# 2024-2025 GENERAL UPDATE (GENUP) COURSE

## COMMERCIAL VERSION

# STUDENT MANUAL©

**September 2024 by North Carolina Real Estate Commission, Cindy S. Chandler, CCIM, CRE, & Scotty Beal, JD**

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# Welcome to the 2024-2025 Mandatory Update Commercial Version

The North Carolina Real Estate Commission (Commission) is honored and excited to bring you the General Update (GENUP) and GENUP Commercial Version courses for the 2024-2025 continuing education (CE) season.

The Commission realizes that the Update courses form the core of CE for North Carolina brokers every year. They are the product of months of work, decades of experience, and involve the time, energy, and efforts of many people throughout the Education & Licensing and Regulatory Affairs divisions.

Beginning each fall the Commission members rely on input from brokers, instructors, surveys, and staff to identify potential topics for the course. The topics eventually chosen by the Commission members are selected to provide current information about law and rule changes, areas of disciplinary concern, and evolving brokerage practices which affect compliance with North Carolina statutes and Commission rules.

Many months of research and authorship are involved in drafting the course. Every word of content contained in the course is reviewed and refined on several levels at the Commission. The goal is to have the Education and Regulatory Affairs Divisions provide consistent and accurate information to consumers and brokers using a unified voice. The voice this year was created by education officers, the Commission's directors, staff attorneys, consumer protection officers, and subject matter experts.

This year's courses are entitled "Playing to Win" and are built around a game show theme. We did this to maximize engagement in the courses and to create lots of opportunities for interaction between the instructor and the students. We know students learn best when they are engaged and having fun. For the first time ever, we have powered this year's Update courses with AI tools to create better quality videos and to be more innovative in the conveyance of information. There are also multiple resources shared in the course.

We trust you will walk away with a rewarding experience and lots of useful and practical information. Our hope is that you have a fun educational experience while taking this course just as we did creating it for you.

The Commission would like to express its thanks to Cindy Chandler and Scotty Beal for their work on this year's Commercial Version.

Leonard C. Elder, JD, DreI, GSI
Director of Education & Licensing

Kizzy Crawford Heath, M.A.Ed., JD, DREI
Assistant Director of Education & Licensing

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## *Introduction*

The 2024-2025 GENUP Courses are four-hour courses that must be completed by all provisional brokers (PBs) and non-provisional brokers who are not brokers-in-charge (BICs) and/or do not have BIC-Eligible status and who wish to renew their licenses on active status on July 1, 2025, for the 2025-2026 license year.

BICs and brokers with BIC-Eligible status must take a Broker-in-Charge Update Course (BICUP) each year to satisfy the Update course requirement and to maintain BIC-Eligible status, as prescribed by Title 21, Chapter 58, of the North Carolina Administrative Code (Rule) Subchapter A, Section .1702 (**Rule 58A .1702**) and **Rule 58A .0110**.

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## *Development and Delivery*

This Commercial Update course was developed and/or approved by the staff of the Commission and is only delivered by certified education providers and approved instructors.

Per **Rule 58H .0101(7)**, an "instructional hour" means fifty minutes of instruction and ten minutes of break time each hour.

Per **Rule 58H .0403(d)**, education providers shall use the Commission-developed course materials to conduct Update courses. Education providers shall provide a copy of the course materials to each broker taking an Update course.

According to **Rule 58H .0207(d & e)**, for each CE course taught, an education provider shall provide a course completion certificate signed by the education director to each student that meets the requirements of **Rule 58A .1705**. The course completion certificate shall identify the course, date of completion, student, and instructor.

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### *RULE 58A .1705: ATTENDANCE & PARTICIPATION REQUIREMENTS*

*(a) In order to receive credit for completing an approved continuing education course, a broker shall:*

*(1) attend at least ninety percent (90%) of the scheduled instructional hours for the course;*

*(2) provide the broker's legal name and license number to the education provider;*

*(3) present the broker's pocket card or photo identification card, if necessary;*

*(4) personally perform all work required to complete the course.*

*(b) With the instructor or the education provider's permission, a ten percent (10%) absence allowance may be permitted at any time during the course, except that it may not be used to skip the last ten percent (10%) of the course unless the absence is:*

*(1) approved by the instructor; and*

*(2) for circumstances beyond the broker's control that could not have been reasonably foreseen by the broker, such as:*

*(A) an illness,*

*(B) a family emergency; or*

*(C) an act of God.*

## Comments and Complaints

Comments and complaints about the course, education provider, or instructor may be directed in writing to:

North Carolina Real Estate Commission
Education and Licensing Division
PO Box 17100
Raleigh, NC 27619-7100
**educ@ncrec.gov**

# CONTENTS


| | | |
|---|---|---|
| Section 1 | Environmental Material Facts | 1 |
| Section 2 | NCREC Frequently Asked Questions | 59 |
| Section 3 | Permits | 88 |
| Section 4 | Education Update | 104 |
| Section 5 | Law & Rules Update | 115 |
| Appendix | Commercial Form Changes | 137 |


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# SECTION 1

# ENVIRONMENTAL MATERIAL FACTS

# LEARNING OBJECTIVES

In this section, we will review the basics of material facts, and then explore several environmental conditions that may give rise to material facts, or at a minimum, create red flags for brokers. The subjects in this section include:

- Components of Material Facts
- Radon Gas
- Solar Panels
- Commercial Building Insurance Rates
- Airports

After completing this section, you should be able to

- define a material fact;
- explain the categories of material facts;
- identify red flags that indicate possible material facts; and
- explain the responsibilities of a broker for discovery and disclosure of material facts.

# TERMINOLOGY

## Material Fact

Any fact that could affect a reasonable person's decision to buy, sell, or lease property is considered a material fact and must be disclosed by a broker to the parties in the transaction regardless of the broker's agency role within the transaction.

## Uniform Commercial Code

According to the Library of Congress, the Uniform Commercial Code (UCC) is a collection of proposed model laws, drafted by the American Law Institute and National Conference of Commissioners on Uniform State Laws that is meant to serve as a guide for state legislatures when they draft statutes involving commercial contracts and related dealings.

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# MATERIAL FACTS

**ANY FACT THAT COULD AFFECT A REASONABLE PERSON'S DECISION TO BUY, SELL, OR LEASE A PROPERTY.**

Disclosure of material facts remains a topic of interest to our Commission largely because it continues to be the basis of many of the complaints it receives on an annual basis. While most of these complaints do not involve commercial transactions, a review of the rules and duties surrounding material facts in a commercial context is warranted.

The ultimate question when discussing material facts is "disclosure." Whether a buyer, seller, or broker must disclose any single fact pertaining to a particular commercial transaction to all the parties in the transaction? As is often the case, the answer is "well, it depends."

Frequently one need only look to statutes or rules to determine if a fact needs to be disclosed in a commercial real estate transaction. Not in this case however. Currently only eight states in the country require sellers to make certain disclosures when selling commercial property (CA, ME, MI, MN, NH, TN, TX, & WA). As North Carolina is not one of those states, we must look elsewhere for guidance on what facts need to be disclosed.

While North Carolina General Statutes (N.C.G.S.) **§93A-6(a)(1)** imposes upon real estate brokers the duty to discover and disclose material facts, no specific facts are mandated. Agency law provides a bit more detail. An agent must disclose to the principal any information that has the potential to affect the principal's rights, duties, and interests or impact their decision in the transaction. Information that an agent must disclose to their principal includes:

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- the other party's willingness to accept a price or terms differing from those initially stated;
- the other party's motivations for participating in the transaction; and
- any other known confidential information that could impact the principal's rights and interests or influence their decision in the transaction.

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As this brief overview reveals, part of the difficulty real estate brokers may experience in grasping the concept of a "material fact" is that there is no precise definition. As such, brokers are tasked with "discovering" them.

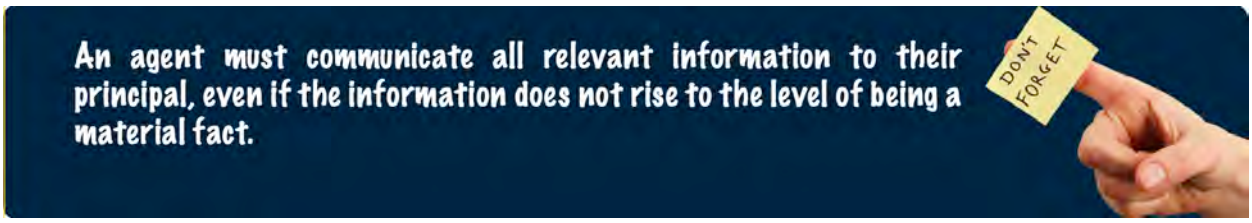
Discovering means to look. And we do really have to look, because the consequences for failing to understand "disclosure" can be devastating. Buyers, sellers, and brokers can all face civil liability for failing to disclose what should be disclosed. It is with these thoughts in mind that we begin our exploration of discovery and disclosure of material facts in a commercial real estate context.

## *So Many Facts, So Little Time*

In any given commercial transaction, there could literally be hundreds if not thousands of facts that come to light during the course of the transaction. Our obligation as brokers working on the transaction is to understand when a particular fact stands out, when it rises to a certain level of import, when (to put it in North Carolina parlance), it becomes "material."

As we begin our work gathering facts about a property, we will typically place all facts into one of two categories, that which we want to disclose and that which we will keep confidential. Facts we want to disclose typically revolve around marketing the listing or touting the buyer as one that can and will purchase the property.

Where the rubber meets the road, typically, is the examination of facts that you may, at first blush, want to keep confidential. If there is a reason why your client wants to keep a specific fact confidential, the broker must examine the fact and determine whether it rises to the level of being "material" and thus must be disclosed.



## *"Material" Fact Defined*

While North Carolina does not have a specific statute detailing what must be disclosed in a commercial real estate transaction, our Commission has articulated a definition to guide us in our determinations.

A material fact is:

> *Any fact that could affect a reasonable person's decision to buy, sell, or lease real property is considered a material fact and must be disclosed by a broker to the parties in the transaction and any interested third parties regardless of the broker's agency role within the transaction.*

Two things should jump out at you about this definition. First, it pertains to "any fact" that you uncover during your work in the transaction. Second, a fact in one commercial transaction could be material, but the same fact in a second commercial transaction might not be material. Put simply, determining if a fact is "material" requires examination of all facts in a commercial transaction, but with a completely unbiased eye, because each transaction is different, and as such, the materiality of any particular fact may be different.

Brokers should be aware that there are some state and fair housing law exemptions for the disclosure of certain facts. An explanation of these facts that may seem material but are ***not***, can be found in **"Material Facts: Speak Up!"**

**THIS CATEGORY INCLUDES EXTERNAL FACTS THAT AFFECT THE USE, DESIRABILITY, OR VALUE OF A PROPERTY**

## *Discovery of Material Facts*

Armed with our definition, brokers can begin work gathering and examining the facts that pertain to the transaction and determining materiality. This begs the question: "where to look for these facts?" The simple answer is, everywhere. A broker has a duty to investigate the property and discover any issues or facts that could be material. This typically begins with a thorough visual inspection.

In any real estate transaction, it is imperative for a broker to actively look for material facts. In purposefully broad strokes, the Commission considers "material facts" to include *at least* the following categories of facts, regardless of who a broker represents in the transaction. A broker should look into facts from each of these categories.

***Facts about the property itself.***

This category includes various substantial property issues that are within the property's boundary lines, including, but not limited to, significant defects or abnormalities in the structure of buildings, as well as malfunctioning systems, roof leaks, drainage problems, or flooding.

***Facts that relate directly to the property.***

This category includes factors outside the property's boundary lines that affect the use, desirability, or value of the property. Such factors include, but are not limited to, impending zoning changes, the presence of restrictive covenants, planned road and/or infrastructure improvements, or planned commercial development in the immediate area.

***Facts directly affecting the principal's ability to complete the transaction.***

This category includes *any fact* that could adversely affect the ability of a party to complete the transaction. Such facts may include, but are not limited to, the buyer's inability to qualify for a loan, a buyer's inability to close on a property without first selling the building they currently own, or a seller's inability to convey clear title.

***Facts that are known to be of special importance to a party.***

This category includes innumerable facts that, while not normally deemed "material," become "material" because of their particular significance to a party in the transaction, and thus must be discovered and disclosed to all parties. Examples include a buyer:

- inquiring about zoning regulations and the impact they may cause to their business.

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- explicitly stating they want to purchase a building located at least five miles from the nearest Starbucks.

When a party to the transaction communicates a particular interest to a broker regarding a property, the broker is obligated to actively discover all facts associated with that interest and disclose them. This obligation has heightened significance because of the importance to the party.

THESE TWO WORDS SUMMARIZE A BROKER'S OBLIGATION WHEN IT COMES TO MATERIAL FACTS

## *Common Knowledge*

Common knowledge is information that is generally known to nearly everyone in a particular market. Therefore, a reasonably prudent broker is expected to possess common knowledge related to the area in which they practice brokerage. In an effort to practice brokerage competently, a reasonably prudent broker would possess common knowledge regarding:

### *Geographic Area*

A broker should have knowledge and familiarity with the geographic area including business developments, economic changes, and zoning and planning development. Brokers can develop geographic competence in a variety of ways such as researching the area, subscribing to news and data services, taking CE courses, and completing professional development classes.

### *Market Area*

A broker should have knowledge regarding the market including economic, social, and environmental influences that may affect the value of property. Also, knowledge of appreciation rates, property prices, and demographic statistics are important.

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Brokers can develop market competence by subscribing to CRE data services, attending meetings held by municipalities and associations dealing with commercial real estate issues.

***Industry Standards for commercial real estate specialty areas (e.g., retail, industrial, hospitality, multi-family, short-sales, land, etc.)***

A broker should have knowledge of the typical transaction cycles for the types of specialties in which they practice. Also, a broker should be familiar with the terminology and transaction documents and/or forms that are used for each specialty area. Brokers can develop industry standards competence by joining industry associations, obtaining professional designations, and adopting a life-long-learning approach to competency.

Other ways to maintain current and accurate general knowledge include:

- reading the local newspaper;
- watching the local news;
- attending city/municipality meetings and/or review agenda notes;
- networking/communicating with other brokers/professionals in real estate in the area; and
- routinely reviewing information regarding zoning and local ordinances.

## *Red Flags*

Imagine that a broker is touring a retail building with her tenant-client and encounters an uncovered electrical panel with wires that are not connected to breakers. Is this a material fact?

The Commission recognizes that brokers are not experts in all areas that might pertain to a commercial property, and does not require brokers to become experts in all things. However, the Commission does require brokers to see what should be seen and take appropriate action. This concept is referred to as a "red flag."

A "red flag" is the presence of any fact or issue that should make a reasonably prudent broker suspect that the situation encountered may give rise to a problem or that information provided by another party may be incorrect or incomplete.

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Addressing the above question, it is *unlikely* that you know just by observing this electrical panel that it will affect your tenant's decision to lease. However, a reasonably prudent broker touring a retail space would know that what you saw was uncommon, and therefore a red flag.

If a broker notices red flags, (i.e., leaks, stains on the ceilings, cracks in the wall, seemingly inaccurate square footage measurements, etc.), a broker must conduct more research and use due diligence to determine the severity of the issue and the effect that the red flags might have on their client's decision regarding the property. The broker may complete additional property-specific research by:

- Inquiring of the seller/broker about known issues with the property.
- Measuring the property or hiring a vendor to measure the property if a discrepancy in square footage is suspected.
- Requesting of the seller or listing broker any service records for repairs conducted on the property.
- Researching the existence of necessary permits with local municipalities.
- Advising your client to hire an inspector and/or contractor to estimate and/or repair issues.

## *Best Practices for Discovery of Material Facts*

A listing broker has the responsibility to confirm the accuracy of the property data and discover material facts upon acquiring a listing.

The following "best practices" may assist the listing broker in the discovery and disclosure of material facts:

- Explain their duty to discover and disclose material facts under License Law and Commission rules to clients and/or consumers.
- Conduct a visual inspection of the property.
- Conduct a thorough interview with the seller to determine goals and desires, information about the property itself, and the timeliness of all repairs and maintenance.

- Determine the seller's willingness to perform additional repairs and maintenance if a defect is discovered.
- Obtain copies of all documents, records, and receipts that pertain to any repairs or renovations performed on the property.

- Talk to neighboring property owners to gain insights about the geographic area and overall marketplace.
- Evaluate the preliminary inspection of the property to determine if any red flags exist before making any statements about the property.
- Research any issues existing on the property to determine if they were repaired and the likelihood of the issue existing in the future.
- Accurately compile all information about a listed property necessary to market the property.
- Disclose the material fact to all parties in the transaction.
- Update all disclosures and marketing as additional information is obtained.

The buyer's broker is tasked with the responsibility of investigating the possible presence of material facts on behalf of their client as well. Typically, a buyer agent can rely on the accuracy of property information provided by the listing broker, whether presented on a listing information sheet or in an MLS. But, as the old adage goes, trust but verify.

In an effort to assist their buyer clients with making informed decisions regarding a transaction, buyer agents should adhere to the following best practices:

- Explain their duty to discover and disclose material facts under License Law and Commission rules to clients and/or consumers.
- Conduct a thorough interview with the buyer to determine goals and desires, as well as all information that the buyer considers to be of special import, or deal-breakers.

- Visually inspect and evaluate a property for possible issues.
- Research property-specific information with an eye toward red flags.
- Ask the listing agent about the presence of material facts.

- Thoroughly verify issues identified by their clients as material, such as the existence of zoning restrictions or impending road construction.
- Review a property's transaction history. If the property was previously under contract, inquire about the property's inspection history. Specifically, if it has been recently inspected, request information on any defects listed in the inspection report.

## *Disclosure of Material Facts*

At this point in a reasonably prudent commercial broker's work on a transaction, you will have created a third bucket of facts. This bucket contains those facts that might not ordinarily be disclosed, but in this particular transaction, have risen to the level of being "material facts."

Although the disclosure of material facts is of paramount importance in any transaction, the Commission does not have a specific rule that mandates how the disclosure of the material facts must take place.

A broker may disclose material facts by:

- including information in the public remarks section of an MLS listing;
- attaching supplemental documentation to the listing with a note in Public Remarks to see the attached documents; and/or,
- email or text message.

Brokers may also verbally disclose the existence of material facts. However, such disclosure may become difficult to prove. As a best practice, brokers should disclose material facts in writing and confirm that the broker representing the opposing party has seen the written disclosure.

Material facts must be disclosed to all persons with whom the broker deals, regardless of whom a broker represents in a transaction. Please note that this requirement extends not only to the parties to the transaction, but to any interested third parties as well, regardless of the broker's agency role within the transaction. This may include lenders, attorneys, and others.

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## *Disclosure of Material Facts Must Be Timely*

Any broker, whether representing a buyer or seller, must timely disclose the existence of material facts to all parties in a transaction. But what does it mean to do so timely? As is so often the case, it depends. Remember our definition of a material fact is whether the fact *"could affect a reasonable person's decision to buy, sell, or lease."* Timely, then must be defined in light of when that *"reasonable person's decision"* must be made.

### *Timeliness at the Closing Table*

If for example, you are at the closing table, and your buyer client is about to sign all the documents, any material fact that comes to light at that very moment, would have to be disclosed immediately (if not sooner!) so as to preserve that buyer's ability to decide whether to continue.

### *Timeliness When Under Contract*

If a material fact comes to light while under contract, but prior to expiration of the exam period, a broker must disclose the fact with sufficient time for a buyer to exercise their right to terminate the contract, or for a seller to exercise whatever rights they may have under the circumstances.

### *Timeliness to Prospective Buyers Before Offer*

The timeliness of a material fact to a prospective buyer that has not made an offer is different. Timely disclosure in this context means that prospective buyers are provided the information in plenty of time to make an informed choice as to whether to make an offer on the listed property.

### *Timeliness to Back-Up Buyer*

In its article, **"Timely Disclosure of Material facts to a Back-Up Buyer,"** NC REALTORS® further clarifies that a back-up buyer should have the same opportunity to decide whether to exercise the right to terminate the back-up contract in light of the just disclosed material fact. Timeliness here means disclosure before the back-up buyer is officially notified that the back-up contract has become primary.

THIS STANDARD IS USED BY THE COMMISSION TO DETERMINE IF A BROKER SHOULD HAVE KNOWN ABOUT A PARTICULAR MATERIAL FACT

## *Commission Employs a Reasonableness Standard*

As outlined above, a broker is obligated to discover and disclose material facts to all interested parties in the transaction, irrespective of whom they represent. This mandatory disclosure requirement includes disclosure of:

- facts about and affecting the property of which the broker is aware,
- facts about and affecting the property of which the broker *should reasonably be aware*, and
- facts and information that is considered common knowledge.

It is essential that brokers thoroughly understand that **N.C.G.S. §93A-6(a)(1)** authorizes the Commission to discipline a broker for ". . . making any willful or negligent misrepresentation or any willful or negligent omission of a material fact."

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In determining whether a broker negligently misrepresented or omitted a material fact, the Commission uses a "reasonableness" standard to evaluate whether a broker breached their duty. In other words, would a reasonably knowledgeable and prudent broker in the same or similar circumstances have known that the information being provided was incorrect? If a broker is relying on information from another source (e.g., property owner or MLS information sheet), the question is whether the broker acted reasonably in relying on the source without independently investigating the matter to verify the accuracy of the information.

The reasonable person standard used by the Commission is actually a legal fiction. There is no such reasonable person. Rather, the standard is an objective one, meant to suggest a broker of average caution, care, and consideration under the circumstances. The determination rests on a comparison between what a reasonable broker would have known and done with the information, under the circumstances, and what the licensee actually knew and did under the same circumstances.

## *Ignorance of a Material Fact May Not Be An Excuse*

Some brokers mistakenly believe that if they don't know of a material fact then they can't be required to disclose it. However, the duty of a broker to discover material facts eliminates a broker's option to avoid learning a material fact. For example, a broker may believe that they do not have to "walk around" a property to view its condition or inquire about standing water on the roof. In this instance, ignorance is not an excuse. Brokers have an affirmative duty to investigate properties and uncover material facts. If you do not fulfill that duty, you will be subject to discipline.

**N.C.G.S. §§93A-6(a)(1, 8, 10)** authorizes the Commission to discipline a broker who:

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- misrepresents or omits a material fact;
- is unworthy or incompetent to act as a real estate broker in a manner as to endanger the interest of the public; or
- engages in any other conduct which constitutes improper, fraudulent, or dishonest dealing, respectively.

Even if a broker is unaware of a material fact, the Commission may take disciplinary action if it deems that a reasonably prudent broker would have known the fact existed. In the Commission's Bulletin article, **"What is Common Knowledge,"** it states that the Commission determines whether a broker knew of the existence of a material fact by analyzing documents, reviewing written correspondence, and conducting interviews with individuals involved in the transaction. Also, the Commission examines public records and analyzes relevant educational resources to determine if a broker should reasonably have discovered the material fact.

The article reiterates that the Commission uses the reasonableness standard to assess a broker's actions in discovering and disclosing material facts. Further, it confirms that a broker is obliged to discover and disclose any material fact that a reasonably knowledgeable and prudent broker would have discovered during the transaction.

**PLEASE NOTE**

Please note that while a reasonably prudent broker, in order to practice brokerage competently, should have common knowledge of the market, a broker is not permitted to make this determination about another broker. The broker cannot decide to refrain from disclosing the material fact to any party because they believe that the material fact was common knowledge.

## *Facts Known to Brokers*

To assist brokers in understanding their duty to discover and disclose material facts to all parties in the transaction, regardless of representation, we provide this series of common questions brokers encounter.

***What if a broker notices cracks in the wall below the loading dock in a warehouse? Does the broker have to disclose this information?***

Yes. The broker must disclose the existence of the cracks in the wall. At a minimum, the cracks raise a red flag concerning the integrity of the loading dock. As such, further inquiry should be done to determine the cause and discover if remediation of the issue(s) has occurred or is needed.

***Does a broker have a duty to disclose the cracks in the wall below the loading dock if they represent the seller?***

Yes. Even though the broker represents the seller, the broker is still obligated to inform the seller of the broker's obligation to disclose material facts, such as the cracks in the walls, to all parties in the transaction.

***What if the seller instructs the broker not to disclose the cracks in the wall below the loading dock?***

The broker must not follow the seller's instructions because they are not lawful. A broker's discovery and disclosure of material facts is not contingent upon whether they receive permission from their client to disclose this information. The discovery and disclosure of material facts is a mandatory requirement under **N.C.G.S. §93A-6(a)(1)**. If the broker obeys the seller and does not disclose the cracks in the wall, the broker may be in violation of the statute and subject to disciplinary action.

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***What if a buyer's broker is informed of the cracks in the wall, but the listing broker and/or seller had no prior knowledge of this material fact? Must the buyer's broker inform the listing broker and/or seller of this information?***

Yes. Although the buyer's broker may reasonably rely on the property information that is provided by the listing broker, they are not absolved of the responsibility to discover and disclose material facts about the property. Therefore, if a buyer's broker is made aware of any material facts during their research or inquiry about a property, they must disclose that information to all parties in the transaction, not just their buyer.

***What if a buyer's broker discovers an issue that might rise to the level of a material fact during a showing? Must the buyer's broker inform the listing broker of this information?***

Yes. If a buyer's broker discovers an issue during a showing, they should notify the listing broker of the potential issue. The listing broker should then notify the seller, investigate the issue, and encourage the seller to have it evaluated by a professional if needed.

- If an offer is presented while the listing broker is actively working to determine if the issue is material, the listing broker should disclose the potential issue to the buyer's agent and inform them that the issue is currently being investigated.

***Once a broker has determined that a red flag or material fact exists, what should be done?***

The broker must disclose the red flag or material fact to all parties to the transaction so each can possess the adequate knowledge to:

- make an intelligent decision regarding the property,
- negotiate repair services, or
- decide to terminate the offer or contract.

***Should a broker still disclose the red flag or material fact if it is going to scare off buyers?***

Yes. A broker does not have a choice regarding whether they disclose material facts to buyers. The statute is clear that

material facts must be disclosed to all parties in the transaction. If a broker is debating whether they should disclose the existence of material facts, they should ask themselves the following questions:

- Would you like to be the subject of a disciplinary investigation?
- Would you like to be a defendant in a civil lawsuit?

A broker who thinks that a transaction will close quicker without disclosing material facts to all parties will more than likely become the subject of a disciplinary action or civil lawsuit due to their failure to follow the law. Brokers should voluntarily disclose material facts to all parties during the transaction rather than possibly defending their license later.

**PLEASE NOTE**

**Brokers cannot use the common law doctrine of caveat emptor as a defense to allegations of failure to disclose material facts. A broker must voluntarily disclose all material facts that the broker knows or reasonably should know to all interested parties in the transaction in a timely manner even though North Carolina is a buyer beware state.**

## RADON

While many people naturally associate radon gas buildup with residential homes, the fact is that radon gas can be present in *any building!* This is of particular import for commercial buildings when you contemplate the number of hours some of the population spends in a commercial building. Office, factory workers, and school children often spend upwards of 1/3 of their day inside commercial or public buildings. As such, the presence of radon can be of significant import to all those involved.

## *What is Radon?*

Radon is a naturally occurring, colorless, odorless, and radioactive gas that is present in the majority of soil and rock in our country. It results from the natural breakdown of underground radioactive metals like uranium, thorium, or radium.

According to the US Environmental Protection Agency's (EPA) "Basic Radon Facts," radon can build up to dangerous levels inside any building, commercial or residential. This is true regardless of the age of the building, whether built on a slab or with a basement.

