**Ask Simon**

**Q:  I purchased a portfolio of single-family houses to hold as an investment. After closing on the purchase, I discovered that many of the properties were built in violation of their building permits and appear to violate the applicable code and zoning regulations. The seller executed a seller’s disclosure statement for each property at the time of the sale but did not disclose these issues. Do I have any legal claims against the seller?**

A: Potentially. You may be able to assert claims against the seller for breach of contract, fraud, and negligent misrepresentation. While the exact claims would depend on the facts of the situation, claims for breach of contract and fraud through passive concealment may be the most promising.

Provided that the seller’s disclosure statements were expressly incorporated into the purchase and sale agreements, it is possible to assert a breach of contract claim based on a false disclosure statement. One important factor to keep in mind is that the seller’s disclosure form states that the seller is making representations “to the best of seller’s knowledge and belief.” Some courts have interpreted this clause to mean that a seller breaches the seller’s disclosure only when he intentionally makes a false statement on that form. While the law is not settled on this point, a buyer claiming that a seller has breached a seller’s disclosure statement may have to show that the seller acted knowingly.

Another potentially viable claim against the seller is fraud through passive concealment. The advantage to a passive concealment claim is that it does not depend on the content of the seller’s disclosure statement and may be available even if properties were sold without a seller’s disclosure statement (a/k/a “as-is”). To prove a claim for passive concealment, it is necessary to show: (1) that the seller has actual knowledge of a property defect; (2) that the seller passively fails to disclose the defect to the buyer; (3) that the defect is unknown to the buyer; and (4) that the defect could not have been discovered through due diligence. One key to prevailing on a passive concealment claim is showing that the seller knew about the defect but kept silent. This element of knowledge may be easier to prove if the seller oversaw construction of the properties, such that the builders of the houses served as the seller’s agents. When this is the case, a court may be inclined to impute the actual knowledge of those agents to the seller.