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NORTH CAROLINA
REAL ESTATE COMMISSION

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July 11, 2011

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Dear Orville:

This letter is in response to your request for clarification about a broker's duty to disclose landslide hazards and landslide hazard maps in Macon and other North Carolina mountain counties.

Based upon our conversation and some written materials we have received, it is my understanding that some years ago a landslide occurred at Fishhawk Mountain. This event, and possibly others, caused the North Carolina Geological Survey to create maps of Macon and perhaps four or five other counties showing areas of possible risk for landslides. During that same time frame and continuing until today, the North Carolina General Assembly and perhaps even some local governments have considered new laws to respond to the perceived landslide threat. To date, however, I am not aware that any bill or ordinance has passed relating to the disclosure of landslide hazards.

It appears also that the local press in your area and advocacy groups have published articles and statements indicating that the North Carolina Real Estate Commission has issued an opinion or ruling about the materiality of the newly created maps. Concerning this, you asked me whether the Real Estate Commission has issued any ruling or statement concerning the slide hazard maps and to clarify what a broker's disclosure obligation is concerning slide hazards and slide hazard maps.

The Real Estate Commission has not issued any ruling concerning slide hazards or slide hazard maps in Macon or any other county. Over the years, the Commission has received few complaints against brokers for failing to disclose subsidence or landslide hazards. As you know, a broker's duty to disclose is set out in N.C.G.S. § 93A-6(a)(1). A broker may be disciplined by

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the Real Estate Commission for “making any willful or negligent misrepresentation or any willful or negligent omission of a material fact.” A fact is material if it is one that an ordinary, reasonable, and prudent person would want to take into account before engaging in a real estate transaction. It is not necessary, however, for the fact to be so serious or important that standing alone it would cause a person to engage in or refrain from engaging in a transaction. Frequently, material facts in real estate transactions are described as defects. Indeed many defects are material, but the question of materiality as contemplated by the law is not limited to defects.

As it is written, the statute creates a knew-or-should-have-known standard for brokers rather than an actual knowledge standard. A broker has a duty to make a reasonable inquiry to discover a material fact when a reasonable broker, employing the minimum standards and skills expected of brokers, would have discovered the same fact and learned of its materiality.

Applying this test, then, to landslides, we begin by determining that a land slide or subsidence or the potential for a landslide or subsidence may be a material fact if it is of so serious a nature that the ordinary, reasonable, and prudent buyer would want to know about it. This question of materiality is often one of degree. The regular occurrence of slides or subsidence or the very risk of such events on a small residential building lot would certainly be material to a buyer under any objective test. However, the same events or risk of such events may be of little consequence or concern to a purchaser if the hazard is confined to a small portion of a much larger tract containing other areas free from hazard. Material fact questions are usually fact specific and this office is usually reluctant to make sweeping pronouncements about materiality of conditions which, when combined with any of a range of circumstances, may produce different results in the application of the materiality test described above.

With so few complaints concerning slide hazards (as opposed to flooding, erosion, structural defects, and other problems which are frequently the subject of consumer complaints against real estate brokers) and no other evidence to indicate that the risk of property damage or personal injury is high or widespread, we decline at the present time to declare that as a minimum standard of practice, a broker must investigate slide hazards or warn his clients of the potential for such hazards in the absence of the broker’s actual knowledge of such hazards or the existence of information, conditions, or other “red flags” which a reasonable inspection of the property by a person trained as a broker would discover.

We note that in Clouse v. Gordon, 115 N.C. App. 500, 445 S.E. 2d 428 (1994), the North Carolina Court of Appeals refused to hold that a broker has a duty to consult flood hazard maps. In that case, disappointed buyers purchased a house and lot in Monroe, North Carolina. During the course of the transaction, a survey was performed which indicated no flood hazard. After the transaction closed, the lot flooded from a nearby creek and the buyers sued the listing agent and others alleging misrepresentation. In support of their claim, the buyers established that the public

flood hazard map clearly showed that a significant portion of the property was in a flood zone and argued that it was the broker's duty to consult the map and advise them about the flood risk. Id. at 504, 445 S.E. 2d at 430. The court rejected the buyer's argument.

This office would concur that under the unique facts recited in Clouse, and without some showing that the broker either actually knew or that she should have known about the flood hazard on the property in question, she was under no duty to consult the flood hazard map. We note that at the time of the transaction in Clouse, flood hazard maps existed for most urban areas and real estate brokers generally were familiar with their availability. We also note, as did the court in Clouse, that the survey created during the course of the transaction showed no flood hazard and that this fact might reasonably have caused the defendant broker to assume no issue of flooding existed. Id. at 509, 455 S.E. 2d at 433. The property in question consisted of two lots. The house was located on one lot and a creek ran across a portion of the other. The presence of the creek was manifest to the buyer plaintiffs and the defendant broker. At closing, the broker pointed out that the creek was not shown on the survey. The buyers argued that the broker's awareness of the creek triggered a duty to consult the flood maps. The court disagreed. Id. at 509-510, 455 S.E. 2d at 433. While this outcome might be debatable, we agree that in the absence of more evidence of a potential flood hazard, the broker had no duty to consult the available map.

The decision of the Court of Appeals in Clouse v. Gordon is instructive in our consideration of a broker's duty to disclose a landslide hazard when maps showing such hazards on a county-wide basis are available for consultation. Because the genuine and immediate risk of slide hazards are isolated and particular to individual parcels, it is our opinion, as it was the court's opinion under the facts of Clouse, that a real estate broker has no duty to consult slide hazard maps when they are available unless, under facts specific to a particular transaction, the broker possesses actual information of a slide hazard or unless an ordinary, reasonable, and prudent real estate broker practicing in the area where the subject property is located should have known that such a hazard imperiled the property. It is also our position that because the actual and immediate threat of slide hazards is not a general one, the mere existence of the map is not itself a material fact which must be disclosed to every purchaser in the absence of some evidence of an actual hazard or threat to the property in a given transaction.

We are aware that other persons commenting on this issue have sometimes cited the decision of the Supreme Court of North Carolina in Johnson v. Beverly-Hanks & Assoc., Inc., 328 N.C. 202, 400 S.E. 2d 38 (1991) as authority for the proposition that a broker must disclose slide hazard maps to prospective purchasers. We disagree. In Johnson, the issue before the court was whether there was a genuine issue of fact in a transaction where a buyer's agent allegedly undertook to procure for her clients an independent, professional inspection of possible structural problems in a house and failed in that undertaking by procuring a inspection by an inspector who

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had previously advised the seller concerning the same property. The question of disclosure of slide hazards does not involve the legal issues flowing from undertakings theories and questions of professional independence.

Please note that this opinion of the Commission's legal staff is based upon the facts and circumstances recited or assumed in this letter. Our opinion might change if the facts and circumstances change or if we discover that we have been mistaken in our understanding of them. Further, we are aware that the issues of disclosure of steep slopes and the mapping of slide hazards have been the subject of bills and debate in the North Carolina General Assembly for a number of years including the current session. If the General Assembly passes any bill touching upon or concerning slopes, mapping, slide hazards, or a broker's duty, we will of course revisit the question and adjust our opinion to conform with the law.

Thank you for your question and your patience while we have had it under consideration.

Yours very truly,

Thomas R. Miller
Legal Counsel

TRM/fj