MASSACHUSETTS ASSOCIATION OF REALTORS®

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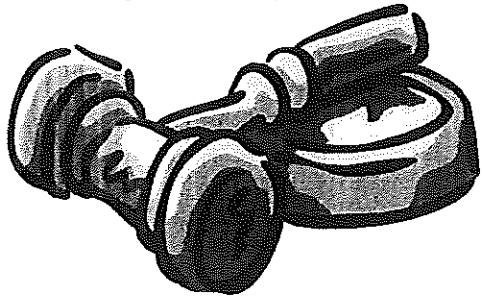
Disclosure

Coming Soon Listings

Multiple Offers

Federal Legal Issues Update

Michael McDonagh, Esq.
MAR General Counsel
Legal Hotline: 800-370-LEGAL (5342)
Monday - Friday from 9AM to 1PM



legal notes

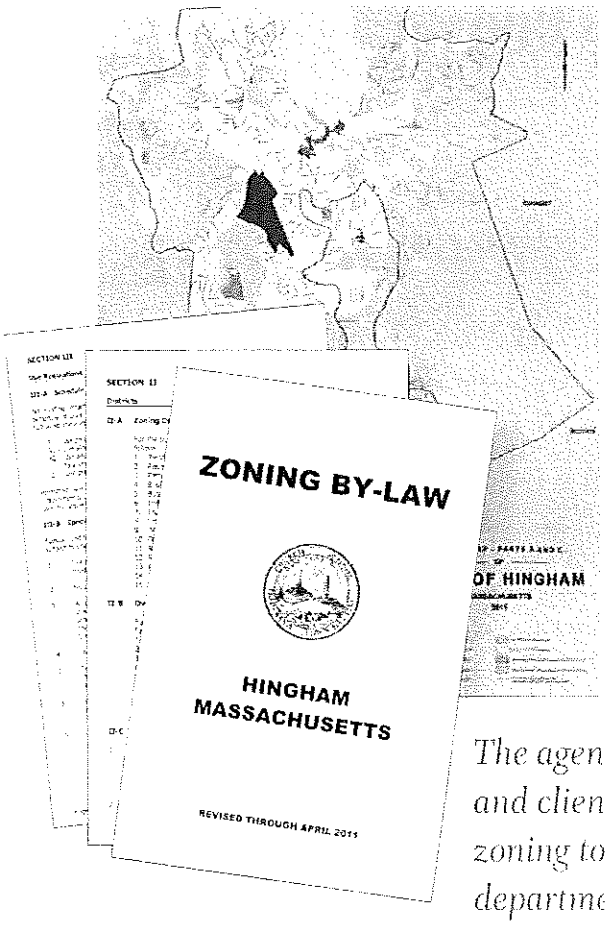
TRANSLATING THE LAW FOR YOU

{legal Realtor®}

Disclaimer of Warranties Can Be a Defense to Claims for Verbal Misrepresentations, but Not for Written Ones

BY ROBERT S. KUTNER, ESQ. *Partner, Casner & Edwards*

Among the most frequent claims by buyers against real estate agents are: (1) that the agent misrepresented information about the property; and (2) that the agent failed to make a disclosure, despite knowledge of facts that should have been volunteered. In a recent case decided by the Massachusetts Appeals Court, *DeWolfe v. Hingham Centre, Ltd.*, the broker defended the buyer's misrepresentation claims, citing a disclaimer of warranties provision in the purchase and sale agreement. Every real estate agent should become familiar with the Court's decision regarding the application of such disclaimer clauses.



The Lawsuit

The lawsuit arose from the purchase of a property in Hingham, which was advertised and listed in MLS as being "zoned Business B." The prospective buyer, Daniel DeWolfe, told the broker that he wanted to relocate his hair salon to the property. DeWolfe claimed that the broker had told him that the property could be purchased as a two family residence and legally converted to a hair salon based on its business zoning. The Appeals Court noted that the broker had provided the buyer with a copy of the Norwell Zoning Ordinance that provided that "hairdresser" was among the permitted uses in a Business B zone.

The agent should direct customers and clients who have concerns about zoning to the local building department or zoning board.

With the assistance of an attorney, DeWolfe signed a P&S on the standard Greater Boston Real Estate Board (GBREB) form that made his obligation to purchase contingent on approval by the town for a hair salon. The form contained a standard disclaimer of warranties provision that: "The BUYER acknowledges that the BUYER has not been influenced to enter into this transaction nor has he relied upon any warranties or representations not set forth or incorporated in this agreement or previously made in writing, except for the following additional warranties or representations, if any, made by either the SELLER or the Broker(s)." In the space for additional warranties appeared the typewritten word "NONE."

After obtaining approval for a six-station hair salon from the Board of Health (but not

continued on page 12

continued from page 10
from the Building Department) in November 2004, DeWolfe purchased the property in December. In early 2005 he learned that the property was actually in a "Residential B" district and that a hair salon was not permitted. DeWolfe sued, claiming a misrepresentation.

Initially, the superior court trial judge dismissed the case on a motion for summary judgment, ruling that the broker had no duty to verify the zoning classification. DeWolfe appealed. On appeal, the Appeals Court vacated the dismissal and sent the case back to the superior court. It reasoned that where the broker had made affirmative written representations that the property was zoned Business B, the broker had a duty to verify the zoning. Analyzing the disclaimer language in the P&S, the Court ruled that the clause was a bar to a claim for a verbal misrepresentation, but not to a written misrepresentation. In essence, the Court ruled that where a written representation was made by the broker concerning the specific zoning classification, the broker had a duty to verify that zoning classification.

Duty of Broker

Importantly, the Court did not rule that it was the duty of the broker to investigate the zoning classification in the absence of an affirmative written representation about zoning. In its decision, the Appeals Court cited with approval, *Quinlan v. Clasby*, a 2008 decision in which it was held that a real estate agent was not liable for marketing a property as a "three-family house," despite the fact that only two of the units were lawful under zoning. The listing broker in *Quinlan* never reviewed records of the Inspectional Services Department of the City of Boston that showed that one of the three units violated zoning. Reversing the trial court's decision against the broker, the Appeals Court in *Quinlan* ruled that the real estate broker had no duty to determine zoning compliance and could rely on information provided by the seller, that the property was a three-family. That remains the law today.

