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FAIR DISCLOSURE AND AIRPORT IMPACT STATEMENTS IN REAL ESTATE TRANSFERS

This report was prepared under ACRP Project 11-01, "Legal Aspects of Airport Programs," for which the Transportation Research Board (TRB) is the agency coordinating the research. The report was prepared by Larry W. Thomas, Attorney at Law, Washington, DC. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

Background

There are over 4,000 airports in the country and most of these airports are owned by governments. A 2003 survey conducted by Airports Council International–North America concluded that city ownership accounts for 38 percent, followed by regional airports at 25 percent, single county at 17 percent, and multi-jurisdictional at 9 percent. Primary legal services to these airports are, in most cases, provided by municipal, county, and state attorneys.

Reports and summaries produced by the Airport Continuing Legal Studies Project and published as ACRP Legal Research Digests are developed to assist these attorneys seeking to deal with the myriad of legal problems encountered during airport development and operations. Such substantive areas as eminent domain, environmental concerns, leasing, contracting, security, insurance, civil rights, and tort liability present cutting-edge legal issues where research is useful and indeed needed. Airport legal research, when conducted through the TRB's legal studies process, either collects primary data that usually are not available elsewhere or performs analysis of existing literature.

Applications

The purpose of fair disclosure laws is to provide prospective home buyers with sufficient information to make informed decisions about the purchase of property. Airport operators are particularly interested that home buyers obtain information about the noise and flight paths associated with airport operations before prospective buyers make decisions about purchasing property located near an airport. In too many cases property is purchased near airports without full disclosure of the nature of airport operations and thus there is the potential for purchaser remorse based on the lack of disclosure of airport noise and operations. In some cases, the adoption of fair disclosure laws that include the disclosure of the potential impacts of aviation operations has been impeded by the fear of some homeowners, local officials, and representatives of the real estate industry that such disclosure may provide an exaggerated impression of the significance of aviation-related impacts and thereby impair property values. Proponents of such disclosure laws maintain that the real estate market takes account of any aviation-related impacts regardless of fair disclosure laws. Still others assert that existing fair disclosure laws are necessary to address issues that arise regarding the disclosure of airport noise and operations in the area where a home is purchased.

This digest examines the effect of a state or locality having no real property disclosure laws, existing general state real property disclosure laws, and existing state real property disclosure laws specifically requiring the disclosure of airports in close proximity to the property being offered for sale. After identifying and analyzing state real property disclosure laws specifically requiring the disclosure of airports, annotated typical fair real property disclosure law provisions have been included. The latter includes provisions essential for effective fair disclosure of airport-related impacts.

This digest should be useful to airport and real estate attorneys, administrators, risk managers, financial officials, state and local policy officials, community and civic association members, realtors, real estate boards and commissions, and to all persons interested in the full disclosure of information that could impact the purchaser(s) of real property in close proximity to an airport.

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FAIR DISCLOSURE AND AIRPORT IMPACT STATEMENTS IN REAL ESTATE TRANSFERS

By Larry W. Thomas, Attorney at Law, Washington, DC

I. INTRODUCTION

The purpose of this digest is to discuss whether and under what circumstances a seller of residential real property or local authorities must give notice to a prospective home buyer that the property is affected by its proximity to an airport.

As is more fully discussed in Appendix A, in the absence of a residential real property disclosure act, the doctrine of *caveat emptor* ("Let the buyer beware") usually applies. Under the *caveat emptor* doctrine, it is a buyer's responsibility to perform the due diligence regarding a property he or she intends to purchase. In those states without disclosure acts a seller's obligation or duty to disclose defects or conditions affecting property is likely to be limited by the *caveat emptor* doctrine. Also, under the doctrine a seller generally is not obligated to reveal all that he or she knows about the property. Except in the circumstances noted in Appendix A, the rule prevents a buyer from suing a seller to rescind a contract or for damages.

The recent trend in the states is the enactment of residential real property disclosure laws. For purposes of this digest, the disclosure laws are of two types: 1) general residential real property disclosure laws, and 2) residential real property laws applicable to the disclosure of the proximity of airports and airport noise affecting property offered for sale.

Approximately two-thirds of the states have enacted general residential real property disclosure laws. The purpose of such laws is to provide prospective home buyers with sufficient information to enable them to make informed decisions about the purchase of residential property. See Appendices A and B for a more comprehensive analysis of the provisions of the acts. Significantly, no circumstances were found in which a disclosure statute lacking an airport disclosure provision has been used to require notification to a prospective buyer of airport proximity or noise.

Some states specifically require the disclosure of an airport or the effect of aviation operations to a prospective purchaser of residential property. The digest discusses the features of such laws requiring the disclosure of airport noise, flight paths, and other effects of airports to prospective purchasers of property in the vicinity of an airport. Appendix C contains a matrix of these laws. Under most residential real property disclosure laws, the requirement to disclose is generally imposed on the seller or his or her agent.

Section II of the digest examines states with airport disclosure laws and discusses when and in what manner a seller must disclose that residential property being offered for sale is within the boundaries of an airport noise exposure map, an airport influence area, or is situated in a military Air Installation Compatible Use Zone (AICUZ).

Section III of the digest discusses whether a state's enactment of an airport disclosure act is an exercise of the state's police power or amounts to a regulatory taking of property that requires the payment of just compensation to property owners affected by a disclosure act's requirements.

Section IV discusses whether an airport disclosure statement would have an effect on a buyer's claim for noise damages after the buyer purchased property knowing that it was subject to airport noise.

Section V addresses the effect of noise studies and contour maps on claims for airport noise damages.

Section VI is a typical fair airport disclosure act developed for the digest that includes comments on proposed provisions and issues relevant to the enactment and use of an airport disclosure statute.

Appendix A is a general discussion of real estate fair disclosure laws. Appendix B is a matrix of state residential real property statutory disclosure provisions. Appendix C is a matrix of state airport disclosure provisions. Appendix D is the Airport Disclosure Statement relating to the Tucson International Airport. Appendix E is the Real Estate Transfer Document Statement for the San Francisco International Airport. Appendix F is a version of the Typical Airport Disclosure Act developed for the digest that is contained in Section VI but without the notes and comments.

II. DISCLOSURE OF AIRPORTS UNDER EXISTING REAL PROPERTY DISCLOSURE LAWS

A. Introduction

Some form of residential and real property disclosure laws specifically pertaining to airports have been enacted in at least 13 states, including Alaska, Arizona, California, Hawaii, Indiana, Maryland, Michigan, Minnesota, New Jersey, Nevada, North Carolina, Tennessee, and Virginia. The disclosure laws take one or more of four approaches. Arizona, California, Hawaii, New Jersey, and North Carolina require that a seller disclose that a property is within an airport influence area, an airport noise contour map, or an airport safety zone. Indiana, Michigan, and Minnesota require

that a seller disclose whether a property is within the proximity or within a certain distance of an airport. Alaska, Nevada, and Tennessee require a seller to disclose whether a property is affected by airport noise or by noise generally. At least three states, Arizona, Maryland, and Virginia require the disclosure of property situated within the vicinity of military airports and operations. Other than with respect to designating an airport influence area or airport safety zone or filing an airport noise contour map in the local land records, airport authorities typically have no responsibility for airport disclosure statements.

B. Disclosure of Property Within an Airport Influence Area, an Airport Noise Contour Map, or an Airport Safety Zone

B1. Arizona

Arizona has several laws requiring the disclosure of airports. First, the State or a political subdivision that has established or operates an airport may designate "an airport influence area."[1] An airport influence area is property in the vicinity of an airport that is

> currently exposed to aircraft noise and overflight and that either has a day-night average sound level of sixty-five decibels or higher or is within such geographical distance from an existing runway that exposes the area to aircraft noise and overflights as determined by the airport owner or operator.[2]

The state or political subdivision must "record" an airport influence area in the county having territory within the area.[3] An interesting feature of the statute is that the county record of an airport influence area is deemed to be sufficient notice to owners or potential purchasers of property in the airport influence area that a property is subject to aircraft overflights and noise.[4]

The statute does not state whether claims relating to airport noise or operations are barred by reason of an owner or potential purchaser having such notice, nor were any cases located construing the provision.

Second, Arizona requires that the state real estate department shall have and make available to the public on request a map showing the exterior boundaries of each territory in the vicinity of a public airport.[5] A public airport must record the map in each county having territory in the vicinity of the airport.[6] The recorded map must be "sufficient to notify owners and potential purchasers of property that the property is located in or outside of a territory in the vicinity of a public airport."[7] Once more, neither is there an indication whether the notice to an owner or a prospective buyer bars any claims in connection with airport noise, nor were there any cases located that have construed the provision.

The phrase "territory in the vicinity of a public airport" means property "that is within the traffic pattern airspace as defined by the federal aviation administration [FAA]" and "includes property that experiences a day-night average sound level" [DNL] of either sixty decibels or higher or sixty-five decibels or higher depending on a county's population.[8] For instance, Scottsdale, Arizona, has complied with § 28-8486 by recording a map of the Scottsdale Airport Traffic Pattern Airspace "known as the 60 DNL Noise Contour."[9] The city states that it has exceeded this minimum standard and has mapped the noise contours out to 55 decibels (dB) DNL.[10]

Because 65 dB DNL contours may not reflect completely the effect of "single event" airport noise on nearby property, Part IV.B.4(b) of the Typical Airport Fair Disclosure Act Provisions developed for the Report provides that a disclosure statement must disclose flight paths including actual radar flight paths or tracks used by landing and departing aircraft in areas beyond 65 dB DNL.[11] (See Appendix D) The reason is that property owners may have complaints regarding single event noise generated by aircraft using the airport that are outside 65 dB DNL contours.[12]

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[1] ARIZ. REV. STAT. ANN. § 28-8485 (2010).

[2] *Id*. § 28-8485(A) (2010).

[3] *Id*. § 28-8485(B) (2010).

[4] *Id*.

[5] *Id*. § 28-8486(A) (2010).

[6] *Id*. § 28-8486(B) (2010).

[7] *Id*.

[8] *Id*. § 28-8486(C)(2)(a) and (b) (2010).

[9] http://www.scottsdaleaz.gov/airport/noisesub_disclosure, last accessed on July 25, 2011. The Web site advises that the recorded noise disclosure maps for other Arizona airports may be viewed at the Public Airport Maps section of the Arizona Department of Real Estate's Web site and that home buyers and renters should educate themselves in advance about issues that affect property for sale or rent.

[10] http://www.scottsdaleaz.gov/airport/noisesub_disclosure, last accessed on July 25, 2011. The Web site informs visitors that "[t]he historic 1985 and 1991 noise contour maps as well as the projected 2005 noise contour maps may be viewed on our Noise Compatibility Planning Page."

[11] *See* Mary Ellen Eagan, Noise Programs in Areas Outside DNL 65 dB, AAAE Airport Noise and Mitigation Symposium (Oct. 5, 2009), available at http://www.hmmh.com/cmsdocuments/Beyond_DNL65.pdf, last accessed on July 20, 2011. The 65 dB DNL is the federally defined threshold level at which aircraft noise begins to interfere with everyday activities, such as talking on the phone or watching TV. Bradley International Airport, 14 C.F.R. Part 150 Study, Noise Exposure Map and Noise Compatibility Program, Executive Summary (Oct. 27, 2003), at ES-3, available at http://www.bradleyairport.com/community/noise_docs/BDL%20Exec%20Summary.pdf, last accessed on July 20, 2011.

[12] *See* Discussion of Methodologies of Measuring Noise Impact (Oct. 22, 2000) (noting that "[s]ome people challenge the use of DNL to assess aviation noise because it is a measure of exposure from cumulative events over time rather than a measure of exposure from a single noise event"), available at http://www.dekalbzoning.com/PDK_FAAnoisediscussion.html, last accessed on July 20, 2011.

B2. California

California's disclosure law prescribes a form entitled "Notice of Airport in Vicinity" when a property is located within an airport influence area.[13] The notice must state:

> This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you.[14]

An airport influence area is defined as "the area in which current or future airport-related noise, overflight, safety, or airspace protection factors may significantly affect land uses or necessitate restriction on those uses as determined by an airport land use commission."[15] If a Natural Hazard Disclosure Statement is required, a seller must determine if the property is located in an airport influence area[16] and provide notice.[17] The airport influence area may be 12- to 45- sq mi depending on the "airport runway's size, orientation, and classification."[18] When the notice is provided in compliance with the statute, the notice relieves the seller "or any listing or selling agent of any further duty…."[19] A transferor or the transferor's agent is not "liable for any error, inaccuracy, or omission of any information delivered…if the error, inaccuracy, or omission was not within the personal knowledge of the transferor" or the transferor's agent.[20]

In California, cities and counties may establish additional or different disclosure requirements but at a minimum the form must include the information in the foregoing Notice of Airport in Vicinity.[21] However, in the absence of an airport influence area map, the disclosure of an airport within 2 mi will satisfy any city or county requirements applicable to transfers of real property.[22]

B3. Hawaii

In Hawaii, disclosure of an airport is required when residential property is "[w]ithin the boundaries of the noise exposure area shown on maps prepared by the [DOT] in accordance with [FAR] Part 150-Airport Noise Compatibility Planning…for any public airport."[23] Second, disclosure is required when residential real property lies within the boundaries of an "Air Installation Compatible Use Zone of any Air Force, Army, Navy, or Marine Corps airport as officially designated by military authorities…subject to the availability of maps that designate" the area.[24] AICUZs are discussed in Section V.C. of this digest.

B4. New Jersey

New Jersey's Planned Real Estate Development Full Disclosure Act (PREDFDA) and its Air Safety and Zoning Act (Air Safety Act) impose disclosure requirements regarding off-site conditions. First, as a result of administrative regulations, PREDFDA requires a seller when issuing a public offering statement to disclose, among other conditions, a property's proximity to airports or flight paths.[25] Second, the Air Safety Act requires a seller to notify a prospective buyer prior to executing a contract for the sale of residential property that the property is located in an airport safety zone.[26] As observed in *Nobrega v. Edison Glen Associates*,[27] New Jersey's New Residential Real Estate Off-Site Conditions Act (Disclosure Act)[28] does not affect the disclosure requirements in PREDFDA or the Air Safety Act.[29] However, the court held that based on legislative intent the Disclosure Act "precludes plaintiffs from suing sellers and developers of real estate under the Consumer Fraud Act for failure to disclose off-site conditions, provided that the sellers and developers satisfy their disclosure obligations under Section 8 and 9" of the Disclosure Act.[30] Pursuant to the Disclosure Act, "[t]he furnishing of notice 'shall be available to the seller as a defense in any action that the seller failed to disclose any conditions which are not part of the project.'"[31]

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[13] CAL. CIV. CODE § 1353(a)(1) (West 2010). See California disclosure statement available at http://www.dre.ca.gov/pub_disclosures.html, last accessed on July 20, 2011.

[14] *Id. See also id.* §§ 1102.6a, subds. (a) and (d)(1)-(2) (West 2010). *See also* App. 5.

[15] *Id.* § 1353(a)(2) (West 2010). *See also id.* § 1103.4(c) (West 2010); CAL. BUS. & PROF. CODE § 11010(b)(12)(B) (West 2010).

[16] CAL. CIV. CODE §§ 1102.6 and 1103.4(c) (West 2010).

[17] *Id.* § 1103.4(c)(1) (West 2010).

[18] Matt Lilligren, *When in Doubt, Point It Out: Chapter 66 Attempts to Clarify California's Residential Real Estate Obligations*, 36 MCGEORGE L. REV. 941, 942–43 (2005).

[19] CAL. CIV. CODE § 1102.4(b) (2010).

[20] *Id.* § 1102.4(a) (2010).

[21] *Id.* §§ 1102.6a, 1103.4, and 1353 (West 2010); CAL. BUS. & PROF. CODE § 11010 (West 2010).

[22] CAL. CIV. CODE § 1102.6a (West 2010).

[23] HAW. REV. STAT. § 508D-15(a)(2) (2010).

[24] *Id.* § 508D-15(a)(3) (2010).

[25] *Id.*, 167 N.J. at 535, 772 A.2d at 377 (citing N.J.S.A. § 45:22A-28(a); N.J.A.C. § 5:26-4.2(a)(17).

[26] Nobrega v. Edison Glen Assocs., 167 N.J. 520, 534–35, 772 A.2d 368, 377 (2001) (citing N.J.S.A. § 6:1-85.2).

[27] 167 N.J. 520, 772 A.2d 368, 377 (2001).

[28] N.J.S.A. §§ 46:3C-1 to C-12.

[29] *Nobrega*, 167 N.J. at 532, 772 A.2d at 375 (citing N.J.S.A. § 46:3C-10(d)).

[30] *Id.* at 534, 772 A.2d at 376 (*citing* N.J.S.A. § 46:3C-8-9).

[31] *Id.* at 531, 772 A.2d at 374 (*quoting* N.J.S.A. § 46:3C-10(b)).

B.5. North Carolina

In North Carolina, the North Carolina Real Estate Commission is charged with developing and requiring the use of a standard residential real property disclosure statement.[32] A disclosure must include "notice from any governmental agency affecting this real property…."[33] Although the section is not specific regarding the disclosure of an airport or airport noise, the Raleigh-Durham Airport Authority (RDU) in North Carolina has taken the position that "[n]oise disclosure is necessary for resale of homes located within the noise-impacted area designated by the RDU Composite Noise Contour Map…."[34] Thus, as a government agency the RDU has "notified property owners within the noise-impacted area by mailing an Aircraft Noise Notification to them."[35] The RDU also states that recent homebuyers should have been informed about noise disclosure by the previous homeowner.[36]

C. Disclosure of Property in the Proximity or Within a Certain Distance of an Airport

C1. Indiana

In Indiana, an owner must disclose "that an airport is located within a geographical distance from the property as determined by the Indiana Real Estate Commission. The Commission may consider the differences between an airport serving commercial airlines and an airport that does not serve commercial airlines in determining the distance to be disclosed."[37]

C2. Michigan

Michigan requires a seller to disclose that residential property is in the "proximity" of an airport, as well as to disclose other enumerated off-site conditions.[38]

C3. Minnesota

Minnesota's approach is somewhat different. A

> seller has no duty to disclose information regarding airport zoning regulations if the seller, in a timely manner, provides a written notice that a copy of the airport zoning regulations as adopted can be reviewed or obtained at the office of the county recorder where the zoned area is located.[39]

D. Disclosure of Property Affected by Airport Noise

D.1. Alaska

In Alaska, a residential real estate disclosure form must inform a buyer that it is a buyer's responsibility to determine whether there are "vibrations, noise [or] the operation of machinery including aircraft" in the vicinity of a property that is the subject of a buyer's potential real estate transaction.[40]

D.2. Nevada

Chapter 645 of the Nevada code is applicable to real estate brokers and salespersons. Section 645.252 requires that a real estate broker or salesperson disclose to each party to a real estate transaction "[a]ny material and relevant facts, data or information" either known or that should have been known by the exercise of reasonable care to a broker or salesperson affecting a property that is the subject of a real estate transaction.[41] As noted by the Clark County (Nevada) Planning Commission, "neither local nor state law currently explicitly requires that homebuyers be informed regarding the effect of aircraft noise on a property."[42] Nevertheless, Clark County "[h]istorically has required noise disclosure to inform homebuyers of the fact that they should anticipate airport related noise for many projects that are significantly impacted by high levels of aircraft noise on a case-by-case basis."[43] The Commission recommends that with respect to proposed developments, including those near McCarran International Airport, "that approval be subject to the realtor/developer…informing prospective buyers of the existing and forecasted noise exposure for the area."[44]

D.3. Tennessee

In Tennessee, a residential real property disclosure form must alert a buyer to "neighborhood noise problems," but the required disclosure is not specific regarding the presence of airports or aircraft noise.[45]

E. Disclosure of Military Airports

A few of the current disclosure acts apply to property near a military airport.

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[32] N.C. GEN. STAT. § 47E-4(b).

[33] *Id*. § 47E-4(b)(5).

[34] RDU Aircraft Noise Program, available at http://www.rduaircraftnoise.com/home/tips.html, last accessed on July 7, 2011.

[35] *Id*.

[36] *Id*.

[37] IND. CODE ANN. § 32-21-5-7(4) (Burns 2010). *See* Indiana Real Estate Commission, Laws and Regulations (2008), available at http://lms.recp.org/pdfs/IREC.2008_EDITION.pdf.

[38] MICH. COMP. LAWS § 565.957, § 7 (2010) (requiring that a seller disclose a property's proximity to a landfill, airport, or shooting range).

[39] MINN. STAT. § 513.56, Subd. 3(c) (2010).

[40] ALASKA STAT. § 34.70.050.

[41] NEV. REV. STAT. § 645.252 (2010).

[42] Clark County Airport Environs Report 5 (2007), available at http://www.clarkcountynv.gov/Depts/comprehensive_planning/advanced_planning/Documents/AirportEnvironsReport.pdf , last accessed on July 7, 2011.

[43] *Id*.

[44] *Id*.

[45] TENN. CODE ANN. § 66-5-210.

E1. Arizona

In Arizona a seller must provide a buyer with a written disclosure prior to transfer of title to property that the property is in the vicinity of a military airport or ancillary military facility "as delineated on a map prepared by the state land department."[46] Furthermore, Arizona requires a property owner subject to the act to "notify potential purchasers of the property and any potential lessees or renters that the property is located in a high noise and accident potential zone."[47]

E2. Maryland

Maryland requires sellers to disclose to buyers known military operations affecting real property, including flight operations and the testing of munitions, which may subject the property to high noise levels.[48]

E3. Virginia

In Virginia, a seller in a locality in which there is a military air installation must disclose to a buyer "whether the subject parcel is located in a noise zone or accident potential zone, or both, if so designated on the official zoning map by the locality in which the property is located on a form provided by the Real Estate Board."[49]

Virginia, however, limits an owner's liability for failure to make a disclosure of noise for properties located outside of the noise contours defined as incompatible with residential use by the FAA. First, a purchaser in a designated noise zone having a DNL of less than 65 dB has no right to terminate a real estate purchase contract because the property owner failed "to timely provide any disclosure required by [Va. Code] § 55-519.1."[50] Second, a purchaser of residential property in a designated noise zone having a DNL of less than 65 dB has no right to claim damages pursuant to the foregoing section.[51]

F. Effect of Airport Disclosure on a Buyer's Obligations

As seen from the above airport disclosure statutes, the onus is on a seller or a seller's agent to disclose an airport or airport noise. Some of the residential real property disclosure laws, which with a few exceptions are not specific to airports, analyzed in Appendix A provide that a seller's disclosure statement does not relieve a buyer of a duty to inspect for defects or problems but any inspection generally is limited to the property itself and does not include off-site conditions such as an airport. In the absence of any real property disclosure law a buyer in most states is subject to the *caveat emptor* rule, which obligates the buyer, before purchasing, to investigate a property and its surroundings to discover any pertinent defects or adverse conditions. The rule does not apply when the seller has an obligation not to conceal or makes a fraudulent misrepresentation of material fact.[52] Further discussion of the *caveat emptor* rule may be found in Appendix A.

The airport disclosure laws do not address but seem to imply that a buyer has the responsibility to follow up on a seller's airport disclosure; for example, in Arizona where a map recorded in the county land records of an airport influence area is deemed to be sufficient notice to potential purchasers that property in the area is subject to aircraft overflights and noise. Likewise, in California it appears that there is an implicit obligation on the part of a buyer to follow up because a seller's compliance with the airport disclosure law relieves the seller or the seller's agent of any further obligation. In Minnesota, a buyer has an implied duty to make any investigation that the buyer deems to be appropriate because a seller only has to give notice that a copy of airport zoning regulations may be reviewed in the county where the property offered for sale is located.

Assuming that a buyer has an implied duty to investigate the effect of an airport on property that a buyer is considering purchasing, none of the airport disclosure statutes or the general residential real property disclosure laws discussed in Appendix A indicate how a buyer is to conduct an inspection. At a minimum, some of the airport disclosure laws suggest that a buyer should review the appropriate land records where there may be a record of a designated airport influence area, airport noise contour map, or AICUZ. Arguably an appraisal would reveal the presence of an airport because of an airport's impact on the value of the property. However, appraisals are often conducted after a buyer has contracted to purchase, but prior to settlement. One example could be when a real estate contract has a financing contingency.

Although appraisals are beyond the scope of this report, it may be noted that the Department of Housing and Urban Development's Handbook entitled *Valuation*

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[46] ARIZ. REV. STAT. § 28-8484(E) (2010).

[47] *Id.* § 28-8481(H) (2010). Section 28-8461(9) defines the term "high noise or accident potential zone."

[48] MD. CODE ANN., REAL PROP. § 14-117(k)(2) (2010).

[49] VA. CODE ANN. § 55-519.1 (Michie 2010).

[50] *Id.* § 55-520(c) (Michie 2010).

[51] *Id.* § 55-524(B)(2) (Michie 2010).

[52] Cunningham v. Miller, 150 Vt. 263, 266, 552 A.2d 1203, 1205 (1988) (stating that "'[h]aphazard falsehood and intentional passing off belief for knowledge are of the same quality as conscious misstatement of facts and furnish the element of knowledge required to make the false representation fraudulent'") (citation omitted); Wall v. Swilley, 562 So. 2d 1252, 1256 (Miss. 1990) (stating that a purchaser, the victim of a seller's material misrepresentation, may recover the difference between the real value of the property and the represented value of the property); Norton v. Poplos, 443 A.2d 1, 4 (Del. 1982) (purchaser entitled to a remand for a determination of whether rescission of a contract should be ordered as a result of innocent misrepresentations made by the seller's agent).

[52] *Norton*, 443 A.2d at 5 (holding that one who delegates the power to act to an agent is responsible for what is done pursuant to that authority and that a seller may not assert innocence or lack of knowledge of the agent's actions as a defense).

Analysis for Single Family One- to Four-Unit Dwellings includes guidelines for appraisals of Federal Housing Administration (FHA)-insured mortgages.[53] Because property near an airport may be subjected to the noise and hazards of low-flying aircraft, "[a]ppraisers must identify affected properties, review airport contour maps and condition the appraisal accordingly."[54] However, appraisers are cautioned not to reject "existing properties only because of airport influences if there is evidence of acceptance within the market and if use of the dwelling is expected to continue."[55] Although an appraisal may reveal the presence of an airport, unless an appraisal's valuation results in the property not qualifying for a buyer's required financing, thereby causing a cancellation of the contract, a buyer still will have agreed to purchase property subject to airport noise.

In Section VI of this digest, which contains the typical airport disclosure act provisions, Part VI.B.7. is more specific in that it provides that "[o]n receipt of an Airport Disclosure Statement in compliance with this Act, a buyer shall have a duty to investigate the *current or future impact of an airport on the property* that is the subject of the Airport Disclosure Statement" [emphasis supplied]. As stated in the Comment to Part VI.B.7., however, the nature of a buyer's investigation is in the buyer's discretion but could include a review of the land records in the county where a property is located, the use of an appraiser or other expert, and/or the buyer's own reconnaissance of the area.

III. AN AIRPORT DISCLOSURE ACT: AN EXERCISE OF THE STATE'S POLICE POWER OR A REGULATORY TAKING?

A. Introduction

Among the issues to be considered is whether airport disclosure legislation would be merely an exercise of a government's police power or would constitute a regulatory taking of real property requiring the payment of just compensation. Parts B and C in this section discuss whether an airport disclosure act is a noncompensable exercise of the government's police powers with respect to real property or would be sufficiently burdensome to constitute a taking. An airport disclosure act likely would be a reasonable exercise of the police power, not a regulatory taking. Part D discusses the difference between a facial and an "as applied" challenge to an airport disclosure act but concludes that under either approach an airport disclosure act probably would be constitutional.

B. Whether an Airport Disclosure Law Is an Exercise of the Police Power

A governmental authority's exercise of its police power in the form of a statute, regulation, or ordinance may give rise to a claim that a landowner has suffered a diminution in value and therefore that the statute, regulation, or ordinance is a *de facto* taking of his or her property. Nevertheless, it appears that a statute requiring the delivery of an airport disclosure statement, as well as requiring that a deed contain an airport disclosure provision or that a disclosure statement be recorded as part of a deed, would not be a taking of an owner's real property.

Under the police power the government has an inherent regulatory power to protect the health, safety, morals, and general welfare of the community. The burdens of such regulation do not amount to takings of property unless the burdens manifest themselves "in certain, enumerated ways."[56] The legislature may authorize or delegate the authority to a particular administrative agency, such as a transportation department, to make reasonable rules and regulations to carry out the police power.[57] The police power is broad and provides the government with an effective tool for governing, but the government may not use its police power "to infringe upon or invade rights safeguarded by constitutional provisions."[58]

As long as a regulation is merely an exercise of the police power and is not a taking, the government is not required to pay just compensation to a property owner affected by the regulation. As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*,[59] although "property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[60] Fre-

[53] Department of Housing and Urban Development, Valuation Analysis for Single Family One- to Four-Unit Dwellings, HUD Directive 4150.2 § 2-2(G), available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsgh/4150.2, last accessed on July 7, 2011.

[54] *Id.*

[55] *Id.*

[56] Eggleston v. Pierce County, 148 Wash. 2d 760, 767, 64 P.3d 618, 622–23 (2003) (citations omitted). *See also* Lincoln Fed. Labor Union v. Nw. I. & M. Co., 149 Neb. 507, 31 N.W.2d 477, 487 (1948) (stating that the term "police power" is used "'to denote those inherent governmental powers which, under the federal system established by the constitution of the United States, are reserved to the several states'") (citation omitted).

[57] Dep't of Highways v. Sw. Elec. Power Co., 243 La. 564, 145 So. 2d 312 (1962); State Roads Comm'n v. Jones, 241 Md. 246, 249, 216 A.2d 563, 565 (1966).

[58] Colman v. Utah State Land Bd. 795 P.2d 622, 627 (Utah 1990) (citation omitted). On the difference between eminent domain and the police power, see 1 NICHOLS ON EMINENT DOMAIN § 1.42.

