

MEMORANDUM

To: Laurie Fowler and Environmental Practicum Faculty

From: Lee Carter

Re: Legal Requirements for Disclosure of Wastewater Management Systems in Real Estate Transactions

Date: September 29, 2006

Question Presented

What are the legal requirements for disclosure (at closing or pre-closing) of the existence of an onsite wastewater treatment system when you buy a house?

Brief Answer(s)

There does not appear to be any requirement that a homeowner/seller or a real estate broker has a duty to disclose the presence of a properly-functioning onsite wastewater treatment system. The Georgia Code imposes specific disclosure obligations on a broker in a real estate transaction, but does not explicitly mention wastewater management systems. However, case law indicates that the presence of a wastewater management system may be disclosed in the initial disclosure statement. Additionally, common law requires a homeowner to disclose all material defects, which includes a defective wastewater management system.

Discussion

There does not appear to be any requirement that a homeowner/seller or a real estate broker has a duty to disclose the presence of a properly-functioning onsite wastewater treatment system. However, certain situations would force the homeowner and/or broker to disclose such existence.

The Georgia General Assembly enacted the Brokerage Relationships in Real Estate Transactions (hereinafter "BRRET") Act in 1993. The purpose of BRRET was to prevent the application of the common law of agency to the relationships between brokers and persons who are sellers, buyers, landlords, and tenants.¹ The General Assembly believed that a codification of the proper relationship between a broker and her client would "promote and provide stability in the real estate market."² BRRET imposes

¹ O.C.G.A. § 10-6A-2(a).

² Id.

specific disclosure obligations on a broker in a real estate transaction. BRRET's corresponding code section is O.C.G.A. § 10-6A-1, et seq. Whether the broker is representing the seller, buyer, landlord, or tenant, she is under a duty to disclose all adverse material facts pertaining to the physical condition of the property and improvements located on such property including but not limited to material defects in the property, environmental contamination, and facts required by statute or regulation to be disclosed which are actually known by the broker which could not be discovered by a reasonably diligent inspection of the property by the buyer.³

As is evident from a careful reading of O.C.G.A. § 10-6A-1, et seq., disclosure of a wastewater management system before or during a closing is not required. A duty to disclose only arises if (1) there is a "material" defect with the system, (2) the broker actually knows about the defect, and (3) the defect in the system could not be discovered by a "reasonably diligent" inspection of the property by the buyer.⁴

A recent Georgia Court of Appeals decision, Dasher v. Davis, 274 Ga. App. 788 (2005), illustrates the implications placed on the broker by BRRET in dealing with a wastewater management system. For that reason, the Court of Appeals' Dasher decision is examined in detail below.

Dasher listed a client's home for sale. In the initial disclosure statement, the sellers indicated that the septic system had been professionally serviced. The buyers requested additional information, and the sellers disclosed to the buyers' real estate agent that the septic system had been serviced in September 2002. In late December, while the house was under contract but before the closing, the sellers experienced a problem with the septic system. The sellers notified Dasher that the septic system needed to be pumped again. This time the septic tank was serviced by a different company. Dasher faxed a disclosure form to the buyers' agent, which she received.

After the sale closed and the buyers were living in the house, they telephoned Dasher and informed him that they were having problems with the septic system. The buyers believed that the septic system needed to be replaced, but a third party inspection revealed that the lines were only "full."

The buyers filed suit against Dasher, et al., seeking rescission of the real estate contract and alleged, *inter alia*, fraud. The trial court denied Dasher's motion for summary

³ O.C.G.A. § 10-6A-4 - § 10-6A-8.

⁴ Id.

judgment and the Court of Appeals accepted his interlocutory appeal. While there was conflicting evidence about the septic system, the Court found "absolutely no evidence that information regarding any alleged defective system or unsuitable ground was ever conveyed to Dasher."⁵ Thus the Court concluded that Dasher could not be held liable for the defective septic system because he had no actual knowledge of the problem.⁶

Dasher indicates two important issues with disclosure and wastewater management systems. First, actual knowledge of the problem or defect is required to hold a broker liable. Second, the existence of a wastewater management system may be disclosed in the initial disclosure statement, and if not, the buyer may ask. Once questioned, the seller is under a duty to answer truthfully so as to not deceive the buyer.

Conclusion

While Georgia law does not impose a strict obligation on either the broker or the seller to disclose the existence of a wastewater management system, Georgia law attempts to protect buyers from fraud in real estate transactions. Thus, brokers and sellers are required to disclose any defects in a wastewater management system and may additionally disclose the mere existence of a system in their initial disclosure statement. Georgia is not alone in placing a limited disclosure duty on the broker and homeowner. According to Dukeminier and Krier, "An increasing majority of states has put on the [broker] the duty to disclose all known defects, equating nondisclosure with fraud or misrepresentation."⁷

⁵ Dasher v. Davis, 274 Ga. App. 788, 790-91 (2004).

⁶ Id.

⁷ JESSE DUKEMINIER AND JAMES E. KRIER, EDS., PROPERTY, FIFTH EDITION 597 (2002) (*citing* Nystrom v. Cabada, 652 So. 2d 1266 (Fla. App. 1995)).