Property Disclosure
In Real Estate Transactions
Property Disclosures—two laws apply:

40-57 for licensees and 27-50 for owners

Link to https://www.scstatehouse.gov/code/t27c050.php and note the ways the Residential Property Condition Disclosure law addresses the real estate licensee.

Also note the list of exemptions to the disclosure law. The list is also available at https://llr.sc.gov/re/RECPDF/Doc370.pdf.

The form for the owner to complete under 27-50 is located at https://llr.sc.gov/re/RECPDF/Property%20condition%20disclosure%20statement.pdf.

There are three answers from which the owner can choose on the mandatory form:

Yes, I know of a problem.

No, I am unaware of a problem.

No representation: I’m not saying yes or no. I am just not saying.

Most of the questions on the form apply to aspects of the property that would seem to be material to purchasers. The seller cannot avoid liability for failure to disclose a known property defect by claiming “no representation.”

The licensee’s job is to let the owner know whether or not the form is required. It is the owner’s responsibility to complete the document and provide honest answers without assistance from the real estate licensee. The owner is responsible for delivering the form to the potential purchaser prior to the purchaser writing an offer to purchase the property.
If subsequent information is gained that would render the form inaccurate (possibly based on a property inspection report), the owner has the option of repairing the problem or completing a new document.

The real estate licensee is required to disclose material facts about the property that are actually known to the licensee and not disclosed by the owner. Review the definition of a material fact in license law located at 40-57-30 (16). Summarize below items considered material and required to be disclosed.

Failure to disclose material facts about the property (by either the owner or the licensee) can result in charges of misrepresentation. Misrepresentation is defined as a false representation of a material fact or failure to disclose a known property defect that causes the consumer to suffer damages. Misrepresentation can be fraudulent or negligent and can be active or passive.

**List facts that might be considered material to:**

- a commercial buyer of a retail space

- a residential buyer of a condo

- a builder who is interested in vacant land
Stigmatizations to Property

A property that has been psychologically impacted is said to have been stigmatized. Such properties are those whose desirability may be affected by events that occurred on or near the property, but which are not manifested by any physical defect to the property.

The most common events associated with stigmatized property are murders, deaths, ghosts, presence of convicted sex offenders, or criminal activity that may have occurred on or near the property. The troublesome task for real estate agents marketing a property affected by such circumstances is to determine whether the facts creating the stigma are material and require disclosure to potential purchasers, and, if so, what must be disclosed.

South Carolina License Law 40-57-740

(E) No cause of action may arise against an owner of real estate or agent of any party to a transaction for failure to disclose in a transaction that:

1. the subject real estate is or was occupied by an individual who was infected with a virus or any other disease which has been determined by medical evidence as being highly unlikely to be transmitted through occupancy of a dwelling place either presently or previously occupied by the infected individual; or

2. the death of an occupant of the property has occurred or the manner of the death

3. any offsite condition or hazard that does not directly impact the property being transferred

4. any psychological impact that has no material impact on the physical condition of the property being transferred.

Nothing in subsection (A) precludes an action against an owner of real estate or agent of the owner who makes intentional misrepresentation in response to direct inquiry from a buyer or prospective buyer with regard to psychological impacts, offsite conditions, or stigmas associated with the real estate.
Property Inspections

The courts have routinely ruled that when a purchaser undertakes an inspection of the property, the liability of the agent is reduced considerably for undiscovered defects. If the purchaser declines this right to inspection, the agent should get documentation in writing.

List the property inspections that would be recommended to a prospective purchaser.
Develop language for the following scenarios:

1. The purchaser asks, “What do you know about this property?”

2. The purchaser asks, “Why is the seller moving?” You are the seller’s agent and have confidential information about the reason for leaving. It is a problem with the traffic congestion around the property.

3. The purchaser asks, “Has anyone ever died in this house? It just doesn’t “feel right.” The seller’s mother lived in the home for 40 years before she expired in her bedroom.

Limiting Liability

- **Document**

  Conversations with potential purchasers of a home (including dates and names of those involved and questions asked).

  Telephone conversations with sellers and potential purchasers about certain facts of a property or a sale.

  Research you have performed on certain features of the property or aspects of a sale.

  Notes involving specific statements made to the buyer or seller.

  Summarize statements or events in a letter to the buyer and seller as their respective agents.

  Have the seller complete a Residential Property Condition Disclosure Statement and give to the purchaser in a timely manner.

- **Conduct a visual inspection and look for red flags.**

  Water stains

  Mold

  Infestations

  Underground storage tanks

  Asbestos-containing insulation

  Cracks in foundation

  Rot or decay

  Signs of neglect
• Make written notes of any defects that your visual inspection reveals.

Seek information from the seller explaining any red flags you discover.

Try to verify the source of the seller’s answer. If the seller is unable to provide satisfactory clarification, you may wish to investigate further.

Document all findings, including past repairs.

Disclose any adverse material findings to potential purchasers.

• Answer specific questions carefully.

Answer specific questions with specific answers.

