker, the broker must disclose all material facts. *What if a seller-client shares with their broker a home inspection that was ordered prior to listing their property? Can a broker share the report? It depends.* If the seller-client advises the broker not to share the home inspection report with prospective buyers, the broker must not share the actual home inspection report. However, the broker must disclose the material fact findings from the report, even though the report findings were originally considered confidential.

Similarly, if a prospective buyer performs a home inspection, then the findings within their home inspection report are also considered confidential information until they share the report with their buyer agent who must still disclose all material facts. Further, the prospective buyer may or may not choose to share the actual inspection report with the seller. If the prospective buyer indicates that their buyer agent can share the home inspection report with the seller, the buyer agent may do so. If the buyer agent does share the report with the seller, the findings within the report will no longer be considered confidential information.

If a buyer agent does share the home inspection report with the listing agent, can the listing agent share the report with other cooperating brokers? It depends. First, after the report is shared, it is no longer considered confidential information. However, the seller may prohibit their agent from sharing the actual report with others. If the seller prohibits this, then the agent must follow the instructions of the seller and not share the actual report. The agent must still disclose material facts.

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## BUILDING PERMITS

The Commission does not expect brokers to remember all of the requirements for obtaining a building permit; however, brokers should have some knowledge regarding the basic requirements for when a building permit is required.

Brokers should accurately disclose material facts such as whether or not required building permits were obtained.

Various resources are available to assist brokers with obtaining information about building permits. For example, in June of 2021, the Commission published an article entitled, [Building Permit's - A Broker's Responsibility](#). This article outlines for brokers the requirements for obtaining building permits for original construction, additions, renovations, and repairs as determined by county and/or municipal building inspection offices.



### ***“Tiki Time”***

Mark, a listing agent with ABC Realty, lists Tara’s property. Mark is excited about listing Tara’s property because she has a hard-wired tiki bar with an outside kitchen and screened porch in her backyard. Mark knows these features will attract several potential buyers. As Mark is entering the information in the MLS, he asks Tara if the tiki bar and screened porch were upgrades constructed by the builder. Tara says that she constructed the tiki bar and screened porch herself after watching a do-it-yourself television show.

Mark is intrigued but wants further clarification and asks Tara if a general contractor assisted her with the project. Tara says no and further explains that she did not pull any permits since she is the homeowner.

Mark does not include this information in the listing description or disclose it to prospective buyers and/or cooperating brokers.

Did Mark fail to fulfill his duties as a broker? Choose the best answer.

- a) Yes. Because Mark was aware that permits were not obtained for plumbing and electrical work and the renovation project was done by an unlicensed person.
- b) No. Because Mark was not aware of any problems with the tiki bar or the screened porch.
- c) No. Because Tara, the homeowner, informed Mark that permits were not required.
- d) Yes. Because all construction projects require permits.



### **When is a building permit required?**

N.C.G.S. §160D-1110(c) states that no permit is required for any construction, installation, repair, replacement, or alteration performed in accordance with the current edition of the North Carolina State Building Code costing fifteen thousand dollars (\$15,000) or less in any single-family residence *unless* the work involves any of the following:

- (1) the addition, repair, or replacement of load-bearing structures;
- (2) the addition or change in the design of plumbing;
- (3) the addition, replacement, or change in the design of heating, air-conditioning, or electrical wiring, devices, appliances, or equipment,

other than like-kind replacement of electrical devices and light fixtures;  
or  
(4) the addition (excluding replacement) of roofing.

**NOTE:** Permit requirements for local jurisdictions vary. Brokers are not expected to interpret the statutes for building permits. However, a broker is expected to inquire about additions/renovations, the existence and/or lack of permits, and red flags that may indicate work has been done to the property. A broker should contact the Building Inspection Department to clarify if/when a permit is required if there is some confusion.



### **What are some red flags that may indicate the need for a building permit?**

Red flags may exist when a seller has:

- added,
- replaced,
- repaired, and/or
- changed some item that affects the structure or the plumbing, HVAC or electrical systems of the property.

If a red flag exists, brokers should ask questions to obtain more information, such as:

- What renovations were performed?
- Who performed the renovations (i.e. licensed contractor/vendor)?
- Did you obtain a permit for the renovations?

Brokers are not expected to become familiar with all state and local permitting requirements; however, they are expected to recognize red flags and ask additional questions.



### **How should a broker verify whether a permit was obtained?**

When a broker lists a property, the broker should inquire about all of the renovations, additions, and repairs made during the seller's ownership.

As a best practice, brokers should contact the local building inspection office to verify:

- whether permits and/or occupational licenses were required for the renovations;
- whether permits were pulled, and obtain copies of the permits.

Additionally, brokers should make a good faith effort to obtain the paid invoices which reference the work that was also completed on the property.



**If a building permit was required but not obtained, must a broker disclose this information?**

**Yes.** If a broker discovers that the seller failed to obtain a required permit, the broker must disclose this material fact to all prospective buyers, even if the seller chooses not to disclose it.

