



MAR Legal Update

March 2023

1



INTRODUCTION

JUSTIN DAVIDSON,
General Counsel &
Director of Government
Affairs



jdavidson@marealtor.com

KATE BERARD,
Associate Counsel &
Director of Professional
Standards



Kberard@marealtor.com

2

2

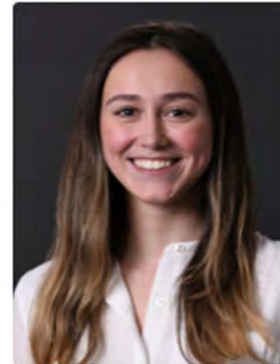
TEAM MEMBERS:



Catherine Taylor
Director of Education &
Associate Counsel



Jonathan Schreiber
Legislative & Regulatory Counsel



Audrey Hettinger
Government Affairs Associate

3

3

AGENDA

- Legal Hotline
- Buyer Agreements
- *Huang Case*
- Professional Standards
- Kahoot!



4

4

LEGAL HOTLINE



5

HOT TOPICS

- LANDLORD / TENANT
- REBATE/REFUNDS & REFERRAL GIFTS
- **DISCLOSURE OBLIGATIONS**
- BACK TO MARKET? ESCROW DUTIES AND DEPOSIT DISPUTES
- CAN A LICENSEE DO BUSINESS UNDER A CORPORATE ENTITY?
- DESIGNATED AND DUAL AGENCY CONSENT AND NOTICE FORMS
- **FRAUDULENT SELLERS**
- BINDING CONTRACTS / CONSIDERATION
- **ARTIFICIAL INTELLIGENCE**

6

DISCLOSURE OBLIGATIONS

What is the **private SELLER** obligated to disclose? Not much. **BUYER BEWARE**

- Lead Paint
- Septic System
- Directly Asked

7

LICENSEES

Real estate licensees have an affirmative duty under M.G.L. c. 93A, the Consumer Protection Statute to disclose “any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction.”

940 CMR 3.16(2)

8

REALTORS®

REALTORS® shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction. They should “discover and disclose adverse factors reasonably apparent to someone with expertise in those areas required by their real estate licensing authority.”

NAR Code of Ethics, Art. 2, Standard of Practice 2-1.

9

Disclosure of Off-Site Problems

- “Off-site physical conditions, known to a seller who is subject to G.L. c. 93A, may require disclosure if the conditions are ‘unknown and not readily observable by the buyer [and] if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and, therefore, render the property substantially less desirable or valuable to the objectively reasonable buyer.’” Urman v. South Boston Savings Bank, 424 Mass. 165 (1996)

3/10/2023

PRESENTATION TITLE

10

10

What the Bank knew:

- Contamination was not on-going
- Contamination had not affected the condominium
- Problem remedied at the school, school re-opened
- No demonstrable future danger to the condo

As a matter of law, the Court concluded that the bank is not liable under G.L.c. 93A as interpreted by 940 Code Mass. Regs. S. 3.16 (2) for failure to disclose to the Plaintiffs the contamination-related closing of the schools

11

11



12

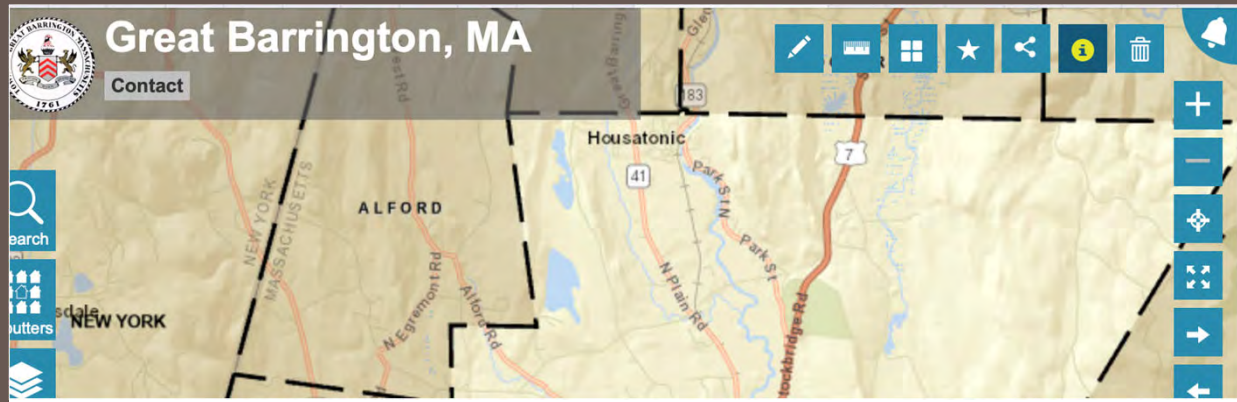
12

HOW TO PROPERLY IDENTIFY YOUR SELLER

- Tax Records
- Registry Of Deeds
- Letter to Address listed
- Google Phone Number / Name.
- Push for a video meeting with lead.
- Ask for ID
- If a buyer – ask for proof of funds.

