SECTION THREE

THE 4 S'S: SEPTIC, STREETS, UNDERGROUND STORAGE TANKS, & SQUARE FOOTAGE

FOR DISCUSSION

1. Sara is a Buyer's Agent whose client is under contract to purchase a home. During the home inspection, the inspector discovers a pipe that indicates the possible presence of an underground storage tank. The listing agent and seller have no information about the underground tank, and the current HVAC system is a modern heat pump. What advice/guidance should Sara offer her client?

2. Bob, a Broker, has been hired by an owner to list her home. Bob asks the owner about the septic capacity, and the owner tells him it is a 3-bedroom system but that she does not have a copy of the permit. The owner has been utilizing the home as a 3-bedroom residence for many years. May Bob rely on the owner's information and market the property as a 3-bedroom home?

3. Adriana, a Broker, lists a property for sale on behalf of a corporate owner. She markets the residential property as being 3050 square feet, noting, "Square footage per tax records." The property is sold, and the buyers are represented by a cooperating firm. Several years later, the buyer-owners decide to sell and discover that the home is only 2200 square feet of heated living space. May Adriana be held responsible for the misrepresentation? Does the original Buyer's Agent share any responsibility?

LEARNING OBJECTIVES

After completing this section, you should be able to:

- explain the extent of a broker's duty to discover and disclose material facts pertaining to:
  1) septic systems,
  2) residential street status, and
  3) underground storage tanks; and

- describe a broker's liability for any square footage representations made by the broker.

INTRODUCTION

This Section will review the facts of several disciplinary cases related to the 4 S's, followed by the Commission's directives on each issue. After reading each case, enter your recommendations as to sanctions imposed by the Commission for each respondent. Possible sanctions include:

- License *Revocation* for a definite or indefinite period of time. A broker whose license is revoked *has no license*.
- License *Suspension* for a stated period of time. A broker whose license is suspended still *has* a license but is prohibited from using it for a specified period of time.
- *Reprimand*: A public statement of disapproval by NCREC. A Broker who has been reprimanded continues to have an active license and may engage in real estate brokerage activities.

Note that the Commission has jurisdiction over brokers. While it has no jurisdiction over unlicensed persons, the Commission does have the authority to seek injunctive relief in Superior Court against unlicensed persons or entities who are illegally engaging in real estate brokerage. The Commission has exercised this injunctive power in the past to initiate legal proceedings against unlicensed persons and obtain a court order directing the person or entity to cease engaging in brokerage until such time as they are properly licensed. Failure to abide by the court order may result in a contempt of court citation which, among other things, may include a period of incarceration.

SEPTIC SYSTEMS & MISREPRESENTATION

Several of the disciplinary cases involving septic issues heard by the Commission in the past few years had similar themes, namely: a broker listed and advertised a property years ago as having more bedrooms than the septic permit allowed; the misrepresentation is discovered years later when the owner lists the property for sale. Here are the facts from a few disciplinary cases.

Case 1

A broker listed a 3200 square foot home for sale in late 2003, advertising it as a 4-bedroom residence based solely on the seller's statements and his visual inspection. The broker did not pull the septic permit, nor check the tax records, both of which indicated the property was approved for 3 bedrooms. The 2004 purchasers discovered the limitation when they went to sell in 2010 and learned that they could not expand the existing septic system to accommodate a fourth bedroom legally. The owners maintained that selling the property as a 3-bedroom home allegedly reduced the market value by more than $100,000 and they filed a complaint with the Commission.

The original listing broker argued that in 2003 "brokers were not obligated to verify information to the degree that they are today," and that it was reasonable for him to rely on the seller's representation because it was not customary to pull permits in 2003-2004. Unfortunately for this broker's defense, during the 15 years he had been licensed prior to the 2003 listing, two articles were published in the *Bulletin* regarding verifying septic permits and a third article on information that listing brokers are required to verify, including septic permits. [14-0394.]

Case 1 Disciplinary Action?

Listing Broker: _____

Case 2

The QB/BIC of a company listed a property in 2002 advertising it in the MLS as having 4 bedrooms. A couple, represented by a buyer agent affiliated with the listing company (i.e., dual agent) purchased it in March 2003 for $145,000.

The buyer-husband died in 2014; in 2015, the widow hired a listing company (not the 2003 listing company) to sell the property. The new listing broker checked the septic permit (from 1987) and discovered the system was only approved for a 2-bedroom house, not 4 bedrooms. Selling the property at the market value of a 2-bedroom house would not even pay off the outstanding mortgage. The widow was able to obtain a permit from the county to enlarge the system to accommodate a three-bedroom house at a cost of roughly $1900 to have the septic tank pumped and the system expanded.

In their joint response, the QB/BIC and buyer/dual agent from the 2003 transaction denied making any statements concerning the septic system's capacity, other than listing it as 4 bedrooms, and argued that had the buyer-couple ordered a home inspection, they could have asked the inspector about the system's capacity. [16-0094.]

Case 2 Disciplinary Action?

QB/BIC: _____

Buyer/Dual Agent: _____

Listing Company: _____

Case 3

A company listed a property in 2008 advertising it as having 3 bedrooms, when in fact the septic permit limited a dwelling to 2 bedrooms. The property sold for $352,500. When the owner prepared to sell in 2011, s/he learned from the listing broker (different company) that the septic permit specified 2 bedrooms. To avoid a significant reduction in the property's value, the owner paid $10,775 to upgrade the septic system to support a 3-bedroom dwelling.

The owner contacted the 2008 listing company which replied, in essence, that the agents (acting as dual agents) had performed their duties and since the owner had multiple inspections, including a septic inspection, the brokers had no liability. The owner then filed a complaint with the Commission.

In their initial response, the 2008 BIC and broker-associate admitted that the listing broker did not pull the septic permit but instead relied on the tax records which indicated 3 bedrooms. They argued that there was no duty in 2007 to contact health departments or check septic permits, that it was not a willful misrepresentation, and that they had a right to rely on the tax records which have shown the property as 3 bedrooms since its construction in 1975.

The NCREC investigator provided the BIC with a copy of a 1993 *Bulletin* article regarding a broker's duty to discover and disclose matters affecting sewage disposal (reprinted at the end of this discussion). The BIC reconsidered his position, settled the dispute with the property owner by paying for the septic system expansion, and conducted training for his associates emphasizing the importance of checking septic permits when listing any property. [12-0323.]

Case 3 Disciplinary Action?

BIC/Listing Company: _____

Buyer/Dual Agent: _____

Case 4

A broker affiliated with a brokerage company listed a property as 4 bedrooms in early April 2015. She asked the seller, a widow, about the septic system. The seller replied that her deceased husband handled those matters, but she thought it was permitted for 3 bedrooms. According to the seller, she asked whether the broker could still market it as 4 bedrooms and the broker allegedly replied that she could, until the MLS compliance administrator contacted her. The broker alleged that the seller insisted that she advertise the property as 4 bedrooms, which she did with no remarks about septic limitations.

Within a few days of listing the property, the listing broker obtained copies of 2 septic permits for the property both of which specified 2 bedrooms. The seller contacted the local health department and learned that there was nothing she could do to enlarge the septic system. The broker continued to list it in the MLS as 4 bedrooms, but added a comment in the Agent Remarks section that the septic permit was for 2 bedrooms. The broker did not stop marketing the listing as 4 bedrooms until the MLS compliance administrator notified her that the advertised number of bedrooms could not exceed that allowed by the septic permit.

The BIC was included in the Inquiry (since BICs are responsible for supervising all advertising that emanates from their office). In her written reply, the BIC stated that while the listing broker advertised the property in the MLS as 4 bedrooms, she indicated in the agent remarks section that the permit had not been obtained from the county. The evidence indicated that no such disclaimer was included initially, and that the company continued to advertise the property as 4 bedrooms for more than 2 months after it knew that the septic permit only allowed 2 bedrooms. [16-0032.]

Case 4 Disciplinary Action?

Listing Agent: _____

BIC: _____

Listing Company: _____

Case 5

In 2009, a broker listed a one-acre rectangular tract with a 2000SF office building located on a rural highway. The owner told the broker that the property had public water and sewer provided by a county-owned facility 100 yards down the road. The sign in front of the referenced facility read "Sanitary District Water Treatment Plant." The owner died in 2011 and the broker relisted the parcel for the estate, advertising it as being connected to public water and sewer based on the owner's earlier statement.