In its decision in *DeWolfe* the Appeals Court distinguished *Quinlan*, stating that the zoning classification had not been mentioned by the broker in *Quinlan*. By contrast, in *DeWolfe* the broker affirmatively identified the zoning classification in writing. Therefore, according to the Court, the broker had a duty to determine the proper classification.

Among the broker's other defenses in *DeWolfe* were that the broker had relied on the seller who was the source of the "Business B" zoning information. While reasonable reliance by a broker on a "reputable source" can be a defense to a claim for misrepresentation, a factual issue was raised in *DeWolfe* concerning the source. That factual issue prevented dismissal of the misrepresentation claim on the grounds that it had been an "innocent misrepresentation."

Much of the *DeWolfe* decision involves interpretation of the "No Warranties or Representations" disclaimer in the standard GBREB P&S. The Appeals Court concluded that its disclaimer barred claims for oral, but not written representations. The Appeals Court explained: "[W]hile an exculpatory clause was included in the warranties and representations section in the standard form purchase and sale agreement used by the parties, it explicitly excludes representations previously made in writing. As noted above, [the listing broker] misrepresented the zoning classification in writing on more than one occasion.

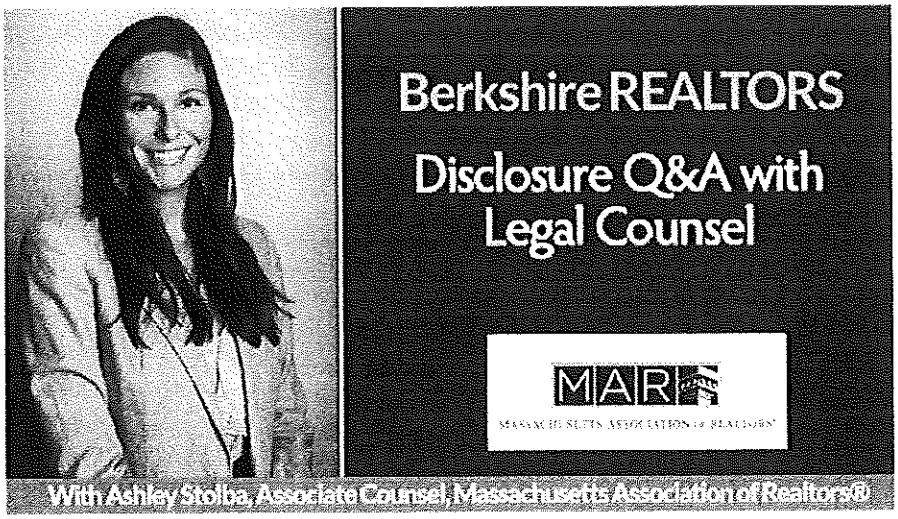
The case of *Cone v. Ellis* . . . cited in the dissent [of two Appeals Court justices], does not address the issue in this case. Cone involved an oral representation. . . . It is quite clear that under the language of the [GBREB] agreement used here, which is the same as that at issue in Cone, a buyer may not rely on such representations."

Recommendations

Based upon the decisions in *DeWolfe*, *Quinlan* and *Cone*, it is recommended that listing agents make no representation about the specific zoning classification or compliance of a property. Without such, the agent has no duty to verify the classification or compliance. As noted educator Jody O'Brien teaches, the agent should be the "source of the source." In other words, the agent should direct customers and clients who have concerns about zoning to the local building department or zoning board. The agent should not volunteer to investigate the issue and provide advice to the buyer. That policy is recommended whether the agent represents the buyer or seller. Alternatively, the agent should recommend that the buyer hire a qualified attorney to prepare a zoning opinion.

The ruling in *DeWolfe* will be undergoing further scrutiny in the next year. The Supreme Judicial Court has just agreed to accept a further appeal, so keep a look out for further reports.

Berkshire REALTORS
And Multiple Listing Service, Inc.



Important Disclosure Information for all REALTORS

POSTED BY SANDY CARROLL, CEO ON AUGUST 4, 2016 IN LEGAL SUMMARIES, RE BUSINESS NEWS | 65 VIEWS

We have two environmental issues in Berkshire County that are always changing, and with constant change there emerges questions about disclosure of POTENTIAL pipelines, PCB paths or dumps. We asked our State Association Legal Counsel, Ashley Stolba to weigh in on these issues. We asked her a series of questions, and she has provided guidance for REALTORS representing both sellers and buyers. Our Introduction/Background:

The first example pertains to a property that is located near (but not adjacent) to the Housatonic River (contaminated with PCBs).

- There are federal and EPA lawsuits regarding the clean-up of these PCBs from a settlement made well over 10 years ago.
- There are contested cleanup plans in court between the EPA / GE.
- The current "plan" sets out to take dredged PCBs from the river (that runs through Pittsfield, Lenox, Lee, Stockbridge, Great Barrington and Sheffield), transport them through adjacent neighborhoods and truck them to an approved facility.
- Some plans call for this PCB "facility" (dump) to be located in Berkshire County, other

UPCOMING EVENTS

Legal Luncheon – $20 Gets "Stay Out of Jail Free" Card
August 17 @ 11:00 am - 1:30 pm

Commercial Real Estate Mar & CE Sessions in MA
August 18, 2016 @ 10:00 am - M 2017 @ 2:00 pm

MLS Board of Directors Mee
September 14 @ 9:00 am - 11:3(

75th Anniversary Gala
September 14 @ 6:00 pm - 10:0(

Realtor Board of Directors M
September 21 @ 9:00 am - 11:3(

Classroom Continuing Educa
September 28 @ 9:00 am - 4:00

Classroom Continuing Educa
September 29 @ 9:00 am - 4:30

5th Annual Chili Cook-off
October 13 @ 5:00 pm - 7:30 pm

MLS Board of Directors Mee
November 9 @ 9:00 am - 11:30 p

View All Events

PAY, REGISTER FOR CLASSES, OR VOLUNTEER

proposals say out of state.

- Currently there aren't access roads in many points of the river, so part of the plan is to create roads through neighborhoods for truck / equipment access. There are no identified locations for these roads that we are aware of.

The other disclosure issue surrounds the natural gas pipeline extension.