[59] 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

[60] *Id.* at 415, 43 S. Ct. at 160, 67 L. Ed. at 326. More recently, according to the Supreme Court of Texas, "[w]hen the benefits to be gained by the public are not commensurate with the burdens imposed upon private persons, the law will not be permitted to stand." State of Tex. v. City of Austin, 160 Tex. 348, 356, 331 S.W.2d 737, 743 (1960) (citations omitted) (holding that a state statute based on a federal statute providing for compensation for relocation of public utilities was constitutional). Nevertheless, "[o]ur fundamental law does not contemplate or require that every private injury and loss which may be necessary to protect or promote the public health,

quently, the police power is exercised by regulatory measures, such as by requiring a permit before an owner builds on his or her property.[61] Although the police power is broad and comprehensive,[62] the courts have found it difficult to fix the boundaries of the police power in a definitive way,[63] in part because the scope of the police power changes from time to time to meet society's changing conditions.[64]

Various regulations or restrictions have been held to be incidents of the exercise of the police power and to be of negligible loss to an individual property owner when compared to the benefits accruing to the community as a whole.[65] In numerous cases in which landowners have challenged various kinds of land-use regulations, the courts have held that there was not a regulatory taking.[66] For example, a state may exercise its police power by prohibiting certain activities such as construction in areas prone to flooding.[67] In New York, a town planning board's conditioning of its approval for a proposed building site on the owner's acceptance of a conservation restriction on development was held not to be a taking.[68] In a Wisconsin case it was held that the transportation department's enactment of set-back restrictions was not a taking.[69]

On the other hand, with respect to airport zoning and real property near airports, a property owner could bring a claim in inverse condemnation based on restrictive airport zoning.[70] Airport zoning ordinances that restrict land use in order to permit safe flight approaches may result in a *de facto* taking of property.[71] Some courts have held that ordinances restricting heights of structures and objects in the vicinity of an airport constitute a taking with regard to an owner's property.[72] However, other courts have held that airport zoning ordinances restricting land use may be a reasonable exercise of the police power.[73] An Illinois appellate court held that height-restriction ordinances near an airport are a proper use of the police power to protect the public from aircraft hazards.[74]

Although the statutory restrictions were much greater than would be true with an airport disclosure act, *Davis v. Brown*[75] is one case suggesting that an airport disclosure law is a noncompensable exercise of the police power. In *Davis*, an Illinois statute allowed the state transportation agency to prepare and record maps setting forth a right-of-way for a proposed highway. The statute also required property owners within the proposed right-of-way to give notice if they planned to develop their property so that the depart-

safety, comfort and convenience must always be borne by individuals and corporations." *Id.*, 160 Tex. at 357, 331 S.W.2d at 743.

[61] Viacom Outdoor, Inc. v. City of Arcata, 140 Cal. App. 4th 230, 44 Cal. Rptr. 3d 300 (Cal. Ct. App. 2006) (rebuilding of a billboard).

[62] Robinson v. Crown Cork & Seal Co., 54 Tex. Sup. J. 71, 335 S.W.3d 126, 2010 Tex. LEXIS 796, at *99 (2010) (concur. op).

[63] First Nat'l Benefit Soc'y v. Garrison, 58 F. Supp. 972, 981–82 (C.D. Cal. 1945).

[64] Consol. Rock Prod. Co. v. City of L.A., 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962).

[65] Schmidt v. Bd. of Adjustment of the City of Newark, 9 N.J. 405, 88 A.2d 607 (1952); *see also* Graybeal v McNevin, 439 S.W.2d 323 (Ky. 1969).

[66] Allegretti v. County of Imperial, 138 Cal. App. 4th 1261, 1279–80, 42 Cal. Rptr. 3d 122, 136 (Cal. Ct. App. 2006) (holding that the imposition of a condition on a property owner's request to activate a well that limited the amount of water that the owner could extract from the aquifer beneath the owner's property was not a taking); Herzberg v. County of Plumas, 133 Cal. App. 4th 1, 17, 34 Cal. Rptr. 3d 588, 599 (Cal. Ct. App. 2005) (county range ordinance that forced property owners to accept the physical invasion of their property by their neighbors' cattle held not to be a taking when the owners had the right to keep cattle off their property with a lawful fence); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (moratorium to maintain the status quo of property surrounding Lake Tahoe to permit environmental research to be included in a future growth plan held a valid exercise of the police power); McElmurray v. Augusta-Richmond County, 274 Ga. App. 605, 607, 618 S.E.2d 59, 62 (Ga. Ct. App. 2005) (no regulatory taking when a property owner consented to the deposit of sludge on his property without knowing that the county also was depositing toxic waste on the property); Miskowiec v. City of Oak Grove, 2004 Minn. App. LEXIS 1236, at *16 (Mich. Ct. App. 2004) (Unpub.) (no unconstitutional taking because of the enactment of land-use regulations classifying wetlands near property as a natural environment lake or because of the imposition of a temporary moratorium on construction in a 100-year flood plain); Wild Rice River Estates, Inc., 2005 N.D. 193, at *P14, 705 N.W.2d 850, 855 (2005) (21-month moratorium on building permits held not to be a taking).

[67] City of Dover v. City of Russellville, 363 Ark. 458, 215 S.W.3d 623 (Ark. 2005).

[68] Smith v. Town of Mendon, 4 N.Y.3d 1, 14, 822 N.E.2d 1214, 1221, 789 N.Y.S.2d 696, 703 (2004).

[69] Wis. Builders Ass'n v. Wis. Dep't of Transp., 285 Wis. 2d 472, 505, 702 N.W.2d 433, 448 (2005).

[70] Katsos v Salt Lake City Corp., 634 F. Supp. 100, 104 (Utah 1986); Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 729–30 (Wyo. 1985).

[71] Osborne Enters. Inc. v. Chattanooga, 561 S.W.2d 160, 164–65 (Tenn. App. 1977).

[72] *See* McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006) (affirming district court's holding and a jury award of compensatory damages of $6.5 million in connection with a county height restriction ordinance that limited the development of Sisolak's airspace because the ordinance effected a "per se" taking of the airspace above Sisolak's property located within the "departure critical area" of an airport approach zone); Ind. Toll Road Com. v. Jankovich, 244 Ind. 574, 582, 193 N.E.2d 237, 242 (1963); Yara Eng'g Corp. v. Newark, 132 N.J.L. 370, 40 A.2d 559 (1945).

[73] Kimberlin v. Topeka, 238 Kan. 299, 710 P.2d 682 (1985); La Salle Nat'l Bank v. County of Cook, 34 Ill. App. 3d 264, 340 N.E.2d 79 (1975).

[74] *La Salle Nat'l Bank*, 34 Ill. App. 3d at 276, 340 N.E.2d at 88.

[75] 221 Ill. 2d 435, 851 N.E.2d 1198 (2006).

ment would be able to exercise its option to commence eminent domain proceedings. After a landowner's required notification to the department, the department had up to 165 days to decide whether to acquire the owner's property by purchase or condemnation.[76] During the statutory period allowed for the department to make its decision, a landowner was not allowed to pursue development.[77]

Nevertheless, the court ruled that the statutory procedure was not a regulatory taking.[78] Unlike the statute at issue in *Davis*, an airport disclosure act does not restrict an owner's use or development of his or her property.

A case that was thought would provide guidance on whether an airport disclosure act would be a regulatory taking is *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, decided in 2010 by the United States Supreme Court.[79] Although Justice Scalia's opinion summarizes the types of regulatory takings, the Court did not undertake a regulatory takings analysis and decided the case narrowly based on Florida property law.[80]

C. Judicial Tests for Determining When Government Action Amounts to a Regulatory Taking

C.1. Overview

There are several bases used by the courts to determine when a regulation has gone too far and amounts to a compensable taking of private property for public use. The first issue is based on whether there has been an actual physical invasion of an owner's property. Unless there is another basis for a taking, if there has been no physical invasion of the property, then there has not been a governmental taking. Second, even when there has not been an actual, physical invasion of an owner's property, there may have been under the circumstances a "categorical taking." One type of categorical taking occurs when a government regulation completely deprives an owner of all economically beneficial use of his or her property. A categorical taking occurs as well when the government uses its own property without justification to destroy private property. A land-use exaction is another form of a categorical taking and occurs when the government requires a property owner to dedicate real property for public use; for example, as a condition to granting a permit. Finally, based on the character of a regulation and an evaluation of case-specific factors, a court may determine that a regulation is a noncategorical taking because of the regulation's economic impact and its interference with a property owner's investment-backed expectations.

C.2. No Physical Invasion of Private Property by an Airport Disclosure Act

The most recognizable form of a taking is when there is an actual appropriation of private property by a condemning authority. A categorical, or *per se*, taking[81] occurs when there is a permanent, physical invasion of an owner's real property,[82] no matter how minor.[83]

In *Loretto v. Teleprompter Manhattan CATV Corp.*[84] the United States Supreme Court held that a requirement that television cables be installed on a landowner's property without compensation pursuant to a statute permitting such installations was a taking. There is a taking when governmental action results in a permanent, physical occupation of private property.[85]

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[76] *Id.*, 221 Ill. 2d at 446, 851 N.E.2d at 1205.

[77] *Id.*

[78] *Id.* at 447, 851 N.E.2d at 1206.

[79] 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010).

[80] J. Peter Byrne, *Rising Seas and Common Law Baselines: A Comment on Regulatory Takings Discourse Concerning Climate Change*, 11 VT. J. ENVTL. L. 625, 629 (2010) (discussing the Florida Supreme Court decision in SBR) (footnotes omitted).

[81] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537, 125 S. Ct. 2074, 2081, 161 L. Ed. 2d 876, 887 (2005) (discussing categorical or per se takings and noncategorical takings).

[82] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 880 (1982). However, in cases of emergency (e.g., a fire or flood) private property may be used temporarily or damaged or even destroyed to prevent injury or loss of life or to protect the remaining property in a community. In Thousand Trails, Inc. v. Cal. Reclamation Dist. No. 17, 124 Cal. App. 4th 450, 21 Cal. Rptr. 3d 196 (2004), a California appellate court held that it was a valid exercise of the police power for the public authority to cut a levee to prevent potentially massive flooding without a preexisting flood prevention plan even though the act resulted in the flooding of the property owner's campground.

[83] *Lingle*, 544 U.S. at 538, 125 S. Ct. at 2081, 161 L. Ed. 2d at 887 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)). *See also Allegretti*, 42 Cal. Rptr. 3d at 128 (quoting Lingle v. Chevron USA, Inc., 544 U.S. at 537, 125 S. Ct. at 2081, 161 L. Ed. 2d at 887). In First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 318, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), the Court held, inter alia, that "'temporary takings' which, as here, deny a landowner all use of his property, are not different in kind from permanent takings for which the Constitution clearly requires compensation." *Id.* at 318, 107 S. Ct. at 2388, 96 L. Ed. 2d at 266 (citation omitted).

[84] 458 U.S. 419, 431, 102 S. Ct. 3164, 3173, 73 L. Ed. 2d 868, 879 (1982); on remand, *see* 58 N.Y.2d 143, 446 N.E.2d 428, 459 N.Y.S.2d 743 (1983) (Although not determining the measure of damages (see *id.*, 446 N.Y.2d at 431), the New York Court of Appeals observed that "so far as the record discloses…the amount recoverable by any single owner is small…." *Id.* at 434).

[85] *Loretto*, 458 U.S. at 428, 437, 125 S. Ct. at 3172, 3177, 161 L. Ed. 2d at 877, 883–84. Other courts have held that if a government entity either directly or indirectly physically intrudes upon private property without compensation, there is a physical taking of property. Town of Clinton v. Schrempp, 2005 Conn. Super. LEXIS 92, at *7–8 (2005) (Unrpt.) (citing Eamiello v. Liberty Mobile Home Sales, Inc., 208 Conn. 620, 640, 546 A.2d 805 (1988).

In *Lingle v. Chrevon USA Inc.*,[86] the Court held that whether a regulation "substantially advances legitimate state interests" is no longer a valid method of discerning whether private property has been taken.[87] The Court explained that "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property."[88] An airport disclosure act, as described in Section VI, would be neither an actual appropriation of private property nor a physical invasion, even minimally, of an owner's property.

C.3. No Deprivation of "All Economically Beneficial Use" of Property by an Airport Disclosure Act

Even in the absence of an actual, physical taking of property, a categorical taking may occur when government regulations completely deprive an owner of "*all* economically beneficial use" of his or her property.[89] As one court has observed, "[a]lmost all of the Supreme Court' holdings on regulatory takings involve the adoption of ordinances, regulations, or other legislation that limit development or regulate land use."[90] The Supreme Court of Idaho stated that "courts have long held that governmental conduct not involving the physical appropriation of property may so interfere with private interests in property as to constitute a taking."[91] Because a claim for a regulatory taking fails when land retains "substantial economic value,"[92] the "determinative factor" is whether there has been a "*complete elimination* of a property's value."[93] (emphasis supplied).

The seminal case is *Lucas v. South Carolina Council.*[94] In *Lucas* a landowner challenged regulations intended to prevent erosion that restricted private development on state beaches. The landowner purchased two lots in 1986 on a South Carolina barrier island with the intention of building single-family homes. Thereafter, in 1988, the state legislature enacted the Beachfront Management Act that barred the landowner from erecting any habitable structures on the land.[95] The purpose of the legislation was to protect the beaches from erosion from the ocean, wind, and various other causes.[96] The landowner filed an inverse condemnation action, claiming that the state's action was a taking because it deprived the owner of all economic use of the property. The United States Supreme Court held that compensation could be required "if, on remand, the state court found that the development regulations were restrictive enough to amount to a taking of the beachfront property."[97] The Court held that no matter how "weighty the asserted 'public interests' involved" are, the government may not deprive an owner of "all economically beneficial use of land…."[98]

Nevertheless, it should be noted that a regulation that diminishes, even destroys, the value of a business operated on an owner's property typically is not a taking within the meaning of *Lucas*: "the categorical taking rule applies only to claimed takings of land."[99] An airport disclosure law is not a *Lucas*-type, categorical taking of a landowner's property; an airport disclosure law would not deprive the owner of all beneficial use of the property. It could be argued, moreover, that a disclosure law would not diminish the value of an owner's property that obviously is located near an airport. Even if the law were to have a deleterious effect on a landowner's business located on his or her property (assuming an airport disclosure act applied to such

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[86] 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (involving a challenge to a state-imposed cap on rent that oil companies in Hawaii could charge dealers leasing company-owned service stations).

[87] *Id.* at 542, 125 S. Ct. at 2083–84, 161 L. Ed. 2d at 890–91 (rejecting the test applied in Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)).

[88] *Id.* at 537, 125 S. Ct. at 2081, 161 L. Ed. 2d at 887.

[89] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016, 112 S. Ct. 2886, 2894, 120 L. Ed. 2d 798, 813 (1992). The Lucas Court held that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property. *Id.* at 1030, 125 S. Ct. at 2901, 161 L. Ed. 2d at 823. *See also Allegretti*, 138 Cal. App. 4th at 1270, 42 Cal. Rptr. 3d at 128 (emphasis in original) (quoting *Lingle*, 544 U.S. at 538, 125 S. Ct. at 2081, 161 L. Ed. 2d at 888 (quoting *Lucas*, 505 U.S. at 1019, 112 S. Ct. at 2895, 120 L. Ed. 2d 814) (some internal quotation marks omitted)).

[90] STS/BAC Joint Venture v. City of Mt. Juliet, Tenn., 2004 Tenn. App. LEXIS 821, at *15–16 (Tenn. App. 2004); City of Coeur d'Alene v. Simpson, 142 Idaho 839, 846, 136 P.3d 310, 318 (2006) (observing that "courts have long held that governmental conduct not involving the physical appropriation of property may so interfere with private interests in property as to constitute a taking") (citation omitted).

[91] *City of Coeur d'Alene*, 142 Idaho at 846, 136 P.3d at 318 (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 414–15, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

[92] Kafka v. Mont. Dep't of Fish, Wildlife and Parks, 2005 ML 241, 2005 Mont. Dist. LEXIS 729, at *1, 57 (Mont. Dist. 2005) (citing Tahoe Sierra Pres. Council, 535 U.S. at 330, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (quoting *Lucas*, 505 U.S. at 1019, 122 S. Ct. 1465, 152 L. Ed. 2d 517)); see Palazzolo v. Rhode Island, 533 U.S. 606, 631, 121 S. Ct. 2448, 2464, 150 L. Ed. 2d 592, 616 (2001) ("A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property economically idle.").

[93] *Lingle*, 544 U.S. at 539, 125 S. Ct. at 2082, 161 L. Ed. 2d at 888 (citing *Lucas*, 505 U.S. 1003, 1017, 112 S. Ct. 2886, 120 L. Ed. 2d 798).

[94] 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

[95] *Id.* at 1006, 112 S. Ct. at 2889, 120 L. Ed. 2d at 808.

[96] *Id.* at 1022, 112 S. Ct. at 2897, 120 L. Ed. 2d at 817.

[97] *See* Manning v. Mining and Minerals Div., 140 N.M. 528, 2006 NMSC 27, at *12, 144 P.3d 87, 90 (N.M. 2006) (citing *Lucas*, 505 U.S. at 1027–30, 112 S. Ct. 2886, 120 L. Ed. 2d 798).

[98] *Lucas*, 505 U.S. at 1028–29, 112 S. Ct. at 2900, 120 L. Ed. 2d at 821 (citations omitted).

[99] *Kafka*, 2005 Mont. Dist. LEXIS 729, at *54–55 (citing Unity Real Estate Co. v. Hudson, 178 F.3d 649, 674 (3d Cir. 1999).

property), any alleged loss likely would be noncompensable under present law.

C.4. No Use by the Government of Its Own Property to Cause a Taking

As the Supreme Court stated in *SBR*, "when the government uses its own property in such a way that it destroys private property, it has taken that property. Similarly, our doctrine of regulatory takings "aims to identify regulatory actions that are functionally equivalent to the classic taking."[100] However, an airport disclosure requirement imposed on a seller of property is not a use by the government of its own property to destroy private property resulting in a taking.

C.5 No "Exaction" by an Airport Disclosure Act

Another form of a categorical taking is when the government requires a dedication of real property known as a land-use exaction.[101] As discussed briefly herein, an airport disclosure law is not an exaction.

An exaction is a *per se* taking that occurs when a landowner must give up a constitutional right to just compensation when property (*e.g.*, an easement) is taken "'in exchange for a discretionary benefit by the government where the benefit has little or no relationship to the property.'"[102] Exactions are defined as "land-use decisions conditioning approval of development on the dedication of property to public use."[103] An exaction is a forced dedication of property, usually by a developer who is required to dedicate some of the land to acquire a permit or to gain approval of a development plan.

In *Dolan v. City of Tigard*[104] and *Nollan v. California Coastal Commission*[105] the United States Supreme Court established a two-pronged "nexus" and "rough proportionality" test in determining whether there has been a regulatory taking resulting from an exaction. In the *Dolan* case the granting of a landowner's request for a permit to expand a store and parking lot was conditioned improperly on the dedication of the property for a "greenway," including a bike/pedestrian path. In *Nollan* a permit to build a larger residence on beachfront property was conditioned improperly on the landowner's dedication of an easement allowing the public to cross part of the property.[106]

In *Wisconsin Builders Association v. Wisconsin Department of Transportation*[107] the Wisconsin Court of Appeals held that the Wisconsin Department of Transportation's (DOT) set-back restrictions were not easements in the *Nollan* and *Dolan* sense. The set-back restrictions did not deprive the landowners of the right to exclude others and thus were not a taking.[108] Similarly, in *Smith v. City of Mahon* the New York Court of Appeals declined "to extend the concept of exaction [to a situation] where there is no dedication of property to public use and the restriction merely places conditions on development."[109] The *Smith* court held that the government's requirement in that case was "a modest environmental advancement at a negligible cost to the landowner [that] does not amount to a regulatory taking."[110]

An airport disclosure act neither would involve a dedication of property to public use nor would it place conditions on the use or development of property.

C.6. No Taking of Private Property by an Airport Disclosure Act Under a Penn Central Analysis

A taking described by the courts as a noncategorical taking is "case-specific," one that involves a "consideration of the economic impact of the regulation, the [regulation's] interference with reasonable investment-backed expectations, and the character of the regulation."[111] To establish a taking by reason of an airport disclosure law's effects on an owner's property, a landowner would have to establish that there had been a taking based on an evaluation and balancing of the factors (the "*Penn Central* factors") enumerated by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*.[112] The *Lingle* Court reaffirmed that noncategorical takings are governed by the standards set forth in *Penn Central*.[113] Indeed,

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[100] *Stop the Beach Renourishment, Inc.*, 130 S. Ct. 2592, 2601, 177 L. Ed. 2d 184,196 (2010) (quoting United States v. Causby, 328 U.S. 256, 261–62, 66 S. Ct. 1062, 90 L. Ed. 1206, 106 Ct. Cl. 854 (1946); Pumpelly v. Green Bay Co., 80 U.S. 166, 13 Wall. 166, 177–78, 20 L. Ed. 557 (1872).

[101] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[102] *Lingle*, 544 U.S. at 547, 125 S. Ct. at 2087, 57 L. Ed. 2d at 894 (citation omitted).

[103] City of Monterey, Ltd. v. Del Monte Dunes, 526 U.S. 687, 702, 119 S. Ct. 1624, 1635, 143 L. Ed. 2d 882, 900 (1999).

[104] 512 U.S. 374, 385, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (reversing the Oregon Supreme Court's ruling that the city's decision to grant a permit to the landowner conditioned on the owner's dedication of her land was not a taking).

[105] 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) (reversing *California*, the appellate court's ruling that the Coastal Commission could condition the grant of a building permit on the owner's transfer of an easement across its beachfront property).

[106] See discussion in *Lingle*, 544 U.S. at 546–47, 125 S. Ct. at 2086, 161 L. Ed. 2d at 892–93.

[107] 285 Wis. 2d 472, 702 N.W.2d 433 (2005).

[108] *Id.* at 505.

[109] Smith v. Town of Mendon, 4 N.Y.3d 1, 12, 822 N.E.2d 1214, 1219, 789 N.Y.S.2d 696, 701 (2004).

[110] *Id.* at 15, 822 N.E.2d at 1221, 789 N.Y.S.2d at 703.

[111] *Miskowiec*, 2004 Minn. App. LEXIS 1236, at *8 (citing Penn Central Co. v. City of N.Y., 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978)); *see also* Agins v. City of Tiburon, 447 U.S. 255, 261–62, 100 S. Ct. 2138, 2141–42, 65 L. Ed. 2d 106 (1980).

[112] 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978); see discussion in Wis. Builders Ass'n v. Wis. Dep't of Transp., 285 Wis. 2d 472, 702 N.W.2d 433 (2005).

[113] The Court stated:

"[m]ost regulatory takings claims are of the noncategorical type…."[114]

In *Penn Central* the Landmarks Preservation Commission denied Penn Central's application to build an office atop its property—Grand Central Terminal in New York City—by reason of the city's Landmark Preservation Law. Previously, the terminal and location had been designated as a landmark and as a landmark site, respectively, under the applicable New York City laws.[115] Penn Central challenged the denial in the courts, but the United States Supreme Court held that Penn Central's property had not been taken without just compensation.

In part, the Court held that

> New York City law does not interfere in any way with the present uses of the Terminal….
>
> [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those preexisting air rights….
>
> [T]he application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.[116]

Thus, in light of *Penn Central* and its progeny, for a noncategorical taking to succeed, the owner must show "the magnitude" of a regulation's economic impact and the degree to which it interferes with legitimate property interests.[117] There is "no precise rule" in cases involving land-use regulations; "a weighing of private and public interests" is required to determine whether a regulatory taking has occurred.[118] A determination of whether a "challenged regulatory restriction constitutes a compensable taking necessitates '[a]n *individualized* assessment of the impact of the regulation on a *particular parcel* of property and its relation to a legitimate state interest….'"[119]

In *Penn Central* the Court emphasized three factors: the economic impact of the regulation on the claimant; the extent to which the regulation has interfered with distinct investment-backed expectations; and the character of the governmental action. The California Supreme Court has identified other nonexclusive factors based on *Penn Central* and other United States Supreme Court cases that may be relevant considerations in an alleged *Penn Central*-type regulatory taking analysis.[120] The purpose of *Penn Central* balancing is "to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[121] Under a *Penn Central* "*ad hoc* factual inquiry," a court may find "that a particular regulation 'goes too far' and constitutes a taking."[122] It does not appear that under the *Penn Central* factors a statute requiring the delivery of an airport disclosure statement or even the recording of one in the land records would constitute a taking. An airport disclosure statement would not alter the character of property, restrict its use or development, or have any bearing on whether and to what extent aircraft noise affected the property.

D. The Difference Between a Facial and an "As Applied" Challenge to an Airport Disclosure Act

Because an airport disclosure act could be challenged on constitutional grounds, it is important to consider the difference between a facial and an "as applied" challenge to such a statute. A facial claim is a challenge to a law's constitutionality without showing the law's effect on or application to a claimant's property.[123] As the Ninth Circuit has stated, a property owner "may challenge [a] zoning restriction on the basis that the 'mere enactment' of the restriction constitutes a taking of its property."[124] The *Penn Central* factors, dis-

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> Primary among [the Penn Central] factors are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." In addition, the "character of the governmental action"—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"—may be relevant in discerning whether a taking has occurred. The Penn Central factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or Lucas rules.

Lingle, 544 U.S. at 538–39, 125 S. Ct. at 2081–82, 57 L. Ed. 2d at 888 (citations omitted).

[114] *City of Coeur d'Alene*, 142 Idaho at 847, 136 P.3d at 318. See also 8 NICHOLS ON EMINENT DOMAIN § G14E.04[4].

[115] *Penn Central*, 438 U.S. at 115, 98 S. Ct. at 2655, 57 L. Ed. 2d at 645.

[116] *Id*. at 136–38, 98 S. Ct. at 2666, 57 L. Ed. 2d at 657.

[117] *City of Coeur d'Alene*, 142 Idaho at 853, 136 P.3d at 324.

[118] County of Alameda v. Superior Court, 133 Cal. App. 4th 558, 566, 34 Cal. Rptr. 3d 895, 900 (2005) (citations omitted).

[119] *Id*. at 566, 34 Cal. Rptr. 3d at 900 (emphasis in original) (citations omitted). *See also* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348, 106 S. Ct. 2561, 2566, 91 L. Ed. 2d 285, 294 (1986) (noting that the Court has no "set formula" to determine where regulation ends and a taking begins).

[120] *Herzberg*, 133 Cal. App. 4th at 14, 34 Cal. Rptr. 3d at 597.

[121] *Id*., 133 Cal. App. 4th at 15, 34 Cal. Rptr. 3d at 598 (citations omitted).

[122] *Kafka*, 2005 Mont. Dist. LEXIS 729, at *58.

[123] 8 NICHOLS ON EMINENT DOMAIN § G14E.04[3], at G14E-45.

[124] Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F.2d 872, 877 (9th Cir. 1987) (holding, inter alia, that a county ordinance reducing the allowed residential densities and reclassifying most of the remaining privately owned, undeveloped land around the lake from a "Recreation" zone to a more restrictive "Rural Lands" zone was not facially unconstitutional).

cussed in Section C.6, *supra*, which are evaluated and balanced to determine the effect of a regulation on specific property, would not be relevant in a facial challenge.[125] In contrast to a facial challenge, in an "as applied" challenge an owner "is disputing…the constitutionality of the regulation to a specific tract of property."[126]

Because facial challenges are less likely to succeed, most challenges are "as applied" challenges. However, an as applied challenge to an airport disclosure law likely would be unsuccessful. First, a disclosure statute is not an actual appropriation of private property nor a physical invasion of an owner's real property.[127] Second, neither requiring a disclosure statement nor requiring the recording of one would "den[y] all economically beneficial or productive use" of a prospective seller's land.[128] For there to be a taking, the diminution in value of a property "must be near total."[129] With an airport disclosure law, an "owner of real property [is not being] called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle…."[130] Arguably, the owner is not being required to sacrifice anything—only to disclose a condition, the proximity of an airport to the property, that may affect a prospective buyer's use and enjoyment of property that is offered for sale.

As for whether a statute requiring the delivery and/or recording of an airport disclosure statement would constitute a taking, once again it appears unlikely based on the *Penn Central* factors that such a disclosure requirement would result in a taking of an owner's property. One reason is that "even severe economic loss is not, at least by itself, sufficient to give rise to a taking."[131] For example, even zoning regulations that affect the value of real estate usually do not implicate the Takings Clause.[132]

In a challenge to an airport disclosure law, a property owner would have to identify property taken, not just an interest or right in property. Regardless of whether a taking is a categorical or noncategorical one, an alleged taking must damage all of the owner's rights in his or her parcel of property.[133] In other words, an owner would have to show in respect to his or her property that the disclosure law denies him or her any "'economically viable use of [the] land….'"[134]

One of the provisions of the Typical Airport Fair Disclosure Act, discussed in Section VI, requires, *inter alia*, that a seller disclose when a property offered for sale is within an AICUZ as shown on a map prepared for a military airport or air installation, the map being the result of an AICUZ study. In *Branning v. United States*,[135] the court held that intensive military flight training in navigable airspace more than 500 ft above the plaintiff's property had resulted in a taking.[136] However, the court rejected the plaintiff's argument that there had been a taking of all property that was within two delineated AICUZ zones simply because they were plotted on an AICUZ map.

> The evidence in this case clearly establishes that the CNR Zone 3 and CNR Zone 2 "footprints" include portions of plaintiff's property on Lady's Island. This is not, in and of itself, sufficient to establish a taking of plaintiff's property by the defendant. It does, however, constitute *valuable evidence* of the impact of defendant's aircraft operations on that part of plaintiff's property….[137]

In *Branning* there was a taking because the noise level suffered by the landowner was "peculiarly burdensome,"[138] not because the government had conducted a study to determine where noise in relation to property was "'normally unacceptable' for residential use."[139] Thus, although a taking may occur when the government imposes regulations "that seek to restrict the use of property after title has been taken,"[140] there is no *per se* taking unless a regulation denies an owner all economically viable use of the owner's property. An airport disclosure law would not restrict a present or prospective owner's use or enjoyment of his or her property.

E. Summary

An airport disclosure act does not come within any of the categories of possible regulatory takings. An airport disclosure act would not be a "classic taking,"[141] nor would it be one that is "functionally equivalent to [a]

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[125] See 8 NICHOLS ON EMINENT DOMAIN § G14E.03[3][b][ii], at G14E-25–27 and nn. 38–39 (citations omitted).

