TO: Larry West, Laurie Fowler

FROM: Kenna Hall

DATE: October 20, 2006

RE: Wastewater Management Systems Disclosure Requirements

Question Presented

Under Georgia law, what are the requirements for disclosure of wastewater management systems during the purchase of real property?

Brief Answer

Georgia law does not currently require disclosure of wastewater management systems during the purchase of real property, however the seller or seller's agent may not make material misrepresentations about wastewater management systems while selling real property.

Discussion

Fraud In General:

A seller of real property is subject to the Fair Business Practices Act\(^1\) which states that a buyer has a right to rescind a sale for fraud and deceit of the seller. A buyer can also sue the seller for breach of contract in the event the buyer makes a material misrepresentation, and the buyer usually has six years from the date of the contract to bring a cause of action.\(^2\) In some cases, the statute of limitations is tolled until the discovery of the fraud or until the fraud would have been discovered by the buyer's due diligence.\(^3\) A misrepresentation must be such that a buyer could not

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\(^1\) O.C.G.A. § 10-1-390 et seq.
\(^2\) O.C.G.A. § 9-3-24
\(^3\) O.C.G.A. § 9-3-96
have learned about it with a reasonable inspection of the property.\textsuperscript{4}

\textit{Real Estate Agents}

The seller's real estate agent's duties and responsibilities are governed by the Brokerage Relationships in Real Estate Transactions Act ("BRETA").\textsuperscript{5} Section (b)(1) provides that a broker must disclose to all parties “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.”\textsuperscript{6} Notice that the statute requires the agent to have actual knowledge of the facts to be disclosed.

To protect themselves against making a material misrepresentation and violating BRETA, the Georgia Association of Realtors requires real estate agents to have the sellers fill out a Seller's Property Disclosure Statement.\textsuperscript{7} Section 16 of the agreement requires the sellers to sign a statement that to the best of the seller's knowledge and belief, the information contained within the disclosure is correct. Section 17 is a merger clause that the buyers must sign stating that no other representations made by the seller or seller's agent are being relied upon by buyers. Section 7 is entitled

\begin{footnotesize}
\textsuperscript{4} Ga. Real Estate Sales Contracts § 15A-17 (5th ed.) Daniel F. Hinkel, Updated By The 2005 Pocket Part
\textsuperscript{5} O.C.G.A. §§ 10-6A-1 through 10-6A-16.
\textsuperscript{6} O.C.G.A. § 10-6A-5 (b)(1)
\textsuperscript{7} Examples are attached.
\end{footnotesize}
“Plumbing Related Items” and asks the seller in part (d) “What is the type of sewage system” and the seller can select public, private, or septic tank. Parts (e), (f), and (g) ask more specific sewage-related questions like the last service date of the septic system and whether there have been or are any leaks, backups, or other similar problems with the sewage system. If a seller makes a material misrepresentation on this disclosure statement, a buyer might have a claim for breach of contract or fraud as the following cases illustrate.

Case Examples:

1) Dasher v. Davis\(^8\) July 28, 2005

This case involves a real estate agent's fraudulent concealment of defects in septic devices. The home buyer, Davis, sued the seller's real estate agent, Dasher, under the Real Estate Brokerage Relationships in Real Estate Transaction Act (BRETA). The sellers informed the buyers that the septic system had been serviced in September 2002, and that pursuant to a problem in December 2002, it was serviced again. After closing, the buyers moved into the house and experienced another problem with the septic system and were then informed the system was “defective” and needed to be replaced. The court held that the buyers failed to show due diligence or justifiable reliance on their part, required by BRETA, because they had knowledge that the septic system had to be serviced twice in a four month period and yet they did not have the system inspected.

prior to closing. The court also held that there was no evidence showing that the seller's agent had actual knowledge of a defect in the septic system, and actual knowledge is required for the agent to be liable under BRETA.

2) **Keller v. Henderson**$^9$ March 9, 2001

The purchasers of a home, Henderson, sued the sellers, Keller, based on several different issues one of which was the misrepresentation of the property's wastewater management system. The buyers were told by the seller's real estate agent that the property was on city sewer, but the Seller's Property Disclosure Statement signed by buyers and sellers stated the property was on septic. The Seller's Property Disclosure Statement contained a merger clause stating that the buyers were not relying on any representations made to them other than what was in the contract. This disclaimer clause prevents the buyers from relying on the real estate agent's misrepresentation. The court held with regards to this issue, that summary judgment should be granted for the sellers on the septic tank claim.