- While it seems that the company already has its permits to proceed in Otis State Forest through Sandisfield, each permit bears a set of conditions that will determine just how such a installation should occur (and still in appeal stages).
- The FERC Certificate has been issued, but we can only locate a vague map http://www.kindermorgan.com/content/docs/Connprojectmap.pdf
- Yesterday, the Eagle Reports Otis Mapping Begins.

With that background, we asked Ashley the following questions about Chapter 93A disclosure requirements for these two types of issues.

"First, thank you for providing MAR with an opportunity to clarify for Berkshire REALTORS the provisions of Chapter 93A that will apply in the two examples above. Let me start with a general reminder about the regulations. The Attorney General has explained Chapter 93A violations occur when: "Any person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction." Chapter 93A requires that a real estate agent volunteer this information, even if the real estate salesperson is not asked. Furthermore, this law does not impose a duty to investigate onto brokers – rather, it requires you to disclose information of which you have actual knowledge."

Q. While all REALTORS (should) know that any PCB contamination ON a property must be fully disclosed to prospective purchasers, what about contamination found NEAR a property? The river, for example.

"The 1997 case of "Urman v. South Boston Savings Bank" ruled that the duty to disclose off-site problems in Massachusetts is limited to: (1) physical conditions; (2) which are known to a business person (seller or broker), but not known and not readily observable by the buyer; and (3) be sufficiently important that they affect the value or use of the property. As such, this would have to be disclosed if there is PCB contamination near the property and it would affect the property's value."

Q. What are the recommended disclosure requirements for POTENTIAL future impacts that have been published in the news media? For example, a property is located near a POSSIBLE PCB dumpsite or near the POSSIBLE excavation route for removal or NEAR the POSSIBLE pipeline path? None of which are done-deals.

"To be conservative, I would recommend disclosure with the permission of the seller. I would recommend disclosing what you know, meaning, news that you have read regarding the proposals and allow the buyer do conduct their own research regarding the legitimacy and likelihood of the proposals."

As always, consult with your office policy and DR (and legal counsel, when necessary) for guidance about making appropriate disclosures about potential impacts if the seller doesn't provide permission.

Q. The Courts ruled that Kinder Morgan has the right of eminent domain for the

construction of the pipe, but it is in the appeals process and environmental advocates indicate they would appeal. Does a Seller's agent disclose that part of the land has been taken by eminent domain? What if the seller does not tell the seller's agent?

"If a property owner has already agreed to an easement, that easement would arguably serve as constructive notice and should be disclosed to any buyer, even if not asked. The DeWolfe case helped us answer this: If the agent has actual knowledge about this easement, that fact should be disclosed. The agent also needs to act reasonably, though; if the seller has not told them about the easement, or even worse, told them that no easement exists, but then the agent reads in the paper or notices letters on the kitchen island about an easement on the property, then that would have to be disclosed. Although the agent does not have a duty to investigate, it does have a duty to act reasonably and disclose what he or she actually knows."

Q. What obligations do seller's agents have in determining when a proposal or possibility becomes a reality? For example, there is a proposed dump site already identified, but it's only a proposal. How closely do agents have to monitor this changing dynamic?

"The agents do not have a duty to investigate, but must act reasonably. They must disclose what they know."

Q. What would be considered proper due diligence for buyer's agents related to the investigation of pipeline paths or PCB contamination or proposed dumps?

"Use a buyer's agency agreement instructing the buyer to conduct their own their own research."

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POSTED IN LEGAL SUMMARIES, RE BUSINESS NEWS

About the Author

Sandy Carroll, CEO

It's my job to make sure we provide the tools and resources to enable our Berkshire REALTORS to meet today's business challenges, take advantage of the opportunities that lie ahead and thrive in their business. We keep the real estate marketplace humming along in the beautiful Berkshires.

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TRANSLATING THE LAW FOR YOU

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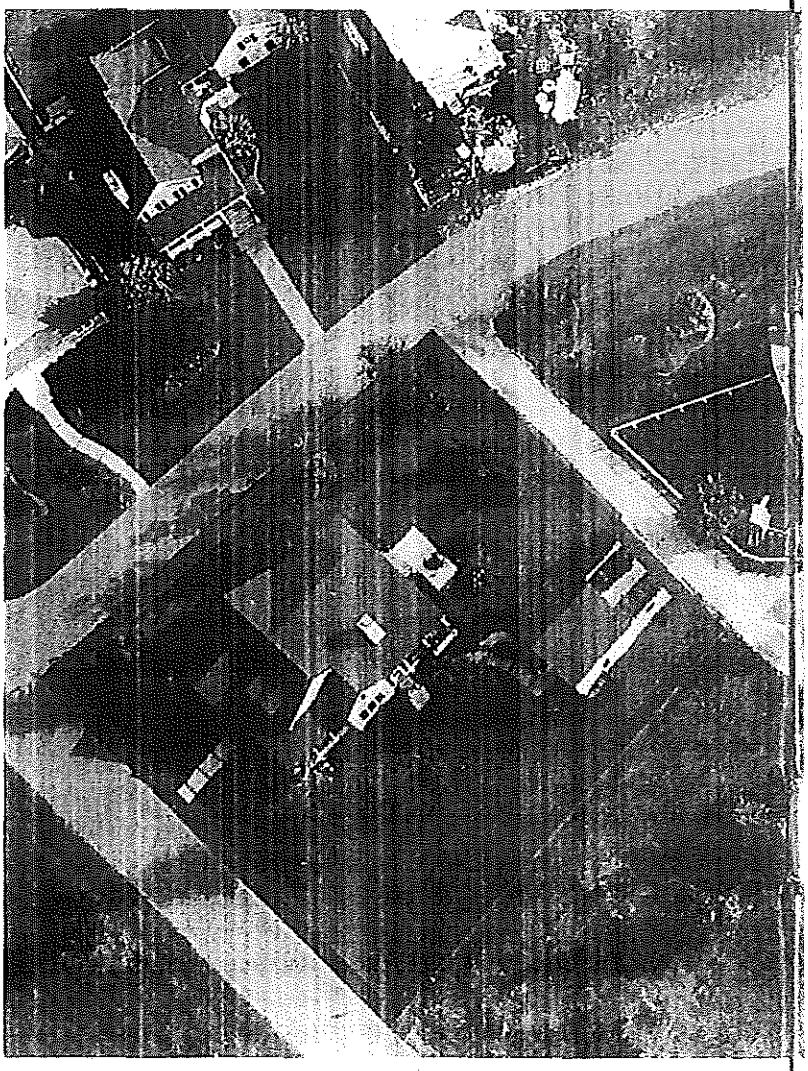
Disclosures Outside the Boundaries

BY ROBERT S. KUTNER, ESQ. *Partner, Casner & Edwards*

Real estate brokers who list properties for sellers and landlords are regularly confronted with the question of whether there is a geographic limit to their disclosure obligations. Must information about conditions outside the four corners of a listed property be obtained or disclosed? Agents representing buyers and tenants face the same question, but with the added burden of the fiduciary duty of due care owed to their clients.