[126] *Id*. § G14E.04[3], at G14E-45.

[127] *Lucas*, 505 U.S. at 1015, 112 S. Ct. at 2893, 120 L. Ed. 2d at 812.

[128] *Id*., 505 U.S. at 1016, 112 S. Ct. at 2894, 120 L. Ed. 2d at 813 (citations omitted).

[129] 8 NICHOLS ON EMINENT DOMAIN § G14E.03[3][b][ii], at G14E-25 and n.37 (citations omitted).

[130] *Lucas*, 505 U.S. at 1019, 112 S. Ct. at 2895, 120 L. Ed. 2d at 815.

[131] 2A NICHOLS ON EMINENT DOMAIN § 6.01[13][c] at 6-36.

[132] *Id*.

[133] Wild Rice River Estates, Inc. v. City of Fargo, 2005 N.D. 193, 705 N.W.2d 850 (2005) (upholding a 21-month moratorium on the issuance of building permits).

[134] Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 296, 101 S. Ct. 2352, 2370, 69 L. Ed. 2d 1, 28 (1981) (citations omitted).

[135] 228 Ct. Cl. 240, 654 F.2d 88 (1981).

[136] *Id*. at 257, 654 F.2d at 99 (stating that "it is clear that the Government's liability for a taking is not precluded merely because the flights of Government aircraft are in what Congress has declared to be navigable airspace and subject to its regulation").

[137] *Id*. at 252, 654 F.2d at 96 (emphasis supplied).

[138] *Id*. at 242, 654 F.2d at 90.

[139] *Id*. at 245, 654 F.2d at 92.

[140] A2 NICHOLS ON EMINENT DOMAIN § 6.01[13][f].

[141] *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2601, 177 L. Ed. 2d at 195.

classic taking."[142] There is no use by the government of "its own property in such a way that it destroys private property…."[143] An airport disclosure act neither would deprive an owner of all "economically beneficial use of his property,"[144] nor would the act cause a taking by recharacterizing "as public property what was previously private property."[145]

Furthermore, an airport disclosure law is not a restriction on the use of property, nor does it have any effect on the level of airport noise affecting a property's value. Whatever noise impact there is remains the same regardless of whether a seller is required to disclose the presence of an airport. As Justice Scalia stated in *SBR*, "the property owner continues to have [what] he previously had."[146]

IV. EFFECT OF AIRPORT DISCLOSURE STATEMENT ON A LATER CLAIM FOR NOISE DAMAGES

A. Whether an Airport Disclosure Statement Precludes a Buyer's Later Claim for Airport Noise Damages

An airport disclosure act could require either that an airport disclosure statement be recorded as part of a deed or that the deed include a provision disclosing an airport in the vicinity of the property. The enactment of an airport disclosure act places a prospective buyer on notice of an airport's proximity to property either because of the receipt of a disclosure statement or because a disclosure statement has become part of the deed and, therefore, of the title to the property.

In *Biddle v. BAA Indianapolis, LLC*[147] the issue was whether the Fakes, two homeowners who had purchased a residence with knowledge that their sellers had been compensated for airport noise, could maintain a later inverse condemnation action because of airport noise.[148]

The Indiana Court of Appeals affirmed the trial court's dismissal of the Fakes' claim. The court agreed that

> the language in the purchase agreement and warranty deed through which the [Fakes] took possession of their residence precluded a claim for inverse condemnation because the language acted as a contractual agreement by which the sellers of the residence were compensated and the [Fakes] accepted the home with the noise and all other effects of the Airport.[149]

Furthermore, the Court of Appeals held that the Indianapolis Airport Authority (IAA) was a third party beneficiary of the agreement between the Fakes and the sellers.[150] An addendum to the purchase agreement stated:

> The Real Estate described herein is located in the Sales Assistance Program area as defined in the Indianapolis Airport Authority's Part 150 Noise Compatibility Study Update dated October 9, 1998. The Sales Assistance Program is a voluntary Program and Sellers have elected to avail themselves of the Sales Assistance Program benefits and obligations pursuant to which seller may receive a payment from the Indianapolis Airport Authority subject to the terms of paragraph of the Participation Agreement Residential Sales Assistance Program of ten percent (10%) of the Contract Sales Price as specified in the Purchase Agreement or Closing Statement, whichever is less, *in exchange for the placement of a Noise Disclosure Statement in the Deed of Conveyance and such other documents transferring an ownership or fee interest in the Real Estate to Purchaser* (emphasis supplied).[151]

Furthermore, the Fakes' deed, which also gave notice of the airport noise, stated that the Fakes were purchasing the property "with full knowledge and acceptance of the noise."[152]

In commenting on the Court of Appeals' affirmance of the trial court's dismissal of the Fakes' claim the Supreme Court of Indiana said nothing about the sellers having received compensation for noise. Rather, the Indiana Supreme Court merely stated that the noise disclosure statement in the Fakes' purchase agreement and deed "specifically gave notice of the noise from airport operations" and that the disclosure statement was intended "to prevent the Fakes from seeking compensation from IAA."[153] As one court has stated, "[i]f a grantor sells his property with restrictions which he intends are for the benefit of his neighbor, the neighbors, as beneficiaries, may enforce the benefiting restrictions."[154] Of course, an airport disclosure act could provide that airports and airport authorities are third party beneficiaries of airport disclosure statements.

In *Biddle*, as stated, the Fakes' sellers were compensated for noise impact by the IAA pursuant to the Sales Assistance Program. It is possible, however, for a seller's property to have been taken by airport noise

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[142] *Id*. (quoting *Lingle*, 544 U.S. at 539, 125 S. Ct. 2074, 161 L. Ed. 2d 876).

[143] *Id*. (citing United States v. Causby, 328 U.S. 256, 261–62, 66 S. Ct. 1062, 90 L. Ed. 1206, 106 Ct. Cl. 854 (1946) (airport-related noise).

[144] *Id*. at 2601, 177 L. Ed. 2d at 196 (citing *Lucas*, 505 U.S. at 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798).

[145] *Id*. (citation omitted).

[146] *Id*. at 2613, 177 L. Ed. 2d at 208.

[147] 830 N.E.2d 76 (Ind. Ct. App. 2005), *aff'd in part*, *superseded in part*, 860 N.E.2d 570 (Ind. 2007).

[148] *Biddle*, 830 N.E.2d at 79.

[149] *Id*. at 85–86.

[150] *Id*. at 86.

[151] *Id*. at 86–87.

[152] *Id.* at 87.

[153] *Biddle*, 860 N.E.2d 570, 574 n.6 (Ind. 2007). The Indiana Supreme Court affirmed the trial court's dismissal of the other homeowners' claims on the basis that there had not been a taking caused by noise associated with the airport.

[154] Se. Toyota Distributors, Inc. v. Felton, 212 Ga. App. 23, 25, 440 S.E.2d 708, 711 (1994).

without any compensation because of the doctrine of adverse possession. For example, in *Baker v. Burbank-Glendale-Pasadena Airport Authority,*[155] in which the plaintiffs' inverse condemnation claim was based on airport noise, smoke, and vibration, the court held that the claim was barred by the law of adverse possession and the statute of limitations. In California, "[p]rescriptive easements are acquired by open and notorious use, hostile to the true owner, under a claim of right, and continuous for the statutory five-year period. Continuity of use is not broken by change in ownership of the dominant tenement."[156] Although the court held that the airport authority was not required to compensate the plaintiffs for an easement taken by prescription, the evidence also established that the airport's takeoffs and landings and related flight paths were unchanged during the period about which the plaintiffs complained.[157]

Just compensation for a taking is payable to the person who owns the property at the time of the taking whether the taking is by a direct condemnation action or by inverse condemnation.[158] If an owner sells the property after the taking but before receiving compensation for the taking, the right to compensation "'does not run with the land but remains a personal claim'" of the former owner.[159] If the government takes possession of an owner's property prior to the owner's sale of the property, the original owner is the one who is entitled to any award of compensation.[160]

> [T]he government effects a taking when it requires the landowner to submit to the physical occupation of her land. Thus, where there is an entry into possession by the condemning authority prior to formal commendation proceedings, the taking which occurs at the entry must be considered the taking for all purposes.…
>
> [T]he right to compensation remains with the vendor of the land unless the contract of sale specifically provides to the contrary.[161]

Thus, the well recognized rule is that if an owner acquires property, for example, after a government regulation effects a taking of an interest in the property, a property owner "'cannot base a taking claim upon an interest he never owned. The relevant property interests owned by [the property owner] are defined by those State laws enacted and in effect at the time he took title….'"[162] A buyer has no claim for a prior taking because a buyer has "actual or constructive notice of all the information he needed to estimate what the land was worth at the time he bought it."[163]

Nevertheless, there may be a taking after a buyer's acquisition of property near an airport.

Even if an airport disclosure statement may preclude a claim for a taking occurring prior to a buyer's acquisition of property, it is not clear that a disclosure statement would bar a later claim if there has been a substantial increase in airport noise resulting in a taking after the owner's acquisition of the property. The *Biddle* court's opinion at least implies that a home buyer who has received a disclosure statement may have a claim for a future taking when there is a sufficient increase in airport noise to result in a taking, even if there had been a taking prior to the buyer's acquisition of the property.[164] Even if there has been an earlier, permanent taking because of airport noise, the first taking is not an automatic bar to a claim for a second, comparable permanent taking.[165] A new cause of action may accrue when "aircraft noise jumps markedly."[166] The introduction of larger, heavier, noisier aircraft may constitute a taking of an additional easement even though the noisier aircraft do not violate the boundaries of an earlier easement.[167] Thus, a property owner may establish an additional loss because of

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[155] 220 Cal. App. 3d 1602, 270 Cal. Rptr. 337 (1990).

[156] *Id*. at 1609, 270 Cal. Rptr. at 340 (citing CAL. CIV. CODE § 1007; CAL. CIV. PROC. CODE § 321; Connolly v. McDermott, 162 Cal. App. 3d 973, 976, 208 Cal. Rptr. 796 (1984); Applegate v. Ota, 146 Cal. App. 3d 702, 708, 194 Cal. Rptr. 331 (1983); Twin Peaks Land Co. v. Briggs, 130 Cal. App. 3d 587, 593, 181 Cal. Rptr. 25 (1982).

[157] *Baker*, 220 Cal. App. 3d at 1606, 270 Cal. Rptr. at 339. *See also* Biddison v. Chicago, 1989 U.S. Dist. LEXIS 9048 (N.D. Ill. 1989).

[158] Argier v. Nev. Power Co., 114 Nev. 137, 139, 140 n.2, 952 P.2d 1390, 1391, 1392 n.2 (1998).

[159] *Id*. at 139, 952 P.2d at 1391 (quoting 2 JULIUS SACKMAN, NICHOLS ON EMINENT DOMAIN § 5.02[3] (1997); United States v. Dow, 357 U.S. 17, 78 S. Ct. 1039, 2 L. Ed. 2d 1109 (1958); Brooks Investment Co. v. City of Bloomington, 305 Minn. 305, 232 N.W.2d 911 (1975)).

[160] *Argier*, 114 Nev. at 140, 952 P.2d at 1392 (citing *Brooks*, 232 N.W.2d at 918).

[161] *Id*. at 141, 952 P.2d at 1392 (citations omitted).

[162] Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61 OHIO ST. L.J. 89, 91 (2000), hereinafter cited as "Stein" (quoting Gazza v. N.Y. State Dep't of Envtl. Conservation, 89 N.Y.2d 603, 615, 679 N.E.2d 1035, 1040 (1997)).

[163] *Id*. at 118 (citations omitted).

[164] *Biddle*, 830 N.E.2d at 87, n.13 (stating that "[o]nly if the scope of the activities [were to] significantly change could the landowner possibly be entitled to compensation for a further taking").

[165] Melillo v. New Haven, 249 Conn. 138, 732 A.2d 133 (1999) (Air Wisconsin's operation of commercial jet service out of Tweed-New Haven Airport between Feb. 15, 1985, and Dec. 1986 held not to be another taking of the subject property that was first taken sometime between 1967 and 1975); Giuliano v. State, DOT, 2007 Conn. Super. LEXIS 3467, at *24–25 (Conn. Super. Ct. 2007) (Unrept.) (finding no taking).

[166] Institoris v. City of L.A., 210 Cal. App. 3d 10, 18, 258 Cal. Rptr. 418, 423 (1989) (holding that a cause of action accrues "when the flights interfered with the use and enjoyment of plaintiffs" properties and resulted in a diminution of their market value"); Aaron v. City of L.A., 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974).

[167] *Branning*, 228 Ct. Cl. at 259, 654 F.2d at 100 (citing Avery v. United States, 165 Ct. Cl. 357, 330 F.2d 640 (1964)).

the increase in noise.[168] It is not clear in such a situation that an airport disclosure statement, even one recorded in the land records, would bar a claim for a later taking.

Nevertheless, the *Biddle* case appears to be the only precedent holding that an airport disclosure statement, which is recorded as part of a buyer's deed, may serve to bar a later action for compensation for airport noise, particularly when the prior owners received compensation for airport noise. However, it is unclear whether a seller who provides a buyer with a required airport disclosure statement must have received compensation for noise in connection with the disclosure statement, or whether the disclosure statement, standing alone, is sufficient to bar a buyer's later inverse claim against the airport for a taking caused by noise.

There is other authority holding that a transferee's knowledge of a taking or potential taking may have an effect later on the landowner's "right to challenge unreasonable limitations on the use and value of land."[169] Although not involving an airport, the decision in *Schooner Harbor Ventures, Inc. v. United States*[170] demonstrates that a property owner's knowledge of matters affecting the valuation of property, such as a regulation restricting or affecting development of the property, may impair an owner's claim that there has been a taking. In *Schooner Harbor*, the plaintiff brought an inverse condemnation action, alleging that land use restrictions imposed by Section 7 of the Endangered Species Act had resulted in a taking of his property.[171] The trial court dismissed the plaintiff's claims, in part because the plaintiff was found to have constructive knowledge of land-use restrictions that affected the land's development at the time the plaintiff acquired the land. In reversing and remanding, the Federal Circuit required that the trial court analyze the plaintiff's case based on the *Penn Central* factors, such as "the economic impact on the plaintiff of the regulations, the impact on Schooner Harbor's reasonable, investment-backed expectations, and the nature of the government action…."[172] However, the court also stated that "Schooner Harbor's knowledge of the regulation…is a factor that may be considered, depending on the circumstances."[173]

In the *Biddle* case, the Fakes had been given notice of airport noise prior to the Fakes' purchase. Similar to the opinion in *Schooner Harbor Ventures*, the Indiana Supreme Court in *Biddle* pointed out that the trial court granted summary judgment against the Fakes on the basis "that their seller accepted payment for damage to value done by airport noise, and provided the requisite formal notice of this fact to the Fakes as buyers."[174] Furthermore, the court stated that "[t]he Fakes are owners who purchased at a reduced price, with the knowledge that the bargain rate existed because of airport noise."[175] The Fakes, therefore, had been compensated already in the form of a reduced price for the property. Thus, there was no interference with any investment-backed expectation that the purchasers' land would not be subject to disturbance caused by the airport.[176] If a buyer in an inverse condemnation case has received an airport disclosure statement, the evidence also may reveal that the buyer purchased the property at a reduced price because of airport noise.

B. The Effect of an Airport Disclosure Act on Compensation for Noise Damages

Even if an airport disclosure statement or the recording of one as part of the deed does not preclude a later claim for noise damages, a disclosure statement could affect the amount of compensation awarded for noise damages.

First, an airport disclosure law is not a restriction on the use or development of property. Even assuming that an airport disclosure act were to be construed as such a restriction, it has been held that if a condemning authority takes property that is burdened by a restriction in the title or by a restriction created by a statute or ordinance, then compensation "is limited to the value of the property with the restricted use."[177] Moreover, as stated, a buyer may have purchased property subject to airport noise at a reduced price, or there may have been a prior taking by adverse possession.

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[168] *Id*. at 259, 654 F.2d at 100.

[169] Palazzolo v. Rhode Island, 533 U.S. 606, 627, 121 S. Ct. 2448, 2463, 150 L. Ed. 2d 592, 613 (2001).

[170] 569 F.3d 1359 (Fed. Cir. 2009).

[171] 16 U.S.C. § 1536(a)(2) (2006).

[172] *Schooner Harbor*, 569 F.3d at 1366.

[173] *Id*. On remand, the Court of Claims held that the takings claim was not ripe for adjudication, because the plaintiff no longer owned the property and, therefore, had no present right to develop it or "ability to seek an incidental take permit" from the United States Department of the Interior, Fish and Wildlife Service. Schooner Harbor Ventures, Inc. v. United States, 92 Fed. Cl. 373, 384 (2010).

[174] *Biddle*, 860 N.E.2d at 582.

[175] *Id*.

[176] *Id*.

[177] 4 NICHOLS ON EMINENT DOMAIN § 12C.02, at 12C-57 (citing, e.g., S. Cal. Fisherman's Ass'n v. United States, 174 F.2d 739 (9th Cir. 1949); John C. McDonald, *Note, Eminent Domain: Valuation Where Property Use Restricted by Deed*, 21 OHIO ST. L.J. 123 (1960)). *See* United States v. 480.00 Acres of Land, 557 F.3d 1297, 1301–1302 (11th Cir. 2009) (affirming a district court judgment that used the following instruction: "If, at the time of the taking, the property was subject to zoning restrictions, license regulations, or other land use restrictions those factors must be considered in evaluating the property…."); Nat'l R.R. Passenger Corp. v. Certain Temporary Easements Above the R.R. Right of Way, 357 F.3d 36 (1st Cir. 2004) (Although Amtrak contended that because of use restrictions in a deed to the property part of the property had no permissible use until much later, Amtrak's own appraisal of the parcel did not reduce the value of the parcel because of the restrictive covenant contained in the 1990 deed.).

Second, it is arguable that an airport disclosure law benefits a buyer by focusing the buyer's attention on the impact of existing or potential airport noise on property that the buyer is considering purchasing. If so, the benefit conferred by disclosure should be an offset against compensation claimed for noise damages. As the court stated in *Schooner Harbor*, an owner's knowledge is a factor that should be considered.

The benefit of a regulation to an owner as compensation for an alleged harm caused by a regulation was addressed in the *SBR* case. At oral argument, Justice Scalia stated that when "[t]he state gave you some *quid pro quo* for [protecting property from further erosion]…maybe that's sufficient compensation" for installing the public beach.[178] As one commentator argues, Florida's beach renourishment program

> does confer substantial benefits on private littoral owners. The restored beach protects their adjacent land from erosion and storm damage. The Act also provides specific legal protections to the littoral owners, such as guarantees of their unimpeded views of and access to the sea. No private land actually is taken, as the beach has to be eroded to qualify for restoration, and the new dry land was previously under water.[179]

Likewise, one who receives notice of the possible impact of an airport prior to the purchase of real property has been benefited. There is authority holding that, although a regulation may diminish a property's value, a property owner, who has received an "average reciprocity of advantage" from the regulation, may not be entitled to compensation.[180]

In sum, if a subsequent buyer purchases property after having been given notice that it is subject to airport noise, especially if the buyer acquired the land under terms reflecting the economic impact of airport noise on the property, a claim in inverse condemnation for noise damages will most likely be denied. Moreover, when a disclosure statement has been recorded as part of the land records, there is precedent holding that the disclosure statement precludes a claim for noise damages, particularly when the buyer's seller has been compensated for noise damages. Alternatively, assuming there is a taking because of airport noise after a buyer has received an airport disclosure statement, any compensation should be reduced to reflect the actual investment-backed expectations the buyer had when purchasing the property, particularly when the buyer's purchase price reflected the effect of airport noise on the property.

V. EFFECT OF NOISE STUDIES AND CONTOUR MAPS ON CLAIMS FOR AIRPORT NOISE DAMAGES

A. Introduction

Because the Typical Fair Airport Disclosure Act Provisions in Section VI use the terms noise exposure map and AICUZ to define residential real property in the vicinity of an airport, the effect of those terms is discussed briefly in this part of the digest. Importantly, it does not appear that the development and publication of a noise exposure map for a public airport or of an AICUZ study or map gives rise to a claim for a taking of an owner's property that is determined to be within the contours of a noise exposure or AICUZ map or chart.

B. Noise Exposure Maps Under Federal Aviation Regulations, Part 150

The Aviation Safety and Noise Abatement Act resulted in the Federal Aviation Regulations (FAR) Part 150 Noise Compatibility Program.[181] Part 150 provides for a public airport's voluntary creation of and submission to the FAA of a noise exposure map, which is a standardized map showing aircraft noise levels in areas around an airport.[182] When an airport authority chooses to submit a noise exposure map the authority creates the map by inputting sound data and other physical factors affecting noise levels into a computer program called the Integrated Noise Model.[183] The program produces noise exposure lines similar to a physical contour map showing banded regions of property that are subject to the same noise exposure levels. The Vision 100–Century of Aviation Reauthorization Act[184] requires the FAA to make noise exposure maps and land use information based on the maps available to the public on the FAA's Web site.[185]

If a noise exposure map has been submitted by an airport authority, the ability of nearby property owners to recover damages for airport noise after the date of the submission of the map is limited. Section 47506(a) provides that a person who acquires an interest in property after February 18, 1980, in an area surrounding an airport who has actual or constructive knowledge of the noise exposure map may recover damages for noise attributable to the airport only if the

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[178] *Stop the Beach Renourishment, Inc.*, 130 S. Ct. 2592, 177 L. Ed. 2d (2010), United States Supreme Court, Oral Argument, Transcript at 18.

[179] J. Peter Byrne, *Rising Seas and Common Law Baselines: A Comment on Regulatory Takings Discourse Concerning Climate Change*, 11 VT. J. ENVTL. L. 625, 628 (2010) (footnote omitted) (discussing the Florida Supreme Court decision in SBR).

[180] Resource Investments, Inc. and Land Recovery, Inc. v. United States, 85 Fed. Cl. 447, 471 and 471 n.35 (2009) (quoting in part Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994) (stating that "[m]ere diminution" occurs when the property owner has received the benefits of a challenged regulation, such that an "average reciprocity of advantage" results from it).

[181] 14 C.F.R. § 150.

[182] *Id*. App. A.

[183] *Id*. § 150.21.

[184] Pub. L. No. 108-176, 117 Stat. 2490 (Dec. 12, 2003).

[185] Available at http://www.faa.gov/airports/environmental/airport_noise/noise_exposure_maps/.

person is able to show a significant change in the airport.[186] Specifically, in addition to any other elements required for the recovery of damages, a plaintiff must show a change in the type or frequency of aircraft operations at the airport, a change in the airport layout or flight patterns, or an increase in nighttime operations and that the damages resulted from the changes or increases.[187]

Constructive knowledge of a noise exposure map is imputed if "before the person acquired the interest, notice of the existence of the map was published at least 3 times in a newspaper of general circulation in the county in which the property is located" or if "the person is given a copy of the map when acquiring the interest."[188]

Also important to the Typical Airport Fair Disclosure Act Provisions contained in Section VI of this digest is that noise exposure maps and related information are inadmissible as evidence in civil actions seeking relief for airport noise.[189] As held in *City of Atlanta v. Watson*,[190] the Aviation Safety Noise Abatement Act of 1979, of which Section 47506 is a part, preempts state law "with regard to the admissibility of airport noise exposure maps and related information in state suits seeking damages due to airport noise."[191]

C. AICUZ Studies and Inverse Condemnation Claims

The Code of Federal Regulations (C.F.R.) in Title 32, § 256.1, *et seq*., sets forth the policy of the Department of Defense "on achieving compatible use of public and private lands in the vicinity of military airfields."[192] Pursuant to the regulations, each of the military branches must study their air installations and develop an AICUZ for each installation. The process requires a detailed study of flight operations, actual noise and safety surveys, best available projections of future flying activities, and desirable restrictions on land use because of aircraft noise and safety.[193] AICUZ studies are

> instituted in an effort to coordinate the requirements of the missions of military air installations, with the development of the surrounding communities. The AICUZ is a concept of identifying compatible and incompatible land use around an air station, the purpose being to guide compatible private development through the cooperation with local jurisdictions in order to minimize public exposure to aircraft noise and accident potential, while at the same time maintaining the operational capability of the station.[194]

An AICUZ for a military air installation consists of land areas where certain uses may obstruct or otherwise be hazardous to aircraft operations and land uses in the vicinity that are exposed to the health, safety, or welfare hazards of aircraft operations.[195] The regulations direct that as part of an AICUZ study, contours for noise zones must be plotted on maps.[196] Furthermore, land use compatibility guidelines are specified for each Clear Zone, Accident Potential Zone, Noise Zone, or combination thereof as appropriate.[197] The first priority is given to safety and noise problems.[198]

AICUZ studies have led to inverse condemnation claims by property owners. In *Branning, supra,* the court held that there had been a taking of the plaintiff's property because low-level flights rendered "the property clearly unacceptable for normal residential use."[199] The AICUZ study showed that part of the plaintiff's property was in the Composite Noise Rating (CNR) Zone 3, the area with the highest aircraft noise impact—115 decibels and above at ground level, and that part of the property was in the CNR Zone 2, the area with modest noise impact—100 to 115 decibels.[200]

Although publication of an AICUZ study was not sufficient to establish a taking of the plaintiff's property,[201] the court did agree that the study was at least valuable evidence of the impact of aircraft operations on the property in the zones.[202]

It has been alleged also that there was a taking when a local zoning board was influenced to adopt AICUZ recommendations. In *De-Tom Enterprises, Inc. v. United States*[203] a property owner claimed that the Air Force's involvement in a local zoning board's decision not to rezone its property for residential use amounted to a taking. The court rejected the claim, stating that "[i]f plaintiff's position is that the Air Force necessarily took plaintiff's property (in the constitutional sense) simply by persuading the County board not to change the zoning of the property, we must reject

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[186] 49 U.S.C. § 47506(a) (2010).

[187] *Id*. §§ 47506(a)(1) and (2) (2010).

[188] *Id*. § 47506(b) (2010).

[189] *Id*. § 47507

> (No part of a noise exposure map or related information described in section 47503 of this title that is submitted to, or prepared by, the Secretary of Transportation and no part of a list of land uses the Secretary identifies as normally compatible with various exposures of individuals to noise may be admitted into evidence or used for any other purpose in a civil action asking for relief for noise resulting from the operation of an airport.).

[190] 267 Ga. 185, 191, 475 S.E.2d 896, 901 (1996).

[191] *Id*. at 191, 194, 475 S.E.2d at 901, 904 (holding that a "land use compatibility guideline chart prepared by the city as part of its noise exposure map" was inadmissible at trial).

[192] 32 C.F.R. § 256.1(a) (2010).

[193] *Id*. § 256.5(a)(1) (2010).

[194] *Branning*, 228 Ct. Cl. at 250, 654 F.2d at 95.

[195] 32 C.F.R. § 256.3(a) (2010).

[196] *Id*. § 256.3(d)(2)(i) (2010).

[197] *Id*. § 256.4(b) (2010).

[198] *Id*. § 256(f)(1) (2010).

[199] *Branning*, 228 Ct. Cl. at 252, 654 F.2d at 96.

[200] *Id*.

[201] *Id*., 228 Ct. Cl. at 250–51, 252, 654 F.2d at 95, 96.

[202] *Id*., 228 Ct. Cl. at 252, 654 F.2d at 96.

[203] 213 Ct. Cl. 362, 552 F.2d 337 (1977).

such a claim on its merits."[204] According to the court, the Air Force had acted essentially in a private capacity the same as any other major landholder may have acted "to persuade the county body to accept its position."[205] The court also pointed out that there was no physical invasion or damage to the claimant's property by the Air Force, which could be held responsible for a taking "only when its own regulatory activity is so extensive or intrusive as to amount to a taking…."[206]

VI. TYPICAL AIRPORT FAIR DISCLOSURE ACT PROVISIONS

A. Introduction

The Typical Airport Fair Disclosure Act Provisions (TAP) set forth in Part B begin with a statement of purpose and a section defining important terms in the TAP. Consistent with other disclosure laws, the TAP applies to residential property with one to four dwelling units and property subdivided for residential development. However, the TAP could be drawn to apply to all real property, including commercial real estate. The proposed TAP exempts some transfers of property from disclosure requirements, such as transfers necessitated because of a probate proceeding or foreclosure or because of inter-spousal transfers.

The TAP prescribes the form of the disclosure statement and when it must be provided to a buyer, but unlike most disclosure laws it requires that a real estate sales contract must incorporate the disclosure statement. Unlike some states' disclosure laws, the TAP does not provide a seller with the option of giving a buyer a report by a third party in lieu of a disclosure statement; if such an approach is allowed, then the real estate contract would need to incorporate the report so that it is binding on the parties. Under the TAP a seller is not responsible to a buyer for a later expansion or change in an airport's operations that affects or would affect the property.

Unlike other disclosure laws, the TAP requires that an airport disclosure statement be made part of the deed, either by including an airport disclosure statement and notification in the deed itself or by making the disclosure statement a part of and recorded with the deed. The TAP's intent is that after an airport disclosure is made, it becomes part of the title to the property so as to be binding on future purchasers by giving them notice of an airport affecting their property.

As for the buyer's remedies, as is true of existing disclosure laws, the TAP permits a buyer to withdraw an offer or rescind a contract prior to a transfer of title. Unlike other disclosure laws, the TAP allows a buyer to exercise his or her right of withdrawal or rescission at any time prior to settlement and to recover any deposit or other funds paid toward the purchase of the property. After a transfer of property a buyer may elect either to rescind the transaction because of the seller's nondisclosure or to retain the property. In either instance, a buyer may sue to recover his or her actual damages. As permitted by other residential real property disclosure laws, attorney's fees and costs are recoverable. The TAP does not preempt any other laws or remedies that a buyer may have under state law. As with several other disclosure laws, the TAP has a 1-year statute of limitations.

B. Typical Airport Fair Disclosure Act Provisions

B.1. Statement of Purpose

The purpose of the Typical Airport Fair Disclosure Act (Act) is to provide prospective purchasers of residential real property with notice of the location of any airport, as defined in section 2, that affects residential real property offered for sale or otherwise transferred unless a transfer is exempt under Section 3.

