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Memorandum

To: Elaine Dreyer

From: Applicant

Date: 7-25-06

Re. Larson Real Estate File

Below is the information you requested regarding the Meridien's potential claims against Karen Larson.

**1) Under the statutory and common law of Franklin, a seller of residential real estate is now obligated to disclose any material facts the seller knows a reasonable buyer would want to know about the property and its environs and must not intentionally misrepresent the property or actively conceal a defect, but the seller need not search out and discover for disclosure facts about which he/she is not aware.**

Under Section 350 of the Franklin Real Property Law, a seller is obliged to provide the buyer with a disclosure statement that discloses any material defects in the property and/or its environs of which the seller is aware. A seller who fails to disclose known material defects may be liable to the buyer for actual damages the buyer suffers as a result of the undisclosed defects and for reasonable attorneys fees and court costs.

Under the common law of Franklin as it existed prior to enactment of Section 350, the buyer was subject to the doctrine of caveat emptor and had a duty to exercise due diligence to inspect the property prior to contracting to buy it; the seller had no affirmative duty to disclose. *Hernandez v. Comfrey*, Franklin Supreme Ct. (2002). Section 350 has abrogated the common law in this regard. However, the common law actions for intentional misrepresentation and fraudulent concealment are still viable. *Wallen v. Daniels*, Franklin Ct. Ap. (2006).

To prevail in an action for intentional misrepresentation, a plaintiff must establish that 1) the seller made a misrepresentation of material fact, 2) the buyer justifiably relied on this misrepresentation, and 3) the buyer suffered an injury. *Hernandez*. Materiality is judged objectively; a fact is material if a reasonable home buyer would have been concerned about it, but *de minimis* defects are not material. *Hernandez*. To prevail in an action for fraudulent concealment, a plaintiff must establish that 1) the seller concealed a material fact with the intent to mislead, 2) the buyer justifiably relied, and 3) the buyer suffered an injury. *Hernandez*, n.1.

The case of *Wallen v. Daniels*, a 2006 decision from the Franklin Ct. of Appeals, construed Section 350, discussed the recent changes in Franklin law abolishing the traditional doctrine of *caveat emptor*, and held that the common law causes of action for fraudulent concealment and intentional misrepresentation are still viable. Under *Wallen*, the seller need not go out and inspect their property for latent material conditions/defects to disclose to buyer. Furthermore, *Wallen* held that Section 350 "does not render a seller liable for nondisclosure of facts that a buyer could have discovered with reasonable effort." A buyer still has the duty to exercise due diligence in inspecting a property before buying it. *Wallen*. The *Wallen* court also further defined "material," holding that a material fact "is one relating to the quality of the property which might decrease its value.

**2) Under the law as it now exists in Franklin, Ms. Larson was obligated to disclose the condition of the roof/ceiling in the bedroom because she knew of the problem and the painting of the ceiling partially concealed it, and she was obligated to disclose the fact that the group home is to open in the neighborhood if such fact was not reasonably discoverable by the Meridiens; she was not under a duty to disclose the fire damage because she did not know of the problem, and she was not obligated to disclose the zoning restrictions beyond disclosing that the neighborhood is zoned historic, or the condition of the kitchen floor because the wear in the vinyl was readily discoverable by the buyers with reasonable effort and the buyers were obligated to exercise such effort.**

As discussed above, Franklin law requires a seller to disclose material facts that a reasonable buyer would want to know and that could decrease the value of a property if such facts are known to the seller. *Wallen*. The seller need not search for latent defects and the buyer is still obligated to exercise due diligence in inspecting a property. *Id*. The seller may not intentionally misrepresent the condition of the property or fraudulently conceal a defect. *Hernandez*.

Here, Ms. Larson admits that she was aware of the problem with the roof. She had roofers look at the roof and give her an estimate, which she further admits was very high. She had the ceiling repainted, which could be construed as a form of fraudulent concealment though there is a question as to whether she had the ceiling painted with the *necessary intent to mislead*. Because she was aware of the problem with the roof and the condition of a roof is something in which a reasonable buyer would be interested and which could adversely affect a property's value, Ms. Larson was under a duty to disclose that condition per Section 350. And again, the painting could give rise to a prima facie case of fraudulent concealment.

Ms. Larson was not obligated to disclose the fire damage because she was not aware of it. The damage had occurred long before she came into possession of the property and was concealed behind new plaster. Because she had no duty to discover latent defects and she had no knowledge of the defect, Ms. Larson is not liable under Section 350 for nondisclosure of the fire damage. Furthermore, there was no intentional misrepresentation or fraudulent concealment on her part - she was unaware of anything to misrepresent or conceal - so she is not liable under the common law.

While Ms. Larson knew of the wear in the vinyl floor, she is not liable under Section 350 or the common law for nondisclosure because a buyer could have easily discovered the condition of the floor with reasonable effort. The fact that the Meridiens were rushing to buy the house does not alleviate their duty to exercise due diligence. They took a risk making an offer on a property without first looking at it.

As to the group home, Ms. Larson was under a duty to disclose that condition in the

neighborhood if the Meridiens could not have reasonably discovered it. *See Harris v. Roth, Franklin Ct. Ap, (2005)*. Here, the press coverage and things surrounding the group home plan may be seen as sufficient to have alerted a reasonably diligent buyer to the condition.

Finally, Ms. Larson's disclosure regarding the zoning of the property was sufficient. A seller must disclose zoning limitations, but need not go into the ramifications of such limits. *Wallen*. Larson listed the property as historic on the disclosure statement. The only questions might arise because the Meridiens allege discussing the matter with Larson and Larson's neighbor had an addition on his home that he added before the limits in zoning applied. However, the Meridiens were under a duty to discover the ramifications of the zoning.

**3) The Meridiens can obtain damages to cover the repairs needed for the roof and potentially for a decrease in value to the property caused by the group home if the home's presence in the neighborhood was not reasonably discoverable by a buyer.**

Under *Wallen*, a buyer may recover actual damages for nondisclosure - damages for necessary repairs. When such damages are not readily ascertainable, a buyer may recover the difference in value between the property as represented in the disclosure statement and an independent appraisal that reflects the undisclosed defect. Here, actual damages caused by nondisclosure of the roof's condition are readily ascertainable through quotations from roofers. The Meridiens claim that the cost of repair will be about \$30,000. Damages could be less if Larson finds a roofer willing to make the repairs for less.

The damages that could be found because of the group home (if it is found that Larson had a duty to disclose it) are less ascertainable and would have to be based on any decrease in value to the property as estimated by an independent appraiser.

This is the state of Larson's case at this time - she has some liability (for the roof), potential liability for the group home, and no liability for conditions the Meridiens could have ascertained with reasonable efforts.