Respond only if you have actual knowledge of the correct answer. Qualify your answer by identifying the source and limitations of the information presented. Get all verifications in writing. Provide whatever sources of information may be available and encourage the purchaser to seek professional assistance.

• Encourage the use of other professionals.

Recommend that the purchaser conduct an independent self-inspection of the property.

Recommend that the purchaser undertake professional inspections.

Recommend that the buyer consult with a professional to assess the extent of any problem and the cost to correct.
The listing agent received notice from an outside buyer agent that the buyer was walking away from the contract under the due diligence clause. The buyer’s property inspection showed rot, a crack in the heating system firebox, previous fire damage, and inadequate wiring for today’s code.

Which facts do you consider material?

How would you advise the seller to proceed?

Does the listing agent now disclose the items found in the inspection report?

What disclosures need to be made in the scenario below?

Jane, a first-time investor, is especially interested in 450 King Street. It has the investment potential she needs to get started in her retirement plan.

Joe, the property owner, has reaped financial rewards since investing in the property but is now ready to sell due to needed maintenance and poor tenant habits that drive him crazy.

Located in a historical district, this property has leaking pipes and inadequate wiring. It is so old, rumors are that ghosts reside right along with the previous fire damage. Though almost all the properties on the street are connected to public sewer, Joe opted out a few years ago and is now being forced to “connect” due to DHEC regulations. The property is great for investment, however.

Joe added a “mother-in law” suite a few years ago to get extra income. He did it without a permit, and since he added the room himself in his spare time, he saved lots of money. Now that the appliances are going bad, Joe feels he just wants to sell instead of upfit.
The current tenant, John, has a lease of $1,750 per month for both units (two bedroom/two bath and “mother-in-law” suite) for another nine months and has sublet the suite to a retiree. Martha (John’s tenant) is a nice lady but is in financial distress and has not paid her rent to John in three months and really needs eviction. Somehow, John has been able to make his payment of $1,750 to Joe in the meantime.

Joe just wants out before things get worse.

Highlight the material facts regarding this property that would need to be disclosed by both the agent and Joe.
Case Study

Jurors heard a radon tampering case against two real estate companies.

The homebuyers, Pete and Sue Radakovich, claimed $172,620 in damages.

The Radakovichs agreed to pay $170,000 for a home owned by Richard and Sherry Fila. As a condition of the sale, they requested a radon test. That test showed a radon level of less than 2pCi/L, well below the EPA recommended action level of 4pCi/L.

Several months after moving in, however, a remediation company hoping to bid on a ventilating system for the home contacted the Radakovichs.

Pete Radakovich testified he angrily told the company his home did not have a radon problem. The company representative assured him it did because he had seen previous test results.

As the story unfolded, the Radakovichs learned the Filas had received a previous offer and those buyers also had requested a radon test. Results from that test, however, came back in excess of 29.3pCi/L—more than seven times above EPA action level. As a result, the deal fell through.

During the trial, the agents confirmed they were aware of the earlier results and did not disclose them to the Radakovichs. The agents denied tampering with the testing device that gave the potential buyers the low reading.

The Filas testified they were only vaguely aware the test was going on. Sherry Fila said during that period a large number of people were coming and going from the house and she was unsure of their reasons for being there. After the Radakovichs discovered the earlier test, they began their own testing and at times found radon levels as high as 40pCi/L.

According to testimony, the Radakovichs spent more than $11,000 on a ventilation system for the house, which still does not lower the radon reading to below 4pCi/L. An appraiser testified the value of the home, purchased for $170,000, now is around $120,000.
What were the critical issues in this case?

As a member of the jury, how would you rule?

How would you make the new owners whole?

What would a diligent agent have done to avoid this situation?
Property Disclosure Quick Quiz

1. On the Residential Property Condition Disclosure Form, the owner of the property has three ways to answer. One way is to mark “no representation.” This means
   a. The seller does not know of an issue
   b. The seller knows of an issue but is unwilling to speak on the issue
   c. The seller is not saying whether or not there is a known issue
   d. The seller is stating that a previous issue has been repaired

2. If the real estate licensee knows of a material adverse defect in the property that the owner has not disclosed, the licensee must
   a. Advise the seller to use “no representation” as the response
   b. Disclose the defect to potential purchasers
   c. Tell the buyer to get a property inspection that would cover the issue
   d. Decline to answer any questions about the issue

3. A stigmatization to the property is considered
   a. A psychological defect—not a material fact
   b. A material fact
   c. To make the property unsaleable
   d. To make the property more valuable

4. The Residential Property Disclosure Form must be completed by the seller and
   a. Presented to buyers before they order inspections
   b. Presented to the buyers at first showing
   c. Presented to the buyers prior to the buyers writing an offer
   d. Presented to the buyers prior to closing

5. It is the responsibility of the ____________ to provide the Residential Property Condition Disclosure Form to the potential purchaser.
   a. Seller
   b. Listing agent
   c. Buyer agent
   d. Transaction broker

6. A material, adverse fact would be considered one that would affect
   a. The structure of the property
   b. The value of the property
   c. The health of the inhabitants
   d. All of the above