13

13



Great Barrington, MA
Contact

Look up your town's GIS Mapping.
This is an EXCELLENT resource not only for seller identification, but for other important facts about the property you are selling!

14

14

Great Barrington, MA

Contact 12-59 1.04 ac

7 omega rd 0.51 ac

Parcel # 32-10-59-0

7 OMEGA RD

WELLENKAMP GREGG O & WELLENKAMP ER...

0.490 ac

0.599 ac

15

15

CAI Property Card

Town of Great Barrington, MA

GENERAL PROPERTY INFORMATION	BUILDING EXTERIOR
LOCATION: 7 OMEGA RD ACRES: 1.54 PARCEL ID: 032.0-0010-0059.0 LAND USE CODE: 131 CONDO COMPLEX: OWNER: WELLENKAMP GREGG O CO - OWNER: WELLENKAMP ERIC H MAILING ADDRESS: P O BOX 413 GT BARRINGTON, MA 01230-0413	BUILDING STYLE: UNITS: 0 YEAR BUILT: FRAME: EXTERIOR WALL COVER: ROOF STYLE: ROOF COVER:
ZONING: R2 PATRIOT ACCOUNT #: 3142	BUILDING INTERIOR INTERIOR WALL: FLOOR COVER: HEAT TYPE: FUEL TYPE: PERCENT A/C: # OF ROOMS: 0 # OF BEDROOMS: 0 # OF FULL BATHS: 0 # OF HALF BATHS: 0 # OF ADDITIONAL FIXTURES: 0 # OF KITCHENS: 0 # OF FIREPLACES: 0 # OF METAL FIREPLACES: 0 # OF BASEMENT CABAGES:
SALE INFORMATION	
SALE DATE: 5/6/2021 BOOK & PAGE: 2686-184 SALE PRICE: SALE DESCRIPTION: MULTI PARCEL SELLER: WELLENKAMP GREGG O,	
PRINCIPAL BUILDING AREAS	
GROSS BUILDING AREA: 0 FINISHED BUILDING AREA: 0 BASEMENT AREA: 0 # OF PRINCIPAL BUILDINGS: 0	

16

16

Search Home Search Criteria Search Options Search Help&Support FAQ Basket

masslandrecords.com
Berkshire M

Recorded Land
[Name Search](#)
[Book Search](#)
[Document Search](#)
[Property Search](#)
[Recorded Date Search](#)
[Unindexed Property Search](#)
[1761-1969 Grantor Index](#)
[1761-1969 Grantee Index](#)

Registered Land (Land Court)
[Name Search](#)
[Book Search](#)
[Certificate Search](#)
[Document Search](#)
[Property Search](#)
[Recorded Date Search](#)

Plans
[Name Search](#)
[Book \(Year\) Search](#)
[Document Search](#)
[Property Search](#)
[Recorded Date Search](#)
[Unindexed Property Search](#)

Registered Land Plans
[Name Search](#)
[Book Search](#)
[Court Case Number Search](#)
[Document Search](#)
[Property Search](#)
[Recorded Date Search](#)

44 Bank Row Pittsfield, MA 01201

Make sure you have the right Registry! Berkshire North, Middle, South!

17

Search Home Search Criteria Search Options Search Help&Support FAQ Basket

masslandrecords.com
Southern Berkshire Recorded/Registered Land

Street #: * Street Name:

