

# DISCLOSURE OBLIGATIONS AND REPORTING REQUIREMENTS FOR ENVIRONMENTAL CONTAMINATION

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# Why does the Presence of Environmental Contamination Matter??

- Depresses Property Value
  - ▶ Liability Risk
  - ▶ Potential cleanup costs
- Increased Transaction Costs

**PRICES SLASHED**

# Buyer's and Seller's Conflict



# Buyer's and Seller's Conflict



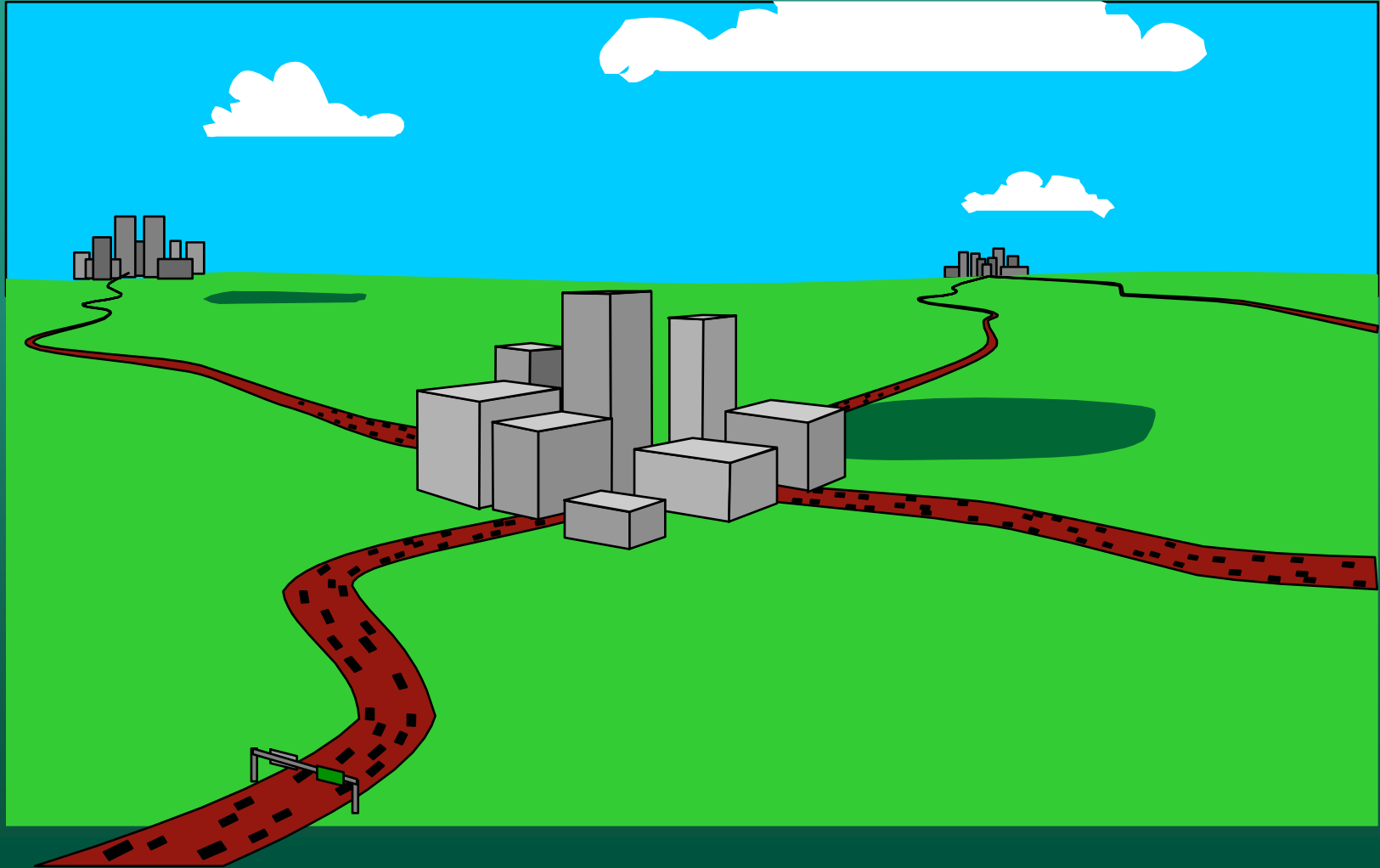
# Statutory Disclosure Obligations

- Residential Property Condition
  - ▶ Improved Property
    - Statutory form at Exhibit A
  - ▶ Unimproved Property
    - Pipeline location
    - Hazardous substances