In 2013, prospective buyers discussed their plans for the property with the listing broker, who acted as a dual agent. The buyers explained that they wanted to build a second metal building on the tract for their appliance repair business and rent out the office space in the existing building. They also hoped to build a residence on the back portion of the lot. After a property inspection and boundary survey, the buyers closed on the parcel. While preparing to erect the metal building for their repair business, the buyers learned from a neighbor that they were building over the septic system for the office building. Upon further investigation, the buyers learned that:

- the septic system had failed and needed immediate replacement;
- the system was at capacity and could not be expanded;
- its capacity was barely sufficient to provide service for the appliance repair shop, thereby scuttling plans to rent the unused office space;
- there was no available public sewer service, as neither of the two closest public sewer authorities provided service to that area; and
- the county Sanitary District Water Treatment facility down the street only provided water.

The listing broker/dual agent admitted his misrepresentation. His errors and omissions insurance coverage paid approximately $28,000 in expenses the buyers incurred in replacing the septic system, relocating the second building, and related matters. [14-0808.]

Case 5 Disciplinary Action?

Listing/Dual Agent: _____

Listing Company: _____

Case 6

A broker affiliated with Company A listed a property in 2007 describing it in the MLS as a 437SF "owner-built" cabin on a 0.7-acre riverfront lot served by a well and septic system. Despite this knowledge, the listing agent made no inquiries as to whether proper building and septic permits existed prior to listing the property.

A buyer working with a broker who was QB/BIC of Company B became interested in the property. The buyer's broker (also a licensed appraiser) failed to provide and explain to the buyer the *Working with Real Estate Agents* brochure, nor did he have a written buyer agency agreement, although he submitted an offer on behalf of the buyer and the parties went under contract.

In the Alternative 1 blank on the standard sales contract, the buyer agent wrote "N/A" as to the buyer's right to have inspections, allegedly informing the buyer that there was no point in having an inspection since the property was being sold "As Is."

The broker did not

- explain what "as is" meant;
- recommend that the buyer have a home inspection;
- advise the buyer about the risks of owning property in a floodplain (other than to say the lender would require flood insurance); or
- check for proper permits, even though he later admitted that it was not uncommon in that area for owners to erect their own structures and rig a sewage disposal arrangement without obtaining the proper permits.

Prior to closing, both the listing agent and buyer agent learned that the county health department could not locate a septic permit for the property. Neither agent contacted the county inspection division to confirm that the proper building permits had been obtained. The buyer closed on the $128,000 purchase in October 2007 with no immediate plans to move into the property.

In 2010, the owner learned from the County when undertaking needed repairs that:

- No permits had ever been issued for the property – neither building, nor well, nor septic;
- To remedy the unpermitted status of the dwelling, the owner must first obtain a septic permit, then a well permit, then a flood permit, and finally, a building permit;
- To qualify for a flood permit, the structure must be elevated 4 feet above the base flood elevation (i.e., 14 feet higher than its current elevation); and
- If these requirements could not be met, the owner would be ordered to remove the structure.

A general contractor advised the owner that the house was not worth salvaging given the number of building code violations, and estimated that it would cost $70,000-$80,000 to remove and replace the structure. The buyer sued both real estate companies and all agents involved and filed a complaint with the Commission. The listing company entered into a settlement agreement with the buyer-owner and paid him $20,000. Company B and its BIC/QB agreed to pay the buyer-owner $15,000. The buyer-owner also filed a claim with the title insurance company. The individual listing broker had retired from real estate and allowed her license to expire in June 2012, before the case was opened in October 2013.

The NCREC investigation also revealed that although the broker/QB/BIC of Company B renewed his firm's broker license each year, he had failed to file annual reports with the NC Secretary of State, Corporations Division, from 2006 through 2013. A revenue suspension was imposed against his corporation in February 2010 and it was administratively dissolved in April 2012, meaning his company no longer had permission to do business in North Carolina. The QB/BIC became aware of this in April 2013, but failed to rectify the situation or notify the Commission and continued conducting brokerage under his unauthorized corporation. The Commission cancelled the firm's license in November 2013 upon learning of the administrative dissolution. The QB/BIC applied to reinstate the firm's license once the corporation was back in good standing with the North Carolina Department of Revenue and the Secretary of State. [14-0273.]

Case 6 Disciplinary Action?

Listing Company: _____

Listing Broker: _____

Listing Company's BIC: _____

Company B: _____

Company B's QB/BIC: _____

As evidenced by this sampling of disciplinary cases, ***an agent's duty to discover and disclose material facts*** needs to be reviewed. A brief summary of the law pertaining to sewage disposal systems follows; it is a review of material included in the section on "Material Facts" from the *2008-2009 Real Estate Update* course and again in "Permits" from the *2012-2013 Real Estate Update* course.

Sewage Disposal Systems & Regulations

State law requires that ***every residence and place of public assembly have an approved system for sewage disposal***. Approved systems include:

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

Not all properties will support an onsite septic system. If such a property cannot be connected to municipal or community systems, the use of that property will be severely restricted, thereby significantly reducing the property's value. Thus, the question of sewage disposal is a material fact that all brokers should research.

While brokers practicing in less urban areas of the State may encounter this issue more frequently, brokers operating in metropolitan areas should not assume they are immune from such considerations. You might be amazed at the number of properties in older neighborhoods that remain on septic systems, but are now surrounded by homes connected to city water and sewer services.

Hopefully the terms *municipal system* and *community system* are self-explanatory; under each, water and/or sewer service is provided for a fee to a property by a third party who controls the delivery mechanisms. The question rises to material fact level when no outside provider exists and the property must supply its own water and sewage disposal to be usable.

Onsite Septic Systems

Onsite systems vary greatly in form and price and who regulates or approves the system. Under state law, ***county Health Departments are responsible for approving underground systems***, whether a conventional subsurface system with tank and drainage field, or the more complicated low-pressure pump system. ***Systems that discharge above the ground***, such as spray-irrigation systems, ***or*** systems that ***discharge into streams or waterways*** are regulated by the ***North Carolina Department of Environmental Quality (DEQ). Off-site and community systems that serve more than one lot also are regulated at the state level***.

Prior to consummating the purchase of property not served by a municipal or community system, a prudent buyer will request a *soil suitability test* if the seller has not or will not provide the results from a seller-ordered evaluation. *A buyer's agent should advise his/her buyer-client to have a soil suitability test performed*. To request testing, a person files an application with the county Health Department explaining the proposed use of the property. A Registered Sanitarian from the Health Department will inspect the lot/tract, gather soil samples from different places on the parcel, and rate the various samples as either:

- *suitable*,
- *provisionally suitable*, or
- *unsuitable* for an underground septic system.

Provisionally suitable means that the location may be suitable if certain conditions are fulfilled. If the sanitarian finds that there is:

1) sufficient suitable or provisionally suitable soil for an onsite system,
   and
2) enough land for a ***repair area,***

then the Health Department will issue an ***improvements permit***. Once issued, the permit is valid for a specified period of time, even if the standards later change, so long as the property features or its proposed uses have not changed. The period of time the permit is valid varies from county to county. **NOTE:** The specified repair area must remain vacant and undisturbed as long as the system is used in case the septic system malfunctions and must be moved to the new area.

Scope of Permit

The septic permit will set a capacity limit for the system, typically specifying the number of bedrooms for a residence (with presumed occupancy of two persons per bedroom), or the maximum number of rooms or some other measure for a nonresidential structure. The permit may prohibit the use of an automatic dishwasher, or garbage disposal, or other use that might overload the system. The permit also may include a map depicting the best location for the system and repair area. If the property's water source is a well, then no component of the septic system may be within 100 feet of any well serving either the subject property or adjoining properties.

An owner selling unimproved land should consider having a soil suitability test prior to listing the property. If the tract is suitable for an onsite septic system, marketability of the property may be enhanced by applying for and obtaining a permit, since the permit is valid for a specified period and it resolves the septic question before it becomes an issue. If the seller learns that the tract is not suitable for any onsite system, then the listing broker must disclose that material fact to all prospective purchasers. It may also influence the seller's decision as to whether s/he wishes to sell now, or wait until community or municipal service becomes available. Again, brokers will be responsible for all assertions or representations they make about a property and its usability, as well as any omissions of material fact. Brokers should verify what type of septic system, if any, serves the property and the number of bedrooms that are permitted **before** making any representations. Some county health departments offer septic permit records online, whereas in other counties you must contact the Health Department for assistance in obtaining copies of septic permits.

