

Commercial property sellers must beware

By Edward L. Haroutunian and Mark E. Wilson
Special writers

The closing on the commercial piece of property has taken place, the seller has received the proceeds of sale, the broker has received his commission and the buyer has received the deed to the property. Another successful deal has been put behind the broker.

Or has it?

Two weeks later, the buyer discovers:

- A stained area in the back of the property;
- A flaking of material covering the pipes in the basement of the building on the property;
- A pipe protruding about three-fourth inches above the ground some distance from the building, which goes to an underground storage tank.

• In a depressed area on the property, which appears to be a natural water runoff area, the edge of a large barrel is found above ground. When investigated, five barrels that have the word "Toxic" painted on the side are found. They are all rusted and have been leaking their contents into the soil for years. Most of the barrels are now empty.

Buyer calls his lawyer, who, in turn, calls the seller and the broker to determine what each knew, or should have known, about the property prior to closing.

The buyer says he knows nothing about these problems. The seller says he knew nothing of any problem, as he has only owned the property for three years. The broker says his obligation is only to find a buyer who is ready, willing and able to buy and besides, he knew nothing about the problems.

WHAT RESPONSIBILITY does the commercial real property broker have to know about the environmental condition of the property and to disclose that condition to a potential purchaser?

There is very little question that if the broker knew of the environmental problem discussed above, he has the duty to disclose the problem to the potential purchaser. The recently enacted "Polluter Pay" statute effective July 1, 1991, codifies Michigan case law, indicating that an environment problem must be disclosed to any potential buyer. But whether the broker has an affirmative duty to conduct an investigation of the property where the environmental problem is unknown to the

guest column

seller and the buyer does not choose to inspect the property, is not clear.

The recent California case of Easton vs. Strassburger, citing the National Code of Ethics of Realtors, held that a residential broker did have the duty to inspect a piece of property prior to a sale. Two other jurisdictions have also adopted the line of reasoning that a residential real estate broker has the independent duty to investigate the property.

In the Easton case, the court relied on the National Association of Realtors Code of Ethics, which says in part:

"The Realtor should recognize that the interests of the nation and its citizens require the highest and best use of the land and the widest distribution of land ownership. They require the . . . preservation of a healthful environment."

Article 9 of the ethics code states that the "Realtor . . . has an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose."

Interestingly, the court did not extend this duty to investigate to the commercial real estate broker. The court noted that the commercial purchaser is generally more astute and informed in these types of transactions than the common homeowner.

The court took it upon itself to draw the distinction between the duties of the residential and commercial broker even though the code of ethics does not. It would appear, however, that it is only a matter of time before a case is brought before the courts dealing with commercial brokers. It would not be surprising to find that the principles applied at that time to commercial brokers are similar to the rules developing in the residential broker area.

ARE THERE any precautions that a broker can take to protect against liability?

A definite "perhaps" can be stated. Here are some possibilities.

• Keep updated on the current environmental hot spots in your area. The Department of Natural Resources makes available the current and proposed list of cleanup

sites. If a site is commonly known to those in the area as a problem area, brokering a deal next door could be costly.

• Investigate the property and the surrounding area. This does not mean you must be a biological engineer. But rusting drums, oozing green liquid and maddening vapors are all common sense signs of trouble. Bring these to the attention of the seller and recommend their investigation or disclosure. Be willing to walk away from the sale if no disclosure or investigation is made. Remember that the average cleanup cost of a site runs into millions of dollars.

• If the broker represents the buyer, the buyer should be advised to have an environmental audit performed. Regardless of whether the buyer has the audit, the broker should insist that the buyer acknowledge that no reliance will be placed on the broker as to environmental matters, and that the audit has been suggested by the broker, but specifically waived by the buyer, if that is the case.

• If the broker represents the seller, an indemnity provision could be used in both the listing agreement and offer to purchase as to all liability relating to environmental difficulties on the property. This assumes that the seller is financially solvent and available when the need for the indemnification arises.

• The broker should state in the listing agreement and offer to purchase that because of the federal and state statutes in this area, both buyer and seller should consult legal counsel. The broker should also suggest that other professionals such as environmental auditors, check if there are any environmental problems with the property.

All possible questions as to a broker's liability and certainly all of the answers are not yet known. What is clear is that if someone is damaged, there will always be the tendency to find someone to sue.

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Sellers of commercial property should take precautions before the sale is completed to ensure that toxic wastes have not been stored on the property.

Thoughtful study of home appliances worth the time

(AP)— Selecting the appropriate appliances for that new house is no easy task. Today's appliances are available in an ever-increasing selection of types, sizes and styles — with price tags as far-ranging as the features, reports Better Homes and Gardens Kitchen and Bath Ideas magazine.

Once appliance selections are made, consumers will probably have to live with their decisions for a decade or more. These shopping tips will help consumers make choices they can live with well into the 21st century.

• Money matters. It's best to establish a realistic budget first. This step alone simplifies purchase decisions and can help folks sort out features that are really necessary.

• Check it out — at the library — first. Study consumer publications that give brand-name ratings, features available, and prices. Before going shopping, take notes and narrow choices to a few specific brands and models.

• Evaluate durability and serviceability. The quality of the basic components is more important than the number of novelty options. The power output of a microwave oven, the number of spraying arms in a

dishwasher, and the capacity of a refrigerator-freezer are crucial to the appliance's value and dependability.

• Make sure it fits. When shopping for appliances, be sure to have a detailed list of the exact measurements allotted for each appliance. Remember the appliance will be in the kitchen for years, so consider any potential changes in family size, lifestyle, and kitchen design when making capacity decisions.

• Price plus consumption equals cost. The true cost of an appliance should be evaluated by both the sticker price and its energy consumption. Energy Guide labels — a bright yellow tag required on all refrigerators, freezers, and dishwash-

ers — give an estimated yearly cost of operation based on a national average energy rate. The labels also share the highest and lowest estimated yearly costs of operation for similar models.

• Shop for the best buys. Don't assume that an appliance warehouse has the biggest bargains. It's true that they buy directly from the manufacturer, but it is also common for a group of smaller dealers to pool resources to buy bigger volumes at discounted rates from the factory, too.

• Find out what is included in the price. If an appliance requires professional installation, ask if it's included in the purchase price.

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