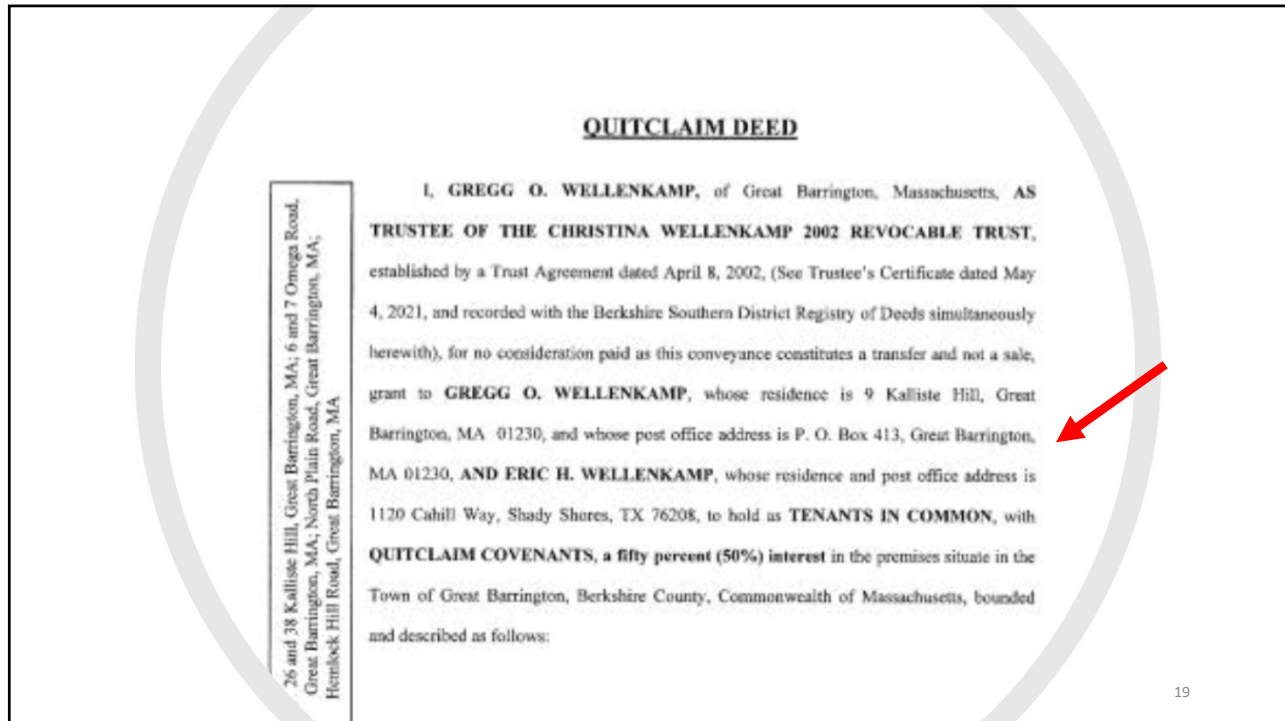
Recorded Land Property Search (Dates Available: 01/01/1959-Current) Street #: 7 Street Name: Omega Town: Search All Towns
 1/1/1959 To: 3/3/2023 (Total: 0.69 seconds, 7 rows)

Select All Invert Selection Deselect All Print Search Result View: 20/Page 50/Page 100/Page