Record Retention Requirements

The NC Department of Natural and Cultural Resources is responsible under state law for establishing a time period for the retention or disposal of public records. [G.S. 132-8.] Pursuant to this mandate, it issues a "Records Retention and Disposition Schedule" for County Health Departments, among other agencies/departments. The NC Department of Natural and Cultural Resources last entered into a legal agreement with the NC Department of Health & Human Services in September 2007 defining record retention requirements by county Health Departments for various public records. All county Health Departments in NC are bound by the terms of the agreement. The agreement and retention schedule may be accessed through the link below. Septic permitting record retention requirements are found in Standard 12, Items 7-9 on page 69.
http://archives.ncdcr.gov/Portals/3/PDF/schedules/Local%20Schedules/Local_Health_Departmens_20070907t.pdf?ver=2016-03-11-084038-573.

County Health Departments are required to retain all:

1) sewage disposal system *permits*,
2) authorizations to *construct or improve* a sewage disposal system, and
3) sewage disposal system *records for subdivisions*

until the system is no longer used or is connected to an approved public or community system.

A shorter record retention period applies to sewage disposal systems where:

1) the permit was issued but the system was never installed (5 years after permit issue date if fee paid, 1 year if fee unpaid),
2) the permit was denied (3 years), or
3) the permit was voided/expired (1 year).

Whenever a property uses an onsite sewage disposal system, the permitting records should still be available from the local Health Department or NC Department of Environmental Quality thereby allowing brokers to verify the number of bedrooms authorized by the permit and discover whether any restrictions were attached, e.g., dishwashers, garbage disposal systems, etc.

Illegal Straight-piping

Straight-piping is illegal, but there still are parts of North Carolina where it occurs.

Straight-piping is where wastewater is discharged directly into the yard or into a nearby creek or stream, rather than into any approved treatment system. It's illegal because state law requires:

> ...any person owning or controlling a residence, place of business or place of public assembly ... shall discharge all wastewater directly to an approved wastewater system for that specific use.

Wastewater includes grey water (i.e., water used for dishes, laundry and bathing) and black water which is sewage. The existence of straight-piping is a material fact and must be disclosed by a broker to **everyone** — owner, buyers, tenants, and lenders — if the broker knows or reasonably should know about it.

Lastly, to confirm that the Commission's position concerning a broker's obligation to discover and disclose septic permit issues has not changed in more than two decades, the following article is from the **Fall 1993 Real Estate Bulletin** written by the late Blackwell M. Brogden, the Commission's former Chief Deputy Legal Counsel. A broker who argues that the duty to discover and disclose septic issues only arose within the past 15 years illustrates his/her ignorance of the law and inattention to attempts to educate.

Advertising occupancy of properties served by on-site sewage systems

Blackwell M. Brogden, Jr., Chief Deputy Legal Counsel. Fall 1993 Real Estate Bulletin, Vol 24, No. 3, p. 5

The Real Estate Commission periodically investigates complaints which allege that brokers have falsely advertised the occupancy levels or number of bedrooms in properties for sale or rent. The basis of these allegations is that the advertised limits exceed the design parameters of the on-site sewage system "improvement permit" issued for a particular property. In other words, the broker has represented that the property can be occupied by more people than the sewage system is designed to handle.

When municipal sewer service is not available for a residential building lot, the local health department evaluates the lot to determine its suitability for onsite sewage disposal. Typically, the lot owner or builder/developer must apply for an "improvement permit" for a sewage disposal system; the application proposes a dwelling with a certain number of bedrooms. The health department environmental health specialist (EHS) will then determine whether the lot will support such a use. If so, the EHS will approve a design for a system of suitable capacity, generally assuming an occupancy level of two persons per bedroom.

Brokers must be alert to these bedroom and occupancy limits in the sale and resale of all properties or lots requiring on-site sewage disposal systems --- not just new homes or homes under construction. They should also be aware of these limits when renting real estate: especially, resort property.

If a broker encourages overuse of a property through his advertising or by other means, the occupants of the property may overload the system, thereby contributing to its eventual failure. When the sewage system fails, the local health department can prohibit further use of the system (and in turn occupancy of the property), in order to prevent contamination of the surrounding groundwater and to protect the public health. Even if the system is repairable, lower occupancy limits may be imposed. At that point, the occupants and owners of the property may blame the broker for their losses. They may also complain to the Real Estate Commission.

The position of the Commission has long been that the real estate broker or salesman who holds himself out as possessing special skills, understanding, and information with respect to real estate should be informed about any use restrictions on particular lands with which he is dealing. Thus, a broker who advertises that a property “sleeps 16” should be certain that any on-site sewage system is in fact designed to serve at least sixteen people. Similarly, a broker who advertises a property for sale as having a certain number of bedrooms should be sure that any on-site sewage system is permitted to handle that number of bedrooms.

The occupancy level imposed by an on-site sewage system improvement permit - like other forms of land-use control - is usually discernable from public records. The health department maintains records that identify either the total number of bedrooms (at two persons per bedroom), or the total number of people that the sewage system has been designed to serve. Be aware that in calculating the number of bedrooms, the sewage rules state that “each bedroom and any other room or addition that can reasonably be expected to function as a bedroom shall be considered a bedroom for design purposes.” In the absence of health department records, a broker generally may advertise occupancy of the property at the number of bedrooms times two.

CAVEAT: The Real Estate License Law prohibits misrepresentation, omission or concealment of material fact; a course of misrepresentation through false advertising; and improper, dishonest and fraudulent conduct. Intentional or negligent misrepresentation of the occupancy design limits of a property served by an on-site sewage disposal system violates the License Law and may result in disciplinary action against the broker.

http://www.ncrecbulletins.org/bulletins/Fall1993-Vol24-3.pdf link to the above article
http://www.ncrecbulletins.org/bulletins/Fall2000-Vol31-3.pdf see p6.
Article reprinted in June 2007 Bulletin, Vol 38, #1.

Residential Property and Owners' Association Disclosure Statement (RPOADS)

The Residential Property and Owners' Association Disclosure Statement attempts to elicit this information in questions 16-18 which ask:

> 16. What is the dwelling's sewage disposal system? ☐ Septic Tank ☐ Septic Tank with Pump ☐ Community System ☐ Connected to City/County System ☐ City/County System available ☐ Straight pipe (wastewater does not go into a septic or other sewer system [note: use of this type of system violates state law]) ☐ Other _____ (Check all that apply).....
>
> 17. If the dwelling is serviced by a septic system, do you know how many bedrooms are allowed by the septic system permit?
> If your answer is "yes," how many bedrooms are allowed? _____
> ☐ No records available
>
> 18. Is there any problem, malfunction or defect with the dwelling's sewer and/or septic system?.....

The problem, of course, is that the seller has the option of responding "no representation" instead of a straight-forward "yes" or "no." An owner's decision to omit answers to questions or to answer "no" or "no representation" does <u>not</u> relieve a listing agent from his/her duty to discover and disclose material facts.

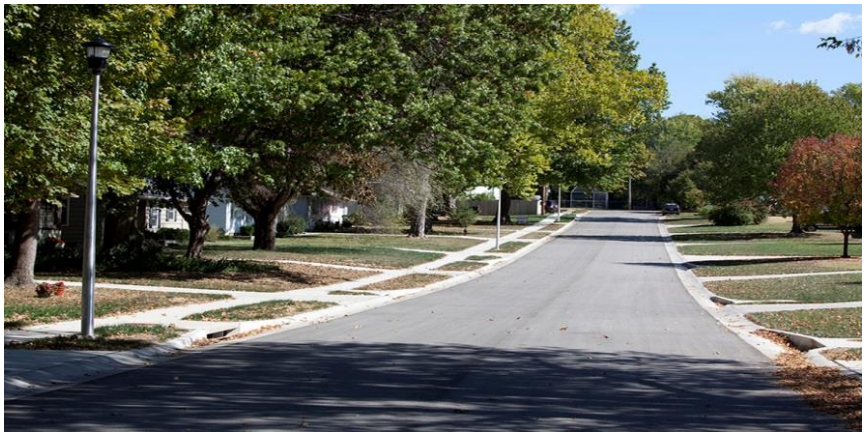
Broker's Duty to Discover and Disclose

Best practice recommendation for brokers is that they request a copy of any septic permit from the Health Department or DEQ, as applicable, rather than rely on the property owner's statements, particularly where there are red flags. If an owner is on city or community water and sewer, a broker should ask to see the bills to confirm who provides these utilities <u>and that the expenses indicate usage of both water and sewage disposal services</u>. An even better practice is to contact the water/sewer service provider and confirm that services are being provided to the property.

