



Must a dual agent disclose the buyer's intended use of the property?

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QUESTION: I have just received an inquiry on one of my listings from an *adorable* little man named Bushy Evergreen. Bushy is helping his employer, Kris Kringle and his wife, Jessica, find a little get-away where they can relax when their seasonal business slows down after the holidays. Bushy has done some research on my listing and he says it would be perfect for the Kringles and their reindeer. He has power of attorney from the Kringles giving him the authority to hire me and purchase the property on their behalf. My question is, do I have to disclose to my seller client, a Mr. Scrooge, the fact that the Kringles plan to bring their reindeer with them? The reason I ask is because the property the seller has listed with me is next door to his residence, and I know him to be a somewhat disagreeable sort of guy. When I told Bushy that I wasn't sure if the seller would be okay with a herd of reindeer living right beside him, he scrunched up his cute little nose and said he'd rather me keep quiet about them.

ANSWER: We assume that both Scrooge and the Kringles have agreed or will agree to dual agency. If that is correct, the dual agency section of the listing and buyer agency agreements states among other things that the parties understand the firm may obtain information which, if disclosed, could harm the bargaining position of the party providing the information, and that the firm will not disclose information that a party has identified as confidential unless disclosure is otherwise required by statute or rule. Since Bushy has requested that you not disclose to Mr. Scrooge the Kringles' plans to bring their reindeer, we don't think you should do so unless their plans would be a material fact that you would be required to disclose under the real estate license law.

The question becomes, what is a "material fact?" According to the Real Estate Commission's *North Carolina Real Estate Manual*, material facts include facts about the property itself, facts relating directly to the property, facts relating to the ability of the agent's principal to complete the transaction, and facts that are known to be of special importance to a party. The *Manual* states that regardless of which party in a transaction a real estate agent represents, such facts must be disclosed to the agent's principal and to third parties the agent deals with. The *Manual* then goes on to provide that under agency law, an agent has the *additional* duty to disclose to his or her principal any information that may affect the principal's rights and interests or influence the principal's decision in the transaction. So, which category of information would the presence of reindeer next door fall into? According to a leading authority*, Kris Kringle's (aka "Santa") eight reindeer are "tiny." In our view, the presence of eight exceedingly small reindeer on the property (nine, if you include Rudolph, who was added to the herd later) could not reasonably be considered a material fact that you would be required by law to disclose to the seller. (As an aside, their tininess likely explains why we can never hear them on the roof.) Although the Kringles' plans for using the property might possibly influence Scrooge's decision whether to sell the property to them, we believe that in agreeing to dual agency in accordance with the terms of the listing agreement, he has *by contract* relieved the firm of any duty it might otherwise have to disclose to him any additional information regarding the Kringles' plans.

* *'Twas The Night Before Christmas*, line 16, originally published in the *Troy Sentinel* on December 23, 1823

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