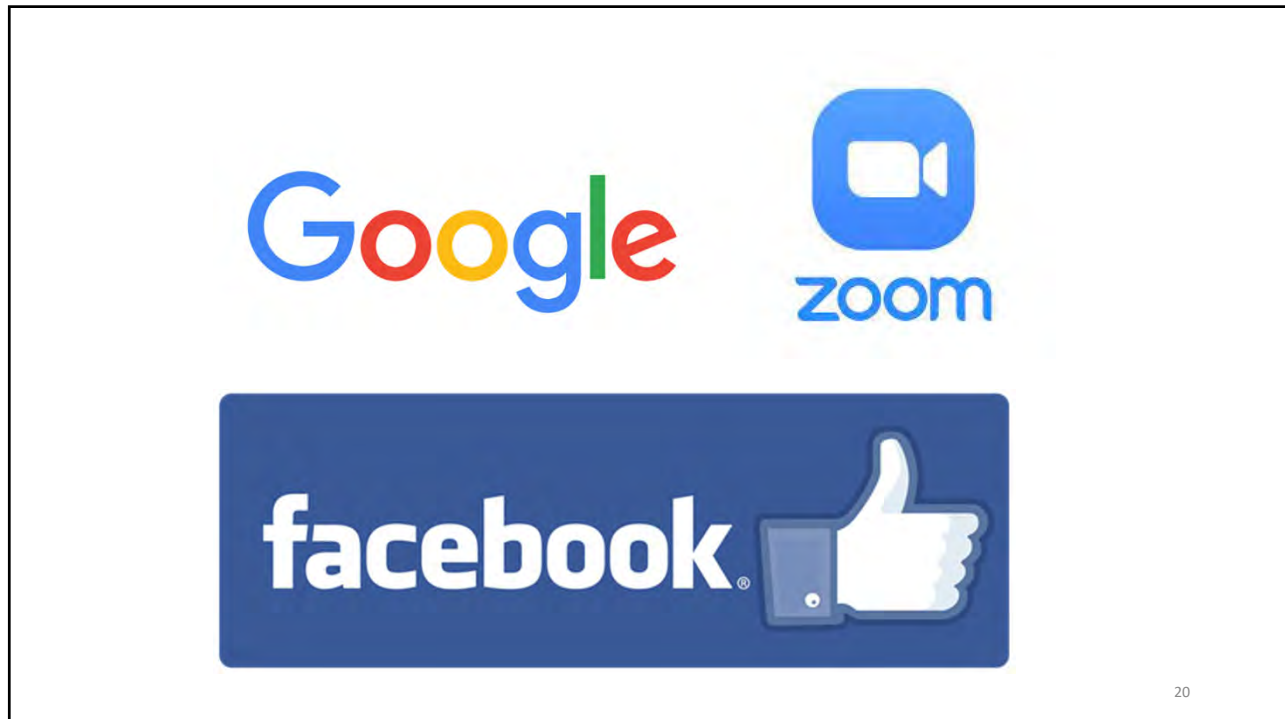
Street Name	Rec. Date	Book/Page	Type Desc.	Street #	Town
<input type="checkbox"/> OMEGA RD	2/9/2021	02680/129	DEED		BARRINGTON
<input type="checkbox"/> OMEGA RD	5/6/2021	02686/165	DEED		GREAT BARRINGTON
<input type="checkbox"/> OMEGA RD	5/6/2021	02686/177	DEED		GREAT BARRINGTON
<input type="checkbox"/> OMEGA RD	5/6/2021	02686/183	DEED		GREAT BARRINGTON
<input type="checkbox"/> OMEGA RD	12/14/2020	02648/261	RELEASE		GREAT

1

18



19



20

Artificial Intelligence in Real Estate

- **Zillow:**
 - Zestimate - An algorithm that uses unique valuation models
 - Zillow Offers & Ibuyers – Zillow estimates it will lose over half a billion dollars in value in what it owns. It is winding down the program. Other Ibuyers are finding success. However, its capacity to accelerate processes may sacrifice needed due diligence measures. Role will only grow as it “learns”
- **Targeted advertising** – can run afoul of fair housing by avoiding certain protected classes (Ex: Crimsafe automatically excluded those with criminal background in tenant screening creating disparate impact on protected classes)
- **ChatGPT** – generates human-like text responding to inquiries and creating property descriptions & social media posts.
- **Virtual Staging** – creates an image of what the place could look like.

21

21

KEEP IT LEGAL

- As HUD’s General Counsel Paul Compton stated, “Even as we confront new technologies, the fair housing laws enacted over half a century ago remain clear—discrimination in housing-related advertising is against the law.”
- When in doubt, if contemplating implementing new technology, particularly technology using algorithms, seek advice of counsel to be sure any effects are not inadvertently violating the law. Although AI promises exciting developments and cost-savings, with great efficiency comes responsibility.

3/10/2023

PRESENTATION TITLE

22

22

Disclose Virtual Staging!

Virtually-altered photos look a lot more realistic than they used to. This realism is both a plus and a danger.

Virtual staging can be a boon when selling a property—if it's done right. Otherwise, it can lead to real estate legal issues.

3/10/2023

PRESENTATION TITLE

23

23



MAR
LEGALHOTLINE

1-800-370-LEGAL (5342)

NOW AVAILABLE TO ALL OF OUR MEMBERS

Hours: Monday – Friday, 9 AM to 4 PM
Or Email: LegalHotline@MARealtor.com

The graphic features a blue background with a white central area. On the left, there is a vertical orange bar with a white telephone handset icon. The text 'MAR LEGALHOTLINE' is prominently displayed in blue and red. Below it, the phone number '1-800-370-LEGAL (5342)' is shown in red. A dark blue horizontal bar contains the text 'NOW AVAILABLE TO ALL OF OUR MEMBERS' in white. At the bottom, a photograph of a smiling woman on a phone call is shown. To the right of the photo, the hours and email contact information are listed. A gold scales of justice icon is in the top right corner, and a gold gavel icon is in the top left corner.

24

The Story



25

The Case

Huang v. Ma

- 2017 Superior Court
- 2021-2022 Appeals Court
- 2022-2023 Supreme Judicial Court



26

Case History

Superior Court-Contract between the parties was not enforceable because it was not reduced to writing.