> **Beware!** In some jurisdictions, once water and sewer are available, the owner must pay a connect fee, *even if the owner does not actually connect to the system*; in this case, however, the monthly bills should reflect no actual usage.

Because state law requires record retention so long as the system is utilized, in theory, a broker should be able to obtain copies of all permits. However, if upon inquiry, a county health department replies that it has no records for a property, the broker should retain both his/her inquiry and the written reply to document the inquiry. If the reply is that no records can be located, a broker should ask if there is any record of when the septic permit records were destroyed. If yes, the implication is that a permit once existed, although its conditions and whether it was installed are unknown. Thus, the question remains: was the system ever properly permitted and what is its capacity? Until that question is resolved, a broker should proceed with great caution. A listing agent who cannot locate a septic permit should disclose that fact, at least in an "agent's remarks" section. A buyer agent who learns or discovers that there is no septic permit must disclose this fact to the buyer and urge the buyer to have the septic system inspected and capacity determined.

RESIDENTIAL STREET STATUS DISCLOSURE



Below are two disciplinary cases from the past three years:

Case 7

An LLC builder/developer that also held a firm broker license hired a broker and her company to be an onsite seller's agent in a new townhome community.

- The onsite broker informed a prospective buyer both orally and in writing that the streets in the neighborhood were "city-owned" and publicly maintained, pursuant to information she obtained from the developer's unlicensed sales manager.
- The executed purchase contract contained a written street disclosure statement again affirming that the streets were public.
- The purchase contract also included a plat map that had been reduced from a much larger illustration to 8.5" x 11". The reduced plat identified the buyer's street as "private," but it was too small to read and it contradicted the written disclosure stating that the streets were public.

The transaction closed in December 2012. In August 2013, the purchaser attended a HOA meeting and learned that some of the neighborhood streets, including hers, were private and she filed a complaint with the Commission.

In her response, the onsite broker acknowledged that she learned in December 2012/January 2013 that some of the roads were private when owners reported calling the city to schedule garbage collection, only to be informed that the streets were private and not eligible for city collection. Beginning January 4, 2013, the onsite agent provided accurate street disclosure statements indicating that certain streets were private and would be maintained by the developer until taken over by the owners' association. However, 65 of 135 homes that she sold that were on private streets went under contract prior to January 4, 2013 and had written disclosures that the streets were public. Thirty of these 65 closed prior to 1/4/2013 without learning that their street was private.

The licensed builder-developer entered into a confidential settlement with the complaining witness. The onsite broker was not aware of any other settlement agreements between the builder and owners and said the HOA had been accumulating a capital reserve fund for street maintenance since sales began.

The onsite agent also admitted that she failed to provide and explain the *Working with Real Estate Agents* brochure to her owner-client and the written listing agreement did not contain the non-discrimination clause required by Commission rule. A lawyer had drafted the listing agreement specifically for this principal-agent relationship. [14-0333.]

Case 7 Disciplinary Action?
Licensed Builder-Developer: _____
Onsite Agent: _____
Her Company: _____

Case 8

This case involves two brokers affiliated with the same company. Broker #1 was the builder/owner of the property which he listed through Broker #2 and the real estate company where they both worked.

The listed property was located in a subdivision developed in the late 1980s/early 1990s in 4 sections. Of the approximately 100 homes in the subdivision, half were in Sections 1 and 2 with publicly dedicated streets that had been accepted for maintenance, and half were in Sections 3 and 4 with publicly dedicated streets that the developer intended to transfer to the NC Department of Transportation (NCDOT) upon reaching the required population density. However, when that time arrived, NCDOT wanted a culvert replaced before it would accept the streets. The developer did not have the $25,000 to replace the culvert, so he did nothing.

The developer (who lived on a publicly maintained street in Section 1) sold the unimproved subject lot to Broker #1 in 2008, at which time the population density had been met. Although the developer failed to provide him with a street disclosure statement, Broker #1 admitted that he knew the lot was on a private street. Broker #1 said he never asked the developer about the status of the transfer process because he did not feel it was necessary. Broker #1 then built a house on the lot and listed it with Broker #2, but did not tell her that the property was on a private street nor did the listing broker ask.

Broker #1 received and accepted an offer on March 21, 2009 through Broker #2 who was acting as a dual agent. Neither broker informed the buyer that the street had not been accepted for public maintenance; the appraisal report prepared for buyer's lender mistakenly indicated that the street was public. The transaction closed May 26, 2009, at which time the roads were in good condition.

Problems began in 2011/2012 when the buyer-owners saw a sign posted on a nearby street reading "State Maintenance Ends Here;" about this time, street repair issues began to arise. The developer refused to make any repairs, so in 2013 each property owner contributed $1,000 to repair the streets sufficiently to permit access by school buses and emergency vehicles. The buyer-owners, who were active military and had been transferred out of state, were under contract to sell the property in 2013, but their buyer's VA loan application was denied when the appraiser correctly reported that the property was on a private street.

As of 2013/2014, there were cracks and potholes throughout Sections 3 and 4 of the subdivision, with a 20-foot diameter crater at the entrance to the complaining party's cul de sac. At that time, the estimate to repair the streets sufficiently to allow acceptance by NCDOT was $100,000. There was neither an owners' association in this subdivision nor any road maintenance agreement.

Broker #2 admitted that she did not try to determine whether the streets were public or private because the property was in an established neighborhood, the roads were paved, and the plat map indicated the roads were built to state standards and would be dedicated to public use upon reaching a specified population density. [15-0046.]

Case 8 Disciplinary Action?

Broker #1: _____

Broker #2: _____

Listing Company: _____

Despite having included street disclosures in the *2008-2009 Real Estate Update* course as well as the *2014-2015 GenUP and BICUP* materials (Section 4; "Miscellaneous Topics" – portions reprinted below), brokers persist in failing to discover and accurately disclose to consumers who is responsible for maintaining the streets abutting their properties. Whether streets are public or private and the responsibility for maintenance are material facts that brokers must investigate.

State Law: Who Has the Duty to Disclose?

G.S. 136-102.6, titled "***Compliance of subdivision streets with minimum standards of the Board of Transportation required of developers***," requires the following.

Subparagraph (a):

- any time an owner subdivides a tract of land into two or more lots <u>for residential purposes</u>
  and
- the subdivision involves *either* changing an existing street or constructing a new street,

then the <u>property owner</u> must record a final map or plat with the Register of Deeds designating the streets as public or private ***prior to conveying any portion of the parcel***.

Subparagraph (f):

> Prior to entering an agreement or any conveyance with any prospective buyer, the developer and seller shall prepare and sign, and the buyer of the subject real estate shall receive and sign an acknowledgment of receipt of a separate instrument known as the subdivision street disclosure statement… [which] disclosure statement shall fully and completely disclose the status (whether public or private) of the street upon which the house or lot fronts….

Why is it significant whether a street is public or private?

Maintenance!

Private versus Public

A **public street** must be constructed in accordance with the Department of Transportation (hereafter DOT) standards. The proposed plat to be recorded in the Register of Deeds office must first be approved by a Review Officer in the Division of Highways and the Review Officer must confirm that the streets are designed to be constructed in accordance with minimum standards of the Board of Transportation *before* the plat may be recorded. The Review Officer issues a certificate of approval confirming construction design compliance, thereby allowing the plat to be recorded

HOWEVER, the law expressly states:

> *....The certificate of approval shall* ***not*** *be deemed an acceptance of the dedication of the streets on the subdivision plat or map.* [Emphasis added.]

If the plat shows that the streets have been dedicated as public, then the developer and seller must certify *in the subdivision street disclosure statement* "… that the right-of-way and design of the street has been approved by the Division of Highways, and that the street has been or will be constructed by the developer and seller in accordance with …" DOT standards for acceptance.