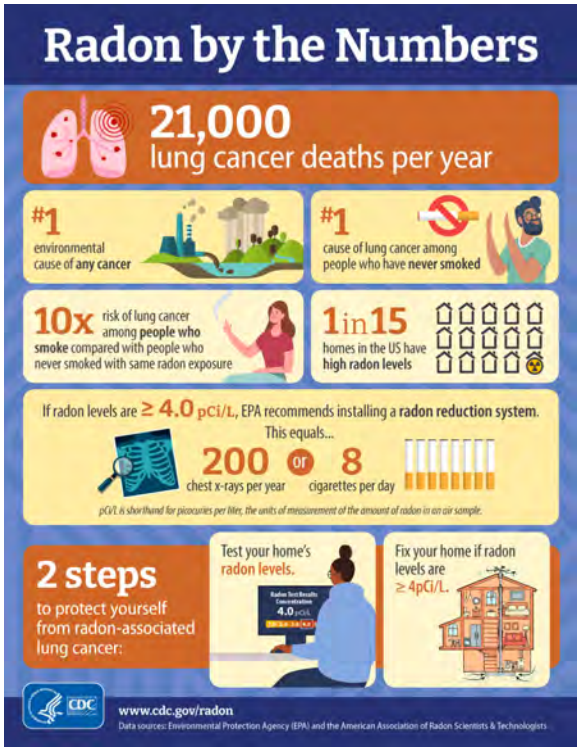
THIS IS THE ONLY WAY TO KNOW IF A BUILDING HAS A PROBLEM WITH RADON GAS

## *Fact or Myth*

- Fact or Myth: Scientists are not sure that radon is a problem.
- Fact or Myth: Radon testing is difficult and time-consuming.
- Fact or Myth: Buildings with radon problems cannot be mitigated.
- Fact or Myth: Radon only affects certain types of structures.

CONSIDERED TO BE THE BIGGEST HEALTH RISK OF RADON EXPOSURE

## *Is Radon Dangerous?*



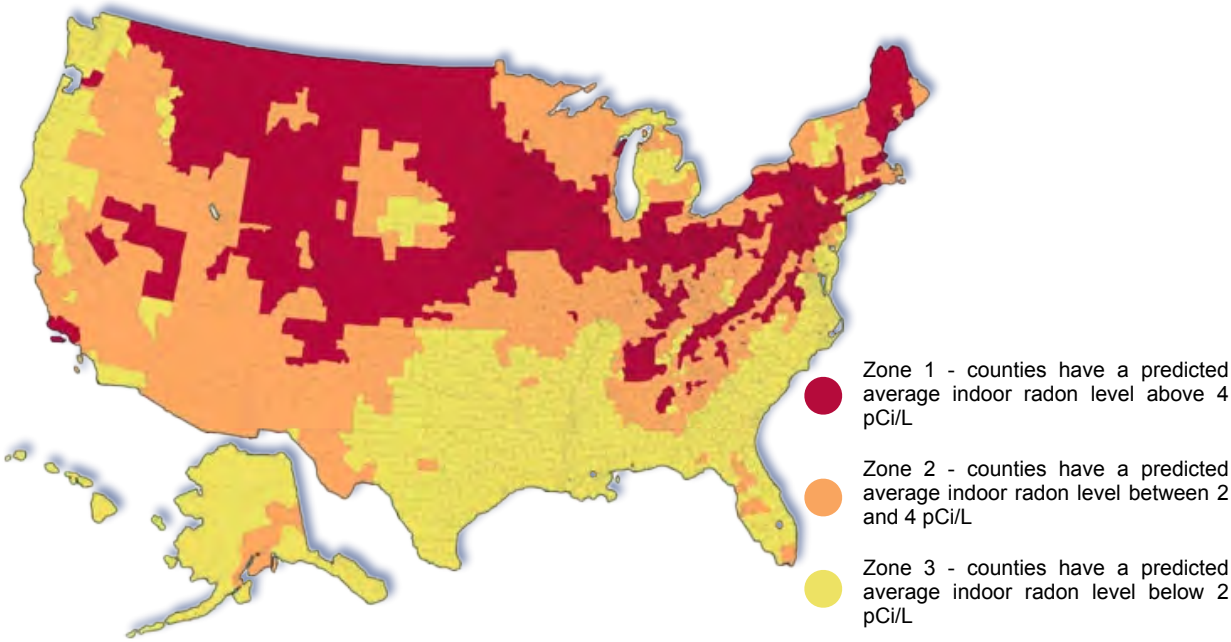

Overall, the EPA reports that radon is the second leading cause of lung cancer in the USA, accounting for about 21,000 deaths annually. Further, radon is the ***number one*** cause of lung cancer among non-smokers, which accounts for nearly 3,000 deaths annually.

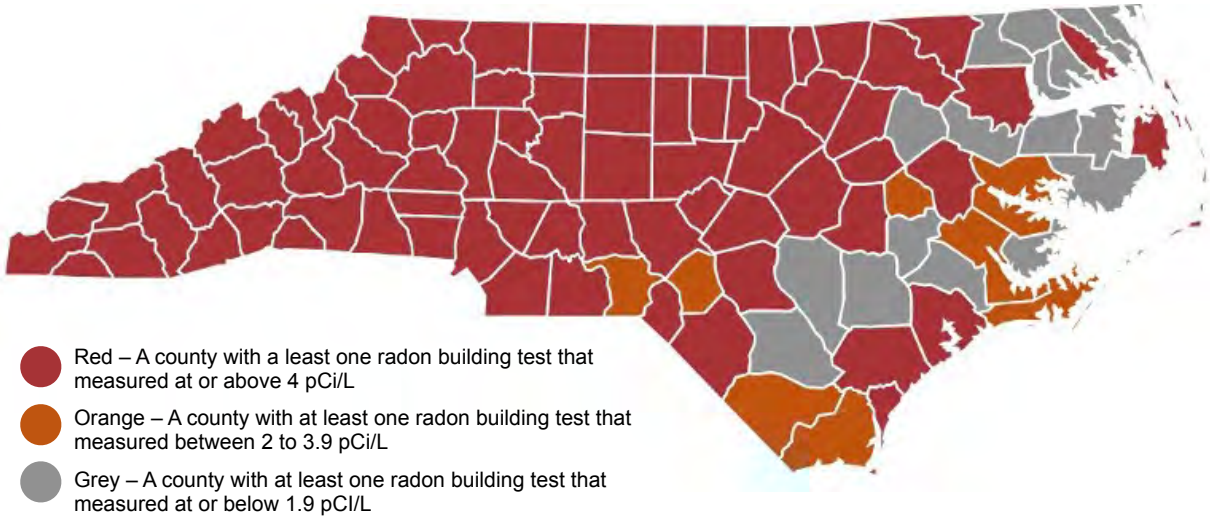
The World Health Organization estimates that worldwide, radon gas exposure causes up to 15% of all cases of lung cancer. According to the **North Carolina Department of Health and Human Services,** (NCDHHS) 450 people die in our state every year from radon-induced lung cancer.

The EPA, in conjunction with Kansas State University, created a webinar entitled **"An Introduction to Radon Gas in Homes"** that provides basic facts about radon (e.g., what it is, what it does, and how to reduce it, etc.).

## *Where is Radon Gas Most Prevalent?*

Radon has been found in every state in our country and in all 100 counties in our state. Within individual structures, radon levels can vary greatly, even adjacent structures may have differing levels. According to **National Radon Defense** and the NCDHHS' **Radon Program**, the following maps illustrate the radon levels that have been recorded in counties across the country and in North Carolina.



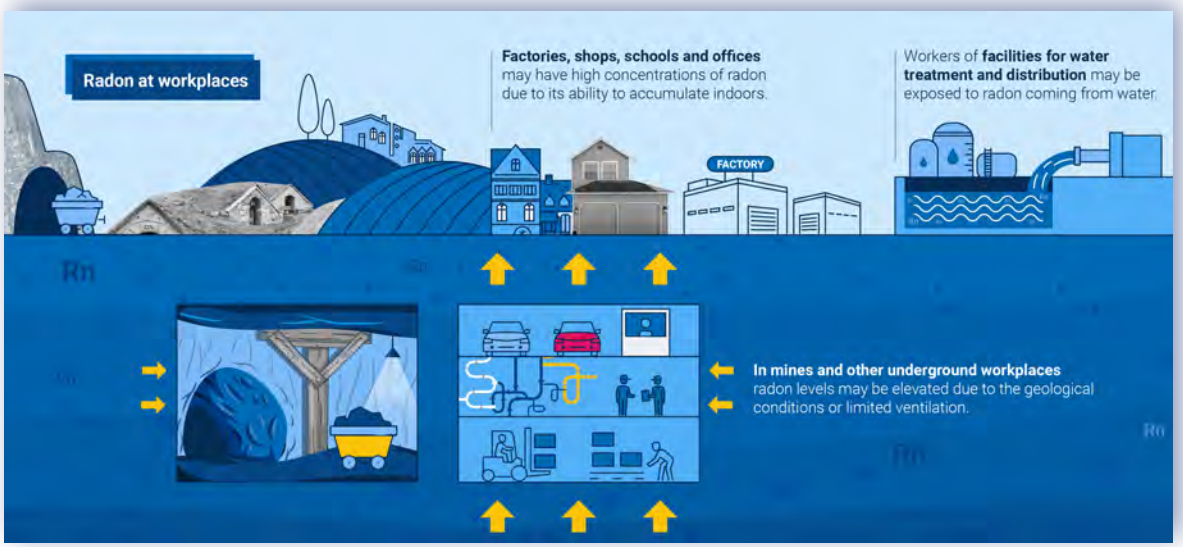

**PLEASE NOTE**

Data provided by the US Center for Disease Control and Prevention indicates that 77 of the 100 counties in North Carolina have indoor radon air levels above the action level of 4pCi/L.

## *How does Radon Enter a Building*

It is important for brokers to know how radon actually enters a commercial building. According to the International Atomic Energy Agency, after released from bedrock material, radon passes through the soil, diluting in the air before entering buildings. Radon exhaling from the ground beneath buildings is

the main source of radon in indoor air. It may enter buildings through cracks in the floor, gaps in construction materials, drains, or the spaces around cables and pipes.



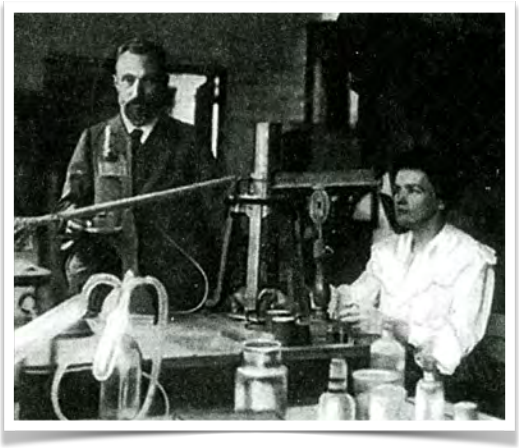

Radon may also enter a commercial building or school through the water supply. Radon will dissolve and accumulate in the groundwater, and then be released into the air once the water leaves the pipes in the building.

As may be obvious by now, the magnitude of radon concentration indoors depends primarily on the amount of radon produced in the underlying soil and bedrock, the soil permeability and composition, and the building's construction. While radon concentrations are generally highest in basements and ground floor rooms that are in contact with the soil, radon levels may be high in main floor and upper rooms as well.

In underground workplaces radon levels may be elevated due to the geological conditions or limited ventilation. The workplaces particularly affected are often associated with work in mines, tunnels, underground garages, and basements. A large proportion of normal above ground workplaces such as factories, shops, schools, museums and offices may also have high concentrations of radon due to their presence in the ground, poor ventilation, or the work performed therein.

## *Radon Measuring Survey*

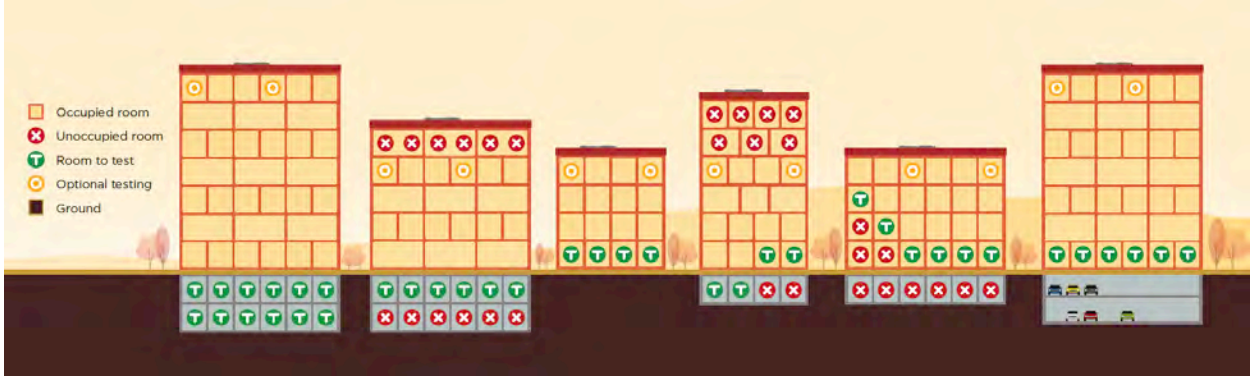
A radon survey is a test conducted by knowledgeable and qualified radon specialists to identify the presence and levels of radon in a commercial real estate structure. These tests include short-term and long-term radon sampling, depending on the individual circumstances.



Radon is measured in picocuries per liter of air (pCi/L), which is actually a measurement of radioactivity. A radon level at or above 4 pCi/L is considered dangerous. In the US, the average indoor radon level is about 1.3 pCi/L. The average outdoor level is about 0.4 pCi/L. The US Surgeon General and EPA recommend remediation for structures with radon levels at or above 4 pCi/L. The EPA strongly recommends that building owners with radon levels of 2-4 pCi/L measure and mitigate their structure.

In most commercial scenarios, the best way to accurately assess radon risk is through site-specific testing by an environmental professional. They may begin their survey with a short-term test. Short-term radon tests are usually performed for imminent commercial real estate transactions. Short-term tests should be conducted for at least 48 hours, but can remain in a structure from two to ninety days.

A long-term radon test is the better indicator of the average radon level in a structure. According to the EPA, long-term tests can also be used to confirm initial, short-term results between 4.0 pCi/L and 8.0 pCi/L. Long-term tests must remain in the structure for more than ninety days, and in some scenarios, up to twelve months. The advantage of performing a long-term test is a reading which is more likely to depict the structure's year-round average radon level, considering fluctuations during time of day, temperature change, and even season.




The primary strategy is to test occupied rooms that are in direct contact with the ground. Public buildings differ from houses in that the occupants are not usually directly involved in the measurement process.

THIS SIMPLE DEVICE CAN DETECT DANGEROUS LEVELS OF RADON GAS

## *Radon Test Devices*

There are many different varieties of radon measurement devices, especially when considering the plethora of residential kits. Most of these devices fall into one of three categories, and in a commercial context, you may encounter these names.

The first group of measurement devices are called alpha track detectors. These detectors use a small piece of special plastic inside a container with a small defined opening. When radon enters the opening in the detector, the alpha radiation causes damage tracks on the plastic; the number of tracks is proportional to the radon concentration.

The second type of measurement devices are called electret ion chambers. This device consists of a special plastic canister (ion chamber) containing an electrostatically charged disk detector (electret). The detector is exposed to radon in the air during the measurement period. Ionization resulting from the decay of radon produces a reduction in the charge on the electret. The drop in voltage on the electret is related to the radon concentration.

The last group of measurement devices are called continuous radon monitors (CRMs). These are devices that record real-time continuous measurements of radon gas over a series of minutes and report the results, generally in hourly increments. Air is either pumped or diffuses into a counting chamber, typically a scintillation cell, an ionization chamber, or a solid state detector. The result using this type of detector is normally available at the completion of the test in the building without additional processing or analysis.

While the first two categories of devices typically require sending the device into a laboratory for analysis and a report, the CRM provides immediate

data on site, and many have the ability to store and then retrieve historical data, which makes long-term measurement much more detailed.

## Radon Mitigation

A radon mitigation system refers to any system or process designed to reduce or permanently remove the presence of radon gas in the indoor air of a structure. This is achieved by expelling the radon gas from beneath the foundation of a building before it can get inside. Fortunately, radon gas can be removed from any structure no matter how large or complex.

### Sub-Slab Depressurization

The most common form of radon mitigation in commercial structures is sub-slab depressurization (SSD). SSD systems work by generating negative pressure under the slab of a structure to draw rising gases out before they have a chance to get in.

This system uses a combination of fans and piping to steadily draw radon-laden air from below a concrete slab foundation or basement into a point of collection, forcing the air to an external vent located above the roof of the property.

### Sub-Membrane Depressurization

When a building has a dirt or gravel crawlspace open to the lowest level of the structure, a method called sub-membrane depressurization may need to be utilized to lower the radon levels to a safe range. Using a special plastic membrane, the exposed foundation is sealed off, with a collection pipe sealed under the membrane. Similar to SSD, the collection pipe is then connected to a fan and vent system which exhausts the radon laden air out a vent above the roofline.

### *Soil Gas Collector Mats*

Also known as a vapor mat, these passive radon mitigation systems are primarily used in new construction. An extremely strong pressure-resistant plastic membrane is placed directly on the soil prior to the foundation being poured. This allows for radon to move freely under the concrete foundation and be passively vented outside without the need of a fan.

**THE LEVEL AT WHICH, IF ATTAINED OR EXCEEDED, MAKES RADON A MATERIAL FACT**

## *Is the Presence of Radon a Material Fact?*

In North Carolina, a radon level equal to or exceeding 4.0 pCi/L is a material fact. If a broker knows, or reasonably should know, that a property's radon level meets or exceeds 4.0 pCi/L, the broker must disclose that fact to all parties in the transaction.

In light of this obligation, brokers representing sellers in commercial transactions should investigate this subject thoroughly with their seller. The following practices should be considered while investigating radon:

- Discuss with seller what radon is and its potential health impacts.
- Inquire of seller about prior radon testing on the property.
- If no prior testing was completed, explain how testing now may avoid anxiety in potential buyers and future delays.
- If prior testing was completed, obtain copies of all available reports.

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- Inquire of seller whether any radon mitigation systems were ever in place, and obtain all records available concerning installation and potential monitoring of those systems.
- Thoroughly explain to the seller your obligations regarding material facts and that despite the seller's requests in this regard, the presence of radon above certain levels is a material fact that must be disclosed to all parties.

**PLEASE NOTE**

The statutory requirement for brokers to discover and disclose material facts applies in all sales and lease transactions. Therefore, if a broker involved in property management is aware or reasonably should know that a property's radon level exceeds 4.0pCi/L, the broker is obligated to disclose this information to all tenants and prospective tenants.

- Fact or Myth: Radon is only a problem in certain parts of the country.
- Fact or Myth: A neighbor's radon test result is a good indication of whether your building has a radon problem.
- Fact or Myth: No one should test well water for radon.
- Fact or Myth: It is difficult to sell a building where radon problems have been discovered.
- Fact or Myth: Our factory has been in our family for generations, it does not make sense to take action now.

# SOLAR PANELS

The desire to incorporate energy-efficient and eco-friendly environments into our work places has led some commercial property owners to install solar panel systems on their properties. There are many reasons behind this desire, including that fact that unused roof space could be a revenue source for the property owner. According to a 2020 article from the Yale School of the Environment there is sufficient unused roof space atop US commercial buildings to power 28,000,000 homes for one year.

Because our Commission views several facts surrounding solar panels as material facts that must be disclosed to all parties to the transaction, it is important that commercial brokers have a working understanding of the basics of commercial solar energy.

## *Key Terminology*

### Photovoltaic (PV) System

A system that converts sunlight directly into electricity using solar panels composed of semiconductor materials.

### Power Purchase Agreement (PPA)

A financial arrangement where a third-party developer installs, owns, and operates a solar system on a commercial property, and the property owner purchases the electricity generated at a predetermined rate.

### Net Metering

A billing mechanism that credits solar energy system owners for the electricity they add to the grid, allowing them to offset their energy costs.

### Investment Tax Credit (ITC)

A federal tax incentive that provides a credit equal to a percentage of the cost of installing a solar energy system, currently 26% (as of 2023).

### Feed-in Tariff (FiT)

A policy mechanism designed to accelerate investment in renewable energy technologies by offering long-term contracts to renewable energy

producers, typically based on the cost of generation. See the case study below.

### Solar Lease

An agreement where a third-party company installs and maintains solar panels on a commercial property, and the property owner pays a fixed monthly fee for the use of the solar system.

THESE TWO THINGS REGARDING SOLAR PANELS ADD COMPLEXITY TO A SALE OR TRANSFER OF A PROPERTY

### *Solar Panel Facts Are Material Facts*

Recalling our material fact definition, there are several aspects of solar energy that will impact a reasonable person's decision to buy, sell, or lease commercial property. While often visible, the presence of solar panels on a building may not be readily apparent. Because solar panels impact the property's energy costs, potential for energy savings, and environmental footprint (among others), the presence of a solar panel system on a commercial building is a significant attribute that must be disclosed.

Brokers should obtain information regarding the system's capacity, age, and expected lifespan, as these factors influence the value and operational costs of the property. Information regarding the maintenance history and current condition of the solar panel system is crucial as well. Properly maintained systems can offer reliable performance and longevity, while poorly maintained systems might require costly repairs or replacements.

Ownership of the solar equipment is also of critical import, as it may affect a seller's ability to convey clear title. Any existing financing arrangements related to the solar panel system, such as PPAs, solar leases, or loans, are material facts. These agreements can impose long-term financial commitments and obligations on the new owner, affecting their cash flow and financial planning. Buyers must understand the terms, duration, and financial implications of these agreements to make an informed decision.

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## *Commercial Solar Benefits*

This section, and the next, are offered as areas that may be considered when working on a transaction involving a solar energy system. This is not an exhaustive list of benefits and drawbacks, nor is it a thorough explanation of each such benefit/detriment. Each situation must be considered on its own merits, and brokers must avoid sweeping comments about the industry, as they may not apply to a particular property.

### *Offset Energy Bills*

One of the most attractive benefits of solar energy is the potential for lower energy bills. Often the energy obtained from the sun's rays offset some or all of an owner's electricity needs. The industry touts ten year ROIs and twenty-five year warranty's on the equipment. Further, many electric companies will offer to buy any excess power generated from your system. Brokers should consider this potential stream of income when working on transactions with solar panels installed.

### *Reduced Dependency on Grid*

Solar panels can reduce dependency on local power infrastructure. Some systems allow for the storage of power, so if the local infrastructure becomes unstable or unavailable, an existing solar system may be able to provide the power you need for your business.

### *Rebates, Creative Financing & Tax Incentives*

Make no mistake, solar energy systems are expensive. That said, however, there are an ever-increasing number of ways to reduce installation and maintenance costs. From manufacturers, to utility companies, to federal, state, and local governments, there are numerous strategies that should be investigated prior to purchasing a property with an existing solar system.

### *Reduce Greenhouse Gases*

Unlike coal-fired electrical plants, solar energy produces no harmful emissions. As the theory goes, by using solar power instead of the municipal power company's coal-fired plants, greenhouse gases that harm the environment and contribute to common health problems may be reduced. As this may be an important factor for some buyers, a broker's knowledge and understanding is important.

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## *Commercial Solar Detriments*

### *High Cost of Installation*

Even with rebates and tax breaks, installing a commercial solar energy system is still a hefty upfront investment. If the system is being added to an existing structure, the electrical system will have to be reconfigured. You may also need to upgrade your roof. These factors make installing a system on an existing building more expensive than during construction.

### *High Maintenance Costs*

Solar power equipment requires regular maintenance. Dust, hail, birds, and other wind-blown debris all result in reduced efficiency of a solar array, and will require periodic maintenance and repair. These costs must be considered when contemplating a structure with an existing solar array.

### *Reliance on Uncontrollable Factors*

Although solar panels decrease dependence on electricity providers, they increase dependence on the weather, which is even less predictable. Cloudy days reduce the system's efficiency, and too many in a row can result in usage from the grid.

If a building is surrounded by tall trees or other buildings, a system may never reach its full potential efficiency. Brokers should recommend a thorough technical review of the structure and electrical requirements before deciding on purchasing a structure with an existing system.

THIS IS WHAT BUYERS AND SELLERS SHOULD RELY ON REGARDING THE EFFECT OF SOLAR PANELS ON A BUILDING'S VALUE

PLEASE NOTE

Brokers should not offer their advice/opinions on the benefits or detriments of solar panels. However, brokers should advise individuals to get a professional inspection and/or opinion regarding purchasing a property with solar panels. Brokers who offer their opinions on the benefits and/or detriments of solar panels may risk making misrepresentations or omissions while conveying or refraining from providing information about the property.

## *The Los Angeles Feed-in Tariff (FiT) Program*

The Los Angeles Feed-in Tariff (FiT) Program, administered by the Los Angeles Department of Water and Power, is designed to promote the development of renewable energy projects within the city. Under this program, commercial property owners and developers can install solar panels and sell the generated electricity back to the power company at a predetermined rate. The FiT program sets competitive pricing to ensure profitability for participants while contributing to the city's renewable energy goals. Contracts typically last 20 years, providing long-term revenue stability for participants. The program includes various capacity tiers, with specific application periods and capacity limits, encouraging widespread participation across different property sizes. By integrating renewable energy into the grid, the FiT program supports Los Angeles' commitment to sustainability and reduces the city's reliance on fossil fuels.

> *TRUE OR FALSE: Because the FiT program is so popular, everyone knows about it and it does not need to be disclosed by a listing broker as a material fact?*

Whether the solar panels are owned, leased, or financed, listing agents must disclose this information when they list a property for sale to avoid a claim of misrepresentation.

## *Installation*

Roof installation is often a good option for commercial buildings, especially since offices, warehouses, factories, and similarly constructed buildings often have vast, flat roofs that are largely unused. Commercial solar panels are generally installed on roofs in one of two ways: ballasted racking or attached racking.

Ballasted racking uses cement blocks or other heavy items to secure panels to a flat roof. Attached racking enables panels to be attached to sloping roofs by using roof-penetrating hardware.

The roof, however, is not the only place that commercial solar panels might be installed. Parking lots, for example, can be turned into solar carports, which are essentially open-air garages with solar paneled roofs. Other options include ground-mounted solar arrays; there are even panels that have the ability to tilt and elevate during certain hours to catch the optimal amounts of sunlight.

**Can solar panels be removed? Solar panels are fixtures; however, if a seller expresses their intent to take the solar panels in the contract, they may do so as long as they return the roof back to its original condition.**

## *Maintenance Costs of Commercial Systems*

The maintenance costs for commercial solar panel systems can vary based on several factors, including the system's size, age, location, and the specific components used. However, a general estimate can help commercial property owners and buyers understand the financial commitment required for maintaining such systems.

### *Annual Maintenance*

Annual maintenance typically includes inspections, cleaning, and minor repairs. The cost for this service generally ranges from $15 to $25 per kilowatt (kW) of installed capacity. For example, a 100 kW system might cost between $1,500 and $2,500 annually for routine maintenance.

### *Cleaning*

Solar panels should be cleaned to ensure optimal performance, especially in dusty or pollen-heavy environments. Cleaning costs can vary widely, but typically fall between $3 to $10 per panel. For a system with 400 panels, this could amount to $1,200 to $4,000 per cleaning. Depending on the environment, cleaning might be required one to four times per year.

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### *Inverter Replacement*

Inverters, which convert the direct current (DC) produced by solar panels into alternating current (AC) for use, usually have a lifespan of ten to fifteen years. Replacing inverters can be a significant expense, typically costing between $0.15 and $0.25 per watt. For a 100 kW system, this could mean a cost of $15,000 to $25,000 every decade or so.

### *Monitoring & Software*

Many commercial solar systems come with monitoring software that detects issues and tracks performance. Subscription fees for such software can range from $100 to $500 annually, depending on the features and services provided.

By considering these factors, commercial property owners and buyers can better anticipate the ongoing costs associated with maintaining a solar panel system, ensuring they can budget appropriately for long-term performance and efficiency.

## *NC Legislation on Decommissioning Solar Equipment*

In North Carolina, the decommissioning of commercial solar equipment is governed by a combination of state regulations and local ordinances designed to ensure that solar installations are safely and responsibly removed at the end of their operational life. State law requires solar developers to provide a decommissioning plan as part of their permit application process. This plan must outline the procedures for dismantling and removing the solar equipment, restoring the site to its original condition, and addressing any environmental impacts. Costs of this nature are important considerations for buyers that do not want to use the solar system on the property they are buying.