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## SQUARE FOOTAGE



### *“Below the Grade”*

Jackie, a listing agent, is instructed by her seller-client, Tamara, to hire a vendor to calculate the square footage of her property. The vendor indicates that the property has 3,419 square feet of heated living area and 1,294 square feet of “partially finished area (below grade)” which is unheated. Jackie includes the unheated area as “Living Area Below Grade” in the MLS and represents that the property has 4,713 square feet instead of 3,419 square feet.

Several buyers are interested in the property. Tamara enters into a contract with a buyer and also accepts a back-up contract on the property. Tamara’s contract with Buyer #1 is terminated during the due diligence period due to repair issues. Jackie does not revise the MLS listing. Saul is the buyer in the back-up contract. During his property inspection, Saul discovers that the basement does not have a heat source and terminates his contract due to misrepresentation.

After Saul terminates the contract, Jackie revises the square footage information in the MLS, discloses the repair issues, and the lack of a permanent heat source in the basement to subsequent buyers.

1. Is it mandatory under Commission rules for a broker to state the square footage of a property in a listing? YES/NO



2. Did Jackie fulfill her duties as a broker?

- a) Yes. Because Jackie immediately corrected the square footage and repair issues in the MLS once it became a problem for the buyers.
- b) No. Because Jackie initially misrepresented the square footage measurement of the heated living area.
- c) Yes. Because Jackie was relying on the square footage measurements from an outside vendor.
- d) No. Because Jackie should have made no reference to the square footage of the unheated below grade area.

The Commission is often asked to clarify whether or not brokers are required to state the square footage of a property in the listing description, and the answer is no. The Commission has published a resource entitled, [Residential Square Footage Guidelines](#), to clarify whether stating the square footage of a property is required by brokers. Further, it also assists brokers with how to measure, calculate, and report (both orally and in writing) the living area contained in detached and attached single-family residential dwellings.

Again, brokers are not required by Commission rules to report the square footage of properties offered for sale (or rent); however, when they do report square footage, it is important that the information they give is accurate. The Commission is aware that brokers who are members of a professional trade association, may be required to report the square footage of a property in a listing. Therefore, the Commission recommends brokers to carefully follow the *Residential Square Footage Guidelines* or any other standards that are comparable to them, including those approved by the American National Standards Institute, Inc. (ANSI) which are recognized by the Commission as comparable standards. Brokers should be aware of the standards a vendor may use and the differences within the standards when they are hired to measure a property.

Also, in 2015, the Commission published an article, [Your Square Footage Measurement Must Be Right When Listing a Property](#). This article is still applicable to brokers today. The article provides responses to some of the most frequently asked questions regarding square footage. Let's review some of the questions and their responses.



### **Do listing agents have to report square footage?**

**No.** The Commission does not require listing agents to report square footage. However, if they decide to report the square footage of a property, it must be accurate. Brokers should obtain the correct square footage by measuring it themselves or utilizing the services of a vendor.



### **Can tax records be used as a resource for square footage measurements?**

**No.** Brokers cannot utilize tax records as a resource for square footage measurements. If a broker finds that after measuring the property, the square footage measurement differs from the information in the tax records, there may be other issues, like a permit, that needs to be investigated and resolved.

**NOTE:** Blue prints are also not an acceptable resource for square footage measurements.



### **Can an appraiser measure the property?**

**Yes.** Although not required, an appraiser is generally a very good source to measure a property due to their training and experience. The Commission will normally allow a broker to rely on a licensed appraiser's current measurement as long as that reliance is reasonable. Regardless of who performs the measurement, the broker or an appraiser, the broker should keep the measurements on file in the event of a question or problem arising.



### **Can I use an old appraisal?**

**No.** A broker should not use an old appraisal or an old MLS listing description since there may have been changes to the property.



## What happens if a broker reports the wrong square footage?

According to N.C.G.S. §93A-6(a)(1), a broker who makes any willful or negligent misrepresentation or pursues a course of misrepresentation through advertising, may be subject to disciplinary action by the Commission. Therefore, if the square footage is wrong, the listing agent **and** firm may be held responsible. Further, per Rule 58A .0110, the BIC is responsible for all advertising, so they may also be subject to disciplinary action.

**NOTE:** The Commission will evaluate the facts of each case to determine what caused the inaccurate square footage. If you would like to know the types of questions the Commission may ask during the course of an investigation, please read the article, [Your Square Footage Measurement Must Be Right When Listing a Property](#), for more details.



## How can a broker include the unpermitted section of a property in the square footage?

The unpermitted section within a property should be included separately and disclosed to all of the parties in writing. A listing agent should disclose this information in writing to ensure they are not misrepresenting the property and/or misleading the buyer. Further, the buyer should be made aware of the unpermitted section's size and location as well. *Brokers should clearly identify unpermitted space within a property.*

**Note:** The Commission recommends brokers to carefully follow the *Residential Square Footage Guidelines* or any other standards that are comparable to them, including those approved by the American National Standards Institute, Inc. (ANSI). Brokers can also familiarize themselves with the ANSI Standards by accessing the [FannieMae website](#).

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## SEPTIC PERMITS

Brokers must research the type of septic system a property has and disclose it to all parties in the transaction. North Carolina requires that every residence have an approved system for sewage disposal. The approved systems for sewage disposal are:

- municipal systems
- community systems, and
- onsite systems.