A **private street** is a street that either:

- has not been constructed in accordance with DOT standards,
  or
- may meet DOT standards, *but has not been accepted by the State or municipality for maintenance as a public street*, <u>even if dedicated as public on the plat</u>.

The maintenance responsibilities of a private street fall to the HOA or property owners once the developer leaves. If the developer/seller/owner designates the streets as private on the plat map, then the required subdivision street disclosure statement shall:

1) include an explanation of the consequences and responsibility as to maintenance of a private street,
   and
2) fully and accurately disclose the party or parties upon whom responsibility for construction and maintenance of such street or streets shall rest,
   and
3) further disclose that the street or streets will not be constructed to minimum standards, sufficient to allow their inclusion on the State highway system for maintenance.

Dedication versus Acceptance

Dedication

Dedication occurs after the Review Officer issues a certificate of approval confirming street design/construction compliance in accordance with State standards and the owner records the plat on which the streets are designated for public use. **Understand** however that dedication of streets to public use **does not mean** any state or local governmental unit has agreed to accept the offer of dedication. People mistakenly assume that dedication of streets to public use *on the plat map* automatically means some governmental unit has accepted that dedication and the responsibility for maintenance. They are absolutely ***wrong***.

Acceptance

Acceptance occurs when the offer of public dedication:

1) is accepted on behalf of the public by some governmental unit in a "recognized legal manner"
2) by a proper public authority.

What is a recognized legal manner?

In the 1992 case of *Bumgarner v. Reneau*, the NC Court of Appeals addressed what is a "proper public authority" and how it may indicate acceptance of an owner's offer of dedication either expressly or by implication. The Court of Appeals held:

> ...A dedication of a road to the general public is a revocable offer until it is accepted on the part of the public in "some recognized legal manner" and by a proper public authority. (Cites omitted.) A "*proper public authority*" is a governing body having jurisdiction over the location of the dedicated property, such as a municipality, an incorporated town, a county, or any public body having the power to exercise eminent domain over the dedicated property. (Cites omitted.) Acceptance in "some recognized legal manner" includes both express and implied acceptance.... **Express acceptance** may take the form of, *inter alia*, a formal ratification, resolution, or order by proper officials, the adoption of an ordinance, a town council's vote of approval, or the signing of a written instrument by proper authorities. **Acceptance** of an offer of dedication is **implied** in North Carolina when the dedicated property is used by the general public *coupled with* control of the road by public authorities for a period of twenty years or more.
> [*Bumgarner v. Reneau*, 105 N.C. App. 362, at 366-367 (1992).]
> [Emphasis added.]

Thus, ***public dedication ≠ acceptance***.

In one case, the trial and appellate courts ruled that a 1936 dedication of public use of a 50' right-of-way in a recorded plat was never expressly or impliedly accepted by the municipality. The abutting property owners maintained the street at their own expense from the 1970s through the early 2000s, when the town attempted to claim the street as public. The owners' association sued to have the 1936 plat offer of public dedication declared withdrawn due to lack of acceptance and they won. The Courts held that the township had never expressly accepted the offer, i.e., in writing, nor had it exercised sufficient control by public authorities for the required 20 year period to constitute implied acceptance.

See *Waterway Drive Property Owners' Association, Inc. v. Town of Cedar Point, et.al.*, (2012)
[Cite: 224 N.C. App. 544; 737 S.E.2d 126, 2012.]
See the 2014-2015 Update Course materials, Section 4, p. 64;
https://www.ncrec.gov/Pdfs/genupdate/SubdivStreets2014.pdf.

Residential Property and Owners' Association Disclosure Statement

The RPOADS again attempts to elicit information concerning street status by asking:

30. Does the property abut or adjoin any private road(s) or street(s)?.....

31. If there is a private road or street adjoining the property, is there in existence any owners' association or maintenance agreements dealing with the maintenance of the road or street?.....

37. Which of the following services and amenities are paid for by the owners' association(s) identified above out of the association's regular assessments ("dues")? (Check all that apply).

#37: Included in the list are street lights, storm water management, and private road maintenance.

As noted before, the owner may answer "yes," "no," or "no representation."

Broker's Duty to Discover and Disclose

Bottom line: ***who bears responsibility for maintaining the roads that provide ingress and egress to a property is a material fact***. Just because a developer or seller expresses the intent to dedicate the streets to public use does *not* mean that maintenance of that street has been accepted by a governmental entity. Until such time as the state or municipality accepts the dedication to public use, who is responsible for repair and maintenance? The developer? The owners' association? The adjacent property owners? The issue should be addressed in either the protective covenants or owners' association rules, but it may be totally overlooked. Where streets are designated as private, then responsibility for maintenance should be specified in the subdivision street disclosure statement required by G.S. 136-102.6.

Brokers should at least ask who maintains the streets that provide access to the property and disclose that information to both prospective purchasers and to lenders, particularly where there is no governmental maintenance responsibility. Red flags such as road conditions or property location that might lead a reasonable broker to suspect lack of public maintenance, increases a broker's duty to investigate road maintenance obligations. The duty to discover and disclose where there are "red flags" applies to both listing and selling agents.

> **REMEMBER:** ***public dedication does not equal governmental acceptance of maintenance and repair responsibilities!*** Generally, all streets will be privately maintained until accepted by the NCDOT or a municipality.

Where streets are designated as private, there should be some writing specifying maintenance by someone, whether the original developer, the adjacent property owners, or an owners' association. Where there is no written agreement, the affected property owners will not be happy ten years down the road when they learn that the issue of who must pay to repair the potholes and otherwise maintain the roads is still an open question. As noted in Case #8, some lenders will not approve financing for a property located on a privately maintained road without a recorded private road maintenance agreement. While the statute only requires the developer and seller to disclose the status of the street abutting the front of the property, prudent brokers should inquire about maintenance duties for *all streets* adjacent to the property.

Is there a standard form for the required street disclosure?

The Commission is not aware of any standard form created by anyone. The statute does not include a sample form, the Commission has not created one, and the Joint Forms Task Force has not created a standard form. The only guidance as to what the disclosure statement must include is contained in the statute, which is reprinted at the end of this Section for brokers' reference.

Who to Contact?

The State is charged with maintaining roads outside of municipal boundaries that are not in private communities. Municipalities generally are responsible for maintaining streets within their jurisdiction that have been accepted for maintenance. Thus, if the street is within city boundaries, you would call City Government, ask what division is responsible for street maintenance (whether in the Public Works or Transportation or some other department), and ask whether the street has been accepted for city or state maintenance.

If the street is not within city boundaries, then you would contact the District Field Office of the Division of Highways within the NCDOT. You can also search the Division of Highways' secondary road database by street name at the following link: https://apps.ncdot.gov/SRLookup/.
Caution: searches are very sensitive to the accuracy of the street name; if you cannot find the street or address you seek, contact the local Field Office.
General information may be found at http://www.ncdot.gov/doh/.

UNDERGROUND STORAGE TANKS (UST)

Case 9

A buyer represented by a buyer agent (and another broker assisting the buyer agent) contracted to purchase a house for roughly $200,000 in 2011. The listing agent (with a different company) stated in the MLS that the property had an oil-burning furnace. The buyer's home inspector reported that not only was the furnace in poor condition, but there also was an underground fuel storage tank. Based on the report, the buyer requested and the seller agreed to install a new HVAC system for approximately $5100 and the transaction closed.

At no time during the transaction did the buyer agent or broker assisting her counsel the buyer regarding potential issues with underground fuel storage tanks, so the buyer never raised the matter with the seller.

Four years later the new owner decides to sell and is told by her listing agent that the presence of an underground fuel storage tank must be disclosed to all prospective buyers and that a buyer's lender might require removal or at least soil testing. The owner accepted an offer to purchase, but the buyer's home inspection revealed that the underground storage tank (UST) was within inches of an enclosed porch the previous owner had added and the tank was leaking. The buyer's lender required removal of the UST and all contaminated soil. The buyers ultimately terminated the contract when the issue could not be resolved within an acceptable time frame.

