

WHEN HIGH TIDE COMES HOME

By Judith I Johannsen

The weathermen got it right this time – a Nor'easter would be roaring through Connecticut, dumping torrential rains and swelling our rivers well beyond flood stage. What they didn't tell us, though, was that we would be gathering up animals two by two and looking for that fabled ark, some of us would now own lakefront property, and we could go kayaking in our basements.

So, how does a little thing like a Nor'easter impact you if you're buying or selling a home?

If you're a seller of residential property in Connecticut (with a few exceptions which include sellers as executors, administrators, conservators and trustees), the law requires you to fill out the state-mandated Residential Property Condition Disclosure Report. You do this whether you are selling your home by yourself or with the assistance of a real estate company.

The disclosure report serves to shed light on the condition of the home's various components (such as the plumbing, heating and electrical) to the best of the seller's knowledge and belief. Specifically, the report asks the seller to disclose the amount, the frequency and location of any water, seepage or dampness in the property as well as sump pump problems, rot or water damage, and water drainage.

Sellers who had completed their property condition disclosure report before the Nor'easter and who answered no problem with and/or no knowledge of water intrusion or water damage, but subsequently found water in their basements, may want to update their disclosure report. The decision to update the report is a seller's alone, not the agent's, as it is a seller's disclosure statement.

What if a seller refuses to update its disclosure report and his/her agent knows of the water problem? Under CT's real estate licensing law and regulations, a real estate licensee is prohibited from concealing (i.e., must disclose) a material fact and a material fact is one that would be important to a reasonable buyer. Water in a basement is a material fact since it may indicate any number of conditions which brought about the intrusion in the first place and/or lead to conditions requiring remedy or repair in the future.

A problem can arise for sellers if they knowingly check off on the disclosure report that they have never had water in their basement when they have. A seller's false representations can lead a buyer to buy where, if the truth were known, a buyer might not. Such misrepresentation can be classified as fraud to induce a prospective buyer to buy and the courts do not look favorably on such a seller. In one case, a court ordered a seller to take back its property, refund the purchase price to the buyer, and reimburse the buyer for all costs and fees associated with trying to fix the problem the seller purposefully failed to disclose.

What if a seller demands that his or her Realtor® say nothing about water in the basement? Since water intrusion is a material fact, a seller's order to say nothing about the problem is asking that Realtor® to disregard its legal and ethical obligation to disclose material facts concerning a transaction. A Realtor® has no obligation to obey unlawful instructions.

Real estate agents and buyers should not assume that the water intrusion during or after the recent storm was a one-time event. Agents will need to disclose the water intrusion to potential buyers and once a buyer has learned of a property's water problem and performs inspections, he or she can then decide whether or not the water intrusion was a one-time event.

Lastly, both buyers and sellers should note that most purchase contracts place the risk of a casualty loss on the seller and require the seller to maintain the property in the same condition it was in on the date their purchase contract was signed. Therefore, a buyer needs to know that the high tide showed up in the seller's basement after their purchase contract was signed so he or she can decide whether the seller's water intrusion clean-up/fix-up met the seller's contractual obligations and to preserve possible insurance claims.

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