### *Local Ordinances and Environmental Considerations*

Local governments in North Carolina may impose additional requirements for the decommissioning of solar equipment. These local ordinances can

include specific timelines for the removal of solar panels, the disposal or recycling of materials, and the restoration of the land. Environmental considerations are a key component, with regulations often mandating the safe disposal of hazardous materials, like photovoltaic cells and inverters, which may contain heavy metals. Local authorities may also require post-decommissioning soil testing and remediation to prevent contamination. Compliance with these local ordinances ensures that decommissioned sites do not pose environmental hazards and can be repurposed for other uses.

### *Projected Costs of Decommissioning*

The projected costs associated with decommissioning commercial solar equipment can vary widely based on the size of the installation, the complexity of the site, and the requirements of the decommissioning plan. On average, the cost ranges from $20,000 to $50,000 per megawatt (MW) of installed capacity. These costs typically cover the dismantling and removal of solar panels, inverters, and mounting structures; transportation and disposal or recycling of materials; and site restoration, including soil grading and seeding. Additional expenses may arise from compliance with environmental regulations, such as hazardous waste disposal fees and soil remediation.

## *Financing options*

When developing a solar project, financing options are of utmost import. For example, who will own the solar array. It can purchased outright and owned by the property owner, or there are third-party ownership options. If the third-party option is chosen, the property owner only purchases the energy produced typically through either a solar lease or a PPA.

### *PPAs*

PPAs are one of the most common methods of financing solar installations for commercial buildings. In a PPA, a third-party developer installs, owns, and operates the solar panels on a commercial property. The property owner then purchases the generated electricity from the developer at a predetermined rate, usually lower than the local utility rate. This arrangement allows businesses to benefit from solar energy without the upfront capital expenditure and ongoing maintenance costs. PPAs typically span 10 to 25 years, providing long-term energy cost savings and price predictability. As brokers, we must investigate all of the details surrounding such agreements as they have long term affect on the property.

### *Solar Leases*

Similar to PPAs, solar leases involve a third-party company installing and maintaining the system on the property. However, instead of buying the electricity produced, the property owner pays a fixed monthly lease payment for the use of the solar system. This lease payment is generally less than the cost of utility-provided electricity, leading to immediate cost savings. Solar leases often come with performance guarantees and maintenance services, ensuring the system operates efficiently over the lease term, which typically ranges from ten to twenty years.

### *Commercial Loans*

Commercial loans for solar panel installations are another prevalent financing option. Businesses can take out loans from banks or specialized solar financing companies to cover the cost of the solar system. These loans can be structured with fixed or variable interest rates and repayment terms ranging from five to twenty years.

### *SBA Loan Guarantees*

Recent changes to the laws surrounding the cap on Small Business Administrative loan guarantees, may be a viable solution to financing solar energy implementation. The benefits of these loans are that they can have long repayment terms and low rates, but the application process can be quite rigorous.

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## *Tax Credits*

There are two tax credits available for businesses that purchase solar energy systems. Remember that a tax credit is a dollar-for-dollar reduction in taxes owed to the federal government. Brokers should remind their client that consultation with a tax professional is a crucial step when considering a tax credit, because you have to have a sufficient tax appetite to take advantage of the tax credit.

The Investment Tax Credit (ITC) is a tax credit that reduces the federal income tax liability for a percentage of the cost of a solar system that is installed during the tax year. This time limitation may not allow a buyer to take advantage of the program.

The Production Tax Credit (PTC) is a per kilowatt-hour tax credit for electricity generated by solar and other qualifying technologies for the first ten years of a system's operation. It reduces the federal income tax liability and is adjusted annually for inflation. This may be of interest to subsequent buyers.

According to an **"August 2024 Update"** from the US Department of Energy's Office of Energy Efficiency and Renewable Energy, solar systems that are placed in service in 2022 or later and begin construction before 2033 are eligible for a for both the ITC and PTC. Owners may also be eligible for certain state and local tax credits.

## *Depreciation of Solar Panels for Commercial Buildings*

Unlike a tax credit, depreciation is a method by which a business' investment in equipment may be recovered, for tax purposes, over a set period of time through annual tax deductions. There are three aspects to a depreciation deduction that pertain to solar owners that of import to commercial brokers.

In the case of a solar energy, a taxpayer following the Modified Accelerated Cost Recovery System schedule, may deduct the system over a five year period.

### *Bonus Depreciation of Commercial Solar Panels*

Congress passed the Tax Cuts and Clean Jobs Act and introduced **"bonus depreciation"** which applies to solar energy costs. This program is scheduled to sunset in 2027, but in

2024-2026, a business owner may deduct 60-40-20% respectively, of their depreciable basis in a solar project, from their federal taxes.

## *NC Building Owner Solar Energy Programs*

North Carolina has several initiatives to promote solar energy adoption among commercial building owners. One of the primary programs is the **"Renewable Energy and Energy Efficiency Portfolio Standard,"** which mandates that investor-owned utilities generate a portion of their energy from renewable sources. This regulation drives utilities to offer incentives and rebates to commercial entities that install solar systems.

Additionally, North Carolina offers the **"North Carolina GreenPower"** program, which supports renewable energy development by providing premium payments for renewable energy generation, including solar power. This program allows commercial solar producers to receive additional revenue for the clean energy they generate.

The state also has a net metering policy, which enables commercial solar system owners to receive credits on their utility bills for excess electricity generated by their solar panels and fed back into the grid. This can result in significant savings on energy costs. Note however, that in 2023, North Carolina's net metering policy was changed to significantly reduce the amount a business owner will receive in credits for energy sold to the energy company.

## *FAQs About Solar Panels for Commercial Buildings*

Let's explore some common questions regarding commercial solar panel installations.

### ***What is the payback period of solar for a commercial building?***

The payback period for a commercial solar system varies based on factors such as system size, installation costs, energy savings, and available incentives. On average, commercial solar systems have a payback period ranging from five to ten years and a ROI between 10% and 20%. However,

specific circumstances and local conditions can influence commercial solar panel payback.

Solar energy savings, impacted by the local solar resource, electricity rates, and building energy consumption, play a crucial role. Financial incentives, such as commercial solar tax credits and rebates, can significantly shorten the payback period. Brokers should urge careful consideration of these variables, along with efficient system design and maintenance, when attempting to assess the payback period of a commercial solar system.

### *What is the lifespan of solar panels on commercial buildings?*

Commercial solar panels typically operate effectively for about twenty-five to thirty years, with many continuing to generate electricity beyond this duration. The longevity of the panels is influenced by factors such as the quality of materials, manufacturing standards, and the operating conditions at the installation site. Regular maintenance and proper care can contribute to extending the effective operational period of commercial solar panels. Careful examination of the existing system should be performed by buyers attempting to assess the remaining lifespan of a solar system.

### *Does solar for commercial buildings require permits?*

Yes, commercial solar systems typically require permits. The solar permitting process ensures compliance with local building codes, zoning regulations, and electrical safety standards. Also, solar permits may be needed for various aspects of the solar PV installation, including structural integrity, electrical connections, and environmental impact.

A broker should check with local authorities having jurisdiction to obtain copies of all the permits required to have a system installed, and then review them with your buyer. Commercial solar systems often require solar engineering reviews and official stamps from a licensed engineer. Brokers should obtain such reviews in order to properly assess an existing system.

### *If the building has a solar system, does that mean the roof was replaced when the system was installed?*

Maybe. If the roof is in poor condition and nearing the end of its lifespan, it was likely replaced, or at a minimum, repaired before the system was installed. A broker should obtain all information about the existing roof, as well as any warranties if the roof was replaced.

### *What if the seller has a loan for the solar panels?*

If the seller has a loan on the solar panels, the broker should inquire about the existence of a UCC-1 Financing Statement on the real property. The UCC-1 is filed by the creditor to provide notice to interested third parties that they have a security interest in a debtor's personal property.

Depending upon the contract terms, the seller's solar panel loan may need to be paid off at or prior to closing or the prospective buyer may be willing to assume the obligation with the solar company if assignment of the solar panel contract is permissible. Title to the property cannot be conveyed without either the lien being paid off or the loan being assumed.

In its Legal Q&A, **"Is the Seller Required to Pay Off a Loan on their Solar Panels?,"** the North Carolina Association of REALTORS® (NC REALTORS®) states that brokers who are involved in a transaction that includes solar panels that are not encumbered by a lien, need to make sure there is a clear understanding between the parties as to how the panels will be transferred, whether in the purchase and sale agreement, or a personal property agreement. Moreover, the understanding should be reduced to a written contract.

Brokers SHOULD NOT review and advise individuals on lease or finance documents pertaining to solar panels. Further, they should not encourage parties to sign or enter into additional agreements pertaining to the leasing or purchasing solar panels. The best course is to advise clients to seek out licensed professionals that have expertise in those disciplines.

THE TIME WHEN A PROSPECTIVE BUYER SHOULD BE PROVIDED WITH DETAILS ABOUT SOLAR PANELS

## *Caveats and Pitfalls in Purchasing Buildings with Existing Solar Panel Systems*

### *System Ownership and Contractual Obligations*

One of the primary considerations for commercial real estate buyers is understanding the ownership and contractual obligations associated with the existing solar panel system. If the system is subject to a PPA or a solar lease, the new owner may inherit these agreements, which could impose long-term financial commitments and operational responsibilities. These contracts often have fixed terms and rates, which may not align with the buyer's financial strategies or energy usage patterns. It's essential for buyers to thoroughly review these agreements to understand the implications on future energy costs and ensure there is no conflict with their business plans.

### *System Performance and Maintenance*

Another potential pitfall is the condition and performance of the existing solar panel system. Buyers need to assess the system's age, efficiency, and maintenance history. Older systems might be less efficient and nearing the end of their productive life, potentially requiring costly upgrades or replacements. Additionally, poor maintenance can lead to decreased performance and unexpected repair expenses. Engaging a qualified solar inspector to evaluate the system's current state and obtaining maintenance records from the seller can help buyers avoid inheriting a poorly performing system that could undermine the expected energy savings.

### *Regulatory and Incentive Changes*

The regulatory environment and availability of incentives for solar energy can significantly impact the financial benefits of owning a solar-equipped building. Buyers must be aware of any changes in local, state, or federal regulations that could affect the solar system's profitability. For instance, alterations to net metering policies, renewable energy credits (RECs), or tax incentives like the Investment Tax Credit (ITC) can change the economic landscape for solar energy investments. It's crucial for buyers to stay informed about potential legislative changes and assess how these might influence the long-term value and return on investment of the solar panel system.

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In summary, while purchasing a building with an existing solar panel system can offer substantial energy cost savings and environmental benefits, brokers must encourage their buyers to carefully evaluate the associated contracts, system condition, and regulatory landscape to ensure they are making a sound investment.

## INSURANCE COVERAGE

The North Carolina Department of Insurance (NCDOI) regulates and controls commercial property insurance rates within the state. While you may note that the North Carolina Rate Bureau (NCRB) has been in the news with regard to homeowners insurance rates of late, the NCRB's jurisdiction does not include commercial carrier rates. Thus, the NCDOI is responsible for collecting and analyzing data from insurance companies to propose rates that accurately reflect the risk associated with insuring commercial properties. These proposed rates are based on comprehensive statistical analyses and actuarial assessments to ensure they are fair and sufficient to cover potential losses.

Once this information is compiled, NCDOI examines the proposed rates to ensure they comply with state laws and are not excessive, inadequate, or unfairly discriminatory. The department may approve the rates as submitted, request modifications, or hold public hearings to gather additional input before making a final decision. This collaborative process ensures a balanced approach to rate-setting, protecting consumers from unfair pricing while ensuring that insurance companies remain financially viable and capable of paying claims.

A REASONABLY PRUDENT NC COMMERCIAL BROKER SHOULD BE AWARE OF PROPOSED INSURANCE RATE INCREASES FOR BUSINESS OWNERS

### *Basic Commercial Building Insurance Coverage*

Commercial building insurance is a critical aspect of risk management for any business that owns or leases property. This type of insurance provides financial protection against physical damage to the building and its contents

caused by various perils, such as fire, theft, vandalism, and certain natural disasters. Understanding the specifics of commercial building insurance helps business owners ensure they have adequate coverage to safeguard their assets and maintain operations after an incident.

Our **NCDOI provides guidance** on the many different aspects of insurance for your business, including:

- automobile
- fire and extended coverage
- business interruption
- general liability
- bonds
- excess & umbrella
- flood & earthquake
- inland marine
- package policies

### *Property Coverage*

The primary component of commercial building insurance is property coverage. This includes the physical structure of the building, as well as permanent fixtures and fittings, such as plumbing, electrical systems, and built-in cabinetry. Coverage can also extend to outdoor elements, like signage, fencing, and landscaping, depending on the policy. It is crucial for business property owners to accurately assess the replacement cost of their property to avoid being underinsured, which could lead to significant out-of-pocket expenses in the event of a claim.

In addition to property coverage, commercial building insurance often includes business personal property coverage. This covers the contents of the building, such as furniture, equipment, inventory, and other movable items used in the business's daily operations. Some policies also offer coverage for valuable papers and records, computer systems, and other specialized equipment. This aspect of the insurance ensures that a business can quickly replace essential items and resume operations after a loss.

### *Business Interruption*

Another essential feature of commercial building insurance is loss of income coverage, also known as business interruption insurance. This coverage

compensates for the loss of income a business suffers if it has to suspend operations due to a covered peril. It can also cover additional expenses incurred to continue operations at a temporary location while repairs are being made. This type of coverage is vital for maintaining cash flow and ensuring that the business can survive during the recovery period.

### *Beware of Exclusions*

Finally, it is important for business owners to be aware of the exclusions and limitations of their commercial building insurance policies. Common exclusions include damage caused by flooding, earthquakes, and acts of war or terrorism. Businesses in areas prone to these risks may need to purchase additional coverage or separate policies to ensure comprehensive protection. Understanding the terms, conditions, and exclusions of a policy helps business owners make informed decisions and avoid unpleasant surprises when filing a claim.

THIS REPORT CONTAINS THE CLAIMS HISTORY FOR A SPECIFIC PROPERTY

## *Underwriting Factors that Impact Your Commercial Property Insurance Premiums*

Underwriting is the process by which an insurance company evaluates the risk associated with insuring a particular property or individual and determines the terms and pricing of the insurance policy.

For commercial property owners, underwriting involves a thorough assessment of various factors that influence the likelihood and potential cost of a claim. These factors include the property's:

- location
- construction type
- age
- usage
- value
- in-place safety and security features, and
- Comprehensive Loss Underwriting Exchange (CLUE) claim history.

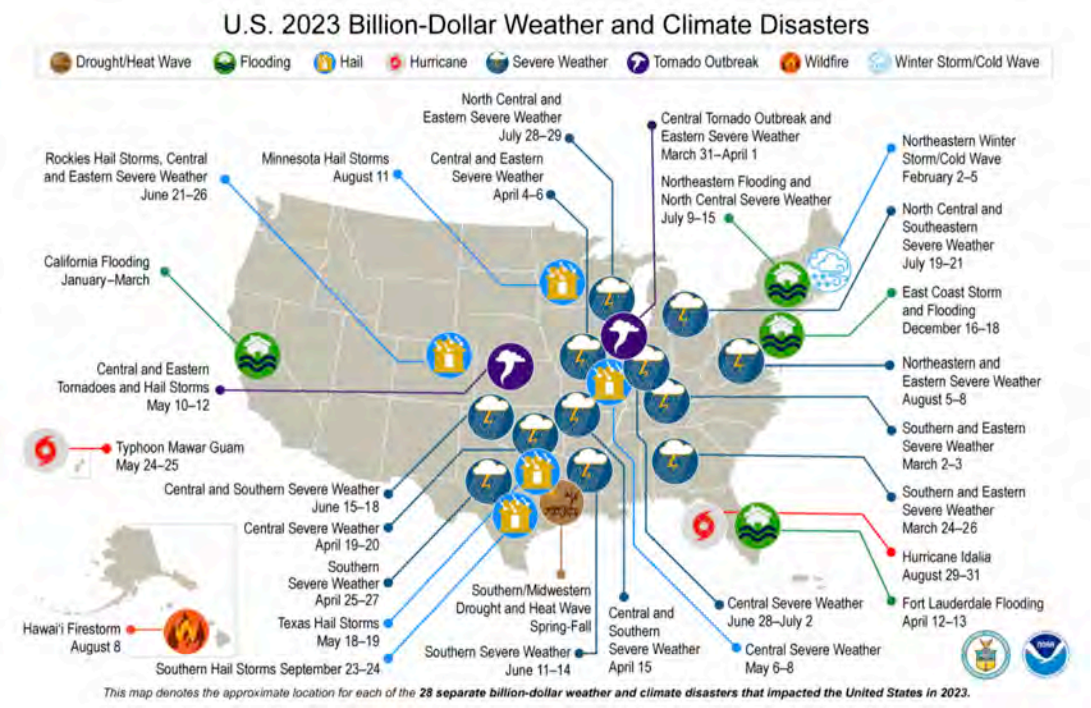
The underwriter uses this information to calculate the risk profile of the property, which directly impacts the insurance premium. Higher perceived risks lead to higher premiums, while properties with lower risk factors may qualify for more favorable rates. The goal of underwriting is to ensure that the premium accurately reflects the level of risk the insurance company is assuming, while also being fair and competitive in the market.

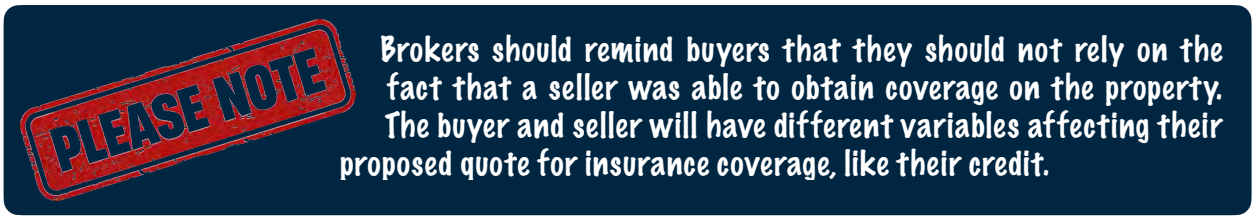
**PLEASE NOTE**

**The Commission does not expect brokers to step outside of their area of real estate brokerage to answer homeowner's insurance related questions. If a client/consumer has insurance related questions, the broker should strongly recommend that the client/consumer speak with a licensed North Carolina insurance agent.**

In addition to the specifics of a given property, insurance companies also factor in the costs of potential disasters when arriving at a premium rate. On any given year, a natural disaster can cost the insurance industry billions of dollars, which is recouped through the premiums they collect.

For example, according to the **National Oceanic and Atmospheric Administration,** in 2023, the US experienced twenty-eight separate billion-dollar weather and climate disasters. This surpassed 2020 — which had twenty-two events — for the highest number of billion-dollar disasters since those records were first compiled.






## *Broker's Responsibility Regarding Flood Zones*

The Commission expects brokers to know or research whether a listed property is in a flood zone. If a property is in a flood zone, this is a material fact because it relates directly to the property and may impact its use, desirability, or value. Therefore, the broker must disclose this information to all parties in the transaction.

Further, brokers should be familiar with the types of flood zones, properties that have the potential for flooding, and the need to obtain flood insurance if the mortgage is backed by the government or insurance is required by their lender. For more details on flood zones, the Federal Emergency Management Agency (FEMA) **provides an explanation** of the twelve flood zones (e.g., Zone A – Zone VE and V1-30).

**SEPARATE DEDUCTIBLES AND POLICIES ARE USUALLY NECESSARY TO COVER THESE TWO EVENTS**

For a property located in a flood zone or near a body of water, a broker should inquire about the property's flood history and disclose flooding events to prospective buyers and tenants.

A broker should never assume, nor lead their buyer-client to believe, that the buyer's lender will not require flood insurance simply because the seller's lender did not require flood insurance when the seller purchased the property.

As is obvious, floods do not follow city limits or property lines. Using a flood map enables an individual to see the relationship between the property and the areas with the highest risk of flooding. Further, FEMA indicates there is no such thing as a "no-risk zone," but some areas have a lower risk.

If an individual has questions about flood maps and insurance, they may contact the **FEMA Mapping and Insurance eXchange (FMIX)**.

Flood maps show how likely it is for an area to flood. Any area with a 1% chance or higher of experiencing a flood each year is considered to have a high risk. Essentially, those areas have at least a one-in-four chance of flooding during a 30-year mortgage.

## *Best Practices for Brokers*

Brokers can assist their clients with making informed decision regarding insurance coverage by educating them on the factors that influence the writing or declination of an insurance policy. Additionally, brokers may want to:

- discuss the benefits/needs for insurance coverage, and
- encourage buyers to get insurance quotes early.

Brokers should remind buyers that they should not rely on the fact that a seller was able to obtain coverage on the property. The buyer and seller will have different variables affecting their proposed quote for insurance coverage, like their credit.

## *Insurance for Coastal Area Commercial Buildings*

**N.C.G.S. §58-45-1**, entitled "Essential Property Insurance for Beach Area Property" establishes the North Carolina Insurance Underwriting Association, also known as the Beach Plan, to provide essential property insurance coverage for properties located in designated coastal areas. The statute recognizes the difficulty property owners in these high-risk areas face in obtaining insurance through the standard market due to the increased risk of windstorms and other coastal hazards. The Beach Plan ensures that

residential and commercial property owners in these coastal regions have access to necessary insurance coverage, thereby promoting economic stability and development in these vulnerable areas.

Further, **N.C.G.S. §58-45-5(2)** defines a coastal area as:

> *All of that area of the State of North Carolina comprising the following counties: Beaufort, Brunswick, Camden, Carteret, Chowan, Craven, Currituck, Dare, Hyde, Jones, New Hanover, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Tyrell, and Washington. "Coastal area" does not include the portions of these counties that lie within the beach area in N.C.G.S. §58-45-5(2b).*

LINK TO STATUTE

For commercial property owners, **N.C.G.S. § 58-45-1** means they have a guaranteed source of insurance coverage for their buildings and contents, even if standard insurance carriers are unwilling to underwrite their policies due to the heightened risks. This access to essential insurance allows commercial property owners to protect their investments and continue operations despite the increased likelihood of severe weather events. By providing this safety net, the Beach Plan helps mitigate financial losses and supports the resilience and growth of businesses in North Carolina's coastal communities.

LINK TO STATUTE

The Commission has created a resource for consumers entitled, **"Purchasing Coastal Real Estate in North Carolina,"** to assist individuals with making an informed choice regarding whether to purchase a property in a coastal area. The Commission does not expect brokers to answer insurance questions regarding potential rate quotes, deductibles, and possible coverage options for a property. However, the Commission expects brokers to know the purpose of property insurance policies and the type of coverage that is customary in the area. A broker should also encourage their buyer client to investigate their insurance needs.

## *Flood Zones*

According to FEMA, floods are unpredictable and can occur naturally almost anywhere. Although river and coastal flooding are two of the most common types of flooding, heavy rains, poor drainage, and nearby construction projects can also put a property at risk for flooding. In it's article, "**Know Your Flood Risk: Homeowners, Renters or Business Owners**," FEMA indicates that flooding remains the country's number one

disaster and can potentially affect every property. Therefore, the article helps people to understand and navigate the flood risk while providing needed resources and information to homeowners, renters, and business owners so they can:

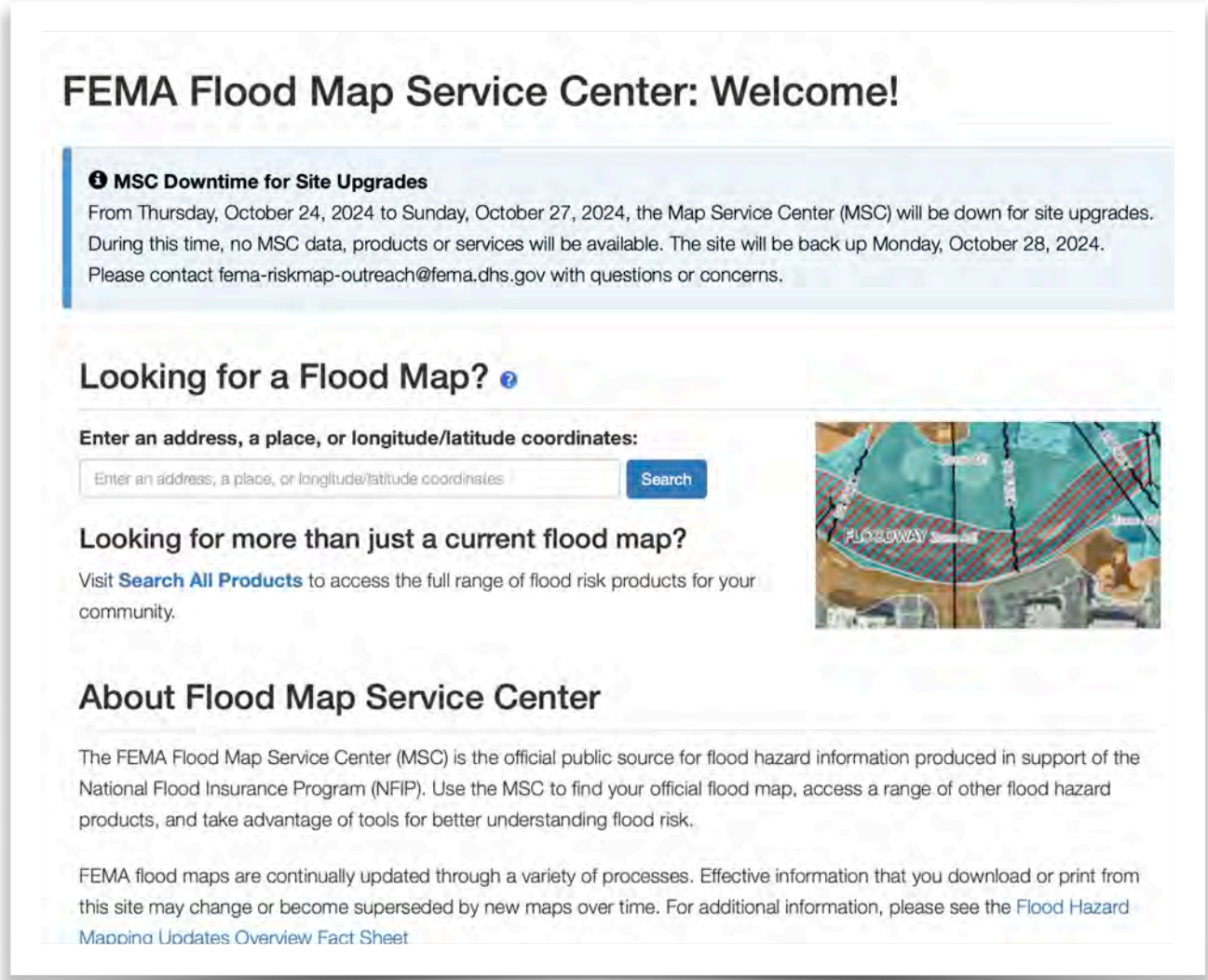
R: Reduce Their Risk

I: Insure Their Risk

S: Share Information on Risk

K: Know Their Risk and Their Community's Risk

FEMA provides and maintains updates on property information and whether the property area has a high risk of flooding. The **FEMA Flood Map Service Center (MSC)** is the official online location to find all flood hazard mapping products created under the National Flood Insurance Program.



# FEMA Flood Map Service Center: Welcome!

**MSC Downtime for Site Upgrades**
From Thursday, October 24, 2024 to Sunday, October 27, 2024, the Map Service Center (MSC) will be down for site upgrades. During this time, no MSC data, products or services will be available. The site will be back up Monday, October 28, 2024. Please contact fema-riskmap-outreach@fema.dhs.gov with questions or concerns.

## Looking for a Flood Map?

**Enter an address, a place, or longitude/latitude coordinates:**

Enter an address, a place, or longitude/latitude coordinates | Search

### Looking for more than just a current flood map?

Visit **Search All Products** to access the full range of flood risk products for your community.

## About Flood Map Service Center

The FEMA Flood Map Service Center (MSC) is the official public source for flood hazard information produced in support of the National Flood Insurance Program (NFIP). Use the MSC to find your official flood map, access a range of other flood hazard products, and take advantage of tools for better understanding flood risk.