### *“The Questionable Bedroom”*

Rebecca lists a property for her seller-client, Alice. Alice informs Rebecca that she is unsure of the type of septic system and if it permits a four-bedroom house. Rebecca does not pull the septic permit and uses the prior listing description which advertised the property as having four bedrooms and 2 bathrooms. Jonah and Lois purchase the property under the impression that it is permitted as a four-bedroom house.

During a renovation project, Jonah and Lois discover the septic permit is for a three-bedroom house. In order to move forward with their renovations, Jonah and Lois must purchase a septic system that accommodates a four-bedroom house.

Did Rebecca fulfill her duties as a broker? Why or Why not? Choose the best answer.

- a) No. Because Rebecca did not research the type of septic system, pull the permit to determine the number of bedrooms permitted, or disclose the information to all parties in the transaction.
- b) Yes. Because Rebecca advertised the property using the previous listing description.
- c) No. Because Rebecca did not disclose the type of septic system.
- d) Yes. Because brokers are not required to pull septic permits.



### **Why is a septic permit important?**

A septic permit is important because it sets the capacity limit for the system, specifically enumerating the number of bedrooms for a residence (with the presumption that two people will occupy a bedroom), or the maximum number of rooms or some other measure for a nonresidential structure.

The permit may also include a map that depicts the best location for the septic system and a repair area. Moreover, the septic permit may also prohibit the use of an automatic dishwasher, garbage disposal, or other mechanism that might overload the system.

**NOTE:** If a property uses an onsite sewage disposal system, the permitting records should be available from the local Health Department or NC Department of Environmental Quality. Brokers should verify the number of bedrooms authorized by the septic permit and discover whether any restrictions are attached to the septic permit, such as prohibition against dishwashers, garbage disposals, etc., to comply with License Law.



### **Should a broker verify the existence of a septic system before listing a property?**

**Yes.** Brokers should verify the type of septic system, if any, that serves the property and the number of bedrooms that are permitted before making any representations about the listing.

To begin the verification process, brokers can interview the seller and ask the following questions about their sewage disposal system:

- What type of septic system do you have?
- Where is the septic system located?
- Where is the repair area for the septic system located?
- Is the septic system working properly?
- Has the septic system been maintained in the past?
- Has the septic system been repaired in the past? If so, when and by whom?
- When was the septic system last pumped?
- Have there been any signs of possible failure with the septic system?
- Have there been any additions to the house?

Brokers can also contact the local Health Department in the county in which the property is located to obtain a copy of the septic permit.

As an additional resource, brokers can use the article, [Septic System Owner's Guide](#), published by North Carolina State Extension Publications, to assist them with gathering introductory information from a homeowner regarding their septic systems.

**NOTE:** The following questions contain responses written by Regulatory Affairs in the article, [Septic Permits- A Refresher](#). Brokers should review the responses below to ensure they are accurately providing information in advertisements or listing descriptions about the septic system.



## **Should a broker assume that a property is connected to municipal water or is serviced by a septic system?**

**No.** Brokers should never assume that a property is connected to municipal water or serviced by a septic system. Most importantly, brokers should never assume that rural homes are the only properties that have septic issues.

A broker should consider the location of the property (i.e. whether it is in an older neighborhood), whether the property exhibits “red flags” (e.g. depression in the yard or the existence of stone markings for the septic tank), or seller confirmation on the existence of a septic system/connection to municipal water to start the verification process on the type of septic system that is on the property.

Brokers can also verify the existence of a municipal connection from the city or county, depending on the location of the property.



## **What is a combination system and what should the broker know about this type of system?**

A combination system is when a property’s septic system is connected to a municipal system but the water is not. Brokers should be aware that city or county responsibilities ends where the septic system connects to the municipal system. Therefore, issues with a pump connected to the septic tank, root damage to pipes in the yard, or other problems that may occur on an owner’s land, are the responsibility of the homeowner.

**NOTE:** Combination systems with municipal system connections may not have a permit on file.



## **What should a broker do if the septic system is an onsite system?**

Once a broker determines that a property has an onsite septic system, they should call the county health department. The county health department should provide the broker with the septic permit information. The broker should review the septic permit to determine the capacity that has been set for the property. Brokers should also analyze the permit to determine whether or not it includes other limitations, such as prohibiting the use of a dishwasher or garbage disposal.

Most importantly, a broker should only advertise the number of bedrooms specified in the septic permit. If the broker misrepresents the property as having more bedrooms than the septic system permits, the system could be overused and eventually fail. Also, if the broker advertises more bedrooms than are permitted, they are engaging in willful misrepresentation.

If the broker experiences issues with locating records for the septic permit, they may utilize the tax records to *assist* with the determination of *permitted* bedrooms. For instance, if the property has four bedrooms but the tax records indicate three bedrooms, this may indicate that three bedrooms is the septic permit's limit. In cases where the permit cannot be located, a broker should disclose what they know; namely, that the property has an on-site septic system but the system permit could not be located. Further, the broker should also document in the transaction file that the septic permit could not be located.