# Statutory Disclosure Obligations

- Residential Property Owner's Association
- Rollback Tax Notice for Vacant Land
- Lead-based Paint
- Underground Storage Tanks
- MSWLFs

# Hidden Treasures





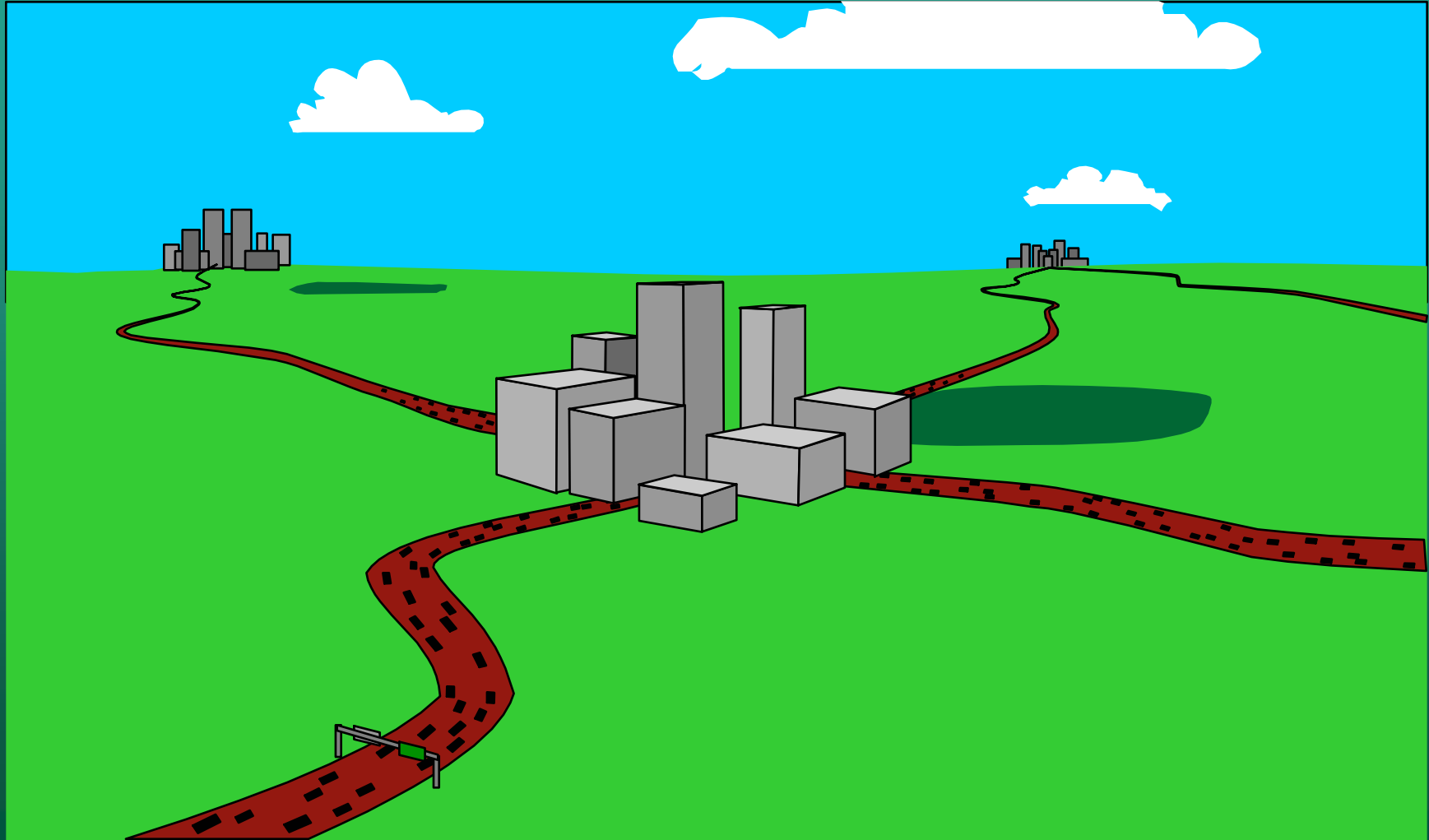
# Curt Mudgeon



# Hidden Treasures – “Before”



# Hidden Treasures – “After”



# Ida Listic

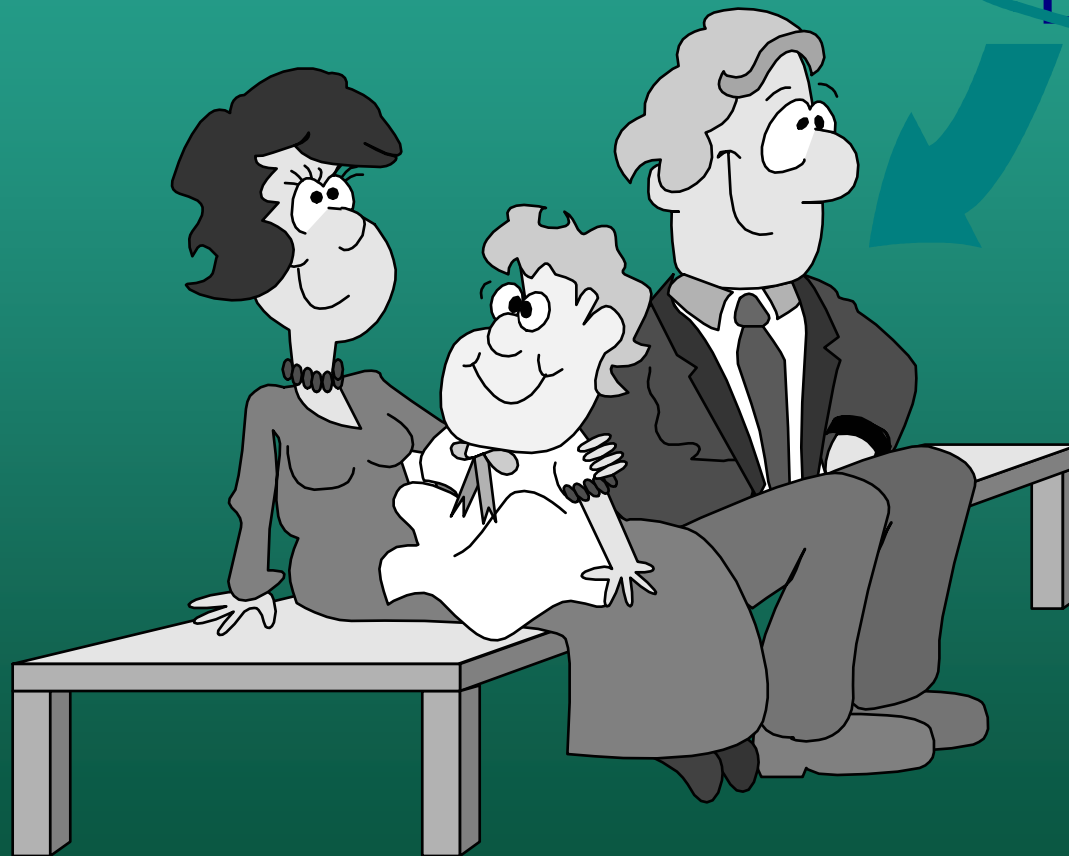


# Seller's Broker - Clu Lesascanby



# The Fairtharts

Drew Lee



# Fairtharts' Environmental Consultant - Dr. Kent Findit



# Tort Risk From Nondisclosure

## Fraudulent Misrepresentation

- Elements
  - ▶ Material representation
  - ▶ False
  - ▶ Known false or recklessly without knowledge
  - ▶ Intention for reliance
  - ▶ Action in reliance
  - ▶ Injury