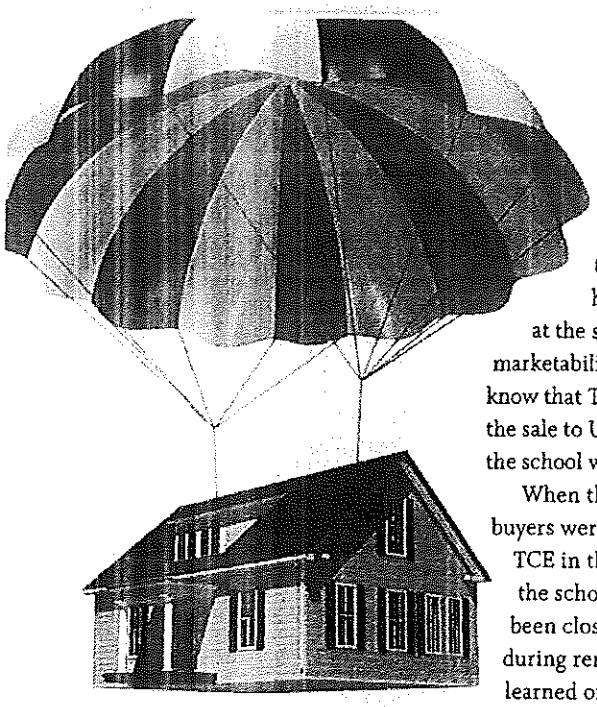
Unfortunately, the legislature has not provided a "bright line" test that limits disclosure to conditions within the geographic boundaries of a property. But guidance has been provided by the Massachusetts Supreme Judicial Court ("SJC") in *Urman v. South Boston Savings Bank*, a case decided in 1997, providing insight as to how similar issues should be handled as well as the factors to be considered.



Case in Point

In *Urman*, South Boston Savings Bank took title to a condominium in Needham through foreclosure. It placed the condo on the market for sale. A year earlier, the Massachusetts Department of Environmental Protection had determined that high levels of a toxic substance, trichloroehylene (TCE), had migrated into groundwater flowing beneath a nearby school and that the vapors presented a danger to the students. In high doses, TCE may cause kidney, heart, respiratory, and nervous system problems.

The school closed for seven months while the TCE was being



- $1,500 for servicers to cover administrative and processing costs; and
- Up to $2,000 for investors who allow a total of up to $6,000 in short sale proceeds to be distributed to subordinate lien holders, on a one-for-three matching basis.

- Requires all servicers participating in HAMP to implement HAFA in accordance with their own written policy, consistent with investor guidelines. The policy may include factors such as the severity of the potential loss, local markets, timing of pending foreclosure actions, and borrower motivation and cooperation.

Resources

A complete list of HAFA guidelines and forms are available at:

www.hmpadmin.com/portal/programs/foreclosure_alternative.html.

A list of servicers participating in HAMP (including HAFA) is available at: www.makinghomeaffordable.com/contact_servicer.html.

remediated. The bank had been told by the prior owner of the condo that an unspecified hazardous waste problem at the school had affected marketability, but the bank did not know that TCE was the problem. Before the sale to Urman the TCE cleanup at the school was completed.

When the condo was sold, the buyers were not advised about the TCE in the groundwater beneath the school or that the school had been closed for seven months during remediation. When they learned of the contamination and school closing, the buyers sued the bank, claiming that the non-disclosure violated the Massachusetts Consumer Protection Act, commonly known as "Chapter 93A." Before trial, the bank filed a motion for summary judgment, asking that the judge rule that the facts were not sufficient to support liability.

No Duty to Disclose

The superior court judge dismissed the case, ruling that the South Boston Savings Bank had no duty to disclose facts about which it had no knowledge, namely, that there was TCE contamination of the groundwater under the school.

There was no evidence that the contaminated groundwater migrated from school grounds to the condominium, nor was there any evidence that the contamination would ever reach the condominium. The trial judge also based his decision on the buyers' failure to present evidence that the market value of any homes in the neighborhood had been adversely affected by the levels of toxic waste in the groundwater beneath the school. The judge stated that there was no justification to allow the buyers to assert a claim that they had bought into a "bad neighborhood."

The decision was appealed to the SJC. The Massachusetts Association of Realtors® filed a brief in support of the bank, urging that the SJC rule that Chapter 93A did not impose a duty to disclose off-site defects. The SJC issued its decision, upholding the dismissal.

Factors Supporting Nondisclosure

The SJC based its decision on several factors. First, it stated that that there is no liability under Chapter 93A for nondisclosure of defects unless the businessperson subject to Chapter 93A (seller or broker) had actual knowledge of the defect. That precedent was first established in 1993 in *Underwood v. Risman*, another case in which MAR filed a brief urging the Court to rule that only "facts" known by a person engaged in business are required to be disclosed under 93A.

A second factor cited by the Court was that the limited knowledge the bank had was not of an "ongoing" problem, but a past one. The TCE had been cleaned up and the school reopened by the date of sale. Third, there was no demonstrable evidence that the contamination would ever reach the condominium. The SJC declined, however, to limit the disclosure duty to problems within the boundaries of the property being sold. According to the Court:

> In appropriate circumstances, 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."

The Court cited with approval language in a New Jersey case, *Strawn v. Canuso*, which stated that there is no need to disclose off-site "transient social conditions" that may affect the market value of a property, but that the duty to disclose applies only to "conditions rooted in the land."

Based upon the Urman decision, the duty to disclose off-site problems in Massachusetts appears to be limited to: (1) physical conditions; (2) which are known to a business person (seller or broker), but not known and not readily observable by the buyer; and (3) be sufficiently important that they affect the value or use of the property. Because of the SJC's quotation from the Strawn case, two additional benefits to brokers can be derived from the opinion.

