



NAVIGATING SELLER'S DISCLOSURE AFTER HARVEY

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In the aftermath of Harvey, many are wondering about the duties of disclosure real estate agents owe to buyers and sellers.

The Texas Real Estate License Act (Chapter 1101, Texas Occupations Code) lists a number of ways in which real estate agents' behavior could result in suspension or revocation of licensure. Among others, Sections 1101.652 (b) (1-4) are germane to agents' behavior related to the disclosure of flooding. Specifically, agents are required to disclose to a potential buyer "a significant defect, including a latent structural defect, known to the license holder that would be a significant factor to a reasonable and prudent buyer in making a decision to purchase real property."

As to flooding of real property, there is no doubt this condition is a *significant defect* that must be disclosed to a potential buyer if *actually known* to the agent. Although the License Act only requires disclosure of what is *actually known*, it is possible a court could impose a broader standard of "ought to have known" on license holders. As a fiduciary, license holders must represent the interest of their clients and perform services with the necessary levels of integrity and competency. After Hurricane Harvey flooding in Houston and the massive publicity worldwide, it seems improbable that any real estate

agent in the southeast Texas area did not know about the event. An agent's fiduciary duty may require a license holder to investigate for their clients whether a property in the Houston area actually flooded.

Do's and don'ts for disclosure about flooding

Do ask questions about flooding events. You may need to contact FEMA or local authorities to dig deeper into the flooding event and what, if anything, governmental authorities had done to remedy future flooding. TREC rules also indicate that if an agent doesn't ask these kinds of questions, the agent could be guilty of an act of omission if the agent chooses not to make further inquiries.

Do advise clients to inquire about the flood zone. Buyer's agents should have their clients determine if the property is situated in a flood zone and to check on the availability of flood insurance. You may want to provide this information to your buyers in writing.

Don't offer legal or engineering advice. This is only appropriate if you hold licenses in those professions. Tell your client to instead seek the assistance of an attorney, civil engineer, or other appropriate professional so he or she can understand the risks involved in a property that has flooded or could flood in the future.

Do carefully consider what you disclose. In the event a homeowner whose property flooded seeks legal action against you for flood-related disclosures, attorneys will question

- What did you actually know about prior flooding of the property in question or about the property's location inside a FEMA-designated flood zone?
- What did you tell potential buyers or sellers of your actual knowledge?
- When did you tell potential buyers or sellers of your actual knowledge of the property's flooding issues?

Will there be court rulings in future lawsuits involving real estate agents in the aftermath of Hurricane Harvey's flooding that clarify the duties agents owe clients and customers? Perhaps, but there is no doubt you already must disclose your actual knowledge about flooding events to any purchaser. ❖

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The seller's disclosure notice is not the real estate agent's disclosure but the *seller's* disclosure. While you may provide the form and answer questions about it, you should not complete the form for a seller. Stress to sellers the importance of answering the questions honestly and thoroughly. It is hard to imagine a seller harmed by over-disclosure.

Members of the Texas Association of REALTORS® have exclusive access to the *Seller's Disclosure Notice* (TAR 1406), which has options to disclose information about a property's flooding history, including whether there has been flooding and if there is present flood insurance coverage.