After many estimates and advice from structural engineers and the EPA, the owner spent over $13,000 to have an environmental firm close the UST in place (since it could not be removed easily) while monitoring the groundwater and recording soil samples. Of the $13,000 total cost, the owner was eligible to be reimbursed roughly $7400 from the Department of Environmental Quality, leaving roughly $7750 out of pocket.

When contacted by the Commission, the BIC of the buyer agent at the time of the 2011 transaction submitted a written response to the Inquiry. He stated that he was not directly involved in the transaction, which had been handled by a broker not on provisional status, and that his company's policy as to USTs was the same in 2011 as in 2015, namely: "Get a licensed environmental company that deals with underground fuel tanks to advise the prospective buyer, and then read the report." The BIC acknowledged that the buyer agent should have educated the buyer about USTs and the company agreed to reimburse the owner all of her out-of-pocket expenses. The BIC also agreed to conduct training for his associated agents reminding them to disclose the risks of USTs.

The broker who served as the buyer agent allowed her license to expire June 30, 2015. She received two Letters of Inquiry, but failed to respond in writing to either. When contacted by phone, the broker-buyer agent stated that her job as a nurse was her top priority and that responding to letters from the Commission did not pay her bills. She said that the buyer was aware that there was an underground fuel storage tank and it was not the broker's job to inform the buyer of the possible risks or suggest an inspection or ask the seller to remove it. The buyer agent accepted no responsibility nor did she contribute to any financial settlement. [16-0059]

Case 9 Disciplinary Action?

Broker-Buyer Agent: _____

Buyer Agent BIC: _____

Buyer Agent Firm: _____

Broker's Duty to Discover and Disclose

Unfortunately, discovering whether a *non-commercial underground fuel storage tank* was ever installed on a property may not be easy. It does not appear there have ever been any regulatory or permitting requirements for **non-commercial** USTs at either the federal or state level. Even today, a property owner apparently can install a non-commercial UST without notifying any authority or obtaining any permit. **Commercial USTs** have been regulated at the Federal level since 1974 following the enactment of the Resource Conservation and Recovery Act (RCRA).

Residential Property and Owners' Association Disclosure Statement

The RPOADS seeks this information in questions #12 and #25 by asking the residential owner/seller:

> 12. What are the dwelling's fuel sources? ☐ Electricity ☐ Natural Gas ☐ Propane ☐ Oil ☐ Other _____ _____ (Check all that apply) If the fuel source is stored in a tank, identify whether the tank is ☐ above ground or ☐ below ground, and whether the tank is ☐ leased by seller or ☐ owned by seller. (Check all that apply).....

> 25. Are there any hazardous or toxic substances, materials, or products (such as asbestos, formaldehyde, radon gas, methane gas, lead-based paint) which exceed government safety standards, any debris (whether buried or covered) or underground storage tanks, or any environmentally hazardous conditions (such as contaminated soil or water, or other environmental contamination) which affect the property?.....

As always, the seller retains the option of answering "no representation," rather than "yes" or "no." Regardless of how the seller answers, a listing broker's duty to discover and disclose material facts remains.

Factors to Consider

As part of the discovery process, a reasonable prudent broker should consider the following:

- the age of the structure,
- its location when built (e.g., urban, suburban, rural),
- previous uses of the property,
- the presence of radiators in the dwelling,
- pipes sticking out of the ground, and
- how long the current owner has owned the property.

A structure built decades ago in what was then a rural environment that has always been used for residential purposes raises the question: what was the original heat source? The current owner may have no idea of the dwelling's history. What inquiries might a reasonable prudent broker make to discover whether an underground storage tank could be on the property? The broker might contact NCDEQ's UST Division and ask whether they have any records of any USTs being removed from the property.

Duties

A **listing agent** who knows that there is a UST on the property *must **disclose** its presence to all prospective purchasers or tenants*; this might best be accomplished by disclosing its existence in the remarks section of any advertising, but no later than when the buyer/tenant first views/is shown the property.

A **buyer agent** *must not only **disclose** the UST's existence to his/her buyer-client, but should **strongly encourage** the buyer to hire an expert to inspect the tank and conduct a soil contamination test to determine whether the buyer is purchasing a major liability*. Why? Typically, the current property owner is held strictly accountable for remediating environmental contamination on the property even though s/he did not install the tank that caused the contamination.

State Non-Commercial UST Trust Funds Eliminated

Property owner liability for USTs has become even more important since the passage of legislation September 18, 2015 that ***eliminated a State trust fund administered by the Underground Storage Tank Section of the NC Department of Environmental Quality that helped defray remediation expenses related to non-commercial USTs***. (Session Law 2015-241.)

To be eligible to share in the remaining trust funds, a report of a problem had to have been filed with the UST Section of NCDEQ by **June 30, 2015** and the work must have been completed by October 1, 2015. Owners who first learn of a problem with a non-commercial UST after July 1, 2015 are not eligible for any State reimbursement funds nor is there any federal program for non-commercial USTs. If, however, an owner discovers that a ***commercial UST*** was installed sometime earlier on his/her property, the owner *may be eligible for contribution from federal funds* administered by the NCDEQ, UST Section.

SQUARE FOOTAGE

Case 10

A broker affiliated with a real estate company listed a bank-owned (REO) property for sale in November 2013, stating in the MLS that it had 4580 square feet of heated living area. The seller accepted a cash offer from a buyer who was interested in purchasing, rehabbing, and flipping the property. The transaction closed in January 2014. When the owner relisted the property for sale in April 2014, his listing agent measured the house using the Commission's *Square Footage Guidelines* and concluded that it only had 3702 square feet of heated living area (approximately a 24% difference), prompting the owner to file a complaint against the previous listing agent.

Upon inquiry, the listing agent (a full broker) admitted that he had used the county tax records to estimate the square footage until he could measure the house, but he claimed the listing went active before he had a chance to measure, and he was fielding multiple offers on the property. The response, prepared by the company's attorney, acknowledged that the firm's policy was to accurately report square footage, that this agent usually adhered to that policy, and that this was a lone oversight.

The Commission's investigator then reviewed the company's website and discovered 10 REO properties listed by the same broker. The MLS data sheets, listing history, and copies of the square footage measurements and calculations were requested for these transactions. The MLS data sheets and listing histories were provided, but no square footage calculations or measurements. The QB/BIC acknowledged that the company had no office policy concerning retention of square footage measurements and calculations. [15-0097]

Case 10 Disciplinary Action?

Listing Agent: _____

BIC: _____

Listing Company: _____

Square Footage Disclosure Requirements

The Real Estate Commission requires brokers to include square footage in their advertising and property descriptions.
True or False?

False. The Commission rarely dictates the content of advertising other than to:

1) prohibit blind ads,
2) require the company's name (or the BIC's name) to appear in all advertising,
3) require compliance with other laws (e.g., fair housing and Regulation Z), and
4) require that all stated information be accurate.

Whereas the first three topics (***septic system limitations, privately maintained streets, and USTs) are material facts*** that a broker has a duty to discover and disclose, the Commission does not require a listing agent to report square footage. In theory, a broker may choose whether to make any representation concerning a dwelling's heated living area. In reality, buyers want to know square footage and this information may be required by a marketing forum, such as a cooperative listing service. What statements or descriptions a broker chooses to make when marketing or showing property are up to the broker, but *all such statements or representations must be accurate.* When they are not, the broker may be asked to explain his/her statement and what information s/he relied on in making that statement.

The Commission's *Residential Square Footage Guidelines* are nearly 20 years old now [©1999] and have been taught consistently in both pre-licensing and post-licensing classes. The Introduction reads:

> …Although real estate agents are not required by the Real Estate License Law or Real Estate Commission rules to report the square footage of properties offered for sale (or rent), when they do report square footage, *it is essential that the information they give prospective purchasers (or tenants) be accurate*….
> [Italics added.]

Should a broker personally measure the structure?

The Guidelines state that brokers "… are expected to be able to accurately calculate the square footage of most [residential] dwellings …. compiled using these *Guidelines* or comparable standards." (p. 5) The *Guidelines* recommend that listing brokers personally measure dwellings to obtain accurate data, particularly if the dwelling is not complex or unusual; however, it may be appropriate with complex dwellings for an agent to rely upon measurements and calculations made by someone "…with greater expertise in determining square footage …" such as a state-licensed appraiser or a more experienced broker, ***so long as*** *the calculations are made in connection with the current transaction*.