First, the standard for disclosure is whether the matter would affect the decision of a "objectively reasonable buyer," not the subjective reaction of any particular buyer. Second, while the term "transient social conditions" has not been defined, presumably it includes such matters as the quality of schools, neighbors who are noisy, and the presence of a halfway house in the neighborhood.

Despite the limitation of the duty to disclose according to Urman, the best defense to a potential claim is disclosure even if the buyer fails to ask. When a question is asked by a buyer, the broker must provide all known information. It is also recommended that the broker identify persons or agencies that may be able to provide facts. Be "the source of the source."

You can access archived Legal Realtor® columns, and other legal news and information, by visiting www.baystaterealtor.com and clicking on "Law & Ethics."

SOCIAL MEDIA POLICY AVAILABLE THROUGH NAR

The National Association of Realtors® has developed a user-friendly document entitled: Use of Social Media in the Real Estate Business. The document was developed to provide brokers with a template that may be used when developing a social media policy for the broker's own firm. The template requires that it be customized to meet the needs of the broker and reflect the business practices of his/her business. The template is not a comprehensive policy document which can be adopted and used without that customization.

For the complete template for creating a Social Media Policy, visit www.realtor.org and click on "Law & Policy."

Q: I have heard a lot of buzz about "pocket listings" and "coming soon" arrangements between brokers and their seller-clients. I remember this being popular many years ago. What is the difference between a "pocket listing" and "coming soon?"

A. The terms "Pocket-Listing," and "Non-MLS listing" generally refer to those listings that are never listed in a Multiple Listing Service. They are different than FSBOs in that the seller engages a broker to sell their property, but the home is not advertised through MLS.

Properties that are advertised as "coming soon" usually refer to those listings that may be listed in the Multiple Listing Service at an upcoming date, but are not currently listed, either because: 1) a listing agreement has been executed and the client has agreed that the property will not be marketed through the MLS until a specified date; or 2) the Broker has engaged an owner in some form of an unwritten or limited marketing arrangement to "pre-market" or sell the owner's property prior to executing a listing agreement with the owner.

Q: My seller-client asked me if he should keep his listing off of the MLS. Why would he want to do this? Are there any ethical or legal obligations that I should consider?

A. Celebrities, public figures, and other individuals who wish to maintain privacy may request that you list their property without entering it into the MLS. Although legal, there are certain considerations that should be discussed thoroughly with your client prior to entering into either a "pocket" listing or a "coming soon" arrangement:

1) MLS Rules and Regulations:
Upon the execution of the listing agreement, most Multiple Listing Services require that the listing be entered into the MLS within a certain amount of time. If you and your client have agreed to keep the listing out of the MLS, most require an opt-out form be signed by the broker, agent, and the seller, acknowledging that the choice to not market the property in the MLS is the sole discretion of the seller. In the circumstance of a "coming soon" listing, where a listing agreement has been signed, but the seller chooses to not market the property for a specified period of time, most MLSs require an opt-out form for that specified time frame. If the broker and client verbally agree to "pre-market" the sale, with no written listing agreement yet in place, the MLS mandatory submission requirement typically does not kick in. To avoid any confusion, be sure to check with your MLS Rules to be sure you are properly handling the listing.

2) REALTOR® Code of Ethics:
All REALTORS® are bound by the REALTOR ® Code of Ethics. For purposes of this discussion, close attention should be paid to Articles 1 and 3. Article 1 states that, "REALTORS ® pledge themselves to protect and promote the interests of their client." Further, Standard of Practice 1-12 specifically requires REALTORS® to discuss with the sellers his or her "company policies regarding cooperation and the amount(s) of any compensation that will be offered...". When a property is listed with the MLS, the amount of compensation to be paid to cooperating agents is specified on the listing, and is generally offered to any MLS participant who is the procuring cause of the sale. If the property is sold while not in the MLS, how will compensation be handled with cooperating agents? It is important to have a conversation with your seller to determine how cooperating agents will be paid if the listing is sold outside of the MLS.

Article 3 of the Code of Ethics places on a REALTOR® a duty to cooperate. Further, Standard of Practice 3-10 states that the "duty to cooperate... relates to the obligation to share information on listed property, and to make property available to other brokers for showing to prospective purchasers... when it is in the best interests of sellers..." If your seller is not fully educated on the ramifications of keeping the listing out of the MLS, it could be perceived that by opting out of the MLS, you are not operating in the best interests of your seller because you are restricting the availability of information and showings to outside brokerages.

3) Massachusetts Law: Under Massachusetts license law, agents owe their clients a number of fiduciary duties, including the duties of loyalty and obedience to lawful instruction. As an agent, you work for your client, and it is important that you always work in his or her best interest. Be sure that the decision to opt-out of the MLS is at the sole discretion, and to the sole benefit, of your client – not the other way around.

4) Listing Agreement: Included in the "Broker's Duties" section of the Massachusetts Association of REALTORS® Listing Agreement is the requirement that the Broker "use reasonable efforts in marketing the Property and agrees to list the Property with...a multiple listing service." As part of your discussions with your client, be sure to point out this clause and allow the seller to decide if he would like it stricken.

5) Fair Housing: Included in the Federal Fair Housing Act is the doctrine of "disparate impact," which means that a policy or practice may be considered discriminatory if it has a disproportionate "adverse impact" against any group based on race, national origin, color, religion, sex, familial status, or disability. If agents limit their listing exposure to only certain sectors of the market, it may have an alleged discriminatory effect (i.e. reinforcing segregated housing patterns), even when there is no intent to discriminate.

In order to both protect yourself and act in the best interest of your client, it is important that the items above are considered. It is recommended that prior to opting out of the MLS, either temporarily or entirely, you make sure that a seller truly understands the advantages and disadvantages of opting out of the MLS, including any options available within the MLS to address their concerns (such as declining Internet display if apprehensive about privacy or non-placement of a lockbox if concerned about security). After full disclosure, make sure the seller voluntarily decides to keep the listing off the MLS. Specifically, you may want to explain to your client that listing a property in the MLS maximizes exposure of for-sale homes to potential buyers and the participating brokers who work with them, advertising the property to a wide range of people generally helps sellers obtain the highest possible price for their home, and when seller's property is in the MLSs, it is included in its download to various real estate Internet sites that are used by the public to search for properties.