**NOTE:** Brokers should take reasonable steps to ensure that they are discovering and disclosing the correct sewage system utilized by any home they are listing. If the home is connected to an on-site septic system, then the property should be represented as having the amount of bedrooms as indicated on the permit.

Buyer agents should be alert to any red flags and perform their own due diligence if there are concerns about the septic system.

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## SUMMARY OF IMPORTANT POINTS

- A material fact is ANY fact that could affect a reasonable person's decision to buy, sell, or lease.
- The four categories of material facts are:
  - facts about the property itself,
  - facts that relate directly to the property,
  - facts directly affecting the principal's ability to complete the transaction, and
  - facts that are known to be of special importance to a party.
- A broker has an affirmative duty to discover and disclose material facts to all parties in a transaction.
- Brokers are expected to take reasonable steps to discover all pertinent facts about a property that are necessary to serve their client's interest.
- Listing agents are expected to:
  - accurately gather all information about a listed property necessary to effectively market the property; and
  - comply with disclosure requirements to prospective buyers.
- buyer's agents are expected to:
  - assist buyer-clients in obtaining any information related to the property; and
  - gather specific property information that is of particular interest to the buyer-clients.
- Any information that may affect the principal's rights and interests or influence their decision in the transaction must be disclosed, such as:
  - the other party's willingness to agree to a price or terms different from those previously stated,
  - the other party's motivation for engaging in the transaction, or
  - any other information that might affect the principal's rights and interests or influence the principal's decision in a transaction.
- State and fair housing laws excuse the disclosure of certain facts that seem material such as:
  - disclosing the death or serious illness of a previous property occupant, or
  - disclosing a convicted sex offender occupying, having occupied, or residing near a property,
- State and fair housing laws prohibit:
  - disclosing a current or former occupants' AIDS/HIV status.
- Brokers must discover and disclose material facts to all interested parties in the transaction.
- The mandatory disclosure of material facts includes disclosure of:
  - facts about the property that the broker knows exist,
  - facts about the property the broker reasonably should know exist, and



- information that is considered common knowledge.
- A broker must disclose a material fact or potential material fact to a client/customer so they can possess the adequate knowledge to:
  - make an intelligent decision regarding a property,
  - negotiate repair services, or
  - decide to terminate the contract.
- The Commission determines whether or not a broker knew the existence of a material fact by:
  - analyzing documents,
  - written correspondence, and
  - interviewing individuals involved in the transaction.
- An examination of public records and educational resources are used by the Commission to determine whether or not a broker should reasonably know a material fact about a property.
- The Commission uses the *Reasonableness Standard* to evaluate a broker's duty to discover and disclose material facts.
- A broker has a duty to discover and disclose any material fact if a reasonably knowledgeable and prudent broker would have discovered the fact during the course of the transaction.
- A red flag is the presence of any fact or issue that should make a reasonably prudent broker working with the buyer or seller suspect that the information provided by another party may be incorrect.
- Red flags can be:
  - stains on the ceiling, floor, or in the cabinet,
  - discolored flooring,
  - absence of septic permits,
  - unpermitted spaces,
  - leaks,
  - stream in the backyard,
  - cracked foundational issues, or
  - miscalculations of square footage.
- If red flags are present, a broker must conduct additional research by:
  - asking the owner about known issues with the property
  - measuring the property or hiring a vendor to measure the property if there is a discrepancy (e.g. red flag) in square footage,
  - asking the owner to provide service records for repairs conducted on the property,
  - researching the existence of septic permits and building permits with the local municipality, or
  - advising the client to hire an inspector and/or contractor to estimate and/or repair issues.

- Common knowledge is defined as knowledge that is widely or generally known to everyone or nearly everyone in a community and can be obtained in a multitude of ways.
- The listing agent is responsible for verifying the accuracy of property data and the discovery of material facts.
- The listing agent can compile accurate property data and discover material facts by:
  - conducting a visual inspection of the property,
  - asking the seller questions about the property, and
  - obtaining copies of documentation regarding repairs and renovations.
- Brokers should ensure they are timely disclosing material facts to all parties in a transaction.
- Timely disclosure of material facts occurs when:
  - the listing agent discloses the existence of a material fact in the description of any advertisement or property listing, and/or
  - before prospective buyers and/or agents view the property.
- A listing agent should consider the following best practices before listing a property:
  - state their duty to discover and disclose material facts under License Law to their clients/consumers,
  - evaluate and conduct a preliminary inspection of the property to determine if any “red flags” exists before making any statements,
  - research issues on the property to determine if they were repaired and the likelihood of the issue existing in the future,
  - interview the seller about repair timelines and prior records of completion,
  - determine the seller’s willingness to repair the defects, and
  - disclose the defects to all parties in the transaction.
- If the listing agent is informed of material facts after they have listed the property, the material facts should be disclosed immediately to all parties in the transaction.
- A buyer agent has a responsibility to inquire about the presence of material facts for their client.
- A buyer agent may rely on the accuracy of the property information provided by the listing agent unless the buyer agent reasonably suspects that the information may be inaccurate.
- A buyer agent has a duty to verify issues that their clients have identified as being material.
- As a best practice, a buyer agent should:
  - research zoning codes/requirements of a property,
  - determine facts of special interest or relevance to their client,
  - research property-specific information,
  - evaluate and visually inspect a property for issues, and

