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When Bad Things Happen to Good Properties

Taking Stigma out of Stigmatized

By Jenifer V. Hofmann

After a mass murder shooting spree, Luby's

Cafeteria, in Killeen, Texas, let their employees off with pay for six months, reconstructed the damaged portions of the building, remodeled and reopened for business. Under similar conditions, a California McDonald's was demolished and another one built a couple of blocks from the original site that was later converted into a city park.

These restaurant sites share the unfortunate likeness of gunmen randomly shooting unsuspecting patrons inside, but how the companies dealt with the aftermath is quite different.

"One was handled in an ideal way and one was less than ideal," according to Randall Bell, MAI, and disaster property expert. Because it is extremely difficult to plan for catastrophes such as these, knee-jerk reactions are usually more the rule than the exception, resulting in companies handling similar situations in radically different ways. Given this, the question of how best to deal with stigmatized properties deserves a closer look.

The crimes committed on the Luby's and McDonald's premises rendered these properties stigmatized. Properties become stigmatized under two types of circumstances. One category, pure stigmas, deals strictly with psychologically based damage where no physical or environmental ramifications result from the event that produced the stigma. The second category consists of properties that contain physical detrimental conditions.

Pure Stigma

The National Association of Realtors (NAR) defines a stigmatized property—referred to here as pure stigmas—as one that has been psychologically impacted by a suspected or actual event that occurred on the property, resulting in no physical impact of any kind. Included in this category are crime scenes, particularly murder scenes, suicides, deaths and AIDS-related illnesses that render properties difficult to market and sell.

The building where Jeffrey Dahmer kept his victims is a case of pure stigma with no physical property damage. In that case, the "stigma goes to the entire site; it doesn't just go to the improvements," according to Bell, often dubbed "Dr. Disaster" for his pioneering work appraising disaster-struck properties.

"It's the site that's stigmatized," Bell says. In fact, the apartment complex was demolished and now sits vacant, surrounded by a fence. Because stigma goes to the entire site and not just to the improvements, "people in the building next door hung posters in their windows to block the view."

Another non-physical condition that adversely affects property value and marketability, for example, is a property that has housed an individual infected with the HIV virus or that had AIDS. A psychological stigma may be created in this situation, but the Federal Fair Housing Act protects the handicapped, including AIDS patients. This means "it is illegal for agents to make unsolicited disclosures concerning whether sellers or property occupants have tested positive for HIV or have been diagnosed with AIDS.

In some circumstances, this also can include honest responses to specific questions by buyers," according to the U.S. Department of Housing and Urban Development.

In fact, the Texas Real Estate License Act states that a licensee shall have no duty to inquire about, make a disclosure related to, or release information related to whether a:

- 1) previous or current occupant of real property had, may have had, has or may have AIDS, HIV-related illnesses or HIV infection as defined by the Centers for Disease Control of the U.S. Public Health Service; or
- 2) death occurred on a property by natural causes, suicide or accident unrelated to the condition of the property.

NAR further advises real estate practitioners to best respond to AIDS-related scenarios by stating: "It is the policy of our firm not to answer inquiries of this nature one way or the other since the firm feels that this information is not material

to the transaction. In addition, any type of response by me or other agents of our firm may be a violation of the federal fair housing laws. If you believe that this information is relevant to your decision to buy the property, you must pursue this investigation on your own."

Physical Detrimental Conditions

The second category of stigmatization covers properties with physical or environmental detrimental conditions. Termite infestation, asbestos, electromagnetic fields (EMFs), underground storage tanks and landfills fall under this classification.

Stigma, as it applies to environmental problems, is generally defined as "an adverse public perception about a property that is intangible and not directly quantifiable," according to *The Appraisal Journal*. Environmental problems may often be remedied and have no lasting effect on the property. "The real estate impact of an environmental contaminant depends on how the substance is controlled, how it is spread, how many people are potentially affected, and the degree to which people may be affected," says *The Appraisal Journal*.

