



SPAGNUOLO & COMPANY REAL ESTATE LAWYERS

Head Office:
#300 – 906 Roderick Avenue
Coquitlam, B.C. V3K 1R1

www.bcrealestatelawyers.com

Phone: (604) 527-4242
Fax: (604) 527-8976
Toll Free Phone: 1-888-873-2829

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“STIGMATIZED” PROPERTIES

A potential buyer may be quite happy with the physical condition and the location of a residential property, but they may avoid purchasing the property because of concerns regarding an event or circumstance occurring in or near the property. Examples include a property next door to a residence occupied by a convicted pedophile, or a reputed gang member. The property could be known as a haunted house. Other examples include a murder or suicide in the home, or the home was subject to a drive-by shooting or used as part of an illegal operation such as a brothel.

Even though the “stigmatizing event” does not directly affect the appearance or use of the property, it has such a negative psychological effect on the potential buyer that they decide not to purchase the property. The property becomes known as a “**stigmatized property**” or a “**psychologically impacted property**”, potentially making it much more difficult to sell and ultimately adversely affecting its market value.

Clearly, the significance of the stigmatizing event will vary with a Buyer’s values, perceptions, beliefs, age, religion, ethnic background, gender and other concerns personal to that Buyer. Some events are so heinous that everyone will know through the media and be so horrified that they would never dream of buying the affected home. In other cases, such as a reputed haunted house, you may find some people may really be shaking in their boots while others (especially in olde England) may see reported ghost sightings as part of the property’s distinct charm, simply shrug their shoulders and hope the notoriety increases the home’s value. As it can be so subjective, it is impossible to determine all the possible events or circumstances that can cause a property to be stigmatized. This makes it very hard to set rules on what possible stigma should be disclosed. One can also ask why should a seller disclose possible stigmatizing events and risk devaluing their main asset when it may not have any effect whatsoever on the buyer’s decision to purchase or not. Therefore, in common law jurisdictions like BC and Ontario, there are no legislation that defines or deals with stigmatized properties.

As a sidebar, in close to half of the American states there is law requiring some form of disclosure of property stigma, as there is in Quebec. California was the pioneer, as often seems

to be the case. California was the first state to pass a law defining the disclosure responsibility of an owner and a real estate agent when selling stigmatized property. For example, the law requires an agent to disclose the fact of a murder on the property for a period of three years after the event.

What can buyers do to protect themselves in BC with respect to stigmatized properties?

In British Columbia, people who are selling their home (“Sellers”), and the agents who represent them, must disclose all known material latent defects. A latent defect is essentially a material defect that is not generally visible during a reasonable inspection but renders the property unfit for habitation or is dangerous or potentially dangerous to the occupants. It is generally associated with a hidden physical defect with the property such as a big crack in the foundation that has been covered up with flooring, faulty wiring covered by drywall or poorly insulated plumbing that leads to pipes freezing and bursting in winter. It has also been held that a latent defect can cover environmental issues such as leaking corroded underground oil tanks and radioactive materials being stored near the property.

Although Sellers are required to disclose all known material latent defects (on the Property Disclosure Statement), they are not required to disclose the existence of all possible stigmas that might be a concern with potential buyers. The doctrine of caveat emptor (buyer beware) still very much applies in BC. This means that buyers in BC have to make their own inquiries for possible stigmas. Of course, they can ask their agent to directly inquire with the seller’s agent. Usually though a seller will either not know or will not want to incur any potential liability and will decline to answer the question directly and advise the buyer to undertake their own investigations. Sometimes, a seller may choose to answer the question and in that case the seller, and the seller’s agent, must exercise reasonable care to ensure the accuracy of their answer. Otherwise, if the seller does not disclose anything, it will be up to the buyer to check other available sources. For example, if a buyer has a concern in respect of criminal activities or convicted felons in or near the property, a buyer should inquire at the local police service, research local newspaper websites, and talk with the neighbors around the property. If there is a suspicion that the property is reputedly haunted, there may be certain websites which have a list of local homes that are apparently haunted.

Agents should note though that, in a limited dual agent situation, if a buyer has notified the brokerage through the agent representing the buyer of their concern about a certain stigma and the brokerage, through the agent representing the seller, is aware of the existence of such a stigma, the brokerage must disclose that information to the buyer.

Can a stigma become a material latent defect that must be disclosed to the buyer by the seller?