Comment

The Act is intended to provide prospective buyers of homes or of parcels intended for residential development with sufficient information to enable them to make informed decisions about their purchase with respect to noise and other effects of an airport affecting the property. The Act should diminish as well the risk of litigation by facilitating meaningful communication between a seller and a prospective buyer regarding the presence of an airport in close proximity to the property offered for sale.[207]

B.2. Definitions

(a) The term *Air Installation Compatible Use Zone* means any military air installation affecting land in its vicinity as shown on a map that plots contours for military aircraft noise and compatible land uses based on a study conducted in accordance with 32 C.F.R. § 256.1, *et. seq*.[208]

(b) The term *airport* means an area of land or other hard surface, excluding water, that is used or intended to be used for the landing and takeoff of aircraft, including any buildings and facilities,[209] and includes an airport area as defined or described in Sections 2(a), 2(e), 2(i), 2(o), and 4(b) of this Act.

(c) The term *airport authority* means the state or any political subdivision thereof or any corporation, entity, or other organization created by law for the establishment, operation, or control of an airport.

(d) The term *Airport Disclosure Statement* means a written statement that identifies an airport as defined

[204] *Id*., 213 Ct. Cl. at 364–65, 552 F.2d at 339.

[205] *Id*., 213 Ct. Cl. 362, 552 F.2d at 339–40.

[206] *Id*., 213 Ct. Cl. at 365, 552 F.2d at 339.

[207] Giametti v. Inspections, Inc., 76 Conn. App. 352, 360, 824 A.2d 1, 7 (2003).

[208] 32 C.F.R. §§ 256.3(a), (d)(2)(i), 256.4(b)(ii), and 256.5(a)(1) (2010); HAW. REV. STAT. § 508D-15(3) (2010).

[209] 14 C.F.R. § 139.5 (2010).

in Sections 2 and 4 and is delivered by a seller or a seller's broker or agent to a buyer or a buyer's broker or agent as required by Sections 4, 5, and 6 of this Act.[210]

(e) The term *Airport Influence Area* means all property in the vicinity of an airport that is exposed to aircraft noise and overflight and that has a day-night average sound level of sixty-five decibels or higher as determined by the responsible airport or airport authority and shown on a map recorded in each county having property within the Airport Influence Area.[211]

(f) The term *buyer* means an individual or trustee or a corporation, partnership or any other entity, either directly or indirectly through a broker or agent, who is attempting to acquire or is acquiring legal or equitable title or a possessory interest in residential real property and includes a transferee as defined in Section 2(r).[212]

(g) The term *dwelling unit* means any building, structure, or portion thereof which is occupied or that is designed or intended to be occupied as a residence by one or more persons.[213]

(h) The term *final settlement* means when a seller delivers a deed of conveyance to a buyer or transferee of residential real property.[214]

(i) The term *Noise Exposure Map* means a map submitted by or on behalf of an airport to the Federal Aviation Administration in accordance with its Regulations appearing at 14 C.F.R. Part 150, Airport Noise Compatibility Planning or any successor regulation.[215]

(j) The term *offer to purchase* means a buyer's written offer to purchase residential real property in any form including but not limited to a real estate contract signed by a buyer and presented for a seller's acceptance, a lease with an option to purchase, the exercise of an option to purchase, or an offer to exchange property for residential real property.[216]

(k) The term *real estate contract* means any of the following:

(1) an executed agreement for the purchase and sale of residential real property;

(2) an executed lease with an option to purchase residential real property;

(3) an executed lease-with-obligation-to-purchase agreement for residential real property;

(4) an executed installment land sale contract for residential real property; or

5) an exercise of an option to purchase residential real property.[217]

(l) The term *residential real property* means:

(1) any land in this state to which is affixed not less than one or more than four dwelling units;[218]

(2) any estate or interest in an unimproved housing lot or lots to be improved by not less than one or more than four dwelling units; and

(3) any land or tract of land that is divided or proposed to be divided over any period into one or more lots, parcels, units, or interests, which are offered, known, designated or advertised as a common unit by a common name or as part of a common promotional plan of advertising and sale.[219]

(m) The term *sale* means an acquisition of residential real property whether by purchase, at an auction, an exchange, an installment contract, a lease with an option to purchase, an exercise of an option, or any other method by which residential real property together with any improvements is sold and includes a transfer as defined in Section 2(p) of this Act.[220]

(n) The term *seller* means an individual or a trustee or a corporation, partnership, or other entity having legal or equitable title who is attempting to sell or transfer or is selling or transferring residential real property either directly or indirectly through a broker or an agent and includes a transferor as defined in Section 2(s).

(o) The term *traffic pattern* means the traffic flow that is prescribed for aircraft landing at, taxiing on, or taking off from, an airfield and includes the actual radar flight paths used by landing and departing aircraft.[221]

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[210] HAW. REV. STAT. § 508D-1 (2010).

[211] ARIZ. REV. STAT. ANN. §§ 28-8485(A) and (B) (2010).

[212] DEL. CODE ANN. tit. 6, § 2571(2) (2010); ME. REV. STAT. tit. 33, § 171(4) (2010); MINN. STAT. § 513.52, Subd. 2 (2010); OKLA. STAT. § 60-832(3) (2010); S.D. CODIFIED LAWS ANN. § 43-4-37 (2010).

[213] NEV. REV. STAT. § 113.100(3) (2010).

[214] DEL. CODE ANN. tit. 6, § 2571(3) (2010); NEV. REV. STAT. § 113.100(1) (2010).

[215] 14 C.F.R. pt. 150 (2010); HAW. REV. STAT. § 508D-15(2) (2010).

[216] OKLA. STAT. § 60-832 (2010).

[217] ME. REV. STAT. ANN. tit. 33, § 171(5) (2010); N.Y. REAL PROP. LAW § 461(4) (2010).

[218] ALASKA STAT. § 34.70.200 (2010); DEL. CODE ANN. tit. 6, § 2571(4) (2010); HAW. REV. STAT. § 508D-1 (2010); 765 ILL. COMP. STAT. 77/5 (2010); ME. REV. STAT. ANN. tit. 33, § 171(6) (2010); MD. CODE § 10-702(b)(1) (2010); MICH. COMP. LAWS § 565.952, § 2 (2010); MINN. STAT. § 513.52, Subd. 4; MISS. CODE ANN. § 89-501(1) (2010); NEB. REV. STAT. § 76-2,120(1)(c) (2010); NEV. REV. STAT. §§ 113.100(3) and (4) (2010); N.C. GEN. STAT. § 47E-1 (2010); OKLA. STAT. § 60-832(8) (2010); PA. CONS. STAT. tit. 68, § 7302 (2010) (statute applicable to all real estate transfers with some exceptions); S.D. CODIFIED LAWS ANN. § 43-4-37 (2010); TENN. CODE ANN. § 66-5-201 (2010); VA. CODE ANN. § 55-517 (Michie 2010); WASH. REV. CODE § 64.06.005 (2010).

[219] DEL. CODE ANN. tit. 6, § 2571(5) (2010); ME. REV. STAT. ANN. tit. 33, § 171(2) (2010); MINN. STAT. § 513.52, Subd. 5 (2010); NEB. REV. STAT. § 76-2,120(d) (2010); NEV. REV. STAT. §§ 113.070(4) and 113.100(5) (2010).

[220] ALASKA STAT. § 34.70.200(4) (2010); HAW. REV. STAT. § 508 D-1 (2010); IOWA CODE § 558A.1(4) (2010); MINN. STAT. § 513.52, Subd. 4 (2010); MINN. STAT. § 513.93 (2010).

[221] Aviation Dictionary, available at http://aviation.aviationdictionary.org/VFA-13-Aviation-Dictionary/traffic_pattern, last accessed on May 5, 2011.

(p) The term *transfer* means any form of transfer of title to residential real property by a seller or transferor to a buyer or transferee.[222]

(q) The term *transfer of title* means the delivery of a properly executed deed of conveyance to real property to a buyer or transferee.[223]

(r) The term *transferee* means anyone acquiring title to residential real property pursuant to an instrument that includes the power to transfer an estate or interest in real property.[224]

(s) The term *transferor* means a person who is transferring title to residential real property to a buyer or transferee.[225]

Comment

Section 2(a) concerns a military airport or air installation for which one of the military branches has conducted a study and mapped an air installation compatible use zone, or AICUZ, that must be disclosed by a seller. As for other alternatives, Arizona requires that a seller provide a proper and timely notice when a property is in a High Noise and Accident Potential Zone.[226] A seller must disclose that the property is located within the zone and is subject to a requirement of compatibility with a military airport, as well as disclose to a buyer that there is a potential for aircraft noise.[227]

In Maryland, sellers of residential real property must disclose to buyers known military operations affecting a property, including flight operations and the testing of munitions that may subject the property to high noise levels.[228]

In Virginia, an

> owner of residential real property located in any locality in which a military air installation is located shall disclose to the purchaser whether the subject parcel is located in a noise zone or accident potential zone, or both, if so designated on the official zoning map by the locality in which the property is located on a form provided by the Real Estate Board.[229]

Furthermore, an owner must disclose "the specific noise zone or accident potential zone, or both, in which the property is located according to the official zoning map."[230]

Section 2(e) defines an airport influence area. As for other alternatives, California defines an airport influence area as one "in which current or future airport-related noise, overflight, safety, or airspace protection factors may significantly affect land uses or necessitate restrictions on those uses as determined by an airport land use commission."[231]

Section 2(i) defines an airport noise exposure map, which some airports have submitted voluntarily to the FAA pursuant to its regulations appearing at 14 C.F.R. Part 150. As of January 2011, as required by the Vision 100–Century of the Aviation Reauthorization Act, Public Law 108-176, the FAA makes available to the public on the FAA's Web site noise exposure maps and other information on public airports that have submitted a noise exposure map under Part 150.[232]

Section 2(l) defines the term residential real property. Current residential real property disclosure laws typically apply to real property consisting of not less than one or more than four dwelling units. Although the Act applies to sales of residential real property, the Act also applies to lots that are intended to be improved with a dwelling, as well as to property that may be subdivided, advertised, and sold to the public for residential use. Presently, most residential real property disclosure laws are concerned with defects in a dwelling unit and thus are inapplicable to unimproved land. Section 2(l) is consistent with current disclosure laws, which do not apply to commercial real property. However, the Act could be expanded to apply to all transfers of real property, including agricultural, commercial, and undeveloped property, because of the possibility of a change in land use affecting property in the vicinity of an airport.

As for Sections 2(p), 2(r), and 2(s), not all residential real property transactions are necessarily in the form of a real estate contract. Thus, the use of the terms transfer, transferee, and transferor is intended to embrace more transactions involving transfers of property subject to the Act. However, certain transfers are exempt under Section 3.

B.3. Exempt Transfers

This Act shall not apply to the following transfers of residential real property:[233]

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[222] OKLA. STAT. § 60-832(5) (2010); S.D. CODIFIED LAWS ANN. § 43-4-37(5) (2010).

[223] N.Y. REAL PROP. LAW § 430(6) (2010).

[224] IOWA CODE § 558A.1(5) (2010).

[225] HAW. REV. STAT. § 558A.1(6) (2010).

[226] ARIZ. REV. STAT. ANN. § 28-8484(E) (2010).

[227] *Id*. §§ 28-8461(20) and 28-8484 (2010).

[228] *Id*.

[229] VA. CODE ANN. § 55-519.1 (Michie 2010).

[230] *Id*.

[231] CAL. CIV. CODE § 1353 (2010).

[232] *See* Airport Noise and Land Use Information, including Noise Exposure Maps, available at http://www.faa.gov/airports/environmental/airport_noise/noise_exposure_maps/, last accessed on May 26, 2011. As the FAA advises, the noise exposure maps and land use information developed pursuant to Pt. 150 are voluntarily prepared by airport sponsors, and not all airport sponsors have prepared them.

[233] CAL. CIV. CODE § 1102.2(b) (West 2010); CONN. GEN. STAT. § 20-327b(b) (2010); DEL. CODE ANN. tit. 6, §§ 2577(1)-(9) (2010); HAW. REV. STAT. §§ 508D-3(1)-(8) (2010); IOWA CODE §§ 558A.1(4) (a)-(h) (2010); ME. REV. STAT. tit. 33, §§ 172(1)-(12) (2010); MD. CODE ANN., REAL PROP. §§ 10-702(b)(i)(2)(ii-vii) (2010); MICH. COMP. LAWS §§ 565.953, § 3(a)-(i) (2010); MISS. CODE ANN. § 89-1-501(2)(g) (2010); NEB. REV. STAT. §§ 76-2,120(6)(a)-(l) (2010); NEV. REV. STAT. §§ 113.115(3)(a)-(d) (2010); N.Y. REAL PROP. LAW §§ 463(1)-(14) (2010); N.C. GEN. STAT. §§ 47E-2(1)-(11) (2010); OHIO REV. CODE ANN.

(a) Transfers pursuant to court order such as transfers ordered by a court in the administration of an estate, trust or guardianship or pursuant to a writ of execution, by eminent domain, and transfers resulting from a decree for specific performance.

(b) Transfers to a mortgagee by a mortgagor in default by a deed in lieu of foreclosure.

(c) Transfers by any sheriff's sale for default on an obligation secured by a mortgage, judgment, tax or other lien.

(d) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship or trust.

(e) Transfers from one co-owner to one or more other co-owners.

(f) Transfers made to a spouse or to a person or persons in the lineal line of consanguinity of one or more of the transferors.

(g) Transfers between spouses resulting from a property settlement incident to a divorce.

(h) Transfers to any government entity.[234]

Comment

Section 3 reflects the approach in many states to exempt specific types of transfers from residential real estate disclosure laws. The California disclosure law has an even more extensive list of exempt transfers.[235]

Some residential real property disclosure laws exempt the first sale of residential property that has never been occupied or inhabited.[236] Although such an exemption may be justified regarding defective material or workmanship in a house that may be under warranty, there appears to be no reason for an airport disclosure act to exempt a first sale of previously unoccupied or uninhabited property.

B.4. Seller's Duty to Disclose an Airport

(a) When residential real property is offered for sale or otherwise transferred, a seller or other transferor shall disclose to a buyer whether the property is located within the boundaries:

(1) of an airport Noise Exposure Map or an Airport Influence Area or

(2) of a military Air Installation Compatible Use Zone.

(b) If neither Section 4(a) (1) or (2) applies, then a seller must disclose whether the residential real property is within 2 miles of an airport and its traffic pattern, as defined in Sections 2(b) and 2(o), including the runways and landing and departure flight paths as shown on a map published by the Federal Aviation Administration or the airport or airport authority, as well as actual radar flight paths used by landing and departing aircraft.[237]

Comment

With respect to Section 4(a), there will not be a noise exposure map that has been submitted to the FAA (submission is voluntary) or a map of a designated airport influence area for all airports within the vicinity of property subject to the Act. Consequently, Section 4(b) is intended to embrace an airport for which there is no noise exposure map, designated airport influence area, or AICUZ. For example, in Indiana, a seller must disclose the existence of an airport that is located within a certain geographical distance from the seller's property as determined by the state real estate commission.[238] The real estate commission may consider the differences between an airport serving commercial airlines and an airport that does not serve commercial airlines in deciding the distance to be disclosed.[239]

B.5. Airport Disclosure Statement

(a) An Airport Disclosure Statement

(1) shall identify the property being offered for sale or otherwise being transferred by its legal description (as shown in the land or tax records for the property) and its street address;

(2) shall state whether the property is within the boundaries of an airport Noise Exposure Map or Airport Influence Area or a military Air Installation Compatible Use Zone; and

(3) if Section 5(a)(2) does not apply, shall state whether the property is within 2 miles of an airport and its traffic pattern as described in Section 4(b) of this Act.

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§§ 5302.30(B)(2)(a)-(n) (2010); OKLA. STAT. § 60-838(A)(1) (2010); R.I. GEN. LAWS §§ 5-20.8-3(1)-(10) (2010); S.C. CODE ANN. §§ 27-50-30(1)-(15) (2010); S.D. CODIFIED LAWS ANN. §§ 43-4-43(1)-(6) (2010); TENN. CODE ANN. §§ 66-5-209(1)-(12) (2010); VA. CODE ANN. §§ 55-518(1)-(9) (Michie 2010); WASH. REV. CODE §§ 64.06.010(1)-(7) (2010); WIS. STAT. §§ 709.01(2)(a)-(d) (2010).

[234] Subsection (h) does not include transfers from any government entity. Although land acquired under Pt. 150 is not to be resold for residential use, sales have been permitted on rare occasions. Subsection (h) is drafted to avoid exempting an airport from providing a disclosure statement when it disposes of residential property acquired under Pt. 150.

[235] CAL. CIV. CODE § 1102.2(b) (West 2010).

[236] ALASKA STAT. § 34.70.120 (2010); CONN. GEN. STAT. § 20-3276(b)(4) (2010); HAW. REV. STAT. § 508D-3(6) (2010); IDAHO CODE § 55-2505(12) (2010); 765 ILL. COMP. STAT. 77/15 (9) (2010); IND. CODE ANN. § 32-21-5-1(b)(8) (Burns 2010); KY. REV. STAT. § 324.360(7) (2010); MD. CODE ANN., REAL PROP. § 10-702(b)(2)(i)(1) (2010); MINN. STAT. § 513.54(10) (2010); NEB. REV. STAT. § 76-2,120(6)(k) (2010); N.Y. REAL PROP. LAW § 463(12) (2010); N.C. GEN. STAT. § 47E-2(9) (2010); OHIO REV. CODE ANN. § 5302.30(B)(2)(l) (2010); OKLA. STAT. § 60-838(9) (2010); R.I. GEN. LAWS § 5-20.8-3(8) (2010); S.C. CODE ANN. § 27-50-30(10) (2010); S.D. CODIFIED LAWS ANN. § 43-44-43(6) (2010); TENN. CODE ANN. § 66-5-209(9) (2010) (exempting first sale "provided the builder offers a written warranty"); VA. CODE ANN. § 55-518(9) (Michie 2010).

[237] HAW. REV. STAT. §§ 508D-15 and 508D-15(a)(2) (2010).

[238] IND. CODE ANN. § 32-21-5-7(4) (Burns 2010).

[239] *Id.*

(b) A seller shall be deemed to be in compliance with this Act when the seller discloses an airport by using the following form and thereafter performing the requirements set forth therein and in Section 6 of this Act:

Airport Disclosure Statement

Pursuant to the Airport Fair Disclosure Act (Act) enacted by this State, [citation], which defines the terms used in this Statement, _____ and ____, (Seller), the owner of residential real property as defined in the Act, situated in the City/County of _____ known as [Legal Description, such as Subdivision, Block, Square, Lot] located at _____ [Street Address], (Property), hereby discloses to __ and ___, (Buyer), that the aforesaid Property is affected by an airport as described below in that the Property is located within the boundaries of:

[COMPLETE ENTRIES THAT APPLY TO THE PROPERTY]

❑ a Noise Exposure Map for the _____ [Name of Airport] submitted by the [Name of Airport or Airport Authority] to the Federal Aviation Administration;

❑ an Airport Influence Area for the _____[Name of Airport] designated by the [Name of Airport or Airport Authority];

❑ a military Air Installation Compatible Use Zone, which is also known as the _____ [Name of Military Airport or Air Installation]; or

❑ the property is located within 2 miles of an airport known as the [Name of Airport] and its traffic pattern as defined in the Act, including the runways and landing and departure flight paths as shown on a map published by the Federal Aviation Administration or by the _____ [Name of Airport or Airport Authority], as well as the actual radar flights paths used by landing and departing aircraft.

This Airport Disclosure Statement shall be attached to and made a part of any real estate contract between the Seller and the Buyer and shall survive the delivery of a deed of conveyance by the Seller to the Buyer at final settlement.

Pursuant to the Section 6(d) of the Act,

(1) the Seller's (or other Transferor's) Airport Disclosure Statement shall be incorporated by reference in the Deed and recorded with the Deed in the land records of the [City/County] in which the aforesaid Property is situated, or

(2) the Seller's (or other Transferor's) Deed shall include the Notification prescribed by Section 6(d)(2) of the Act prior to its recording in the aforesaid land records.

The Buyer is hereby notified that, prior to signing a real estate contract for the purchase of the aforesaid Property, the Buyer should conduct any investigation that the Buyer deems prudent and necessary to assess the impact, if any, of the airport, including but not limited to airport-related noise, that may affect the Buyer's use and enjoyment of the Property.

Date _____
Seller _____
Seller _____

I (We) acknowledge receipt of the foregoing Airport Disclosure Statement:

Date _____
Buyer _____
Buyer _____

Comment

Although several states' disclosure laws prescribe the form for the disclosure of defects and conditions either in the statute or as required by a real estate commission or equivalent body, Section 5 is based on California's form entitled Notice of Airport in Vicinity.[240]

[240] CAL. CIV. CODE § 1353(a)(1) (West 2010).

B.6. Timing and Delivery of Airport Disclosure Statement

(a) A seller or a seller's broker or agent shall deliver an Airport Disclosure Statement at the time residential real property is being offered for sale and/or listed with a broker or agent for sale and not later than when a buyer makes an offer to purchase the property.[241]

(b) The Airport Disclosure Statement shall be included within the real estate contract or shall be incorporated by reference in the contract and made an addendum to the contract.[242]

(c) The real estate contract shall state that the Airport Disclosure Statement survives the delivery of the deed of conveyance to the property.

(d) A Seller's deed of conveyance

(1) shall incorporate an Airport Disclosure Statement that shall be recorded as an addendum to the deed or

(2) shall include the following statement and notification:

Airport Disclosure Statement and Notification

This Notification is required by the Airport Fair Disclosure Act, [citation] enacted by the State of _____.

The property being conveyed hereby is within the boundaries of an airport Noise Exposure Map for the [Name of Airport], an Airport Influence Area for the [Name of Airport] designated by the [Name of Airport or Airport Authority], and/or a military Air Installation Compatible Use Zone for the [Name of Military Airport or Air Installation], or is within 2 miles of the [Name of Airport] or its traffic pattern, including the runways and landing and departure flight paths as shown on a map published by the Federal Aviation Administration or the [Name of Airport or Airport Authority] and the actual radar flight paths used by landing and departing aircraft. The property being conveyed may be affected by airport operations including but not limited to noise, vibration, smoke, odor, and/or traffic.

This Notification is binding on the grantee and all future grantees and all other transferees of the herein described real property.

Comment

Section 6(a) requires the disclosure of an airport affecting the property as soon as the property is offered or listed for sale and no later than when a buyer makes an offer. In contrast, some residential real property disclosure laws permit disclosure to be made even after a real estate contract has been executed by a buyer and seller. The intent of Section 6(a) is to provide for early disclosure so as to avoid any dispute later regarding the transaction because of a seller's failure to make a required airport disclosure. Section 6(a) is consistent with disclosure laws in some states that authorize a seller's broker or agent to deliver a required disclosure statement.[243]

Section 6(b) differs from most residential real property disclosure laws. Virtually all of the current disclosure laws do not require that a property disclosure statement be made a part of the real estate contract.[244] The intent of Section 6(b) is that rather than a disclosure statement being merely informative, the statement will continue to be binding both on a seller and a buyer. Local real estate practice may vary; however, in many if not most jurisdictions a prospective buyer's offer to purchase real property is often in the form of a real estate contract signed by the buyer that is presented to the seller for the seller's acceptance. If so, a real estate contract may include an airport disclosure clause to be completed by a seller or a seller's agent or broker prior to a buyer's offer. Alternatively, an addendum may be completed by a seller that is provided to a buyer for attachment to the buyer's offer to purchase. In either instance, the disclosure must comply with Sections 4, 5, and 6.

The intent of Section 6(c) is to avoid unambiguously the merger-by-deed doctrine whereby a deed of conveyance to real property supersedes either in whole or in part the real estate contract. It does not appear that any of the present residential real property disclosure laws provide that the real estate contract survives the deed. In *Biddle v. BAA Indianapolis, LLC,*[245] because the effect of airport noise on the property purchased by the buyers had been disclosed to the buyers

[241] *Id.* §§ 1102.3 and 1102.12 (authorizing delivery by a real estate agent); CONN. GEN. STAT. § 20-327b(a) (2010); HAW. REV. STAT. § 508D-4(2) (2010); IDAHO CODE § 55-2509 (2010); MISS. CODE ANN. § 89-1-503 (2010); NEB. REV. STAT. § 76-2,120(7) (2010); NEV. REV. STAT. § 113.070(2) (2010) (stating that "[t]he seller shall retain a copy of the disclosure document which has been signed by the initial purchaser acknowledging the date of receipt by the initial purchaser of the original document"); OHIO REV. CODE ANN. § 5302.30(I) (2010); OKLA. STAT. § 60-834(D) (2010); R.I. GEN. LAWS §§ 5-20.8-2(a) and 5-20.8-5(a) (2010) ("Every agreement for the purchase and sale of residential real estate located in the state shall contain an acknowledgement that a completed real estate disclosure form has been provided to the buyer by the seller.").

[242] DEL. CODE ANN. tit. 6, § 2573 (2010) (providing also that the disclosure form signed by the buyer and seller must "become a part of the purchase agreement"); N.Y. REAL PROP. LAW § 462 (2010) (stating that "[a] copy of the property condition disclosure statement containing the signatures of both seller and buyer shall be attached to the real estate purchase contract").

[243] *See, e.g.*, ME. REV. STAT. ANN. tit. 33, § 176(1) (West 2010) (stating that information in the disclosure statement is for disclosure only and not intended to be part of the contract between the purchaser and seller).

[244] *But see* DEL. CODE ANN. tit. 6, § 2573 (2010) (providing also that the disclosure form signed by the buyer and seller must "become a part of the purchase agreement").

[245] 860 N.E.2d 570 (Ind. 2007).

both in the real estate contract and in the deed to the property, the court affirmed a trial court's dismissal of the buyers' later inverse condemnation claim against the Indianapolis Airport Authority for an alleged taking based on airport noise.

Pursuant to Section 6(d), if an Airport Disclosure Statement is referenced in, attached to, and recorded with the deed, or if the deed includes the prescribed Airport Disclosure Statement and Notification, all subsequent buyers and transferees will be on notice of an airport affecting the property.

B.7. Buyer's Duty to Investigate

On receipt of an Airport Disclosure Statement in compliance with this Act, a buyer shall have a duty to investigate the current or future impact of an airport on the property that is the subject of the Airport Disclosure Statement.

Comment

Section 7 is consistent with the disclosure laws in several states providing that a seller's compliance with a residential real property disclosure law is not a substitute for a buyer's inspection of the property or an excuse for a buyer not to exercise reasonable care.[246] For example, in Hawaii, "[t]he disclosure statement shall not be construed as a substitute for any expert inspection, professional advice, or warranty that the buyer may wish to obtain."[247]

The nature of an investigation would be in the buyer's discretion, but could include a review of the land records in the county where the property is located, the use of an appraiser, another expert, and/or the buyer's own reconnaissance of the area.

B.8. Buyer's Right to Withdraw an Offer or Rescind a Contract[248]

(a) If an Airport Disclosure Statement is not delivered to a buyer or is not delivered to a buyer until after a buyer makes an offer to purchase, the buyer may withdraw an offer to purchase or rescind any resulting real estate contract at any time between the date of the offer to purchase or the resulting real estate contract and the final settlement on the property.

(b) A buyer may withdraw an offer to purchase or rescind a resulting real estate contract by notifying the seller or the seller's broker or agent:

(1) by delivering a letter in person to the seller or the seller's broker or agent;

(2) by mailing a letter to the seller or the seller's broker or agent by certified mail, return receipt requested; or

(3) by sending a letter by any other method, including a courier service or electronic mail or facsimile, as long as there is a record showing the delivery of the letter to the seller or the seller's broker or agent.

(c) If a buyer withdraws an offer to purchase or rescinds a real estate contract in accordance with this section, the withdrawal of the offer or the rescission of the resulting real estate contract is without penalty to the buyer and the seller or the seller's broker or agent shall return to the buyer (or direct any third party to return to the buyer) within two business days the buyer's deposit and any other funds paid by the buyer in advance of the final settlement for the purchase of the property.

Comment

The presence of an airport is a condition that may affect a buyer's use and enjoyment of property, as well as affect a resale of the property. Consequently, Section 8(a) is more favorable to buyers than most if not all of the current real property disclosure laws. Rather than limit a buyer to a few days to withdraw an offer or rescind a contract, Section 8(a) permits a buyer to do so at any time prior to final settlement. Although a buyer should be able to withdraw an offer any time prior to a seller's acceptance, it may be important to specify that a buyer has the right to withdraw an offer,

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[246] 367 DEL. CODE ANN. tit. 6, § 257 (2010); GA. CODE ANN. § 10-6A-5(b)(2) (2010); HAW. REV. STAT. § 508D-1(3) (2010); IDAHO CODE § 55-2507(4) (2010); NEV. REV. STAT. § 113.140(3) (2010) ("Neither this chapter nor chapter 645 of NRS relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself."); OHIO REV. CODE ANN. § 5302.30(D)(1) (Baldwin 2010); OKLA. STAT. § 60-833(B)(2)(c) (2010); R.I. GEN. LAWS § 5-20.8-2(b) (2010); S.C. CODE ANN. § 27-50-80 (2010).

[247] IDAHO STAT. § 55-2507(3) (2010); IND. CODE ANN. § 32-21-5-9 (Burns 2010); KY. REV. STAT. ANN. § 324.360(7) (2010); LA. REV. STAT. ANN. § 3198(D)(1) (West 2010); MICH. COMP. LAWS § 565.951, § 7(1) (2010); MISS. CODE ANN. § 89-1-509 (2010); NEB. REV. STAT. §§ 76-2,121(3)(e), (f), and (g) (2010); NEV. REV. STAT. § 113.130 (2010) ("A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property."); OHIO REV. STAT. ANN. § 5302.30(D)(1) (2010); OKLA. STAT. § 60-832(10) (2010); OR. REV. STAT. § 105.464 (2010); R.I. GEN. LAWS § 5-20.8-2(b) (2010); S.D. CODIFIED LAWS ANN. § 43-4-44 (2010); TENN. CODE ANN. §§ 66-5-201 and 66-5-210 (2010); VA. CODE ANN. § 55-518(B) (Michie 2010); and WASH. REV. CODE § 64.06.015 (2010).