- inquire with the listing agent about the presence of material facts for their client.
- A home inspection consists of a written evaluation of two or more of the following components of a residential building: heating system, cooling system, plumbing system, electrical system, structural components, foundation, roof, masonry structure, exterior, and interior components, or any other related residential housing component.
- A home inspection is important because it evaluates the condition of the property on the day it is inspected.
- Homebuyers are not required to conduct a home inspection prior to purchasing a property; however, brokers are encouraged to advise their clients to conduct a home inspection.
- They should thoroughly review the home inspection report with the client. If the broker or client has any questions about items discussed in the report, the broker should ask for clarification or an explanation from the home inspector.
- The broker also has an affirmative duty to disclose any and all material facts identified in the inspection report.
- A broker should not attempt to interpret the home inspection report or the condition of the property.
- Brokers are not expected to know all of the requirements for obtaining a building permit.
- Red flags may exist when a seller has:
  - added,
  - replaced,
  - repaired, and/or
  - changed some item that affects the structure or the plumbing, HVAC or electrical systems of the property.
- If a red flag exists, brokers should ask questions to obtain more information, such as:
  - What renovations were performed?
  - Who performed the renovations (i.e. licensed contractor/vendor)?
  - Did you obtain a permit for the renovations?
- Brokers should contact the local building inspection office to verify whether:
  - permits and/or occupational licenses were required, and
  - permits were pulled, and obtain copies of the permits.
- If a broker discovers that the seller failed to obtain a required permit or failed to hire a licensed professional when a license was required, then the broker must disclose this material fact to all prospective buyers, even if the seller chooses not to disclose it.
- A Commission publication entitled, *Residential Square Footage Guidelines* is available to assist brokers with measuring, calculating, and reporting (both orally and in writing) the living area contained in detached and attached single-family residential dwellings.

- Brokers are not required by License Law or Commission rules to report the square footage of properties offered for sale (or rent); however, when they do report square footage, it is essential that the information they give is accurate.
- Brokers cannot use tax records or blueprints as a resource for square footage measurements.
- Brokers should not use an old appraisal or old MLS listing description as a resource for square footage measurements.
- Unpermitted additions to a property should not be included in the overall square footage of the property. The unpermitted section should be included in the description separately and disclosed to all of the parties in writing.
- Brokers must research the type of septic system a property has due to it being a material fact.
- A septic permit is important because it sets the capacity limit for the system and specifies the number of bedrooms for a residence, or the maximum number of rooms or some other measure for a nonresidential structure.
- Brokers can contact the local Health Department in the county in which the property is located to obtain a copy of the septic permit.

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## ANSWERS TO DISCUSSION QUESTIONS

### *For Discussion on page 1*

#### *Is it a Material fact?*

True or False. Indicate whether or not the following “facts” are material.

Answers in bold.

- a) Square footage error - **True**
- b) Synthetic Stucco that has been repaired or replaced - **True**
- c) The mere existence of polybutylene plumbing - **False**
- d) A structural issue that has been repaired - **True**
- e) A well recently contaminated with e-coli but current tests reveal no presence of bacteria - **True**
- f) A roof that leaks during severe rain - **True**

#### *“See No Evil, Say No Evil”*

Jake, a broker with A+ Realty, meets with Peter, a property owner, to provide a listing presentation. During the meeting, Peter says that he recently had a home inspection that indicated water leakage in the basement walls and crawl space, but that he has ordered no further inspections to verify the issue or determine repair needs. Jake tours the property and observes no moisture or standing water. Peter decides to list the property with Jake. On the *Residential Property and Owners’ Association Disclosure Statement (RPOADS)* Peter selects “No Representation” to all of the questions. Throughout the listing period, there is no visible evidence of moisture or water, so Jake does not mention Peter’s inspection report to any of the prospective buyers.

1. Did Jake fulfill his duties as a broker? YES/NO

Answer: No.

2. Why or Why not? Choose the best answer.

Answer in bold.

- a) ***Although Jake did not personally observe any moisture or standing water, he still had an obligation to disclose the water leakage in the basement walls and crawl space.***
- b) Because Jake has an obligation to disclose whether he personally saw any water or not.
- c) Because the owner, Peter, already checked “No Representation” on the RPOADS.
- d) Because Peter’s completion of the RPOADS relieved Jake of any additional disclosure obligations.

### ***“Dues Surprise Party”***

Linda, a broker with X Realty, lists her personally owned residential condominium unit with her firm on March 1. The unit goes under contract on March 3 and the buyer submits the Due Diligence Fee and the Earnest Money Deposit in accordance with the terms of the contract. Linda receives notification of a proposed assessment from the HOA on March 5. If the assessment is approved, HOA dues will be temporarily increased starting in July to pay for various exterior repairs. Must Linda tell the buyer about the proposed assessment? Why or why not? Choose the best answer.

Answer in bold.