Unacceptable Information Sources

- the property owner
- tax records
- listing, appraisal or survey information from a prior transaction
- blueprints or building plans*

* If the structure is not yet built, a broker who provides information as to projected square footage should disclose that the estimate is based on building plans, and *must measure the structure upon completion and report the actual square footage*.

May a broker working with a buyer or tenant rely on the square footage as reported by the listing agent/company in its marketing of the property?

Generally, yes, unless the error is so significant that it should be obvious to a reasonably prudent broker. What is sufficiently significant that a reasonably prudent broker would notice? The *Guidelines* suggest that a broker working with a buyer may not be expected to notice that a dwelling listed as 2200SF is actually 2000SF, whereas the same broker should recognize a problem when viewing a dwelling listed as 3200SF that actually is 2300SF. Thus, absent a red flag, a broker representing a buyer or tenant generally is not required to discover and disclose square footage.

Is there some permissible margin of error?

A broker must use skill, care, and diligence when providing any brokerage service, including determining square footage. The Commission recognizes that minor discrepancies may exist between square footage calculations due to variations in distance readings, conversion factors and interpretation of *living area*, and such differences

> … based upon an agent's thoughtful judgment reasonably founded on these or other similar guidelines will not be considered by the Commission to constitute error on the agent's part. Deviations in calculated square footage of less than five percent will seldom be cause for concern unless a broker intentionally overstates the square footage. *Guidelines*, p. 7.

Final Reminders/Definitions

- "Living area:" portion of the dwelling intended for human occupancy that is:
  - heated by a permanently installed heating system suitable for year-round occupancy;
  - finished, (walls, floors, ceilings and ceiling height minimum 7'); and
  - directly accessible to other areas of the dwelling by a heated hall or stairway.

- Measurements generally are based on the exterior of the dwelling. If you take interior measurements, add 6" for exterior walls.

- Brokers need not distinguish above-grade from below-grade in their total square footage calculation, but should inform the buyer that the appraisal most likely will list square footage for each separately.

- If any portion of the dwelling is unpermitted, a listing broker may include that area in the total square footage determination so long as s/he clearly identifies the amount that is unpermitted, e.g., 3750 total SF of which 850SF is an unpermitted addition that otherwise meets the definition of living area.

Brokers who choose to list properties sight-unseen **do so at their peril**. While there may not be a problem if all the information is accurate, if there *is* an inaccuracy or misrepresentation, the broker will be asked to explain the sources of his/her information and why s/he relied on that source. The fact that the broker never visited the property to personally inspect it generally is not viewed favorably and will not excuse the broker from disciplinary action.

Record Retention

The Commission's *Residential Square Footage Guidelines* have advised since at least 2006 that:

> Brokers must retain for at least three years all sketches, calculations, photos, and other documentation used and/or relied upon to determine square footage. [*Guidelines*, p. 7.]

The Commission's record retention rule [Rule 58A .0108] for years has required retention of all "disclosure documents" as well as "any other records pertaining to real estate transactions" and square footage calculations fall within both categories. Nonetheless, to eliminate any doubt, retaining "all sketches, calculations, photos, and other documentation used or relied upon to determine square footage" was added to Commission Rule 58A .0108 as of July 1, 2016, as mentioned in Section Three of these materials.

SUMMARY

Brokers have an affirmative obligation to discover and disclose material facts. A broker should:

- always check with the Health Department or NCDEQ when a property is not connected to a municipal or community sewage disposal system to obtain a copy of the septic permit and review its scope and limitations.

- determine who is responsible for maintaining the streets adjacent to the property and contact the municipality or District Office of the Division of Highways if there is any doubt as to whether the streets have been accepted as public by a proper public authority for maintenance purposes.

- be alert to signs that may indicate the presence of a non-commercial or commercial underground storage tank on a property and investigate any red flags. Any broker who knows that there is a UST on the property must disclose that material fact to everyone, and buyer agents should strongly recommend that the buyer hire an environmental expert to assess the situation and check for soil contamination.

- review a seller's disclosures on the RPOADS and exercise heightened due diligence and inquiry where the seller either fails to answer a question or answers "no representation" to most or all questions.

- ensure the accuracy of any representations the broker chooses to make, including square footage, and retain copies of all sketches, calculations, and other documents created or relied upon to determine square footage for three years from the conclusion of the transaction.

ANSWERS TO DISCUSSION QUESTIONS

Page 37

Sara is a Buyer's Agent whose client is under contract to purchase a home. During the home inspection, the inspector discovers a pipe that indicates the possible presence of an underground storage tank. The listing agent and seller have no information about the underground tank, and the current HVAC system is a modern heat pump. What advice/guidance should Sara offer her client?
Answer*: Sara should encourage her buyer to have the tank inspected.*

Bob, a broker, has been hired by an owner to list her home. Bob asks the owner about the septic capacity, and the owner tells him it is a 3-bedroom system but that she does not have a copy of the permit. The owner has been utilizing the home as a 3-bedroom residence for many years. May Bob rely on the owner's information and market the property as a 3-bedroom home?
Answer*: No, Bob should investigate further. At a minimum he should check for records at the local health department.*

Adriana, a broker, lists a property for sale on behalf of a corporate owner. She markets the residential property as being 3050 square feet, noting, "Square footage per tax records." The property is sold, and the buyers are represented by a cooperating firm. Several years later, the buyer-owners decide to sell and discover that the home is only 2200 square feet of heated living space. May Adriana be held responsible for the misrepresentation? Does the original Buyer's Agent share any responsibility?
Answer*: Yes, Adriana and the Buyer's Agent may be held responsible for the misrepresentation.*

DISCIPLINARY CASE OUTCOMES

As brokers will see when reviewing the outcomes in the disciplinary cases below, the Commission frequently will impose a harsher sanction in a case, but allow the broker to reduce it to a lesser sanction or dismissal by completing some specified education by a certain date. This approach seeks to fulfill the Commission's purpose of protecting the public interest while educating brokers in hopes of improving their knowledge, competency, and skills.

"These sanctions do not seem harsh enough!"

Often, brokers question the severity (or lack thereof) of outcomes in cases such as these. Here is a brief overview of the investigation and hearing process:

> After probable cause has been found for a hearing, the prosecuting attorneys attempt to settle cases without resorting to a full evidentiary hearing. The negotiated settlement leads to a consent order which, in many cases, will require the broker to meet certain conditions, including attending classes, providing evidence that trust accounts are fully funded and maintained in compliance with Commission rule. The Consent Order will also, in most cases, be a lesser sanction than that requested or imposed after a hearing. When pursuing settlement, prosecuting attorneys take into account all aspects of both the transaction and the broker including whether other complaints have been filed, length of service/brokerage knowledge, possible defenses, and availability of witnesses. Note that often, the broker has a different "take" on events.
>
> When considering a disciplinary sanction, the Commission and its prosecuting attorneys also take into consideration whether a broker has compensated or is attempting to compensate the complaining witness for any damages they may have suffered.

"Some of these issues happened many years ago. Is there a Statute of Limitations on complaints?"

While there is no statute of limitations on NCREC disciplinary jurisdiction, the investigation of older cases can be affected by lack of availability of documentary evidence and witnesses.

Also, it is important to note that brokers are held to the rules and laws at the time the alleged incident(s) occurred.

CASE OUTCOMES

(Underline indicates final outcome.)

Septic Systems and Misrepresentation

Case 1, page 39. *Listing broker:* 3-month suspension, reduced to Reprimand if completes 1 CE course.

Case 2, page 40. *Listing company and listing broker:* both reprimanded. Dismissed as to buyer/dual agent.

Case 3, page 40. *BIC:* Reprimand, but dismissed if offers training session for associates re: pulling septic permits for listings. BIC held the required training so the case was dismissed as to all agents and the company and no names were published in the *Bulletin*. Why might this outcome have been different than that in Cases #1 and #2 where names were published in the *Bulletin*?

Case 4, page 41. *Listing Broker:* 30-day license suspension, reduced to a reprimand if completes 4 specified CE courses. *BIC:* Reprimand for failing to properly review advertising. *Listing Company:* Dismissed.

Case 5, page 42. *Listing Broker/dual agent:* 6-month suspension, stayed and converted to 6-month probation if completes 1 required CE course by certain date. *Listing Company:* Closed.