[248] ALASKA STAT. § 34.70.020 (2010); CAL. CIV. CODE § 1102.3 (West 2010); HAW. REV. STAT. 508D-16(b) (2010) (requiring return of all deposits); 765 ILL. COMP. STAT. 77/40 (2010) (providing for termination of the contract); LA. REV. STAT. §§ 9:3198(B)(2) and (3)(a) (2010); ME. REV. STAT. tit. 33, § 174(2) (2010); NEV. REV. STAT. §§ 113.130(b)(1) and 113.150(1) and (2) (2010); N.C. GEN. STAT. § 47E-5(b) (2010); OHIO REV. CODE ANN. § 5302.30(K)(2) (2010); OR. STAT. § 105.475(1) (2010); R.I. GEN. LAWS §§ 5-20.8-4(a) and (b)(1) and (2) (2010); S.D. CODIFIED LAWS ANN. §§ 43-4-38 and 43-4-39 (2010); TENN. CODE ANN. § 66-5-203(b) (2010); VA. CODE ANN. § 55-520(B) (Michie 2010); WASH. REV. CODE §§ 64.06.030 and 64.06.040(3) (2010).

such as one made at an auction or when a buyer has made a firm offer.

However, some states may want to limit the time within which a buyer may withdraw an offer or rescind. For example, some disclosure laws limit a buyer's right to withdraw an offer or to rescind a contract to 72 hours, excluding federal and state holidays and weekends, after delivery of the disclosure statement.[249] Furthermore, some states may want to provide that noncompliance with the Act does not invalidate a sale or conveyance when a buyer does not exercise his or her rights pursuant to this Section.[250] If so, the following Sections (d) and (e) could be used in Section 8.

> (d) Any rights of a buyer to terminate a real estate contract provided by this section are waived conclusively if not exercised prior to final settlement or prior to occupancy of the property, whichever is earlier, by the buyer. A buyer's right to rescind a real estate contract or a conveyance of residential real property subject to this Act for reasons other than a seller's non-compliance with the Act are not affected by this section.[251]

> (e) A transfer subject to this Act is not invalid or is to be invalidated solely because of the failure of the seller or the seller's broker or agent to comply with this Act.[252]

The inclusion of subsections (d) and (e) would mean that a buyer would not be able to rescind a purchase after a transfer of title. If subsections (d) and (e) are included in Section 8, then Section 9 below will require revision or deletion. However, Section 9(d) that permits a buyer to claim actual damages directly and proximately caused by a seller's noncompliance with the Act could be retained.

B.9. Buyer's Right to Claim Damages

(a) If residential real property has been transferred to a buyer prior to a seller's disclosure of an airport, as defined in Section 2, the buyer may bring an action within one year of the final settlement on the real property to rescind the purchase and the transfer of title to the buyer and to recover any actual damages directly and proximately caused by the seller's failure to disclose an airport as required by this Act.[253]

(b) In lieu of rescission under Section 9(a), a buyer may elect to retain the property and commence an action for actual damages directly and proximately caused by the seller's failure to deliver an Airport Disclosure Statement as required by this Act.[254]

(c) A buyer's right to claim damages for a seller's noncompliance with the Act is not affected by a buyer's sale or re-conveyance of the subject property within one-year of the final settlement on the residential real property at issue.

(d) In any legal or equitable action by a buyer based on or arising out of a seller's non- compliance with the Act, the buyer may recover attorney's fees and costs as determined by the court.[255]

(e) This section does not limit any other rights or remedies a buyer may have under state law, whether by statute or at common law.

Comment

Section 9 provides a buyer with several remedies. Even if a buyer elects to rescind a transaction after conveyance, Section 9(a) permits a buyer to recover any actual damages sustained by a buyer that were directly and proximately caused by a seller's noncompliance.

Section 9(b) permits a buyer to elect to retain the property and sue to recover actual damages that were directly and proximately caused by a seller's noncompliance.

The intent of Section 9(c) is to preserve a buyer's rights and remedies even though within 1 year of final settlement a buyer has sold or reconveyed the prop-

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[249] LA. REV. STAT. § 9:3198(3)(a) (2010); ME. REV. STAT. tit. 33, § 174(2) (2010).

[250] 372 CAL. CIV. CODE § 1102.13 (2010) provides:

> No transfer subject to this article shall be invalidated solely because of the failure of any person to comply with any provision of this article. However, any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of this article shall be liable in the amount of actual damages suffered by a transferee.

[251] LA. REV. STAT. § 3198(3)(b) (2010); ME. REV. STAT. tit. 33, § 174(4) (2010); MD. CODE ANN., REAL PROP. § 10-702(k)(2) (2010).

[252] LA. REV. STAT. § 3198(3)(d) (2010); ME. REV. STAT. tit. 33, § 174(5) (2010).

[253] ALASKA STAT. § 34.70.070 (2010); CAL. CIV. CODE §§ 1102.1(a), 1102.8, and 1102.13 (West 2010); HAW. REV. STAT. § 508D-14 (2010); IDAHO CODE § 55-2514 (2010); 765 ILL. COMP. STAT. 77/45 (2010); LA. REV. STAT. 9:3198B.(d) (2010); ME. REV. STAT. tit. 33, § 178 (2010); MINN. STAT. § 513.57, Subd. 3 (2010) ("[n]othing in sections 513.52 to 513.60 precludes liability for an action based on fraud, negligent misrepresentation, or other actions allowed by law"); OHIO REV. CODE ANN. §§ 5302.30(J) and (L) (2010); PA. CONS. STAT. tit. 68, § 7313(a) (2010); TENN. CODE ANN. §§ 66-5-208(a)(1)(a)-(a)(3) and (b) (2010); WASH. REV. CODE § 64.06.070 (2010).

[254] ALASKA STAT. § 34.70.090(b) (2010); HAW. REV. STAT. § 508D-16(c) (2010); IDAHO CODE § 55-2517 (2010); 765 ILL. COMP. STAT. 77/55 (2010); IOWA CODE § 558A.6 (2010); MINN. STAT. § 513.57, Subd. 2 (2010) ("recover damages and receive other equitable relief as determined by the court"); MISS. CODE ANN. § 89-1-523 (2010) (providing that "any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of sections 89-1-501 through 89-1-523 shall be liable in the amount of actual damages suffered by a transferee"); NEB. REV. STAT. § 76-2,120(12) (2010); N.Y. REAL PROP. LAW § 465(2) (2010) (applying to a "willful failure"); OKLA. STAT. § 60-837(B) (2010); PA. CONS. STAT. tit. 68, § 7311(a) (2010); S.D. CODIFIED LAWS ANN. § 43-4-42 (2010); TENN. CODE ANN. § 66-5-208(a)(1) (2010) (for owner's misrepresentations on residential disclosure statement); VA. CODE ANN. § 55-524(B)(2) (Michie 2010).

[255] ALASKA STAT. § 34.70.090(d) (2010); HAW. REV. STAT. § 508D-16(c) (2010); 765 ILL. COMP. STAT. 77/25 (2010); NEB. REV. STAT. § 76-2,120(12) (2010); NEV. REV. STAT. § 113.150(4) (2010); OKLA. STAT. § 60-837(D) (2010); S.C. CODE ANN. § 27-50-65 (2010); S.D. CODIFIED LAWS ANN. § 43-4-42 (2010).

erty to another buyer or transferee, possibly because of the effect of airport noise.

Section 9(d), which is consistent with several state disclosure laws, permits a buyer to recover attorney's fees and costs.

Section 9(e) preserves any other rights and remedies that a buyer may have under state law. For example, although a seller may make the required airport disclosure, the seller could accompany the disclosure with misrepresentations or conceal information known only to a seller regarding an airport's impact on the property. However, consistent with several current disclosure laws, some states may prefer that the Act's remedies supersede all other rights and remedies under state law.[256]

B.10. Limitation of Seller's Liability [257]

A seller is not liable for any error, inaccuracy or omission of any material information provided by a government or governmental agency or by an airport or airport authority on which a seller relied when complying with Sections 4, 5, and 6 of this Act as long as the error, inaccuracy or omission was not within the actual knowledge of the seller.[258]

Comment

Section 10 is intended to protect a seller who has relied on material information provided by a government or governmental agency or by an airport or airport authority that proves to be erroneous, inaccurate, or incomplete. The section is similar to existing disclosure laws that provide that a seller has no liability for information supplied by the government when the seller has no actual knowledge that the information that is material to the transaction is erroneous or inaccurate or omits information.

B.11. Seller's Compliance as Precluding Liability for Airport Changes After Final Settlement

A seller who complies with Sections 4, 5, and 6 has no liability to a buyer regardless of any change in an airport, including its operations, flight paths, or noise, occurring after final settlement.

Comment

Section 11 is intended to protect a seller from any claim arising out of a change in an airport, including airport-related noise. However, some states may want to require a seller to disclose to a buyer whatever the seller knows at the time of the buyer's offer regarding an airport's plans that may affect the airport's future size, operations, or flight paths. If so, a state may want to provide also that a seller has to act in good faith, which in many states means honesty-in-fact.[259]

B.12. Waiver Prohibited[260]

(a) The requirements of this Act may not be waived, orally or in writing, by a buyer of residential real property subject to this Act.

(b) Any waiver signed by or on behalf of a buyer is void *ab initio*.

Comment

Section 12 is the opposite of disclosure laws in a majority of states (that address the issue) that permit a buyer to waive a disclosure act's requirements. Allowing a waiver of an airport disclosure act could undermine the Act's effectiveness as sellers or their brokers or agents could include a standard waiver in real estate contracts to avoid disclosing an airport to a prospective buyer. Nevertheless, some states may want to allow a buyer to waive the protection of an airport disclosure act.

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[256] OKLA. STAT. § 60-638(F) (2010).

[257] ALASKA STAT. § 34.70.030 (2010); CAL. CIV. CODE § 1102.9 (West 2010); DEL. CODE ANN. tit. 6, §§ 2575(1) and (2) (2010); HAW. REV. STAT. § 508D-13 (2010); PA. CONS. STAT. tit. 68, § 7314 (2010); VA. CODE ANN. § 55-521(B) (Michie 2010).

[258] CAL. CIV. CODE § 1102.4(a) (West 2010); CONN. GEN. STAT. § 20-327c (2010); GA. CODE ANN. § 10-6A-5(b)(2) (2010) (applicable to brokers); HAW. REV. STAT. § 508D-9(1) (2010) (stating "[f]acts based on only the seller's personal knowledge"); IDAHO CODE § 55-2507 (2010) ("actually known by the transferor"); 765 ILL. COMP. STAT. 77/25(b) (2010) ("The seller shall disclose material defects of which the seller has actual knowledge."); IND. CODE ANN. § 32-21-5-11(a) (Burns 2010); LA. REV. STAT. 9:3198E.(2) (2010); ME. REV. STAT. ANN. tit. 33, ch. 7, § 177(1); MD. CODE §§ 10-702(e)(2)(viii) and 10-702(e)(3)(iv)(1) and (2) (2010); MICH. COMP. LAWS § 565.955, § 5(1) (2010); MINN. STAT. § 513.57, Subd. 1 (2010); MISS. CODE ANN. § 89-1-505 (2010); NEB. REV. STAT. 76-2,120(8) (2010); NEV. REV. STAT. § 113.150(5)(a) (2010); N.C. GEN. STAT. § 47E-4 (2010); OHIO REV. CODE ANN. § 5302.30(F)(1) (2010); OKLA. STAT. §§ 60-833(B)(1) and 60-835(C) (2010); PA. CONS. STAT. tit. 68, § 7309(b) (2010); R.I. GEN. LAWS §§ 5-20.8-2(a) and 5-20.8-9 (2010); S.C. CODE ANN. §§ 27-50-40(B) and (C) (2010); TENN. CODE ANN. §§ 66-5-204(a) and (b) (2010); VA. CODE ANN. § 55-521(A) (Michie 2010); WASH. REV. CODE § 64.06.050(1).

[259] ALASKA STAT. § 34.70.060 (2010); CAL. CIV. CODE § 1102.7 (West 2010); HAW. REV. STAT. § 508D-7 (2010) (requiring "good faith and due care"); IDAHO CODE §§ 55-2507(5) and 55-2516 (2010) (stating that "good faith means honesty in fact"); LA. REV. STAT. ANN. § 9:3198B.(1) (West 2010); MICH. COMP. LAWS § 565.960, § 10 (2010); MINN. STAT. § 513.55, Subd. 1(b) (2010); MISS. CODE ANN. § 89-1-511 (2010); Ohio REV. CODE ANN. § 5302.30 (Baldwin 2010) (good faith meaning "honesty in fact"); S.D. CODIFIED LAWS ANN. § 43-4-41 (2010).

[260] CAL. CIV. CODE § 1102(c) (West 2010) (stating that "[a]ny waiver of the requirements of this article is void as against public policy"); MD. CODE ANN., REAL PROP. § 10-702(K)(1) (2010) (stating that "[t]he rights of a purchaser under this section may not be waived in the contract of sale and any attempted waiver is void"); WASH. REV. CODE § 64.06.010(7) (2010) (stating that "the buyer may not waive the receipt of the 'Environmental' section of the seller disclosure statement").

B.13. Statute of Limitations[261]

Any legal or equitable action based on noncompliance with the Act must be brought within one year of the date of an executed real estate sales contract if there was no transfer of title to the buyer or transferee, or if there was a transfer of title to the buyer or transferee, within one year of the date of the final settlement on the property.

Comment

Section 13 sets an outermost limit on the initiation of claims for failure to comply with the Act. Current residential real property disclosure laws bar claims after 1 year or at the most 2 years.

C. Suggested Practices for Implementing an Airport Disclosure Act

As seen in Section 2 of the Act, an airport means an airport having a noise exposure map, an airport in a designated airport influence area, or a military AICUZ. If an airport affecting nearby residential property does not have a published noise exposure map or a recorded airport influence area or AICUZ that is readily available to the public then the airport authority (or other responsible authority) may want to designate an airport influence area as defined in Section 2(e) of the Act and record a noise contour map in counties in which any part of an airport is located and make the map available on its Web site.

Another approach is provided by Section 4(b) of the Act that does not involve plotting noise contours on a map. An airport authority could use an existing map showing the airport and its environs that includes all property within 2 mi of the airport and its traffic pattern as defined in Sections 2(b) and 2(o). The map could be made available via the airport or airport authority's Web site. Depending on the circumstances the airport authority may want to extend the map's coverage beyond 2 mi to show the possible impact of the airport's operations on property in the vicinity of the airport.

The Act is drafted so as to make a disclosure statement binding on all future buyers and grantees of the property. However, for the Act to be successful the local real estate industry will need to be informed of a seller's responsibility under the Act and of the Act's particular directives. For example, real estate contracts in use where an airport is located may fail to include an anti-merger clause, and deeds commonly in use are unlikely to refer to an airport disclosure statement or include within the deed an airport disclosure statement.

Thus, real estate brokers and agents, as well as local bar associations and attorneys, will need to be informed of a seller's obligation to disclose an airport (Section 4 of the Act) and that a seller must do so in the manner required by Sections 4, 5, and 6. An airport authority will want to inform sellers, brokers, agents, prospective buyers, city and county recording or land office officials and clerks, and others of the importance of using the disclosure form and notice provided in Sections 5 and 6 so that the form and notice become commonly accepted practice. Besides providing a copy of the form and notice (as well as of the disclosure act) to persons involved in real estate transactions, an airport authority could make the information available on its Web site, as well as provide links for users to download the disclosure law and the Airport Disclosure Statement form and notice.

An airport authority will want to draw special attention to the requirement in Section 6 of the Act that when property subject to the Act is being offered for sale, the real estate contract must provide that the airport disclosure statement survives a transfer of title. Furthermore, if the deed does not incorporate by reference and attach an airport disclosure statement, then the airport disclosure statement and notification prescribed by Section 6 of the Act must be included in the text of the deed. An airport authority may need to make available both an addendum with an anti-merger clause for attachment to a real estate contract and an addendum with the airport disclosure statement and notification that may be attached to a deed. Without an airport authority or other office taking steps to assure that the Act's requirements are being observed, even if an airport disclosure statement is delivered to a buyer, the statement may have no effect after a closing on the property and it would not be binding on future buyers and grantees so as to give them notice of an airport in the vicinity of the property being conveyed.

An airport authority's outreach should include potential home buyers so that they are informed not only of a seller's obligations under the Act but also of a buyer's obligation to inspect a property under Section 7 and of their rights and remedies under Section 8 in the event of a seller's noncompliance. In notifying the public regarding the Act's provisions and obligations, an airport authority would want to note that the methods of giving a proper notice of termination of a contract are set forth in Section 8. Buyers, moreover, should be made aware of their right to actual damages and attorney's fees and costs under Section 9 for a seller's noncompliance, subject to a 1-year statute of limitations.

Finally, if not unduly burdensome for an airport authority, it may want to contact neighborhood associa-

[261] 765 ILL. COMP. STAT. 77/60 (2010) ("No action for violation of this Act may be commenced later than one year from the earlier of the date of possession, date of occupancy, or date of recording of an instrument of conveyance of the residential real property."); NEB. REV. STAT. § 76-2,120(12) (2010) ("Any action to recover damages under the cause of action shall be commenced within one year after the purchaser takes possession or the conveyance of the real property, whichever occurs first."). *See* HAW. REV. STAT. § 508D-17 (2010) (2 years); MINN. STAT. § 513.57, Subd. 2 (2010) (2 years); OKLA. STAT. § 60-837(c) (2010) (2 years); PA. CONS. STAT. tit. 68, § 7311(b) (2010) (2 years).

tions, community groups, local newspapers, and bloggers in areas with property within the boundaries of a noise exposure map, airport influence area, or an AICUZ, or, if those designations are not applicable, property that is within 2 mi (or other distance) of the airport and its traffic pattern as a way of promoting local familiarity with the airport disclosure act and its requirements. In addition to providing information and documents on a Web site, a descriptive brochure with a copy of the law, the form of the airport disclosure statement, and the addenda for a real estate contract and deed would be a helpful take-home package for prospective buyers and sellers, as well as others who need to be aware of the airport disclosure requirements.

CONCLUSION

Although many state legislatures have adopted residential property disclosure laws, only a few states require the disclosure of an airport or of the potential impact of airport noise or other effects on nearby property. The general disclosure laws applicable to residential property have not been construed to require the disclosure of an airport. However, several states have specific disclosure laws requiring sellers to disclose when residential property offered for sale is affected by a public or military airport. Thus, in a few states disclosure may be required regarding property that is within the boundaries of an airport noise exposure map or a designated airport influence area or that is situated in a military AICUZ, terms that are used in the Typical Airport Fair Disclosure Act developed for this report.

There could be some concern whether the enactment of an airport disclosure act would be only an exercise of a state's police power or could amount to a regulatory taking of an owner's property. However, based on current United States Supreme Court decisions, although the law continues to evolve, it does not appear that an airport disclosure act would come within any of the categories of possible regulatory takings. Furthermore, an airport disclosure law is not a restriction on the use of property, nor does it have any effect on the level of airport noise affecting a property's value. Whatever noise impact there is remains the same regardless of whether a seller is required to disclose the presence of an airport.

The disclosure act provisions contained in Section VI of this report are based in part on provisions appearing in many of the current disclosure laws. However, significant provisions included in the TAP to the effect that a disclosure statement must be included in the parties' real estate contract; that the contract must include an anti-merger clause so that it is clear that the contract and disclosure statement survive the delivery of the deed; and that the disclosure statement be recorded with the deed or that the deed must include the prescribed airport disclosure statement and notification are not present in existing airport real property disclosure acts. The intent of suggesting that these provisions be included is to make the disclosure statement binding not only on a present buyer and seller but also on future buyers and grantees of the property.

Finally, for successful implementation of an airport disclosure act, airports and airport authorities would need to engage in community outreach to familiarize buyers and sellers, as well as others involved in residential real estate transactions, with the Act and its disclosure requirements and procedures.

APPENDIX A

REAL ESTATE FAIR DISCLOSURE LAW

The purpose of residential real property disclosure laws is to provide prospective home buyers with sufficient information to enable them to make informed decisions about the purchase of residential property.

I. SELLER'S DUTY TO DISCLOSE PROPERTY DEFECTS OR OFF-SITE CONDITIONS

According to the National Association of Realtors, approximately two-thirds of the states have enacted residential real property disclosure laws.[262] A survey of state statutes conducted for this report reveals that, although the statutes vary, at least 36 states have laws requiring a seller to disclose to a buyer defects in or conditions affecting residential real property that is offered for sale.[263]

In those states without a disclosure act, a seller's obligation or duty to disclose defects of conditions affecting property likely is limited by the rule of *caveat emptor*, a doctrine of "long standing" in the United States.[264] As explained by an Ohio court,

> [t]he principle of *caveat emptor* applies to sales of real estate relative to conditions open to observation. Where those conditions are discoverable and the purchaser has the opportunity for investigation and determination without concealment or hindrance by the vendor, the purchaser has no just cause for complaint even though there are misstatements and misrepresentations by the vendor not so reprehensible in nature as to constitute fraud.…
>
> A seller of realty is not obligated to reveal all that he or she knows. A duty falls upon the purchaser to make inquiry and examination.[265]

Thus, at common law for a seller to be able to defend against a claim under the *caveat emptor* doctrine the defect must be one that is observable or discoverable upon reasonable inspection. A purchaser must have an unimpeded opportunity to examine the property, and a seller must not engage in fraud.[266] Patent defects are those that are open and observable to an ordinarily prudent person conducting a reasonable inspection.[267] Under the *caveat emptor* doctrine, a buyer is obligated to investigate a property to discover any defects or adverse information before purchasing the property "as is."[268] Generally, the rule pre-

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[262] Tanya D. Marsh & Robert G. Solloway, *Survey: Property Law: Let the Seller Beware: The Slow Demise of Caveat Emptor in Real Property Transactions and Other Recent Developments in Indiana Real Property Law*, 38 IND. L. REV. 1317, 1320 (2005).

[263] The following states have residential real property disclosure acts: Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Nebraska, Nevada, New Hampshire (limited to water and sewage), New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington, Wisconsin.

[264] Layman v. Binns, 35 Ohio St. 3d 176, 177, 519 N.E.2d 642, 643 (Ohio 1988).

[265] *Id.*, 35 Ohio St. 3d at 177, 519 N.E.2d at 643–644 (holding that the sellers did not engage in fraud because the defect could have been detected by inspection and that the buyers failed to show any affirmative misrepresentation of a material fact).

[266] *Id.*, 35 Ohio St. 3d at 178, 519 N.E.2d at 644. In regard to the rule of caveat emptor and commercial property, see Kathleen McNamara Tomcho, *Note: Commercial Real Estate Buyer Beware: Sellers May Have the Right to Remain Silent*, 70 S. CAL. L. REV. 1571, 1575–76 (1997). *See also* Holmes v. Couturier, 452 N.W.2d 135, 137 (S.D. 1990) (holding that fraud will "vitiate any contract" even if the other party accepted the property "as is"); Haygood v. Burl Pounders Realty, Inc., 571 So. 2d 1086 (Ala. 1990); Nei v. Burley, 388 Mass. 307, 310, 446 N.E.2d 674, 676 (1983) (stating that "[s]ellers and brokers who represent sellers are not liable in fraud for failing to disclose every latent defect known to them which reduces materially the value of the property and of which the buyer is ignorant").

[267] Tomcho, *supra* note 266, at 1571, 1585.

[268] Van Camp v. Bradford, 63 Ohio Misc. 2d 245, 252, 256, 623 N.E.2d 731, 736, 738 (Ohio C.P. 1993) (stating, however, that the legislature's enactment of a residential real property disclosure law (citing OHIO REV. CODE ANN. § 5302.30) was "a bold step toward ameliorating the harsh application of caveat emptor in even patent defect real estate transactions" and that "[a] seller who is under a duty to disclose facts and fails to do so will be held liable for damages directly and proximately resulting from his silence").

vents a buyer from suing a seller to rescind a transaction or for damages even though the seller knew of undisclosed defects or conditions affecting the property.[269]

The rule of caveat emptor does not exclude a buyer's rights to rescission or damages when a seller has committed a fraud in connection with a sale or when a buyer purchases property subject to express or implied warranties.[270] A seller also may be held liable for misrepresentations by his or her broker or agent.[271]

Disclosure may concern either on-site conditions associated with a building or property or off-site conditions, such as nearby highways, sewage treatment plants, or stadium lights. In the states where sellers have a duty at common law to disclose off-site defects, disclosure is required for defects that are known to the seller, that are unknown to and not readily observable by the buyer, and that are material.[272] In California, a seller has a common law duty to disclose facts known to the seller that materially affect the value or desirability of the property—facts that are known by or are accessible only to the seller, who also knows that the facts are not observable by a buyer.[273] A New York court held that a seller had no duty to disclose a local government's plan to remove a nearby subway location, because the transit authority's application to remove the station and the city's denial of the application were facts that were readily ascertainable by the plaintiffs' simple perusal of the public records.[274]

In contrast, New Jersey has "long since discarded the doctrine of *caveat emptor* with regard to the sale of real estate."[275] In *Strawn v. Canuso*,[276] New Jersey's Supreme Court held that a builder-developer and its broker had a duty to advise prospective purchasers of

> off-site physical conditions known to [the seller] and unknown and not readily observable by the buyer if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and, therefore, render the property substantially less desirable or valuable to the objectively reasonable buyer.[277]

Not long after the *Strawn* decision, the New Jersey legislature enacted a New Residential Construction Off-Site Conditions Disclosure Act.

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[269] *Layman*, 35 Ohio St. 3d at 177, 519 N.E.2d at 644 ("A seller of realty is not obligated to reveal all that he or she knows. A duty falls upon the purchaser to make inquiry and examination").

[270] *Haygood*, 571 So. 2d at 1089 (holding that when a real estate purchase agreement states that there is no warranty or guarantee of the condition of the property or any equipment therein, the purchasers may not rely on a seller's previous statements); *Nei*, 388 Mass. at 310, 446 N.E.2d at 676 (sellers' failure to disclose a seasonal stream that ran through a pipe or culvert onto the property was a mere nondisclosure that failed to amount to fraud).

[271] *Norton*, 443 A.2d at 5 (holding that one who delegates the power to act to an agent is responsible for what is done pursuant to that authority and that a seller may not assert innocence or lack of knowledge of the agent's actions as a defense).

[272] Florrie Young Roberts, *Off-Site Conditions and Disclosure Duties: Drawing the Line at the Property Line*, 2006 BYU L. REV. 957, 960 (2006) (citing cases applying "the traditional analysis for the duty to disclose on-site conditions to determine whether sellers also have a duty to disclose off-site conditions").

[273] Alfaro v. Cmty. Hous. Improvement Sys. & Planning Ass'n, Inc., 171 Cal. App. 4th 1356, 1382, 89 Cal. Rptr. 3d 659 (2009) (citing Lingsch v. Savage, 213 Cal. App. 2d 729, 735, 29 Cal. Rptr. 201, 205 (1963); Reed v. King, 145 Cal. App. 3d 261, 265, 193 Cal. Rptr. 130, 131 (1983). The Alfaro court noted that there is now a statutory duty in California to disclose deed restrictions in a real estate transfer disclosure statement. *Id*. (citing CAL. CIV. CODE § 1102.6).

[274] Saslow v. Novick, 19 Misc. 2d 712, 713, 191 N.Y.S.2d 645, 648–49 (1959).

[275] Boschen v. Campanelli, 2007 N.J. Super. LEXIS 994, at *3 (N.J. Super. Ct. App. Div. 2007 (Unrpt.)) (citing Weintraub v. Krobatsch, 64 N.J. 445, 317 A.2d 68 (1974) (holding that a seller of real estate had a duty to disclose to a prospective purchaser that the house was infested with cockroaches and that a breach of that duty could entitle the purchaser to rescind the contract).

[276] 140 N.J. 43, 657 A.2d 420 (1995), superseded by statute as stated in Aden v. Fortsh, 169 N.J. 64, 776 A.2d 792 (2001).

[277] *Id*. at 65, 657 A.2d at 431.

II. STATE RESIDENTIAL REAL PROPERTY DISCLOSURE LAWS

A. Real Property Subject to a Disclosure Requirement

Disclosure statements required by state residential real property disclosure laws have many common features. Most of the present disclosure laws do not require the disclosure of an airport affecting property offered for sale.

Many of the current disclosure laws define the term real property to mean residential real property consisting of one to four dwellings units.[278] Vacant or unimproved land usually is not subject to the disclosure laws. Minnesota's act exempts "real property that is not residential property,"[279] whereas Maryland's statute specifically excludes "[a] sale of unimproved property" from any disclosure requirement.[280] Disclosure statutes in general have not been applied to sellers of commercial real property.[281]

B. Timing, Proof of Delivery, Amendments, and Waiver of Disclosure Statements

B.1. Time of Disclosure

Many disclosure laws require that sometime before or at the time of a buyer's offer to purchase residential real property, or before or at the time of the execution of a real estate contact, a seller must deliver to a buyer in person or by mail a written disclosure statement, the form of which may be prescribed by the statute.[282] Another example of timing is to require that a disclosure must be made prior to the time of transfer of the title to the real property.

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[278] ALASKA STAT. § 34.70.200 (2010); DEL. CODE ANN. tit. 6, § 2571 (2010); HAW. REV. STAT. § 508D-1 (2010); 765 ILL. COMP. STAT. 77/5 (2010); ME. REV. STAT. ANN. tit. 33, § 171(6) (West 2010) (stating that "'[r]esidential real property' means real estate consisting of one or not more than 4 residential dwelling units"); MD. CODE ANN., REAL PROP. § 10-702(b)(1) (2010); MICH. COMP. LAWS § 565.952, § 2 (2010); MISS. CODE ANN. § 89-501(1) (2010); NEB. REV. STAT. § 76-2,120(1)(c) (2010) (stating that "[r]esidential real property shall mean real property which is being used primarily for residential purposes on which no fewer than one or more than four dwelling units are located"); NEV. REV. STAT. § 113.100(4) (2010); N.C. GEN. STAT. § 47E-1 (2010); PA. CONS. STAT. tit. 68, § 7302 (2010) (statute applicable to all real estate transfers with some exceptions); S.C. CODE ANN. § 27-50-10(8) (2010) (providing that "'real property' means lot or parcel and the dwelling unit"); S.D. CODIFIED LAWS ANN. § 43-4-37 (2010); TENN. CODE ANN. § 66-5-201 (2010) (applicable to residential real property of not less than one or more than four dwelling units); VA. CODE ANN. § 55-517 (Michie 2010) (residential property of one to four units); WASH. REV. CODE § 64.06.005 (2010).