Notes from the MAR Legal Hotline

Michael McDonagh, MAR General Counsel
Ashley Stolba, MAR Staff Attorney

April 2013

MULTIPLE OFFERS AND THE STATUTE OF FRAUDS

Q: A seller verbally accepted my buyer-client's offer over the phone last night, and told me she would email me the signed offer in the morning. When I spoke to the listing broker today, she informed me that her seller had accepted another offer. My buyers are so upset! Isn't that a breach of contract?

A. No. Offers are not binding until they are signed by both the buyer and the seller. In order for a contract for the sale of land in Massachusetts to be enforceable, it must comply with the statute of frauds (M.G.L. chapter 259 section 1), which states that no action shall be brought upon a contract for the sale of real property unless it is in writing and signed by the party "against whom enforcement is sought." Until you receive an accepted offer signed by the seller, technically no enforceable agreement exists. If the seller accepts another offer, even after verbally accepting your buyer's, there is very little the buyer can do to enforce the agreement.

It is important to note that although this scenario is frustrating, the listing agent probably has not acted unethically. Under Article 1 of the National Association of Realtors® Code of Ethics, Realtors® are required to promote and protect their client's best interest. In addition, Standard of Practice 1-7 specifies that listing brokers shall continue to submit offers until closing unless otherwise instructed by their clients. If the seller receives other offer(s) after he or she verbally accepts your buyer's, the agent has a duty to submit those offer(s), and the seller has the right to accept it. Many brokers cry foul and state that they would have gone back to both buyers and asked for their "best and final" offers. While this is common, it is not required. In this scenario, the listing broker probably acted in their client's best interest by presenting all offers and ensuring the seller accepted the best one for them. If you receive a verbal acceptance, you should be sure to communicate to your buyer that it is not binding until it is memorialized in writing and signed by the seller.

A word of caution on e-mail: a recent Massachusetts district court ruling, *Feldberg, et al. v. Coxal,* held that e-mail exchanges could satisfy the statute of frauds if the material terms of the agreement were present and the parties, through their conduct, displayed intent to be bound. Thus, when negotiating a transaction via email, it is wise to consider the desires of the client in forming an agreement and to be very clear in your email about the intent of the client to form a binding agreement.

Q. I am the listing broker of a property that has received multiple offers. One of the offers is a full price, no contingency, cash offer. Is the seller required to accept that offer?

A. No. By simply placing a house in the multiple listing service or an advertisement in the paper, the seller does not create a unilateral contract that requires him to sell his property for the asking price. A full price, cash offer, therefore, does not create a contract between the seller

and prospective buyer. In a seller's market, multiple full price offers can come in and the seller may wish to seek a higher price. If this is the case, make sure your seller understands that if he is attempting to create a bidding war, all prospective purchasers could abandon the property.

Q: My seller clients have received offers from two different buyers. They now want to counter both of them in writing. Is this permissible?

A. While a seller is legally permitted to counter more than one offer at the same time, doing so is not advisable. If the seller counters in writing both offers and each counter is accepted before the seller is able to communicate an intent to withdraw her counter to one of the two buyers, the seller could be bound to two written contracts and thus have potential liability to those buyers. Even if not in writing, verbal acceptance of both offers could likely raise questions as to whether the seller is negotiating in good faith and treating the buyers fairly.

It is important in any multiple offer situation that the sellers understand their options. Explaining these options ahead of time and working with the sellers to develop a strategy that fits their needs and preferences is always a good idea. Sellers can accept one offer and reject others; they can reject all offers as presented, and make a counteroffer to one; they can reject all offers and continue to market the property to other buyers; or they can reject all offers and give all buyers an opportunity to submit another offer as their "highest and best offer."

For additional information on multiple offers, visit www.marealtor.com and click on "Legal." NAR has also produced a paper entitled "Presenting and Negotiating Multiple Offers" which has suggestions on how to handle these situations. This document may be found at www.realtor.org.

Notes from the MAR Legal Hotline

Michael McDonagh, MAR General Counsel
Ashley Stolba, MAR Associate Counsel

July 2013

MORE ON MULTIPLE OFFERS

Q: I am the listing agent on a property that has received multiple offers. My client has not accepted any yet, and a buyer's agent has asked if there have been other offers made on the property. How do I respond?

A. This is a good example as to the importance of client pre-counseling. The *REALTOR® Code of Ethics* was amended ten years ago to add Standard of Practice 1-15, which reads: "REALTORS®, in response to inquiries from buyers or cooperating brokers shall, with the sellers' approval, disclose the existence of offers on the property. Where disclosure is authorized, REALTORS® shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker." Thus, seller's agents may only disclose the existence of other offers on the property *if the seller has allowed for it.*

The MAR Exclusive Right to Sell Listing Agreement specifically provides that the listing broker may disclose to prospective buyers whether an offer has been submitted on the property. It should also be noted that SOP 1-15 only applies to unaccepted offers. SOP 3-6 puts an affirmative duty onto seller's agents to disclose the existence of accepted offers, even if there are unresolved contingencies, to any broker seeking cooperation.

Q: I understand that with the seller's approval, I can disclose the existence of other offers. I also understand that once I have an accepted offer, I must disclose this, even if not asked. So, how much can I tell the buyer's agents about the other offers?

A. The answer to this question tends to surprise many buyers. In 2006, SOP-13 was amended to clarify that when REALTORS® are working with buyers, they must advise them of the "possibility that sellers or sellers' representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties."

Contrary to some states, Massachusetts has no such law that requires offers to be confidential. Therefore, most offers are not confidential, and if seller's agents have permission to disclose the fact that an offer exists on a property, they could also disclose terms of the offer, too.

If your buyer does wish to keep terms of the offer confidential, he or she should work with an attorney to draft a binding separate agreement to be presented and agreed to prior to presenting the offer. If you simply put the confidentiality terms in the offer, and the offer is either rejected or never accepted, no confidentiality has ever been agreed upon, and the terms will not be confidential.

Q: I have a traditional office and we practice dual agency. I am worried of potential conflict if I receive offers from, both inside and outside of my firm. How do I assure both my client and the buyer's agents that I will be impartial?