Case 6, pages 42-43. *Listing Company:* 6-month suspension reduced to a reprimand if current BIC takes specified CE course. *Listing Broker:* closed, as no longer licensed. *Listing company's BIC in 2007* (at time of transaction): 6-month suspension reduced to a reprimand if takes specified CE course. *Company B/selling company:* 24-month suspension effective October 1, 2014, stayed if BIC/QB completes one 30-hour post-license course prior to Oct 1, 2014. *Broker/QB/BIC of Company B:* 24-month suspension, stayed if completes one 30-hour post-license course prior to Oct 1, 2014 *and* cannot be BIC for 5 years beginning June 2014. QB/BIC took 30-hour class so 24-month suspension stayed for both he and his company, *i.e.*, no active suspension.

Streets Disclosure

Case 7, page 49. *Licensed builder-owner:* 3 month stayed suspension, reduced to reprimand if BIC takes specified CE course. *Onsite Broker:* 6 month stayed suspension, reduced to reprimand if she takes specified CE. *Onsite Broker's company:* 3 month stayed suspension (for listing agreement omission), reduced to reprimand if onsite broker/BIC takes specified CE.

Case 8, page 50. *Broker #1:* 3-month suspension, reduced to reprimand if takes specified CE by certain date. *Broker #2 and Listing Company:* Close and warn to discover and disclose material facts.

Underground Storage Tanks

Case 9, pages 56-57. *BIC and Company:* closed, but warned to educate associates regarding the need to disclose the potential risks and costs of USTs. *Broker/buyer agent:* revoked; cannot apply to reinstate prior to March 2017.

Square Footage

Case 10, page 59. *Listing Broker:* 3-month active suspension, reduced to reprimand if completes 2 specified CE courses prior to certain date. *BIC & Listing Company:* Closed and warned to keep required transaction records.

NOTE: Each sanction is specific not only to the violation but also to the respondent/situation.

See Subparagraph (f), next page, for the required contents of the street disclosure.

§ 136-102.6. Compliance of subdivision streets with minimum standards of the Board of Transportation required of developers.

(a) The owner of a tract or parcel of land which is subdivided from and after October 1, 1975, into two or more lots, building sites, or other divisions for sale or building development for residential purposes, where such subdivision includes a new street or the changing of an existing street, shall record a map or plat of the subdivision with the register of deeds of the county in which the land is located. The map or plat shall be recorded prior to any conveyance of a portion of said land, by reference to said map or plat.

(b) The right-of-way of any new street or change in an existing street shall be delineated upon the map or plat with particularity and such streets shall be designated to be either public or private. Any street designated on the plat or map as public shall be conclusively presumed to be an offer of dedication to the public of such street.

(c) The right-of-way and design of streets designated as public shall be in accordance with the minimum right-of-way and construction standards established by the Board of Transportation for acceptance on the State highway system. If a municipal or county subdivision control ordinance is in effect in the area proposed for subdivision, the map or plat required by this section shall not be recorded by the register of deeds until after it has received final plat approval by the municipality or county, and until after it has received a certificate of approval by the Division of Highways as herein provided as to those streets regulated in subsection (g). The certificate of approval may be issued by a district engineer of the Division of Highways of the Department of Transportation.

(d) The right-of-way and construction plans for such public streets in residential subdivisions, including plans for street drainage, shall be submitted to the Division of Highways for review and approval, prior to the recording of the subdivision plat in the office of the register of deeds. The plat or map required by this section shall not be recorded by the register of deeds without a certification pursuant to G.S. 47-30.2 and, if determined to be necessary by the Review Officer, a certificate of approval by the Division of Highways of the plans for the public street as being in accordance with the minimum standards of the Board of Transportation for acceptance of the subdivision street on the State highway system for maintenance. The Review Officer shall not certify a map or plat subject to this section unless the new streets or changes in existing streets are designated either public or private. The certificate of approval shall not be deemed an acceptance of the dedication of the streets on the subdivision plat or map. Final acceptance by the Division of Highways of the public streets and placing them on the State highway system for maintenance shall be conclusive proof that the streets have been constructed according to the minimum standards of the Board of Transportation.

(e) No person or firm shall place or erect any utility in, over, or upon the existing or proposed right-of-way of any street in a subdivision to which this section applies, except in accordance with the Division of Highway's policies and procedures for accommodating utilities on highway rights-of-way, until the Division of Highways has given written approval of the location of such utilities. Written approval may be in the form of exchange of correspondence until such times as it is requested to add the street or streets to the State system, at which time an encroachment agreement furnished by the Division of Highways must be executed between the owner of the utility and the Division of Highways. The right of any utility placed or located on a proposed or existing subdivision public street right-of-way shall be subordinate to the street right-of-way, and the utility shall be subject to regulation by the Department of Transportation. Utilities are defined as electric power, telephone, television, telegraph, water, sewage, gas, oil, petroleum products, steam, chemicals, drainage, irrigation, and similar lines. Any utility installed in a subdivision street not in accordance with the Division of Highways accommodation policy, and without prior approval by the Division of Highways, shall be removed or relocated at no expense to the Division of Highways.

The paragraph below specifies the information the street disclosure must contain.

(f) Prior to entering any agreement or any conveyance with any prospective buyer, the developer and seller shall prepare and sign, and the buyer of the subject real estate shall receive and sign an acknowledgment of receipt of a separate instrument known as the subdivision streets disclosure statement (hereinafter referred to as disclosure statement). Said disclosure statement shall fully and completely disclose the status (whether public or private) of the street upon which the house or lot fronts. If the street is designated by the developer and seller as a public street, the developer and seller shall certify that the right-of-way and design of the street has been approved by the Division of Highways, and that the street has been or will be constructed by the developer and seller in accordance with the standards for subdivision streets adopted by the Board of Transportation for acceptance on the highway system. If the street is designated by the developer and seller as a private street, the developer and seller shall include in the disclosure statement an explanation of the consequences and responsibility as to maintenance of a private street, and shall fully and accurately disclose the party or parties upon whom responsibility for construction and maintenance of such street or streets shall rest, and shall further disclose that the street or streets will not be constructed to minimum standards, sufficient to allow their inclusion on the State highway system for maintenance. The disclosure statement shall contain a duplicate original which shall be given to the buyer. Written acknowledgment of receipt of the disclosure statement by the buyer shall be conclusive proof of the delivery thereof.

(g) The provisions of this section shall apply to all subdivisions located outside municipal corporate limits. As to subdivisions inside municipalities, this section shall apply to all proposed streets or changes in existing streets on the State highway system as shown on the comprehensive plan for the future development of the street system made pursuant to G.S. 136-66.2, and in effect at the date of approval of the map or plat.

(h) The provisions of this section shall not apply to any subdivision that consists only of lots located on Lakes Hickory, Norman, Mountain Island and Wylie which are lakes formed by the Catawba River which lots are leased upon October 1, 1975. No roads in any such subdivision shall be added to the State maintained road system without first having been brought up to standards established by the Board of Transportation for inclusion of roads in the system, without expense to the State. Prior to entering any agreement or any conveyance with any prospective buyer of a lot in any such subdivision, the seller shall prepare and sign, and the buyer shall receive and sign an acknowledgment of receipt of a statement fully and completely disclosing the status of and the responsibility for construction and maintenance of the road upon which such lot is located.

(i) The purpose of this section is to ensure that new subdivision streets described herein to be dedicated to the public will comply with the State standards for placing subdivision streets on the State highway system for maintenance, or that full and accurate disclosure of the responsibility for construction and maintenance of private streets be made. This section shall be construed and applied in a manner which shall not inhibit the ability of public utilities to satisfy service requirements of subdivisions to which this section applies.

(j) The Division of Highways and district engineers of the Division of Highways of the Department of Transportation shall issue a certificate of approval for any subdivision affected by a transportation corridor official map established by the Board of Transportation only if the subdivision conforms to Article 2E of this Chapter or conforms to any variance issued in accordance with that Article.

(k) A willful violation of any of the provisions of this section shall be a Class 1 misdemeanor. (1975, c. 488, s. 1; 1977, c. 464, ss. 7.1, 8; 1987, c. 747, s. 21; 1993, c. 539, s. 996; 1994, Ex. Sess., c. 24, s. 14(c); 1997-309, s. 4; 1998-184, s. 3.)

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