FEMA flood maps are continually updated through a variety of processes. Effective information that you download or print from this site may change or become superseded by new maps over time. For additional information, please see the Flood Hazard Mapping Updates Overview Fact Sheet

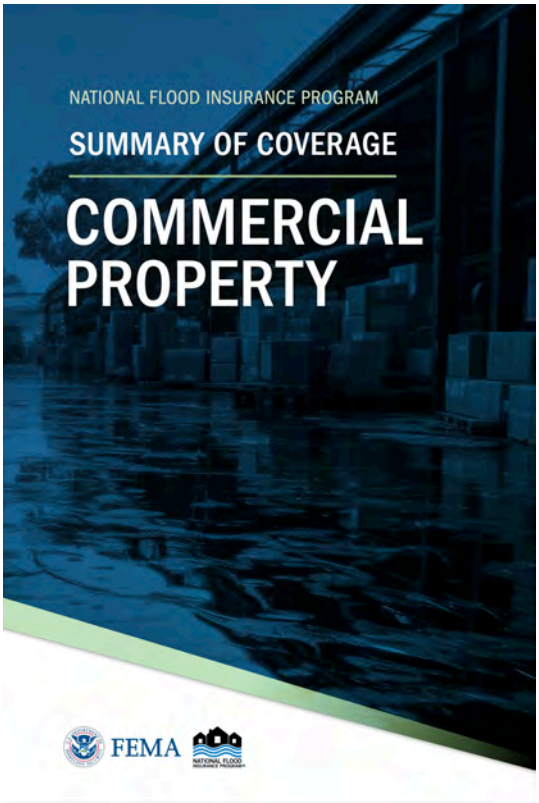
## *Flood Insurance*

According to the NCDOI's **"Flood Insurance FAQs"** a standard North Carolina commercial property policy does not cover water damage due to flood. However, some carriers have added limited coverage to their deluxe policies or added it to their other policies by "endorsement."

If your client's business property is (or will be) in a flood plain, near a river, or near the coast, you should urge them to consult with an insurance professional and consider purchasing flood insurance for the property.

Also, individuals should know that even if a property is not located in a designated flood plain, they should not assume that the property will never experience flood damage.

The National Flood Insurance Program (NFIP) is managed by FEMA and is delivered to commercial property owners through a network of more than 50 insurance companies. In its informative brochure **"Summary of Coverage - Commercial Property,"** FEMA provides information on the NFIP's Standard Flood Insurance Policy for commercial property only. This policy type is used to insure non-residential buildings, five or more family residential buildings, condominiums with more than 25% non-residential occupants, and/or the contents within this structures.




Commercial property owners may obtain additional information from NFIP by contacting them at 800-621-3362 or locate a flood insurance provider by clicking the NFIP icon below:

NATIONAL FLOOD INSURANCE PROGRAM

# AIRPORTS

As you are likely aware, airports are not just transportation hubs but also catalysts for economic growth, attracting businesses like industrial plants, distribution center, hotels, and retail centers that thrive on the proximity of the airport and constant flow of travelers. However, the success and sustainability of these developments are significantly influenced by, among other things, local zoning ordinances.

These regulatory tools help shape the character, density, and use of land around airports, balancing the need for economic expansion with concerns such as noise control, environmental impact, and community compatibility. Understanding how these ordinances and districts function is important for commercial brokers with clients interested in the acquisition or disposal of properties in close proximity to airports.

**FEDERAL LAW REQUIRES THE FAA TO MAKE MAPS AVAILABLE REGARDING THIS ASPECT OF AIRPORTS**

## *Is Proximity to an Airport a Material Fact?*

Yes. Brokers need to evaluate whether the proximity of an airport is a fact that affects the use, desirability, or value of the property. Remember, a material fact is *any* fact that could affect a reasonable person's decision to buy, sell, or lease real property. As should be obvious to you by now, the proximity of an airport to a particular property can easily create several facts that may be material to a property owner or buyer.

## *Pros & Cons of Commercial Property Near an Airport*

Acquiring commercial property near an airport offers several strategic benefits to building owners. Such benefits can significantly enhance the value and profitability of the property. It is thus incumbent upon commercial brokers working in such markets to be familiar with these benefits, as well as the associated risks, in order to inquire of, and disclose to the clients all material facts surrounding airport proximity. The following benefits and risks provide fertile ground for commercial brokers looking for material facts:

- High Visibility and Traffic
  - Airports attract a constant flow of travelers, providing businesses with a steady stream of potential customers and clients.
- Proximity to Transportation
  - Easy access to major transportation routes, including highways and public transit, enhances the property's appeal to businesses that rely on logistics and quick connectivity.
- Economic Growth
  - Airports are often surrounded by thriving business districts, which can drive up property values and create opportunities for partnerships and networking.
- Diverse Tenant Base
  - The demand for a wide range of services—from hotels and restaurants to car rentals and retail shops—ensures a consistent demand for commercial space.
- Infrastructure Development
  - Areas around airports typically benefit from ongoing infrastructure investments, such as road expansions and utility upgrades, which can further increase property value.
- Incentives and Zoning Flexibility
  - Local governments may offer incentives or flexible zoning regulations to encourage development near airports, making it easier to customize and optimize the use of the property.

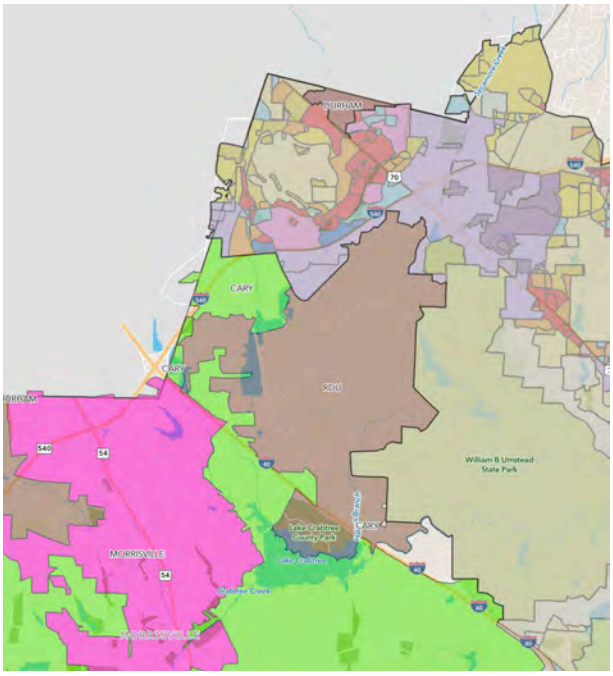
While acquiring commercial property near an airport can offer numerous benefits, there are also several potential drawbacks that building owners should consider:

- Noise Pollution
  - Constant air traffic can lead to significant noise levels, which may deter certain types of tenants or require costly soundproofing measures.
- Air Quality Concerns
  - Proximity to an airport may expose the property to higher levels of air pollution, which could impact tenant satisfaction and long-term property value.
- Height Restrictions:

  - Zoning laws near airports often impose strict height restrictions on buildings to ensure airspace safety, potentially limiting the property's development potential.
- Traffic Congestion:
  - The high volume of vehicles associated with airport operations can lead to increased traffic congestion, which may adversely affect accessibility and desirability for businesses and customers.
- Security Regulations:
  - Enhanced security measures around airports can lead to additional regulatory compliance requirements and restrictions on property use, potentially limiting flexibility for certain businesses.
- Market Saturation
  - The high demand for commercial space near airports can lead to market saturation, resulting in increased competition and potentially lower rental rates or occupancy levels.

## *Zoning*

A key consideration for owners and buyers of commercial property near airports is zoning. As such, this is an important area for commercial brokers to discover and then disclose to their clients.




Airport zoning districts are specialized areas where land use regulations are tailored to accommodate the unique needs and challenges associated with airport operations. These districts typically include provisions that manage noise levels, control building heights, and guide land use to ensure safety and efficiency in the airspace.

For example, noise overlay zones often include restrictions on certain types of development, such as residential housing, while encouraging commercial and industrial uses that are less sensitive to noise. Height restrictions within these districts are designed to prevent any obstructions to flight paths, ensuring that buildings do not interfere with safe aircraft

operations. These regulations not only protect airport operations but also provide clarity and predictability for developers, making it easier to plan and invest in properties near airports.

By addressing common concerns like noise pollution and safety, airport zoning districts can actually encourage commercial development. These districts often include incentives for businesses that align with the needs of the airport, such as logistics companies, hotels, and conference centers, which can benefit from proximity to air travel. Additionally, zoning ordinances may incorporate infrastructure improvements, like enhanced roadways and public transportation options, that ease traffic congestion and improve access to airport-adjacent properties. By mitigating some of the potential detriments, such as noise and traffic issues, these districts create a more attractive environment for businesses, ultimately fostering economic growth around the airport while ensuring that development is compatible with both the airport's operational needs and the surrounding community. The key is a balanced approach.

Brokers must remain well informed on all of the aspects of zoning districts and zoning overlay districts. In addition, a comprehensive knowledge of your client buyer's needs an desires is also crucial to matching the them with the right commercial property.

THIS ASPECT OF AIRPORT PROXIMITY CAN BE A PROBLEM FOR SOME AND NO PROBLEM FOR OTHERS

### *Airport Noise*

Airport noise can have a significant impact on commercial landowners within flight paths, influencing property values, tenant satisfaction, and the types of businesses that can thrive in these areas. On the negative side, excessive noise from frequent air traffic can deter certain businesses, particularly those that require a quiet environment, such as offices, hotels, or conference

centers, potentially leading to lower rental rates or higher vacancy levels. Noise pollution may also necessitate costly soundproofing measures to make properties more attractive to tenants.

**THESE SPECIFIC MAPS REGARDING AIRPORT NOISE ARE HELPFUL FOR DISCLOSURE**

The Federal Aviation Administration (FAA) is required by the Vision 100-Century of Aviation Reauthorization Act to make noise exposure and land use information available to the public through **noise exposure maps** (14 CFR Part 150). These maps detail numerous aspects of the area in close proximity to airports. Brokers should know where to access these noise contour maps and what information they provide.

If a property is near an airport, the traffic patterns, proximity to the airport, and the noise that may be audible from the aircraft at the property may be considered pivotal information that requires disclosure. It is quite possible that a buyer may surmise that increased noise and traffic patterns will impact the typical use and enjoyment of the property, thus, impacting the buyer's perceived value. As such, brokers must be aware of our commercial client's noise tolerance.

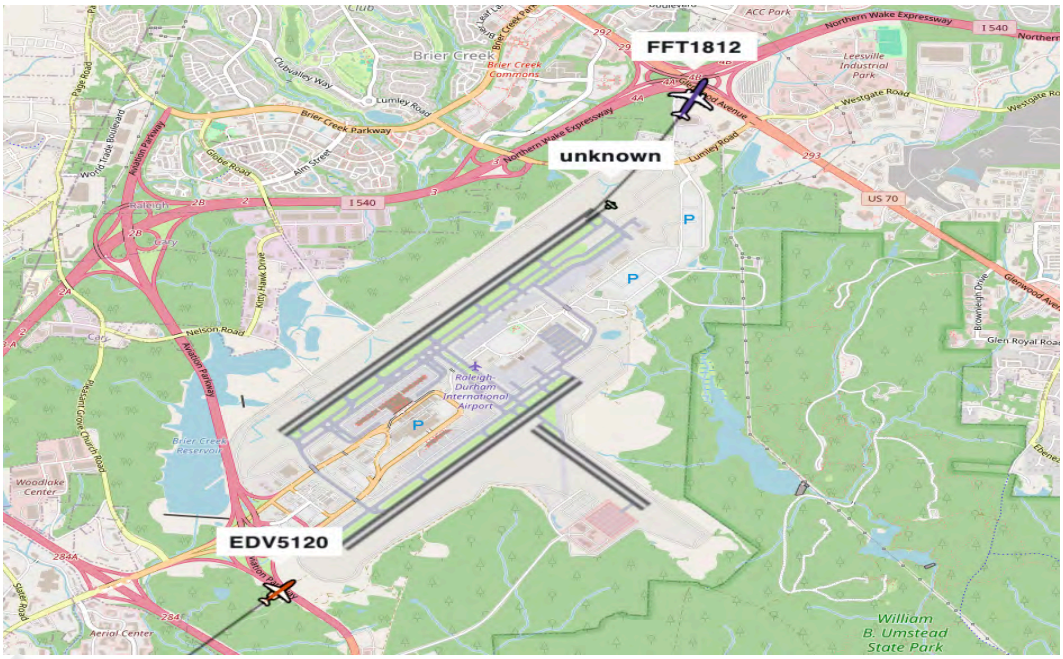
For example, visiting the Raleigh-Durham International Airport's (RDU) **Composite Noise Contour Map** will reveal to a broker areas where the sound energy is equal to or above an annual average daily decibel level of 55 decibels. This information should be provided to your buyer to determine whether the sound is too much for their intended use. Such work will narrow your search and save valuable time during the property search process.

The RDU Composite Noise Contour Map does not indicate all areas where aircraft noise will be observed on the ground. The map shows areas expected to experience average noise impacts above 55 db DNL (Day Night Noise Level- areas inside the green contour on the map). Brokers should also know that aircraft and their associated noise can be observed outside of these contours depicted on the map.

In an effort to adhere to their fiduciary duties to advise their clients, brokers should recommend actually spending time at the property at different times of the day to evaluate the actual noise impacting the property prior to purchase. According to RDU's Real Estate Information, the peak times to observe air traffic are early mornings between 6:00 a.m. and 9:00 a.m. and evenings between 5:30 p.m. and 9:00 p.m. However, aircraft arrive and depart from RDU twenty-four hours a day.

An additional resource provided by RDU is their **Flight Tracking System**. If your client is interested in property in close proximity to RDU, a prudent broker would advise the client about this system and how it displays daily flight paths in relation to specific addresses. The instructions on how individuals can view the flight paths are as follows:

- click on the house-shaped icon in the left sidebar to enter the property address, and
- click on the icon shaped like a line graph in the left sidebar to select radar (flight) tracks to view at set time periods during the day.




**RDU Frequently Asked Questions** also provides additional clarification regarding flight tracks, aircraft restrictions, and approaches to the runway upon landing. If brokers/individuals have further questions about aircraft noise disclosure, they may call the Noise Office at RDU at 919-840-2100 ext. 3.

**PROPERTY OWNERS NEAR AIRPORTS RECEIVE THESE DOCUMENTS FROM NEARBY AIRPORT AUTHORITIES**

To further assist individuals with providing aircraft noise disclosures, RDU created a sample "Aircraft Noise Notification" that may be used. The samples are provided on the next two pages and can be accessed online for Durham and Wake counties.

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# AIRCRAFT NOISE NOTIFICATION

Dear Property Owner:

You are listed by the Durham County Tax Office as the owner of a parcel of land located within the general area surrounding Raleigh-Durham International Airport (RDU) that is exposed to average aircraft noise levels which exceed typical ground-based, or background, noise. The map displays that area and shows contours of equal average aircraft noise exposure associated with current flight operations at the airport and those projected through approximately the year 2010. Sites closer to the airport are exposed to higher average noise levels than those farther away.

The purpose of this notice is to advise you that exposure to aircraft noise may affect the usability of some land for certain types of noise sensitive uses, including residential use. Persons who are sensitive to aircraft noise should satisfy themselves before buying the property that exposure to such noise will not materially affect their ability to use and enjoy land whose purchase they may be considering.

The Raleigh-Durham Airport Authority has and, upon request, will provide information which may be helpful to property owners and prospective purchasers in assessing the likely effect of aircraft noise on the use of land they own or are considering purchasing.

You also are advised that the "Residential Property Disclosure Act" (N.C.G.S. Chapter 47E) was enacted by the North Carolina General Assembly and became effective January 1, 1996. That law requires the owners of residential real property to disclose to prospective purchasers the existence of certain conditions associated with the property no later than the time an offer to purchase, exchange or option the property is made, or an option to purchase the property pursuant to a lease with an option to purchase is exercised.

Among the conditions that must be disclosed to and acknowledged by the prospective purchaser are any notice from any governmental agency affecting the property. The Airport Authority is a governmental agency. THIS NOTICE SERVES AS YOUR NOTICE OF POTENTIAL AIRCRAFT NOISE IMPACT UPON YOUR PROPERTY AND SHOULD BE DISCLOSED TO ALL PROSPECTIVE PURCHASERS WHO MAY BE CONSIDERING USE OF THE PROPERTY FOR A RESIDENTIAL PURPOSE.

For additional information or if you have questions or need assistance, please call the RDU Noise Officer at 919-840-2100 between 9:00 a.m. and 5:00 p.m. Monday-Friday or write to: Noise Officer

Raleigh-Durham Airport Authority
P. O. Box 80001
RDU Airport, North Carolina 27623-0001

# AIRCRAFT NOISE NOTIFICATION

Dear Property Owner:

You are listed by the Wake County Tax Office as the owner of a parcel of land located within the general area surrounding Raleigh-Durham International Airport (RDU) that is exposed to average aircraft noise levels which exceed typical ground-based, or background, noise. The map displays that area and shows contours of equal average aircraft noise exposure associated with current flight operations at the airport. Sites closer to the airport are exposed to higher average noise levels than those farther away.

The purpose of this notice is to advise you that exposure to aircraft noise may affect the usability of some land for certain types of noise sensitive uses, including residential use. Persons who are sensitive to aircraft noise should satisfy themselves before buying the property that exposure to such noise will not materially affect their ability to use and enjoy land whose purchase they may be considering.

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For additional information or if you have questions or need assistance, please call the RDU Noise Officer at 919-840-2100, ext. 3 between 9:00 a.m. and 5:00 p.m. Monday-Friday or view the noise web site at www.rduaircraftnoise.com or write to:

Noise Officer
Raleigh-Durham Airport Authority
P. O. Box 80001
RDU Airport, North Carolina 27623-0001

# SECTION 2

# NCREC'S FREQUENTLY ASKED QUESTIONS

# LEARNING OBJECTIVES

After completing this Section, you should be able to:

- identify the most frequently asked questions; and
- explain the Commission's responses to the most frequently asked questions.

# TERMINOLOGY

### Due Diligence Fee

A negotiated amount of money paid by a buyer directly to a seller in exchange for the buyer's unilateral right to terminate the contract.

### Property Condition Assessment (PCA)

An evaluation of a commercial building's physical state, typically conducted during the buyer's examination (due diligence) period, that provides a comprehensive overview of the building's structural integrity, mechanical systems, electrical and plumbing infrastructure, and other key components. It identifies any existing deficiencies, necessary repairs, or potential future maintenance issues.

### Trust Account

A business checking account that is separate from company operating funds, contains monies belonging to others, is fully insured, is custodial (i.e., in the name of the broker or brokerage company), and makes funds available on demand.

### Unlicensed Assistant

A person that does not hold an active NC real estate license but assists a BIC, team, group, or individual licensee with administrative real estate tasks. An unlicensed assistant is prohibited from performing activities that require an active license. The BIC, in conjunction with the employing licensee, group, or team, is responsible for all acts of any unlicensed assistant.

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# INTERACTING WITH THE COMMISSION

The Commission provides brokers with several convenient options to ensure they are able to effectively communicate with staff members.

Generally, brokers have three options to communicate with Commission staff:

- telephone (the Commission accepts phone calls Monday-Friday from 8:30 a.m. to 5:00 p.m.);
- email; and/or
- the Commission website.

**PLEASE NOTE**

If contacting Regulatory Affairs, a caller is asked to provide their name, license number (if licensed), and a phone number, and a member of Regulatory Affairs staff will call back, usually the same day.

## *Coming Soon: Alfred!*

For brokers who prefer immediate communication, the Commission will soon offer the opportunity to interact with the chatbot, Alfred, on the Commission's website. Alfred allows the Commission to use artificial intelligence and natural language from resources like our License Law and Commission rules, the North Carolina Real Estate Manual, and Real Estate Licensing in North Carolina to offer personalized assistance and accurate responses to consumers and brokers.

Further, Alfred will be able to answer the most frequently asked questions regarding licensure and CE requirements in North Carolina using proactive engagement and tailored responses which will contribute to the Commission's efficiency.

## *Calling the Commission*

The Commission receives an average of 500 telephone calls and 1,000 emails each day. Although a great majority of broker inquiries are requests for information on licensure and form processing; we still answer a variety of questions that pertain to brokerage activity as well.

Depending on the purpose of the telephone communication, incoming calls are sent to one of two different divisions, either License Services or Regulatory Affairs.

When calling the Commission, brokers will have the opportunity to speak directly with a License Specialist in License Services when guidance is needed on licensure or form submission, or an Information Officer in Regulatory Affairs to help interpret License Law and Commission rules.

Main number: (919) 875-3700 | Regulatory Affairs (919) 719-9180

**REGULATORY AFFAIRS**

- Complaints
- Investigations
- Audits
- Contract questions
- Compliance concerns
- Transaction questions
- Law and Rule explanations

**LICENSE SERVICES**

- Continuing Education
- License applications
- BIC status
- Affiliations
- Broker license info
- Pocket cards
- Reinstatements
- Background checks
- License exam

**PLEASE NOTE**

Due to the high volume of calls received, it may be necessary for a broker to leave their phone number, license number, and a reason for their call so that a call ticket may be assigned, and then an a member of the Commission staff will return the call.

*I have some questions that I need to ask, but the last time that I called, the person I spoke with would not provide information unless I gave them my license number. I don't want to do that. I think you are just trying to catch me doing something wrong so you can initiate a complaint against me. How many calls can I make before you do that? Are you putting me on a list or something? Why do you want my license number anyhow?*

The Commission asks for your license number for three main reasons:

- To be able to look at your actual license record for accuracy in the response.
- To create a record of the phone call to improve Commission services.
- To document the discussion for the protection of the broker.

*I was calling to see if you could help me. I found a webinar about the Working with Real Estate Agents Disclosure on the Commission's website. I was thinking that it would be a great tool to use with my new brokers in an orientation that I do regularly. How do I get approval to use links or materials to Commission resources on my website or communications to my brokers or my clients?*

Brokers do not need approval from the Commission to use links and/or resources on their website or communications to clients. A plethora of information is available on the Commission's website. To start, check out the Resources tab at the top of the home page. You'll find information about Frequently Asked Questions, Fair Housing, Trust Accounts, and a Video Library. And that is just for starters.

# UNLICENSED ASSISTANTS

*My brother has asked for my help in collecting rent from his tenants, handling maintenance requests, and handling payment for expenses associated with the property. I am going to charge him for these services. I am a CPA. Do I need a real estate license?*

## *When Do You Need a License*

N.C.G.S. §93A-2 dictates when a real estate broker license is required in North Carolina. This statute defines a real estate broker as one who:

LINK TO STATUTE

- lists, buys, sells, auctions, leases, rents, leases, or offers to do any of the foregoing, or otherwise negotiates the purchase, sale, or exchange of real estate or improvements thereon (LLBEANS),
- for others,
- for compensation, valuable consideration, or the promise thereof.

Thus, "brokerage" is:

- listing, buying, selling, auctioning, leasing, renting, or offering to do any of the foregoing, or otherwise negotiating the purchase, sale or exchange of real estate for improvements thereon,
- for others,
- for compensation or consideration.

## *Property Management*

Property management typically involves the leasing of real property for others. In such a case, N.C.G.S. §93A-2(a) requires a property manager to be an actively licensed real estate broker.

LINK TO STATUTE

On the other hand, License Law and Commission rules do not prohibit unlicensed property owners from personally leasing properties they own. However, they may not give any compensation to any unlicensed individual (e.g., friends, siblings, neighbors, etc.) in return for providing assistance in leasing their properties.

This is not just referral fees. A landlord renting their owned property may not give any compensation to an unlicensed person in exchange for any service (e.g., collecting rents, showings, handing out keys, etc.). To be clear, only deeded owners of real property may buy, lease, sell, or exchange owned property without having an active real estate license.

## *Licensing Exception for Salaried Employees of a Broker Engaging in Property Management*

License Law permits brokers who engage in property management to hire unlicensed salaried (i.e., W-2) employees to assist with specified leasing activities. These unlicensed salaried employees may be onsite (i.e., office at an apartment complex) that the broker has agreed to manage or work out of the broker's office.

N.C.G.S. §93A-2(c)(6) states that the provisions of N.C.G.S. N.C.G.S. §93A-1 and N.C.G.S. §93A-2 do not apply to, and do not include:

LINK TO STATUTE

> *Any salaried person employed by a licensed real estate broker, for and on behalf of the owner of any real estate or the improvements thereon, which the licensed broker has contracted to manage for the owner, if the salaried employee's employment is limited (to certain actions). . .*

LINK TO STATUTE

In other words, N.C.G.S. §93A-2(c)(6) creates an exception to the LLBEANS rule requiring a real estate license. The exception allows a property manager's unlicensed salaried assistant to:

- Exhibit rental units on the managed property to prospective tenants.
- Provide the prospective tenants with standard information about the lease of the units.
- Accept applications for lease of the units.
- Complete and execute preprinted form leases.
- Accept security deposits and rental payments for the units only when the deposits and rental payments are made payable to the broker employed by the owner.

The exception is not unlimited. Unlicensed, salaried employees are not permitted to negotiate issues such as lease terms, rental amount, partial payment of tenant security deposit, among others. Such issues require a license and must be referred to the broker.

Specifically, the salaried employee ***shall not*** negotiate or sign a property management agreement, negotiate the amount of security deposits or rental payments, nor negotiate lease terms on behalf of the owner or broker.

The following chart specifies the permitted activities related to property management that a salaried unlicensed assistant may perform.

| ACTIVITIES RELATED TO PROPERTY MANAGEMENT ONLY | |
|---|---|
| **Unlicensed Salaried Assistants May:** | **Only Licensed Brokers May:** |
| Order and supervise routine and minor repairs at the direction of a licensee | Solicit or negotiate management contracts with prospective clients |
| Coordinate or confirm appointments between brokers and other persons | Prepare information to be placed in marketing materials for sale or lease listings |
| Submit listings and changes to a MLS provider, but only if the listing or change is based upon data supplied by a broker | Discuss or explain management agreements, leases, or other similar matters with persons outside the firm |
| Schedule showings for listed rental properties | Hold themselves out as a licensee |
| Complete and execute preprinted form leases for rental property managed by the firm | Determine the deductions from a tenant security deposit |
| Answer basic questions from prospective tenants and others about managed properties if the broker has provided the information in promotional materials | Negotiate the amount of rent, deposits, or other lease provisions in connection with properties listed for rent by the firm |
| Receive and forward phone calls, texts, and emails to licensees in the firm | |
| Act as a courier at the direction of a broker | |
| Assist a licensee with inspecting rental properties | |
| Research and obtain copies of documents in the public domain, such as the Register's of Deeds, Clerks of Court, or Tax Office. | |
| Obtain keys for listed properties | |
| Enter broker-provided information on lease forms | |
| Record and deposit trust monies under the close supervision of the BIC | |
| Check license renewal records and other personnel information pertaining to licensees in the office at the direction of the BIC | |
| Prepare checks and act as a bookkeeper for the firm's bank accounts under close supervision of the BIC | |
| Place broker-authorized "For Rent" signs on property | |
| Show rental properties managed by the broker to prospective tenants | |

## *Further Exception for Salaried Employees of a Broker Engaging in Vacation Rental Transactions*

In vacation rental transactions the unlicensed salaried employee of a licensee may offer a prospective tenant a rental price and term from a preprinted schedule that sets forth prices, terms, and the conditions and limitations under which they may be offered. The schedule shall be written and provided by the employing broker with the written authority of the landlord. See **N.C.G.S. §42A-4(6).**

LINK TO STATUTE

The Commission published an article entitled, **"Unlicensed Assistants - Drawing the Line Between What They Can and Cannot Do"** to assist brokers/companies with ensuring that unlicensed assistants do not cross the line and engage in unpermitted brokerage activities while working.

LINK TO DOCUMENT

## *BICs and Unlicensed Assistants*

*I am a BIC. I have never used unlicensed assistants in my office. One of my affiliated brokers wants to hire an unlicensed assistant. Because the affiliated broker is an independent contractor, I am going to require them to supervise and be responsible for anything improper that may occur with the unlicensed assistant. They are going to pay their assistant directly and be responsible for the training. If I get that agreement in writing, am I protected as the BIC?*

The designated BIC is the person the Commission considers primarily responsible for the supervision/management of a brokerage office. As such, the BIC has the responsibility to supervise affiliated brokers, employees, and others who perform duties on behalf of the brokerage including unlicensed assistants employed by the company.