Appeals Court-Overturned Superior Court because express exemption to Statute of Frauds provides that a contract to pay for the services of a licensed real estate broker need not be in writing to be enforceable.

BUT...



27

Appeals Court-the Dissent

Clear Statement Rule:

The court should read a “clear statement” requirement into real estate contracts, such that an exclusive agency agreement would have to specifically state that commission is a remedy, otherwise it would not be available as expectation damages.



28

The Amicus

Main Arguments:

- I. Buyer agency is new and differs from existing case law
- II. Exclusive agency agreements are important and should be protected
- III. Expectation damages are normal and proper
- IV. This is a bad case to create a new law from



29

The Supreme Judicial Court

Oral Arguments:

- Amicus brief relied on heavily by plaintiff and justices.

SJC Decision:

- Broker “wins”
- “According to the amicus briefing...”
- “As ably explained by the amicus...”



30

The “Win”

What does it mean to win?

- Case goes back to Superior Court for a trial.
- Broker must prove that the alleged oral agreement actually existed.
- “again taking the facts in the light most favorable to Huang, *as we are required to do*”



31

The Takeaway

Use a written buyer agency agreement!



32

NAR – DOJ Settlement

- 1.) The (a) amount of compensation offered to buyers' agents for each MLS listing will be made publicly available. Publicly accessible MLS data feeds will include offers of compensation, and (b) buyers' agents will have an affirmative obligation to provide such information to their clients for homes of interest.
- 2.) While NAR has long encouraged buyers' agents to (a) explain how they expect to be paid, typically through offers of cooperative compensation from sellers' agents, there will be a rule that more specifically states that (b) buyers' agents cannot represent that their services are free to clients.
- 3.) The new rules will require, with the seller's prior approval, a licensed real estate agent will have access to the lockboxes of properties listed on an MLS even if the agent does not subscribe to the MLS.



33

PROFESSIONAL STANDARDS

34

ETHICAL ISSUES

BROKER OVERSIGHT

GENERAL MARKETING v.
TARGETED
SOLICITATION

STANDARD OF PRACTICE
10-5

35

35

GENERAL MARKETING v. TARGETED SOLICITATION

Article 16: REALTORS shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other REALTORS have with their clients.

Standard of Practice 16-2: Article 16 does not preclude REALTORS from making general announcements to prospects describing their services and the terms of their availability even though some recipients may have entered into agency agreements or other exclusive relationships with another REALTOR. General telephone canvass or mailing to all prospects in a given geographical area or profession for example is fine.

36

36

What is unethical solicitation?

1. Telephone or personal solicitation of property owners who have been identified by a real estate sign, MLS or other information as having exclusively listed their property with another REALTOR.

BE CAREFUL OF WITHDRAWN LISTINGS!

2. Mail or other forms of written solicitation of prospects whose properties are exclusively listed with another REALTOR when solicitation is directed specifically to property owners and not part of a general mailing.

37

37

STANDARD OF PRACTICE 10-5

Article 10: REALTORS shall not deny equal professional services to any person for reasons of race, color, religion, sex, disability, familial status, national origin, sexual orientation, or gender identity. REALTORS shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of..... REALTORS in their real estate employment practices, shall not discriminated against any person or persons on the basis of ...”

Standard of Practice 10-5: REALTORS must not use harassing speech, hate speech, epithets, or slurs based on race, color, religion, sex, disability, familial status, national origin, sexual orientation, gender identity.”

3/10/2023

PRESENTATION TITLE

38

38

The screenshot shows the website for the Massachusetts Association of REALTORS®. The header includes the logo, navigation links for '2024 MAR Elections', 'Fair Housing', 'Login Help', and 'Accessibility', a 'LOGIN' button, and a search icon. A secondary navigation bar lists 'Membership', 'Events & Education', 'Data & Tools', 'Advocacy & Legal', 'Buyers & Sellers', and 'About MAR'. The main content area features a 'Dispute Resolution' section with a sub-header 'The suggested course of action if a dispute arises...' and a background image of two hands shaking. Below this is a breadcrumb trail 'Home > Dispute Resolution', a main heading 'Dispute Resolution', and a paragraph explaining that disputes often arise from miscommunication and suggesting an open conversation with the agent or principal broker. Two buttons are provided: 'Guide for REALTORS®' and 'Guide for Consumers'. At the bottom, contact information for Kate Berard, Director of Professional Standards and Associate Counsel, is listed with email and phone details.

39



40