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Wetlands can soak more than a buyer's feet
By Curtis Seltzer

Buyers need to do due diligence on rural property for environmental issues. A recent story about a New York buyer who purchased a 22-acre parcel in Hampton Roads, Va., illustrates what can happen when a buyer doesn't. (Scott Harper, "A cautionary tale for landowners: Wetlands violations will cost you," Virginia Pilot, May 31, 2010; (‼ HYPERLINK "http://hamptonroads.com/2010/05/cautionary-tale-wetlands-violations-will-cost-you" ¶ http://hamptonroads.com/2010/05/cautionary-tale-wetlands-violations-will-cost-you⊥ .)

The buyer, Kurt A. Lorenz, bought the open-and-wooded acreage in 2006 for $330,000. He planned to build a retirement home and a horse barn.

Before closing, he did not hire a consultant to determine whether any environmental issues were present. He did not ask the seller to disclose any environmental conditions that would negatively affect his enjoyment and use of the property. Virginia does not require disclosure of wetlands as part of the selling process.

The seller's broker appears to have said something about wetlands to Lorenz, sufficient in a judge's estimation that it should have "…excited his [the buyer's] suspicions." The exact nature of this information and how it was presented to the out-of-state buyer unfamiliar with this area was a matter of dispute. It appears the seller never said that the buyer could not build on portions of the land classified as wetlands, which, it seems, both the seller and the seller's broker knew or at the very least, suspected.

Much of this area contains wetlands, either typical marsh or non-tidal wetlands that contain tree and fields. Locals know to factor in wetlands on property purchases. The buyer's local lawyer, if he used one, should have known.

Lorenz cleared 10 acres of land and began building his horse barn. He obtained no local building permit or land-disturbance permit. Perhaps he did not think that these permits were required for agricultural structures and land uses in this county.

Virginia's Department of Environmental Quality was inspecting a wetlands site on adjacent property in 2008 when its representatives off-handedly observed Lorenz's work in progress. His job was shut down; he was fined almost $23,000 and assessed $50,000 to restore the wetlands that he had cleared. He sued the seller and the seller's broker unsuccessfully.

The buyer is not blameless in this mess. He did not properly research his purchase. He did not know the questions he needed to ask. He did not put in his contract a disclosure requirement. He did not ask his lawyer whether his property could be developed. He did not, apparently, have a broker/agent representing him in the purchase. He did not find out about local conditions. He did not apply for or obtain proper permits.

If the buyer had a local lawyer working with him at the time he placed a contract on this property, the local lawyer did not protect his client's interest. The lawyer could have recommended an environmental-study contingency, with results acceptable to the buyer. The lawyer could have inserted a disclosure requirement in the contract that would have asked the seller to disclose conditions of which he had knowledge that would constrain the buyer's future use of the property. If the seller refused to sign a contract because of one or the other of these two provisions, the buyer would have been told loudly and clearly to find out what's up.

The seller and seller's broker, however, appear to have been less than forthright with this buyer about their knowledge of the presence of wetlands and the development restrictions that classification brings.

The Commonwealth of Virginia does not require sellers or brokers to disclose wetlands on rural property. The residential property disclosure law does require disclosure of "land-use" considerations, but a seller can opt out of this disclosure by signing a disclaimer (buyer buying "as

is" with defects). Non-residential property appears to be mainly a matter of buyer-beware in the Old Dominion. Some states require some types of disclosure on rural property, for example, with minerals severed from surface ownership.

Assuming that the seller, the seller's broker and the seller's lawyer had no knowledge of the wetlands situation on this tract, it falls on the buyer to know which questions to ask and how to get their answers. If the seller's side did have knowledge, it does not appear that Virginia required them to disclose it.

Lorenz paid far more than he should have for property that could not be used for the purpose he wanted. He could now purchase a mitigation right from a wetlands bank to do what he wanted, but that is a very expensive proposition. He's stuck.

Most landowners get no compensation from wetlands on their property that restrict use. The U.S. Supreme Court ruled in Lucas v. South Carolina Coastal Council (1992) that compensation is due a landowner from a regulatory use restriction only if no economically beneficial uses are left. Since Lorenz could have derived some economic benefit from his wetland-restricted property, he has no claim for public compensation.

Landowners who are deprived of 99 percent of their economic use get nothing. I'm unaware of any tax break that landowners in this situation can invoke.

The rule in rural real estate is less location, location, location and more research, research and research.

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