A BIC must:

- provide guidance on the office policies regarding activities that may be performed by unlicensed assistants;
- ensure unlicensed assistants comprehend that engaging in activity that requires a real estate license is not permitted;

- communicate regularly with unlicensed assistants and monitor their compliance with office policies, License Law, and Commission rules; and
- make affiliated brokers aware of their responsibility to also supervise unlicensed assistants.

LINK TO STATUTE

**N.C.G.S. §93A-6(b)(4)** provides that the Commission may suspend or revoke any license issued under the provisions of this Chapter or reprimand or censure any licensee when:

> *. . . the broker's unlicensed employee, who is exempt from the provisions of this Chapter under G.S. 93A-2(c)6), has committed, in the regular course of business, any act which, if committed by the broker, would constitute a violation of G.S. 93A-6(a) for which the broker could be disciplined.*

Essentially, if an unlicensed assistant does engage in activities that:

- are illegal,
- violate License Law and Commission rules, and/or
- violate state and federal laws,

the BIC and/or affiliated broker may be held liable for the conduct of the unlicensed assistant. Further, to reduce risk and ensure unlicensed assistants are not participating in brokerage activities, a prudent BIC will implement training programs and provide educational resources for the unlicensed assistants employed by the company and/or affiliated brokers.

These training programs and resources should provide the unlicensed assistants with information that explains the obligations they must adhere to (e.g., fair housing, handling of trust money, etc.) while performing duties on behalf of the company and/or affiliated broker.

Moreover, the Commission believes that all licensees should have, at a minimum, a basic understanding of property management and a property manager's responsibilities.

LINK TO DOCUMENT

The Commission informed brokers and consumers about the various types of unlicensed activity in the December, 2023 eBulletin article, **"Brokers & Consumers Should Beware of Unlicensed Activity in North Carolina."** The article provides a list of such activities and cautions brokers on what to look for.

# CONCERNS REGARDING SQUARE FOOTAGE (SF)

*I just came from a listing appointment for a strip center. The owner bought the three-bay strip center five years ago and has remodeled both end caps, but the center bay remained unfinished. The owner has the original construction plans which show the building is a 70′ x 90′ rectangle, for a total of 6,300 SF. There are also two 18″ columns in each bay. The owner wants me to advertise each bay as having 2,100 SF. However, when I measure each space, the total does not equal 2,100 SF. Do I have to obey the landlord's instruction, when I know that the measurements inside each bay do not equal 2,100 SF. I am looking for the Commission rule on measuring commercial space, but cannot find one. Can you help me?*

Brokers are often confused about measuring and SF requirements, whether they can use technology to assist, and whose requirements they are complying with. We are here to help.

## *Commission Does NOT Require Advertisement of SF*

First, and foremost, the Commission does not require a broker to measure a space, nor advertise the SF of a property. Frequently commercial multiple listing services will request or require such information, as do many of the online listing services like LoopNet, Crexi, etc., but there is no law or Commission rule that mandates such information be advertised.

While a commercial broker is not required to do so, it is likely that the market, clients, and competition will necessitate providing this information. For example, consider that most tenant searches for rental space start online and contain a certain size parameter. Even though you may have the perfectly sized space, if you do not provide SF, your property may not be in that prospective tenant's search result.

## *Commission Requires Accuracy if You Advertise SF*

As with any information contained within any advertising disseminated by a licensee, the Commission requires it to be accurate. In addition to licensees, BICs are also responsible for all advertising, including representations about SF in any MLS. Misrepresentations or omissions may result in discipline from the Commission, so attention to accuracy is strongly recommended. A great resource for additional information is Tiffany Ross's article in last year's eBulletin entitled **"Measuring Square Footage."**

LINK TO DOCUMENT

## *Standard for Commercial SF Calculations*

The American National Standards Institute (ANSI) is a private, non-profit organization that administers and coordinates the US voluntary standards and conformity assessment systems. Founded in 1918, ANSI works in close collaboration with stakeholders from industry and government to identify and develop standards and conformance-based solutions to national and global priorities. One of those sets of standards are those associated with the accurate measurement of commercial real estate.

In 1915, the Building Owners and Managers Association International (BOMA) published the first *"Standard Method of Floor Measurement."* Today, BOMA has become the standard for ANSI in commercial property SF measurement through its rigorous and widely adopted methodology. BOMA developed a set of guidelines that provided a consistent and transparent way to measure and report the SF of commercial properties, addressing industry needs for clarity in leasing and property management. Recognizing the value of these guidelines, ANSI adopted BOMA's standards, making them the *de facto* criteria for measuring commercial space in the US.

BOMA has developed standards for measuring all types of commercial real estate. They are available for each major commercial sector:

- **Office**
- **Industrial**
- **Gross Areas**
- **Multi-Family & Hospitality**
- **Retail**
- **Mixed Use**

LINK TO DOCUMENT

PLEASE NOTE

While a broker may be disciplined for misrepresenting the actual square footage of a space in her marketing, the Commission has not disciplined a licensee for a calculation error amounting to less than 5% of the total space.

# COMMERCIAL BUILDING INSPECTIONS

*I am a listing broker. My listing went under contract with a buyer who obtained a building inspection report. After receipt of the report, the buyer terminated the contract citing financing issues. A second potential buyer has expressed sincere interest in the property, but the buyer's broker is insisting I provide them with the previous inspection report. Must I comply with this request?*

No. Absent specific instruction from your seller client, a listing broker is under no obligation to provide a potential buyer with an inspection report. That said, however, the listing broker is obligated to disclose all *material facts* found in the inspection report. More to come on this later.

## *No Substitute for Inspection*

While neither the Commission, nor our General Statutes, require any buyer to conduct a building inspection, a buyer will generally gain a clearer understanding of the condition of the building by hiring a qualified building inspector. A broker should never discourage a client from ordering an inspection, test, or survey, even if it is not required. Inspections are an extremely important part of the purchase process for every commercial buyer/tenant. Brokers who represent prospective buyers should furnish them with lists of licensed, competent service providers to contact and hire.

## *Professional Services Disclosure and Election Form*

NC REALTORS® Form 585 (NCAR Form 585) is an excellent tool for documenting inspections and adding specialized inspections and/or testing of any structure or feature of a commercial property. The Form, executed by broker and client, informs the client of the professional services that are typically performed in connection with the purchase and sale of commercial real estate. Further, it confirms that the broker has recommended that the client consult with professionals in each area for an opinion regarding each such recommended service. A sample of the Form is provided on the next page.

**PLEASE NOTE**

Form 585 confirms with client that a broker cannot give advice in certain matters that may relate to the purchase or sale of property including, but not limited to, matters of law, taxation, financing, surveying, structural soundness, engineering, environmental, or geotechnical matters.

NC REALTORS® Commercial Forms

**PROFESSIONAL SERVICES DISCLOSURE AND ELECTION (COMMERCIAL)**

Property Address:_____("Property")
Buyer or Seller:_____ ("Client/Customer")
Real Estate Firm:_____("Firm")

1. There are professional services that typically are performed in connection with the purchase and sale of commercial real estate. Client/Customer understands that Firm cannot give advice in certain matters that may relate to the purchase or sale of the Property, including but not limited to matters of law, taxation, financing, surveying, structural soundness, engineering, environmental matters or geotechnical matters.

| Service | Selected (initial) | Waived (initial) | Name(s) of Service Provider(s) | Who Orders |
|---|---|---|---|---|
| Appraisal | | | | |
| Attorney/Title Exam/Closing | | | | |
| Environmental Assessments | | | | |
| Financing | | | | |
| Geotechnical Evaluation | | | | |
| Mechanical Inspection | | | | |
| NFIP Elevation Certificate | | | | |
| Property Insurance | | | | |
| Structural Inspection | | | | |
| Survey* (see note below) | | | | |
| Utilities Evaluation | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

*NOTE REGARDING SURVEYS: Situations arise all too often that could have been avoided if the buyer had obtained a new survey from a NC registered surveyor. A survey will normally reveal such things as encroachments on the Property from adjacent properties (fences, driveways, etc.); encroachments from the Property onto adjacent properties; road or utility easements crossing the Property; violations of set-back lines; lack of legal access to a public right-of-way; and indefinite or erroneous legal descriptions in previous deeds to the Property. Although title insurance companies may provide lender coverage without a new survey, the owner's policy

Page 1 of 2

**North Carolina Association of REALTORS®, Inc.**

Individual Agent Initials _____ Client/Customer initials _____ _____

**STANDARD FORM 585**
**Revised 7/2021**
**© 7/2024**

SAMPLE

If a broker advises a buyer client to conduct an inspection and the client declines, a prudent broker will document the fact that the buyer ignored the broker's recommendation and chose not to order an inspection.

## *Commercial Inspectors in North Carolina*

Often commercial brokers represent clients with a desire to have a structure they own, or would like to buy, inspected to apprise them of its integrity and value. The client may turn to their real estate broker for recommendations for an inspector. As trusted and competent real estate professionals, it is therefore incumbent upon us to provide guidance to our clients regarding this particular need.

As we all understand, the relative complexity of a particular commercial property will fall on a large spectrum of possibilities. Client needs may span from a simple 1,200 SF residential office location, to a 250,000 SF industrial manufacturing facility. In order to competently advise our clients, a brief survey of potential inspectors is warranted.

### *Professional Engineers*

The North Carolina Board of Examiners for Engineers and Surveyors regulates engineers and surveyors in our State. **N.C.G.S. §89C-1, et. seq.** defines the practice of engineering as the application of special knowledge in the mathematical, physical, and engineering sciences to the:

LINK TO STATUTE

> *. . . consultation, investigation, evaluation, planning, and design of engineering works and systems, planning the use of land and water, engineering surveys, and the observation of construction for the purposes of assuring compliance with drawings and specifications . . . in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects . . . insofar as they involve safeguarding life, health or property, and including such other professional services as may be necessary to the planning, progress and completion of any engineering services.*

Depending on the scope of the commercial building involved in your transaction, a professional engineering and consultation firm may be your best recommendation to your client because they will commonly have professional engineers with expertise in several different engineering disciplines available to address any specific issues detected.

## *Inspection Reports in North Carolina*

The particular discipline of the inspector retained to complete the inspection of a commercial building will often dictate the type of inspection report you will receive. As such, a general review of what you should expect is warranted.

### *Home Inspection Reports*

According to **N.C.G.S. §43-151.45**, a home inspection consists of a written evaluation of two or more of the following components of a residential building: heating system, cooling system, plumbing system, electrical system, structural components, foundation, roof, masonry structure, exterior, and interior components, or any other related residential housing component. These inspections are not exhaustive or conclusive. Inspections serve as preliminary information for a potential homebuyer to make a determination to proceed with the purchase of a home or terminate the contract based on the findings in the home inspection.

LINK TO STATUTE

### *Property Condition Report*

Unlike home inspection reports, use of Property Condition Assessments (PCAs), is guided by standards promulgated by the American Society for Testing Materials. Standard **E2018-15** provides a baseline guide for the PCA process. The goal is to identify and communicate physical deficiencies to the person requesting the report. The term physical deficiencies includes the presence of conspicuous defects and deferred maintenance of a subject property's systems, components, or equipment as observed during completion of the PCA.

LINK TO DOCUMENT

The process is comprised of a walk-through survey, document reviews, interviews, and then the completion of a Property Condition Report (PCR). The PCR incorporates the information obtained during the above, and includes Opinions of Costs for suggested remedies of the physical deficiencies identified.

PCAs provide valuable information on the condition of the property or real estate that may be purchased, leased, refinanced, or simply requested to better understand future maintenance needs. Depending on the complexity of the property, brokers should recommend this type of service to all their clients so they can make the most informed decisions possible.

## *Broker Responsibilities Regarding Inspections*

A broker has a fiduciary duty to ensure they represent their clients' interests at all times, including during the inspection period. The eBulletin article, **"Handling Inspections: Guidelines for Brokers,"** assists brokers with managing the process.

LINK TO DOCUMENT

### *Must a Prospective Buyer Provide a Copy of the Inspection Report to the Seller?*

Typically a prospective buyer is under no obligation, absent a contractual agreement to the contrary, to turn over an inspection report to the seller. That said, however, an increasingly common contractual provision in a commercial purchase and sale agreement will require buyer to provide seller with copies of all inspections, environmental testing, etc., in the event that buyer terminates the contract prior to the conclusion of the examination period.

All of that said, there may exist valid reasons why a prospective buyer would want to provide the seller with a copy of the inspection report (e.g., negotiation tactic, request for repairs, etc.). Once a prospective buyer does turn over an inspection report to the seller, there is no longer any confidentiality associated with the report, and the seller may use the report as it deems necessary.

### *Buyer Broker's Responsibility Regarding Contents of Prospective Buyer's Inspection Report*

Regardless of how a prospective buyer wishes to proceed following receipt and review of a building inspection report, the broker has separate responsibilities concerning any material facts revealed in the report. Remember, a broker has a duty to discover and disclose all material facts. If any material facts are discovered during the broker's review of the report, regardless of the confidentiality of the report itself, or the wishes of the prospective buyer, those material facts must be disclosed to all parties.

## *Seller's Receipt of Buyer's Inspection Report*

*Hi, my client seller obtained an inspection report from a prospective buyer. The report, addressed to the prospective buyer, stated that it is confidential. The prospective buyer provided a copy of the report to the seller and then terminated the contract for financing reasons. Can my seller share the inspection report from the previous prospective buyer to a new prospective buyer?*

Yes. Despite the confidential nature of the report between the inspector and the buyer, once the buyer shares the report with a seller or listing broker, the report is no longer confidential. Upon receipt, the listing broker and seller should meet and review the report in detail. A plan should be created as to how any issues revealed in the report will be handled.

Further, it will be up to the seller to decide whether to share the actual report with any future protective buyers.

### *Listing Broker's Responsibility Regarding Contents of Prospective Buyer's Inspection Report*

Regardless of whether a seller decides to provide the inspection report to a future prospective buyer, some findings in the inspection report may be considered material facts, and as such, must be disclosed by the broker to all current and future parties. This fact should be explained to the seller during the inspection report review meeting.

In its Legal Q&A, **"Is an Inspection Report a Material Fact That Must be Disclosed?,"** NC REALTORS® further clarifies that the listing agent is not required to disclose the actual report or even its existence. The inspection report, itself, is not a material fact. In this regard, the broker must follow the instruction of the seller client.

LINK TO DOCUMENT

**PLEASE NOTE**

Brokers must follow their client's directions in regard to the distribution of the actual inspection report. However, it is mandatory that brokers disclose any and all material facts contained within it.

## EXAM PERIOD INSPECTIONS

*I am having trouble with a battle between a listing agent and the buyer I represent. My buyer wants to do additional inspections regarding a building. We are under contract. The listing agent told us that we cannot do any more inspections because our examination period has expired. Is it correct that my buyer can't do more inspections?*

It depends. To clarify whether a buyer has a right to continue inspections on a property that is under contract, a review of the contractual terms is necessary.

## *NCAR Form 580-T & 580L-T*

Contrary to residential forms, commercial forms limit a buyer's right to perform inspections. If the parties used the NCAR Form 580-T "Agreement for Purchase and Sale of Improved Real Property," or the NCAR Form 580L-T "Agreement for Purchase and Sale of Land," a buyer's right to inspections is detailed in Section 6 under Conditions.

Inspections of commercial property pursuant to these agreements have several requirements. In summary, and absent other agreement to the contrary, a Seller permits entrance upon the property for due diligence inspections:

- between the Contract Date and the end of the Examination Period;
- at buyer's sole expense;
- at reasonable times during normal business hours;
- after reasonable notice is given by the buyer of the timing of each inspection;
- in a good and workmanlike manner; and
- which includes seller providing all contracts, books, records, or other agreements related directly to the property or the operation and maintenance thereof.

Further, buyer acknowledges and agrees that:

- entrance upon the property is permitted for the purpose of inspecting, examining, conducting timber cruises, and surveying the Property;
- upon request of seller, buyer shall provide evidence of general liability insurance;
- seller's permission does **not** include any invasive testing without the express written permission as to each such test;
- if buyer's inspections cause damage to the property, all such damage shall be repaired by the buyer, at buyer's expense, and in such a manner that does not unreasonably interfere with use and enjoyment of the property;
- buyer assumes all responsibility for the acts of itself and its agents or representatives in exercising its rights to inspect and agrees to indemnify and hold Seller harmless from any damages resulting therefrom; and
- Buyer will comply with the terms of any tenant lease which conditions access to such tenant's space at the property.

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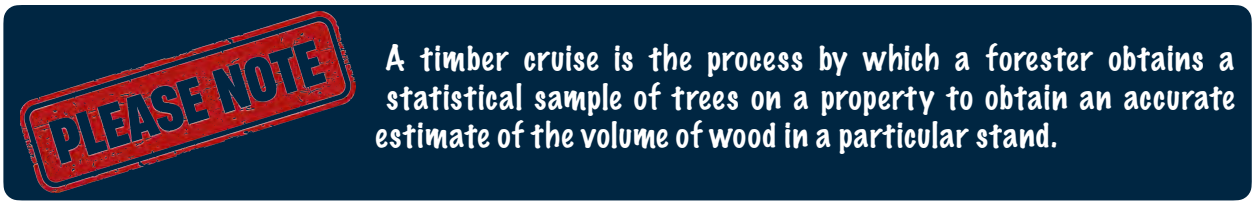


### *Time is of the Essence*

Please note that the "Examination Period" clause of both referenced commercial purchase agreements contains language making the timing of the examination period "of the essence."

The phrase "time is of the essence" signifies that adherence to specified deadlines, such as those related to the examination period, is critical and non-negotiable. This means that the parties involved are legally obligated to perform their duties within the designated time frame. Failure to meet the examination period deadline could result in the forfeiture of the right to perform inspections once the examination period ends.

## ADVERTISING: UNAFFILIATED BROKERS

*I was calling because I want to know if I can help a family member. I am a semi-retired commercial broker and a sole proprietor unaffiliated with a brokerage. My license is current and active. My younger brother wants to sell a commercial building where the tenant has just moved out. Can I represent him in the listing, advertising, and marketing of this commercial property?*

If a broker is active and not affiliated with a BIC, they are only permitted to do the following:

- receive referral fees,
- sell, buy, or lease property for themselves, and
- represent a prospective buyer or prospective tenant so long as the broker did not solicit the business.

Also, pursuant to Rule 58A .0110(b), a broker who chooses to conduct brokerage activities as a sole proprietor, but does not want to act as a BIC, cannot:

- solicit business, advertise, or otherwise promote their services;
- list properties (which inherently requires promoting);
- have licensees affiliated with the broker's sole proprietorship; or
- be responsible for holding any monies that must be deposited into a trust account.

The Commission published the eBulletin article, "Limited Activities Available to Unaffiliated Brokers," to assist individuals with differentiating between the permitted activities of brokers affiliated with a BIC versus the limited, permissible activities of unaffiliated brokers.

So the answer to our caller's questions is, probably not. While the business came to him through a familial relationship (unsolicited), the caller's brother wants caller to list the property for sale. This will obviously require advertising the property, which is impermissible because the caller-sole-proprietor is not affiliated with a BIC. About the only thing the caller can do for his brother is refer him to another broker, and collect a referral fee.

## INTEREST BEARING TRUST ACCOUNTS

*I am a BIC and have served as the BIC for Enterprise Realty for the past 4 years. When I became the BIC and opened the trust account, I completed the Commission's 4-hour Basic Trust Account Procedures course. Do I have to retake that course every 3 years?*

Rule 58A .0110(g)(9) specifies that a BIC must take the "*Basic Trust Account Procedures Course*" within 120 days of assuming responsibility for a trust account. This subsection further indicates that a BIC is not required to complete the course more than once in a three-year period. Although the BIC is not required

to complete the course again, the Commission does not prohibit a BIC from taking the course again for additional information.

Please remember that trust money is:

- ANY money belonging to others;
- received by a real estate licensee;
- acting as an agent in a fiduciary capacity related to a real estate transaction.

Funds that may be considered trust money include (but are not limited to):

- earnest money deposits;
- rent payments;
- final settlement payments;
- tenant security deposits;
- homeowner association dues;
- advance rental deposits; and
- funds used to maintain owners' properties.

A brokerage company or sole proprietorship does not have to have a trust account if it does not hold money belonging to others while acting as a licensee in a real estate transaction. However, if a company does elect to hold trust money, **Rule 58A .0116** requires monies belonging to others to be deposited into a trust account "no later than three banking days following the broker's receipt of such monies." except as provided in subparagraph (b). The exceptions in **Rule 58A .0116(b)** are:

- all monies received by PBs must be delivered, upon receipt, to their BIC;
- all monies received by a non-resident commercial broker must be delivered to the North Carolina affiliated/supervising broker for deposit in the NC broker's trust account; and
- check/negotiable instruments for earnest money and tenant security deposits payable to the broker/company may be held and safeguarded by a broker during contract/lease negotiations but must be deposited in a trust account not later than three banking days following acceptance of the offer to purchase or lease agreement. If the deposit is tendered in cash, then it must be deposited no later than three banking days following receipt, even if no contract has been signed.

## *Trust Accounts: Interest Earned*

It is permissible for brokers to have interest-bearing trust accounts where the interest belongs to the broker, so long as they comply with the requirements in **Rule 58A .0116(c)**, namely:

LINK TO STATUTE

- the broker first obtains written authorization from the persons for whom they hold the funds to deposit the funds into an interest-bearing account;
- the authorization clearly specifies how and to whom the interest will be disbursed; and
- the authorization is printed in a manner that will draw attention to the authorization and distinguish it from other provisions of the instrument (e.g., italics, boldface type, underlining, a blank to be filled in with the name of the party to whom the interest will be paid, etc.).

Brokers earning interest in their brokerage trust accounts must transfer the accumulated interest from their trust account to their operating account each month upon receipt of the bank statement indicating the amount of interest credited to avoid commingling monies that belong to the broker with monies belonging to others.

The Commission published an eBulletin article entitled, **"Avoid These 10 Common Mistakes to Make Trust Account Management Trouble Free"** to assist brokers/companies with managing their trust accounts. The article poses questions about specific conduct and then counsels the reader on whether such conduct is appropriate and consistent with License Law and Commission rules.

LINK TO DOCUMENT

# AGENCY AGREEMENTS & CONFIDENTIALITY

*I am hoping you can help me with a tough decision. I previously listed a property at 123 Eveningstar Drive. The property did not sell, and the listing expired ninety days ago. It is now re-listed by another brokerage. I have a buyer interested in purchasing it. Do I have to keep my previous discussions with the seller confidential, or must I share them with the buyer?*

An agency relationship is created when one person (i.e., principal) authorizes another person (i.e., agent) to handle certain matters on behalf of the principal. When created, brokers must act as fiduciaries for their principals while conducting real estate transactions. A fiduciary is a person who acts for another in a relationship of trust and who is obligated to act in the other's best interests, placing the other's interests before any self-interest.

Under common law, a fiduciary must:

- be loyal to the principal and preserve personal and confidential information about the principal;
- operate in good faith to promote the principal's interests; and
- disclose all facts to the principal that may influence her decision.

Although a broker must act as a fiduciary during an agency relationship, the relationship may be terminated by mutual agreement of the parties, by consummation of the transaction, or by the passing of the expiration date specified in the contract.

## *When Does the Duty to the Principal End?*

Generally an agent has no continuing duty to the principal after the termination of their agency contract. After the expiration date specified in the listing or buyer agency contract, or after a transaction has been successfully concluded, a broker has no further obligation to that principal.

### *Exceptions to the General Rule*

Under certain circumstances, however, a broker will have obligations to the principal that continue even after the formal termination of the relationship. If, in the agency contract, an agent expressly promises to perform some act or service after the expiration date, then the broker will be expected to keep their express promise. A continuing obligation also may be implied.

For example, an agent who still holds a client's money after the termination of the agency relationship still owes the client the duty to safeguard and account for the money.

Another common example where a broker's obligations to the principal would survive the formal termination date in the agency contract is in a sales transaction when the listing or buyer agency contract expires after the buyer and seller have entered into a contract, but before the transaction has closed. Under such circumstances, the broker will continue to owe agency duties to the buyer or seller client until the transaction either closes or terminates in some other way. That said, however, it is always best to renew the existing agreement until after the transaction closes.

Also, some courts have held that a real estate agent's fiduciary duties also survive the termination of the agency relationship in certain transactions where the agent seeks to deal on their own behalf with former principals. In such circumstances, the courts have held that real estate brokers have a continuing duty of loyalty and good faith to the former principals to the extent that the brokers may not use their former position of confidence to profit or gain an unfair advantage over former clients.

**PLEASE NOTE**

Under agency law, it is appropriate for a broker to share with a new client any information from a previous client that may help them in their current transaction. It is not only appropriate for the broker to share the information about the sellers' situation with the buyer, the broker is obligated to do so under agency law. It is also important to keep in mind that the real estate company's firm license and the affiliated broker's license must be on active status at all times during the period in which services are rendered.

# NCREC FORMS

*After meeting with my CPA, they suggested I set up an LLC for my real estate business. I created an entity with the Secretary of State and submitted a firm license request that I was trying to obtain for compensation only. I accidentally put the BIC of my current firm as the BIC of my LLC. How do I fix this mistake?*

## *Submission of Correct Forms*

The Commission expects brokers to submit the correct form related to the type of service they are requesting. To help, at the beginning of each form, the Commission has provided a brief description of the form and the requirements for completion.

It is essential that brokers thoroughly read the forms to ensure they are providing accurate information. Failures in this regard may result in affiliating or terminating relationships with the wrong brokerage or designating yourself as a BIC of the wrong entity.

Brokers who accidentally submit inaccurate/erroneous information should promptly correct the mistake by simply completing a new form with the correct information. The new form should be carefully reviewed prior to submission, and "auto-fill" features should be avoided.

What brokers should not do is:

- email the wrong form back to the Commission and try to explain; nor
- contact the Commission via phone or email and try to explain.

## *Commission Approves Use of "Dynamic" Forms*

Our Commission has numerous forms that provide licensees and consumers with the opportunity to obtain information and services from the Commission. Generally, these forms are separated into the following categories:

- Application Forms
- Consumer Forms
- Licensee Forms
- Data Order Forms
- Trust Account Forms
- Timeshare Forms

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The Commission has approved the use of digital forms for efficiency in responding to brokers' submission of information and requests for Commission services.

These digital forms are also "*dynamic*." By that we mean that as information is entered into a form, the remainder of the form adjusts based upon the information entered previously. Put simply, if you answer yes to a question, you will get a different set of subsequent questions than if you had answered no.

This adaptive feature streamlines data entry by reducing user errors and enhances Commission staff efficiency. For example, if brokers provide their license number while completing a form, when submitted that form is automatically integrated with the Commission's license record database. This integration allows Commission staff to easily review the form, supplemental documentation, and the broker's history while accessing the license record, which results in faster process times for all form submittals.

**PLEASE NOTE**

It is imperative for brokers to comprehend that prior to submitting a form, they are certifying the accuracy of the information. Therefore, the Commission may use the submission of inaccurate information as evidence against a broker in a disciplinary action.

*I am a PB, and I would like to affiliate with ABC Brokerage. What do I need to do?*

PBs and brokers who wish to affiliate their license with a BIC must electronically complete the **License Activation and Affiliation Form** (REC 2.08) and then submit it to the Commission.

Upon submission of the form, a PB is certifying that they are engaged in the business of real estate under the supervision of the BIC named on the form, and that they will engage in acts which require a real estate license only while under the active and direct supervision of that named BIC.

Additionally, the BIC is also certifying that the PB named on the form (as of the date shown) is engaged in the business of real estate and under their active and direct supervision and will remain so until subsequent written notice is given to the Commission.

Last, the BIC certifies that if, within thirty calendar days following the date of REC 2.08 submission, the named BIC has not received a "*Notice of License Record Change*" from the Commission as proof of receipt and acceptance of this form, said PB will discontinue all license activity.

