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Short Memo #1

## ISSUE

What are the legal requirements for disclosure of wastewater management systems in a real estate transaction?

## SHORT ANSWER

In Georgia, there is no general legal requirement that the seller of a home disclose the type, or even existence of, a wastewater management system on the property being sold. In some other states, the legislatures have mandated the disclosure of septic systems in the sales of homes.

However, in every jurisdiction, the seller and/or his broker are duty bound to disclose a defect in the septic system if they know of the defect and reasonable inquiry by the purchaser would not uncover it.

## ANALYSIS

Historically, the doctrine of caveat emptor governed the sales of real estate in the United States. That is, "let the buyer beware."<sup>1</sup> Legal protections just were not available for the purchaser of real estate, and he was to proceed at his peril. However, over the past thirty years, legislatures and courts have whittled away at the caveat emptor doctrine, providing more and more protections for purchasers in residential real estate transactions.<sup>2</sup>

### I. Disclosure of Septic System in General

Septic systems are employed in large numbers all over the state of Georgia. For example, there are an estimated 400,000 septic systems in the twenty county metro-Atlanta area.<sup>3</sup> However, neither state nor local officials in Georgia require maintenance or inspection of septic tanks after they are installed.<sup>4</sup> Septic system failures can give rise to great public dangers, such as contaminated drinking water, and huge clean up costs.<sup>5</sup>

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<sup>1</sup> Margaret A. Rolando, *Offering Documents and Required Pre-Sale Disclosures*, at [http://d2d.ali-aba.org/\\_files/thumbs/rtf/CL072-chapter\\_11\\_thumb.pdf#search=%22offering%20documents%20and%20required%20pre-sale%20disclosures%22](http://d2d.ali-aba.org/_files/thumbs/rtf/CL072-chapter_11_thumb.pdf#search=%22offering%20documents%20and%20required%20pre-sale%20disclosures%22) (last visited Sept. 29, 2006).

<sup>2</sup> *Id.*

<sup>3</sup> Janet Frankston, *Lax Septic Tank Oversight Brews Health Hazards*, at [http://www.faihandthecity.org/issues/health/articles/partners-ajc/septic\\_tanks.shtml](http://www.faihandthecity.org/issues/health/articles/partners-ajc/septic_tanks.shtml) (Nov. 28, 2003).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

It seems reasonable to assume that the buyer of a home should be informed as to how wastewater is managed on the property. While, as a matter of decency, home sellers are supposed to advise purchasers of the presence of septic systems on real estate disclosure forms, Georgia law does not require it.<sup>6</sup>

One Georgia statute at least purports to require septic system disclosure in some instances. The Georgia Land Sales Act prohibits the sale of subdivided lots unless the purchaser is given a property report, which contains, among other things, septic system disclosure.<sup>7</sup> However, the statute provides many exemptions and in practice does not seem to reach many affected purchasers. Single or isolated transactions are exempted, as are the sale of all subdivision interests to ten or fewer people and the sale of parcels five acres or more in size.<sup>8</sup> In Mancuso v. Steyaard, the Georgia Court of Appeals held that a property owner's action brought under the Land Sales Act failed, even though septic system disclosures were not made when he purchased a subdivision lot.<sup>9</sup> The court held that, under the statute's plain language, property containing a residential house was exempted from the statutory disclosure requirements.<sup>10</sup> Indeed, with so many exemptions, it seems difficult to see what practical effect this statute has at all.

Realizing the dangers inherent in faulty septic systems, some states have taken legislative steps to ensure that home buyers are fully informed of the nature and presence of septic systems on the property they are purchasing. Two great examples of such state action are found in Minnesota and Virginia.

Minnesota acknowledged that “[a]n important means of bringing septic systems into compliance is ensuring that property owners are aware of the possible pollution and human health problems associated with noncomplying septic systems.”<sup>11</sup> The legislators in Minnesota realized that the transfers of residential real estate provided a perfect opportunity to make sure that property owners get the information they need to make an informed decision.<sup>12</sup> The result of Minnesota's realization was a state statute requiring the disclosure of septic systems at property sale or transfer.<sup>13</sup> Before signing an agreement to sell or transfer real property, the seller must provide to the buyer a written disclosure statement outlining how sewage generated at the property is managed.<sup>14</sup> If the seller fails to provide the requisite notice, he will be liable to the buyer for the costs required to bring a noncompliant system into compliance.<sup>15</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> DANIEL F. HINKEL, GA. REAL ESTATE SALES CONTRACTS § 2-7 (5th ed.).

<sup>8</sup> *Id.*

<sup>9</sup> Mancuso v. Steyaard, 2006 WL 1843641 (Ga.App.).

<sup>10</sup> *Id.* at \*2.