In a BC case in 2003, the buyers refused to complete on a purchase of a lake front property in Kelowna after finding out from a neighbor that the adjoining property that was next to a public park was being used in the summer as a nude beach. The sellers sued the buyers for the down payment of \$100,000. The trial judge ruled in favour of the sellers and said that the sellers’ non-disclosure of the use of the nearby beach did not amount to a latent defect and did not entitle the

buyers to escape their obligations under the contract. The trial judge said, “The presence of nude bodies next door or parading in front of one’s house may or may not be a defect. This requires a subjective test. To allow defects to be determined by individual preferences would open the floodgates of litigation by remorseful purchasers and create an impossible standard of disclosure for vendors. In this case, the alleged defect was occurring outside the boundaries of the property purchased. The presence of a nude beach next door to the subject property is not a defect, latent or patent. There is no duty on the vendor to disclose the existence of the nude beach.” The buyers were ordered to pay the \$100,000 down payment to the sellers. The BC Court of Appeal dismissed the Buyer’s appeal and upheld the trial judge’s decision. As the trial judge alludes to in his judgment, to allow the presence of a nude beach to become a latent defect would start a slippery slope that is very hard to stop and could force sellers to disclose anything and everything to avoid claims of misrepresentation. Presumably the term slippery slope had nothing to do with suntan lotion from the nude beach enthusiasts.

A far more damaging psychological event is unfolding at the time of writing this article. In a recent Ontario case a lawyer is arguing that the stigma of having a neighbor who has been convicted of possessing child pornography amounts to a latent defect. In this case, a couple, with two young children, bought a home in June 2010 but found out only after completion that a man convicted of possessing child pornography was living across the street. The couple believes that it was not safe to move in. The couple is suing the sellers and the sellers’ realtors arguing that they should have disclosed this information which the couple learned was common knowledge in the neighborhood. The lawyer states that the presence of this neighbor is a latent defect in that it was not apparent upon a reasonable inspection, but one the seller knew about, and renders the home uninhabitable. This latent defect argument in relation to a convicted criminal in the neighborhood enters uncharted territory. The defence to such a claim is that, although socially and morally it is a good idea to disclose, the current law does not require disclosure and that it is really stretching the law to include this event as a latent defect. Of course nobody wants to live near a sex offender but the court must answer the question of whether the effect of having a neighbor with a child pornography conviction is too subjective to be considered a latent defect of your property. The case is still ongoing and a settlement may be reached before a court decision is made. Some have argued that if there was an accessible public sex offender list in Canada, buyers could check themselves without having to go through the stress of a court case and arguing what should have disclosed by sellers. However, as it would be very hard to keep such a list up to date with people moving and changing addresses, would buyers really be able to completely rely on such a list?

In another Ontario case, a couple with three children bought a home next door to a father and son who had both been convicted of possessing child pornography. The couple subsequently decided to sell the home, disclosed the presence of the father and son next door and state that as a result it took nearly a year to sell and they sold it at \$30,000 less than what they paid. The couple sued the vendors, who were real estate agents selling their own property. As a result, the lawyer for the couple is relying on the disclosure requirements under the Ontario Real Estate and Business Brokers Act rather than the latent defect argument although that argument would probably have been advanced if the vendors were not realtors. That Act is similar to the legislation in BC under the Real Estate Services Act and Real Estate Council Rules in that it requires all realtors divesting themselves of an interest in real estate to advise all parties involved in writing that they

are realtors who have an interest in the transaction and to provide full disclosure of all facts within their knowledge which affect or will affect the value of the property they are selling. The case is still to be decided.

In the future, even if the argument that certain stigmas can amount to latent defects fails, it may be suggested that more questions should be listed in the General Section of the Property Disclosure Statement to go along with the marijuana grow operation and the material latent defects questions. These questions could directly address serious particular stigmas such as “Has there ever been a murder on the property?” Again though, a seller may not know the full history of the property or may just refuse to complete the Property Disclosure Statement. In any event, it would not absolve the buyer from making their own inquiries.

Conclusion

In British Columbia there is currently no legal requirement for sellers, or the agents representing them, to disclose possible stigmas in respect of a property such as if a murder, suicide, gang shooting or ghost sighting may have occurred in or near the property. Sellers should be very careful with their replies if they decide to directly answer questions from buyers in respect of possible stigmatizing events or circumstances concerning their property and obtain independent legal advice if unsure. Buyers, if they have suspicions about a possible event or circumstance that may have occurred in or near the property, should be very diligent in their inquiries, checking with the seller through their agent, the police, neighbors, newspapers, and websites and leaving no stone unturned. Realtors should be very careful when acting for their clients and make sure that they observe their own professional disclosure requirements set by the Real Estate Council, especially in a limited dual agent situation and when selling property they own themselves.

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