- a) No. Because she owns the property, Linda has no obligation to share the information about the assessment unless it is approved prior to closing.
- b) No. Because the proposed assessment is only for a temporary increase in dues, there is no obligation to disclose.
- c) **Yes. Because Linda is a broker, she must disclose the proposed assessment because it is a fact that is directly related to the property.**
- d) Yes. Because she owns the property, Linda is obligated to the share the information about the assessment if it is approved prior to closing.

### ***For Discussion on page 11***

#### ***“The Unexpected Tenants”***

Charlie, a seller-client, hires Teresa, an agent with 123 Homes, to list his property. Charlie informs Teresa that his family cemetery is located on the property. Teresa decides not to disclose this information to potential buyers because she does not want to scare them off and she wants the property to sell quickly. Fred, a buyer, purchases the property and realizes the existence of the cemetery after he moves into the home.

Fred contacts Teresa and expresses his anger with the cemetery not being disclosed prior to his purchase of the property. Did Teresa fulfill her duties as a broker? Why or why not? Choose the best answer.

Answer in bold.

- a) Yes. Because it was Charlie’s duty as a seller to disclose this information to prospective buyers.
- b) No. Because Teresa did not advise Charlie to disclose this information in the seller’s disclosure.
- c) Yes. Because Teresa did not represent Fred and had no duty to discover and disclose material facts to him.
- d) **No. Because Teresa was aware of the cemetery prior to listing the property and should have disclosed this fact relating to the property to all parties in the transaction.**

## ***For Discussion on page 14***

### ***“The Raining Skylights”***

Cher, a seller, wants to list her property, so she hires Zack, a listing broker, with ABC Homes.

During the prelisting walk through, Cher informs Zack that she has completed the Residential Property and Owners’ Association Disclosure Statement and Mineral and Oil and Gas Rights Mandatory Disclosure Statements.

Zack asks Cher if she has any problems with the roof leaking because he notices several stains near the skylights. Cher states that the roof only leaks during heavy rainfall. She also states that the insulation surrounding her skylights is decayed and she does not have the extra funds to repair them before listing the property.

Zack creates the listing in the MLS and does not disclose the leaking roof. Sam, a buyer agent, and his buyer-client, Shannon, go to view Cher’s property. Sam notices the stains on the ceiling and discusses this information with Shannon. Shannon still expresses an interest in the property; however, Sam informs her that he needs to ask Zack some additional questions and conduct more research before he could assist her with making an intelligent, informed offer.

1. Did Zack fulfill his duties as a broker? Why or why not? Choose the best answer.

Answer in bold.

- a) No. Because Zack is not a home inspector.
  - b) No. Because Cher made Zack aware of the leaking roof and he failed to disclose it to all parties in the transaction.**
  - c) Yes. Because Zack did not verify any issues.
  - d) Yes. Because Cher’s comments are her opinions.
2. Did Sam fulfill his duties as a broker? Why or why not? Choose the best answer.

Answer in bold.

- a) Yes. Because Sam told Shannon they needed further information regarding the property.
- b) No. Because Sam should not have written the offer without an additional investigation.
- c) Maybe. Sam did reasonably suspect there was an issue; therefore, the best practice would be for Sam to get the additional information from Zack, the listing agent, before assisting the buyer with her offer.
- d) Yes. Because Sam did not know for certain if there were any problems with the skylights.

## ***For Discussion on page 17***

### ***“Slip Sliding Away”***

Maxine is the buyer agent for Alesha. Alesha is interested in purchasing a beach-front property. Maxine contacts Rob, a listing agent, for the property. During the conversation with Rob, Maxine asks the following questions:

1. Does the property have any storm damage from the hurricane last year?
2. What are the locations of the set-back lines for the property?
3. Can a structure be rebuilt on the lot if the existing structure was extensively damaged?

Rob tells Maxine that the hurricane caused cosmetic damage and is currently being repaired. He stated that even if a hurricane were to cause serious damage in the future, he saw no reason she couldn't rebuild. He also states that he will provide her with additional information later because he did not know the locations of the set-back lines. Maxine informs Alesha of the information she receives from Rob. Alesha tells Maxine she really likes the property and instructs her to submit an offer. Maxine submits the offer without receiving the additional information or verifying the extent of the damage to the property.

Alesha hires vendors to perform the inspection and survey soon after she goes under contract on the property. After the survey, she is informed to contact the Division of Coastal Management for more details. Maxine calls the Division and they tell her the lot has more than 50% damage; therefore, the existing structure on the property cannot be rebuilt using the current footprint.

Alesha does not want to proceed with the transaction and terminates the contract even though the due diligence period has expired. The seller, releases Alesha's earnest money deposit.

1. Should Rob possess common knowledge regarding the properties he list? YES/NO

**Answer:** Yes. Common knowledge is knowledge that is widely or generally known to everyone or nearly everyone in the community. If Rob is going to practice in an area, Rob should have common knowledge, specifically geographic competence about properties in his area.

2. Did Rob fulfill his duties as a broker? Choose the best answer.

Answer in bold.

- a) Yes. Because the owner told Rob it was being repaired.
- b) No. Because Rob should have knowledge about common requirements in coastal management areas and should have known that damage beyond 50% would prohibit rebuilding in the coastal management area.**
- c) Yes. Because Rob may have been unaware of the actual damage to the structure.
- d) No. Because Rob does not usually deal with coastal properties.