*I would like to terminate my affiliation with John Wick, the BIC of ABC Brokerage. Which form do I need to submit to the Commission?*

If a broker wishes to terminate their affiliation with a firm or sole proprietorship, they must submit the **Request to Terminate Your Affiliation with a Firm or Sole Proprietorship** (REC 2.22). The Commission will process the form within three-five business days and brokers will be emailed a "*Notice of License Record Change"* acknowledging the requested change. If brokers do not receive said Notice within thirty days, they will need to contact the Commission and inquire about the status of their form submission.

Before a BIC submits REC 2.22, they should consider that the submission will affect all licensees currently under their supervision at the office. Absent another BIC being designated, PBs will be placed on inactive status and "full" brokers will remain on active status at their home addresses but will no longer be affiliated with the firm or sole proprietorship.

Therefore, to prevent this, the new BIC should submit a new properly completed **Request for BIC Eligible Status and/or Broker-in-Charge Designation** (REC 2.25) ***BEFORE*** the outgoing BIC submits REC 2.22.

LINK TO FORM

***Know Your Forms!***

Please be aware that brokers are confusing two different forms and the result may cause significant stress and additional work for all involved. The forms are REC 2.22 and the **Request to Remove Licensee From Broker Supervision** (REC 2.13). In summary:

LINK TO FORM

- REC 2.22 is a ***broker*** request to terminate that broker's affiliation with a firm or sole proprietor.
- REC 2.13 is a ***BIC*** request to terminate a PB or broker's affiliation with the BIC.

PLEASE NOTE

Be aware that submission of a new broker affiliation form does not automatically terminate any current affiliation. Submission of a Request to Terminate Affiliation is needed to remove the current affiliation.

# SECTION 3

# ANTITRUST ISSUES IN CRE

# LEARNING OBJECTIVES

After completing this Section, you should be able to:

- explain what antitrust violations are and how they hurt consumers;
- describe how the various federal and state laws and regulations work to prohibit antitrust and anti-competition practices;
- identify the most common antitrust violations in commercial real estate and the various actions, statements, and behaviors that give rise to them; and
- enumerate the methods and strategies by which commercial real estate brokers can avoid violations of antitrust laws.

# TERMINOLOGY

## Collusion

A secret agreement or cooperation between two or more parties, typically for illegal, deceptive, or fraudulent purposes. The parties involved in collusion often work together to achieve a shared objective, such as manipulating markets, deceiving others, or violating laws, in a way that benefits them at the expense of others.

## Treble damages

A legal remedy in which a court orders the payment of three times the actual damages suffered by a plaintiff. This punitive measure is designed to deter wrongful conduct by making the penalty for such behavior significantly more severe than just compensating for the harm caused.

## Price-fixing

Occurs when competing brokers or firms agree to set or maintain certain commission rates, fees, or other pricing structures rather than allowing market forces to determine them independently.

## Group Boycott

Agreement between two or more persons to refuse to deal with a particular person, company, or group to eliminate competition or coerce behavior.

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# ANTITRUST

In the past, when brokers heard the term "antitrust violation," several common thoughts and associations may have come to mind:

- *Monopoly*: Many people think of large corporations or monopolies that control a significant portion of a market, leading to unfair competition.
- *Price-fixing:* Working directly with your competitors to fix prices for goods or services, thereby reducing competition and harming consumers through inflated prices.
- *Consumer Protection*: Some might think about the impact on consumers, such as higher prices, fewer choices, or inferior products resulting from lack of competition.

Today, the most prevalent thought is likely the Missouri class-action antitrust case, *Burnett et al. v. National Association of Realtors et al*. Despite these accurate thoughts about antitrust, they really do not answer the question, “What is antitrust?”

## *Concept of a Free Market*

The concept of a free market is a foundational principle of our democracy, embodying the belief that individuals and businesses should operate in an environment where competition, innovation, and consumer choice drive economic growth and prosperity. In a free market, prices are determined by supply and demand, and resources are allocated efficiently based on the voluntary exchanges between buyers and sellers. This system not only fosters economic freedom but also promotes individual liberty, as people have the opportunity to pursue their own interests and ambitions without undue interference. The free market serves as a mechanism for balancing diverse interests (both economic and societal), encouraging meritocracy, and ensuring that no single entity can dominate the economic landscape to the detriment of others.

Historically, the integrity of our free market system came under stress as mega-corporations used their market share and economic strength to manipulate markets. Companies such as Standard Oil and American Tobacco emerged in the late 19th and early 20th centuries, and began monopolizing entire industries and manipulating market conditions to their

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advantage. Often referred to as trusts because of the manner in which they were created, they violated free market principles by restricting fair competition, which is essential for maintaining a dynamic and responsive economy. By controlling vast portions of the market, these entities were able to set prices, exclude competitors, and influence political and economic policies, ultimately undermining the democratic ideals of equal opportunity and fair play.

## *Standard Oil Tactics*

In the late 1800s, the Standard Oil Trust exemplified how a single entity could manipulate an entire industry and monopolize the market. Led by John D. Rockefeller, Standard Oil used aggressive strategies such as undercutting prices to eliminate competition, securing secret deals with railroads for cheaper freight costs, and acquiring or crushing rivals through predatory pricing and buyouts. This enabled Standard Oil to control the majority of the oil refining capacity in the US, and set prices and market terms that stifled competition and innovation.

The dominance of Standard Oil not only reshaped the oil industry but also had profound economic and political implications on the nation. It prompted a public outcry and criticism over its business tactics, which were viewed as ruthless and monopolistic.

## *Government Response*

In response to these threats, antitrust laws were established to preserve the free market and ensure a level playing field for all participants. These laws made illegal any agreements that restrained trade and prohibited the formation of monopolies.

Today, antitrust laws continue to play a crucial role in maintaining the health and fairness of our economy. By targeting practices that restrain trade, such as price-fixing, market allocation, and collusion, these laws ensure that businesses compete based on quality, price, and innovation rather than through unethical and illegal means. This not only protects consumers from inflated prices and limited choices but also encourages a vibrant and competitive marketplace where new and existing businesses can thrive.

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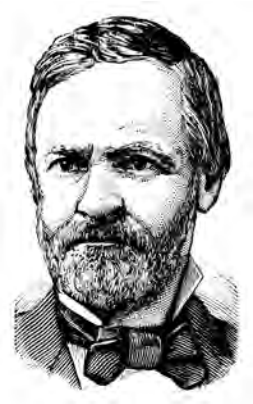
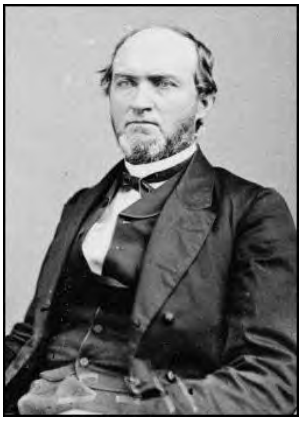
## *The Law*

### *Federal*

When discussing US antitrust law, it's essential to understand the foundational statutes that guide current policy. The cornerstone of US antitrust law is the Sherman Antitrust Act of 1890 (15 U.S.C. §§ 1-7). It was named after its architect, Senator John Sherman of Ohio, and garnered a unanimous vote in the House and only 1 nay vote in the Senate. When enacted, it was touted as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." This Act prohibits monopolistic practices and conspiracies that restrain trade, making it illegal to form agreements that limit competition or establish monopolies.

LINK TO STATUTE





The Clayton Act of 1914 (15 U.S.C. §§ 12-27) built on the Sherman Act by addressing specific practices that could lead to anticompetitive behavior. Authored by Alabama Congressman Henry Clayton, Jr., it targets mergers and acquisitions that may substantially lessen competition and prohibits practices like price-discrimination and exclusive dealing arrangements that could harm competition. It also provides for treble damages to any person who is injured in their business or property, plus legal fees.

LINK TO STATUTE

LINK TO STATUTE

Lastly, the Federal Trade Commission Act (FTCA) of 1914 established the Federal Trade Commission (FTC) (15 U.S.C. §§ 41-58), which enforces antitrust laws alongside the US Department of Justice (DOJ). The FTCA prohibits "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce, providing the FTC with broad authority to address anticompetitive behavior. The US Supreme Court (SCOTUS) has held that all violations of the Sherman Act also violate the FTCA. Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTCA against the same kinds of activities that violate the

Sherman Act. Understanding the basics of these laws is crucial for real estate brokers to ensure compliance and avoid practices that could lead to antitrust violations.

### *State of North Carolina*

In North Carolina, antitrust violations are governed by the Unfair and Deceptive Trade Practices Act (UDTPA)(**N.C.G.S. §75-1 et seq.**). This Act prohibits monopolistic behavior, price-fixing, and other anticompetitive practices that may harm the state's economy. Under the UDTPA, individuals or businesses harmed by such practices can sue for treble damages and attorneys' fees, making it a powerful tool for enforcement at the state level.

LINK TO STATUTE

### *The Commission*

While the Commission does not have a specific rule regarding antitrust, **N.C.G.S. §93A-6** contains several types of violations that may also constitute unfair and/or deceptive trade practices and violate the UDTPA. For example, §93A-6(a)(8) provides for disciplinary action against a broker who engages in "conduct constituting improper, fraudulent, or dishonest dealing."

LINK TO STATUTE

## *The Criminal Consequences*

Antitrust violations in the US can be addressed both criminally and civilly. Although most enforcement actions are civil, the Sherman Act provides for stiff criminal penalties. Criminal prosecutions are typically limited to intentional and clear violations such as when competitors fix prices or rig bids. Criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to ten years in prison, may be imposed under the Act.

Civil enforcement, pursued by private parties or the FTC, can lead to injunctions, treble damages, and significant legal fees. A good example of such an action is the *Burnett et al. v. National Association of Realtors et al.* case, where private attorneys brought suit on behalf of "potentially hundreds-of-thousands of sellers" in a class action suit in Missouri. The verdict, and ultimate settlement, will likely total more than $1,000,000,000.

## *Application of the Law*

Since the Sherman Act's inception, SCOTUS, and the lower courts, have worked diligently to shape and adapt its meaning to our ever changing marketplace.

### *A Sliding Scale*

Initially, SCOTUS held that the Sherman Act did not prohibit every restraint of trade, but only those that were unreasonable. And this made sense. For example, and taking it to extremes, a simple partnership agreement between two attorneys working in the same small town restrains trade, but partnerships, in and of themselves, are not violations of antitrust laws.

Further, consider our Constitutional right to free speech. Despite its Constitutional weight, this right is not unlimited. In our society you are not free to scream "FIRE" in a crowded theatre. SCOTUS was forced to balance our right to free expression with public safety and order.

The same holds true for antitrust laws. SCOTUS balanced our desire to have a free market and allow participants to operate freely within that market against the need to prohibit certain market participant actions when they unreasonably restrain trade.

### *Two Standards: "Per Se" and "Unreasonable" Violations*

In evaluating antitrust claims, federal courts apply one of two distinct approaches: the "*per se* rule" and the "rule of reason." The *per se* rule automatically deems certain business practices, such as price-fixing and market division, as violations of antitrust laws without consideration of their actual effect on the market. This approach assumes such practices are inherently harmful.

In contrast, the rule of reason requires a more comprehensive analysis, where a court examines the context and impact of the practice on competition to determine whether it unreasonably restrains trade. This method acknowledges that some practices may have pro-competition justifications.

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## *Brokers Need to Be Vigilant*

Antitrust laws are designed to promote fair competition and prevent unlawful practices that restrain trade or create monopolies. In the context of commercial real estate transactions, antitrust violations can manifest in several ways involving commercial brokers. Understanding these violations is crucial to ensure compliance with laws such as the Sherman Act, Clayton Act, and various state regulations.

There are several ways real estate brokers, in the past, have run afoul of the antitrust laws. The following are some of the more common examples.

### *Cooperation Among Competitors*

The antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. In commercial real estate, cooperation among competitors, often termed "collusion," can lead to violations of antitrust laws. This occurs when competing brokers or firms agree on certain business practices such as setting commission rates or dividing market territories to eliminate competition and manipulate market conditions. Such agreements undermine the competitive marketplace, restrict innovation, and artificially inflate prices for services.

### *Price-Fixing*

This can occur when real estate firms agree to all charge the same fees, or offer agency agreements on the same pre-set terms. To avoid allegations of price-fixing, brokers must be careful what they say. Some of the things we should never say to a customer or client:

- "That's what we all charge."
- "That's the going rate."
- "No one will agree to different terms."
- "We all use the same listing agreement and offer

the same terms."

- "No one negotiates the commission rate. It's x%."
- "The minimum listing period in our market is 12 months."

It is perfectly acceptable to quote YOUR firm's rates and policies. If your firm does not negotiate, then its fine to say so. What you must avoid is talking about what all the other firms are doing and give the impression that the client or customer doesn't have any choice.

### *Group Boycotts*

In a commercial real estate context, a group boycott might occur when several brokers or firms agree to exclude a competitor from participating in certain market activities. For instance, they might collectively decide not to collaborate or share listings with a particular broker, effectively cutting off their access to valuable market information and opportunities. This kind of exclusion can severely limit the boycotted broker's ability to compete, manipulate market dynamics in favor of the participating brokers, and ultimately reduce competition. Again, this can lead to higher prices and less choice for consumers. Such practices can violate antitrust laws designed to promote competition and protect consumers.

### *Market Allocation Schemes*

Market allocation involves an agreement between competitors to divide markets among themselves, whether by geography, type of services, or specific clients, to reduce or eliminate all competition.

While we do not hear much about this in our business, agents do run into it from time to time. This is where the real estate market is divided up and "territories" are assigned to firms or licensees. Most times this is done informally. Here are some area allocation statements you might hear. Be sure YOU never say this:

- "They need to stay across the river, this is OUR territory."

- "Let's agree that I will take the north-side and you take the south-side."
- "They don't belong to our Board."

Of course agents should not undertake to represent a client in geography (or an area of specialty) where they are not competent. However, if the agent can competently and professionally assist a client or customer, then the geography should not be a barrier.

### *The Case of the Bad Border Policy*

Bob is a broker in Hayesville, NC, but works all along North Carolina's border with Georgia. Because of his proximity, Bob also obtained a real estate license in Georgia, so he could work in both states. Bob applied to XYZ MLS, Inc., the only multiple listing service in the bordering Georgia County for membership. Bob was provided with a membership form which, among other things, contained the following membership criteria:

- Receive 85% affirmative vote from existing members.
- Purchase a share of XYZ stock.
- Have a favorable "character-financial" report from Equifax.
- Have a favorable business reputation.
- Have an office in the Georgia County that is open during "customary business hours."

Bob's application was submitted and then denied. He was informed that he did not receive the requisite number of affirmative votes based upon the information contained within his application. As there was no other MLS in the area, and all the brokers in that MLS were bound to keep the listings confidential, Bob was essentially shut out, and unable to work in that area.

*What should Bob do in light of the XYZ MLS's refusal to accept him as a member?*

*A. Bob should file a complaint with the Commission and get them to force XYZ MLS to admit him as a member.*

*B. Bob should speak with other brokers that were denied membership and create their own MLS.*

*C. Bob should contact the Georgia Association of REALTORS® and complain about XYZ MLS's criteria.*

*D. Bob should contact the DOJ and file a complaint against XYZ MLS and provide all of the details of their onerous membership criteria.*

***The Rest of the Story . . .***

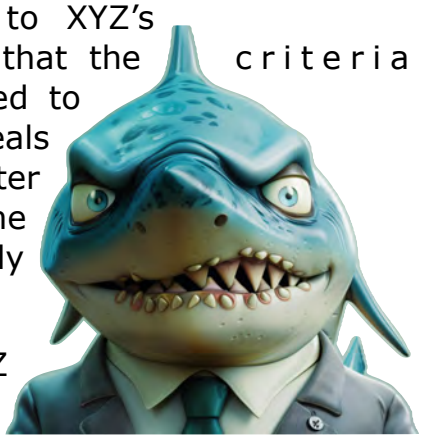
Bob, along with many other brokers in his situation, complained about this unduly harsh treatment and admission standards. Shortly thereafter, the DOJ brought suit against XYZ in federal court alleging that XYZ's rules went far beyond what was necessary to assure any legitimate objectives of an MLS service. XYZ filed a motion to essentially dismiss the case (summary judgment) and the trial court granted the motion, finding no issue with the rules.

The DOJ appealed. To reach its decision on appeal, the Court of Appeals applied what is commonly referred to as the "rule of reason" test to each of the criteria required by XYZ. Under this test, the Court considered the question of how much market power XYZ actually had and the validity of the competitive justifications for each restriction. Put simply, a Court applying this test will void any restraint whose anticompetitive effects outweigh its contributions to competition.

At the outset of its analysis, the Court recognized that while:

> *. . . a trade group like a multiple listing service may create significant competitive advantages both for its members and for the general public, there exists the potential for significant competitive harms when the group, having assumed significant power in the market, also assumes the power to exclude other competitors from access to its pooled resources.*

Upon application of the rule of reason test to XYZ's membership criterial, the Appeals Court found that the criteria was unjustifiably broad and not narrowly tailored to achieve a legitimate competitive goal. The Appeals Court reversed the trial court and sent the matter back to the trial court for further consideration. The parties to the matter settled the dispute shortly thereafter.



The group boycotting tactic employed by XYZ created an unbalanced marketplace where certain

players, like our friend Bob, were unfairly disadvantaged. Antitrust laws play a critical role in addressing these issues by leveling the playing field and ensuring that businesses compete on merit rather than collusion.

## *Case of the Overreaching Board*

Jasmine wanted to sell her North Carolina home. As she began interviewing realtors, she discovered the Association. The Association was a 1,300 member group of real estate brokers engaged in the selling, leasing, and managing of real estate in the area. They also functioned as an MLS. If Jasmine wanted her house in the Association's MLS, she needed to sign a preprinted form contract that contained the following provisions:

- Exclusivity to Association's broker to sell the property.
- Mandatory two-six month listing agreement.
- Commission rate equal to or greater than what the Association recommended.
- Commission be divided 70-75% to listing broker and 25-30% to selling broker.

Jasmine felt that the commission the Association broker wanted to charge was too high, and she tried to negotiate it. The Association refused to accept her listing unless the commission was equal to or higher than their recommendation.

*What should Jasmine do in light of the Association's refusal to negotiate their commission rate?*

*A. Jasmine should file a complaint with the Commission stating that the Association's commission rates are too high.*

*B. Jasmine should just trust that another broker will be able to sell her house without use of the Association's MLS.*

*C. Jasmine should contact an attorney in the area that handles antitrust litigation and provide all of the details to see if she has the basis for a lawsuit against the Association.*

*D. Jasmine should contact NC REALTORS® and complain about the Association's tactics.*

### *The Rest of the Story . . .*

Jasmine and several other home sellers filed complaints with the DOJ. The DOJ brought suit against the Association alleging price-fixing practices,

among others, all in violation of US antitrust laws. After initial pleadings and motions were heard, the court urged the parties to get together to attempt a settlement of the matter. In light of the risks associated with any case of this nature, the parties did just that.

In the settlement, the Association was prohibited from antitrust conduct, including:

- Fixing, establishing, or maintaining commissions rates.
- Urging that its members adhere to a schedule of commissions.
- Instructing or educating members on what commission rates to charge.
- Taking punitive action against brokers for refusal to adhere to commission schedule.
- Having any rule that prohibits a member from working with a nonmember.
- Publishing, for ten years, any study or survey suggesting historical values of commissions charged.
- Refusing to accept a request for multiple listing services from a seller because the offered commission was too low.

Price-fixing, as described above, undermines the fundamental principles of a free market by artificially inflating prices and reducing consumer choice. As Jasmine experienced, when brokers conspire to set prices, competition is stifled, leading to her paying higher commissions, and resulting in less innovation in the marketplace. Antitrust laws are essential in combating these practices, ensuring that prices are determined by market forces rather than collusion. By enforcing these laws, the playing field is leveled, promoting fair competition, protecting consumers, and fostering a healthy, dynamic economy.

### *Case of the Disappearing Broker*

Wills, Mira, and Casey worked for Honda Jet in the Triad for the last six months. All three lived in the large development called Spring Meadow near the Honda Jet facility. At lunch one day, the three were chatting about their new homes and their experiences with their brokers. Interestingly, all three had similar experiences. Both Wills and Casey went to ABC and XYZ brokerages, respectively, and remarkably, were referred to the same broker at Elite Brokerage.

Mira, was referred by a friend to her broker at Cumberland Brokerage. After touring a few homes, Mira indicated that she wanted to live closer to work, and asked her Cumberland broker to look for property in Spring Meadow. Craziest thing, Mira's broker said she should call Elite Brokerage as well if she really wanted to buy in Spring Meadow.

Later that evening, Casey was at home cleaning up after dinner, having hosted her brother Nomar and his wife Eliza. Making conversation, Casey told the pair of the odd story she had heard at lunch that day, and how interesting it was that everyone seemed to refer buyers to Elite Brokerage for homes in Spring Meadow. Eliza, a real estate broker herself, worked for a small brokerage call Peak Realty. Eliza remarked that this was not the first time she had heard such stories, and she was growing increasingly frustrated with her inability to break into the Spring Meadow market.

*How should Eliza react in light of her sister-in-law's story, along with past stories she heard about Elite?*

A. *Eliza should chalk it up to the drawbacks of working in a small brokerage.*
B. *Eliza should get the name of the Elite broker and confront him with her concerns and get him to let her work in Spring Meadow.*
C. *Eliza should communicate with her BIC and/or the North Carolina Attorney General's office to see what options they may have regarding the mysterious hold Elite has on Spring Meadow.*
D. *Eliza should file a complaint with the Commission citing the Elite Broker's failure to disclose material facts about how he gets all the business.*

***The Rest of the Story . . .***

Eliza repeated the story to her BIC, and the brokerage eventually made a complaint to North Carolina Attorney General. This resulted in Peak Realty filing suit against Elite Brokerage and two others. The suit alleged a complex market allocation conspiracy among the brokerages, all in violation of the UDTPA. After initial pleadings and motions were heard, the Court urged that the parties get together to attempt a settlement of the matter. Elite and the other defendant

brokerages refused to settle, asserting that they did nothing wrong. The matter went to trial and a verdict was entered in favor of the Plaintiffs, awarding $5,000,000 in damages, which, because of the treble damages provision of the UDTPA, became a $15,000,000 award.

## ANTITRUST: BROKER BEST PRACTICES

In order to avoid any of the pitfalls and penalties associated with antitrust issues, brokers should adhere to the following:

- Educate yourself on antitrust laws, and stay abreast of recent developments through CE and informational webinars.
- When communicating with customers, speak to ***your*** firm's policies regarding commission rates. Never compare to, or speak for, other firms when communicating with anyone outside your firm.
- In group gatherings of brokers, be mindful that discussions don't venture into areas which would violate antitrust laws. Language such as "Let's all agree to charge 5%" and "Let's all agree to not work with that new firm" may have far reaching implications for all involved.
- If group discussions start going the wrong way, ask that the discussion stop immediately. If they do not, leave and ask that your departure be noted. You also note this and notify your BIC.
- When someone outside your firm asks you what everyone else is charging, don't take the bait. Keep the discussion on what your firm does and the services your firm provides for that fee.
- Be mindful when talking to other agents in your market. In some markets a small number of firms may control the market. If you are an agent with one of those firms, your off the cuff opinions on policies could be construed as speaking on behalf of your firm and create legal problems for your firm.
- Decide for yourself (if an independent broker) what you will charge, what policies you will use, including terms offered to clients.

- Never discuss pricing or pricing issues with any competitor. If you attend a trade show, for example, and other competitors are discussing pricing, walk away immediately.
- Never discuss allocating customers or markets to competitors in exchange for receiving "protected" customers or territories. "Divide and conquer" can be a violation of antitrust laws.
- Never make a sale contingent on a customer purchasing a second product from you. These tie-in purchases can violate antitrust laws if they restrict competition for the second item.

# SECTION 4

# EDUCATION UPDATE

## LEARNING OBJECTIVES

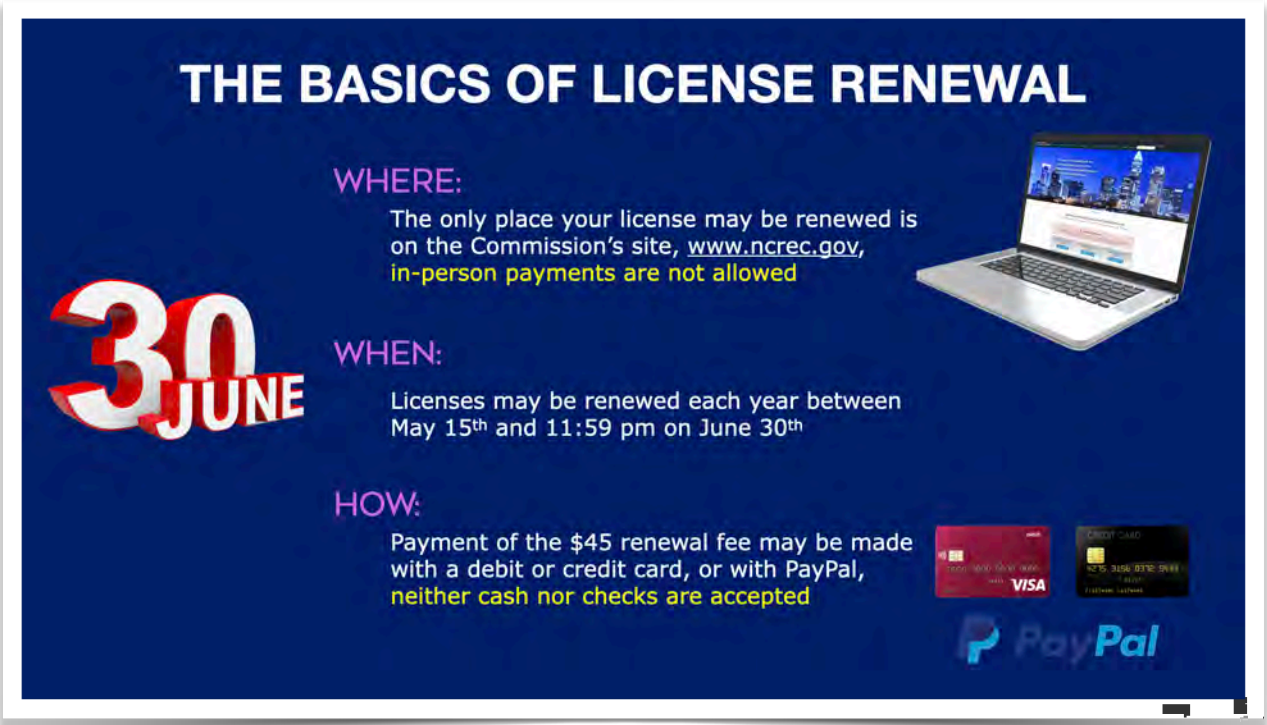
By the end of this Section, you should be able to:

- describe when a broker, qualifying broker, and BIC must renew their license, and
- explain the differences between an expired and an inactive license.

## LICENSE RENEWALS

Brokers, firms, and limited-nonresident-commercial-licensees (LNCL) must renew their real estate license each year during the statutory forty-five day renewal period from May 15th through June 30th. The annual renewal fee is $45.00 and must be:

- paid on the Commission's website; and
- received by the Commission by 11:59:59 pm on June 30th.



**PLEASE NOTE**

Don't wait until the last minute on June 30th to renew your license. If the Commission's website is down, your internet or power is down, or something else prevents you from renewing, then your license will expire and you will have to deal with the consequences that result from your failure to timely renew your license.

## *Common Questions Regarding Renewal*

The Commission regularly receives questions regarding the license renewal process. Knowing the truth may spare you the consequences.

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**I CAN RENEW MY BROKER LICENSE BEFORE I COMPLETE MY CE COURSES?**

TRUE. License renewal is not contingent upon a broker completing his or her CE requirements. No License Law nor Commission rule requires a broker to complete CE courses prior to renewing their license.

Therefore, a broker could choose to renew their license prior to completing CE. Theoretically, a broker wishing to maintain an active license could renew their license on May 15th and then complete their CE before June 10th.

---

**I CAN COMPLETE MY CE COURSES PRIOR TO RENEWING MY LICENSE?**

TRUE. A broker may choose to complete their CE courses prior to renewing their real estate license. The Commission does not require a broker to complete CE prior to submitting a license renewal. It is up to the broker to decide when to take CE and renew their license. However, to maintain an active license status, a broker must complete CE courses by June 10th.

