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Want to sell real estate? Then don't play hide the ball

By Curtis Seltzer

Every so often I get fed up with having sellers play "hide the ball" with buyers, including me. Since, unlike residential housing, so few state disclosure requirements apply to land, sellers and their brokers may decide that their best marketing tactic is to disclose as little as possible. That approach may have worked in the champagne days of the past, but I think it's self-defeating in times like these.

I emailed an inquiry to a seller of some 15,000 acres in the Southeast not long ago. The seller's "marsh" was pitched as a timber tract. The seller's property manager emailed me a "map" and excerpts from a timber cruise done more than a decade ago, about the time when the current owner bought it. Let's say the price was \$2,500 an acre.

The tract was part of a very large swamp. Some of it may have been marshy, but my guess was that most of it was very swampy.

A reputable outfit had done the timber cruise. But it appeared that the cruise was done for the current owner in advance of the tract being purchased. I could not tell from the materials whether the tract had or had not been cut after the cruise date. My guess is that it had been.

I suspected that some portion of the merchantable timber counted in the cruise would be on ground too wet to actually harvest. Such timber should not be counted as merchantable, because it's either economically or technologically out of reach. No definition of operability was provided. I could not determine whether merchantable timber on inoperable ground was counted in this cruise.

I asked whether the seller owned the minerals. The property manager said he didn't know! He said he would find out and get back to me, which he never did.

A fee-simple sale -- where the seller owns and conveys all surface, subsurface and air rights in the property, less only recorded restrictions -- is vitally important to a buyer. Subsurface minerals can be a source of lease and royalty income. If the surface owner doesn't want mineral development because of its surface impacts, he should stay away from property where the subsurface minerals have been split from the surface, either by lease or sale.

There's another reason why fee-simple is important, which has to do with a conservation easement. Mineral ownership is almost always required for any conservation easement applying to the surface, except when the applicant can show either that minerals aren't present or that they are of no commercial significance. A conservation-minded buyer would not be interested in this tract if an easement could not be arranged.

The seller's email contained what was represented to be a "timber type map" that stated in very small print: "Property lines...drawn from a combination of survey plats and aerial photos and are not guaranteed to be exact." A state-registered forester drew the map. A buyer could easily mistake this map for a survey. When I asked how the seller's acreage figure had been calculated, I received no answer. I also received no answer to my question as to whether boundaries were marked on the ground.

The property manager informed me that no boundary survey existed, and the "price could be adjusted based on final acreage as determined by a survey." Getting boundaries settled and fixed in the field is a seller responsibility in my opinion. When a seller doesn't have a recorded survey, the least that can be offered to a buyer is a computer-generated deed-mapper printout on a topographical map that follows the calls in the seller's deed. When a seller proposes to me that we split the cost of a survey, I am always inclined to answer, "Sure, as long as we lower the asking price by my share of the survey's cost."

The "timber type map" showed two parcels, amounting to several hundred acres, with disputed ownership. I asked the property manager whether any boundary disputes still existed. He chose not to answer this question.

I asked whether any federal endangered, threatened or sensitive (ETS) species -- or their habitats - were found on the property. He replied: "To our knowledge, there are no ETS on the property." I spent five minutes on Internet research looking up the website for that state's natural-heritage division and discovered three endangered species and more than a dozen threatened and sensitive species were present in this county, likely in this area and probable on this tract. Maybe the seller's representative actually did not know this readily obtained information. Maybe, he chose not to know. Maybe he knew and preferred not to say.

Was the seller conveying with a general warranty deed or something less? The answer—"The deed structure is to be determined."

I asked what the tax-assessed value and annual tax hit were. No answers.

I asked whether any zoning or land-use restrictions applied. No answer.

I asked whether the seller had a mortgage on the property. No answer.

I asked whether the tract joined public land. No answer.

I asked whether the property would convey with any encumbrances or reservations of interest. No answers.

Sellers have three ways of dealing with due-diligence questions from buyers: 1) stonewall and provide as little information as possible; 2) provide all information in the seller's possession and identify items that require additional research; and 3) some middle ground between providing almost no information and providing everything.

When I run into a seller playing hide the ball with me, alarms go off very loudly. Something is being hidden—maybe a lot of things. Non-answers of the type above discredit a seller in my eyes. I trust nothing after that kind of response. And, generally, I don't waste time with sellers who play this game.

With markets the way they are, sellers should consider leaning far more toward full disclosure and away from hide the ball.

And if a buyer wants to test a seller, he should ask what the seller paid for the property. Some states require that this figure be made part of the public record. It's a required due-diligence question, whether or not a seller chooses to answer. When a seller does answer, I'm encouraged to go forward. It's a sign that the seller wants to sell.

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