A. Article 1 of the Code of Ethics requires REALTORS® to treat all parties honestly. Moreover, the second part of SOP 1-15 states that "Where disclosure is authorized, REALTORS® shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee

in the listing firm, or by a cooperating broker." Therefore, unlike the disclosure rules for the terms of an offer, this is not a term that you and your seller may keep confidential.

In order to avoid claims of preferential treatment, in particular, buyers claiming that the buyer-client from the non-cooperating broker was given inside information, or that the presentation of the cooperating offer was somehow delayed, withheld, or fairly presented, it is a good practice to do the following: 1) provide sellers with written disclosures explaining their options when dealing with multiple offers. Specifically, that they can: accept one offer and reject others; reject all and counter one; reject all offers and continue to market the property; or reject all offers and give all prospective purchasers the opportunity to submit their "highest and best offer, and 2) encourage sellers to reject offers in writing. That way, there is proof that the offer was presented.

Q: My seller wants to have an open house this weekend, and does not want to consider any offers before that time. Can she do that?

A. State regulations and the Code of Ethics require that offers be submitted to the client right away. However, it is important to remember that your fiduciary duties as an agent require you to follow the lawful instructions of your client. Therefore, the seller is free to set parameters for the agent to follow regarding offers, so long as they are legal and not discriminatory.

For additional information on multiple offers, visit www.marealtor.com and click on "Legal." NAR has also produced a paper entitled "Presenting and Negotiating Multiple Offers" which has suggestions on how to handle these situations. This document may be found at www.realtor.org.

Business E-mail Compromise

~Be Prepared~

How and When to Report the Matter to the Federal Bureau of Investigation

The CFO of a U.S. company received an e-mail from her CEO while the CEO was on vacation out of the country. The CEO requested a transfer of funds for a time-sensitive payment that required discretion. The CFO followed the instructions and wired $250,000 to a bank in Hong Kong. The next day, the CEO called about another matter. The CFO mentioned she had completed the wire the day before, but the CEO said he never sent the e-mail and knew nothing about the transaction. The company was the victim of a Business E-mail Compromise (BEC).

BEC is a type of sophisticated financial fraud targeting businesses of all types and sizes. BECs are carried out by compromising legitimate business e-mail accounts through social engineering or computer intrusions to conduct unauthorized transfers of funds.

Common Variations

- Hacked accounts via spear phishing
- Spoofed accounts made to look similar to authentic accounts (john.kelly@abc.com vs john.kelley@abc.com)
- Spoofed accounts with slight variations in domains (abc@lawfirm.com vs abc@lawflrm.com)
- Spoofed accounts mimicking the real account until one reviews the extended header or hovers a curser over the e-mail address

Common Targets

- Free web based e-mail users
- Bookkeepers, accountants, controllers
- Title companies and attorneys in the midst of a real estate transaction

Statistics

The Internet Crime Complaint Center (IC3) has seen a 270% increase in identified victims and exposed loss since January 2015. The scam was reported in all 50 states and in 79 countries. Fraudulent transfers were sent to 72 countries; however, the majority went to banks in China and Hong Kong. Over 8,000 victim complaints totaling almost $800 million were reported to the IC3 from October 2013 to August 2015.

Suggestions for Protection

- Employee awareness/education on how to identify the scam before sending payments to the fraudsters.
- Verify wire transfer requests and changes to vendor bank accounts with two-factor authentication such as a secondary sign-off and/or using voice verification over known phone numbers.
- Create intrusion detection system rules that flag e-mails with extensions similar to company e-mail or differentiate between internal and external emails.
- Be wary of free, web-based e-mail accounts, which are more susceptible to being hacked.
- Be careful when posting financial and personnel information to social media and company websites
- Regarding wire transfer payments, be suspicious of requests for secrecy or pressure to take action quickly.
- Register domains that are slightly different than your actual domain.
- Know the habits of your customers, including the details of, reasons behind, and typical payment amounts.
- Scrutinize all e-mail requests for transfers of funds.

What to do if you are a victim

Request your financial institution issue a "SWIFT recall" and file a Suspicious Activity Report or "SAR." For domestic transfers, also request your financial institution send a "hold harmless" letter to the beneficiary bank.

Experience has shown that after three days, funds have likely been transferred out of the beneficiary account. This is not always the case and the FBI may still be able to pursue a criminal prosecution.

Depending on how long ago you sent the money, incidents in Rhode Island, Massachusetts, New Hampshire and Maine should be reported as follows:

Funds wired within last 3 days?

If the amount was approximately $50,000 or more: Immediately report the incident to the FBI's Boston office at 617-742-5533. Provide the following information:

- Summary of the incident
- Victim name
- Victim location (City, State)
- Victim bank name
- Victim account number
- Beneficiary name
- Beneficiary account number
- Beneficiary bank location
- Intermediary bank name
- SWIFT/IBAN number
- Date of transaction
- Amount of transaction

Request the duty agent contact the supervisor of the Economic Crimes Squad immediately.

If the amount was significantly less than $50,000: Report the matter to the FBI via the Internet Crimes Complaint Center (IC3) at www.ic3.gov. You may also want to consider notifying local law enforcement.

Funds wired more than 3 days ago?

If the amount was approximately $50,000 or more: Immediately report the incident to the FBI's Boston office at 617-742-5533 and the IC3 at www.ic3.gov.

If the amount was significantly less than $50,000: Report the matter to the FBI via the IC3 at www.ic3.gov. You may also want to consider notifying local law enforcement.

For additional information on Business Email Compromises, go to www.ic3.gov. Specific public service announcements on this scam include:

- Alert Number I-082715a-PSA dated 8/272015 (http://www.ic3.gov/media/2015/150827-1.aspx)
- Alert Number I-082715b-PSA dated 8/272015 (http://www.ic3.gov/media/2015/150827-2.aspx)
- Alert Number I-012215-PSA dated 1/22/2015 (http://www.ic3.gov/media/2015/150122.aspx)

REALTORMag

Is Your Website ADA Compliant?

It may only be a matter of time before the online world is held to the same accessibility standards that buildings are. Here's how to get ready.

APRIL 2016 | BY LESLEY M. WALKER

When you think of the Americans with Disabilities Act (ADA), you might envision ramps to make it easier for people who use wheelchairs to physically access buildings. But today, with so much commerce being conducted online, some courts are finding that websites must also be accessible to people with visual and other impairments. That could mean big changes to how your professional, brokerage, and association websites work in the future.