**PLEASE NOTE**

The Commission strongly encourages brokers to complete their required CE courses earlier in the license year to maximize the benefit of the information and avoid a rush in May and early June.

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**I AM THE QUALIFYING BROKER/BIC OF MY FIRM. I MUST RENEW BOTH MY INDIVIDUAL LICENSE AND THE FIRM LICENSE?**

TRUE. A broker who is both the BIC and the Qualifying Broker (QB) of a firm is responsible for renewing both their individual broker license and the firm license during the annual renewal period from May 15th through June 30th.

### *Bic Fails to Timely Renew*

If the designated BIC of a single-office firm fails to renew their individual broker license, the consequences are substantial:

- The BIC's license is placed on expired status, and their designation as BIC is removed.
- The affiliations of all brokers affiliated with that firm are removed and their addresses are changed to their respective home addresses, on active status.
- The licenses of all PB's are placed on inactive status.
- No brokerage activities may be performed in the name of the firm until a BIC is designated.
- All clients must be notified that the affiliated broker working on their transaction may not perform any brokerage activities until a BIC is designated.
- Once a BIC is designated:
  - broker affiliations must be reestablished by filing the affiliation form with the Commission; and
  - once affiliated, those brokers must be assigned to each agency agreement.

There are subtle differences between a BIC's expired license status in a single-office firm and multiple-office firm, but the scope of the problem is just as vast. The ripple effects of this type of failure are far reaching and not easily navigated. The Commission recommends that great care be taken in assuring that all licenses are renewed in a timely manner.

### *QB Fails to Timely Renew Broker License*

If the QB of a firm fails to renew their individual broker license, the consequences are more substantial:

- The QB's license is placed on expired status.
- The firm's license is placed on inactive status.
- All agency agreements are nullified.
- The firm may not engage in any brokerage activities.
- The designation of every BIC in every office within the firm is removed.
- The affiliations of all brokers and PBs affiliated with the firm are removed, and their addresses changed to their home addresses.
- The licenses of all previously affiliated PBs are placed on inactive status.
- Once a new QB is designated for the firm:
  - a BIC must be designated for each firm office;
  - broker affiliations must be reestablished by filing the affiliation form with the Commission for each broker; and
  - all agency agreements may then be reestablished.

### *QB Fails to Renew the Firm License*

If the QB of a firm renews their individual license, but fails to renew the firm license, the consequences, well, by now you know, it's bad!

- The firm's license is placed on expired status.
- The designation of every BIC in every office within the firm is removed.
- The affiliations of all brokers and PBs affiliated with the firm are removed, and their addresses changed to their home addresses.
- The licenses of all previously affiliated PBs are placed on inactive status.
- The firm may not engage in any brokerage activities until:
  - its new application for a firm license is approved;
  - a BIC is designated for each of the firm's offices;
  - broker affiliations are reestablished
  - agency agreements are reestablished

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**I DO NOT HAVE TO RENEW MY LICENSE IF IT IS INACTIVE?**

FALSE. You must renew your license to keep it's status "current." If you fail to keep your license on current status, your options to activate an inactive license are removed until you become current again. If you do not renew timely, your license is expired; thus, requiring re-qualification for licensure. Whether it was on active or inactive status when it expired is irrelevant.

Further, this is true even if the broker intentionally placed their license on inactive status. The broker should still renew the license each year to ensure its current in the event they would like to practice brokerage in the future. If a broker wants to activate an inactive license, the broker needs to meet the educational requirements in Rule 58A .0504(d) and Rule .1702(a)-(b).

LINK TO STATUTE

LINK TO STATUTE

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**I CAN COMPLETE MY PENDING TRANSACTION EVEN IF I DID NOT RENEW MY LICENSE?**

FALSE. If your license expires on June 30 due to non-renewal, you cannot engage in ***any*** brokerage activities beginning July 1st. This includes attending a closing for a client's transaction that was pending before the license expired; your brokerage company would have to send another affiliated broker to represent the company's client. You may not resume brokerage activities until your license is reinstated to "current and active" status and you are affiliated with a BIC.

**PLEASE NOTE**

Brokers who serve in the military and are on active deployment during the renewal period may be granted special consideration under federal law.

## *Common Questions Regarding Expired & Inactive License Status*

To lawfully engage in brokerage activity, an individual or entity must have a license set to "CURRENT" and "ACTIVE" status at the time the broker provides the brokerage services. A thorough understanding of your license

status is an essential part of being a broker. Engaging in brokerage activities when your license status is not current and active will subject you to discipline from the Commission as well as a potential forfeiture of the commissions you have may have earned for those brokerage services.

---

**I CAN PLACE A REFERRAL AND RECEIVE REFERRAL FEES WITH AN INACTIVE LICENSE?**

FALSE. A broker's license status must current and active at the time of performing brokerage activity, which includes the placing of a referral, in order to legally receive any referral fees.

Remember, active status is bestowed upon a license when the licensee has completed the appropriate eight hours of CE by June 10th each year **and** has timely renewed their broker license by June 30th.

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**I WAS LICENSED IN MARCH '24 AS A PB AND MUST TAKE CE BY JUNE '25 TO REMAIN CURRENT AND ACTIVE?**

LINK TO STATUTE

TRUE. Rule 58A .1702(c) indicates that, to maintain active status, CE courses shall be completed before the second renewal following the initial licensure and upon each subsequent annual renewal.

In this scenario, a broker was licensed in March, 2024, would renew their broker license for the first time by June 30th, 2024, to maintain current status, and no CE is required at this 1st renewal to maintain active status. The second renewal of their license would occur on or before June 30th, 2025; therefore, the broker must complete CE prior to June 10th, 2025, to maintain active status, or the license becomes inactive.

**I HAVE TO TAKE POSTLICENSING EDUCATION AND CE EVEN IF I HAVEN'T AFFILIATED WITH A BIC?**

TRUE. According to Rule 58A .1902(b), a PB must complete their Postlicensing education within 18 months of initial licensure (not date of license activation) to remove the provisional status from their license record.

LINK TO STATUTE

To achieve and maintain active license status, a PB must be supervised by a BIC and timely complete all Postlicensing courses. However, if a PB chooses to remain on inactive status, they are strongly encouraged to complete their Postlicensing education and annual CE courses to remain eligible for easy license activation. Although CE is not required to renew a license on inactive status, the activation requirements for a license with a CE delinquency in Rule 58A .1703 are quite stringent.

LINK TO STATUTE

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**I CAN TAKE CE WITH AN INACTIVE LICENSE?**

LINK TO STATUTE

TRUE. Rule 58A .1702(e) reveals that a broker is not required to take CE while their license is on inactive status. However, the broker may take CE while their license is on inactive status in preparation to easily achieve active status under Rule 58A .1703 (see above).

---

**I WILL RECEIVE CE CREDIT FOR SUCCESSFULLY COMPLETING A POSTLICENSING COURSE?**

FALSE. Postlicensing courses do not provide CE credit, pursuant to Rule 58A .1704.

LINK TO STATUTE

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**AS A BROKER, I CAN GET EQUIVALENT CE CREDIT FOR COURSES NOT APPROVED BY THE COMMISSION?**

FALSE. Courses taken by brokers to satisfy education requirements in other states, or for other license types (e.g., appraisal, home inspection, etc.), cannot be submitted for to the Commission and receive equivalent CE credit.

LINK TO STATUTE

According to amended Rule 58A .1708, the Commission limits eligibility for a CE equivalent waiver to approved real estate educators only. An approved instructor may receive CE equivalent credit for teaching a Commission Update Course, teaching a Commission-approved CE elective for the first time, or developing a CE course that is approved by the Commission. Instructors must submit a waiver application prior to June 17th each year, specifying how they met the requirements, along with an application fee of $50 if pursuing the new course approval option.

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**I CAN AUTOMATICALLY GET A WAIVER OF THE REQUIREMENT FOR POSTLICENSING COURSES?**

LINK TO STATUTE

FALSE. Rule 58A .1905 provides that a broker may apply for a waiver of one or more of the three thirty hour Postlicensing courses if, and only if the broker:

LINK TO STATUTE

- obtained education equivalent to the Commission's Postlicensing courses, as prescribed by Rule 58A .1902;
- obtained experience equivalent to forty hours per week as a licensed broker or salesperson in another state for at least five of the last seven years immediately prior to submitting the waiver request; or
- worked forty hours per week as a licensed North Carolina attorney practicing real estate matters for two years preceding the waiver request.

LINK TO STATUTE

The broker must meet the requirements set forth in this Rule and include supporting documentation in their waiver application. Further, Rule 58A .1905(c) states that a broker is ineligible for a Postlicensing waiver if the broker was issued an NC real estate license without passing the NC license examination.

---

**I CAN RENEW THE FIRM LICENSE EVEN IF THE QUALIFYING BROKER'S LICENSE IS EXPIRED?**

FALSE. The firm license is inexorably linked to the QB's license. Thus, the firm's QB must have a license on current and active status. As long as the firm has a QB with such a status, and the firm's license is timely renewed, the firm license remains current.

If the QB's license expires or becomes inactive on July 1, the firm's license status will also become inactive, meaning no brokerage activities may take place under the firm's name. While losing a current and active BIC only takes an individual office down, losing a current and active QB takes the entire firm down.

In such case, the firm license cannot be activated until either the QB's license has returned to active status, or the firm appoints a new current and active QB. Note that even if the firm license is active, the firm cannot legally perform brokerage at any office location without a designated BIC.

---

**A QUALIFYING BROKER MUST COMPLETE CE EVEN IF THEY ARE NOT ACTIVELY PRACTICING BROKERAGE?**

TRUE. For a broker to remain a QB of a firm, the QB must maintain current and active license statuses, which means the QB must timely renew and complete CE each year. Failure to complete the appropriate CE course by June 10th requires the appointment of a new QB with appropriate status, by June 30th to avoid having the firm license go inactive on July 1st.

---

Many licensees contact the Commission, education providers, and instructors with questions about how to get their real estate license "up to date." The correct answer to this question begins with the licensee using the proper verbiage when discussing their license, namely "status," as in "what is my current license status?" Once complete, three questions need to be answered:

- Is the license status inactive or expired?
- Why is the license status either inactive or expired?
- How long has the license status been inactive or expired?

The Commission strongly urges licensees with questions about their license status to contact one of the Commission's License Service Specialists. These folks can immediately examine the licensee's record and properly advise them of the process necessary to achieve their goals. Whether a licensee is attempting to "fix" an inactive status or expired status, every single action requires the licensee to first cure any CE deficiency that may exist in their license record.

Please review the guides below for how to reinstate an expired broker license and/or activate an inactive license.

## When the Broker License is Inactive

| Cause of the Inactivity | Length of Inactivity | Process Required Per Rule |
|---|---|---|
| Provisional Broker inactive due ONLY to non-affiliation | Any length of time | **Per Rule 58A .0506**<br>• File Form 2.08 – License Activation and Broker Affiliation |
| Provisional Broker inactive due to failing to complete Post within 18 months | Any length of time | **Per Rule 58A .1902**<br>• Complete all three 30-hour Postlicensing courses within 2 years of filing the License Activation and Broker Affiliation form<br>• File Form 2.08 – License Activation and Broker Affiliation |
| Broker inactive due to a CE deficiency | 2 years or less | **Per Rule 58A .1703**<br>• Make up any deficiency in the previous year with CE electives<br>• Complete the required current year CE consisting of an Update course and an elective course<br>• File Form 2.08 – License Activation and Broker Affiliation |
| | More than 2 years | **Per Rule 58A .1703**<br>• Complete the current year CE consisting of an Update course and an elective course<br>• Complete 2 Postlicensing courses no more than 6 months prior to filing the License Activation and Broker Affiliation form<br>• File Form 2.08 – License Activation and Broker Affiliation |

## When the Broker License is Expired

| Cause of the Expiration | Length of Expiration | Process Required Per Rule 58A .0505 |
|---|---|---|
| The only cause of an expired status is failing to renew or failing to pay the $45 renewal fee each year on or before June 30th. | Less than 6 months | • Pay a $90 reinstatement fee<br>• Disclose any convictions or disciplinary actions<br>• File a Form 2.08 - License Activation and Broker Affiliation |
| | For 6 months but not more than 2 years | • Within 6 months prior to reinstatement, complete one 30-hour Postlicensing course OR pass the National and State license exam sections*<br>• File a License Reinstatement Application with $90 fee<br>* Individuals with an active license in another state may choose to pass the state portion of the license examination in lieu of completing the Postlicensing course |
| | More than 2 years | • Must be relicensed as if they never possessed a license:<br>➢ Complete a Prelicensing course<br>➢ Pass the National & State sections of the license exam<br>➢ Submit a new license application with fee |

# SECTION 5

# LAW & RULES UPDATE

# LEARNING OBJECTIVES

After completing this Section, you should be able to:

- state the status of the North Carolina privilege tax;
- explain the basis for, and result of, Weston's Law; and
- differentiate between a service animal and an assistance animal.

# TERMINOLOGY

## Fair Housing Act

According to the Department of Housing and Urban Development (HUD), the Fair Housing Act (FHA) protects people from specified types of discrimination when they are renting or buying a home, getting a mortgage, seeking housing assistance, or engaging in other housing-related activities.

## Service Animal

The Americans with Disabilities Act (ADA) defines a "service animal" as any dog or miniature horse that is individually trained to do work or perform tasks for the benefit of an individual with a physical, sensory, psychiatric, intellectual, or mental disability.

## Source of Income Discrimination

According to the American Bar Association (ABA), source of income discrimination refers to the practice of refusing to rent to a housing applicant because of that person's lawful form of income.

## Violence Against Women Act

The Violence Against Women Act (VAWA) is a federal law that, in part, provides housing protections for survivors of domestic violence, dating violence, sexual assault, and/or stalking. Despite the name of the law, VAWA's protections apply regardless of sex, sexual orientation, or gender identity of the victim.

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# THE CASE OF WESTON'S LAW

In July, 2021, the Androw family left their home in Canton, Ohio, bound for Corolla on North Carolina's Outer Banks for a summer vacation. The family had rented a four-story beach house. On the evening of July 11, the family's seven year old son, Weston, was riding in the rental home's residential elevator. The elevator stopped between the second and third floors and Weston was discovered trapped between the elevator car and the elevator shaft. Emergency workers arrived at the scene, were able to quickly free Weston, but were unable to resuscitate him.

## *The Rest of the Story*

Investigation revealed that a large gap existed between the front of the elevator (hoistway car) and the floor (hoistway landing). It was in this gap where young Weston became trapped. In the aftermath, Weston's parents sounded the alarm about the residential elevators, the dangers they posed, and pushed for reforms.

At the time, North Carolina's Elevator Safety Act, (N.C.G.S. §95-110.1, et seq.), governed the operation, use, inspection and certification of elevators. Sadly, however, the Act did not apply to elevators in single family homes, like the one rented by the Androw family.

According to the National Elevator Industry, Inc., the leading trade organization for elevator manufacturers and installers, elevators in the US travel more than 2.8 billion miles each year. Commercial elevators across the country are regulated and periodic inspections are required. North Carolina alone has roughly 22,000 elevators, and that number grows by more than 1,000 each year. Step on a commercial elevator in North Carolina and you can expect it's been inspected. That simply wasn't the case for single family rental home elevators in NC.

## *Recalls and Reforms*

In September, 2022, the US Consumer Product Safety Commission (CPSC) announced a recall of some 117,100 residential elevators, citing the entrapment threat for children. CPSC Chair Alex Hoehn-Saric said, "Residential elevators pose a deadly risk to children. It's long past time for all homeowners to address the hazard and ensure that children cannot get trapped between elevator doors, particularly in vacation rental homes, by families who may not be familiar with elevators."

Also in June, 2022, NC's General Assembly introduced House Bill 619 which sought additional safety requirements for elevators in certain residential rental accommodations and modifications to the State Building Code. After garnering unanimous approval, the Bill was signed into law by Governor Cooper on July 8, 2022, and Weston's Law (**N.C.G.S. §143-143.7**) became fully effective on October 1, 2022.

LINK TO STATUTE

Problems emerged almost immediately. The complexity of the changes and the limited number of elevator companies able to complete the modifications made compliance difficult. Beginning in April, 2023, the General Assembly began work on an amendment to to clarify the requirements. Governor Cooper signed the amended law on June 30, 2023.

N.C.G.S. §143-143.7 made conforming changes and created new requirements for elevator systems in residential rentals, rented for fifteen or more calendar days, including privately-owned residences, cottages, or similar accommodations subject to taxation under N.C.G.S. §105-164.4F (vacation rentals).

The amendment took effect in three phases. Phase 1 was in effect until June 30, 2024. Phase 2 is in effect from June 30, 2024, until January 1, 2025. Phase 3 will take effect on January 1, 2025. If an elevator fails to meet the standards, landlords are obligated to halt its operation until guards or doors meeting the specified criteria can be installed. To ensure compliance, property owners are required to submit specific documentation to the State Fire Marshal after installation of the modifications.

## *Anticipated Impact to Brokers*

The overall anticipated impact to most brokers is minimal. However, brokers that encounter a residential elevator within a property must inquire of the owner whether the elevator is in compliance with the current General Statutes.

### *Best Practices for Compliance*

Brokers should consider implementing the following best practices to ensure compliance with Weston's Law, License Law, and Commission rules:

- Know the requirements for elevator gaps, door strength, and deformation tolerance as stated in the statute.
- Ask whether the property's elevator complies with Weston's Law.
- Verify with the Fire Marshal's office that the owner has complied with the documentation requirements detailed in Weston's Law.
- Disclose to prospective buyers or short term rental tenants whether the elevator in the property complies with required regulation.
- Refrain from representing any property owner who has failed to comply but is continuing to allow the elevator to be used.
- Advise the owner to address any non-compliance issues promptly and in adherence with the Statue.
- Recommend property owners hire professionals to maintain or conduct necessary modifications/installations for compliance.
- Ensure properties are advertised accurately and reflect whether a property is in compliance.
- Educate owners about the importance of elevator compliance and the potential legal consequences due to non-compliance.
- Encourage owners to seek the advice of an attorney to ensure they comprehend their responsibilities under the law.

If brokers incorporate these best practices while communicating with property owners, it can help ensure compliance with the requirements set forth in the Statute. The Commission has also published the following eBulletin article, **Weston's Law Revised** to educate brokers on the law

## PRIVILEGE OF DOING BUSINESS JUST GOT CHEAPER

### *Law of the Land*

For more than eighty years our General Assembly has required certain North Carolina professionals to obtain a privilege license each year. First

introduced in 1938, N.C.G.S. §105-41 imposed on certain professional license holders a requirement to purchase a $50.00 privilege license annually. This license afforded the holder "the privilege of practicing the profession or engaging in business."

### *Ding Dong the Tax Is Dead*

Beginning in March, 2023, however, our General Assembly began the process of eliminating certain privilege taxes. Session Law 2023-134 repealed N.C.G.S. §105-41, effective July 1, 2024. Thus, real estate brokers and other professionals are no longer required to apply to the NC Department of Revenue for a privilege license, or renew an existing privilege license. The final license period ended on June 30, 2024.

We as brokers, and especially property managers of residential rental properties, must be cognizant of both the Federal and NC Fair Housing laws and be ever vigilant to avoid violations. As we will detail later, violations of these laws may also constitute violations of License Law and Commission rules as well.

## FAIR HOUSING: THE LAW

### *Federal Law*

The FHA, passed in 1968, is a crucial piece of legislation that aims to protect people from discrimination when they are renting, buying, or securing financing for a home. This law, codified at **42 U.S.C. §§ 3601 - 3619**, makes it illegal to treat someone unfairly in housing if they are a member of a protected class. The goal of the FHA is to ensure that everyone, regardless of their background or personal characteristics, has equal access to housing opportunities.

Before this law was enacted, it was common for landlords, real estate agents, and lenders to refuse to work with people based on their race or other protected characteristics. This not only limited where people could live but also reinforced segregation and inequality in neighborhoods. By prohibiting discriminatory practices, the FHA seeks to break down these

barriers and help create a fairer housing market where everyone has the chance to find a safe and affordable place to live.

HUD and the DOJ are jointly responsible for enforcing the federal FHA. Individuals who believe they have been discriminated against can **file a complaint** with the DOJ or HUD, which can lead to penalties for those found guilty of discrimination. The FHA also allows for lawsuits in federal court, which can result in compensation for victims and further discourage discriminatory practices. In this way, the FHA plays a key role in advancing civil rights and ensuring that housing opportunities are available to all.

### *The FHA*

As a reminder, reference herein to the FHA is to the Fair Housing Act, not the the Federal Housing Administration. The Federal Housing Administration is a division of HUD, that helps buyers secure financing for homes by providing mortgage insurance on loans made by approved lenders. While often referred to as the FHA, this is a separate entity, and will not be addressed during this writing.

## *North Carolina's State Fair Housing Act*

In addition to the FHA, forty-nine states and DC have adopted their own fair housing laws. North Carolina's State Fair Housing Act (NCFHA) (**N.C.G.S. §41A-1 et. seq.**) allows North Carolina residents to address housing discrimination more efficiently and with greater local relevance. Though the NCFHA is certified by HUD as "substantially equivalent" to the FHA, State agencies are often better equipped to handle specific concerns and complaints that arise within their jurisdiction, offering a more streamlined process for residents seeking justice.

This dual-layer of protection may also provide additional legal leverage for individuals who face discrimination, allowing them to pursue action under both federal and state laws, which can sometimes result in stronger enforcement and greater accountability. With the NCFHA, North Carolina ensures that its residents are protected not just by federal authorities but also by their state government, which is more closely attuned to their specific needs and circumstances.

The NCFHA is administered by the North Carolina Human Relations Commission (HRC). The twenty-two member HRC, a part of the Civil Rights Division of the Office of Administrative Hearings (OAH), is tasked, *inter alia,* with the responsibility of promoting equality of opportunity for all North Carolinians.

LINK TO DOCUMENT

## NC Municipal Human Relations Commissions

LINK TO STATUTE

Pursuant to N.C.G.S. §160A-492, North Carolina also authorizes local governments to support fair housing protections through the creation of "Human Relations Programs." These programs are devoted to the promotion of equality of opportunity for all citizens, and offer dispute resolution which can lead to quicker resolutions and more tailored responses to the unique housing challenges faced by communities in North Carolina. Each of the following municipalities have such programs:

| | | | |
|---|---|---|---|
| Alamance County | City of Greensboro | County of Orange | City of Washington |
| City of Asheville | City of Greenville | City of Raleigh | City of Wilmington |
| City of Charlotte | City of Goldsboro | City of Reidsville | City of Wilson |
| City of Durham | City of High Point | City of Rocky Mount | City of Winston-Salem |
| City of Fayetteville | City of Lexington | City of Salisbury | |
| County of Granville | City of Morganton | City of Statesville | |

## License Law & Commission Rules Regarding Fair Housing

LINK TO STATUTE

In addition to the statutory framework, the Commission has solidified its commitment to fair housing with the adoption of License Law and Commission rules that mandate adherence to the overall policy. Rule §58A .0104(b) requires that every written agreement for brokerage services contain the following provision:

> *The broker shall conduct all brokerage activities in regard to this agreement without respect to the race, color, religion, sex, national origin, handicap, or familial status of any party or prospective party." The provision shall be set forth in a clear and conspicuous manner that shall distinguish it from other provisions of the agreement.*

LINK TO STATUTE

This Rule echos the heart of the fair housing laws, prohibiting licensees from discrimination (in favor of or against) any member of a protected class when conducting brokerage activities. Combined with N.C.G.S. §93A-6(10) & (15), the Commission has power to suspend or revoke, at any time, a license, or to

reprimand any licensee, if it adjudges the licensee guilty of violating the fair housing provision of **Rule §58A .1601.**

LINK TO STATUTE

## Protected Classes

The FHA prohibits discrimination in the renting or buying of a home, obtaining a mortgage, seeking housing assistance, or engaging in other housing-related activities. This of course often begs the question "Discrimination against who?"

A "protected class" is a group of people legally shielded from discrimination based on specific characteristics of said groups. The concept of protected classes in fair housing was developed through a combination of historical events, civil rights movements, and legislative action aimed at addressing systemic inequalities in the housing market. Over the years, the scope of protected classes has expanded, and today consists of the following seven groups that have faced discrimination in housing:

- race
- color
- national origin
- religion
- sex
- familial status
- disability

## Exception to FHA for Some Types of Housing

Few laws are absolute in the scope, and the FHA is not one of them. While it does have a broad reach, it does not include the following types of housing:

- Owner-occupied buildings with no more than four units.
- Single-family housing sold or rented by the owner without the use of a broker.
- Housing operated by religious organizations and private clubs that limit occupancy to members.

That said, however, North Carolina provides protections that exceed the FHA. Even though the FHA excepts single family housing sold or rented by the owner without a broker, the NCFHA does not include that exception. Thus, in North Carolina, the only two types of housing is excepted from the NCFHA:

- Owner-occupied buildings with no more than four units.
- Housing operated by religious organizations and private clubs that limit occupancy to members.

For more information regarding exemptions, see ***"The State of Fair Housing in North Carolina 2000-2020."***

## *Filing a Complaint*

### *Federal*

A complaint based upon the FHA may be filed with HUD's Office of Fair Housing and Equal Opportunity (FHEO) using the following options:

LINK TO DOCUMENT

- **Online in English or Spanish**.
- Download a HUD complaint form in a variety of languages and email it to a local FHEO office.
- Call an FHEO intake Specialist at 1-800-669-9777.

### *North Carolina*

LINK TO DOCUMENT

Any person who claims to have been injured by an unlawful discriminatory housing practice may file a civil lawsuit, or file a complaint with the HRC. **Complaints for alleged violations** of NCFHA must be filed within one year of the alleged violation.

Once a complaint has been filed, the HRC will investigate to determine whether unlawful discrimination has occurred. The HRC will also attempt to resolve the issues through informal conference, conciliation, or persuasion. If the complaint is not resolved before the investigation is complete, upon completion of the investigation, the Commission will determine if reasonable grounds exist to believe that an unlawful discriminatory housing practice has occurred.

If no reasonable grounds are revealed to demonstrate that an unlawful discriminatory housing practice has occurred, the HRC will dismiss the complaint and issue a "right-to-sue" letter to the complainant allowing the pursuit of a private civil action.

If however, the HRC does uncover reasonable grounds to support a finding that discriminatory housing practices occurred, and conciliation attempts have failed, the complainant may request a "right-to-sue" letter and bring a

civil lawsuit. Or, the complainant may allow the HRC to file a lawsuit on behalf of the complainant, or host an administrative hearing to determine a final decision on the matter.

The Commission has published a brochure entitled **"Fair Housing"** to assist brokers and housing providers with the FHA.

LINK TO DOCUMENT

# FAIR HOUSING: THE POLICY

## *What Does Housing Discrimination Look Like?*

Imagine for a moment, that a person with purple skin attempted to lease a house for herself and her family. The landlord, however, refused to lease the property to the family because they have purple skin. Unfortunately that type of housing discrimination still occurs. And, there are dozens of examples of more subtle actions that also constitute discrimination. Despite the federal, state, and societal focus over the last several decades, housing discrimination continues to be an issue. While the reasons are multi-factorial, a review of the more common factors is warranted.

### *Systemic Bias*

Systemic bias involves discriminatory practices that are embedded in the policies and procedures of the institutions that govern housing. This can include laws, regulations, or business practices that, intentionally or not, disadvantage certain groups of people, often based on race, ethnicity, or other protected characteristics. For example, *redlining*, a practice where lenders refused to provide mortgages to people in certain neighborhoods based on racial composition, is a form of systemic bias. Even when individuals within the system may not personally hold prejudiced views, the system itself perpetuates inequality and restricts access to housing for marginalized groups.

### *Implicit Bias*

Implicit bias, on the other hand, refers to unconscious attitudes or stereotypes that influence an individual's decisions and actions, often without their awareness. As stated in the **"Racial Equity"** section of the 2021-2022 Update Course, all implicit biases are not negative.