3. Did Maxine fulfill her duties as a broker? Choose the best answer.

Answer in bold.

- a) Yes. Because Maxine relied on the information from the listing agent.
- b) No. Because Maxine did not have enough information and repeated a misrepresentation made by the listing agent.**
- c) Yes. Because Maxine is not a structural engineer.
- d) No. Because Maxine must do a visual inspection of the property before writing an offer.

### ***For Discussion on page 19***

#### ***“The HGTV Special”***

Pat, a listing agent with 123 Realty, is representing Joe in the sale of his property. Joe, an investor, tells Pat that he purchased the property seven months ago and his son, Sam, performed the renovations. The renovations included the addition of a bedroom, bathroom, deck and HVAC system. Pat asks Joe for a copy of the permits. Joe states that Sam is not a licensed contractor and he did not obtain permits.

After receiving this information, Pat lists the property and advertises all of the new renovations. Buyer #1 offers to purchase the property. During their inspection, the home inspector states that the deck is not structurally sound. Buyer #1 terminates the contract during the due diligence period. Pat does not update the listing nor did Joe revise any seller disclosures.

Buyer #2 submits an offer and has the property inspected as well. The inspection report for Buyer #2 reveals the same deck issue noted in the inspection report submitted by Buyer #1. Buyer #2 submits a Due Diligence and Repair Addendum. Joe agrees to make the repair for Buyer #2. Buyer #2 has the property re-inspected after the repair was allegedly made and it has not been fixed. Buyer #2 terminates after the due diligence period. Joe refuses to release the earnest money deposit to Buyer #2. Also, he does not update any seller disclosures and Pat does not revise the listing in the MLS.

Pat receives an offer from Buyer #3 who is represented by Sue, a buyer agent. After advisement from Sue, Buyer #3 offers to pay the full price in cash, close within seven days, and will not conduct an inspection. Joe accepts the offer and the property closes without incident. After closing, Buyer #3 discovers the house needs thousands of dollars in repairs.

1. Did Pat have knowledge of a material fact? YES/NO Why or why not?

**Answer:** Yes. Pat had knowledge of material facts when she was informed by Joe that his renovations were performed by his son, Sam, who was unlicensed. Pat also knew that Joe did not obtain permits for the renovations.

2. Did Pat fulfill her obligations as a broker? Choose the best answer.

Answer in bold.

- a) Yes. Because until the initial home inspections, Pat did not know if there were problems with the deck.
- b) Yes. Because it was the obligation of Buyer #3 to get a home inspection.
- c) **No. Because Pat did not disclose the unpermitted additions nor that the work was done by an unlicensed individual.**
- d) No. Because Pat should have required the Joe to obtain the proper permits.

3. Should Sue, the agent for the 3<sup>rd</sup> buyer, have foreseen any red flags in this transaction? YES/NO Why or Why not? Choose the best answer.

Answer in bold.

- a) **Yes. Sue should have reasonably known there were some red flags due to the number of times the property was under contract. She should have asked additional questions.**
- b) No. Because Sue did not represent any of the previous buyers.
- c) No. Because Sue buyer-client chose not to get a home inspection.
- d) No. Not unless Sue actually knew there were problems with the deck.

### ***For Discussion on page 22***

#### ***“The Garage Has Feet”***

Jessica, a buyer agent, represents Sue. Sue is interested in a residential property in an older, established neighborhood. Jessica and Sue view the property.

While viewing the property, Jessica is concerned because Rachelle, the listing agent, describes the property as having 3264 square feet in the MLS. Jessica tells Sue that she believes the square footage wrongfully includes 576 square feet from the garage. Jessica does not advise Sue to have the property professionally measured and she does not notify Rachelle of the misrepresentation. Sue purchases the property and is later informed that the property is actually 2688 square feet. Did Jessica fulfill her duties as a broker? Why or why not? Choose the best answer.

Answer in bold.

- a) No. Because she did not inform Rachelle of her misrepresentation of the square footage.
- b) Yes. Because she made Sue aware of the misrepresented square footage.
- c) **No. Although she advised Sue that the square footage may be inaccurate, she did not advise her to have the property professionally measured or notify Rachelle of the inaccuracy.**
- d) Yes. Because she did not have a duty to inform Rachelle about her misrepresentation of the square footage.

## ***For Discussion on page 26***

### ***“The Not So New HVAC”***

Jason, a BIC and listing agent with XYZ Realty, lists his personal residential property. Jason indicates in MLS that the property has new carpeting, wood flooring, and a new HVAC system. Further, he writes in the MLS remarks that the property qualifies for conventional financing although his community consists mainly of rental properties.

Jason uses the square footage in the tax records to enter the property in MLS. During the listing period, Jason has three buyers contract to purchase the property but all of the contracts were terminated after a property inspection indicated material defects with the HVAC system. Jason does not update the listing with this new information from the home inspection report.