<sup>11</sup> Minnesota Pollution Control Agency, *Guide to septic system disclosure at property transfer*, at <http://www.pca.state.mn.us/publications/wq-wwists6-11.pdf#search=%22minnesota%20guide%20to%20septic%20system%20disclosure%22> (January 2001).

<sup>12</sup> *Id.*

<sup>13</sup> Mn. Stat. § 115.55, Subd. 6 (2004).

<sup>14</sup> Minnesota Pollution Control Agency, *supra* note 11.

<sup>15</sup> *Id.*

Virginia has taken steps to require some homeowners to disclose information about septic systems on their property; however, Virginia's statutory requirements fall substantially short of the blanket disclosure set forth under Minnesota law.<sup>16</sup> Some years ago, the Virginia Board of Health set certain minimum standards that newly installed septic systems must meet.<sup>17</sup> In 2003, the General Assembly passed a law allowing existing septic system owners to apply for a waiver, the effect being to "grandfather" their systems into compliance with state regulations.<sup>18</sup> In other words, septic systems existing when the minimum standards were promulgated did not have to meet the stringent new standards, so long as they were brought to proper working order.<sup>19</sup> The Virginia legislature, in 2005, passed a law requiring those homeowners who currently possess or have applied for a waiver to disclose this fact to potential purchasers.<sup>20</sup>

Virginia's disclosure requirements were not prompted by the same public health concerns that motivated Minnesota's legislators to act. Under Virginia law, an existing septic system waiver is nullified at the transfer of property.<sup>21</sup> So, the purchaser of a home operating on a waiver could be forced to install an entirely new septic system, one that meets the stringent state regulations.<sup>22</sup> The disclosure requirements, therefore, operate as a protection mechanism for the buyer rather than as a means toward protecting and improving public health.

## II. Disclosure of Septic System Defects

While sellers in Georgia are under no legal duty to disclose the existence of a wastewater treatment system to potential purchasers, these sellers (and sellers in every jurisdiction) are legally required to disclose defects in their systems. Georgia courts hold that a real estate seller must disclose "material defects in the property ... which are actually known by the broker [and] which could not be discovered by a reasonably diligent inspection of the property by the buyer."<sup>23</sup> Thus, two elements must be met before the disclosure requirement is triggered. First, the seller must *actually know* of the defect. Second, the defect cannot be one that would be uncovered by the buyer through his exercise of reasonable diligence. Obvious or discoverable defects will not trigger disclosure requirements.

In *Dasher v. Davis*, the purchasers of a home brought a fraud action against the seller's real estate agent alleging that he fraudulently concealed a defect in the septic system.<sup>24</sup> The sellers, in their initial disclosure statement, indicated that the septic system

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<sup>16</sup> Richmond Association of Realtors, *New Septic Tank Law Starts July 1*, at forms.caar.com/forms/Legal%20and%20Legislative/New%20Septic%20Tank%20Law%20Starts%20July%20201,%202005.doc.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Dasher v. Davis*, 274 Ga.App. 788, 618 S.E.2d 728 (2005).

<sup>24</sup> *Id.* at 788, 729.

had been professionally serviced.<sup>25</sup> While the real estate agent was informed that there had been a problem with the septic system, he did not know that the system was defective, believing instead that the problem had been remedied.<sup>26</sup> The Georgia Court of Appeals held that in these circumstances, it could not be said that the agent *knew* about the defect, and therefore he bore no liability to the purchasers of the real estate.<sup>27</sup>

An Arkansas case also bears mention in the realm of septic system disclosure. In Barringer v. Hall, the purchasers of a home brought a fraud action against the sellers asserting that the sellers had misrepresented that a septic system existed when in fact there was no system at all.<sup>28</sup> Shortly after purchasing the home, the plaintiffs discovered that there was not a septic system on the property but rather sewage was piped from the house to the side of a mountain.<sup>29</sup> Despite the fact that the seller had informed the buyer of the existence of a septic system, the Court of Appeals held for the seller.<sup>30</sup> The court concluded that the seller had been operating under the misunderstanding that there was a septic system.<sup>31</sup> Since he did not actually know differently, the buyers could not succeed in a fraud action against him.<sup>32</sup>

### Conclusion

In Georgia, there is no legal requirement that sellers of residential real estate disclose the nature or existence of a wastewater management system. However, if the septic system is defective, the seller knows about the defect, and reasonable investigation on the buyer's part would not uncover the defect, the seller must disclose the defect to the buyer to avoid liability for fraud.

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Barringer v. Hall, 89 Ark.App. 293, --- S.W.3d ---- (2005).

<sup>29</sup> *Id.* at \*1.

<sup>30</sup> *Id.* at \*2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*