3) **Hoffman v. Fletcher**$^{10}$ June 20, 2000

Buyer Hoffman agreed to purchase a home from Fletcher and both were represented by ReMax Associates of Athens agents. Hoffman filed suit against the sellers and the sellers' agent claiming breach of warranty because of passive concealment of the condition of the

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$^9$ Keller v. Henderson 248 Ga.App. 526, 545 S.E.2d 705, 1 FCDR 1137
$^{10}$ Hoffman v. Fletcher 244 Ga.App. 506, 535 S.E.2d 849, 00 FCDR 2843
septic system after the home's septic tank overflowed after closing. The sellers stated on the Seller's Property Disclosure Statement that they were aware of past drainage problems with the property, but stated that they were not aware of “past or present leaks, backups, or other similar problems relating to any of the plumbing, water, and/or sewage related items.” The purchase agreement also stated that the sellers had to provide a letter from the Oconee County Health Department stating that “any sewer problem on [the] street has been satisfactorily taken care of.” This letter was provided to the buyer's agent and it stated that a visual inspection did not reveal a current problem but that the property had a history of problems with effluent seepage and that this had been corrected. The court held that the buyer was put on notice about the property's drainage problems and that there was no evidence indicating that problems with the septic system resulted from anything other than the drainage problems which were disclosed.

4) Akins v. Couch\textsuperscript{11} June 14, 1999

Prior to listing their home for sale, the Couches were informed by the Fayette County Health Department of their need for a new septic system. The Couches listed their home for sale and signed a Seller's Property Disclosure Statement saying they were not aware of any problems with sewage-related items. The sellers specifically denied that there were any problems with the septic system to the buyer's agent. The sellers thought the buyer's lender would require a

“septic clearance letter” from the Health Department, so they requested one, but the Fayette County Health Department refused to issue one due to the septic system's problems. At closing, the buyer's lender did not require a septic clearance letter, and the seller and the seller's agent kept quiet about the septic system problems. Within days of the purchase, the buyer discovered that the septic system did not function and sued seller and seller's agent for rescission of the sale and compensatory and punitive damages. The court held that genuine issues of material fact existed as to whether the buyers used due diligence in the inspection of the property prior to the sale and that this was a question for the jury. The court also stated that a buyer can exercise due diligence without hiring a professional inspector, and that simply because there was a public record of the septic system's malfunction, the buyer's claim of passive concealment of defects is not defeated.

5) Gerald v. Doran\textsuperscript{12} November 23, 1983

The seller represented to the buyer of a house and lot that the house was connected to public sewer and the buyers purchased the house in 1976. In 1977, after experiencing problems with the house's plumbing, the buyers discovered the house was not connected to public sewer, but was serviced by a septic tank and a sump pump. Problems continued and in 1981 the buyers were told that it would be impossible to connect the house to public sewer due to issues with the depth of the sewer lines. In 1982, the buyers decided to sue the

\textsuperscript{12} Gerald v. Doran 169 Ga.App. 22, 311 S.E.2d 225
seller alleging that he knew the house was not connected to public sewer and could never be connected to public sewer and misrepresented this fact to the buyers. The court held that the buyer's discovery of the fraud occurred in 1977 when they discovered the house was not connected to public sewer, and thus the statute of limitations barred the buyers' claim for fraudulent misrepresentation.

Conclusion

There is no explicit requirement under Georgia law that a seller of real property must disclose the type of wastewater management system in use on a property. If a seller makes a misrepresentation as to the condition or existence of a septic system, the buyer must prove in court that he/she used reasonable diligence in inspecting the property and justifiably relied on the seller's representation. Reasonable diligence may require searching public records of the property's septic system maintenance, and it may require thorough inspection if the buyer is put on notice that there may be any problem with the septic system itself or the property's drainage. A Seller's Property Disclosure Statement can protect a seller from liability for material misrepresentations if there is a sufficient merger clause in the contract, but this Disclosure Statement is not required by law, it is used by real estate agents to protect themselves from making a material misrepresentation. A buyer should read a Seller's Property Disclosure Statement carefully for anything that may put them on notice of a possible problem with the septic
system including frequent servicing of the septic system. The buyer can also request a “septic clearance letter” from the county health department and this letter should indicate any past or current problems with the septic system and can put the buyer on notice to have the system carefully inspected.