# Tort Risk From Nondisclosure

Fraudulent Misrepresentation  
**Non-disclosure**

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- Additional Element
  - ▶ Sellers duty to disclose
    - Defect not discoverable by exercise of ordinary care
    - Confidential/fiduciary relationship between buyer and seller

# Tort Risk From Nondisclosure

Fraudulent Misrepresentation  
**Fraudulent Concealment**

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- Additional Element
  - ▶ Seller had actual knowledge of acts concealed and fixed purpose to conceal the wrong

# Tort Risk From Nondisclosure

## Remedies for Fraudulent Misrepresentation

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- Actual Damages
  - ▶ Out of pocket
  - ▶ Benefit of the bargain
- Special/Consequential Damages
- Rescission
- Punitive

# Tort Risk From Nondisclosure

## Negligent Misrepresentation

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- Elements
  - ▶ Business transaction
  - ▶ False representation
  - ▶ Negligence
  - ▶ Reliance
  - ▶ Monetary damages

# Tort Risk From Nondisclosure

## Remedies for Negligent Misrepresentation

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- Pecuniary loss

# Tort Risk From Nondisclosure

## DTPA

- Broad protection for consumers from false and misleading acts
- No reliance required
- Few defenses
- Remedies include attorneys fees and treble damages

# Tort Risk From Nondisclosure

## Fraud in Real Estate and Stock Transactions Act

- Elements
  - ▶ False representation
    - Intended to induce
    - Reliance

# Tort Risk From Nondisclosure

## Fraud in Real Estate and Stock Transactions Act

- Remedies

- ▶ Benefit of bargain or out of pocket damages
- ▶ Rescission
- ▶ Exemplary damages - if actual awareness of falsity or failure to disclose falsity of representation



# How Does a Seller Avoid Nondisclosure Risk?



# Avoiding Nondisclosure Risks

## Disclose When:

- Statute or Rule Requires
- Known Material Defect
- Constructive Knowledge of Material Defect
- Defect Not Reasonably Discoverable
- Confidential Relationship

# Allocating Nondisclosure Risk

The "As Is" Clause to the Rescue?

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- Sale made with all latent and patent defects, and without representations or warranties
- Parties are free to contract -allocate environmental liabilities

# Allocating Nondisclosure Risk

Maybe not . . .

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- May be invalid if fraudulently induced
- Must disclose facts not reasonably discoverable

# CERCLA Liability

## The Innocent Landowner Defense

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- Buyer has no reason to know of release or threatened release of hazardous substances on the property
- Buyer has undertaken all appropriate inquiry

# Reporting Obligations

## Discovery of a Release

- Obligations Burden Owners
- Discovery may trigger statutory requirements

# Reporting Obligations

## Discovery of a Release

- From Storage Tank Systems
  - ▶ Must report within 24 hours of discovery of suspected or confirmed release
- Non-Tank Releases
  - ▶ Governed by Texas Water Code § 26.039

# Reporting Obligations

## Discovery of a Release - § 26.039

“Whenever an accidental discharge or spill occurs from any activity or facility which causes or may cause pollution, the individual operating, in charge of, or responsible for the activity or facility shall notify the Commission as soon as possible and not later than 24 hours after the occurrence.”



# Reporting Obligations

Discovery of a Release - § 26.039

“Accidental Discharge”

“act or omission through which waste or other substances are inadvertently discharged into water of the state.”

# Reporting Obligations

## Discovery of a Release - § 26.039

### “To Discharge”

“To deposit, conduct, drain, emit, throw, run, allow to seep, or otherwise release or dispose of or to allow, permit or suffer any of these acts or omissions.”

# Reporting Obligations

## Discovery of a Release - § 26.039

### “Spill”

“An act or omission through which waste or other substances are deposited where, unless controlled or removed, they will drain, seep, run or otherwise enter water in the state.”

# Reporting Obligations

Discovery of a Release - § 26.039

“Other Substances”

those “which will cause pollution”  
if discharged into water.

# Reporting Obligations

## Discovery of a Release - § 26.039

### “Pollution”

“the alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property or to public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.”