LINK TO DOCUMENT

Implicit bias might manifest itself when a broker unintentionally treats someone differently based on their race, ethnicity, or another protected characteristic, despite believing that they are being fair. For example, an agent might subconsciously steer clients of a particular race away from certain neighborhoods or make assumptions about their ability to afford certain properties. Unlike systemic bias, implicit bias is more about individual attitudes that contribute to discrimination, often subtly, and without the person's conscious intent to discriminate.

### *Negative Trends*

In 2022, more than 33,000 fair housing complaints were filed with HUD, the DOJ, and private non-profit fair housing organizations. This marked a nearly 6% increase over 2021.

In a National Fair Housing Alliance report entitled **"2023 Fair Housing Trends Report,"** the ongoing financial and societal impacts of the COVID-19 pandemic, and the high demand and record shortages of housing for rent and sale, have combined to increase racial and ethnic disparities in the housing market. These factors contributed to the increased complaints filed by harmed and disadvantaged individuals.

LINK TO DOCUMENT

Economic disparities among the population of buyers and tenants also contribute to some of the issues/challenges with fair housing. Often it manifests itself as *source of income discrimination (SOID),* where individuals within the protected classes face barriers that limit their housing options due to being underemployed, on a fixed income, or unemployed. Property owners and managers may discriminate against an applicant's source of income which contributes to systemic inequalities.

## FAIR HOUSING: SOURCE OF INCOME DISCRIMINATION

Six months ago, Justin was involved in a terrible collision which resulted in him being confined to a wheelchair. As a result, he lost his job and applied for a Housing Choice Voucher (HCV) due to his loss of income. He

presented the voucher to his landlord, who then threatened Justin with non-renewal of their lease if he attempted to pay rent using the voucher, stating "these types of payments have to be approved at the beginning of the lease."

*Regarding the landlord's conduct:*

A. *The landlord is correct that the use of vouchers must be approved at the beginning of the lease.*
B. *There is no fair housing right to use vouchers.*
C. *The landlord's conduct can be a violation of both the federal and state fair housing acts.*
D. *The landlord must accept the voucher, but only because of the disability.*

The landlord's conduct likely violated both the FHA and NCFHA. Justin was not disabled when he signed the lease, but now that he is, the landlord's threat constitutes discrimination based upon that disability. As disability is one of the protected classes, such discrimination is a violation.

## *The Law*

At the outset, it is important to note that SOID is not, in and of itself, a violation of the FHA nor NCFHA. However, in the 2023 General Assembly Session, Senate Bill 167 was introduced in an effort to make SOID a violation of the NCFHA. As of this writing, this Bill remains in Committee.

Further, there are areas of North Carolina where the local Human Relations Commissions have led the charge for such prohibitions. According to HUD, there are five North Carolina municipalities that have enacted prohibitions against SOID: Chapel Hill, Charlotte, Mecklenburg County, Raleigh, and Winston-Salem.

As an example, in June, 2022, Winston-Salem's City Counsel enacted the Housing Justice Act. The Act is designed to reduce homelessness and provide equitable outcomes for city residents . . . by eliminating barriers to housing such as certain criminal convictions, sources of income, and the lack of affordability." In pertinent part, the **§2-10(d)** of the Act states:

LINK TO STATUTE

> *No person, who has received city funds for the construction, development, rehabilitation, or renovation of a residential or housing development project, or who has purchased or leased city property shall deny an applicant, tenant, or occupant housing, which includes the sale, rental, re-occupancy and financing of such housing, based upon the applicant's, tenant's or occupant's sources of income.*

### *Best Practices for Brokers*

In its article, **"Your Money's No Good Here: Combatting Source of Income Discrimination in Housing,"** the ABA states that SOID refers to the practice of refusing to rent to a housing applicant because of the person's lawful form of income. SOID disproportionately affects renters of color, women, and people with disabilities. Therefore, this type of discrimination contributes to the continuation of many racially segregated communities.

To combat SOID, housing providers should use *objective criteria* to screen applicants and their sources of income. If an applicant has legal, regular, and verifiable income, it should not matter if the income is derived from employment, retirement, public benefits, or disability.

In an effort to assist brokers with avoiding SOID, brokers should avoid engaging in the following:

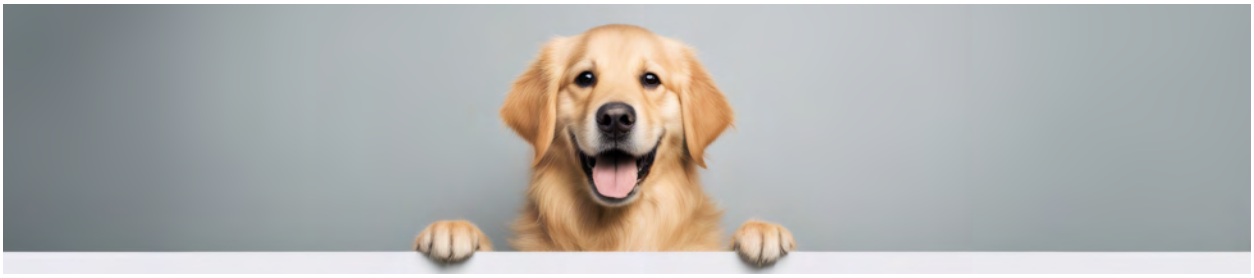
- Advertising that an individual "must have a job" to rent an apartment.
- Requiring documentation that is only available to working applicants, like paycheck stubs.
- Refusing to rent to an individual using a housing voucher as part of their income.

- Setting income requirements artificially high (i.e., monthly income must be four times the rent) in order to exclude applicants who receive public benefits.
- Any requirement that requires co-signers or a larger security deposit because of an applicant's source of income.

## ADA & FHA: SERVICE & ASSISTIVE ANIMALS

It is well documented that the nature, severity, or affect of a particular disability can be eased with the help of an animal. Our furry friends can

provide invaluable support, comfort, and/or assistance with essential tasks that enable greater independence. Often, however, persons with disabilities will be met with policies and rules that prohibit animals in their residence or commercial space.



The legal framework surrounding service and assistive animals is designed to protect the rights of individuals with disabilities while balancing the interests of property owners and the general public. While straight forward, the laws surrounding service and assistive animals often lead to confusion due to the different definitions, rights, and protections that apply to each type of animal across various settings. As it is incumbent upon brokers to assist their clients and customers with a variety of issues surrounding this subject matter, a review of the basics is warranted.

### *It Begins With a Disability . . .*

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In order to obtain the benefits of a service or assistive animal, an individual must have a disability as defined by the FHA. The Act **defines persons with a disability** to mean those individuals with mental or physical impairments that substantially limit one or more major life activities. The term mental or physical impairment may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness.

As we will see shortly, landlords and property managers are often faced with making the determination of whether a disability is observable. Observable disabilities include blindness or low vision, deafness or being hard of hearing, mental illness, or mobility limitations. Some impairments may not be observable. In such case, the housing provider may request information regarding the disability and the disability-related need for the animal but is not entitled to know the individual's diagnosis.

## *And an Animal . . .*

Many people struggle with the distinction between service animals and assistive animals. This confusion is amplified by the fact that Americans with Disabilities Act (ADA) provides the definition for a service animal while the FHA provides a broader definition of an assistance animal. Still broader is the Air Carrier Access Act which also defines a service animal. The varying legal requirements and protections can lead to misunderstandings among the public, businesses, and housing providers, resulting in inconsistent enforcement and challenges for individuals who rely on these animals for support.

### *The ADA's Service Animal*

Foremost in your minds initially must be the scope of the ADA. Please remember that, generally, the ADA requires that service animals be allowed to enter and accompany their handlers in all areas of any public facilities and private businesses where the public is normally allowed to go.

LINK TO STATUTE

A service animal, as defined by the ADA, is a dog that is individually trained to do work or perform tasks directly related to, and for the benefit of, an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Some examples of disability support that service animals perform are:

- Alerting a hearing-impaired person to sounds.
- Guiding a visually-impaired person.
- Pulling a wheelchair.
- Reminding a person to take their medication.

Please note, however, that federal law (28 CFR §35.136) also recognizes miniature horses as service animals if has been individually trained to do work or perform tasks for the benefit of the individual with a disability.

LINK TO STATUTE

### *Assistive Animal*

Again, our initial inquiry must be the scope of the

FHA's rule regarding assistive animals. The FHA requires that assistive animals be allowed in a person's residence, including all areas of the housing where tenants are normally allowed to go.

**An assistance animal**, as defined by the FHA, is any animal that provides support, assistance, or emotional comfort to a person with a disability, where the presence of the animal is necessary to afford the individual an equal opportunity to use and enjoy their dwelling.

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#### *Unique Animals*

When used in fair housing discussions, a unique animal is a kind of animal that is not typically associated with providing support, such as exotic pets or species other than dogs or cats. A reasonable accommodation for a unique animal may be necessary if:

- the animal is trained to do work or perform tasks that a dog cannot perform (confirmed by a health care professional);
- the individual has an allergy that prevents using a dog; or
- without the animal, the symptoms or effects of the person's disability will be significantly increased.

For example, a capuchin monkey may be trained to assist a person with paralysis from a spinal cord injury. The monkey, because it has hands, can retrieve a bottle of water from the refrigerator, unscrew a cap, insert a straw, and place the bottle of water in a holder for the individual. A service dog is not able to perform these types of manual tasks.

### *Then a Request For an Accommodation*

Consistent with the overall goals of the underlying policy, the ADA provides a process for obtaining approval of a service animal, entitled a "request for reasonable accommodation." The "request" seeks a change, exception, or adjustment to a rule, policy, practice, or service currently in place at the requestor's place of residence. The accommodation sought is necessary in order for the disabled requestor to have equal opportunity to use and enjoy a dwelling, including public and common use spaces.

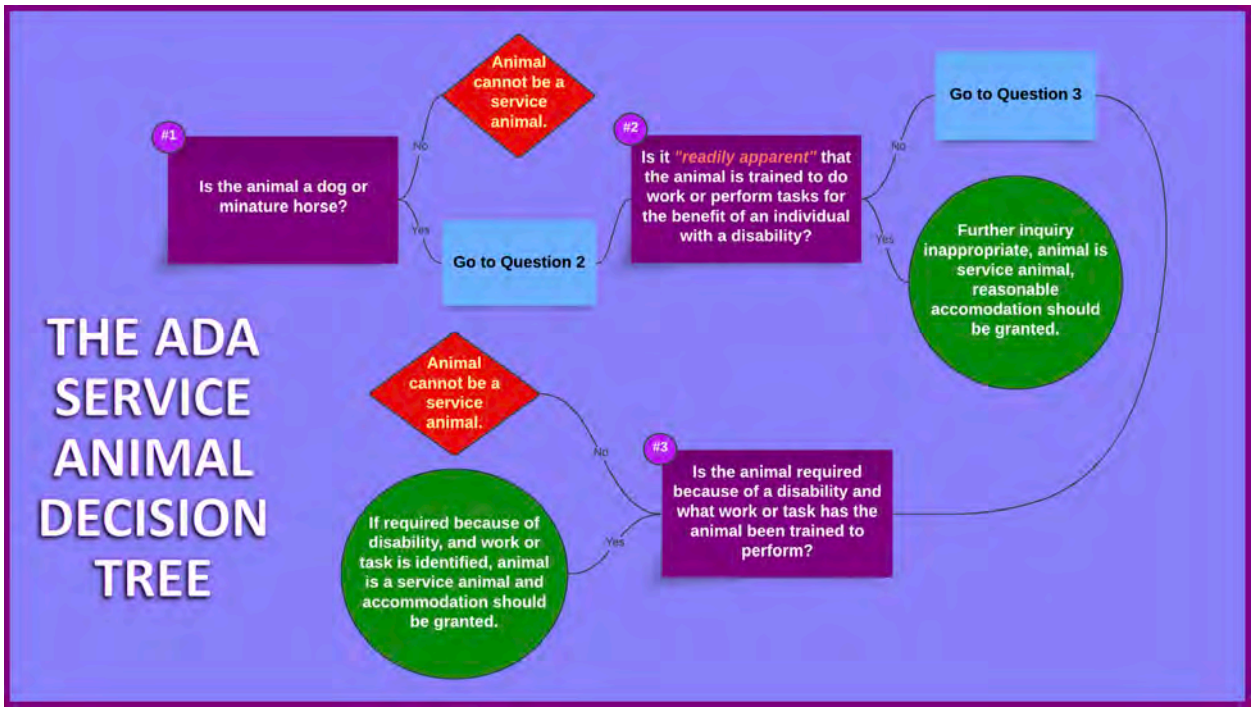
According to a recent **FHEO Notice**, the FHA requires housing providers to modify or make exceptions to policies governing animals when it may be necessary to permit persons with disabilities to utilize animals. Moreover, housing providers should follow the guidance of the DOJ when assessing whether an animal is a

LINK TO DOCUMENT

service animal under the ADA which generally require state and local governments and public accommodations to permit the use of service animals by a disabled person.

## *What to Ask After Receipt of Accommodation Request*

Owners, landlords, and property managers should be aware of the process to follow when faced with a request for reasonable accommodation of a service animal. Consider this three question test:




Although domesticated, non-domesticated, and unique animals may be considered for reasonable accommodations, a housing provider may deny a reasonable accommodation request due to:

- a direct threat to the health and safety of others; or
- the potential of the animal to cause substantial physical damage to the property of others.

Reasonable accommodation requests must be analyzed using objective evidence about the particular conduct of the assistance animal, and not the conduct of similar animals.

## *The Case of Poor Polly*

Sarah, a tenant, leases a single-family home managed by Bob, a property manager. Bob has restricted the number of assistance/ service animals Sarah can have in the home to one, her dog. However, upon leasing the property, Sarah sent Bob a letter from her medical professional indicating that she has a disability that requires the use of a service dog *and* a parrot. Bob denied Sarah's request to have the parrot in the residence citing existing rules and that she already has a dog.

*In regard to Bob's policy:*

A. *Bob has likely violated fair housing laws with this type of policy.*
B. *Bob is not subject to fair housing because he is not the owner.*
C. *So long as Bob applies the policy to everyone in a fair manner there is no violation.*
D. *Restrictions on the number of service animals in a dwelling are enforceable.*

### *The Rest of the Story . . .*

Property managers who develop policies restricting the number of assistance animals that are allowed in a property may be in violation of the FHA. The Act makes it unlawful for a housing provider to refuse a reasonable accommodation for a person with a disability who needs it to use and enjoy the dwelling. Therefore, housing providers are required to modify or make exceptions to policies by allowing persons with disabilities to have assistance animals. An attorney should be consulted before denying a reasonable accommodation request to prevent violations of FHA.

## *A Whopper of a Problem*

Karla suffers with chronic pain syndrome, and is accompanied by a service dog when in public. Karla actually has two service dogs, one named "Blondie" and another named "Gabriell." Both dogs are trained to provide services to Karla when she is in public.

In June, Karla and her service dogs, along with her friend Judy, visited a Burger King restaurant at about 5:45 p.m. At the time, both dogs were carrying out their duties as service dogs.

Karla and Judy approached the counter to place their orders. The employees refused service to Karla and Judy because of the service dogs. Karla explained that the two dogs were service animals, and thus were allowed in the restaurant. The supervisor stated that dogs were not allowed, ordered Karla and Judy to leave the property, called the police, and threatened the pair with arrest if they did not leave immediately.

*In regard to Burger King's policy prohibiting dogs in the restaurant:*

*A. The policy is justified because they are a business not a residence.*

*B. Enforcing the policy was justified because Karla's disability was not "readily apparent."*

*C. The policy was justified because Karla can only have one service animal, not two.*

*D. The prohibition was inappropriate in light of the fact that Karla explained the dogs were service animals and the law allows them to enter commercial establishments.*

***The Rest of the Story . . .***

Karla complained to owner of the franchise, ADRU Corp., and instituted litigation when ADRU Corp. failed to respond. In the lawsuit, Karla alleged facts suggesting violations of the ADA laws against discrimination by public accommodations. Specifically, her complaint stated:

- she is disabled within the meaning of the ADA;
- ADRU is a private entity that operates a place of public accommodation; and
- ADRU denied her public accommodations because of her disability.

Though ADRU Corp. offered $2,000 to settle the claim, they refused to change their policy. Ultimately the Court ruled against ADRU, ordered it to pay $20,432.00 in damages, and further ordered:

*ADRU Corp. must permit service dogs to accompany people with disabilities in all areas of the facility where the public is normally allowed to go, unless the dog is creating a disturbance and the animal's handler does not take effective action to control it, or the dog is not housebroken. When it is not obvious what service an animal provides, staff may ask only two questions: (1) is the dog a service animal required because of a disability; and (2) what work or task has the dog been trained to perform. Staff cannot ask about the person's disability, require medical documentation, require a special identification card or training documentation for the dog, or ask that the dog demonstrate its ability to perform the work or task.*

## *No Room at the Inn*

Zoey, a Virginia resident, suffers from PTSD which was diagnosed after her honorable discharge from the US Army. She has a service dog named Alpha who is trained to provide deep pressure therapy, anxiety alerts, and awaken Zoey from night terrors.

In the summer of 2022, Zoey and Alpha traveled through North Carolina on their way to the coast for a job interview. She had a reservation at The Lodge. Zoey, with Alpha, entered the lobby and went to the front desk. She was rudely greeted by the desk clerk who told her "No dogs allowed, its policy."

Zoey explained that Alpha was a service dog, and thus no different than a cane or a wheelchair. Zoey also asked the desk clerk to look at the "Service Dog" vest affixed to Alpha's back. The desk clerk said the vest doesn't matter, and that she needed to show her North Carolina registration of the animal as a service dog. Zoey had no such registration because she lived in Virginia. Zoey was told to leave the premises or the police would be called. Zoey left, and fearful that she would not find any rooms anywhere, slept in her car.

*In regard to The Lodge's policy prohibiting dogs on the premises:*

*A. The Lodge employee had no right to ask for proof of Service Animal Registration because Alpha was wearing a vest.*

B. *Despite the North Carolina law requiring residents to register their service animals, Zoey was not a North Carolina resident, so refusing to rent her a room because she didn't have one was illegal discrimination.*
C. *The policy was justified because Zoey should have registered her service dog prior to entering North Carolina.*
D. *Because North Carolina's law requires registration, it is stricter than Federal Law, and therefore controls this situation.*

***The Rest of the Story . . .***

Zoey filed a complaint against The Lodge alleging violations of the ADA with regard to her service dog. The Lodge denied the allegations citing **N.C.G.S. §168.4.2**, which allowed Lodge employees to ask for the required registration.

The Lodge was partially correct. North Carolina statutes do require a disabled person with a service animal to register the animal with the DHHS, and show proof of registration if requested by a commercial establishment.

What The Lodge didn't recognize, or train its employees on, was the next phrase of the statute that states:

> *. . . or upon a showing that the animal . . . has been trained as a service animal.*

In other words, all Zoey was required to show, as a non-resident, was proof that Alpha had been trained as a service animal. And this makes sense, as many states do not have a registration requirement.

Because of The Lodge's misunderstanding of the law, it agreed to a conciliation with Zoey whereby she received a week's free lodging during each of the ensuing three years and The Lodge agreed to the placement of signs on the property and notices in its advertising, along with existing and new employee training, that its policies were consistent with the ADA and that service animals were welcome.

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# APPENDIX

# NCAR COMMERCIAL FORM CHANGES

# SUMMARY OF FORM CHANGES

As a handy reference to commercial practitioners, we have provided a summary of the fourteen (14) NCAR/NCAB commercial forms that are new or changed effective on July 1, 2024. A summary of the significant changes to each form is included. A marked-up copy of each form showing the exact changes may be viewed by clicking on the name of the form.

***Form 530 – Exclusive Buyer/Tenant Representation Agreement***

***Form 531 – Non-Exclusive Buyer/Tenant Representation Agreement (Client Responsible)***

*NAR Settlement Edits*. The edits in this paragraph make clear that the buyer/tenant and their agent have agreed to compensation, and if other compensation is offered to the agent, then the agent must obtain their client's consent for such other compensation, including cooperating compensation over the amount agreed to in this agency agreement. If an agent negotiates cooperating compensation that is different from what is agreed to in this agency contract, then the agent and the client can execute Forms 541, 542, or 561, as applicable, to show that the client agrees to different compensation. Changes also appear here to indicate that agent's services are determined individually, fully negotiable, and not set by law.

It should be noted that the answer "no" can part of any negotiation. An agent or firm is permitted to determine the value of their services, so long as that value is not set, determined, coordinated, or in any way unlawfully affected by what a competitor might charge or is charging. Firms are strongly encouraged to discuss their compensation policies with their own lawyer to ensure compliance with antitrust laws.

The parties agree that Firm shall first seek the fee from the listing agent. If there is no listing agent, Firm shall first seek the fee from the seller/landlord. ~~Should~~ The fee so obtained shall not be greater than the fee listed above~~, Firm shall be entitled to retain the difference~~. Should the fee so obtained be less than the fee listed above, Client shall pay Firm the difference at closing or upon execution of a lease, as applicable.

**Notice**: Client understands and acknowledges that there is the potential for a conflict of interest generated by a percentage of transaction value-based fee for representing Client. **THE AMOUNT, FORMAT, OR RATE OF REAL ESTATE ARE NOT FIXED BY LAW. FEES ARE SET BY EACH FIRM INDIVIDUALLY AND ~~MAY BE~~ ARE FULLY NEGOTIABLE.**

## Form 532 – Non-Exclusive Buyer/Tenant Representation Agreement

*NAR Settlement Edits*. The edits in the note at the bottom of page 2 make clear that even though the client is not responsible to pay for agent's services, as has always been the case with this form, that any monetary compensation must be disclosed to the client and agreed to prior to agent's signing a cooperating compensation agreement with the seller, landlord, or listing firm. This change is required by the settlement.

This Agreement does not obligate you to pay a brokerage fee or assure the payment of a brokerage fee to Firm. ~~which will be compensated under an offer of compensation from a cooperating seller/landlord/listing firm.~~ Firm shall first negotiate compensation from the seller/landlord/listing firm, and you must consent to such compensation prior to Firm entering into an agreement for compensation from seller/landlord/listing firm.

## Form 541 – Commission Split Agreement Sales Transactions

## Form 542 – Commission Split Agreement Lease Transactions

*NAR Settlement Edits*. The edits at the bottom of page 2 provide signature lines so that clients can acknowledge and consent to the compensation stated on page 1 of the form.

By signing below, Seller and Buyer hereby acknowledge receipt of a completed copy of this form, and consent to the split of compensation described herein.

| **SELLER:** | **BUYER:** |
|---|---|
| _____ | _____ |
| Date: _____ | Date: _____ |
| _____ | _____ |
| Date: _____ | Date: _____ |

## Form 561 – Confirmation of Commission

*NAR Settlement Edits*. The edits at the bottom of page 2 make clear that the client is consenting to the compensation described in the form.

By signing below, Seller and Buyer hereby acknowledge receipt of a completed copy of this form, and consent to the split of compensation described herein.

| SELLER: | BUYER: |
|---|---|
| _____ | _____ |
| Date: _____ | Date: _____ |
| _____ | _____ |
| Date: _____ | Date: _____ |

## Form 570 – Exclusive Right to Lease and/or Sell Listing Agreement

## Form 571 – Exclusive Right to Sell Listing Agreement

## Form 572 – Exclusive Right to Lease Listing Agreement

¶ 2 *NAR Settlement Edits*. Edits here indicate that client must consent to cooperating compensation via another form.

¶ 7 *NAR Settlement Edits*. Technical edit to comply with settlement agreement, specifically inserting the word "fully." The note in section 2.1 herein still applies, however.

**2. BROKER COOPERATION/AGENCY RELATIONSHIPS:** Firm has advised Client of Firm's general company policy regarding cooperating with subagents, tenant agents or dual agents. Client has received and read the "Working with Real Estate Agents (Lease Transactions) Disclosure" and authorizes the Firm to ~~compensate~~ (subject to Sections 7b.(i) and 7b.(ii)) ~~and~~ cooperate with the following (Firm agrees to inquire of all agents at the time of initial contact as to their agency status): (CHECK ALL APPLICABLE AGENCIES)

- ❑ subagents of Client
- ❑ tenant agents
- ❑ dual agents representing both Client and the tenant in the same transaction (subject to the terms of Section 16).

Any potential agreement between Firm and a cooperating agent to share compensation must be first approved by Client in writing. Forms 541 and 542, as applicable, may be used document such cooperating compensation.

**7. COMMISSIONS:** The amount, format or rate of real estate commission is not fixed by law. Commissions are set by each broker individually and ~~may be~~ are fully negotiable between a firm and its client.

## *Form 573 – Disclosure and Fee Agreement for Non-Listed Property Sale*

## *Form 574 – Disclosure and Fee Agreement for Non-Listed Property Lease*

¶ B Language simplified so the firm can inform seller of prospects either orally or in writing.

¶ 1 *NAR Settlement Edits*. Notice added that already exists in other forms indicating that agent's services are determined individually, fully negotiable, and not set by law.

B. Firm has advised Seller of Firm's general company policy regarding agency. Seller has received and read the North Carolina Real Estate Commission's "Working with Real Estate Agents Disclosure" and understands that Firm will be acting as:

❑ a Seller's Agent

❑ a Buyer's Agent

with respect to:

❑ _____ who would like to see the Property.

❑ any prospect Firm registers with Seller prior to showing the Property by giving Seller notice of such prospect, either orally or in writing. ~~as evidenced by a registration document (either a CONFIRMATION OFAGENCY RELATIONSHIP AND REGISTRATION STATEMENT – NCAR Form 510 or substantially similar registration document) provided by Firm to Seller prior to showing the Property.~~

**NOTICE: Seller understands the amount, format, or rate of real estate fees are not fixed by law. Fees are set by each firm individually and are fully negotiable.**

## *Form 592-T – Commercial Lease Agreement (Single Tenant)*

## *Form 593-T – Commercial Lease Agreement (Multi-Tenant)*

¶ 3(b) This section has been simplified to make it easier for the parties to calculate rent adjustments over the course of the lease term.

¶ 593-T Exhibits – The exhibits have been redefined so that they mirror the exhibit purposes that are used in Form 592-T.

**RENTAL**

3. (a) **Rent**. Beginning on _____ ("Rent Commencement Date"), Tenant agrees to pay Landlord (or its Agent as directed by Landlord), without notice, demand, deduction or set off, an annual rental of $_____, payable in equal monthly installments of $_____, in advance on the first day of each calendar month during the term hereof. Upon execution of this Lease, Tenant shall pay to Landlord the first monthly installment of rent due hereunder. Rental for any period during the term hereof which is less than one month shall be the pro-rated portion of the monthly installment of rental due, based upon a 30-day month.

(b) **Rent Adjustment**. The annual rental payable hereunder (and accordingly the monthly installments) shall be adjusted every Lease Year Anniversary, including any Lease Year Anniversaries resulting from a renewal exercised by Tenant in Section 2 herein, by (*check only one*):

❑ _____ **% OR $**_____ over the amount then payable hereunder.

~~❑ If this box is checked, the annual rental payable hereunder (and accordingly the monthly installments) shall be adjusted every ____ Lease Year Anniversary by _____% over the amount then payable hereunder. In the event renewal of this Lease is provided for in Section 2 hereof and effectively exercised by Tenant, the rental adjustments provided herein shall apply to the term of the Lease so renewed, or~~

❑ ~~If this box is checked, the annual rental payable hereunder (and accordingly the monthly installments) shall be adjusted every Lease Year Anniversary by~~ The greater of: (i) _____% ~~percent (_____%)~~ over the amount then payable hereunder, or, (ii) the percentage increase (but not any decrease) in the numerical index of the "Consumer Price Index for All Urban Consumers" (1982-84 = 100) published by the Bureau of Labor Statistics of the United States Department of Labor ("CPI") for the immediately preceding twelve (12) month period over the amount then payable hereunder.

~~❑ If this box is checked, the annual rental payable hereunder (and accordingly the monthly installments) shall be adjusted every ____ Lease Year Anniversary by $_____ over the amount then payable hereunder. In the event renewal of this Lease is provided for in Section 2 hereof and effectively exercised by Tenant, the rental adjustments provided herein shall apply to the term of the Lease so renewed,~~

❑ ~~If this box is checked,~~ The annual rental payable hereunder (and accordingly the monthly installments) shall be adjusted as provided on **Exhibit B** ~~C~~.