For example, high-tension lines (EMFs) and polluted waterways often lead to an unsalable property, otherwise known as economic incurable obsolescence, according to *The Real Estate Guide to the Environment* authors Barry Chalofsky and Joel Finestine. The real or imagined fear of health risks resulting from such exposure has a direct effect on marketability.

For example, studies show that values decreased most when waste sites were officially declared Superfund sites or when problems were first reported publicly, says Karl L. Guntermann at Arizona State University. Values rose after the sites were closed; demonstrating the extent of price effect is generally related to the public awareness of the problem, and it diminishes as the problem is eliminated.

Superfund legislation passed in 1980, creating a federal means to identify and clean up contaminated properties. The Superfund act called on the Environmental Protection Agency to identify the worst contaminated sites nationwide and provide assistance to clean them up.

In 1986, Congress introduced an "innocent property buyer" clause to the Superfund. The provision permits a buyer to conduct a due diligence investigation prior to completing a purchase. If the buyer discovers evidence of contamination or hazard-generating activity, they can legally void the trans-

'Stigma goes to the entire site; it doesn't just go to the improvements.'

action. This is now common practice for most commercial real estate transactions.

Often the investigation begins with a Phase I site assessment that typically involves documenting a site's history, reviewing all records and inspecting the site. If the Phase I investigation produces evidence of contamination, a Phase II is performed. This includes soil and water sampling and analysis. Phase III is the site cleanup, in the event that testing confirms significant levels of contamination. This procedure is most common for industrial sites.

In Texas, commercial real estate practitioners may encounter this situation with some frequency. For example, an abandoned gas station is for sale and a buyer is interested in purchasing it for development. First, the prospective buyer will need to make sure no underground storage tanks are present. If there are tanks, they will most likely need to be removed as well as any gasoline, diesel fuel, kerosene or waste

oil spillage. A rule of thumb is that underground storage tanks have a 25-year life expectancy, and when they corrode, unused hydrocarbons can leak into the soil and contaminate ground water or enter sewers and basements and become fire hazards, according to Guntermann.

What can real estate practitioners then surmise? Losses are related to the severity or potential danger (real or perceived) of contaminated properties as well as other factors that include the distance from the site, says Guntermann. Therefore, stigma may represent a large portion of lost value immediately after the contamination is identified and when uncertainty about the problem and its solution abound.

Also consider the 1970s asbestos scare. The fibrous material was commonly used in the construction industry for decades until studies began to demonstrate that the asbestos fibers could infiltrate the lungs—a potentially fatal condition. Hitting the papers, this news caused a near panic in some real estate markets. “Many properties containing asbestos were stigmatized, becoming unmarketable virtually overnight,” says Guntermann.

With more scientific information available, public fear and concern in the real estate community dissipated and became more narrowly focused on a smaller sample of properties than originally suspected.

Referring to the Exxon Valdez oil spill in 1989 and the cleanup efforts that followed, “The appraisal profession has now come to recognize that environmental stigma can indeed be temporary rather than permanent,” says Richard J. Roddewig in *The Appraisal Journal*. “Annual economic loss due to impairment decreased each year after the spill as a result of Exxon cleanup activities and natural cleaning by winter storms.” In fact, by 1992, three years after the 10.8 million-gallon spill, impairment was reduced to 2 percent.

When Disaster Strikes

After studying disaster properties for more than ten years and working on cases such as the Oklahoma City bombing;



the JonBenet Ramsey home in Boulder, Colorado; the “Heaven’s Gate” mansion and the Nicole Brown Simpson condo in California, Bell is nationally and internationally recognized as an expert. He recommends that real estate professionals adhere to the following list of guidelines when dealing with stigmatized properties.

- First, forget about the real estate and address the needs of the victims and their families. Try to forget about inanimate

objects like real estate and help the people that are impacted.