The ADA is silent on the issue of online accommodation because the Act predates the widespread use of the Internet. Without clear guidance, consumers and businesses have had to turn to courts around the country to resolve the question of whether the ADA's accessibility obligations extend to a business's online presence. Courts are split on the question of if and when a business is obligated to create an accessible website. However, an accumulation of case law now asserts that a business's accessibility obligations do indeed extend to its website, so it's a smart risk management decision to evaluate your own websites now.

To further underscore the timeliness of undertaking this evaluation, activity at the Department of Justice, the federal agency responsible for enforcing the Act, demonstrates that it is likely only a matter of time before a clear mandate of web accessibility under the ADA is issued. The DOJ has long taken the broad position that the ADA's obligations extend to all websites under Title III, the section of the ADA that applies to businesses. Back in September 2010, the DOJ issued an Advance Notice of Proposed Rulemaking regarding the accessibility of web information and services, which sought to add web accessibility requirements to Title III. Meanwhile, DOJ enforcement actions, demand letters, and complaints filed by private litigants are adding up. While a final rule isn't expected until sometime in 2018, the DOJ's position—and the significant amount of enforcement activity it's conducted to underscore that position—means it's time for professionals to start thinking about making changes.

At this point you may be asking yourself, "What exactly does an accessible website look like?" In practice, it doesn't necessarily look all that different to people without disabilities. An accessible website allows adaptive software and specialized browsers used by persons with disabilities to augment content and make it easier to consume. For example, these programs might add text descriptions to complex graphics, voice-overs that read text aloud, or transcripts of videos. Accessible websites allow the specialized programs and browsers to easily interact with a website in order to improve and help maximize a person's experience on the site, obtaining the site's information in a format that takes their disability into account.

So what can you, as a business owner, do to get ahead of this issue? As a first step, contact your website provider to inquire about the current accessibility of your site, and ask what it's currently doing to create or improve accessibility. If you operate your own website and do not have the technical expertise in-house, consult one of the many technical experts who specialize in creating and maintaining accessible websites. A technical expert can help identify where your site might fail to comply with the "Web Content Accessibility Guidelines 2.0," a technical standard created by the World Wide Web Consortium to help developers and site

managers make the web more accessible.

Once you understand what accessibility improvements to your website are needed, changes can be implemented incrementally. In their settlement orders, the DOJ has generally allowed businesses up to 18 months to implement necessary accessibility changes to their sites. And remember, even after your website is updated, you should ensure ongoing compliance with the Web Content Accessibility Guidelines 2.0 when you add new content or website features. Educate and train relevant personnel to ensure they are knowledgeable about and focused on your business's online accessibility. Technical experts are also available to monitor your website and alert you when a change or remediation is necessary.

You might also consider making it easier for users of your site who may be disabled to get in touch. A simple feedback form can help them inform you about what accessibility features may need to be improved or added. And adding contact information for someone at your business who can respond to a particular user's inability to access the site, or a portion of it, is a proactive step your business can take to address site accessibility issues up front in order to avoid running into legal problems later.

With more and more business being conducted over the Internet, and the likely changes to the regulatory landscape, getting out in front of the online accessibility issue is a smart business decision. Not only can it help you avoid legal risks down the road, it also establishes your business as accessible to all and may enhance your reputation and even your bottom line.

If you are attending the 2016 REALTORS® Legislative Meetings & Trade Expo in Washington, D.C., don't miss the Risk Management and License Law Forum on May 11 from 12:15 p.m. to 1:45 p.m. The program, dedicated to website accessibility, will feature two expert speakers on the issue, including an attorney who specializes in the Americans with Disabilities Act and who has vast experience in website accessibility claims, along with a technical expert who creates and maintains accessible websites.

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REALTORMag

FAA Finalizes Rule for Commercial Drones

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Using a drone to capture listing photos and videos or inspect properties is about to become significantly easier now that the federal government has finalized its long-awaited regulations over the commercial use of unmanned aerial systems.

The final rule issued Tuesday by the Federal Aviation Administration paves the way for people who obtain a remote pilot certificate to operate drones that weigh less than 55 pounds, as long as the aircraft remains within visual line-of-sight. Earning the certificate will involve passing a test of aeronautical knowledge at an FAA-approved testing center — but it will not require applicants to have formal flight training.

Get Educated on Drones

A Broader View of Drones

Should You Pursue Drone Technology?

Luxury Brokers Are Bringing Drones Indoors

The FAA has, until now, required people wishing to operate drones commercially to obtain a so-called Section 333 waiver, and the agency has limited those waivers to people with a pilot's license. That constraint has stood in the way of real estate professionals and others wishing to use drones in their businesses, despite the growing availability and decreasing cost of lightweight, remote-controlled aircraft equipped with cameras.

The new FAA regulations, which take effect in August, follow requests from industry groups, including the National Association of REALTORS®, for regulators to develop a framework that would allow people without specialized training to use drones for purposes other than a hobby. NAR sent multiple letters to the FAA during the rulemaking process and testified before Congress in support of the use of drones in the real estate industry.

"We've worked hard to strike a responsible balance that protects the safety and privacy of individuals, while also ensuring real estate professionals can put drones to good use," NAR President Tom Salomone said in a statement. "That effort just took another big step forward. The rules will help more real estate professionals take flight, making the efficiency and innovation that drones have to offer available to a much broader base of operators."

Although the new regulations eliminate the requirement that drone operators hold a pilot's license, they contain a host of restrictions intended to protect people on the ground. Beyond requiring the operator or another visual observer to be able to see their drone while it is in operation, the regulations prohibit flying inside buildings or flying over people who are not connected with the flight. In addition, drone flights will be permitted only during daylight or twilight hours, drones must not fly faster than 100 miles per hour, and operators must be at least 16 years old.

The regulations will permit drone operators to obtain waivers from the FAA for some of the restrictions if they are able to demonstrate that their proposed flight will still be able to operate safely.

Meanwhile, NAR is calling for the FAA to develop less-restrictive rules for drones under four pounds. NAR also believes the FAA should come up with guidelines that would permit drone flights to go beyond visual line-of-sight, which is particularly important for aerial photography of large buildings or expansive tracts of land.