Chad, the fourth buyer, enters into an agreement to buy the property and hires a vendor to perform a home inspection. His inspection report also indicates that the HVAC system has material defects. Chad is no longer interested in purchasing the property and terminates the contract during the due diligence period. Jason updates the *MLS after* Chad terminates the contract.

1. If Jason is an unlicensed individual, does he have to disclose material facts?  
YES/NO

**Answer:** No. Jason does not have to disclose material facts as a “seller” of the property. Sellers are not required to disclose material facts about their property in the disclosure forms.

2. If Jason is an unlicensed individual, does he have to disclose material facts on the *RPOADS* form? YES/NO Why or Why not?

**Answer:** No. Jason does not have to disclose the existence of material facts on the *RPOADS*.

3. As a licensed broker selling his own property, has Jason violated License Law and Commission rules? Choose the best answer.

Answer in bold.

- a) Yes. Because in this transaction, Jason is in the role of a private seller.
- b) No. Because home inspection reports can vary and the previous reports were just opinions.
- c) **Yes. Because he relied on tax records for the square footage and failed to disclose a material fact regarding the HVAC.**
- d) No. Because he did not attempt to represent the buyers and owed them no obligations.

## ***For Discussion on page 30***

### ***“Tiki Time”***

Mark, a listing agent with ABC Realty, lists Tara’s property. Mark is excited about listing Tara’s property because she has a hard-wired tiki bar with an outside kitchen and screened porch in her backyard. Mark knows these features will attract several potential buyers. As Mark is entering the information in the MLS, he asks Tara if the tiki bar and screened porch were upgrades constructed by the builder. Tara says that she constructed the tiki bar and screened porch herself after watching a do-it-yourself television show.

Mark is intrigued but wants further clarification and asks Tara if a general contractor assisted her with the project. Tara says no and further explains that she did not pull any permits since she is the homeowner.

Mark does not include this information in the listing description or disclose it to prospective buyers and/or cooperating brokers.

Did Mark fail to fulfill his duties as a broker? YES/NO Why or why not? Choose the best answer.

Answer in bold.

- a) ***Yes. Because Mark was aware that permits were not obtained for plumbing and electrical work and the renovation project was done by an unlicensed person.***
- b) No. Because Mark was not aware of any problems with the tiki bar or the screened porch.
- c) No. Because Tara, the homeowner, informed Mark that permits were not required.
- d) Yes. Because all construction projects require permits.

## ***For Discussion on page 32***

### ***“Below the Grade”***

Jackie, a listing agent, is instructed by her seller-client, Tamara, to hire a vendor to calculate the square footage of her property. The vendor indicates that the property has 3,419 square feet of heated living area and 1,294 square feet of “partially finished area (below grade)” which is unheated. Jackie includes the unheated area as “Living Area Below Grade” in the MLS and represents that the property has 4,713 square feet instead of 3,419 square feet.

Several buyers are interested in the property. Tamara enters into a contract with a buyer and also accepts a back-up contract on the property. Tamara’s contract with Buyer #1 is terminated during the due diligence period due to repair issues. Jackie does

not revise the MLS listing. Saul is the buyer in the back-up contract. During his property inspection, Saul discovers that the basement does not have a heat source and terminates his contract due to misrepresentation.

After Saul terminates the contract, Jackie revises the square footage information in the MLS, discloses the repair issues, and the lack of a permanent heat source in the basement to subsequent buyers.

1. Is it mandatory under Commission rules for a broker to state the square footage of a property in a listing? YES/NO

**Answer:** No. It is not a mandatory requirement under Commission rules for a broker to state the square footage of a property in a listing. If a broker does state the square footage of a property, the information must be accurate. If the information is inaccurate, the broker may be engaging in misrepresentation.

2. Did Jackie fulfill her duties as a broker? Choose the best answer.

Answer in bold.

- a) Yes. Because Jackie immediately corrected the square footage and repair issues in the MLS once it became a problem for the buyers.
- b) No. Because Jackie initially misrepresented the square footage measurement of the heated living area.**
- c) Yes. Because Jackie was relying on the square footage measurements from an outside vendor.
- d) No. Because Jackie should have made no reference to the square footage of the unheated below grade area.

### ***For Discussion on page 36***

#### ***“The Questionable Bedroom”***

Rebecca lists a property for her seller-client, Alice. Alice informs Rebecca that she is unsure of the type of septic system and if it permits a four-bedroom house. Rebecca does not pull the septic permit and uses the prior listing description which advertised the property as having four bedrooms and 2 bathrooms. Jonah and Lois purchase the property under the impression that it is permitted as a four-bedroom house.

During a renovation project, Jonah and Lois discover the septic permit is for three-bedroom house. In order to move forward with their renovations, Jonah and Lois must purchase a septic system that accommodates a four-bedroom house. Did Rebecca fulfill her duties as a broker? Why or Why not? Choose the best answer.

Answer in bold.

- a) **No. Because Rebecca did not research the type of septic system, pull the permit to determine the number of bedrooms permitted, or disclose the information to all parties in the transaction.**
- b) Yes. Because Rebecca advertised the property using the previous listing description.
- c) No. Because Rebecca did not disclose the type of septic system.
- d) Yes. Because brokers are not required to pull septic permits.