

## BUYER BEWARE



### **Real estate brokers not required to determine that a property is in compliance with applicable zoning laws before selling it.**

The Massachusetts Appeals Court recently concluded that a real estate broker's failure to verify a property's zoning status before putting it on the market did not constitute an unfair or deceptive business practice in violation of the state's consumer protection law. Buyers should, therefore, always be prepared to conduct their own due diligence regarding a property's zoning status and should not rely on their brokers' representations about zoning when purchasing real estate.

*Quinlan v. Clasby*, 71 Mass. App. Ct. 97 (2008), involved the sale of a house in South Boston that contained three separate apartment units. Although it was zoned as a three-family home, the variance permitting this use allowed for no more than one unit to be above the first floor. At the time of its sale, the house had two second-floor apartments.

The seller informed the broker that the house was a "three-family" and the broker inspected the property and determined that it was being used as a three-family residence. The broker also obtained copies of the tax records that showed that the property had been taxed as a four-family home for the previous eight years. Without checking the applicable

records on file, the broker advertised and sold the house as a three-family dwelling.

Several years later, the buyers attempted to resell the property, and received an original offer to purchase of \$390,000. Once the new buyer determined that the property was not a lawful three-family house, however, she opted out of the deal. The buyers eventually sold the property for \$320,000, \$70,000 less than the original offer.

The buyers filed suit against the broker seeking to recoup their lost profits. They argued that the broker could have reasonably ascertained the unlawful zoning status of the property by checking the public records and that her failure to do so was both unfair and deceptive. They also argued that the fact that the property had previously been taxed as a four-family residence should have put her on notice that there was a problem with the property's zoning status.

At trial, the broker testified that when listing a property she typically obtains information from the owner, inspects the property, and checks the deed and tax information. She does not check the zoning status because she

lacks the experience necessary to determine what the legal zoning status of a property is. The Massachusetts Association of Realtors also submitted an amicus brief in support of the broker establishing that brokers do not generally perform title searches and that they lack the training necessary to give advice regarding compliance with legal zoning laws. The buyers offered no contrary evidence.

The Appeals Court ruled in the broker's favor, finding that the consumer protection statute does not impose liability for failing to disclose what one does not know. The Court further held that given that brokers, industry-wide, typically do not review zoning records or provide advice regarding zoning matters, brokers are under no duty to determine whether a property is in compliance with applicable zoning laws before putting it on the market. By inspecting the property and confirming that it was a three-family unit and by obtaining relevant tax documents, the broker "did all that was legally required of a real estate broker in the sale" of a property.

In light of the Appeals Court's ruling in *Quinlan*, buyers should not rely on a broker's representations regarding the

---

This newsletter is intended to provide general information of interest to the business community and individuals. It is not intended to provide specific legal advice or to address fact-specific issues. For fact-specific inquiries, you should consult your legal counsel. Berluti & McLaughlin LLC assumes no liability in connection with the use of this newsletter. The Supreme Judicial Court may consider this material advertising.

zoning status of a property. To ensure that the property is as advertised, buyers should perform their own due diligence through a qualified professional, such as an attorney, to verify that the property is in compliance with all applicable zoning laws.

Buyers can further protect their interests by ensuring that any representations or warranties made about the property, including its legal status and uses, are included in the purchase and sale agreement.

In the Greater Boston Real Estate Board's Standard Purchase & Sale Agreement (available at [www.gbreb.com](http://www.gbreb.com)), buyers and sellers can include any additional warranties and representations made between the parties in Section 25 of the contract. Although it is common practice for parties to write in "none, property sold as is," buyers must include any warranties and representations they wish to enforce against the seller in the agreement. In the case of zoning, any and all representations made by the seller regarding the legal uses and status of the property should be written into the contract.

*FOR QUESTIONS, PLEASE CONTACT ATTORNEY ROBERT BERLUTI, THE FIRM'S LITIGATION PARTNER, OR JOHN McLAUGHLIN, THE FIRM'S CORPORATE PARTNER.*