

REAL ESTATE LAW

RECENT DEVELOPMENTS IN REAL ESTATE TRANSACTIONS

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In the past year, the rights and obligations of parties involved in real estate transactions have changed. Oral contracts can now be enforced; sellers of new construction have a duty to disclose undesirable conditions; and lead-based paint disclosure requirements must be met. These changes, discussed below, may have a significant impact upon the way real estate transactions are conducted in New Jersey.

ORAL REAL ESTATE AGREEMENTS ENFORCEABLE UNDER NEW STATUTE OF FRAUDS

An agreement to sell a piece of real estate or to enter into a long-term lease must be in writing in order to be legal and enforceable. Or does it? According to the new Statute of Frauds in New Jersey, this maxim of the real estate industry is no longer true.

In effect since January 1996, the new Statute of Frauds was the result of a joint effort on the part of the New Jersey Law Revision Committee and the State Bar Association to clarify the law governing written agreements. The new law was intended to eliminate some of the outdated language of the Statute and make it easier for those conducting business today to understand its requirements. The end result, however, has proven to be a dramatic reworking of the Statute of Frauds, with its most important modifications coming in the area of real property transactions.

The new law still requires that an agreement to sell real estate or to enter into a lease for longer than three years must be in writing in order to be legal and binding upon the parties. Under some circumstances, however, a written agreement is no longer a prerequisite to enforceability.

Equitable Considerations

Under the new Statute of Frauds, an agreement to transfer real estate, whether it is a sale or lease transaction, may be enforceable in the absence of a written contract, if the party who is purchasing or leasing the property can establish that the seller or landlord has turned the property over to him. The party must also establish that he has paid all or part of the agreed upon price for the transaction and that he has reasonably relied on this transfer to his detriment. If a court finds these facts to exist, the agreement will be binding and enforceable.

Clear and Convincing Evidence

In the most dramatic modification to the Statute, the new law now provides that no writing is required to enforce an agreement to sell or lease property if a party can prove by clear and convincing evidence:

a description of the real estate;

the nature of the interest being transferred;

the existence of the agreement; and

the identity of the parties involved.

This new provision will make it easier for judges to achieve equitable results without struggling, as they have in the past, to fit the agreement into some recognized exception to the Statute of Frauds. These unwritten agreements recognized by the new Statute, however, will not be enforceable against bona fide purchasers or lienors, who have entered into written agreements regarding the real estate and are unaware that these oral contracts have been made.

Broker Authorization Agreements

The new law requires that a real estate broker's authorization to sell or to lease property must be provided in writing. This is true whether the broker is working on behalf of the seller, the purchaser, the landlord or the tenant. In addition, a broker negotiating the purchase or sale of a business, regardless of whether the deal involves an interest in real estate, must put his or her authorization in writing. The new Statute of Frauds does retain the exception known as the "five day rule," making it possible for a broker who acts pursuant to an oral agreement to receive a commission, if written notice is provided to the principal within five days of making the oral agreement and before the actual sale or lease has taken effect.

DUTY TO DISCLOSE HAZARDOUS OFF-SITE CONDITIONS

In the case of *Strawn v. Canuso*, decided in May 1995, the New Jersey Supreme Court found that builders, developers and brokers of a newly constructed residential development could be held liable for failing to disclose to buyers the fact that a hazardous landfill was located one half mile from the development. The Court imposed a duty to disclose any off-site condition which was known to them, but not to the buyers, which could materially affect the value of the property.

Reaction to the *Strawn* decision was swift, and this duty to disclose has proven to be short lived. In September 1995, the New Jersey State Legislature passed the New Residential Construction Off-Site Conditions Disclosure Act. The Act requires that a list of all off-site conditions that may materially affect property values be kept by each municipality.

Who Must Disclose?

