

Building Code Myths Create Liability Risks for Real Estate Professionals

If we were writing a Steven King-style horror movie, it might begin with a real estate broker discussing all the attractive features of a new home. After noting the “brilliant design,” the high ceilings, state-of-the-art kitchen and the exciting architectural details, the broker happily, assures the buyer, “The house is fully compliant with the building code, so you can be confident that it has no structural defects and that the construction quality is superb.” Cue the eerie music and note the black storm clouds forming in the sky.

Why is this a horror story? Because the broker almost certainly has no idea whether the house is “fully compliant” with the building code (few buildings are); because code compliance is unrelated to construction quality; and because if the buyer relies on the broker’s assurances and discovers they aren’t accurate, the movie is not going to end well for the broker.

For the uninitiated (when it comes to building codes, most of the world is “uninitiated”), building codes represent an immense liability swamp. And real estate brokers aren’t the only professionals at risk of stumbling into it. Developers, appraisers, and even home inspectors frequently offer broad and unsubstantiated assurances about building codes and what they say or don’t say about construction quality and structural safety.

Building codes are not the equivalent of the Good Housekeeping Seal of Approval that many real estate professionals assume them to be. What they know, or assume they know, about building codes is often based more on myths than facts. Five myths in particular need to be debunked: That all municipalities have building codes; that all buildings meet code requirements; that building codes require high quality construction standards; that code compliant buildings are problem-free; and that building codes apply to all buildings.

Myth Number One: All municipalities have comprehensive building codes. In fact, many municipalities (as many as 40 percent, according to some estimates) have not adopted comprehensive codes specifying the construction requirements for residential and commercial buildings. It isn’t just tiny cities and towns that lack building codes; some larger cities have not yet adopted a comprehensive building code.

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Myth Number Two: In municipalities that have a building code, all buildings comply fully with it. When an audience of builders is asked if anyone has built a home that complied completely with applicable building codes, no hands are raised. And you can be suspicious of any builders who claim otherwise. Building codes are thousands of pages long; they usually incorporate multiple national codes (governing fire safety and energy conservation, for example); they are filled with intricate, detailed specifications and requirements, and those requirements change frequently to reflect changes in national standards and improvements in technology, or in response to local tragedies highlighting the need for new protections. The local officials responsible for enforcing the code can't possibly know all the details or keep up consistently with all the changes.

That's why one home inspector we know advertises, "If I don't find a code violation, you don't owe me anything." As far as we know, she's never had to perform an inspection for free. This doesn't mean that buildings are unsafe; it just means that they aren't likely to comply with every detail of every building code requirement.

Some building code requirements aren't requirements at all; they are characterized as "guidance" for the local enforcement officials (usually building inspectors), who have considerable discretion to determine the standards buildings must meet. They can choose to overlook some details while insisting on rigorous, down to the last quarter-of-an-inch adherence to others.

To a great extent, compliance with the code is in the eyes of the inspectors enforcing it. There have been huge battles with building inspectors because of that. In one case, a letter from the National Fire Protection Agency confirmed that an installation to which a building inspector objected complied fully with the national fire safety standards. The inspector didn't care. "I make the decision," he said, "and I want it this way."

Myth Number Three: Code compliance assures construction quality. Perhaps the most common myth about building codes is that they require the highest design and construction standards. Not so. The occupancy permit an inspector issues for a new or renovated building tells you that it meets the minimum safety standards the code requires to ensure that a structure will withstand strong winds, minimize fire risks and provide a generally safe environment for residents; it tells you nothing about the quality of the construction, and it provides no assurance at all about how the building components will perform.

For example, a building code would specify the height of windows, the amount and type of insulation required, and the materials used on the roof. The windows may comply with the height requirements, but if they are installed improperly, the building won't be water-tight. If the insulation isn't installed properly, it won't provide the protection and energy efficiency owners expect. And if the transitions from one material to another on the roof aren't sealed properly, the roof will leak. A building could comply with all the code's safety requirements and still have serious design and/or construction defects. They may not violate the code, but they will almost certainly compromise the building's performance.

Myth Number Four: A code compliant building has no safety defects. We often find safety violations in buildings that have passed muster with the municipal building inspector. Architects may miss some code requirements and municipal inspectors don't always notice those violations or insist on correcting them. If a homeowner fails to correct a safety flaw – an improperly designed stairway, for example – because the broker said code compliant buildings "have no safety or structural defects," and someone is injured as a result, the owner will sue the broker along with the builder, the architect and everyone else remotely within litigation reach.

Myth Number Five: The building code applies to all buildings. Buildings must comply with the codes in place when they were constructed or substantially renovated, but they don't have to meet requirements added since. Ground fault circuit interrupters (GFCI's), carbon monoxide detectors and other safety features that are common in residential structures today weren't required 25 years ago. Their absence from older buildings may be a safety concern for prospective buyers or current residents, but it is not necessarily a building code violation.

The current code will apply, however, if an older building is substantially renovated or has to be reconstructed after a fire or other disaster. This could be a major concern in a condominium, because a standard condominium insurance policy would typically cover only the cost of restoring the building to its condition before the disaster; it wouldn't pay to add features, such as sprinklers, that weren't part of the original structure, but that are required now. A condominium association that failed to obtain the additional coverage needed to cover those costs, because owners were told their buildings "complied fully" with the building code, would face a huge uncovered expense. And the developer or real estate broker who provided that assurance would almost certainly face an immense damage claim.

Do No Harm

Real estate professionals who emphasize building code compliance, either to reassure buyers or to caution them, may unintentionally mislead and even harm them instead. Home buyers who think code compliant means "problem-free" may ignore structural problems they should address; buyers warned about "violations" that aren't violations or aren't problematic, may unnecessarily eliminate an otherwise desirable property.

The best way to avoid these outcomes and the potential liability related to them is to eliminate the term "building code" entirely from the vocabulary you use in talking to consumers:

1. Recognize that your knowledge of building codes is probably limited at best, and don't rely on assurances provided by other real estate professionals. Their understanding of building codes is probably as limited as yours.
2. Be aware of the liability risks you face if owners rely, to their detriment, on assurances that you offer explicitly or imply about building code compliance. And make sure everyone who works for or with you understands those risks as well. This is particularly important for real estate brokers, who are responsible not only for their own acts but for the actions of real estate agents working under their license. "Loose lips" don't just sink ships; they can sink a real estate company, as well.
3. Talk to consumers about safety issues rather than building code compliance. Building safety is a topic real estate professionals can address knowledgeably from personal as well as professional experience, and it will resonate more forcefully than code compliance with most consumers.

Tell home buyers that the lack of a railing on the deck or the spacing between the rails on the stairs violates Section 345.3 (b) of the building code, and their eyes will glaze over. Tell them someone may fall off that deck or their toddler may slip through the stair railings, and you will definitely get their attention. Most buyers won't care that not having a GFCI violates the building code (which may or may not be the case); tell them that if the hair blower they are using falls in a sink filled with water, a GFCI will ensure that they won't be electrocuted, and they will probably decide having one is a good idea.

"Talk about things you know" - standard advice for writers- is good advice for real estate professionals as well. What most real estate professionals know about building codes is based largely on myths; what they don't know can be harmful to the real estate professionals themselves and to the clients and customers they serve.