- Consult an attorney.
- Chronologically document all activity. Carefully videotape and photograph.
- Secure the property.
- Deal with the situation. Silence tends to invite negative speculation.
- Make proper disclosures.
- If the media gets involved, cooperate.
- Promptly implement a written action plan with stated goals and objectives.
- Depending on the situation, take the property off the market. Try to rent it before selling it at a large discount.
- Be considerate of neighbors and other tenants.
- Negotiate with lenders to get consideration or a moratorium on payments.
- File insurance claims.
- Be realistic about the price and any discounts.

Real estate professionals must understand that, more often than not, they are dealing with fears and not physical characteristics of a property.

“Perception, people say, is stronger than reality,” say Chalofsky and Finestine. “Each person’s history shapes his own view of the world. This personalized or distorted view is known as perception, and your view of everything is based on this perception, rather than reality.”

Picking Up the Pieces

Real estate practitioners must decipher whether the stigma is material to the real estate transaction. Is the stigma fact



SITES ASSOCIATED WITH STIGMA

include (clockwise from top left) JonBenet Ramsey’s home in Boulder, Colo., the Nicole Brown Simpson condo where she and Ronald Goldman were murdered, and O.J. Simpson’s Rockingham Estates being bulldozed.

or fiction? If it is true and could affect the transaction, it is best to disclose the facts. Consider if the stigma is permanent or repairable.

Agents often find themselves in the precarious situation of balancing buyers' and sellers' needs and desires. They must protect a seller's privacy and civil rights while at the same time, work with the buyer's desire to know information not related to physical aspects of the listed property. The NAR legal department suggests considering these steps to establish materiality:

- Determine if fact or fiction. Investigate the source of information by talking with neighbors and checking newspapers. If the stigma is based on rumor rather than fact, agents are not obligated to disclose. Conversely, if the stigma is based on fact, as in the restaurant murders, proceed to the next step.
- Check state laws. In Texas, when a property defect is physical, disclosure is mandatory. When the defect is non-physical, or emotional, however, disclosure becomes dependent on materiality to the transaction.
- Determine materiality. Agents should put themselves in the situation. Ask if knowing about the stigma would affect the willingness, or that of most people, to purchase the property or reduce the amount of money they would pay for the property. And, would a reasonable person be willing to buy the property knowing about the stigma?
- Discuss disclosure with the sellers. If the sellers decide to disclose the stigma, inform prospects judiciously. Not all interested in the property are ready, willing and able buyers. If the sellers refuse to disclose what is determined to be material to the property and transaction, forfeit the listing.

For information on Texas law regarding recovering damages, see Judon Fambrough's Real Estate Center October 1990 *Law Letter* article, "Recovery of Actual Damages and Stigmatization."

So what can and should real estate agents disclose? A 1993 Texas law provides some answers. It states that a licensee has no duty to inquire about, make a disclosure related to or release information concerning a previous or current occupant having AIDS, HIV-related illness or an HIV infection. In addition, the Texas Real Estate Commission has enacted

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mandatory disclosure for all properties, stigmatized or not. This form is part of the standard promulgated sales contract and requires agents to accurately list details such as leaking roofs, faulty water heaters and cracked slabs.

"I think that Luby's did everything right," says Bell. "Luby's is the quintessential case on how to handle a situation. The manager told me, 'It sounds corny but, they wanted to treat everyone affected by the situation as if they were a member of their family.'"

Bell cites properly remembering the victims in a public place, such as at a city park, the best place for a memorial. "I think the community wants to remember those people, and I think that community issues belong at a community setting." In contrast, the McDonald's memorial was at the bulldozed murder site.

Luby's also provided counseling, did not go into a state of denial and faced the sad reality head-on.

"There was never any attempt to squelch or throw water on the issue," says Bell. "The incident was admitted to and dealt with in a very professional and courteous way by the company. They treated everyone very, very well and, in turn, they got a restaurant that still performs." ☐

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