[279] MINN. STAT. § 513.54(1) (2010).

[280] MD. CODE ANN., REAL PROP. § 10-702(b)(2)(vii) (2010). *See also* MISS. CODE ANN. § 89-1-501(h) (2010) (exempting "[t]ransfers of real property on which no dwelling is located").

[281] Tomcho, supra note 266, at 1571, 1573 (1997).

[282] ALASKA STAT. §§ 34.70.010(a) and (b) (2010) (requiring that disclosure must occur prior to "transfer of title" and "as soon as practicable before execution" of a real estate sales contract); CAL. CIV. CODE §§ 1102.3(a) and (b) (West 2010); CONN. GEN. STAT. § 20-327b(a) (2010) ("Except as otherwise provided in this section, each person who offers residential property in the state for sale, exchange or for lease with option to buy, shall provide a written residential condition report to the prospective purchaser at any time prior to the prospective purchaser's execution of any binder, contract to purchase, option, or lease containing a purchase option."); DEL. CODE ANN. tit. 6, §§ 2572(b) and 2573 (2010); HAW. REV. STAT. §§ 508D-4(1)(A) and (B) (2010) (requiring the delivery of a disclosure statement "within six months before or ten calendar days after the acceptance of a real estate purchase contract by the buyer"); IDAHO CODE § 55-2509 (2010); 765 ILL. COMP. STAT. 77/20 (2010); IND. CODE ANN. § 32-21-5-10(a) (Burns 2010); IOWA CODE § 558A.2(1) (2010); LA. REV. STAT. ANN. 9:3198B.(2) (West 2010); ME. REV. STAT. ANN. tit 33, § 174(1) (West 2010); MD. CODE ANN., REAL PROP. § 10-702(e)(4)(f)(1) (2010); MICH. COMP. LAWS § 565.954, § 4(1) (2010); MISS. CODE ANN. §§ 89-1-503(a) and (b) (2010); NEB. REV. STAT. § 76-2,2120(7) (2010); NEV. REV. STAT. §§ 113.080(1) (2010) (applicable to counties whose population is 400,000 or more relating to the disclosure of gaming enterprise districts) and 113.130(1) (2010); N.J. STAT. ANN. § 46:3C-8 (2010); N.C. GEN. STAT. § 47E-5(a) (2010); OHIO REV. CODE ANN. § 5302.30(C) (Baldwin 2010); OKLA. STAT. § 60-834(A) (2010); OR. REV. STAT. § 105.464 (2010) (see buyer's acknowledgment); R.I. GEN. LAWS § 5-20.8-2(a) (2010); S.D. CODIFIED LAWS ANN. § 43-4-38 (2010); TENN. CODE ANN. § 66-5-203(a) (2010) (requiring delivery of disclosure statement prior to acceptance of the real estate contract); VA. CODE ANN. § 55-520(A) (Michie 2010); WASH. REV. CODE § 64.06.030 (2010) ("Unless the buyer has expressly waived the right to receive the disclosure statement, not later than five business days or as otherwise agreed to, after mutual acceptance of a written agreement between a buyer and a seller for the purchase and sale of residential real property, the seller shall deliver to the buyer a completed, signed, and dated real property transfer disclosure statement."); WIS. STAT. § 709.02(1) (2010).

B.2. Proof of Disclosure

Current real property disclosure laws require that there must be proof that a disclosure statement was delivered to a buyer. Although the states' approaches vary, the disclosure laws ordinarily require that a disclosure statement be signed, that the signed real estate contact include the disclosure statement as an addendum, or that a buyer sign a receipt for the delivery of a disclosure statement.[283] For example, in Delaware a seller or a seller's agent must give a copy of the disclosure form "to all prospective buyers or prospective buyer's agent prior to the time the buyer makes an offer to purchase," and the disclosure form signed by the buyer and seller must "become a part of the purchase agreement."[284] However, unlike Delaware's statute, very few of the disclosure laws require that a disclosure statement must be made a part of the parties' real estate contract; in fact, some states provide that a "statement is for disclosure only and is not intended to be a part of any contract between the purchaser and the seller."[285]

B.3. Amendments to a Disclosure Statement

A disclosure statement may become inaccurate after its initial delivery to a buyer, or there may be a material change affecting the property after the statement's delivery.[286] Some disclosure laws require that after a seller delivers a disclosure statement and prior to an executed contract or a transfer of the property by deed a seller must amend a disclosure statement that fails to include required information or that has become inaccurate.[287]

B.4. Waiver of Disclosure Statement

A majority of the states' disclosure laws that address the issue permit a buyer to waive the requirements of the disclosure act.[288] A minority of the states expressly prohibit a buyer's waiver of disclosure requirements.[289]

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[283] CAL. CIV. CODE §§ 1102.3 and 1102.12 (West 2010) (authorizing delivery by a real estate agent); CONN. GEN. STAT. § 20-327b(a) (2010); HAW. REV. STAT. § 508D-4(2) (2010); IDAHO CODE § 55-2509 (2010); MISS. CODE ANN. § 89-1-503 (2010); NEB. REV. STAT. § 76-2,120(7) (2010); NEV. REV. STAT. § 113.070(2) (2010) (stating that "[t]he seller shall retain a copy of the disclosure document which has been signed by the initial purchaser acknowledging the date of receipt by the initial purchaser of the original document"); N.Y. REAL PROP. LAW § 462 (Consol. 2010) (stating that "[a] copy of the property condition disclosure statement containing the signatures of both seller and buyer shall be attached to the real estate purchase contract"); OHIO REV. CODE ANN. § 5302.30(I) (Baldwin 2010); OKLA. STAT. § 60-834(D) (2010); R.I. GEN. LAWS §§ 5-20.8-2(a) and 5-20.8-5(a) (2010) ("Every agreement for the purchase and sale of residential real estate located in the state shall contain an acknowledgement that a completed real estate disclosure form has been provided to the buyer by the seller.").

[284] DEL. CODE ANN. tit. 6, § 2573 (2010).

[285] ME. REV. STAT. ANN. tit. 33, § 176(1) (West 2010); *see also* IND. CODE ANN. § 32-21-5-7(3) (Burns 2010).

[286] ALASKA STAT. § 34.70-040; CAL. CIV. CODE § 1102.5 (West 2010) ("If information disclosed in accordance with this article is subsequently rendered inaccurate as a result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this article."); IDAHO CODE § 558A.3(2) (2010); ME. REV. STAT. ANN. tit. 33, § 175(2) (West 2010) ("If prior to settlement or occupancy a seller has actual knowledge of an error, inaccuracy or omission in the disclosure after delivery of the property disclosure statement to purchaser, the seller shall supplement the property disclosure statement with a written supplemental disclosure."); MINN. STAT. § 513.58, Subd. 1 (2010) ("A seller must notify the prospective buyer in writing as soon as reasonably possible, but in any event before closing, if the seller learns that the seller's disclosure required by section 513.55 was inaccurate."); N.Y. REAL PROP. LAW § 464 (Consol. 2010); N.C. GEN. STAT. § 47E-7 (2010); OHIO REV. CODE ANN. § 5302.30(G) (Baldwin 2010); OKLA. STAT. § 60-834(C) (2010); PA. CONS. STAT. tit. 68, §§ 7307 and 7312 (2010); TENN. CODE ANN. § 66-5-205 (2010); VA. CODE ANN. § 55-522 (Michie 2010).

[287] WASH. REV. CODE § 64.06.040(1) (2010) (requiring an amendment when a "seller becomes aware of additional information, or an adverse change occurs which makes any of the disclosures made inaccurate").

[288] ALASKA STAT. § 34.70.110 (2010); ME. REV. STAT. ANN. tit. 33, § 174(4) (West 2010); MINN. STAT. § 513.60 (2010); S.C. CODE ANN. § 27-50-110 (2010); N.Y. REAL PROP. LAW § 462 (Consol. 2010)

> Nothing contained in this article or this disclosure statement is intended to prevent the parties to a contract of sale from entering into agreements of any kind or nature with respect to the physical condition of the property to be sold, including, but not limited to, agreements for the sale of real property "as is."

TENN. CODE ANN. § 66-5-202(2) (2010) (purchaser may waive); WASH. REV. CODE § 64.06.010(7) (2010).

[289] CAL. CIV. CODE § 1102(c) (West 2010) (stating that "[a]ny waiver of the requirements of this article is void as against public policy"); MD. CODE ANN., REAL PROP. § 10-702(K)(1) (2010) (stating that "[t]he rights of a purchaser under this section may not be waived in the contract of sale and any attempted waiver is void"); WASH. REV. CODE § 64.06.010(7) (2010) (providing that a buyer may not waive receipt of environmental section of the disclosure statement).

C. Seller's Disclosure Obligations

C.1. Duty to Disclose Limited to Seller's Actual or Personal Knowledge

Under present disclosure laws, sellers and/or their agents generally are not liable for errors or omissions regarding matters of which they had no actual or personal knowledge. In addition, a seller is not liable or responsible for the accuracy or veracity of information supplied by governmental agencies that a seller provides to a buyer.[290] Some of the disclosure laws allow a seller to provide a buyer with the report of an expert.[291]

C.2. Disclosure as a Representation or Warranty by a Seller

The distinction between a representation and a warranty is quite important, because for a buyer to recover for a breach of a representation, the buyer must prove fraud, whereas for a breach of warranty. a buyer must prove only that a statement was made or implied and that it was false.[292] Some disclosure laws provide that a seller's representation in a residential disclosure report does not constitute a warranty to the buyer.[293]

For either a representation or a warranty in a disclosure statement to be actionable after a transfer of title. the better practice is to attach the disclosure statement to the sales contract and include an anti-merger clause in the contract so that the contract and disclosure statement are not merged in a deed of conveyance.[294]

C.3. Seller's Good Faith or Honesty in Fact

Some disclosure laws require sellers to act in good faith when disclosing property defects and conditions affecting a property offered for sale. Often the term "good faith" is defined to mean "honesty in fact."[295]

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[290] CAL. CIV. CODE § 1102.4(a) (West 2010); CONN. GEN. STAT. § 20-327c (2010); GA. CODE ANN. § 10-6A-5(b)(2) (2010) (applicable to brokers); HAW. REV. STAT. § 508D-9(1) (2010) (stating "[f]acts based on only the seller's personal knowledge"); IDAHO CODE § 55-2507 (2010) ("actually known by the transferor"); 765 ILL. COMP. Stat. 77/25(b) (2010) ("The seller shall disclose material defects of which the seller has actual knowledge."); IND. CODE ANN. § 32-21-5-11(a) (Burns 2010); LA. REV. STAT. ANN. 9:3198E.(2) (West 2010); ME. REV. STAT. tit. 33, § 177(1) (2010); MD. CODE ANN., REAL PROP. §§ 10-702(e)(2)(viii) and 10-702(e)(3)(iv)(1) and (2) (2010); MICH. COMP. LAWS § 565.955, § 5(1) (2010); MINN. STAT. § 513.57, Subd. 1 (2010); MISS. CODE ANN. § 89-1-505 (2010); NEB. REV. STAT. 76-2,120(8) (2010); NEV. REV. STAT. § 113.150(5)(a) (2010); N.C. GEN. STAT. § 47E-4 (2010); OHIO REV. CODE ANN. § 5302.30(F)(1) (Baldwin 2010); OKLA. STAT. §§ 60-833(B)(1) and 60-835(C) (2010); PA. CONS. STAT. tit. 68, § 7309(b) (2010); R.I. GEN. LAWS §§ 5-20.8-2(a) and 5-20.8-9 (2010); S.C. CODE ANN. §§ 27-50-40(B) and (C) (2010); TENN. CODE ANN. §§ 66-5-204(a) and (b) (2010); VA. CODE ANN. § 55-521(A) (Michie 2010); WASH. REV. CODE § 64.06.050(1) (2010).

[291] COMP. LAWS § 565.955, § 5(3) (2010); MINN. STAT. § 513.53, Subd. 3 (2010); MISS. CODE ANN. § 89-1-505(3) (2010); NEV. REV. STAT. § 113.150(5)(b) (2010); N.C. GEN. STAT. § 47E-6 (2010)

> (The owner may discharge the duty to disclose imposed by this Chapter by providing a written report attached to the residential property disclosure statement by a public agency or by an engineer, land surveyor, geologist, pest control operator, contractor, home inspector or other expert, dealing with matters within the scope of the public agency's functions or the expert's license or expertise. The owner shall not be liable for any error, inaccuracy, or omission of any information delivered pursuant to this section if the error, inaccuracy, or omission was made in reasonable reliance upon the information provided by the public agency or expert and the owner was not grossly negligent in obtaining the information or transmitting it.)

R.I. GEN. LAWS § 5-20.8-8(a) (2010); TENN. CODE ANN. § 66-5-204 (2010); VA. CODE ANN. § 55-521(C) (Michie 2010); WIS. STAT. § 709.02(1) (2010).

[292] Marsh & Solloway, *supra* note 262, at 1317, 1321 (2005).

[293] CONN. GEN. STAT. § 20-327b(d)(2)(D) (2010); DEL. CODE ANN. tit. 6, § 2574 (2010); Md. CODE ANN., REAL PROP. §§ 10-702(e)(3)(iv)(1) and (2) and (i)(1) (2010) ((providing that a "disclosure statement is not a warranty by the vendor as to…[t]he condition of the property of which the vendor has no actual knowledge; or…[o]ther conditions of which the vendor has no actual knowledge").

[294] Tomcho, *supra* note 266, at 1571, 1579.

[295] ALASKA STAT. § 34.70.060 (2010); CAL. CIV. CODE § 1102.7 (West 2010); HAW. REV. STAT. § 508D-7 (2010) (requiring "good faith and due care"); IDAHO CODE §§ 55-2507(5) and 55-2516 (2010) (stating that "good faith means honesty in fact"); LA. REV. STAT. ANN. § 9:3198B.(1) (West 2010); MICH. COMP. LAWS § 565.960, § 10 (2010); MINN. STAT. § 513.55, Subd. 1(b) (2010); MISS. CODE ANN. § 89-1-511(2010); OHIO REV. CODE ANN. § 5302.30 (Baldwin 2010) (good faith meaning "honesty in fact"); S.D. CODIFIED LAWS ANN. § 43-4-41 (2010).

C.4. Disclosure as Precluding a Seller's Liability

According to state disclosure laws, a seller's compliance with a disclosure requirement precludes the seller's liability for defects or conditions affecting the seller's property.[296] In Delaware, a buyer does not have a cause of action against a seller or his agent for material defects that were disclosed prior to a buyer's offer to purchase, material defects that developed after a buyer's offer but that were disclosed prior to final settlement, or material defects that occurred after final settlement.[297]

D. Transfers Exempt from Disclosure Requirement

Current disclosure laws commonly exempt from as few as four to as many as 12 specific types of transfers of residential real estate. One fairly common exemption is for a first sale of residential property that has never been occupied or inhabited.[298] Although such an exemption may be justified for defects in new dwellings that may be under warranty, it is questionable whether such an exemption is appropriate in an airport disclosure act.

The California statute is an example of a disclosure law with an extensive list of exemptions, including transfers pursuant to various kinds of court orders;[299] transfers to a mortgagee resulting from a default under a mortgage or because of a foreclosure sale;[300] transfers by a fiduciary;[301] transfers between co-owners[302] or spouses;[303] and some transfers or exchanges to or from a governmental entity,[304] as well as other exempt transfers.[305]

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[296] ALASKA STAT. § 34.70.030 (2010); CAL. CIV. CODE § 1102.9 (West 2010); HAW. REV. STAT. § 508D-13 (2010); PA. CON. STAT. tit. 68, § 7314 (2010); VA. CODE ANN. § 55-521(B) (Michie 2010).

[297] DEL. CODE ANN. tit. 6, §§ 2575(1) and (2) (2010).

[298] ALASKA STAT. § 34.70.120; CONN. GEN. STAT. § 20-3276(b)(4) (2010) (exempting "newly constructed residential real property"); HAW. REV. STAT. § 508D-3(6) (2010) (exempting "[i]nitial sale of new residential property"); IDAHO CODE § 55-2505(12) (2010) (exempting "[a] transfer that involved newly constructed residential real property that previously has not been inhabited"); 765 ILL. COMP. STAT. 77/15 (9) (2010); IND. CODE ANN. § 32-21-5-1(b)(8) (Burns 2010); KY. REV. STAT. ANN. § 324.360(7) (2010); MD. CODE ANN., REAL PROP. § 10-702(b)(2)(i)(1) (2010); MINN. STAT. § 513.54(10) (2010); NEB. REV. STAT. § 76-2,120(6)(k) (2010); N.Y. REAL PROP. LAW § 463(12) (Consol. 2010); N.C. GEN. STAT. § 47E-2(9) (2010); OHIO REV. CODE ANN. § 5302.30(B)(2)(l) (Baldwin 2010); OKLA. STAT. § 60-838(9) (2010); R.I. GEN. LAWS § 5-20.8-3(8) (2010); S.C. CODE ANN. § 27-50-30(10) (2010); S.D. CODIFIED LAWS ANN. § 43-44-43(6) (2010); TENN. CODE ANN. § 66-5-209(9) (2010) (exempting first sale "provided the builder offers a written warranty"); VA. CODE ANN. § 55-518(9) (Michie 2010).

[299] CAL. CIV. CODE § 1102.2(b) (West 2010).

[300] *Id*. § 1102.2(c) (West 2010).

[301] *Id*. § 1102.2(d) (West 2010). The subsection also states that "[t]his exemption shall not apply to a transfer if the trustee is a natural person who is sole trustee of a revocable trust and he or she is a former owner of the property or an occupant in possession of the property within the preceding year."

[302] *Id*. § 1102.2(e) (West 2010).

[303] *Id*. §§ 1102.2(f) and(g) (West 2010).

[304] *Id*. § 1102.2(j) (West 2010). *See also* CONN. GEN. STAT. § 20-327b(b) (2010); DEL. CODE ANN. tit. 6, §§ 2577(1)-(9) (2010); HAW. REV. STAT. §§ 508D-3(1)-(8) (2010); IOWA CODE §§ 558A.1(4) (a)-(h) (2010); ME. REV. STAT. ANN. tit. 33, §§ 172(1)-(12) (West 2010); MD. CODE ANN., REAL PROP. §§ 10-702(b)(i)(2)(ii-(vii) (2010); MICH. COMP. LAWS § 565.953, §§ 3(a)-(i) (2010); MISS. CODE ANN. § 89-1- 501(2)(g) (2010) (exempting as do some other acts "[t]ransfers or exchanges to or from any government entity"); NEB. REV. STAT. §§ 76-2,120(6)(a)-(l) (2010); NEV. REV. STAT. §§ 113.115(3)(a)-(d) (2010); N.Y. REAL PROP. LAW §§ 463(1)-(14) (Consol. 2010); N.C. GEN. STAT. §§ 47E-2(1)-(11) (2010); OHIO REV. CODE ANN. §§ 5302.30(B)(2)(a)-(n) (Baldwin 2010); OKLA. STAT. § 60-838(A)(1) (2010); R.I. GEN. LAWS §§ 5-20.8-3(1)-(10) (2010); S.C. CODE ANN. §§ 27-50-30(1)-(15) (2010); S.D. CODIFIED LAWS ANN. §§ 43-4-43(1)-(6) (2010); TENN. CODE ANN. §§ 66-5-209(1)-(12) (2010); VA. CODE ANN. §§ 55-518(1)-(9) (Michie 2010); WASH. REV. CODE §§ 64.06.010(1)-(7) (2010); WIS. STAT. §§ 709.01(2)(a)-(d) (2010).

[305] CAL. CIV. CODE §§ 1102.2(h) (West 2010) (exempting "[t]ransfers by the Controller in the course of administering Chapter 7 (commencing with Section 1500) of Title 10 of Part 3 of the Code of Civil Procedure") and 1102.2(i) (exempting "[t]ransfers under Chapter 7 (commencing with Section 3691) or Chapter 8 (commencing with Section 3771) of Part 6 of Division 1 of the Revenue and Taxation Code").

E. Disclosure of All Material Facts or Off-Site Conditions

Several states' disclosure laws require a seller to disclose all "material defects."[306] In Minnesota a seller must disclose "*all material facts* of which the seller is aware that could adversely and significantly affect (1) an ordinary buyer's use and enjoyment of the property; or (2) any intended use of the property of which the seller is aware."[307] (emphasis supplied). Furthermore, a seller's "disclosure must be made in good faith and based upon the best of the seller's knowledge at the time of the disclosure."[308]

Statutes in some states are more specific regarding the disclosure of off-site conditions. Disclosure statutes may require a seller to disclose a "former federal or state ordnance location"[309] or when a "property is adjacent to, or zoned to allow, an industrial use."[310] A seller may be obligated to disclose "transportation maps and plans;"[311] adverse physical conditions in the immediate neighborhood within 1 mi of the property that could not be discovered by a buyer upon a diligent inspection or review of government documents;[312] or property that is near "grazing on the open range"[313] or agricultural operations.[314] It is not uncommon for a disclosure law to require a seller to disclose matters relating to zoning and land use affecting a property offered for sale.[315] For example, a seller may be required to disclose designations in a master plan regarding land use for the adjoining parcels of land.[316] In contrast, under the Connecticut disclosure statute, a seller is not liable "for [the] failure to disclose [the] existence of hazardous waste facilities."[317]

In some states, local governments are authorized to decide whether to require the disclosure of conditions affecting residential real property, as in Michigan.[318]

However, in Pennsylvania, a municipality or local authority does not have the power to mandate that a seller make "any particular d isclosures" to a buyer regarding a residential real estate transfer[319] or require that "provisions on any particular subject be included in an agreement of transfer."[320]

Although an airport safety zone and an airport must be disclosed as off-site conditions under two New Jersey acts, as set forth in Section II of this report, no disclosure laws in other states, as well as cases, were located that specifically require the disclosure of an airport as an off-site condition.

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[306] DEL. CODE ANN. tit. 6, § 2572(a) (2010); HAW. REV. STAT. § 508D-1 (2010) ("'Material fact' means any fact, defect, or condition, past or present, that would be expected to measurably affect the value to a reasonable person of the residential real property being offered for sale."); IDAHO CODE § 55-2508 (2010) (requiring disclosure of "[a]ny other problems"); 765 ILL. COMP. STAT. 77/30(1) (2010)

(In this form, "material defect" means a condition that would have a substantial adverse effect on the value of the residential real property or that would significantly impair the health or safety of future occupants of the residential real property unless the seller reasonably believes that the condition has been corrected.).

[307] MINN. STAT. § 513.55, Subds. 1(a)(1) and (2) (2010).

[308] *Id*. § 513.55, Subd. 1(b) (2010).

[309] CAL. CIV. CODE § 1102.15 (West 2010).

[310] *Id*. § 1107.17 (West 2010).

[311] GA. CODE ANN. § 10-6A-5(b)(2) (West 2010).

[312] *Id*. § 10-6A-5(b)(1) (2010) (emphasis supplied) (e.g., reasonably available governmental regulations, documents, records, maps, and statistics; land use maps and plans; zoning ordinances; recorded plats and surveys; transportation maps and plans; maps of flood plains; tax maps; school district boundary maps; and maps showing the boundary lines of governmental jurisdictions).

[313] NEV. REV. STAT. §§ 113.065(1) and (3) (2010).

[314] WASH. REV. CODE § 64.06.022 (2010).

[315] N.C. GEN. STAT. § 47E-4(b)(5) (2010) (requiring a seller to disclose "[t]he zoning laws, restrictive covenants, building codes, and other land use restrictions affecting the real property, any encroachment of the real property from or to adjacent real property, and notice from any governmental agency affecting this real property").

[316] NEV. REV. STAT. § 113.070(1) (2010).

[317] CONN. GEN. STAT. § 20-327f(c) (2010).

[318] MICH. COMP. LAWS § 565.959, § 9 (2010) (stating that a "city, township, or county may require disclosures in addition to those disclosures required by [state law], and may require disclosures on a different disclosure form in connection with transactions subject to this act").

[319] PA. CONS. STAT. tit. 68, §§ 7311 and 7315(a)(1) (2010).

[320] *Id*. § 7315(a)(2) (2010).

F. Buyer's Obligation to Inspect Property

In several states a seller's compliance with a disclosure requirement is not a substitute for an inspection of the property by a buyer or an excuse for a buyer not to exercise reasonable care.[321] Some disclosure laws state that a seller's disclosure statement is neither a warranty nor "a substitute for any expert inspection, professional advice, or warranty that the buyer may wish to obtain."[322]

G. Effect of Nondisclosure on a Transfer of Real Property

Current disclosure laws typically provide that a transfer of real property that was made without a seller's compliance with a disclosure requirement is not void or invalidated[323] or does not create any defect in title.[324]

H. Buyer's Remedies for a Seller's Violation of a Disclosure Act

H.1. Buyer's Right to Withdraw an Offer or Rescind a Sales Contract

Current disclosure laws usually provide that if a disclosure statement has not been delivered to a buyer or if a disclosure statement is discovered to be inaccurate or misleading prior to the closing on the property, a buyer within a specified number of days may withdraw an offer or rescind a resulting sales contract in the manner specified by the statute.[325] Although a buyer presumably may withdraw an offer at any time prior to a seller's acceptance, clearly specifying a buyer's right to withdraw could be important, for example, when a buyer bids at an auction or makes a firm offer.[326]

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[321] DEL. CODE ANN. tit. 6, § 2574 (2010) (seller's completed disclosure form not a substitute for any inspections or warranties that the seller or buyer may wish to obtain); GA. CODE ANN. § 10-6A-5(b)(2) (2010); IDAHO CODE § 55-2507(4) (2010); NEV. REV. STAT. § 113.140(3) (2010) ("Neither this chapter nor chapter 645 of NRS relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself."); OHIO REV. CODE ANN. § 5302.30(D)(1) (Baldwin 2010); OKLA. STAT. § 60-833(B)(2)(c) (2010); R.I. GEN. LAWS § 5-20.8-2(b) (2010); S.C. CODE ANN. § 27-50-80 (2010).

[322] HAW. REV. STAT. § 508D-1(3) (2010). *See also* DEL. CODE ANN. tit. 6, § 2574 (2010) (not a warranty); IDAHO STAT. § 55-2507(3) (2010); IND. CODE ANN. § 32-21-5-9 (Burns 2010); KY. REV. STAT. ANN. § 324.360(7) (2010); LA. REV. STAT. ANN. § 3198(D)(1) (West 2010); ME. REV. STAT. ANN. tit. 33, § 176(1) (West 2010) ("A property disclosure statement and any supplement to a property disclosure statement are not a warranty by the seller. The information in the disclosure statement is for disclosure only and is not intended to be a part of any contract between the purchaser and the seller."); MICH. COMP. LAWS § 565.951, § 7(1) (2010); MISS. CODE ANN. § 89-1-509 (2010); NEB. REV. STAT. §§ 76-2,121(3)(e), (f), and (g) (2010); NEV. REV. STAT. § 113.130 (2010) ("A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property."); OHIO REV. STAT. ANN. § 5302.30(D)(1) (2010); OKLA. STAT. § 60-832(10) (2010); OR. REV. STAT. § 10, 105.464 (2010); R.I. GEN. LAWS § 5-20.8-2(b) (2010); S.D. CODIFIED LAWS ANN. § 43-4-44 (2010); TENN. CODE ANN. §§ 66-5-201 and 66-5-210 (2010); VA. CODE ANN. § 55-518(B) (Michie 2010); and WASH. REV. CODE § 64.06.015 (2010).

[323] ALASKA STAT. § 34.70.090(a) (2010); CAL. CIV. CODE § 1102.13 (West 2010); IDAHO CODE § 55-2517 (2010); IND. CODE ANN. §§ 32-21-5-10(c) and 32-21-5-7(3) (Burns 2010); IOWA CODE § 558A.8 (2010); LA. REV. STAT. ANN. 9:3198B.1(3)(c) (West 2010); ME. REV. Stat. Ann. tit. 33, § 176(1) (West 2010); MICH. COMP. LAWS § 565.964, § 14 (2010); MINN. STAT. § 513.59 (2010); MISS. CODE ANN. § 89-1-523 (2010); NEB. REV. STAT. § 76-2,120(11) (2010); OHIO REV. CODE ANN. § 5302.30(K)(1) (Baldwin 2010); OKLA. STAT. § 60-837(E) (2010); PA. CONS. STAT. tit. 68, § 7311(a) (2010); R.I. GEN. LAWS § 5-20.8-5(b) (2010); S.C. CODE ANN. § 27-50-50(B) (2010); S.D. CODIFIED LAWS ANN. § 43-4-42 (2010).

[324] R.I. GEN. LAWS § 5-20.8-5(b) (2010).

[325] ALASKA STAT. § 34.70.020 (2010); CAL. CIV. CODE § 1102.3 (West 2010); HAW. REV. STAT. § 508D-16(b) (2010) (requiring return of all deposits); 765 ILL. COMP. STAT. 77/40 (2010) (providing for termination of the contract); LA. REV. STAT. § 9:3198B.3(a) (2010); ME. REV. STAT. ANN. tit. 33, § 174(2) (West 2010); NEV. REV. STAT. §§ 113.130(b)(1) and 113.150(1) and (2) (2010); N.C. GEN. STAT. § 47E-5(b) (2010); OHIO REV. CODE ANN. § 5302.30(K)(2) (Baldwin 2010); OR. REV. STAT. § 105.475(1) (2010); R.I. GEN. LAWS §§ 5-20.8-4(a) and (b)(1) and (2) (2010); S.D. CODIFIED LAWS ANN. §§ 43-4-38 and 43-4-39 (2010); VA. CODE ANN. § 55-520(B) (Michie 2010); WASH. REV. CODE §§ 64.06.030 and 64.06.040(3) (2010).

[326] *See* Rosin v. First Bank of Oak Park, 126 Ill. App. 3d 230, 234, 466 N.E.2d 1245, 1249 (Ill. Ct. App. 1984) (stating that in addition to general principles of contract formation there are several additional factors unique to auction sales that must be considered). As for firm offers, see generally Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713, 719 n.52 (1996) (stating that "the formal requisites for an irrevocable offer…are a signed writing and a mere recitation of consideration" (citing Restatement (Second) of Contracts 87(1) and (2)).

