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To Disclose or Not to Disclose?

Since the first sales of real estate in Michigan over 200 years ago, sellers, developers, realtors and real estate agents have worried and even agonized over what matters regarding the property involved should be disclosed to prospective purchasers. When the sale involves a lakefront property on a body of water that has some type of contamination, the dilemma is even greater. If the pollutant is disclosed to a potential purchaser, the purchaser may walk away from the real estate deal or demand that the price be lowered dramatically. If known potential pollution or contamination is not disclosed, there are not only ethical and honesty obligations involved, but the seller and the real estate agent or realtor could very well be sued later and could be on the hook for damages or at least paying their own defensive attorney fees and court costs in a contentious lawsuit.

Michigan's seller disclosure requirements are fairly moderate compared to other states. In Michigan, there are three types of disclosure requirements:

1. Disclosures mandated by statute.
2. Common law requirements (which are created by Michigan appellate courts, including the Michigan Supreme Court and the Michigan Court of Appeals).
3. Ethical and civil requirements for real estate agents, realtors and other real property brokers or sales people.

MCL 565.951 *et seq.* is called the "Michigan Seller Disclosure Act" and requires the seller of a house, cottage, cabin or other dwelling to disclose certain matters in a written form. Those matters include, but are not limited to, the condition of appliances, utilities, the interior and exterior of the property structure, heating, plumbing, and electrical systems and other matters (see MCL 565.957 for all required disclosures). Generally, that statute does not apply to vacant property.

Pursuant to the Michigan common law, nondisclosure potentially involves two different types of fraud – misrepresentation (which includes making false statement, lying, and unintentional misrepresentation) and "silent fraud." *Me-D, Inc. v WB McConkey*, 231 Mich App 22; 585 NW2d 33 (1998).

Finally, realtors, real estate brokers, salespersons and other agents are subject to various ethical and professional standards disclosure requirements.



In general, it is best to disclose everything that is relevant about a lakefront or other waterfront property to a prospective buyer, including actual or potential contamination of the lake or river waters and groundwater if known or reasonably ascertainable. Why? Not only are most sellers of real property (including the owner of the property, realtors, real estate brokers, salespeople and other professionals) honest, but most of those individuals want to pursue the right, honest and ethical path. And, in the overwhelming majority of cases, that involves full disclosure, even in those cases where disclosure might not be legally required by law. Furthermore, disclosure accords peace of mind with regard to minimizing litigation. The statutes of limitations of Michigan are generally three years for fraud and six years for a breach of contract. Most people do not want to have to worry for years about whether or not the purchaser in a real estate transaction will sue the seller or realtor several years later.

What types of contamination can occur in inland lakes or rivers? Unfortunately, there are many potential sources, including the following:

1. Perfluorooctane Sulfonate (PFOS) and perfluorooctanoic acid (PFOA) (collectively, "PFF"), which is a chemical that had many commercial and industrial applications, including waterproofing of shoes.
2. Lead.
3. Arsenic.
4. Industrial chemicals.
5. Fertilizer from agricultural uses.

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Every important disclosure should be in writing, with the seller of the property retaining proof that the written disclosure was given to and physically accepted by the prospective purchaser.

Quite often, written disclosures can be written in such a way that they are full, honest and accurate, but without hyperbole or unduly alarming a purchaser. For example, suppose that PFFs are found in a lake or well water. A reasonable disclosure could read as follows:

“PFFs have been found in Bass Lake at low levels below X parts per billion and this is a substance that can be potentially harmful. For more information, please consult the report dated August 5, 2018 done by the Lenawee County Health Department or contact an engineer or other professional of your choice.”

If it is not certain that a particular contaminant is contained in the lake, river or groundwater, a disclosure could indicate that “it appears” that such substance is present but that further testing should be done to reach a terminative conclusion.

It is a truism that every body of water in Michigan has some pollutions or contaminants in it. In most cases, those contaminants are at very low levels and, in many cases, are a product of nature. For example, low levels of arsenic are contained naturally in every body of water in Michigan but typically at such a low level that experts have determined the low concentration should not adversely impact human health. *R.*