Under the Act, only the Commissioner of Environmental Protection and any person who owns, leases or maintains any off-site conditions, have a duty to disclose the existence of these conditions to the clerk of the municipality. The municipality, in turn, is responsible for creating and maintaining a list of the off-site conditions that exist within its borders. Those who must disclose have until September 1996 to do so and must update the information they provide annually. A new bill, introduced into the New Jersey Assembly this past March and currently before the Committee on Housing, would revise the language of the Act to make it clear that municipalities are under no obligation to actively obtain information concerning the off-site conditions. The municipalities, however, are responsible for updating the lists in their possession on an annual basis.

Conditions that must be disclosed include: overhead electric utility transmission lines, electrical transformer substations, underground gas transmission lines, sewer pump stations, sanitary landfill facilities, public wastewater treatment facilities and airport safety zones. In addition, any property that is a known hazardous discharge site must be disclosed and placed on the list.

The Seller's Duty to Disclose

Under this new law, any builder or broker who provides a prospective purchaser with notice that such a list exists is deemed to have fully-disclosed any off-site conditions and will not be subjected to liability. This is true regardless of whether those who have the duty to disclose have not yet done so, or whether the list that is provided by the clerk is inaccurate. Moreover, the seller's disclosure provisions have been made retroactive and preclude the finding of liability on the part of a builder or broker in contracts entered into prior to the date of enactment.

NEW FEDERAL LEAD-BASED PAINT DISCLOSURE REQUIREMENTS

In March 1996, the Environmental Protection Agency and the Department of Housing and Urban Development released regulations requiring those who sell or lease housing to disclose the existence of lead-based paint in their homes. These regulations were issued pursuant to the Residential Lead-Based Paint Reduction Act of 1992, and are aimed at providing families with enough information to protect themselves from the dangerous consequences of lead-based paint exposure. The requirements go into effect on September 6, 1996, for owners of more than four single-family, residential dwellings and on December 6, 1996, for owners of one to four of these dwellings.

Who Must Disclose?

Anyone selling or leasing residential housing that was constructed prior to 1978 must abide by the disclosure requirements of the new regulations. Housing for the elderly or for persons with disabilities (unless a child under the age of 6 lives in the residence), is exempted from coverage. Also exempted are zero-bedroom dwellings, such as efficiencies or loft apartments, leases for less than 100 days, renewal leases where the landlord has previously made the required disclosure, housing purchased at foreclosure sales and housing that has been inspected and found to be lead-based paint free.

What Must Be Disclosed?

Although not obligated to correct the existence of any lead-based paint hazards in the home, owners and landlords of housing that is covered by the regulations must:

provide the buyer or the tenant with an EPA-approved lead hazard information pamphlet;

disclose to the buyer or the tenant the presence of any known lead-based paint or lead-based paint hazards in the housing;

disclose to any agent the presence of any lead-based paint or lead-based paint hazards in the housing; and

provide the buyer or the tenant with any records or reports in his possession, pertaining to lead-based paint in the housing.

If a seller or landlord receives an offer from a buyer or tenant prior to fulfilling these disclosure requirements, the offer may not be accepted until the requirements have been fully satisfied. In addition, after full disclosure has been made, the seller must grant the buyer a ten day period in which to conduct an inspection or risk assessment of the housing for the presence of lead-based paint and its associated hazards. The parties may, however, provide in writing that the time frame for assessment may be longer or shorter

than ten days. All contracts for the sale or lease of housing that is covered by the regulations must contain "A Lead Warning Statement" that sets forth these requirements in their entirety.

Agent Responsibilities

Any agent involved in a sale or lease of the specified housing must inform the seller or landlord of his obligations under these regulations. The agent is responsible for ensuring that the seller or landlord has performed all of the activities required of him, including disclosing the proper information to buyers and tenants and providing buyers with the opportunity to inspect the premises. If the seller or landlord fails to perform these activities, then the agent must personally ensure compliance with the disclosure requirements. The agent, however, will not be held responsible for any information that has not been disclosed to him by the seller or landlord.

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