H.2. Rescission After Transfer of Title

Several states' disclosure laws provide that a buyer has no right to rescind a transaction after a transfer of property because of a seller's noncompliance with the disclosure law.[327] In Maryland, "[a]ny rights of the purchaser to terminate the contract provided by this section are waived conclusively if not exercised before…[c]losing or occupancy by the purchaser, whichever occurs first, in the event of a sale…."[328]

H.3. Buyer's Right to Sue

The existing disclosure laws also provide guidance regarding a buyer's remedies for a seller's noncompliance. Under Tennessee's disclosure law, a buyer may not institute an action for the seller's "failure to provide the disclosure or disclaimer statement required by this part;"[329] rather, the buyer may bring an "action available in law or equity against an owner for misrepresentation or failure to disclose material facts regarding the subject property…."[330] Thus, if a seller makes a misrepresentation on a disclosure statement, a buyer may bring "[a]n action for actual damages suffered as a result of defects existing in the property as of the date of execution of the real estate purchase contract."[331] However, a seller must have "actually presented" a required disclosure statement, and the buyer must not have been aware of an undisclosed defect.[332] A buyer's second remedy is when there has been a misrepresentation in a disclosure statement: the buyer may terminate the contract, but the termination must occur prior to the closing.[333] Finally, a buyer may rely on any other remedies available at law or in equity against a seller for his or her intentional or willful misrepresentation of the condition of the property.[334]

A related issue that should be addressed in an airport disclosure act is whether a buyer's other remedies are pre-empted. Several disclosure laws do not affect other disclosures required by law or affect other remedies that may be available to a buyer.[335] Minnesota's disclosure law does not preclude a seller's liability for fraud, negligent misrepresentation, or other actions.[336] In contrast, Oklahoma's disclosure act "supplants and abrogates all common law liability, rights, duties, obligations and remedies therefor."[337]

H.4. Damages, Penalties, Attorney's Fees, and Costs

Several states' disclosure laws allow a buyer to claim "actual damages" for a seller's negligence or other failure to comply with the law.[338] Mississippi's statute, for example, provides that "any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of [the disclosure law] shall be liable in the amount of actual damages suffered by a transferee."[339] Some disclosure statutes prescribe a

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[327] HAW. REV. STAT. § 508D-6(2) (2010); 765 ILL. COMP. STAT. 77/40 (2010); MICH. COMP. LAWS § 565.954, § 4 (2010) (providing that a "transferee's right to terminate the purchase agreement expires upon the transfer of the subject property by deed or installment sales contract").

[328] MD. CODE ANN., REAL PROP. § 10-702(k)(2)(i) (2010).

[329] TENN. CODE ANN. § 66-5-208(b) (2010).

[330] *Id*. § 66-5-208(b) (2010).

[331] *Id*. § 66-5-208(a)(1) (2010).

[332] *Id*.

[333] *Id*. § 66-5-208(a)(2) (2010).

[334] *Id*. § 66-5-208(a)(3) (2010).

[335] ALASKA STAT. § 34.70.070 (2010); CAL. CIV. CODE §§ 1102.1(a), 1102.8, and 1102.13 (West 2010); HAW. REV. STAT. § 508D-14 (2010); IDAHO CODE § 55-2514 (2010); 765 ILL. COMP. STAT. 77/45 (2010); LA. REV. STAT. ANN. 9:3198B.(d) (West 2010); ME. REV. STAT. ANN. tit. 33, § 178 (West 2010); OHIO REV. CODE ANN. §§ 5302.30(J) and (L) (Baldwin 2010); PA. CONS. STAT. tit. 68, § 7313(a) (2010); WASH. REV. CODE § 64.06.070 (2010).

[336] MINN. STAT. § 513.57, Subd. 3 (2010).

[337] OKLA. STAT. § 60-638(F) (2010).

[338] ALASKA STAT. § 34.70.090(b) (2010); HAW. REV. STAT. § 508D-16(c) (2010); IDAHO CODE § 55-2517 (2010); 765 ILL. COMP. STAT. 77/55 (2010); IOWA CODE § 558A.6 (2010); MINN. STAT. § 513.57, Subd. 2 (2010) ("recover damages and receive other equitable relief as determined by the court"); NEB. REV. STAT. § 76-2,120(12) (2010); N.Y. REAL PROP. LAW § 465(2) (Consol. 2010) (applying to a "willful failure"); OKLA. STAT. § 60-837(B) (2010); PA. CONS. STAT. tit. 68, § 7311(a) (2010); S.D. CODIFIED LAWS ANN. § 43-4-42 (2010); TENN. CODE ANN. § 66-5-208(a)(1) (2010) (for owner's misrepresentations on residential disclosure statement); VA. CODE ANN. § 55-524(B)(2) (Michie 2010).

[339] MISS. CODE ANN. § 89-1-523 (2010) (citing §§ 89-1-501 through 89-1-523).

civil penalty for a seller's noncompliance,[340] whereas others permit a buyer to recover treble damages.[341] In Nevada, if a seller fails to comply with the disclosure law, the purchaser may recover from the seller treble the amount necessary to repair or replace the defective part of the property, together with court costs and reasonable attorney's fees.[342]

In a few states, an aggrieved buyer may recover a relatively small monetary penalty for each infraction by a seller of the disclosure statute.[343] However, a seller in New York also is liable in actual damages "for a willful failure to perform the requirements of this article…in addition to any other existing equitable or statutory remedy."[344] Finally, a buyer's attorney's fees and costs are recoverable in some states.[345]

H.5. Statute of Limitations

Under the disclosure laws that authorize a civil action by a buyer, the applicable statute of limitations is either 1 year[346] or 2 years,[347] usually commencing from the date the purchaser received the disclosure statement, the date of settlement,[348] or the date of occupancy of a leased property.[349]

III. MERGER BY DEED DOCTRINE

For the purpose of binding successive owners of a property, a deed of conveyance would have to include a disclosure statement or notification or a disclosure statement would have to be recorded with the deed and become part of the land records and the title to the property.

First, the reason for requiring a real estate purchase contract to stipulate that a disclosure statement survives the delivery of a deed is that under the merger-by-deed doctrine, prior agreements between a buyer and a seller may be merged in the deed upon the deed's delivery and acceptance.[350] According to one court, strictly speaking, the doctrine of merger does not serve to make the contract and deed one, but on a buyer's acceptance of a deed all prior negotiations and agreements are deemed to have been merged in the deed.[351] Elsewhere, it is held that a deed generally supersedes the real estate purchase contract and "becomes the only binding instrument between the parties."[352] Thus, after passage of title, the contract ceases to be a viable basis upon which a buyer may sue.[353] The purpose of the merger-by-deed doctrine is to protect the security of land titles and bring finality to real estate purchases.[354]

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[340] R.I. GEN. LAWS § 5-20.8-5 (2010) (providing for a "civil penalty" in the amount of $100 "per occurrence").

[341] ALASKA STAT. § 34.70.090(c) (2010) ("three times actual damages"); S.C. CODE ANN. § 27-50-65 (2010).

[342] NEV. REV. STAT. § 113.150(4) (2010) (but stating "[e]xcept as otherwise provided in subsection 5" of the statute).

[343] N.Y. REAL PROP. LAW § 465(1) (Consol. 2010) (a $500 credit against the agreed upon purchase price of the residential real property); R.I. GEN. LAWS § 5-20.8-5 (2010) ($100 "per occurrence").

[344] *Id*. § 465(2) (Consol. 2010).

[345] ALASKA STAT. § 34.70.090(d) (2010); HAW. REV. STAT. § 508D-16(c) (2010); 765 ILL. COMP. STAT. 77/25 (2010); NEB. REV. STAT. § 76-2,120(12) (2010); NEV. REV. STAT. § 113.150(4) (2010); OKLA. STAT. § 60-837(D) (2010); S.C. CODE ANN. § 27-50-65 (2010); S.D. CODIFIED LAWS ANN. § 43-4-42 (2010).

[346] 765 ILL. COMP. STAT. 77/60 (2010) ("No action for violation of this Act may be commenced later than one year from the earlier of the date of possession, date of occupancy, or date of recording of an instrument of conveyance of the residential real property."); NEB. REV. STAT. § 76-2,120(12) (2010) ("Any action to recover damages under the cause of action shall be commenced within one year after the purchaser takes possession or the conveyance of the real property, whichever occurs first.")

[347] HAW. REV. STAT. § 508D-17 (2010); MINN. STAT. § 513.57, Subd. 2 (2010); OKLA. STAT. § 60-837(c) (2010); PA. CONS. STAT. tit. 68, § 7311, § 7311(b) (2010).

[348] VA. CODE ANN. § 55-524(C) (Michie 2010).

[349] TENN. CODE ANN. § 66-5-208(a)(1) (2010); VA. CODE ANN. § 55-524(C) (Michie 2010).

[350] Czarobski v. Lata, 227 Ill. 2d 364, 369, 882 N.E.2d 536, 539–40 (Ill. 2008) (stating that the doctrine is well established but noting exceptions to the doctrine).

[351] Purbaugh v. Jurgensmeier, 240 Neb. 679, 683, 483 N.W.2d 757 (1992).

[352] *Czarobski*, 227 Ill. 2d at 369, 882 N.E.2d at 540.

[353] Carey v. Shellburne, Inc., 42 Del. ch. 496, 504, 215 A.2d 450, 455 (Del. ch. 1965) (stating that when "a deed is executed and delivered pursuant to a contract of sale of realty, the latter merges with the former and becomes void").

[354] *Czarobski*, 227 Ill. 2d at 369–70, 882 N.E.2d at 540.

However, the presumption of the merger-by-deed doctrine may be negated by a real estate purchase contract providing that its terms will survive the execution of a deed to the property.[355] The importance of the anti-merger clause in a contract is illustrated by a Maryland case in which the real estate contract at issue provided that the grantees were to receive a general warranty deed to their property.[356] Although the mistake was not noticed until after the closing, the plaintiffs and grantees received only a special warranty deed. The plaintiffs' position was saved by an anti-merger clause in the contract, which provided that the contract "shall survive the execution and delivery of the deed…and shall not be merged therein…."[357] Based on the anti-merger clause, the court affirmed a trial court's order that the prior owners re-convey the property with a general warranty deed.[358]

There is authority that the doctrine does not apply to the provisions of an antecedent contract that are not necessarily performed or satisfied by the execution and delivery of a deed[359] or to covenants in a contract that are independent of a deed's provisions.[360] Collateral agreements, therefore, are not necessarily merged in a deed.[361] In New Jersey, it has been held that an oral warranty did not merge in the deed.[362] A Florida appellate court held that there was no merger by the deed to landlocked property because the real estate contract contained a provision affirming that there was ingress and egress to the land.[363]

Likewise, in Illinois there is an "exception or qualification to the merger rule [if] the contract contains provisions that delivery of the deed does not fulfill."[364] In such circumstances, "the contract is not merged in the deed, and the contract remains in force until the contract has been fully performed."[365]

> Illinois courts have applied this exception where, for example, the contract created an easement that was not referenced in the deed…; the contract expressly warranted the condition of the heating system at closing…; and the contract called for construction of a building on the conveyed property…. In each instance, the court determined that the contractual provision was an independent or collateral undertaking, incidental to the main purpose of the agreement, and did not merge with the deed.[366]

If the disclosure statement is regarded as a representation and not a warranty then there may be an even greater likelihood that a court would hold that in the absence of an anti-merger clause in the contract a disclosure statement does not survive.[367]

B. Covenant Running with the Land

If it is unclear whether a collateral agreement or declaration survives the delivery of a deed, then a court would be required to determine what the parties intended to be incorporated in the deed or what was not necessarily performed or satisfied by the deed.[368] For the protection of a buyer or other transferee, as well as to avoid the merger-by-deed rule, an airport disclosure act should require that a disclosure state-

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[355] Erlewine v. Happ, 39 Md. App. 106, 109, 383 A.2d 82, 84 (1978).

[356] *Id.* at 109, 383 A.2d at 84. *See also* A.G. Shepard, *Deed as Superseding or Merging Provisions of Antecedent Contract Imposing Obligations Upon the Vendor*, 38 A.L.R. 2d 1310 (1933 and 2010 Supp.); M.O. Regensteiner, *Deed as Imposing Upon Vendee Obligations Additional to, or as Superseding or Merging Obligations Imposed by Antecedent Contract*, 52 A.L.R. 2d 647 (1954 and 2010 Supp.)

[357] *Erlewine*, 39 Md. App. at 109, 383 A.2d at 84.

[358] *Id.* at 112, 383 A.2d at 85–86.

[359] New Prospect Area Fire Dist. v. New Prospect Ruritan Club, 311 S.C. 402, 404–05, 429 S.E.2d 791, 793 (1993) (The court held that the doctrine of merger did not apply because "a deed constitutes only part performance of a preceding contract" and that "other distinct and unperformed provisions of the contract are not merged in the deed.")

[360] Opler v. Wynne, 402 So. 2d 1309, 1311 (Fla. 3d DCA 1981).

[361] Caparrelli v. Rolling Greens, Inc., 39 N.J. 585, 590–91, 190 A.2d 369, 372 (1963).

[362] *Id.*, 39 N.J. at 591, 190 A.2d at 372.

[363] *Opler*, 402 So. 2d at 1311.

[364] *Czarobski*, 227 Ill. 2d at 369, 882 N.E.2d at 540 (Illinois Supreme Court recognizing a mutual mistake exception to the merger-by-deed doctrine).

[365] *Id.* at 369, 882 N.E.2d at 540.

[366] *Id.* at 370, 882 N.E.2d at 540 (citations omitted).

[367] *See also* Beal v. Schewe, 291 Ill. App. 3d 204, 683 N.E.2d 1019 (1997) (legal description of land merged in the deed although the buyer determined later that the land conveyed was deficient by 32 acres).

[368] *Purbaugh*, 240 Neb. 679, 683, 483 N.W.2d 757, 1992 Neb. LEXIS 151 at *9–11.

ment be recorded as part of the deed or require that an airport disclosure statement be included in the deed.[369] The weight of authority is that an owner of land is bound by an agreement only if it appears in his own chain of title.[370] For example, an agreement imposing restrictions on the use of land will be considered duly recorded if the agreement is attached to a duly-recorded warranty deed from the grantor to the grantee such that the grantee is charged with notice of the agreement.[371]

Declarations or agreements with respect to real property may be recorded independently in the land records and still bind the property and provide constructive notice.[372] In *Southeast Toyota Distributors, Inc. v. Fellton*,[373] the court held that an agreement containing certain restrictive covenants that was recorded by a grantor of property as part of the deed of conveyance was binding on Toyota as a successor in title to the property.[374] A second agreement was recorded independently that was not referenced in the deed of conveyance; nevertheless, "Toyota had constructive knowledge of [the agreement] and took the property subject to the equitable servitude thereby created."[375]

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[369] Committee to Save Beverly Highlands Homes Ass'n v. Beverly Highlands Homes Ass'n, 92 Cal. App. 4th 1247, 1269, 112 Cal. Rptr. 2d 732, 748 (2001) (stating that "[a] covenant running with the land is created by language in a deed or other document showing an agreement to do or refrain from doing something with respect to use of the land"); Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618, 622–23 (Utah 1989) (stating that a covenant runs with the land when the covenant touches and concerns the land, the covenanting parties intend that the covenant runs with the land, and there is privity of estate); Ticor Title Ins. Co. v. Rancho Santa Fe Ass'n, 177 Cal. App. 3d 726, 734, 223 Cal. Rptr. 175, 180 (1986) (stating that "one of the usual requirements for covenants to run with the land and to bind subsequent owners is recordation"); Shunk v. Palm Beach County, 420 So. 2d 394, 395–96 (Fla. 4th DCA 1982) (holding that because "the purported covenant…does not appear in the record chain of title [the] covenant could not run with the land").

[370] Shunk v. Palm Beach County, 420 So. 2d 394 (Fla. 4th DCA 1982) (holding that an unrecorded contractual agreement to furnish water and sewer service to the property line that was never included or referred to in any deed of record was not a covenant running with the land).

[371] Se. Toyota Distributors, Inc. v. Fellton, 212 Ga. App. 23, 25, 440 S.E.2d 708, 711 (1994).

[372] *Id*. at 26, 440 S.E.2d at 711. *See also* Cavaliere v. Skelton, 73 Ark. App. 188, 40 S.W.3d 844 (2001); Javna v. D. J. Fredricks, Inc., 41 N.J. Super. 353, 125 A.2d 227 (1956).

[373] 212 Ga. App. 23, 440 S.E.2d 708 (1994).

[374] *Id.* at 25, 440 S.E.2d at 711.

[375] *Id*. at 26, 440 S.E.2d at 712.

APPENDIX B

Matrix of Residential Real Property Statutory Disclosure Provisions

(Except as noted in Appendix C, the statutes do not specifically refer to airports)

Definition of Real Property	
Defining residential real property to be property having one to four dwelling units	Alaska Stat. § 34.70.200 (2010) Del. Code Ann. tit. 6, § 2571 (2010) Haw. Rev. Stat. § 508D-1 (2010) 765 Ill. Comp. Stat. 77/5 (2010) Me. Rev. Stat. Ann., tit. 33, § 171(6) (West 2010) Md. Ann. Code, Real Prop. § 10-702(b)(1) (2010) Mich. Comp. Laws § 565.952, § 2 (2010) Miss. Code Ann. § 89-501(1) (2010) Neb. Rev. Stat. § 76-2,120(1)(c) (2010) Nev. Rev. Stat. § 113.100(4) (2010) N.C. Gen. Stat. § 47E-1 (2010) Pa. Cons. Stat. tit. 68, § 7302 (2010) S.C. Code Ann. § 27-50-10(8) (2010) S.D. Codified Laws Ann. § 43-4-37 (2010) Tenn. Code Ann. § 66-5-201 (2010) Va. Code Ann. § 55-517 (Michie 2010) Wash. Rev. Code § 64.06.005 (2010)
Stating specifically that disclosure is inapplicable to vacant or unimproved land	Minn. Stat. § 513.54(1) (2010) Md. Ann. Code, Real Prop. § 10-702(b)(2)(vii) (2010) Miss. Code Ann. § 89-1-501(h) (2010)
Timing of Disclosure	
Requiring disclosure before or at the time of a buyer's offer to purchase or on or before the execution of a real estate contract	Alaska Stat. §§ 34.70.010(a) and (b) (2010) Cal. Civ. Code §§ 1102.3(a) and (b) and 1102.12 (West 2010) Conn. Gen. Stat. § 20-327b(a) (2010) Del. Code Ann. tit. 6, §§ 2572(b) and 2573 (2010) Haw. Rev. Stat. §§ 508D-4(1)(A) and (B)

	and 508D-4(2) (2010) Idaho Code § 55-2509 (2010) 765 Ill. Comp. Stat. 77/20 (2010) Ind. Code Ann. § 32-21-5-10(a) (Burns 2010) Iowa Code § 558A.2(1) (2010) La. Rev. Stat. Ann. § 9:3198B.(2) (West 2010) Me. Rev. Stat. Ann. tit 33, § 174(1) (West 2010) Md. Ann. Code, Real Prop. § 10-702(e)(4)(f)(1) (2010) Mich. Comp. Laws § 565.954, § 4(1) (2010) Miss. Code Ann. §§ 89-1-503(a) and (b) (2010) Neb. Rev. Stat. § 76-2,2120(7) (2010) Nev. Rev. Stat. §§ 113.070(2), 113.080(1), and 113.130(1) (2010) N.J. Stat. Ann. § 46:3C-8 (2010) N.Y. Real Prop. § 462 (Consol. 2010) N.C. Gen. Stat. § 47E-5(a) (2010) Ohio Rev. Code Ann. §§ 5302.30(C) and 5302.30(I) (Baldwin 2010) Okla. Stat. §§ 60-834(A) and (D) (2010) Or. Rev. Stat. § 105.464 (2010) R.I. Gen. Laws §§ 5-20.8-2(a) and 5-20.8-5(a) (2010) S.D. Codified Laws Ann. § 43-4-38 (2010) Tenn. Code Ann. § 66-5-203(a) (2010) Va. Code Ann. § 55-520(A) (Michie 2010) Wash. Rev. Code § 64.06.030 (2010) Wis. Stat. § 709.02(1) (2010)
Requiring that the disclosure statement be made a part of the real estate contract	Del. Code Ann. tit. 6 § 2573 (2010) Me. Rev. Stat. Ann. tit. 33, § 176(1) (West 2010) Ind. Code Ann. § 32-21-5-7(3) (Burns 2010) N.Y. Real Prop. Law § 462 (Consol. 2010) R.I. Gen. Laws §§ 5-20.8-2(a) and 5-20.8-5(a) (2010)
Amendments	
Requiring a seller to amend a disclosure statement that has become inaccurate or when	Alaska Stat. § 34.70-040 Cal. Civ. Code § 1102.5 (West 2010)

there has been a material change affecting the property	Idaho Code § 558A.3(2) (2010) Me. Rev. Stat. Ann. tit. 33, § 175(2) (West 2010) Minn. Stat. § 513.58, Subd. 1 (2010) N.Y. Real Prop. Law § 464 (Consol. 2010) N.C. Gen. Stat. § 47E-7 (2010) Ohio Rev. Code Ann. § 5302.30(G) (Baldwin 2010) Okla. Stat. § 60-834(C) (2010) Pa. Cons. Stat. tit. 68, §§ 7307 and 7312 (2010) Tenn. Code Ann. § 66-5-205 (2010) Va. Code Ann. § 55-522 (Michie 2010) Wash. Rev. Code § 64.06.040(1) (2010)
Waiver of the Statutory Requirements	
Permitting a buyer to waive a disclosure statement	Alaska Stat. § 34.70.110 (2010) Me. Rev. Stat. Ann., tit. 33, § 174(4) (West 2010) Minn. Stat. § 513.60 (2010) N.Y. Real Prop. Law § 462 (Consol. 2010) S.C. Code Ann. § 27-50-110 (2010) Tenn. Code Ann. § 66-5-202(2) (2010) Wash. Rev. Code § 64.06.010(7) (2010)
Prohibiting a buyer's waiver of disclosure	Cal. Civ. Code § 1102(c) (West 2010) Md. Ann. Code, Real Prop. § 10-702(K)(1) (2010) Wash. Rev. Code § 64.06.010(7) (2010) (not permitting waiver of environmental section)
Seller's Duty to Disclose Limited Actual or Personal Knowledge	
Providing that a seller or seller's agent is not liable for errors or omissions regarding matters of which the seller or agent had no actual or personal knowledge or for information supplied by governmental agencies that a seller or agent provides to a buyer	Cal. Civ. Code § 1102.4(a) (West 2010) Conn. Gen. Stat. § 20-327c (2010) Ga. Code Ann. § 10-6A-5(b)(2) (2010) (applicable to brokers) Haw. Rev. Stat. § 508D-9(1) (2010) Idaho Code § 55-2507 (2010) 765 Ill. Comp. Stat. 77/25(b) (2010)

	Ind. Code Ann. § 32-21-5-11(a) (Burns 2010) La. Rev. Stat. Ann. § 9:3198E.(2) (West 2010) Me. Rev. Stat. tit. 33, § 177(1) (2010) Md. Ann. Code, Real Prop. §§ 10-702(e)(2)(viii) and 10-702(e)(3)(iv)(1) and (2) (2010) Mich. Comp. Laws § 565.955, § 5(1) (2010) Minn. Stat. § 513.57, Subd. 1 (2010) Miss. Code Ann. § 89-1-505 (2010) Neb. Rev. Stat. § 76-2,120(8) (2010) Nev. Rev. Stat. § 113.150(5)(a) (2010) N.C. Gen. Stat § 47E-4 (2010) Ohio Rev. Code Ann. § 5302.30(F)(1) (Baldwin 2010) Okla. Stat. §§ 60-833(B)(1) and 60-835(C) (2010) Pa. Cons. Stat. tit. 68 § 7309(b) (2010) R.I. Gen. Laws §§ 5-20.8-2(a) and 5-20.8-9 (2010) S.C. Code Ann. §§ 27-50-40(B) and (C) (2010) Tenn. Code Ann. §§ 66-5-204(a) and (b) (2010) Va. Code Ann. § 55-521(A) (Michie 2010) Wash. Rev. Code § 64.06.050(1) (2010)
Expert Report in Lieu of Disclosure Statement	
Permitting a seller to provide a buyer with an expert's report in lieu of a disclosure statement	Cal. Civ. Code § 1102.4(c) (West 2010) Md. Code Ann., Real Prop. § 10-702(j)(1) (2010) Mich. Comp. Laws § 565.955, § 5(3) (2010) Minn. Stat. § 513.53, Subd. 3 (2010) Miss. Code Ann. § 89-1-505(3) (2010) Nev. Rev. Stat. § 113.150(5)(b) (2010) N.C. Gen. Stat. § 47E-6 (2010) R.I. Gen. Laws § 5-20.8-8(a) (2010) Tenn. Code Ann. § 66-5-204 (2010) Va. Code Ann. § 55-521(C) (Michie 2010) Wis. Stat. § 709.02(1) (2010)

Disclosure Statement Not a Warranty	
Stating that a disclosure statement does not constitute a warranty to a buyer	Conn. Gen. Stat. § 20-327b(d)(2)(D) (2010) Del. Code Ann. tit. 6, § 2574 (2010) Md. Code Ann., Real Prop. §§ 10-702(e)(3)(iv)(1) and (2) and (i)(1) (2010)
Seller's Good Faith or Honesty in Fact	
Requiring a seller to make disclosure in good faith, meaning "honesty in fact"	Alaska Stat. § 34.70.060 (2010) Cal. Civ. Code § 1102.7 (West 2010) Haw. Rev. Stat. § 508D-7 (2010) Idaho Code §§ 55-2507(5) and 55-2516 (2010) La. Rev. Stat. Ann. § 9:3198B.(1) (West 2010) Mich. Comp. Laws § 565.960, § 10 (2010) Minn. Stat. § 513.55, Subd. 1(b) (2010) Miss. Code Ann. § 89-1-511 (2010) Ohio Rev. Code Ann. § 5302.30 (Baldwin 2010) S.D. Codified Laws Ann. § 43-4-41 (2010)
Disclosure as Precluding a Seller's Liability	
Providing that a seller's compliance with disclosure requirements precludes liability for defects or conditions affecting the property	Alaska Stat. § 34.70.030 (2010) Cal. Civ. Code § 1102.9 (West 2010) Del. Code Ann. tit. 6, § 2575(1) and (2) (2010) Haw. Rev. Stat. § 508D-13 (2010) Pa. Cons. Stat. tit. 68, § 7314 (2010) Va. Code Ann. § 55-521(B) (Michie 2010)

Transfers Exempt from Disclosure Requirements	
Exempting a first sale of property that has never been occupied or inhabited	Alaska Stat. § 34.70.120 Conn. Gen. Stat. § 20-3276(b)(4) (2010) Haw. Rev. Stat. § 508D-3(6) (2010) Idaho Code § 55-2505(12) (2010) 765 Ill. Comp. Stat. 77/15(9) (2010) Ind. Code Ann. § 32-21-5-1(b)(8) (Burns 2010) Ky. Rev. Stat. Ann. § 324.360(7) (2010) Md. Code Ann., Real Prop. § 10-702(b)(2)(i)(1) (2010) Minn. Stat. § 513.54 (10) (2010) Neb. Rev. Stat. § 76-2,120(6)(k) (2010) N.Y. Real Prop. Law § 463(12) (Consol. 2010) N.C. Gen. Stat. § 47E-2(9) (2010) Ohio Rev. Code Ann. § 5302.30(B)(2)(l) (Baldwin 2010) Okla. Stat. § 60-838(9) (2010) R.I. Gen. Laws § 5-20.8-3(8) (2010) S.C. Code Ann. § 27-50-30(10) (2010) S.D. Codified Laws Ann. § 43-44-43(6) (2010) Tenn. Code Ann. § 66-5-209(9) (2010) Va. Code Ann. § 55-518(9) (Michie 2010)

Exempting other transfers including transfers pursuant to a court order; transfers to a mortgagee resulting from a default under a mortgage or because of a foreclosure sale; transfers by a fiduciary; transfers between co-owners or spouses; and some transfers to or from a governmental entity, as well as other transfers	Cal. Civ. Code §§ 1102.2(b), (c), (d), (e), (f), (g), and (j) (West 2010) Conn. Gen. Stat. 392 § 20-327b(b) (2010) Del. Code Ann. tit. 6, §§ 2577(1)-(9) (2010) Haw. Rev. Stat. §§ 508D-3(1)-(8) (2010) Iowa Code §§ 558A.1(4) (a)-(h) (2010) Me. Rev. Stat. Ann., tit. 33, §§ 172(1)-(12) (West 2010) Md. Code Ann., Real Prop. §§ 10-02(b)(i)(2)(ii-(vii) (2010) Mich. Comp. Laws §§ 565.953, § 3(a)-(i) (2010) Miss. Code Ann. § 89-1-501(2)(g) (2010) Neb. Rev. Stat. §§ 76-2,120(6)(a)-(l) (2010) Nev. Rev. Stat. §§ 113.115(3)(a)-(d) (2010) N.Y. Real Prop. Law §§ 463(1)-(14) (Consol. 2010) N.C. Gen. Stat. §§ 47E-2(1)-(11) (2010) Ohio Rev. Code Ann. §§ 5302.30(B)(2)(a)-(n) (Baldwin 2010) Okla. Stat. § 60-838(A)(1) (2010) R.I. Gen. Laws §§ 5-20.8-3(1)-(10) (2010) S.C. Code Ann. §§ 27-50-30(1)-(15) (2010) S.D. Codified Laws Ann. §§ 43-4-43(1)-(6) (2010) Tenn. Code Ann. §§ 66-5-209(1)-(12) (2010) Va. Code Ann. §§ 55-518(1)-(9) (Michie 2010) Wash. Rev. Code §§ 64.06.010(1)-(7) (2010) Wis. Stat. §§ 709.01(2)(a)-(d) (2010)

Disclosure of All Material Facts or Off-Site Conditions Affecting Property	
Requiring a seller to disclose all material defects of which the seller is aware that could adversely and significantly affect an ordinary buyer's use and enjoyment of the property or any intended use of the property of which the seller is aware	Del. Code Ann. tit. 6, § 2572(a) (2010); Haw. Rev. Stat. § 508D-1 (2010) Idaho Code § 55-2508 (2010) 765 Ill. Comp. Stat. 77/30(1) (2010) Minn. Stat. § 513.55, Subds. 1(a)(1) and (2) (2010)
Requiring a seller to disclose that a property is near a former federal or state ordnance location; an industrial use; adverse physical conditions within 1 mi that could not be discovered by a buyer upon a diligent inspection; or agricultural operations	Cal. Civ. Code §§ 1102.15, 1107.17 (West 2010) Ga. Code Ann. §§ 10-6A-5(b)(1) and (2) (2010) Nev. Rev. Stat. §§ 113.065(1) and (3) (2010) Wash. Rev. Code § 64.06.022 (2010)
Requiring disclosure of matters relating to zoning and land-use affecting a property	N.C. Gen. Stat. § 47E-4(b)(5) (2010) Nev. Rev. Stat. § 113.070(1) (2010)
Buyer's Obligation to Inspect Property	
Stating that disclosure does not relieve a buyer of a duty to inspect property or obtain professional advice	Del. Code Ann. tit. 6, § 2574 (2010) Ga. Code Ann. § 10-6A-5(b)(2) (2010) Idaho Code § 55-2507(4) (2010) Ohio Rev. Code Ann. § 5302.30(D)(1) (Baldwin 2010) Haw. Rev. Stat., § 508D-1(3) (2010) Idaho Stat. § 55-2507(3) (2010) Ind. Code Ann. § 32-21-5-9 (Burns 2010) Ky. Rev. Stat. Ann. § 324.360(7) (2010) La. Rev. Stat. Ann. § 3198(D)(1) (West 2010) Me. Rev. Stat. Ann. tit. 33, § 176(1) (West 2010) Mich. Comp. Laws § 565.951, § 7(1) (2010) Miss. Code Ann. § 89-1-509 (2010) Neb. Rev. Stat. §§ 76-2,121(3)(e), (f), and (g) (2010)

	Nev. Rev. Stat. §§ 113.130 and 113.140(3) (2010) Ohio Rev. Stat. Ann. § 5302.30(D)(1) (2010) Okla. Stat. §§ 60-832(10) and 60-833(B)(2)(c) (2010) Or. Rev. Stat. § 105.464 (2010) R.I. Gen. Laws § 5-20.8-2(b) (2010) S.C. Code Ann. § 27-50-80 (2010) S.D. Codified Laws Ann. § 43-4-44 (2010) Tenn. Code Ann. §§ 66-5-201 and 66-5-210 (2010) Va. Code Ann. § 55-518(B) (Michie 2010) Wash. Rev. Code § 64.06.015 (2010)
Effect of Nondisclosure on a Transfer of Real Property	
Providing that nondisclosure does not invalidate a transfer of property or create a defect in title	Alaska Stat. § 34.70.090(a) (2010) Cal. Civ. Code § 1102.13 (West 2010) Idaho Code § 55-2517 (2010) Ind. Code Ann. §§ 32-21-5-7(3) and 32-21-5-10(c) (Burns 2010) Iowa Code § 558A.8 (2010) La. Rev. Stat. Ann. § 9:3198B.1(3)(c) (West 2010) Me. Rev. Stat. Ann. tit. 33, § 176(1) (West 2010) Mich. Comp. Laws § 565.964, § 14 (2010) Minn. Stat. § 513.59 (2010) Miss. Code Ann. § 89-1-523 (2010) Neb. Rev. Stat. § 76-2,120(11) (2010) Ohio Rev. Code Ann. § 5302.30(K)(1) (Baldwin 2010) Okla. Stat. § 60-837(E) (2010) Pa. Cons. Stat. tit. 68, § 7311(a) (2010) R.I. Gen. Laws § 5-20.8-5(b) (2010) (creates no defect in title) S.C. Code Ann. § 27-50-50(B) (2010) S.D. Codified Laws Ann. § 43-4-42 (2010)
Buyer's Right to Withdraw Offer or Rescind Sales Contract	
Permitting a buyer to withdraw an offer or	Alaska Stat. § 34.70.020 (2010)

rescind a sales contract because of a seller's noncompliance	Cal. Civ. Code § 1102.3 (West 2010) Haw. Rev. Stat. § 508D-16(b) (2010) 765 Ill. Comp. Stat. 77/40 (2010) La. Rev. Stat. § 9:3198B.3(a) (2010) Me. Rev. Stat. Ann. tit. 33, § 174(2) (West 2010) Mich. Comp. Laws § 565.954, § 4 (2010) Nev. Rev. Stat. §§ 113.130(b)(1) and 113.150(1) and (2) (2010) N.C. Gen. Stat. § 47E-5(b) (2010) Ohio Rev. Code Ann. § 5302.30(K)(2) (Baldwin 2010) Or. Rev. Stat. § 105.475(1) (2010) R.I. Gen. Laws §§ 5-20.8-4(a) and (b)(1) and (2) (2010) S.D. Codified Laws Ann. §§ 43-4-38 and 43-4-39 (2010) Va. Code Ann. § 55-520(B) (Michie 2010) Wash. Rev. Code §§ 64.06.030 and 64.06.040(3) (2010)
Buyer's Right to Rescind After Transfer of Title	
Permitting a buyer to rescind after the transfer of property because of a seller's noncompliance	Haw. Rev. Stat. § 508D-6(2) (2010) 765 Ill. Comp. Stat. 77/40 (2010) Md. Code Ann., Real Prop. § 10-702(k)(2)(i) (2010)
Buyer's Other Remedies	
Permitting a buyer to sue for a seller's noncompliance or to pursue other remedies under state law	Alaska Stat. § 34.70.070 (2010) Cal. Civ. Code §§ 1102.1(a), 1102.8, and 1102.13 (West 2010) Haw. Rev. Stat § 508D-14 (2010) Idaho Code § 55-2514 (2010) 765 Ill. Comp. Stat. 77/45 (2010) La. Rev. Stat. Ann. § 9:3198B.(d) (West 2010) Me. Rev. Stat. Ann. tit. 33, § 178 (West 2010) Minn. Stat. § 513.57, Subd. 3 (2010) Ohio Rev. Code Ann. §§ 5302.30(J) and (L) (Baldwin 2010)

	Pa. Cons. Stat. tit. 68, § 7313(a) (2010) Wash. Rev. Code § 64.06.070 (2010)
Recovery of Damages	
Permitting a buyer to claim actual damages for a seller's noncompliance	Alaska Stat. §§ 34.70.090(b) and (c) (2010) Haw. Rev. Stat. § 508D-16(c) (2010) Idaho Code § 55-2517 (2010) 765 Ill. Comp. Stat. 77/55 (2010) Iowa Code § 558A.6 (2010) Minn. Stat. § 513.57, Subd. 2 (2010) Miss. Code Ann. § 89-1-523 (2010) Neb. Rev. Stat § 76-2,120(12) (2010) N.Y. Real Prop. Law § 465(2) (Consol. 2010) Okla. Stat. § 60-837(B) (2010) Pa. Cons. Stat. tit. 68, § 7311(a) (2010) S.D. Codified Laws Ann. § 43-4-42 (2010) Tenn. Code Ann. § 66-5-208(a)(1) (2010) Va. Code Ann. § 55-524(B)(2) (Michie 2010)
Recovery of Civil Penalty	
Permitting recovery of civil penalty for a seller's noncompliance	Nev. Rev. Stat. § 113.150(4) (2010) R.I. Gen. Laws § 5-20.8-5 (2010) S.C. Code Ann. § 27-50-65 (2010) N.Y. Real Prop. Law § 465(1) (Consol. 2010)
Attorney's Fees and Costs	
Permitting a buyer to recover attorney's fees and costs for a seller's noncompliance	Alaska Stat. § 34.70.090(d) (2010) Haw. Rev. Stat. § 508D-16(c) (2010) 765 Ill. Comp. Stat. 77/25 (2010) Neb. Rev. Stat. § 76-2,120(12) (2010) Nev. Rev. Stat. § 113.150(4) (2010) Okla. Stat. § 60-837(D) (2010) S.C. Code Ann. § 27-50-65 (2010) S.D. Codified Laws Ann. § 43-4-42 (2010)

Statute of Limitations	
Providing for a 1- or 2-year statute of limitations commencing from the date of the buyer's receipt of the disclosure statement, the date of settlement, or the date of occupancy of leased property	Haw. Rev. Stat. § 508D-17 (2010) (2 years) 765 Ill. Comp. Stat. 77/60 (2010) (1 year) Neb. Rev. Stat. § 76-2,120(12) (2010) (1 year) Minn. Stat. § 513.57, Subd. 2 (2010) (2 years) Okla. Stat. § 60-837(c) (2010) (2 years) Pa. Cons. Stat. tit. 68, §§ 7311, 7311(b) (2010) (2 years) Tenn. Code Ann. § 66-5-208(a)(1) (2010) (1 year) Va. Code Ann. § 55-524(C) (Michie 2010) (1 year)

APPENDIX C

Matrix of State Airport Disclosure Provisions

Requiring a seller to disclose an airport, an airport influence area, or an airport safety zone in the vicinity of property offered for sale	Ariz. Rev. Stat. Ann. § 28-8485 (2010) Cal. Civ. Code §§ 1353(a)(1) and 1353(a)(2) (West 2010) Haw. Rev. Stat. § 508D-15(a)(2) (2010) N.J. Stat. Ann. §§ 6:1-85.2, 16:62-3.1, and 45:22A-28(a) (2010)
Requiring a state or political subdivision or a public airport to record a map of an airport influence area	Ariz. Rev. Stat. Ann. §§ 28-8485(B) and 28-8486(B) (2010).
Directing a state real estate commission to make a map available to the public showing the location of property near a public airport or requiring disclosure of an airport within a certain distance of an airport as determined by a real estate commission	Ariz. Rev. Stat. Ann. § 28-8486(A) (2010) Ind. Code Ann. § 32-21-5-7(4) (Burns 2010)
Stating that a buyer is deemed to have notice of a recorded map of airport influence area	Ariz. Rev. Stat. Ann. § 28-8486(B) (2010)
Requiring disclosure of military airports and flight operations or of a military Air Installation Compatible Use Zone	Ariz. Rev. Stat §§ 28-8461(9), 28-8481(H), and 28-8484(E) (2010) Haw. Rev. Stat. § 508D-15(a)(3) (2010) Md. Code Ann., Real Prop. § 14-117(k)(2) (2010) Va. Code Ann. §§ 55-519.1, 55-520(c), and 55-524(B)(2) (Michie 2010)
Not requiring disclosure as long as a seller provides timely written notice of the availability and location of airport zoning regulations	Minn. Stat. § 513.56, Subd. 3(c) (2010)

APPENDIX D

SAMPLE AIRPORT DISCLOSURE STATEMENT

The undersigned owner(s) of a lot in the subdivision known as _____, a Pima County subdivision recorded in Book at Page of Maps and Plats, acknowledges that the property lies in proximity to Tucson International Airport and that the property is subject to aircraft overflight and noise that may be annoying or objectionable to some persons.

Flight patterns within 5 nautical miles of Tucson International Airport (TIA) are controlled by the Federal Aviation Administration (FAA) Air Traffic Control Tower (ATCT) according to rules and guidelines for maintaining aircraft separation. The ATCT at TIA is in operation 24 hours per day. According to FAA rules, except when necessary for takeoff and landing, aircraft may not fly below 1000 ft. above ground level in populated areas.

While air traffic may be generalized into tracks, it is, by nature, dispersed. Aircraft may approach and depart the airports from any number of directions. Flight paths vary depending on a variety of factors including origin/destination, wind conditions and other aircraft in the traffic pattern. As a result, any property in the vicinity of an airport is likely to be subject to aircraft overflight and its impacts to some degree.

As traffic approaches or departs from an airport, it is lower to the ground, more concentrated and more frequent. The area where air traffic converges as it approaches and departs the airport is represented by the FAA Traffic Pattern Airspace. This area is shown on exhibit A, attached. Lower altitudes and more frequent activity increase the impacts of aircraft on the ground within this area.

The most significant impacts occur within noise contours. Noise contours depict the area where average noise exposure over a 24 hour period is considered "significant" by FAA standards. Measures such as sound insulation of structures and land use planning to exclude noise sensitive uses are required to maintain compatibility within these areas. As explained, aircraft approach and depart the airport on dispersed paths. As a result, a property that is outside established noise contours may still be impacted by the effects of periodic aircraft overflights.

Flight patterns are apt to shift or change over time. Changes in operations may occur due to weather, changes in users, changes in aircraft type, military missions, weather conditions, etc. Similarly, TIA has a master plan that identifies plans for future expansion and development needs. These plans are updated every several years to respond to the needs of the aviation community.

The undersigned acknowledges the Owner(s) is aware of these impacts and that the Tucson Airport Authority and all persons lawfully using the Airport have the right to operate aircraft in the airspace above and near the property.

Dated this _____ day of _____, 20_____.

Owner _____

Owner _____

APPENDIX E

SAMPLE REAL ESTATE TRANSFER DISCLOSURE STATEMENT

REGARDING AIRPORT NOISE, FOR THE CITIES OF PACIFICA, SOUTH SAN FRANCISCO, SAN BRUNO, AND MILLBRAE

THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF _____, COUNTY OF SAN MATEO, STATE OF CALIFORNIA, DESCRIBED AS _____. THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN COMPLIANCE WITH ORDINANCE NO. _____OF THE CITY OR COUNTY CODE AS OF _. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.

I.
SELLERS INFORMATION

The Seller discloses the following information with the knowledge that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER(S) AS REQUIRED BY THE CITY OF OR COUNTY OF SAN MATEO AND ARE NOT THE REPRESENTATIONS OF THE AGENT(S), IF ANY, THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN THE BUYER AND SELLER.

1. San Francisco International Airport is the fifth largest airport by volume in the United States and the seventh largest by volume in the world.

2. The property is subject to noise from aircraft overflight.

3A. Per Pacifica Ordinance No. 619-C.S., at its closest point is located 2.5 miles from San Francisco International Airport and its closest point, the 1983 CNEL contour area is 4.1 miles from San Francisco International Airport.

3B. Per South San Francisco Ordinance No. 1289-2001 San Francisco International Airport is within 3.75 miles of all residential property in South San Francisco.

3C. Per San Bruno Ordinance No. 1646, at their closest point, dwelling units in the City of

San Bruno are located approximately 0.25 miles from the San Francisco International Airport's outer perimeter of its developed area. At their farthest point, dwelling units within San Bruno are located approximately 4.0 miles from the San Francisco International Airport's outer perimeter of its developed area.

4. After January 1, 1993, if the subject property is constructed or reconstructed after its total or partial destruction, or if it is reconstructed or renovated at a cost equal to 25% or more of the current market value of the home, it must be insulated against aircraft noise to meet FAA noise insulation program standards, as required by amendments to the local building codes.

5. If the subject property has already received noise insulation pursuant to the FAA Noise Insulation Program, the owner may not deliberately or willfully act to reduce or destroy the effectiveness of the noise mitigation measures.

6. The attached maps for each above mentioned city outline the 1983 65 CNEL Noise Contour. The city ordinances require that these specific maps are made part of the disclosure. Additional information may be obtained from resources including, but not limited to the following Aircraft Noise Insulation offices:

City of Pacifica Aircraft Noise Insulation Office: 170 Santa Maria Avenue, Pacifica, CA, 94044, (650) 738-7341

City of San Bruno Aircraft Noise Insulation Project: 881 W. San Bruno Avenue, San Bruno, CA, 94066, (650) 877-8689

City of South San Francisco Aircraft Noise Insulation Project: 2850 Galway, South San Francisco, CA, 94080, (650) 877-8600

County of San Mateo Aircraft Noise Insulation Office: 455 County Center, Second Floor, Redwood City, CA, 94063, (650) 363-4417

The San Francisco International Airport's website www.flyquietsfo.com will allow you to locate your property relative to the 65 CNEL Noise Contour.

❏ If this box is checked, the subject property falls within the Aircraft Noise Footprint based on the FAA 1983 CNEL Noise Exposure Map.

Seller certifies that the information herein is true and correct to the best of the Seller's knowledge as of the date signed by the Seller.

Seller _____ Date _____

Seller _____ Date _____

II.

BUYER(S) AND SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN BUYER AND SELLER(S) WITH RESPECT TO ANY ADVICE/INSPECTIONS/DEFECTS.

I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Seller _____ Date ____ Buyer _____ Date_____

Seller _____ Date ____ Buyer _____ Date_____

Agent (Broker Representing Seller) By _____ Date
(Associate Licensee or Broker-Signature)

Agent (Broker Obtaining the Offer) By _____ Date
(Associate Licensee or Broker-Signature)

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

APPENDIX F

TYPICAL AIRPORT FAIR DISCLOSURE ACT PROVISIONS[376]

1. Statement of Purpose

The purpose of the Typical Airport Fair Disclosure Act (Act) is to provide prospective purchasers of residential real property with notice of the location of any airport, as defined in section 2, that affects residential real property offered for sale or otherwise transferred unless a transfer is exempt under Section 3.

2. Definitions

(a) The term **Air Installation Compatible Use Zone** means any military air installation affecting land in its vicinity as shown on a map that plots contours for military aircraft noise and compatible land uses based on a study conducted in accordance with 32 C.F.R. § 256.1, *et. seq*.

(b) The term **airport** means an area of land or other hard surface, excluding water, that is used or intended to be used for the landing and takeoff of aircraft, including any buildings and facilities, and includes an airport area as defined or described in Sections 2(a), 2(e), 2(i), 2(o), and 4(b) of this Act.

(c) The term **airport authority** means the state or any political subdivision thereof or any corporation, entity, or other organization created by law for the establishment, operation, or control of an airport.

(d) The term **Airport Disclosure Statement** means a written statement that identifies an airport as defined in Sections 2 and 4 and is delivered by a seller or a seller's broker or agent to a buyer or a buyer's broker or agent as required by Sections 4, 5, and 6 of this Act.

(e) The term **Airport Influence Area** means all property in the vicinity of an airport that is exposed to aircraft noise and overflight and that has a day-night average sound level of sixty- five decibels or higher as determined by the responsible airport or airport authority and shown on a map recorded in each county having property within the Airport Influence Area.

(f) The term **buyer** means an individual or trustee or a corporation, partnership or any other entity, either directly or indirectly through a broker or agent, who is attempting to acquire or is acquiring legal or equitable title or a possessory interest in residential real property and includes a transferee as defined in Section 2(r).

(g) The term **dwelling unit** means any building, structure, or portion thereof which is occupied or that is designed or intended to be occupied as a residence by one or more persons.

(h) The term **final settlement** means when a seller delivers a deed of conveyance to a

[376] See Section VI of this digest for comments and citations that were omitted for the Appendix.

buyer or transferee of residential real property.

(i) The term **Noise Exposure Map** means a map submitted by or on behalf of an airport to the Federal Aviation Administration in accordance with its Regulations appearing at 14 C.F.R. Part 150, Airport Noise Compatibility Planning or any successor regulation.

(j) The term **offer to purchase** means a buyer's written offer to purchase residential real property in any form including but not limited to a real estate contract signed by a buyer and presented for a seller's acceptance, a lease with an option to purchase, the exercise of an option to purchase, or an offer to exchange property for residential real property.

(k) The term **real estate contract** means any of the following:

(1) an executed agreement for the purchase and sale of residential real property;
(2) an executed lease with an option to purchase residential real property;
(3) an executed lease-with-obligation-to-purchase agreement for residential real property
(4) an executed installment land sale contract for residential real property; or
(5) an exercise of an option to purchase residential real property.

(l) The term **residential real property** means:

(1) any land in this state to which is affixed not less than one or more than four dwelling units;
(2) any estate or interest in an unimproved housing lot or lots to be improved by not less than one or more than four dwelling units; and
(3) any land or tract of land that is divided or proposed to be divided over any period into one or more lots, parcels, units, or interests, which are offered, known, designated or advertised as a common unit by a common name or as part of a common promotional plan of advertising and sale.

(m) The term **sale** means an acquisition of residential real property whether by purchase, at an auction, an exchange, an installment contract, a lease with an option to purchase, an exercise of an option, or any other method by which residential real property together with any improvements is sold and includes a transfer as defined in Section 2(p) of this Act.

(n) The term **seller** means an individual or a trustee or a corporation, partnership, or other entity having legal or equitable title who is attempting to sell or transfer or is selling or transferring residential real property either directly or indirectly through a broker or an agent and includes a transferor as defined in Section 2(s).

(o) The term **traffic pattern** means the traffic flow that is prescribed for aircraft landing at, taxiing on, or taking off from, an airfield and includes the actual radar flight paths used by landing and departing aircraft.

(p) The term **transfer** means any form of transfer of title to residential real property by a seller or transferor to a buyer or transferee.

(q) The term **transfer of title** means the delivery of a properly executed deed of conveyance to real property to a buyer or transferee.

(r) The term **transferee** means anyone acquiring title to residential real property

pursuant to an instrument that includes the power to transfer an estate or interest in real property.

(s) The term **transferor** means a person who is transferring title to residential real property to a buyer or transferee.

3. Exempt Transfers

This Act shall not apply to the following transfers of residential real property:

(a) Transfers pursuant to court order such as transfers ordered by a court in the administration of an estate, trust or guardianship or pursuant to a writ of execution, by eminent domain, and transfers resulting from a decree for specific performance.
(b) Transfers to a mortgagee by a mortgagor in default by a deed in lieu of foreclosure.
(c) Transfers by any sheriff's sale for default on an obligation secured by a mortgage, judgment, tax or other lien.
(d) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship or trust.
(e) Transfers from one co-owner to one or more other co-owners.
(f) Transfers made to a spouse or to a person or persons in the lineal line of consanguinity of one or more of the transferors.
(g) Transfers between spouses resulting from a property settlement incident to a divorce.
(h) Transfers to any government entity.

4. Seller's Duty to Disclose an Airport

(a) When residential real property is offered for sale or otherwise transferred, a seller or other transferor shall disclose to a buyer whether the property is located within the boundaries:

(1) of an airport Noise Exposure Map or an Airport Influence Area or
(2) of a military Air Installation Compatible Use Zone.

(b) If neither Section 4(a) (1) or (2) applies, then a seller must disclose whether the residential real property is within 2 miles of an airport and its traffic pattern, as defined in Sections 2(b) and 2(o), including the runways and landing and departure flight paths as shown on a map published by the Federal Aviation Administration or the airport or airport authority, as well as actual radar flight paths used by landing and departing aircraft.

5. Airport Disclosure Statement

(a) An Airport Disclosure Statement

(1) shall identify the property being offered for sale or otherwise being transferred by its legal description (as shown in the land or tax records for the property) and its street address;
(2) shall state whether the property is within the boundaries of an airport Noise Exposure Map or Airport Influence Area or a military Air Installation Compatible Use Zone; and
(3) if Section 5(a)(2) does not apply, shall state whether the property is within 2 miles of an airport and its traffic pattern as described in Section 4(b) of this Act.

(b) A seller shall be deemed to be in compliance with this Act when the seller discloses an airport by using the following form and thereafter performing the requirements set forth therein and in Section 6 of this Act:

Airport Disclosure Statement

Pursuant to the Airport Fair Disclosure Act (Act) enacted by this State, [citation], which defines the terms used in this Statement, and (Seller), the owner of residential real property as defined in the Act, situated in the City/County of known as [Legal Description, such as Subdivision, Block, Square, Lot] located at [Street Address], (Property), hereby discloses to and (Buyer), that the aforesaid Property is affected by an airport as described below in that the Property is located within the boundaries of:

[COMPLETE ENTRIES THAT APPLY TO THE PROPERTY]

❏ a Noise Exposure Map for the _____ [Name of Airport] submitted by the [Name of Airport or Airport Authority] to the Federal Aviation Administration;

❏ an Airport Influence Area for the _____ [Name of Airport] designated by the [Name of Airport or Airport Authority];

❏ a military Air Installation Compatible Use Zone, which is also known as the _____ [Name of Military Airport or Air Installation]; or

❏ the property is located within 2 miles of an airport known as the _____ [Name of Airport] and its traffic pattern as defined in the Act, including the runways and landing and departure flight paths as shown on a map published by the Federal Aviation Administration or by the _____ [Name of Airport or Airport Authority], as well as the actual radar flights paths used by landing and departing aircraft.

This Airport Disclosure Statement shall be attached to and made a part of any real estate contract between the Seller and the Buyer and shall survive the delivery of a deed of conveyance by the Seller to the Buyer at final settlement.

Pursuant to the Section 6(d) of the Act,

(1) the Seller's (or other Transferor's) Airport Disclosure Statement shall be incorporated by reference in the Deed and recorded with the Deed in the land records of the [City/County] in which the aforesaid Property is situated, or

(2) the Seller's (or other Transferor's) Deed shall include the Notification prescribed by Section 6(d)(2) of the Act prior to its recording in the aforesaid land records.

The Buyer is hereby notified that, prior to signing a real estate contract for the purchase of the aforesaid Property, the Buyer should conduct any investigation that the Buyer deems prudent and necessary to assess the impact, if any, of the airport, including but not limited to airport-related noise, that may affect the Buyer's use and enjoyment of the Property.

_____ _____
Date Seller

_____
Seller

I (We) acknowledge receipt of the foregoing Airport Disclosure Statement:

_____
Date

_____
Buyer

_____
Buyer

6. Timing and Delivery of Airport Disclosure Statement

(a) A seller or a seller's broker or agent shall deliver an Airport Disclosure Statement at the time residential real property is being offered for sale and/or listed with a broker or agent for sale and not later than when a buyer makes an offer to purchase the property.

(b) The Airport Disclosure Statement shall be included within the real estate contract or shall be incorporated by reference in the contract and made an addendum to the contract.

(c) The real estate contract shall state that the Airport Disclosure Statement survives the delivery of the deed of conveyance to the property.

(d) A Seller's deed of conveyance

(1) shall incorporate an Airport Disclosure Statement that shall be recorded as an addendum to the deed or

(2) shall include the following statement and notification:

Airport Disclosure Statement and Notification

This Notification is required by the Airport Fair Disclosure Act, [citation] enacted by the State of ____.

The property being conveyed hereby is within the boundaries of an airport Noise Exposure Map for the [Name of Airport], an Airport Influence Area for the [Name of Airport] designated by the [Name of Airport or Airport Authority], and/or a military Air Installation Compatible Use Zone for the [Name of Military Airport or Air Installation], or is within 2 miles of the [Name of Airport] or its traffic pattern, including the runways and landing and departure flight paths as shown on a map published by the Federal Aviation Administration or the [Name of Airport or Airport Authority] and the actual radar flight paths used by landing and departing aircraft. The property being conveyed may be affected by airport operations including but not limited to noise, vibration, smoke, odor, and/or traffic.

This Notification is binding on the grantee and all future grantees and all other transferees of the herein described real property.

7. Buyer's Duty to Investigate

On receipt of an Airport Disclosure Statement in compliance with this Act, a buyer shall have a duty to investigate the current or future impact of an airport on the property that is the subject of the Airport Disclosure Statement.

8. Buyer's Right to Withdraw an Offer or Rescind a Contract

(a) If an Airport Disclosure Statement is not delivered to a buyer or is not delivered to a buyer until after a buyer makes an offer to purchase, the buyer may withdraw an offer to purchase or rescind any resulting real estate contract at any time between the date of the offer

to purchase or the resulting real estate contract and the final settlement on the property.

(b) A buyer may withdraw an offer to purchase or rescind a resulting real estate contract by notifying the seller or the seller's broker or agent:

(1) by delivering a letter in person to the seller or the seller's broker or agent;
(2) by mailing a letter to the seller or the seller's broker or agent by certified mail, return receipt requested; or
(3) by sending a letter by any other method, including a courier service or electronic mail or facsimile, as long as there is a record showing the delivery of the letter to the seller or the seller's broker or agent.

(c) If a buyer withdraws an offer to purchase or rescinds a real estate contract in accordance with this section, the withdrawal of the offer or the rescission of the resulting real estate contract is without penalty to the buyer and the seller or the seller's broker or agent shall return to the buyer (or direct any third party to return to the buyer) within two business days the buyer's deposit and any other funds paid by the buyer in advance of the final settlement for the purchase of the property.

9. Buyer's Right to Claim Damages

(a) If residential real property has been transferred to a buyer prior to a seller's disclosure of an airport, as defined in Section 2, the buyer may bring an action within one year of the final settlement on the real property to rescind the purchase and the transfer of title to the buyer and to recover any actual damages directly and proximately caused by the seller's failure to disclose an airport as required by this Act.

(b) In lieu of rescission under Section 9(a), a buyer may elect to retain the property and commence an action for actual damages directly and proximately caused by the seller's failure to deliver an Airport Disclosure Statement as required by this Act.

(c) A buyer's right to claim damages for a seller's noncompliance with the Act is not affected by a buyer's sale or re-conveyance of the subject property within one-year of the final settlement on the residential real property at issue.

(d) In any legal or equitable action by a buyer based on or arising out of a seller's non-compliance with the Act, the buyer may recover attorney's fees and costs as determined by the court.

(e) This section does not limit any other rights or remedies a buyer may have under state law, whether by statute or at common law.

10. Limitation of Seller's Liability

A seller is not liable for any error, inaccuracy or omission of any material information provided by a government or governmental agency or by an airport or airport authority on which a seller relied when complying with Sections 4, 5, and 6 of this Act as long as the error, inaccuracy or omission was not within the actual knowledge of the seller.

11. Seller's Compliance as Precluding Liability for Airport Changes After Final Settlement

A seller who complies with Sections 4, 5, and 6 has no liability to a buyer regardless of any change in an airport, including its operations, flight paths, or noise, occurring after final settlement.

12. Waiver Prohibited

(a) The requirements of this Act may not be waived, orally or in writing, by a buyer of residential real property subject to this Act.

(b) Any waiver signed by or on behalf of a buyer is void *ab initio*.

13. Statute of Limitations

Any legal or equitable action based on non-compliance with the Act must be brought within one year of the date of an executed real estate sales contract if there was no transfer of title to the buyer or transferee, or if there was a transfer of title to the buyer or transferee, within one year of the date of the final settlement on the property.

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